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The International Comparative Legal Guide to: Corporate Governance 2011

A practical cross-border insight to
corporate governance

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Vietnam

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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed

The most dominant types of corporate entity in Vietnam are limited liability companies and shareholding companies. Corporate governance principles and laws are most relevant to shareholding companies, so the main focus of the discussion is on this type of entity. The Enterprise Law 2005 regulates corporate entities and sets out basic conditions in which these entities must operate.

A shareholding company may be a public company or a private company. Additional corporate governance requirements are applied to public companies, especially in terms of disclosure of information. A public company is defined as a joint stock company that has shares issued to the public or listed on a Stock Exchange or a Securities Trading Center, or shares owned by at least 100 investors, excluding professional securities investors, and paid-up charter capital of VND10 billion or more.

A shareholding company has a three-layer management structure consisting of the General Meeting of Shareholders, the Board of Management, and a Director or General Director. These management bodies are discussed in detail in question 3.1.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The Enterprise Law is the main source for corporate governance law in Vietnam. It sets out the laws for the organisation and operation of corporate entities in Vietnam. The Security Law and its implementation regulations also regulate publicly-listed companies. Circular 09, issued in 2010, sets out a number of new provisions that provide clearer regulations on disclosure requirements of public companies, while Decree 102 gives shareholders clear rights to bring actions against personnel responsible for the management of the company.

The main pieces of legislation regulating corporate governance in Vietnam are as follows:

1. Law on Enterprise No. 60/2005/QH11 passed by the National Assembly dated November 29, 2005 (Enterprise Law);
2. Decree No. 102/2010/ND-CP of the Government guiding Enterprise Law 2005, dated October 1, 2010 (Decree 102);
3. Law on Securities No. 70/2006/QH11 passed by the National Assembly, dated June 29, 2006, as amended by Law No. 62/2010/QH12 passed by the National Assembly dated November 24, 2010 on Amendment and Supplementation of

a number of Articles of Law on Securities (Security Law);

4. Decision No. 12/2007/QD-BTC of the Ministry of Finance Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Security Trading Centre, dated March 13, 2007 (Decision No. 12);
5. Decision No. 15/2007/QD-BTC of the Ministry of Finance promulgating the Model Charter Applicable to Companies Listed on Stock Exchange/Security Trading Centre, dated March 19, 2007 (Decision No. 15); and
6. Circular No. 09/2010/TT-BTC of the Ministry of Finance on Disclosure of Information on the Securities Market, dated January 15, 2010 (Circular 09).

1.3 What are the current topical issues, developments and trends in corporate governance?

There are many areas of law that are weak in the protection of minority shareholders' interest. Even though shareholders are granted, the rights to participate in the General Meeting of Shareholders (GMS) and have the right to ask questions to the auditors during the GMS, in practice, the auditors are often not present in such meetings. Additionally, in reality, most minority shareholders are also faced with a general lack of information as to whether the auditors are in fact independent because the legal mechanisms and other resources available to minority shareholders to verify the independence of the auditors are often insufficient. These, among other factors, often lead to asymmetry of information between the minority shareholders and those involved in the management of the company.

Before passing Decree 102 in 2010, the enforcement rights of the shareholders were unclear. The new Decree provides clear guidance on the power and role of the shareholders in initiating actions against the management bodies of the company. It remains to be seen, however, how the courts will implement the regulation and whether the shareholders can, in practice, confidently enforce their rights under Decree 102.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

Ordinary shareholders can exercise their powers by expressing their opinion and voting in the GMS. Their voting power is proportionate to their share of capital contribution.

Shareholders who hold at least 10 percent of shares for a consecutive period of at least six months (or otherwise stated in the charter of the company) have the additional right to nominate candidates to the Board of Management (BOM) and the Inspection Committee (IC). The IC must act upon requests from such shareholders to inspect issues relating to the management and administration of the company.

Such shareholders also have the additional right to request the convening of the GMS when the BOM breaches their rights or makes a decision that falls outside its authority. A GMS can also be requested where there is no new BOM after six months of expiry of the term.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Generally, shareholders are not liable for acts or omissions of the corporate entity. A shareholder's liability is limited to the contributed capital in the company. Shareholders who hold management positions in the company can have civil and/or criminal liabilities for violations of corporate laws or penal laws.

A shareholder is also personally liable when, in the name of the company, the shareholder breaches the law, or conducts business for a benefit other than the company's benefit, or pays premature debts when the company is likely to be in financial danger.

2.3 Can shareholders be disenfranchised?

No, generally they cannot be disenfranchised. However, a founding shareholder will automatically cease to be a shareholder of the company if the shareholder fails to pay in full for the number of shares that have been registered for subscription, within ninety days of the establishment of the shareholding company. A shareholding company is required to have at least three "founding shareholders" at the time of its initial establishment. Upon establishment, the founding shareholders are required to subscribe to a set number of shares. Founding shareholders have certain statutory rights and obligations.

2.4 Can shareholders seek enforcement action against members of the management body?

The new Decree 102 gives shareholders the power to instigate legal proceedings against members of BOM and company directors. Only shareholders who hold at least 1 percent of the total number of ordinary shares for a consecutive period of six months are entitled to initiate proceedings through requesting the IC to lodge a legal action. In case of failure by the IC to act within 15 days of the request, shareholders have the right to initiate the proceeding themselves.

Shareholders may initiate proceeding against the members of the management body or company director if such member or director fails to perform their assigned duties or performs such duties contrary to law. Actions may also be brought against members or directors who use company information, know-how, or business opportunities for personal purposes, or when such persons abuse their position and assets of the company for personal benefit. The company charter may stipulate other instances where shareholders have the right to bring action against a company management body or its directors.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

The Enterprise Law imposes restrictions on the mobility of shares of the founding shareholders. The shares of the founding shareholders are transferable among the founding shareholders, but require approval by the GMS if the founding shareholder wishes to assign ordinary shares to a person who is not a founding shareholder within three years of registration of the company. Such restriction is lifted after three years from the date the company receives its business registration certificate.

According to the Enterprise Law, shareholders of non-listed companies holding at least 5 percent of the total number of shares must register with the local Department of Planning and Investment within seven working days from the date of acquiring such ownership percentage.

With regard to listed companies, a major shareholder owning directly or indirectly at least 5 percent of the voting shares must report to the State Securities Commission and the Stock Exchange or Securities Trading Center (e.g. Hanoi Stock Exchange or Ho Chi Minh City Stock Exchange) within seven days from the date of becoming a major shareholder.

In addition, if a person responsible for the management of a listed company is also a shareholder, and such person decides to trade shares outside the Stock Exchange or Securities Trading Center, the details of such transaction must be reported to the State Securities Commission and the Stock Exchange at least three days prior to such transaction. This requirement is not limited to transactions with members of the management body, but extends to the chief accountant, a major shareholder, a person authorised to disclose information of a listed company, and an affiliated person of the listed company. The result of the transaction must be reported within three days of completion of such transaction.

2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

Shareholder meetings must be convened at least once a year. The convenor of a shareholders meeting must prepare a list of shareholders, the programme, agenda and documents for the meeting, and draft resolution on each of the items on the agenda. The convenor must also fix the time and location of the meeting and send a written invitation to all shareholders who are entitled to attend the meeting.

For a non-listed company, shareholders may hold an *ad hoc* GMS when necessary and for the benefit of the company, or when the number of the remaining members of the BOM is less than the number required by the law. Such meetings may also be held upon request from a shareholder or a group of shareholders holding 10 percent or more of total shares or upon the request of the IC.

For a listed company, in addition to the above, the BOM must convene an *ad hoc* GMS where the annual balance sheet, biannual or quarterly statements, or audited reports of a financial year reflect loss of half of the charter capital. A shareholder or a group of shareholders with more than 5 percent of total shares may also request an *ad hoc* GMS.

Generally, a shareholder has the right to attend, discuss, and vote with the voting rights in proportion to his or her shares held in the company. A shareholder may authorise another person to act on his or her behalf in a shareholders meeting. If a shareholder fails to attend a meeting after being duly notified, the shareholder will lose his or her right to vote at that meeting.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management bodies of a shareholding company include the GMS, the BOM, and a Director or General Director.

The GMS is the highest decision-making authority in a shareholding company. It oversees the direction of the company and makes decisions on investment of at least 50 percent of the total value of the assets. It also handles breaches of duties of other management bodies. The GMS can make decisions on the reorganisation and dissolution of the company.

The BOM has the power to make decisions in the name of the company and oversees the medium-term plans and strategies of the company. In addition, it has the power to appoint, dismiss, or remove and supervise the Director or the General Director. In terms of management of the company business, it has the power to make decisions on company share policies, investment plans, and market expansion of the company. The BOM has the right to approve company contracts valued at 50 percent (or a smaller amount as stipulated in the company charter) of the total value of assets for the given financial year.

The Director or the General Director manages day-to-day business operations of the company. A Director serves a term of five years, subject to reappointment. The Director is responsible for implementation of business plans and resolutions passed by the BOM.

The establishment of the IC is required if the company has more than 11 individual shareholders or one corporate shareholder holding more than 50 percent of total shares of the company. The chairman of the BOM or Director or General Director can be appointed as the legal representative of the company.

As a general principle, a decision of the GMS is passed if it is approved by 65 percent (or a larger threshold as set out in the charter of the shareholding company) of the total shares represented by attending members.

3.2 How are members of the management body appointed and removed?

A GMS has the legal authority to appoint, dismiss, or remove members of the BOM and members of the IC.

The BOM has the legal authority to appoint, dismiss, or remove the Director or the General Director of the company.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

The Enterprise Law acts as the main source governing the contracts and remuneration of members of the management body.

The company is entitled to pay remuneration to members of the management body on the basis of business performance. The company charter should determine in detail the terms of remuneration. However, where such details are not included in the charter, the law stipulates that the total amount of remuneration for the BOM must be decided by the GMS at the annual meetings. Members of the BOM are entitled to reimbursement of meals, accommodation, travel, and other reasonable expenses incurred in the course of conducting their duties.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

The Enterprise Law imposes public disclosure duty on the members of the management bodies to declare their relevant interest with the company. The members of the BOM, the IC, the Director or General Director, or other managers must declare the information on the enterprise in which they own contributed capital or shares. They are also required to declare information on enterprises in which their related persons own more than 35 percent of the charter capital. Disclosure of such interest must be made within seven working days from the date it arises.

Any member of the BOM in a listed company who directly or indirectly benefits from a contract or transaction that has been signed or is intended to be signed with the company, and where such member is aware that he or she has an interest, is required to disclose the nature and content of such interest to the BOM.

The law does not provide outright limitation on the interest in securities held by the management body, as long as disclosure requirements are met and the interest is obtained in accordance with the procedures stipulated in the Vietnamese laws.

3.5 What is the process for meetings of members of the management body?

The BOM meetings can be carried out on a regular basis, or the chairman may convene a regular meeting of the BOM if it is considered necessary. However, such meetings should be carried out at least once per quarter.

The meeting of BOM must also be convened if it is requested by the IC, or the Director or the General Director, or at least five management personnel, or at least two members of the BOM, or as otherwise stated in the company charter.

Notice of the meeting must indicate the time, venue, and programme of the meeting, and it must be sent to each member via courier, telecom, fax, telex, or other electronic means. The notice must enclose documents to be discussed or used at the meeting and voting forms for the members where applicable.

A meeting is open if at least three-quarters of the total number of members attend. The resolution of the management body will be passed if it is approved by the majority of the attending members. In the case of a tied vote, the final decision is made by the vote of the chairman.

3.6 What are the principal general legal duties and liabilities of members of the management body?

In general, all personnel involved in the management of the company must fulfil their delegated duties and ensure the best interest of the company. They must perform such duties in accordance with the law, the company charter, and resolutions of the GMS.

Members of the management body are prohibited from abusing their position within the company by using information, know-how, or business opportunities of the company for their own interest or for an interest other than the company interest.

As discussed above, all such personnel must notify the company if they, or their related persons, own or have contributed capital or controlling shares in the other entities.

The BOM, the Director, and the General Director are also

prohibited from increasing salary or paying bonuses when the company has not paid in all the debts due and payable.

3.7. What are the main specific corporate governance responsibilities/functions of members of the management body?

The functions of the BOM, and the Director or the General Director, are detailed in the company charter.

The BOM is appointed by the GMS. The law provides the BOM with the power to supervise, appoint, dismiss, and make decisions on remuneration of the Director or General Director and other management personnel in the company. The BOM also makes decisions on the organisational structure and internal management rules of the company. The body also approves the agenda for the GMS and obtains opinions to pass resolutions of the GMS. The BOM provides recommendations on reorganisation or dissolution of the company, or it may request bankruptcy of the company.

The Director or General Director manages day-to-day business operations of the company and has the power to appoint and remove management personnel of the company, except for those under the scope of authority of the BOM. The Director or General Director also implements BOM resolutions and business and investment plans.

3.8 What public disclosures concerning management body practices are required?

The Law on Securities requires a listed company to publicly disclose the company's "business organisation model, the managerial apparatus and shareholder structure".

Further, the law requires a public company to disclose within 24 hours information on resolutions passed by the GMS, or when there is a decision to bring legal action against a member of the management body, or a change of key personnel in the company.

Such information must be published on the website of the company and disclosed to the State Securities Commission and the Stock Exchange.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

The Enterprise Law does not provide specific provisions in relation to insurance and indemnities of the members of the management bodies. However, Decision No. 15, which only applies to listed companies, provides in its model company charter that a listed company is liable to pay compensation to a member of a management body who is involved in litigation in which he or she acts as an employee or a legal representative of the company. Such litigation excludes cases where the company initiated the proceedings. The company can opt to insure such persons in order to avoid paying compensation itself.

However, the members of the management bodies will only be exempt from liabilities if they acted honestly, diligently, carefully, and professionally, and they must have believed they acted in the best interest of the company.

In general, a member of the management body of a shareholding company (regardless of whether the company is public or private) is held personally liable for claims against the company if such member acted for his or her personal benefit or acted contrary to law.

4 Corporate Social Responsibility

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

There are no specific regulations on corporate social responsibility. Under the Enterprise Law, in general, employers must ensure rights and interests of employees by implementing regimes of social insurance and health insurance for their employees in accordance with Vietnamese laws. In addition, the enterprise must comply with the laws on security, social order and safety, protection of natural resources and the environment, and protection of historical and culture sites.

4.2 What, if any, is the role of employees in corporate governance?

There are no specific regulations on the role of employees, who are not shareholders, in corporate governance in Vietnam.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

Generally, the legal representative or the person authorised by the listed companies is responsible for disclosure and transparency.

5.2 What corporate governance related disclosures are required?

Under the Enterprise Law, the member of the BOM, the IC, the Director or General Director, or other managers of a shareholding company must declare their equity interest (such as shareholdings) in other companies and business entities. They are also required to declare information on enterprises in which their related persons own more than 35 percent of the equity interest. Disclosure of such interest must be made within seven working days from the date it arises.

There are additional public disclosure requirements for public companies. A public company must make disclosure within 24 hours of resolutions passed by the GMS. Such resolutions may include information on amendments of the charter of the company, new developments in the direction of the company, changes in the personnel of the BOM, or reorganisation or dissolution of the company.

It must also disclose within 24 hours any decision to bring legal proceedings against a member of the management body or any court decision in relation to the operation of the company. Any concluded breach of law on taxation by the company must be disclosed.

A public company must also disclose within 72 hours any decision made by BOM on medium-term strategies, business plans, or change of accounting methods. Any decision in relation to establishment, acquisition, or dissolution of a subsidiary must be disclosed.

All the above information must be disclosed on the website of the company and disclosed to the State Securities Commission and the Stock Exchange.

5.3 What is the role of audit and auditors in such disclosures?

The financial statements must be audited by an independent auditing company that is established and operating under the law of Vietnam. According to auditing regulations, the auditing company is responsible for the examination, evaluation, and verification of the accuracy and truthfulness of the financial statements. The auditing company does not have any responsibility in relation to the disclosure requirements of the reports of the company. It is the responsibility of the company to disclose such information.

5.4 What corporate governance information should be published on websites?

Public companies must have a shareholder relationship column on their website, which includes the company charter, internal administration rules, and disclosure of issues relating to meetings of the GMS. Such information must be regularly updated on the website.

There are no similar requirements for non-listed companies.

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