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Will Pearce

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Truong Nhat Quang, Nguyen Van Hai and Krissen Pillay¹

I OVERVIEW OF GOVERNANCE REGIME

Corporate governance in Vietnam is primarily regulated by the Law on Enterprises,² which provides for, among other matters, different corporate forms of business entities and the corresponding governance model of each. The two main corporate forms are the limited liability company, which could be owned by between one and 50 members, and the joint-stock company, which must have at least three shareholders but is not subject to any limitation on its number of shareholders. Less common forms of corporate entities include sole proprietorship and partnership companies.

A limited liability company, the prevalent form for small companies, consists only of members who typically have a fused role as both equity participants and managers. A joint-stock company, differently, has a clear distinction between equity participants and management, with most medium-sized and large companies following this corporate form. Joint-stock companies are either private joint-stock companies or public joint-stock companies (usually called private companies and public companies, respectively).

Public companies, generally defined as joint-stock companies with at least 30 billion dong³ in paid-up charter capital and 10 per cent of their voting shares held by at least 100 retail investors, are also subject to corporate governance rules provided for under:

- a* the Law on Securities;
- b* Decree 155 of the government on corporate governance of public companies; and
- c* Circular 96 of the Ministry of Finance on disclosure of information of public companies.⁴

The principal function of these rules is to provide a fair, orderly and transparent market for the trading of securities.

1 Truong Nhat Quang is the managing partner, Nguyen Van Hai is a partner and Krissen Pillay is a counsel at YKVN.

2 Law on Enterprises No. 59/2020/QH14 (National Assembly, 17 June 2020) (Law on Enterprises).

3 At the time of writing, 10,000 dong is equivalent to roughly US\$0.44.

4 Law on Securities No. 54/2019/QH14 (National Assembly, 26 November 2019) (Law on Securities); Decree No. 155/2020/ND-CP (Government, 31 December 2020) providing specific corporate governance regulations for public company (Decree 155); and Circular No. 96/2020/TT-BTC (Ministry of Finance, 16 November 2020) providing guidelines on disclosure of information on securities market (Circular 96).

Public companies may or may not be listed on a stock exchange. There is no clear distinction in the corporate governance regime applicable to listed public companies and unlisted public companies, and the Listing Rules of stock exchanges do not impose any additional corporate governance requirements.

Vietnam's public securities markets are operated under two stock exchanges: the Ho Chi Minh Stock Exchange (HOSE) and the Hanoi Stock Exchange (HNX). A dichotomy is being established so that, by 30 June 2025, while the HOSE will list and trade shares, fund certificates and warrants, the HNX will list and trade bonds and derivatives.

During the past two decades, the Law on Enterprises and the Law on Securities have been updated a few times, with the latest versions passed during 2019–2020. Decree 155 and Circular 96, the implementing regulations of those laws, were issued around the same time. These laws and regulations form the main part of the Vietnamese corporate governance regulatory framework.

In addition to mandatory rules provided in the laws and regulations, the State Securities Commission (SSC), with support from the International Finance Corporation, issued in 2019 the Vietnam Corporate Governance Code of Best Practices for public companies (the CG Code), which recommends greater standards than minimum legal requirements, although it is not itself mandatory. The 2015 G20/OECD Principles of Corporate Governance and the 2017 ASEAN Corporate Governance Scorecard have been used as key reference materials in developing the CG Code. The CG Code is considered an important milestone for Vietnam and will continue to assist the SSC and other policymakers in evaluating Vietnam's corporate governance framework and steering its continuing evolution.

Corporate governance is enforced more prevalently in joint-stock companies. For private companies, the local licensing authorities (i.e., the local Departments of Planning and Investment) are responsible for enforcing corporate governance rules. For public companies, the SSC is the key regulator and enforcement agency. Monetary penalties are the key sanction applied for both private companies and public companies.

This chapter canvasses the corporate governance matters of joint-stock companies in general, with a focus on public companies. Sector-specific companies are also subject to separate sets of corporate governance regulations issued by their line regulators, which are not addressed herein.

II CORPORATE LEADERSHIP

i Board structure and practices

General

A company has the option of following either a two-tier board structure (i.e., a board of directors (BOD) and a supervisory board (SB)) or a one-tier board structure (i.e., a BOD only). For a company that follows a one-tier board structure, at least 20 per cent of the members of the BOD must be independent and the company must form an internal audit committee, the members of which are drawn from the BOD (a sub-board committee).

BOD and SB members are appointed by the general meeting of shareholders (GMS). The general director (GD) is responsible for the day-to-day management of the company business.

BOD composition

In a joint-stock company, the number of BOD members must be at least three but not more than 11, and all must be natural persons and with none being a family member of the director, GD or other manager of the company.

A shareholder or a group of shareholders holding 10 per cent or more of the voting shares of a company has the right to nominate candidates to the BOD, unless a lower threshold is provided in the company's charter. The election of BOD members by the GMS may occur through cumulative voting. This allows minority shareholders greater representation in the BOD. Cumulative voting was previously popular because it was mandatory under the previous Law on Enterprises, though is now less popular (due to its being optional).

To facilitate objective decision-making, it is further required that at least one-third of BOD members in public companies are non-executive members (i.e., not the company's GD, deputy GD, chief accountant or other managers as stipulated in the company's charter). Listed public companies are required to have at least one independent board member if the BOD comprises between three and five members, two independent board members if the BOD comprises between six and eight members, and three independent board members if the BOD comprises between nine and 11 members. Failure to comply with this requirement may subject a company to a fine of up to 150 million dong.⁵ The SSC has, in practice, applied these fines, highlighting the importance placed on the independence requirement. The CG Code recommends that at least one-third of BOD members should be independent.

Independent members are subject to several restrictions, including that they must not:

- a* be employed within the same corporate group nor receive any remuneration (other than allowances);
- b* hold more than 1 per cent of the voting shares of the company;
- c* have been a manager (including a BOD or SB member) in the past five years;
- d* be a relative of a major shareholder; or
- e* be a manager of any subsidiary.

The term of each BOD member may not exceed five years, though they may be re-elected for an unlimited number of terms, apart from independent members, who are limited to two consecutive terms. Further, a BOD member of a public company is not permitted to sit on the board of more than five other companies. Failure to comply with this requirement may subject the relevant member to a fine of up to 100 million dong.⁶ The SSC has sanctioned non-compliance with this requirement.⁷

SB composition

SB members are appointed in a similar manner to those of the BOD, and the number of SB members must be at least three and not more than five.

5 Decree No. 156/2020/ND-CP (Government, 31 December 2020) on administrative penalty in securities and securities market, as amended by Decree No. 128/2021/ND-CP (Government, 30 December 2021) Providing Amendments to Government's Decree No. 156/2020/ND-CP dated 31 December 2020 prescribing penalties for administrative violations against regulations on securities and securities market (Decree 156), Article 15.5(a).

6 Decree 156, Articles 5.3 and 15.5(a).

7 See <https://tuoitre.vn/uy-ban-chung-khoan-huy-quyet-dinh-xu-phat-hanh-chinh-voi-ong-trinh-van-quyet-20220406130307836.htm> (last visit on 15 March 2023).

It is a general requirement for the head of the SB in a joint-stock company to hold certain professional qualifications and to serve full-time. Furthermore, members must not be related to the company. They must not be, among other things, a manager of the company or a family relative of any BOD member, the GD or other managers. In respect of a public company, they should not be employed in the accounting or finance department of the company nor have been a member or an employee of the company's auditor during the previous three years.

ii Legal responsibilities and representation

BOD

The BOD manages the business of the company and may delegate its authority. It supervises the GD and other managers. The powers of the BOD are limited by law, including when certain decisions may be taken only by the GMS. This broadly occurs when the rights of shareholders are involved (such as any dealings with shares) or the company enters into significant transactions. Decisions of the GMS must be implemented by the BOD. The chair of the BOD may not unilaterally exercise the authority of the BOD without requisite BOD approval. There is a court ruling that annulled a decision by a chair to dismiss a company's manager without the BOD's prior approval.⁸

For a company that follows a one-tier board structure, independent BOD members and the audit committee must perform a supervisory function by overseeing the implementation of management control in the company. The oversight by the SB is replaced by independent BOD members (together with the audit committee).

The BOD operates under its internal regulations, which are established by the BOD itself. The CG Code recommends that the BOD should set up a system that provides (as a minimum) criteria and processes to determine the performance of the BOD, its individual members or its committees on the basis of, among other things, feedback from shareholders.

BOD members are subject to certain duties owed towards the shareholders and the company and which are fiduciary in nature, although the concept of a fiduciary duty does not formally exist under Vietnamese laws and regulations. BOD members are generally required to:

- a* exercise their powers and perform their duties in accordance with the law, the charter or as authorised by the GMS;
- b* exercise their powers and perform their duties honestly, prudently, to the best of their abilities and in the best interests of the company; and
- c* be loyal to the interests of the company and shareholders and not to use information and business opportunities for their own benefit.

The CG Code further requires that BOD members should act in good faith, with due diligence and care, and in the best interests of the company and shareholders.

To avoid conflicts of interest, BOD members are subject to disclosure obligations with regard to related-party transactions and any interest held in other companies (in addition to securities markets disclosure requirements, discussed below in Section III). Failure to comply with these disclosure obligations may subject the relevant BOD member to a fine of up to

⁸ Judgment No. 43/2018/KDTM-PT, dated 20 September 2018, of the High People's Courts of Ho Chi Minh City (*Mrs Le Hoang Diep Thao v. Mr Dang Le Nguyen Vu*) (2018).

100 million dong.⁹ The CG Code recommends that the BOD adopt a written policy on related-party transactions and the BOD must generally ensure that such transactions are conducted in accordance with market standards.

Legal representative

The legal representative is a corporate office (being an individual) that may, broadly speaking, enter the company into external legal acts and that represents the company in proceedings.¹⁰ Legal representatives are subject to fiduciary-type duties similar to those of the GD or chair of the BOD. In practice, it is typical for the chair or GD to sign contracts on behalf of the company.

SB

The SB is a specific corporate body and not a sub-board committee. The SB performs oversight of the BOD and the GD with respect to the management of the company. The SB of public companies is required to establish internal operation regulations that must be approved by the GMS. The SB has the power to review, inspect and evaluate the effectiveness and efficiency of the company's internal control systems, internal audit and risk management. It can request information and conduct investigations. Notably, there is a ruling that the SB cannot, without the legal representative's approval, use an external auditor and which shows that the SB cannot infringe on the scope of other corporate bodies.¹¹ It therefore cannot usurp the BOD's authority to manage the business of the company. In practice, the SB's role is fairly limited for private companies, though it is more active for public companies. There have been examples of the SB taking the BOD to task, a prominent example being the SB of a public company reporting to the SSC that the board had altered information in the governance report of the SB and impacting on the work of the SB.¹²

GD

The GD, a role akin to managing director or chief executive officer, is responsible and has the authority for the day-to-day management of company business (except that falling within the BOD's power). Each company has only one GD. The GD may also be the legal representative of the company. The GD implements the BOD's decisions and can appoint other managers of the company. The GD is appointed by, and is accountable to, the BOD. Failure to obtain requisite BOD approval for matters that fall within the BOD's powers may subject the GD to a monetary fine of up to 100 million dong.¹³ If a related-party contract is not properly approved by the GMS or BOD, the GD may be held liable to compensate the company in respect of its loss.

The GD cannot serve a term exceeding five years though may be reappointed for an unlimited number of terms.

9 Decree 156, Articles 5.3 and 15.5.

10 Law on Enterprises, Article 12.1.

11 Judgment No. 48/2018/KDTM-PT, dated 19 October 2018, of the High People's Courts of Ho Chi Minh City (names of the involved parties are redacted) (2018).

12 See <https://www.phapluatplus.vn/thuong-truong/nghi-an-ve-dan-lanh-dao-cotecccons-khong-trung-thuc-truoc-ban-to-cua-ban-kiem-soat-d127060.html> (last visit on 14 March 2023).

13 Decree 156, Articles 5.3 and 15.4(dd).

Audit committee

The Law on Enterprises contemplates the audit committee as a sub-board committee. The audit committee is required for companies that follow a one-tier board structure. The committee's main role is to inspect, review and supervise the company's accounting and audit function. In practice, the role of the audit committee in Vietnamese companies remains rather blurred.

The committee must consist of at least two members. Its head must be an independent BOD member and the other members must be non-executive BOD members.

Company administration office

Decree 155 creates a role for a company administration office, which could be broadened to a company secretary (the latter itself being optional). This office is responsible for, among other things:

- a* providing advice to the BOD in organising the GMS;
- b* preparing for meetings of the BOD, the SB and the GMS;
- c* providing advice on procedures for issuance of resolutions of the BOD;
- d* providing financial information, meetings minutes of the BOD and other information for members of the BOD and the SB; and
- e* supervising and reporting to the BOD on the company's information disclosure.

Historically, few public companies have disclosed use of this role, though company secretaries have become more popular.

iii Compensation

The BOD determines the remuneration of the GD and other managers, while remuneration of both BOD members and SB members is determined by the GMS. The CG Code clarifies certain criteria for remuneration of the BOD members by determining the roles, performance and incentives in respect of the BOD members, and recommends a remuneration committee be set up. These have become more common in public companies, and the remuneration of BOD members and executives is usually calculated by such a committee with approval of the GMS or the BOD (as applicable). Excessive executive pay has not attracted much controversy, although this can at times be topical. Companies usually avoid publicly disclosing individual salaries and provide only a total spend. During 2022, the HOSE issued a request for Vietnam Airlines (Vietnam's national carrier) to clarify the individual salaries of its BOD, GD and SB, which was complied with.¹⁴ Such action may result in greater public disclosure and discourse.

The basic annual fee of the BOD chair is often one-and-a-half to three times higher than other BOD members. The non-fixed remuneration package is the most popular approach (more so for independent members) and includes the basic annual fee, combined with committee fees and fees for additional BOD activities. Another structure used is the single fixed remuneration package, whereby only a single fixed fee is paid for all assignments.

¹⁴ See <http://daidoanket.vn/nhieu-doanh-nghiep-niem-yet-khong-cong-bo-thong-tin-thu-nhap-cua-lanh-dao-5693333.html> (last visit on 15 March 2023).

The least popular is the pro bono approach, whereby no annual fee is payable, but BOD members are paid a nominal business fee for each activity.¹⁵ Compensation is usually in the form of cash, although share and cash combinations do occur.¹⁶

iv Sub-board committees

The BOD may form sub-board committees to assist with certain special matters. It is common for public companies to set up committees having specific functions for their governance – for example, a human resources committee. The CG Code proposes that the BOD be proactive in establishing certain committees, such as a competent risk management committee and others, to oversee, for example, corporate governance. In practice, it is not unusual for companies (especially those engaged in financial services, partly because of sector requirements) to have a strategy committee, a personnel and remuneration committee, a risk committee and an audit committee. Nomination committees are less common.¹⁷

III CORPORATE DISCLOSURE

i Non-public companies

Non-public companies are subject to basic disclosures set out in the Law on Enterprises, including that they must publish the following on their websites:

- a* their charter;
- b* certain qualifications and work experience of BOD members, SB members and the GD;
- c* annual financial statements; and
- d* annual reports on evaluation of operational results of the BOD and SB.

Additionally, certain corporate information (including details of BOD members, SB members, the GD and legal representatives) must be disclosed to the local licensing authorities, some of which is made available through online public searches of the National Business Registration Portal, a centralised national portal providing basic corporate information of all companies incorporated in Vietnam.

In practice, non-public companies generally do not comply with the above disclosure requirements.

ii Public companies

In addition to the aforementioned being equally applicable, public companies are also subject to a set of disclosure requirements provided for in Circular 96. These consist of periodic and ad hoc disclosures, as well as disclosures upon request from the SSC or the relevant stock exchange.

Disclosures must be made on a company's website and must be notified to the SSC at the same time and, for listed companies, also to the relevant stock exchange.

15 See <https://cafebiz.vn/khao-sat-cac-cong-ty-viet-dang-tra-thu-lao-cho-hoi-dong-quan-tri-nhu-the-nao-20210123090911731.chn> (last visit on 15 March 2023).

16 *ibid.*

17 *ibid.*

Periodic disclosures

A public company must periodically publish on its website, the relevant stock exchange's disclosure system and the SSC's disclosure system:

- a* annual audited financial statements;
- b* annual reports in the prescribed form set out in Circular 96 (which includes disclosure of operations of the company, reports and assessments of the BOD and corporate governance information); and
- c* half-yearly management reports.

Separate and consolidated financial statements are required for a public company that is a parent company.

Large-scale public companies (those with charter capital of at least 120 billion dong) and listed companies must also disclose reviewed half-yearly financial statements and quarterly financial statements.

Public companies are obliged to publicly disclose certain information, including their foreign ownership limit, share redemption information and, for listed companies, information about offerings, issuance, listings of shares and reporting on the use of proceeds from capital-raising activities. Additionally, draft resolutions to be adopted at the annual general meeting must be disclosed in advance.

Ad hoc disclosures

Public companies must disclose information on an ad hoc basis within 24 hours of the occurrence of certain prescribed events. These include all resolutions of the general meeting of shareholders, changes or disruptions to business or licences, decisions on dividend-related matters or redemption of shares, changes in the number of voting shares, changes to positions of internal persons, related-party transactions, transactions with a value exceeding 15 per cent (or 10 per cent in the case of listed and large-scale public companies) of total assets of the company, information affecting the share price of the company and other material events affecting the business or corporate governance of the company.

Listed and large-scale public companies are obliged to disclose, within 24 hours, all decisions to increase or decrease the charter capital, to conduct transactions of 10 per cent or more of the value of total assets of the company, or to contribute capital in another organisation equal to at least 50 per cent of that other organisation's participation capital.

Whenever any major shareholder (i.e., a holder of 5 per cent or more of the voting shares in a public company) is increased by a 1 per cent increment, then that shareholder must notify the SSC, the relevant stock exchange and the relevant company. The company is then required to publish this information on its website.

Disclosure on request

Public companies are required to disclose, within 24 hours of a request from the SSC or the relevant stock exchange, events that seriously affect the lawful interests of investors or information about the company that significantly affects its share price that the SSC or the exchange wishes to verify. Disclosure following such a request must include the relevant cause and an assessment of the authenticity of the event and remedy.

Public companies generally follow a higher standard of compliance to disclosure requirements. The SSC monitors compliance and may subject public companies to monetary

finances. According to a recent survey on information disclosure,¹⁸ 385 of 736 companies listed on HOSE and HNX meet disclosure standards, accounting for more than 52 per cent of the total number of companies surveyed. ‘Large cap companies’ (being listed companies with market capitalisation of above 10,000 billion dong) had a higher level of compliance than other groups.¹⁹

IV CORPORATE SOCIAL RESPONSIBILITY/ESG

There have been continuous improvements in environmental, social and governance (ESG) legislation, policies and corporate governance, with the government and market participants paying greater attention to this area. Certain investment funds have adopted the United Nations Principles for Responsible Investment,²⁰ Vietnamese listed companies have shown strong commitment to ESG,²¹ and Vietnam has itself pledged to phase out coal energy at the 2021 United Nations Climate Change Conference.²²

Circular 96 requires public companies to report on ESG issues in their annual report (e.g., greenhouse gas emissions, energy consumption, water consumption, compliance with the law on environmental protection, policies concerning employees, responsibility for local community, investments and other community development activities). The CG Code recommends disclosure of environmental and social reporting, and this should follow globally accepted standards.

Recent legal changes include that Decree 31²³ requires that the term of foreign investment projects not be extended when using obsolete, environment-threatening or resource-intensive means, and Decree 45²⁴ imposes increased financial penalties for administrative environmental protection offences and, for more stringent requirements, allows for suspension of environmental licences for a period (therefore impacting on the operation of the violating company).

Green bonds have become increasingly popular among Vietnamese issuers, with outstanding debts for green projects at October 2022 exceeding US\$20 billion (being

18 Survey conducted by three non-governmental organisations: vafe.org.vn, vietstock.vn and fili.vn.

19 See https://vafe.org.vn/download/IRAWards2022_BaoCaoKhaoSatCongBoThongTin2022.pdf (last visit on 14 March 2023).

20 See <https://hanoitimes.vn/esg-offers-answer-for-vietnam-enterprises-to-secure-future-growth-318137.html> (last visit on 14 March 2023).

21 See <https://hanoitimes.vn/vietnams-companies-commit-sustainable-business-practices-pwc-vietnam-322180.html> (last visit on 14 March 2023).

22 See <https://e.vnexpress.net/news/news/vietnam-pledges-to-phase-out-coal-power-4381543.html> (last visit on 14 March 2023).

23 Decree No. 31/2021/ND-CP (Government, 26 March 2023) providing elaboration of some articles of the Law on Investment, Article 27.10.

24 Decree No. 45/2022/ND-CP (Government, 7 July 2022) providing penalties for administrative environmental protection offences, Articles 11.4, 18.8(b), 19.12(b), 20.7(b), 21.8(b), 24.8(a)(c) and 31.8(b)(d).

4.4 per cent of the total outstanding debts).²⁵ Funds raised from the issuance of green bonds must be recorded and managed separately and disbursed to the projects that create environmental benefits (as specified in the relevant bond issuance plans).²⁶

Recently issued Decree 58²⁷ has simplified the registration process for non-governmental organisations, and this may facilitate corporate social responsibility (CSR) activity in Vietnam.

Notable CSR activities by large corporates include:

- a* activities supporting people and frontline workers to fight the covid-19 pandemic by Masan Group;²⁸
- b* the Stand Tall Vietnam Milk Fund and the School Milk Program of the Vietnam Dairy Products Joint Stock Company (Vinamilk);²⁹
- c* the 3P Strategy (profit, people and planet) of FPT Corporation;³⁰ and
- d* the Kind Heart Foundation and the Innovation Foundation of VinGroup.³¹

Drivers of CSR include business organisations (such as business chambers), and certain of these have developed recognitions and awards to honour CSR programmes. Development finance institutions, including the International Finance Corporation and Asian Development Bank, are investors that usually require greater CSR. Vietnam's trade relations can also play a role, and the free trade agreement between Vietnam and the European Union provides that the parties 'agree to promote corporate social responsibility'.³²

V ENGAGEMENT WITH SHAREHOLDERS

i Shareholder rights and powers

Shareholders generally exercise their rights through the GMS – the highest decision-making body of a company. Shareholders may attend and vote at a GMS in person or by proxy. Voting thresholds are generally more than 50 per cent for basic matters and at least 65 per cent for certain specified matters. Resolutions passed by way of collecting written opinions are decided by more than 50 per cent; however, certain important decisions must be passed by meeting. Companies may issue voting preference shares with greater voting rights, although only to founding shareholders or shareholders that are government entities or government-authorized entities. Companies may also issue shares with preferential dividend or redemption rights (generally to anyone). Shareholders holding preferential shares may attend and vote on matters that adversely affect the rights and obligations attached to such shares.

25 See <https://ven.vn/green-finance-puts-down-roots-in-vietnam-46567.html> (last visit on 14 March 2023).

26 Decree No. 08/2022/ND-CP (Government, 10 January 2022) providing elaboration of several articles of the Law on Environmental Protection, Articles 154.1 and 157.1.

27 Decree No. 58/2022/ND-CP (Government, 31 August 31 2022) providing registration and management of operations of foreign non-governmental organizations in Vietnam, Articles 10, 11.7, 14 and 15.7.

28 See <https://www.masangroup.com/news/masan-news/Masan-Group-s-imprint-at-the-Asian-Corporate-Excellence-Sustainability-Awards-2021.html> (last visit on 14 March 2023).

29 See <https://en.nhandan.vn/over-1-300-children-in-hanoi-benefit-from-stand-tall-vietnam-milk-fund-post87331.html> (last visit on 14 March 2023).

30 See <https://vccinews.com/news/28194/.html> (last visit on 14 March 2023).

31 See <https://vingroup.net/en/business/social-br-enterprise/2476/the-kind-heart-foundation#:~:text=The%20Kind%20Heart%20Foundation%20is,%20kindness%20to%20the%20community.%E2%80%9D> (last visit on 14 March 2023).

32 Free Trade Agreement between Vietnam and the European Union, Article 13.10.2(e).

A shareholder or a group of shareholders holding at least 5 per cent of the shares of a company may call a GMS if they consider the BOD to have acted in material violation of shareholders' rights or managers' duties or decided matters that are outside its authority. Matters that must be submitted to shareholders for approval include the amount of dividend to be paid, the redemption of more than 10 per cent of issued shares, approval of the annual financial statements, and investment or sale of assets valued at 35 per cent or more of total assets of the company.

Shareholders may approach a court to annul or prevent implementation of any BOD decision that causes damage to the company and is (or has been passed) contrary to law, the company's charter or GMS resolutions.

Furthermore, shareholders holding at least 1 per cent of the total ordinary issued shares of a company have the right to directly, or on behalf of the company, pursue a direct derivative suit against a BOD member or the GD under certain circumstances in which that individual has failed to fulfil his or her duties. In pursuing the suit, the claimant (with court consent) has the right to examine, look up and extract necessary information before and during the suit. A recent example of shareholders exercising this right is the shareholders of a tourism company successfully pursuing claims on behalf of the company against its GD (relating to the GD's failure to comply with work permit requirements for foreign employees).³³ Vietnamese law does not currently provide a clear legal basis for a derivative suit against external parties (except for where a minority shareholder may pursue a claim against a parent company on behalf of a subsidiary).

Shareholders holding at least 5 per cent of shares may approach a court or arbitration, within 90 days of receipt of the GMS's resolution, to invalidate this GMS resolution on certain grounds. This may occur by way of a unilateral petition and is therefore subject to a simpler procedure.

ii Shareholder duties and responsibilities

Shareholder duties in Vietnamese law are very basic. These include the obligation to contribute the registered charter capital, not to withdraw contributed capital from the company, to comply with the company's charter and internal regulations, to observe the GMS and BOD resolutions and to keep information provided by the company confidential. Vietnamese law does not expressly require a shareholder to act in the interests of the company.

A parent company may not unduly exert itself to force a subsidiary to conduct business outside the subsidiary's ordinary course, or engage in non-profit-making activities and cause loss to the subsidiary. The parent company may be held liable for loss suffered, and a shareholder may bring a derivative claim against the parent to compensate the subsidiary. Additionally, under the Law on Securities, major shareholders of a public company that directly or indirectly hold at least 5 per cent or more of voting shares may not use their influence to cause any damage to the rights and benefits of the company and other shareholders. These provisions appear to emphasise shareholder equality rather than any general duty of shareholders.

33 Judgment No. 29/2017/KDTM-PT dated 14 August 2017 of the High People's Court in Ho Chi Minh City (*Mr Nguyen Van H v Mr Kakazu Shogo*) (2017).

iii Shareholder activism

Shareholders are becoming increasingly active as Vietnamese law gravitates towards greater corporate governance. Within the shareholder toolbox, the GMS decides remuneration of the BOD and the SB. As mentioned, holders of 5 per cent of ordinary shares may call a GMS to deal with BOD malfeasance. If the BOD fails to convene the GMS, then the SB can call the GMS and, failing that, the relevant shareholders may themselves call the meeting. Historically, attempts to call a GMS by shareholders have ended in failure, prompting a change in the Law on Enterprises with a reduction (from 10 per cent to 5 per cent) of the minimum shareholding requirement for calling a GMS. The current law authorises the SB to review agreements between a company and its related parties and make recommendations in respect of transactions that require GMS or BOD approval.

A recent example (among a growing number of cases) of shareholder activism is the minority shareholders of an engineering consultancy firm (in 2022) challenging their BOD members and the GD for improperly convening the GMS and an alleged undue dismissal of an independent BOD member.³⁴

iv Takeover defences

Vietnamese law does not distinguish between friendly and hostile takeovers. In addition, hostile takeovers are uncommon, although proxy fights do take place in practice.

The most prominent safeguard to hostile takeovers is the requirement of public tender offers. The Law on Securities requires an acquirer to launch a public tender offer (i.e., a regulated offer) for, among other things, any acquisition of 25 per cent or more of the voting shares of a public company. The acquirer must register the public tender offer with the SSC and notify the BOD of the target company of the proposed public tender offer. The target company is obliged to disclose the receipt of the public tender offer on its website within three days. The BOD must, within 10 days of receipt, deliver its opinion on the public tender offer to the SSC and all shareholders.

Defensive devices that are common in more developed jurisdictions, such as the shareholders' right plan (i.e., poison pill), staggered board appointments, the acquisition or disposal of an asset (which may require GMS sanctioning) and preference voting shares (subject to described limitations) are present in Vietnam, though highly exceptional.

v Contact with shareholders

Shareholders holding 5 per cent or more of the ordinary shares of a company are entitled to access and extract the minutes of meetings, resolutions and decisions of the BOD, semi-annual and annual financial statements, reports of the SB, contracts and transactions subject to approval by the BOD and other documents (except those that involve business secrets). These rights are not widely exercised.

The CG Code recommends that the BOD should ensure the equitable treatment of all shareholders, including minority and foreign shareholders, and that the company has a system of registering shareholder complaints and effectively regulating corporate disputes. The company should also disclose the ultimate beneficial ownership of 5 per cent or more of

³⁴ See <https://tienphong.vn/chu-tich-tong-giam-doc-cong-ty-pve-bi-co-dong-kien-ra-toa-post1455292.tpo> (last visit on 14 March 2023).

its shares. Although not prescribed under any law or regulation, this requirement represents an important development of the Vietnamese corporate governance framework towards greater transparency and effective shareholder involvement.

VI OUTLOOK

The government, together with market participants (including Vietnamese companies), has taken encouraging steps towards a stronger corporate governance regime, with increasing displays of shareholder activism and CSR and ESG activity. This has been facilitated by the progressive approach of the Law on Enterprises and the Law on Securities, as well as certain other laws and soft codes. Given that these Laws, together with Decree 155 and Circular 96, have fairly recently come into effect, wholesale changes are not expected in the near future, although there have been changes to the regime applicable to corporate bond issuances (which, although not specifically governance related, remain notable). We expect the described trend in Vietnam to continue as it mirrors the growing sophistication of this market.

