COMMENTS

ADDRESSING ABUSE OF THE CORPORATE ENTITY IN THE PEOPLE’S REPUBLIC OF CHINA: NEW THOUGHTS ON CHINA’S NEED FOR A DEFINED VEIL PIERCING DOCTRINE

DAVID M. ALBERT*

1. INTRODUCTION

China’s legal system would benefit greatly from the development of a well-defined veil piercing doctrine, a tool that is currently unavailable to Chinese courts in all but the most limited of circumstances. While China’s reluctance to include such a doctrine at earlier stages of development was understandable, its absence at China’s current level of economic and legal maturation is a noticeable weakness in China’s corporate law system. The gradual and informal adoption of a piercing doctrine will strengthen China’s corporate law system making it more complete.

China, like many other jurisdictions,1 has embraced and benefited from the principle of limited liability for shareholders of a corporate entity.2 The “corporate veil” is another term for this

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* J.D. Candidate, 2003, University of Pennsylvania Law School. I would like to thank my wife, family, Professor Jacques deLisle, Albert Cheng, Chiwei Huang, and the editors of the University of Pennsylvania Journal of International Economic Law.

1 Such jurisdictions include the United States, Great Britain, and France.

principle that limits the liability of a corporation's shareholders so that they shall not be held unconditionally liable for the debts and obligations of the entity.  

In most other jurisdictions, however, courts are provided with the ability to disregard the corporate entity and thereby "pierce the corporate veil" in certain cases where abuse of the corporate entity has been found. By piercing the corporate veil, the court can impose "personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." 

3 See BLACK'S LAW DICTIONARY 341 (7th ed. 1999) (defining "corporate veil: [b] the legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions").

4 The term "piercing the corporate veil" became well known after Maurice Wormser, a law professor at Fordham University, wrote his key article on the subject. See Maurice Wormser, Piercing the Veil of Corporate Entity, 12 COLUM. L. REV. 496 (1912).

5 STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL 1-28 (2001) (discussing the doctrine as applied in the United States):

[I]n the present condition of the authorities, a corporation will be looked upon by the courts as a legal personality, for ordinary purposes in everyday business transactions as a general principle and until adequate reason to the contrary appears; but... the fiction will be disregarded and the law will look to see the men and facts behind the fiction whenever it is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery and crime.


6 PRESSER, supra note 5, at 1-6.

The "veil" of the "corporate fiction," or the "artificial personality" of the corporation is pierced, and the individual or corporate shareholder exposed to corporate of personal liability, as the case may be, when a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders.

Id. See BLACK'S LAW DICTIONARY 1168 (7th ed. 1999) ("piercing the corporate veil: [t]he judicial act of imposing liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts. Also termed disre-
In China, despite exponential growth in corporate registrations and concurrent increases in abuse, unlike other jurisdictions, the veil piercing doctrine remains largely unavailable.

There is no doubt that corruption and abusive behavior is a major problem in a rapidly transforming China. While a great deal of the Chinese leadership's domestic support hinges on their ability to continue operating and managing a system that creates wealth for their citizens, the party has been equally concerned with maintaining a system that is considered fair by its participants. The development of a well-defined piercing doctrine, by providing contract and tort victims harmed by abusive corporate conduct with a means of redress, is one practical measure that can be taken to make China's economic landscape more just.

Many factors dictate that a well-defined doctrine for piercing the corporate veil be adopted in China gradually and using relatively informal means. This approach is necessary because the characteristics of the doctrine—its elusive nature, possibility for abuse, and potential to frighten investors—coupled with the unique character of China's currently emerging legal system—the

7 See Chen Zhao Deng & Xiao Ling Feng, Fen Xi Gong Si Ren Ge Fou Ren Zhi Du [Analyzing the System of Disregarding the Corporate Entity] (explaining that many people in China currently exploit the corporate identity and limited liability to engage in all types of improper business practices); Peng, supra note 2, at 277 ("While 'briefcase companies' mushroom to take advantage of limited liability, the enforcement of laws and regulations concerning enterprise responsibilities and liabilities has so far not achieved a sufficiently high priority on the government's agenda.").


9 See Xiaobo Lu, Cadres and Corruption: The Organizational Involution of the Chinese Communist Party 190 (2000) (discussing the pervasiveness of official corruption in China and noting that "from the very beginning of the reforms, the problem of corruption was recognized as a serious challenge to the regime").

10 PRESSER, supra note 5, at 1-28.

11 See Peng, supra note 2, at 277-78 (noting that "even courts sometimes surrender to such pressures and disregard the limited liability protection provided in the Company Law," and relating the story of a businessman who was held hostage in his hotel room in a small town in China until he paid debts although he was part of a limited liability company).
limited number of professionally trained judges, limited judicial experience with the corporate form, ability for localism and corruption to pervade decisions—would make the immediate wholesale adoption of a broad piercing doctrine too unpredictable and potentially disruptive to China’s limited liability system. An immediate and complete adoption would risk throwing confusion into China’s Company Law regime, undermining investors’ confidence in China’s commitment to limited liability. It would also have the potential of negatively impacting investment levels and economic growth.

Such a gradual and evolutionary process is similar to the manner in which veil piercing doctrines have been implemented in other jurisdictions. In China’s case, it would be best to gradually introduce the doctrine by applying it narrowly to specific instances, using it to address one particular type of abusive situation at a time. In addition, the introduction of the doctrine should proceed in a relatively informal manner through non-legislative means such as State Council guidance and Supreme Court explanations.

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13 See Peng, supra note 2, at 280 (stating that “[p]roblems exist in the enforcement of these economic laws and regulations and in the education of the general public about the corporate entity and the role of limited liability”).

14 See Lu, supra note 9, at 190 (describing official corruption during the recent period of economic reform); Lubman, supra note 12, at 395 (remarking that “[t]he strongest and most insidious type of extra-judicial influence on the outcomes of non-criminal disputes is interference by local officials in pending litigation and in the enforcement of judgments”); Roman Tomasic & Jian Fu, Company Law in China, in COMPANY LAW IN EAST ASIA 138 (Roman Tomasic ed., 1999) [hereinafter Company Law in China] (“Maintenance of central control in a system as large and diverse as that of China must inevitably face serious problems of fragmentation or ‘centre-periphery’ problems. This is especially evident through the challenges to national authority provided by the forces of localism in China’s provinces and special economic zones.”).

15 See, e.g., Ma Jing et. al., Er Shi Shi Ji Mou Zhong Guo Gong Si Fa Li Lun Yan Jiu Jiu Zong Shu [A Summary of Theory and Research on China’s Company Law at the End of the 20th Century], in GONG SI FA LU PING LUN (Corporate Law Review 2001) 210 (Gongyun Gu ed., 2001) [hereinafter Shanghai Corporate Law Review 2001] (summarizing the recent thoughts of various scholars regarding the state of the doctrine of disregarding the corporate entity in China).

16 See generally Presser, supra note 5, at 1-13 (presenting the “origin of equitable veil-piercing theory and the early evolution of scholarly approaches to the problem” in the United States).
While it is understandable that China might not have been ready to introduce this doctrine when drafting the 1994 Company Law, the chorus of Chinese scholars and commentators calling for a more defined veil piercing doctrine has been increasing. Today, after several years of experience with the principles of limited liability and in light of the number of unfair practices and abuses of the corporate entity, China's corporate law system requires the introduction of a piercing doctrine that will add strength and balance to the Chinese corporate system.

This Comment will first discuss the relevant legislation and other forms of guidance establishing the parameters of limited liability and piercing the corporate veil in China today. Several judicial decisions on the topic will also be considered. Next, this Comment looks at the current debate among Chinese scholars concerning abuse of the corporate form and the adoption of a piercing doctrine in China. Finally, a case is made that China's company law regime will benefit from the gradual and informal development of a broader and better defined piercing doctrine ultimately leading to the promulgation of appropriate legislation.

2. LIMITED LIABILITY AND PIERCING THE CORPORATE VEIL IN CHINA TODAY

An analysis of relevant authorities in China shows that, except for in the narrowest of circumstances, they provide courts with little guidance for piercing the corporate veil in China today. As a civil law country, there are several sources that help one to understand limited liability and veil piercing in China. These include: (1) legislation (i.e., Company Law of 1994 and the General Principles of Civil Law ("GPCL"); (2) interpretations issued by the Chinese Supreme Court; and (3) publicly released judicial opinions. In addition, the State Council and administrative agencies can issue guidelines on certain issues. The guidance that the three enumerated sources provide in outlining the state of veil piercing in China today will be discussed in turn in the next three Sections.

17 See generally Peter Howard Corne, Creation and Application of Law in the PRC, 50 AM. J. COMP. LAW 369 (2002) (detailing the legislative hierarchy of the PRC and the ways in which the law in China is often reinterpreted. Discussion of how temporary administrative regulations or provisions are used by the State Council to implement and add detail to "many of the matters left outstanding by the higher law."
2.1. Legislation

In regard to legislation, both the Company Law of 1994 and the General Principles of Civil Law provide the main contours of limited liability in China today.

Clearly modeled on other Western corporation laws, the Company Law of 1994 allows for the establishment of a legal person with limited liability in China when minimum requirements for registered capital are met and certain legal conditions are fulfilled. The concept of limited liability for shareholders was a relatively new one for China but its adoption is understandable in light of the drafters' desire that the law "promote competition and productivity" while also "countenance and even promote the development of small private enterprises."

It should be noted that while limited liability for corporations at the expense of creditors or tort victims had been long accepted in the West, "[i]n China, which lacks a comparable history of orien-

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18 Previous Company Laws have been enacted in China but have had little effect on the way that businesses were organized. One Company Law was enacted during the Qing Dynasty in 1904, another during the Republican Period in 1914, and another when the Nationalists were in power in 1946. For a brief history of Company Law in China, see Company Law in China, supra note 14, at 138. See also Art & Gu, supra note 2, at 274 (discussing the economic and historical context of the Company Law as well as the purposes of the law).

19 The Company Law specifically contemplates two basic company forms, the "limited liability company" and the "joint stock company" whose liabilities are limited in the following manner:

In the case of a limited liability company shareholders shall assume liability towards the company to the extent of their respective capital contributions, and the company shall be liable for its debts to the extent of all of its assets. In the case of a joint stock limited company, its total capital shall be divided into equal shares, shareholders shall assume liability towards the company to the extent of their respective shareholdings, and the company shall be liable for its debts to the extent of its assets.

Company Law, supra note 2, art. 3.

20 See id. art. 8 ("Incorporation of limited liability companies or joint stock limited companies must meet the conditions stipulated by the present Law."); id., Chapter II: Incorporation and Organizational Structure of Limited Liability Companies (providing the conditions required for incorporation of a limited liability company and minimum capital requirements for different categories of businesses, i.e., production, wholesale, retail, science and technology, etc.); id., Chapter III: Incorporation and Organizational Structure of Joint Stock Limited Companies (providing the conditions required for incorporation of a Joint Stock company and minimum capital requirements for different categories of businesses, i.e., production, wholesale, retail, science and technology, etc.).

21 Art & Gu, supra note 2, at 274-75.
tation toward private enterprise, acceptance of limited liability could not be presumed." Its adoption in the Company Law indicates that China, like Western capitalist countries, was making a decision that the benefits to society as a whole would outweigh the cost to those who might be left without a remedy for contract and tort claims.

In Western jurisdictions, however, the externalities created by embracing limited liability have been tamed by the adoption of a piercing doctrine to hold shareholders personally liable in certain cases of abuse. China’s Company Law “explicitly protects shareholders from liability beyond their capital contributions, and does not mention ‘piercing the corporate veil’ or any other limitation on shareholder immunity.” In a sense, China’s lack of a piercing doctrine indicates that China has gone further than many jurisdictions in the West in embracing limited liability at the expense of those claimants left without a remedy for certain contract and tort claims.

To be fair, the Company Law does provide certain limits to limited liability. Although there is no article directly speaking to the piercing issue, legal liability is the topic of Chapter X, Articles 206 through 228, which provide penalties if a company violates the law with respect to its registered capital, or acts unlawfully in any of the other manners stipulated. However, these articles provide

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22 Id. at 293.
23 See id. (discussing the adoption of the concept of limited liability in the West).

The idea that those operating a business should be entitled to enjoy the profits if it succeeds, but be insulated from liability for losses if it fails, is neither intuitively appealing nor obvious. The concept inevitably denies recovery not only to contract claimants but also to personal injury tort victims when the company is bankrupt. Western capitalist countries decided long ago that the benefits to society of encouraging commerce in this manner outweighed the detriment to such claimants.

Id. See also Peng, supra note 2, at 268 (discussing China’s inclusion of a limited liability concept in the Company Law and noting that “[g]iven the failure to address such a concept in the historic development of enterprise law in China, this step indicates China’s recognition that, in balancing the benefits of encouraging commerce and entrepreneurship with the evils of the society bearing the costs of externalities created by individuals, the former outweighs the latter”).

24 Art & Gu, supra note 2, at 294.
25 See Company Law, supra note 2, Chapter X: Limited Liability.
26 See Zhang Xianchu, Piercing the Company Veil and Regulation of Companies in China, in Legal Developments in China: Market Economy and Law 132 (Wang
only for criminal and administrative penalties and therefore do not provide an explicit cause of action for creditors or others who might have been harmed by the violations stipulated in these articles.27

Several articles of the General Principles of Civil Law of 1986 also touch on the issues of liability and piercing.28 GPCL Article 37 provides additional conditions that an organization must meet to qualify as a legal person: "(a) it must be established according to the law; (b) it must have the necessary property or funds;29 (c) it must have its own name, organizational structure and premises; (d) it must be able to independently assume civil duties."30

Moreover, under GPCL Article 49, there are times when the statutory representative of a legal person31 will be liable and subject to administrative and criminal liability where the legal person carries out certain illegal activities. This includes situations in which:

(a) the legal person has conducted illegal business operations beyond its registered scope of business; (b) the legal

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27 See Yan Ze Ping, Fa Ren Ren Ge Fou Ding Zhi Du Tan Xi [Learning About Disregarding the Corporate Entity in China], LAWYER WORLD, Nov. 1998 (discussing the current status of the doctrine for disregarding the corporate entity in China and the author's suggestion for amendment to the relevant law).


29 Company Law Articles 23 and 78 stipulate the minimum amounts of capital required for legal enterprises in different types of businesses. See Company Law, supra note 2.

30 BING LING, CIVIL LAW 27 (2001) (stating:

The independent assumption of civil duties requires the legal person to possess the necessary property and funds to carry out its activities. It does not mean that a legal person shall discharge all the civil duties it undertakes, but that it shall perform its civil duties with all of its own assets), available at http://personal.cityu.edu.hk/~lwbing/Research/CivilLaw.pdf (last visited Jan. 20, 2002).

31 According to GPCL Article 38, the "statutory representative" of a legal person is the person who has management authority and exercises authority on behalf of the legal person according to the company charter or law. GPCL, supra note 28, art. 38.
person has willfully failed to disclose true information or has resorted to deception in dealing with the tax or registration authorities; (c) the legal person has withdrawn funds or concealed property to evade performance or an obligation; (d) the legal person has disposed of property without authorization after being wound up, dissolved or declared bankrupt; (e) the legal person has failed to apply for registration and make public announcements in a timely manner at the time of its changes or termination, resulting in significant loss to interested parties; (f) the legal person has engaged in any other activities prohibited by law, resulting in harm to state interests or public interest.32

This idea of a statutory representative of a legal person, is a Chinese concept that could also be said to provide limits to the limited liability concept. While the punishment can be serious, it is unlike piercing however, because the legal representative “is not personally liable for corporate debts.”33

GCPL Article 45 also requires minimum amounts of capital and provides criminal penalties if these minimums are not maintained.34 Unfortunately, remedies under this article of the GCPL are unsatisfactory to many of those harmed since penalties are again only administrative or criminal in nature. None of the articles in the GCPL provide adequate protection or proper remedies for those harmed in most of the situations in which the corporate form is abused.35

The Company Law is generally viewed in China as a transitory document in need of reform,36 and as such has generated continued discussion and debate. It is clear that further development of

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32 The paraphrasing of this article of the GPCL comes from Bing Ling, supra note 30, at 28.
33 Art & Gu, supra note 2, at 294.
34 GPCL, supra note 28, art. 45.
35 See infra Section 3.2 for a discussion of specific forms of abuse of the corporate entity.
36 See Company Law in China, supra note 14, at 147 (“It seems inevitable that China’s Company Law will be subject to further reform as China gains more experience with the application of the existing legislation.”); see also Zheng Juan Shi Chang Zhi Du Chuang Xin Yu Gong Si Fa Xiu Gai Wan Shan Gao Ji Yan Tao Hui, Fa Yan Zhai Yao [Summary of Speeches from the Seminar on New Ideas in the Securities Market System and on the Revision and Perfection of the Company Law] [Hereinafter Summary of Speeches] (discussing how to implement a more developed security market and corporate governance system in China).
the corporate law regime in China requires new solutions to address the abuses that have been engendered by the limited liability system. The system's inability to respond to these realities is viewed as negatively affecting not only the interests of creditors but also those of the corporate system and society as a whole. While minimum capital requirements, the legal statutory representative of legal person, and the provisions for severe administrative and criminal penalties do provide some limits to limited liability in practice, the issue of piercing the corporate veil to get at the assets of shareholders must be addressed to strengthen the corporate law regime as a whole and balance the externalities created by China's current approach to limited liability.

2.2. Chinese Supreme Court Authority

Today, the key authority for piercing the corporate veil in China is found in a narrowly tailored Supreme Court document issued in 1994 as a response to a question presented by the higher People's Court of Guangdong. In China, the Supreme Court has started to take on a more "law-making and interpretive role,"

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37 See generally Shanghai Corporate Law Review 2001, supra note 15, at 211 (stating that China should not avoid dealing with the problem of shareholders abusing limited liability to harm creditors and the public interest).

38 See id. (discussing the meaning, application, and effect of a doctrine for disregarding the corporate entity in China).

39 Peng, supra note 2, at 280 (discussing how the Company Law also contains "significant limitations on the availability of limited liability protection to participants of commercial activities").

40 The situation in regard to legislation remains unchanged since Zhang Xianchu published his article on this subject in 1996. See Zhang, supra note 26, at 133 (noting that with regard to the "legal scheme to prevent abuse of the company entity... most of the sanctions employed are of either administrative or criminal nature and... equitable remedy for company creditors in fraud or abuse situations beyond the capital contribution is not available under the present legislation.").

41 "On the Assumption of Civil Liability After an Enterprise Established by Another Enterprise has been Closed Down or Gone Out of Business." Reply to the High Court of Guangdong by the Supreme Court on Liability of Promoting Enterprises for Their Terminated Enterprises on March 30, 1994 [hereinafter 1994 Supreme Court Reply].

42 See Company Law in China, supra note 14, at 140. (explaining that the Supreme People's Court stands at the pinnacle of the Chinese judicial system, below which are the provincial level High People's Courts, city and prefecture based Intermediate People's Courts, county and district level Local People's Courts, and town and village level Local People's Courts' divisions).

43 See id. (providing an explanation of different types of legal authority in China); Corne, supra note 17, at 396 ("The issue of which bodies have the authority
even though this role had been constitutionally delegated only to the legislature. It fulfills this role in some instances by issuing replies to questions asked of it by lower judicial entities of which this is one example.

This document contemplates a situation in which one company has established another and provides that after an enterprise has gone out of business or been closed down, if the assets of the company are not great enough to satisfy its debts, then the enterprise that established the company will assume civil liability to the extent that the amount of registered capital of that company exceeds the actual capital contribution made to it. On the other hand, if no capital was actually contributed to the terminated company, or the amount was not sufficient according to the law, then the company will be determined not to be a legal person and its full civil liability will be assumed by the enterprise that established the company.

The reply further clarifies that in cases where the facts show that a company did not meet the conditions required for registration as a legal person, the People’s Court may request that the company’s business license be revoked. If the license is not revoked by the administration for industry and commerce, the People’s Court may choose to disregard the legal person status of the enterprise.44

This 1994 document has been criticized as being too narrowly tailored45 because it only deals with the situation in which capitalization is insufficient or conditions for registration have not been met, and does not provide guidance for cases in which a broader piercing doctrine could be applied to reach the assets of a shareholder where abuses of the corporate entity have nonetheless oc-
curred. Examples of such abuse are discussed later in this Comment.

Today, even with this 1994 Supreme Court document, Chinese lawyers in Beijing and Shanghai complain that attorneys trying to argue the facts of a case in which their client has been harmed by abusive corporate machinations will have trouble finding any support to bring a veil piercing argument. A recent article on the subject complains of China's narrow application of the piercing doctrine and bemoans that, except in cases of insufficient capitalization, China lacks the legal tools to rely on, making it difficult for the courts to administer a piercing doctrine. Further explanations by the Supreme Court would be helpful in providing courts with guidance in cases where abuse has occurred.

2.3. Judicial Opinions

The opinions that have been released show that while courts are sometimes willing to pierce the corporate veil, the doctrine has been inconsistently applied and only in the most limited of situations. The cases clearly reflect the lack of guidance available on the piercing issue in China.

It has been noted that in piercing cases, the Supreme Court "has paid close attention not only to the issues of undercapitaliz-
tion and benefit taking, but also the issues of control and fraud. For example, in one case, the Supreme Court confirmed a Guangdong high court decision to pierce the company’s veil and order the county government to repay the debts of a certain company when it was found that the company was really an instrument of the government and did not have any invested capital.

Similarly, the Supreme Court pierced a company’s veil of limited liability and held a local government office liable where the Supreme Court found that the company was registered by the said local government although it had no capital of its own. In addition, the court found that the assets of this company were moved to another company (established by the same government office) just before a judgment on behalf of the creditor was to be executed. In another case, the Supreme Court directed the high court of Guangdong to find that an “upper level” state-owned enterprise that was a minority shareholder in a certain subordinate company, was liable for the debts of that subordinate where the upper-level company was both liable for the wrongdoing and had made no capital contribution.

Another interesting piercing case involving the defrauding of a creditor is the 1991 case, Rosin Factory of Wuzhou v. Huajian. In this case the court found that the defendant company was nothing more than “a shell company with no capital, no site for operations and no ability to perform contracts” and that it did not meet the

50 Zhang, supra note 26, at 135.
51 See id. (discussing the case of Yue Hai Import-export Co. v. The People’s Government of Yang Chuen County (1992), from “Certain Opinions Concerning Implementation of Company Registration Regulation of China” July 12, 1994. In deciding to pierce in this case, Zhang notes that the court found it relevant here that, after dissolution, all the company employees returned to the government and that the government collected money from a debtor to the company.).
52 See id. (discussing the case of Ping Ding Branch of Shanxi Oil Co. v. Oil Dev. Group of Bai City of Jilin (1991), from Economic Division of the Supreme Court, Selected Economic Cases Heard by the Supreme Courts (1994)).
53 See id. (discussing the case of Ping Ding Branch of Shanxi Oil Co. v. Oil Dev. Group of Bai City of Jilin (1991), from Economic Division of the Supreme Court, Selected Economic Cases Heard by the Supreme Courts (1994)).
54 See id. at 136 (discussing the case of Union of Victory Oil Refinery v. Trading Group of Mei County of Guangdong (1992). The fact that the company signed a contract with its creditor that was ultra vires and void and that it knew it could not meet its obligation under the contract was a main reason the court chose to pierce the company’s veil in this case, according to Zhang Xianchu.).
The company was held liable for the full amount owed to the plaintiff. However, since the company’s sole investor and legal representative was unable to be found, the court placed liability on the Village Enterprise Commission that improperly verified the information in the defendant’s business application up to the registered capital of the defendant company as reported by the Commission. To what degree, one wonders, was the existence of fraud in the facts the main factor leading to the courts willingness to apply a piercing remedy?

Although it is difficult to obtain a picture of how the doctrine is applied as a whole throughout China, through the sparse number of judicial decisions that are released, the cases seem to indicate that, except in the narrowest of circumstances, piercing is not often employed. It is also interesting to note that most of the cases that are heard and prevail are contract rather than torts cases.

Most importantly, in cases where the use of a piercing doctrine might be appropriate, other factors may stand in the way of its proper usage. The common problems that might affect the outcome of cases in China’s judicial system today include the interference of local Communist Party branches or government branches that can slow proceedings and make the collection of evidence difficult; inexperienced judges; and other pressures arising from local protectionist tendencies. In addition, the inability of the judi-

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56 Id. No laws or documents were specifically cited in this decision.
57 Id.
58 In other jurisdictions, it is usually more difficult to prevail on contract cases than in torts because it is usually assumed that a creditor has the opportunity to investigate and contract for the risks he is taking while a tort victim does not have the benefit of this bargain. In China, while the situation has improved somewhat in recent years, accurate information is not as readily available to creditors making them more vulnerable than their counterparts in the United States. In addition, torts cases are generally handled through other channels in China. See Zhang, supra note 26, at 134 (stating that contracts disputes are the main part of the cases handled by Chinese courts because labor, product liability, torts, bankruptcy, and environment cases are often handled through administrative channels).
59 Lubman, supra note 12, at 397 (“The low educational level of China’s judges creates significant difficulties.”).
60 See Zhang, supra note 26, at 137 (“To make the situation worse, local protectionism is also a factor hindering fair hearing of piercing actions.”); see also Lubman, supra note 12, at 395 (noting that “the strongest and most insidious type of extra-judicial influence on the outcome of non-criminal disputes is interference by local officials in pending litigation and in the enforcement of judgments”); Lubman, supra note 12, at 408 (“Critical weaknesses in staffing procedures at the
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To immediately adopt a broad piercing doctrine in such an environment could cause much confusion and inconsistency in decision-making. These problems at the judicial level clearly support the gradual and informal adoption of this doctrine, a process that will assure its proper assimilation by China’s evolving judiciary.

3. TOWARDS A MORE COMPLETE COMPANY LAW REGIME: THE ARGUMENT FOR A DEFINED VEIL PIERCING DOCTRINE IN CHINA

China’s lack of a piercing doctrine has been a topic of debate and discussion among Chinese scholars and legal commentators. A survey of recent scholarly writings published in China indicates that a majority of writers favor the adoption of some type of piercing doctrine, differing mainly on how it should be implemented and in what cases. In particular, several recent articles have looked to other countries to examine how they have handled problems of corporate abuse in a limited liability system. The trend in corporate law worldwide, writes one commentator has been for most jurisdictions to adopt some type of piercing doctrine.

The following Sections provide a general picture of the recent discussion in China surrounding this issue. The types of abuses that an effective piercing doctrine should address in China are presented in Section 3.1. In Section 3.2, the recent arguments made by courts, poorly trained judges, overt localistic influence, and the absence of a concept of independent adjudication further hobble the operations of the courts.

See Lubman, supra note 12, at 395 (“‘Local Protectionism’ consistently makes it difficult to enforce judgments of the courts when the successful litigants must attempt to obtain payment in a place where defendants live or do business.”).

Ci Yun Zhu, Gong Si Fa Ren Ren Ge Fou Ren Fa Li Zai Mu Zi Gong Si Zhong De Yun Yong [The Use of Disregard of the Corporate Entity in the Parent/Subsidiary Context], FA LU KE XUE (XI BEI ZHENG FA XUE YUAN XUE BAO, Xi An), May 1998, at 40-46 (looking at veil piercing practices in the United States); Ziyun Zhu, Tan Gong Si Fa Ren Ge Fou Ren Fa Li De Shi Yong Yao Jian (Discussing the Important Documents Concerning Disregarding the Corporate Personality), ZHONG GUO FA XUE JING (Chinese Legal Studies (Beijing)), May 1998, at 73-81 (looking at the piercing situation in the United States).

Xin Min Zhang, Gong Si Li Fa De Fa Zhan Qu Shi Ji Wo Guo Gong Si Fa De Wan Shan [Trends in the Development of the Company Law and the Perfection of the Company Law], XIAN DAI FA XUE (CHONG QING) (Modern Legal Studies, Chongqing), Feb. 2000, at 103-05 (discussing the present development of China’s Company Law and offering several suggestions for improvement of the law).
those opposed to the development of such a doctrine in China will be presented. Section 3.3 explains the reasoning of those who support the development of the doctrine. Finally, Section 3.4 presents views about how the doctrine might be implemented.

3.1. What Type of Abuse Might a Piercing Doctrine Address?

Of the many ways in which the corporate form can be abused, some are common in many jurisdictions and others are unique to China. Regarding those abuses that are unique to China, these may be viewed as the "inevitable by-product of [China's] struggle to turn a model of central planning economy under administrative control for forty years to one based on market discipline."64 Two types of abuses mentioned in a 1996 article on this subject remain relevant to a modern piercing doctrine for China.65 These include situations where a claimant is harmed by: (1) companies that were established by local Communist Party or government branches without capital or with borrowed or insufficient funds; and (2) when a company in distress establishes a minimum of one other company and moves assets into the newly established company so that the distressed company may be considered an "empty shell" in liquidation. Companies also maintain old business registrations, and then use these to escape from debts incurred by their so called "new businesses," which are really operating in the same area of business and with the same personnel.66

More recent articles discussing the current Chinese environment have echoed some of the earlier concerns while adding a few others. Articles have called for the use of some kind of piercing doctrine to be used in the following situations:
(a) insufficient capitalization;67
(b) abuse by a single shareholder company;68
(c) mixing of assets and responsibilities among the corporation, its shareholders and related companies, making it eas-

64 Zhang, supra note 26, at 131.
65 Id. (discussing major types of abuse).
66 Id.
67 Yan Hai Liu, supra note 45 (defining the meaning of "insufficient capitalization" in China and suggesting how to deal with this problem through piercing the corporate veil).
68 Nie, supra note 48, at 80-82 (suggesting that China promulgate legislation regarding the one company and disregarding the corporate personality of one man entities).
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ier for the corporation to hide assets and avoid responsibility; 69
(d) the situation in which the shareholder seriously interferes with the operations of the company, so that the corporation in fact becomes a puppet of the shareholder; 70
(e) where the corporation acts unlawfully; 71
(f) where the company operates as a shell, removing capital in anticipation of times of distress and moving it to a newly established company to avoid liability. 72

These situations are common in Western capitalist countries and are covered to different extents in different jurisdictions by veil piercing. 73

It has also been suggested that China should consider a type of reverse piercing by which subsidiaries would take responsibility in certain situations for the debts of the parent. 74 One scholar has even recommended the use of the doctrine in the environmental tort context, 75 a potentially enormous area of future disputes. Lawyers in Shanghai mentioned recent, although ultimately unsuccessful, attempts at using the piercing argument as a way for minority shareholders to bring shareholder suits. 76

69 Yan Hai Liu, supra note 45 (describing the problems that occur when the assets and responsibilities of the corporation are mixed among the corporation, shareholders and related entities).
70 See id. (analyzing several examples of how this situation of shareholder interference easily arises in the parent subsidiary context).
71 See id. (providing examples of unlawful behavior, including the establishment of a corporation without following the rules in the Company Law, not holding shareholder or director meetings, shareholders using capital assets to pay personal bills, the insufficient keeping of financial and managerial records).
72 See id. (presenting examples of abuse in which capital is moved out of a company resulting in harm to the corporation’s creditors); see Deng & Feng, supra note 7.
73 See Alting, supra note 5; Thompson, supra note 5.
74 Xiang Jun Kong, Cong Gong Si Tuo Ke Tao Zhai Kan Si Ren Ge Fou Ren De Shuang Chong Xing [Looking at the Dual Characteristics of Disregarding the Corporate Entity From the Perspective of Using Shell Companies to Avoid Debts], REN MIN FA XUE BAO (JING) (PEOPLE’S LEGAL STUDIES PAPER, BEIJING) Feb. 16, 1999 (encouraging the use of reverse piercing in China and presenting an example of a case in which reverse piercing might be employed).
75 Ji Mei Chen, Lun Mu Zi Gong Si Jie Gou Zhong You Xian Ze Ren Lan Yong De Jiu Ji [Discussing Remedies for Abuse of Limited Liability in the Parent/Subsidiary Context], HE BEI FA XUE [HE BEI LAW SCIENCE], Nov. 5, 2000 at 123-24 (introducing how the doctrine of piercing the corporate veil in the common law system deals with abuses of limited liability).
76 Interview with attorneys in Shanghai (Dec. 2001).
One recent article discusses using the doctrine in regard to multinational companies in China. Noting that piercing problems mainly arise in closed companies and corporate groups, the doctrine is especially relevant in China, where many multinationals have invested and opened subsidiaries. There is currently no way for a creditor in China to pursue a claim against the parent company based on a piercing theory. Even though it is difficult to execute judgments overseas, the author believes that a well-developed piercing doctrine in China will not only prevent abuse by multinationals but also lead to foreign courts carrying out Chinese piercing judgments. However, as the author correctly notes, China is one of the world’s largest recipients of foreign direct investment and it should be careful to develop a doctrine that is well-defined. Otherwise, investors may feel uncertain about the level of risk to which their Chinese investments will expose them, and might decrease their activity in China.

The lack of published cases precludes an accurate survey of the frequency with which courts deal with the above types of situations. However, anecdotal reports from Chinese attorneys and also the concerns of scholars indicate that all of the abuses mentioned above exist and are areas of current concern. China’s company law regime would benefit greatly from the introduction of a broader veil piercing doctrine that would begin to cover some of the abuses mentioned here.

3.2. Criticism of the Piercing Doctrine

While clearly a minority, not all scholars or practitioners are proponents of developing a broader piercing doctrine in China. Some scholars believe that the concept and logic inherent in the

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77 Min Zhang, Kua Guo Gong Si Nei Mu Zi Gong Si Fa Ren Ge Fou Ding Ji Qi Xian Shi Yi Yi [Disregarding of the Corporate Entity with Regard to Parent-Subsidiary Corporate Personality Within A Multi-National Corporation, and Its Practical Significance], GUO JI MAO YI WEN TI [JOURNAL OF INTERNATIONAL TRADE], Apr. 6, 2000, at 54-56 (introducing the doctrine of piercing the corporate veil and discussing its feasibility for China with regard to multinational companies).
78 See id.
79 See id.
80 See Chris Giles, Asia-Pacific & International Economy: China Draws Foreign Investors, FIN. TIMES, Sept. 23, 2002 (stating that, for the first time, China has surpassed the United States as the most attractive destination for foreign direct investment).
81 Zhang, supra note 77, at 54-56 (discussing the importance of not negatively effecting the level of foreign investment in China).
idea of piercing the corporate veil are inherently confused. Others do not believe that the theory can be properly applied at this period in China’s development, and moreover, that it is not a “magic pill” that will solve the many problems and abuses of the corporate system. It is felt by some that there are other and better ways to deal with abuses of the corporate system. In addition, using the doctrine indiscriminately, where it does not belong, notes one article, can lead to negative impact on investment and economic growth.

Among those who object to the theory behind piercing, it is argued that the doctrine has two main failings. First, the legal basis for holding shareholders liable has not been verified, namely: Is the shareholder liable for violating an agreement or for violating rights? Second, unified standards or prerequisites for using the doctrine have not been established. There is no standard for finding: when someone is at fault, whether negligence is an appropriate standard, whether damages must be proven, et cetera.

Many of the reservations expressed by Chinese scholars about the doctrine are neither new nor novel. In his treatise on the subject, Piercing The Corporate Veil, Stephen Presser notes that until recently, few scholars had written on piercing because of the “doctrine’s frustrating fluidity.” He further notes that, “[s]cholars who have examined the piercing the veil doctrine have seemed almost in despair, remarking that the rationales for piercing the veil are ‘vague and illusory’, and that the jurisprudence of veil piercing is a ‘legal quagmire.” Presser also points out that authors of a recent scholarly attempt to “impose order on the field,” noted that piercing the veil, “like lightning . . . is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability,

82 Shanghai Corporate Law Review 2001, supra note 15, at 212 (discussing how some scholars feel the area of disregarding the corporate entity has some theoretical contradictions and conceptual confusion).

83 Id. (discussing concerns of scholars in China regarding this doctrine), citing Xin Zhong Zhao, Dui Wo Guo Shi Yong Gong Si Fa Ren Ren Ge Fou Ren Fa Li De Zhi Yi, He Bei Fa Xue (He Bei Law Sciences) 105-107 (1994).

84 See id. (citing Jing Xia Shi, Mu Gong Si Dui Po Chan Zi Gong Si De Zhai Wu Ren – Guan Yu “Jie Kai Gong Si Mian Sha Li Lun De Tan Tan, Fa Xue Ping Lun, Issue 3).

85 PRESSER, supra note 5, § 1.01, at 1-7.

and conversely of piercing the corporate veil, is among the most confusing in corporate law." Nonetheless, limited liability has entrenched itself as an essential facet of the economies of Western capitalist countries and along with this, the widespread and long-standing adoption of piercing in Western capitalist countries indicates that the benefits of both limited liability and piercing outweigh any confusion its adoption might create.

It is, however, this unpredictability that concerns many scholars in China and makes them wary of unleashing such a potentially powerful doctrine on a relatively inexperienced judiciary. There are also concerns that localism and other forms of pressure could bias local courts in their application of the doctrine. Even the most ardent supporters of a broad piercing doctrine seem to be aware of its elusive nature, the risks of it being abused and the need to proceed with caution so as not to undermine the value of the limited liability system. Such a result could of course have serious negative consequences for economic vitality, growth, and investment (both domestic and foreign).

Some have suggested that it is precisely some of the most politically powerful groups in China whose assets would be made vulnerable by the implementation of a broad-based piercing doctrine. It is therefore viewed as political wrangling at the highest levels that has kept this issue from being dealt with at the legislative level. While there may be some truth to this statement, it is difficult to prove, and the concerns discussed above provide other very plausible reasons that the doctrine has not yet been adopted in China.

### 3.3. Support for Developing a Piercing Doctrine

Most scholars, while cognizant of the doctrine's weaknesses, believe that on balance China will benefit from the introduction of a defined veil piercing doctrine. Many believe that the larger

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88 See Introduction, supra Section 1 (discussing corruption, lack of properly trained judges, etc.).

89 In fact, the thesis of Presser's book is that the increasing use of the piercing doctrine in the United States is posing a real threat to the "integrity of the corporate entity," and that courts are not aware of the "delicate balance to be struck" between the public goals of legislation that allows piercing and the "original public policies of democracy and economic expansion which lay behind the creation of state law doctrines of limited liability." Presser, supra note 5, § 1.06, at 1-74.
threat to the validity of the corporate system in China is presented by ignoring current abuses and neglecting to provide proper tools to deal with these abusive and unfair practices. While the veil piercing doctrine is not perfect, this has not precluded its beneficial use in many other jurisdictions and should not prevent China from beginning to develop the doctrine to suit its own particular problems and characteristics.

It is a concern for justice and fairness that motivates many of those that support the use of the doctrine in China. While Presser expresses concerns about potential threats to the corporate entity in the United States due to excessive piercing, in China it is the lack of a more defined piercing doctrine that is seen as a threat to the health of the corporate system. This concern is likely a reflection of the abuses that exist in the economy of a rapidly transforming China.

The call for reform in this area comes not only from academics but also from those working in the judiciary. Discussing the operational weaknesses of China’s Company Law at a recent seminar in Beijing, a staff member of China’s Supreme Court mentioned several situations in which it is important to establish a mechanism by which the veil of limited liability can be pierced and the negligent shareholder would be held civilly liable. Even the courts recog-

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90 See Shanghai Corporate Law Review 2001, supra note 15, at 210 (stating that China must find a way to deal with abuses of limited liability).

91 As Maurice Wormser once wrote: “[I]n general a corporation must be viewed as a personality, separate and distinct from its shareholders, whether individual or corporate, but this fiction, like any other fiction, must be employed with common sense and applied so as to promote the ends of justice. It must not be converted into a fetish.” PRESSER, supra note 5, § 1.03[3], at 1-28.

92 See Wanhua Du, Speech as Vice Director of the Research Institute of the People’s Supreme Court, in Summary of Speeches, supra note 36.

Along with economic development, there have been more and more lawsuits. Company Law is basically just a law of corporate organization, it lacks the operational facility and therefore it is hard to bring suit without the guidance of additional Supreme Court explanations. One of the urgent problems requiring judicial explanation is: piercing the veil. Sometimes an investor does not meet his investment duties, or the investment does not meet the minimum requirement for registered capital OR did not meet the requirements of the business license, or after the company has been set up, the founder takes back the money, or using its controlling power to transfer subsidiary’s assets (to parent), etc. If creditors file suit, for now, they can only take the assets of the original company. Under this condition, we should establish a system to pierce the corporate veil and to make negligent shareholders directly liable for debts.
nize that justice today demands the tools to handle the increasing number of cases in which innocent parties have been harmed by illegal use of the corporate entity.

In addition, in early 2000, some representatives at the Shenzhen People’s Congress proposed that the Shenzhen congress should allow local judges to apply a veil piercing doctrine on a pilot basis. As a Special Economic Zone in China, Shenzhen often serves as an incubator for new economic ideas in China. Such experimental ideas can be introduced in Shenzhen owing to the special legislative powers held by the Shenzhen legislature. The fact that members of this legislature proposed action on veil piercing indicates their acknowledgement that beginning to experiment with the application of veil piercing is necessary in China and that the time has come for its introduction, at least on an experimental basis.

3.4. How China Should Develop a Piercing Doctrine

Given the complex nature of this doctrine, its potential for misuse, and China’s current stage of judicial development, it is in China’s best interest that the doctrine be introduced gradually—by dealing with different abuses in turn over time—and informally—by issuing explanations and regulations to guide its use—allowing adjustments as the success and problems of the doctrine in practice become apparent. While China’s earlier reluctance to implement such a doctrine when first experimenting with limited liability companies is understandable, at China’s current stage of economic and legal maturation the doctrine’s absence is a noticeable anomaly and one that the legislature and courts should begin to address. However, the gradual approach, utilizing relatively informal means, is necessary for providing the courts and others the time to adapt to the doctrine while also adapting the doctrine to the special characteristics of China’s economic and legal landscape.

As recently mentioned by the Supreme Court staff member discussed in the previous Section and as others have suggested, fur-
ther Supreme Court explanations would be one method by which the courts would be provided with guidance and the tools to handle company law related cases, including those where piercing might be a proper remedy. Similar to the approach taken in Japan, China could absorb the idea of piercing or disregard of corporate personality in certain situations—the gradualist approach. As in Japan, the Supreme Court should issue judicial cases and rulings and distribute them to the lower court for guidance on how they should be applied—the use of relatively informal means. When the time is right, then the Company Law should be amended to provide for piercing.

For now, one scholar suggests, additional informal means could be introduced by the passing of administrative regulations by the State Council before new articles in the company law are adopted. At the same time China should be careful not to

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94 See Yan Hai Liu, supra note 45 (suggesting that the Supreme Court should publish typical cases which people can use as a reference regarding when piercing may be applicable); Wanhua Du, Speech as Vice Director of the Research Institute of the People's Supreme Court, in Summary of Speeches, supra note 36 (explaining that in order to help the courts to make their decisions it is necessary for there to be made available more judicial explanations regarding the Company Law).

95 Hao Dong Shang, Gong Si You Xian Ze Ren Zhi Du Tan Xi (suggesting that, as in Japan, China should first go through a transitional stage in which the Supreme Court can set out elements of piercing actions and refer to other judicial cases to establish the boundaries of a piercing doctrine in China), available at http://www.allbright.lawyers.com.cn/lvbbs/shanghaodong.htm.

96 Shang, supra note 94 (suggesting separate articles to deal specifically in the parent-subsidiary context. In Taiwan, there is also a sub-chapter of the Company Law which deals specifically with the parent-subsidiary context. For now, he says administrative regulations should be passed by the State Council before adopting new articles in the Company Law.)

97 See Corne, supra note 17, at 382 (analyzing ways in which the law is reinterpreted in China through temporary administrative regulations or provisions provided by the State Council).

A resolution of the Standing Committee of the NPC [National People's Congress], the Resolution Authorizing the State Council to Make Provisional Regulations in Regard to Reform of the Economic System and Opening to the Outside World ... authorized the State Council to make temporary regulations relevant to economic reform .... Such legislation is considered to be a form of 'quasi-law', enacted to regulate the current situation in the absence of other legislation and intended as a means by which to accumulate experience .... The ultimate intention is for the NPC to itself draft legislation when the situation is considered "mature", that is, when sufficient experience has been assembled, followed by the invalidation of the temporary regulations.

Id.
frighten foreign investors. Improvements in this area should be introduced step by step given the importance of maintaining a healthy level of economic growth and high levels of foreign investment to China. However, in light of the judiciary and legislature’s silence on this issue for so many years and the importance of creating and maintaining a just system, the initial steps should be taken as soon as possible.

4. CONCLUSION

In China, the ability to pierce the corporate veil and find liability in certain cases of abuse is a necessary addition to the next stage of development of China’s corporate law system. While most jurisdictions have developed a doctrine of piercing by which the veil of limited liability can be lifted and the assets of shareholders can be reached in instances of abuse, China, for many reasons, has yet to fully develop such a doctrine. Moreover, because of unique factors present at China’s current stage of economic and legal development and because of the nature of the doctrine, piercing should be adopted gradually and through informal means at first.

As was done in Japan, China should begin by State Council Explanations and by various Supreme Court interpretations before finally promulgating the necessary legislation. It is a complicated doctrine that has the potential to undermine the credibility of the corporate entity and to frighten investors if not carefully and judiciously employed. Therefore, the judiciary and the investment/business community should be given time to adjust to the addition of this doctrine through its gradual introduction. This gradualist approach implemented through relatively informal means will provide the legislature with the time and feedback necessary to create the appropriate doctrine and an equitable system which more properly balances the competing aims of economic development and justice.

In trying to implement the doctrine, it should be noted that there is likely to be political resistance to supporting legislation that might frighten investors, a potential that is especially real if the doctrine is unpredictably and inconsistently applied. This resistance will likely be reduced if the approach is more gradual and

98 Shang, supra note 94.
99 In this country, the doctrine also evolved over time. See Presser, supra note 5.
informal. It should be noted that these same concerns were present as the doctrine developed in the United States.

While the doctrine has been developed in other jurisdictions, the doctrine needs to be adopted to best handle China’s particular problems. As pointed out by one of the drafters of the Company Law, there may be certain tests that have been applied and are utilized in other jurisdictions that will not be fully applicable in China.¹⁰⁰ There are also issues of special concern in China, including questions about the level of professional training of judges and independence of the judiciary that must be considered in designing a doctrine that will not itself become a tool for abuse.

The gradual adoption of a piercing doctrine through the use of informal means in China is both necessary and welcome. Such an improvement to the current situation will restore a balance to China’s economy and especially to those would be creditors and tort claimants who can proceed with the knowledge that they may have the possibility of redress in certain cases where the corporate entity has been abused. It also has the potential of deterring many of those who wish to use the corporate entity as a tool for abuse, while providing a remedy for those who are victims to such unfair practices. With the gradual development and promulgation of opinions and guidance and eventually the passing of legislation, investors will have time to become comfortable with the new situation, the judiciary can adjust to this exception to limited liability, and the corporate law system will be strengthened.

¹⁰⁰ Interview with Professor Jiang Ping, in Beijing (Jan. 2, 2002) (providing an example of a case in which two companies were not necessarily controlled by the same company because their offices were in the same building and their telephone extension was the same. This test might be more useful in other countries, but not in China where many companies share the same building and even the same telephone switchboard).