THE CORPORATE GOVERNANCE REVIEW

Twelfth Edition

Editor
Petra Zijp

THE LAWREVIEWS

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 12th edition, we are seeing that corporate governance has become an even more vital and all-encompassing topic, especially this second year after the start of the covid-19 pandemic – a year in which we have continued to see climate issues, political instability, technological change, a steady increase in attention to environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. As this Review's previous editor mentioned in his preface, we all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? And how do corporations report? It has become increasingly relevant that corporations report on not only financial information, but also on reliable and comparable sustainability information – non-financial information that investors and other stakeholders need.

We fortunately continue to see proposals for new laws, regulations and other initiatives for a global framework of sustainability disclosure that is based upon the needs of investors and the financial markets. I should like to highlight two developments in this respect. First, the EU Corporate Sustainability Reporting Directive (CSRD) proposal of April 2021. It forms part of the European Green Deal. This proposal should assist companies in meeting the increasing demands for sustainability information. Companies within the scope of the CSRD proposal would have to report on a whole range of sustainability issues relevant to the company's business. Sustainability information would cover not just environmental factors but also social and governance factors. Governance factors encompass the role of the corporation's administrative, management and supervisory bodies (including with regard to sustainability matters and their composition; business ethics and corporate culture, including anti-corruption and anti-bribery; the corporation's political engagements, including its lobbying activities; the management and quality of relationships with business partners, including payment practices; and the corporation's internal control and risk management systems, including for the reporting process). The EU has indicated that it is clearly in the

interest of the EU and European companies and investors to have standards that are globally aligned, and has indicated that EU standards should aim to incorporate the essential elements of globally accepted standards currently being developed.

This touches upon the second development I want to mention. The trustees of the IFRS Foundation announced the formation of the International Sustainability Standards Board (ISSB) on 3 November 2021 at COP26 in Glasgow. The ISSB will develop – in the public interest – standards that will result in a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets. The aim of the ISSB's standards is to cover important sustainability topics (environmental, social, governance – ESG) on which investors would like to be informed. Climate-related information will be dealt with first, given the urgency in this field. The ISSB has indicated that it will build on the work of existing investor-focused reporting initiatives to become the global standard-setter for sustainability disclosure for the financial markets. These two initiatives – on a regional and a global scale – may prove to bring about a sea change in the way corporations report and – maybe – conduct their business.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as the new editor of this Review will continue to be to achieve a high quality of content so that the Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I would like to thank my partner and wonderful colleague Willem Calkoen for his outstanding work over the past years as editor of this Review. It is an honour to take over from him, and I fully realise that I have some big shoes to fill. For now, I would like to thank all the contributors who have helped with this project. I hope this book will give you food for thought. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Petra Zijp
NautaDutilh
Amsterdam, The Netherlands
March 2022

Chapter 24

VIETNAM

Truong Nhat Quang, Nguyen Van Hai and Krissen Pillay[1]

I OVERVIEW OF GOVERNANCE REGIME

Corporate governance in Vietnam is mainly 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 the number of shareholders. Less common forms of corporate entities include sole proprietorship and partnership companies.

A limited liability company consists only of equity members and is the prevalent form for small companies. In a joint-stock company, differently, there is a clear distinction between equity participants and management, and most medium and large companies are incorporated under this corporate form. Joint-stock companies include private joint-stock companies and 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 dong[3] 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.

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.

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1 Truong Nhat Quang and Nguyen Van Hai are partners and Krissen Pillay is a senior associate 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).

During the past two decades, the Law on Enterprises and the Law on Securities have been updated a few times, with the latest versions being passed during 2019–2020 and effective from 1 January 2021. 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 summer 2019 the Vietnam Corporate Governance Code of Best Practices for public companies (the CG Code), which recommends standards that go beyond the minimum requirements imposed by laws and regulations. These are not 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 more prevalently enforced 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. Lawsuits against shareholders and managers remain uncommon.

This chapter canvasses the corporate governance matters of joint-stock companies in general, with a focus on public companies. Financial institutions such as banks, insurers, securities companies and fund managers 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 company business.

BOD composition

In a joint-stock company, the number of BOD members must be at least three and not more than 11, and all must be natural persons. 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 for BOD members, unless a lower threshold is provided in the company's charter. The election of BOD members by the GMS may occur through cumulative voting, which is popular in joint-stock companies, albeit optional. This allows minority shareholders greater representation in the BOD. Cumulative voting is popular in joint-stock companies.

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). For unlisted public companies and listed public companies that follow a one-tier board structure, at least one-fifth of the BOD members must be independent. 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 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; nor

e be a manager of any subsidiary.

The term of each BOD member may not exceed five years, though re-election may be for an unlimited number of terms. Independent member positions in the BOD 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.

SB composition

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

It is a general requirement for the head of the SB in a joint-stock company to hold certain professional qualifications and 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 if the company enters into significant transactions. Decisions of the GMS must be implemented by the BOD. The

5 Decree No. 156/2020/ND-CP (Government, 31 December 2020) on administrative penalty in securities and securities market (Decree 156), Article 15.5(a).

chair of the BOD may not unilaterally exercise the authority of the BOD without requisite BOD approval. There is a court ruling annulling a decision by a chair to dismiss a company's manager without the BOD's prior approval.[6]

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 lack of an SB is compensated by oversight by independent BOD members and the audit committee.

The BOD operates under its internal regulations, which are established by the BOD itself. The CG Code goes further by recommending 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 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 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 the disclosure requirements of securities markets discussed below in Section III). Failure to comply with these disclosure obligations may subject the relevant BOD member to a fine of up to 100 million dong. 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.

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 could not use an external auditor without the approval of the legal representative, indicating

6 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).

quite clearly that the SB cannot infringe the scope of other corporate bodies.[7] Therefore, it 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 more active for public companies.

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 those falling within the BOD's power). Each company has only one GD. The GD may also be the legal representative of the company and, if so, the GD has the authority to contract on behalf of the company or to represent the company in legal proceedings involving 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 fine of up to 100 million dong. If a related party contract is not properly approved by the GMS or BOD, the GD may be held jointly 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.

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

Decree 155 creates a role for a person to be responsible for company administration who can also assume the role of company secretary (the latter office is itself optional). This person will be 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 very few public companies have disclosed use of this role, although company secretaries have become more popular.

7 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).

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 that a committee be set up to deal with this. Remuneration committees have become more common in public companies and the remuneration of BOD members and executives is usually calculated by such a committee and approved by the BOD or the GMS (as applicable). Excessive executive pay has not attracted much controversy although, as with other jurisdictions, this can be a topical issue.

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. 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.[8] Compensation is usually in the form of cash, although share and cash and share combinations do occur.[9]

iv Sub-board committees

The BOD may form sub-board committees to assist with certain special matters. It is not unusual 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, nominations and remuneration. 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.[10]

III 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.

8 See in Vietnamese at https://cafebiz.vn/khao-sat-cac-cong-ty-viet-dang-tra-thu-lao-cho-hoi-dong-quan-tri-nhu-the-nao-20210123090911731.chn (last accessed on 7 January 2022).

9 ibid.

10 ibid.

Additionally, certain corporate information (including details of BOD members, SB members, the GD and legal representative) must be disclosed to the local licensing authorities, some of which is made available through public searches of the National Business Registration Portal.

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

ii Public companies

The aforementioned disclosure requirements are applicable equally to public companies and non-public companies. Public companies are also subject to a set of disclosure requirements provided for in Circular 96 and are specifically subject to periodic and ad hoc disclosures, as well as certain 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.

Periodic disclosures

A public company must periodically publish on its website 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 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, insider transactions, transactions with a value exceeding 15 per cent 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 the 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 the voting shares of any major shareholder holding 5 per cent (or more) of 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 comply with the applicable disclosure requirements. The SSC regularly monitors this and non-compliance may subject public companies to monetary fines. The SSC has been increasingly imposing fines in respect of violations of disclosure obligations of listed public companies and the total number of sanctioning decisions (in respect of disclosure obligations) issued by the SSC was 26.5 per cent higher in 2021 compared with 2020.[11]

IV CORPORATE SOCIAL RESPONSIBILITY / ESG

i Corporate social responsibility

Circular 96 requires public companies to report on environmental, social and corporate governance 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 that the BOD ensure disclosure of key non-financial information, including environmental and social reporting. Significant recommended practices under the CG Code include that the BOD should ensure that:

a relevant information is prepared in accordance with globally accepted standards, such as those issued by the International Integrated Reporting Council, the Global Reporting Initiative or the Sustainable Assurance Standards Board, and subject to independent verification; and

b appropriate governance policies and processes are in place to monitor the quality of information.

Decree 31[12] provides that the operational term of investment projects of foreign-invested companies should not be extended when using obsolete, environment-threatening or resource-intensive means. Although the implementation of this provision is not widespread, there is an intention to have 'clean' foreign investment.

It is expected that Vietnam will follow the global trend of increased corporate social responsibility, partially driven by investor concerns and public opinion. Development finance institutions, including the International Finance Corporation and Asian Development Bank,

11 See in Vietnamese at https://baodautu.vn/rot-rao-loc-san-trong-cong-bo-thong-tin-cong-ty-dai-chung-d157956.html (last accessed on 7 January 2022).

12 Decree 31, Article 27.10.

are investors that usually require a higher level of corporate social responsibility. Trade relations may also play a role, for example, the free trade agreement between Vietnam and the European Union provides that the parties 'agree to promote corporate social responsibility'.[13]

V 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. In principle, each ordinary share is granted only one vote. Companies may issue voting preference shares with greater voting rights, although only to founding shareholders or shareholders that are government entities or government-authorised entities. Companies may also issue shares with preferential dividend or redemption rights (generally to anyone). A change in the Law on Enterprises now allows shareholders holding preferred dividends and redeemable preferred shares to attend and vote on matters that adversely affect the rights and obligations attached to such shares.

A shareholder or a group of shareholders holding at least 5 per cent of shares of a company may call a GMS meeting if they consider the BOD to have acted in material violation of shareholders' rights, managers' duties or has decided matters that are outside its authority. The 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, and investment or sale of assets valued at 35 per cent or more of the total asset value.

Shareholders may approach a court to prevent the BOD from implementing or to annul any BOD decision or resolution that 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 that supports this right.

A notable example of shareholders using the derivative suit is the one being pursued by the shareholders of Mon Hue against abuse of power of the managers when appropriating the company's properties. Vietnamese law does not currently provide for a clear legal basis for an indirect corporate derivative suit (save where a minority shareholder may pursue a claim against a parent company on behalf of a subsidiary).

Additionally, the Law on Enterprises provides a regime for shareholders holding at least 5 per cent of shares to approach a court, 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 (rather than a suit that must involve two parties in dispute) and is therefore subject to a simpler procedure. This remains an interesting tool that could be further developed.

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

ii Shareholder duties and responsibilities

Shareholder duties as provided in Vietnamese law are very basic. They 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 comply with GMS and BOD resolutions and to keep information provided by the company in confidence in accordance with the company's charter and the law. Vietnamese law does not expressly require a shareholder to act in the interests of the company (as is the case with BOD members).

Should a company become controlled by a shareholder (i.e., a parent company), then the parent company may not unduly exert itself to force the 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 sustained and a shareholder may bring a direct 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. This appears to emphasise the principle of equality between shareholders rather than impose any general duty on shareholders.

iii Shareholder activism

Shareholders are becoming increasingly active in corporate governance 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 do so, the SB can call the GMS and, failing which, 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.

iv Takeover defences

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

The most prominent safeguard to hostile takeovers is the requirements of public tender offers. The Law on Securities requires an acquirer to launch a public tender offer for, among other things, any acquisition of 25 per cent or more of the voting shares of a public company (resulting in a regulated offer). 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 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 the company's 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 its shares. This is the first instance of the use of the term 'ultimate beneficial ownership'. 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 state has been encouraging corporate governance and shareholder activism, shown by way of changes to the Law on Enterprises and the Law on Securities. Given that these laws, together with Decree 155 and Circular 96, have recently come into effect then new laws and regulations are not expected in the near future. In the long term, the SSC could consider issuing guidelines for implementation of the Law on Securities, Decree 155 and Circular 96 to better enforce the mandatory rules provided under these laws and regulations. It is hoped that CG Code recommendations would be more widely accepted.

Appendix 1

ABOUT THE AUTHORS

TRUONG NHAT QUANG

YKVN

Truong Nhat Quang, the managing partner of YKVN, heads a well-recognised, top-tier corporate practice focused on banking, capital markets and M&A transactions.

Quang has successfully handled landmark deals in Vietnam, regularly advising on complex lending and borrowing issues, representing government agencies and multilateral organisations on nation-shaping industrial projects, and advising on the largest capital markets, privatisation and private equity transactions in Vietnam.

Quang's clients include top Vietnamese banks and corporates, global investment banks, banks active in Vietnam and global private equity funds.

He is the respected author of numerous publications on Vietnam's legal environment, and has co-authored articles specifically on banking and project finance in the country, such as the Vietnamese chapter of *Banking Yearbook 2004* (International Financial Law Review), *BOT Project Financing in Vietnam* (Asia Law, 2003), and the Vietnamese chapter of *Taking Security in Emerging Asian Markets* (Asia Law, 1997). In particular, Quang has authored the treatise on Vietnamese contract law *Contract Law – Fundamental Legal Issues* (*Pháp Luật Về Hợp Đồng – Các Vấn Đề Pháp Lý Cơ Bản*), Vietnamese corporate law, *Corporate Law – Fundamental Legal Issues* (*Pháp Luật Doanh Nghiệp – Các Vấn Đề Pháp Lý Cơ Bản*), and *Skills for Transactional Business Lawyers – Sharing Real Life Experience in Vietnam* (*Kỹ Năng Hành Nghề Luật Sư Tư Vấn – Chia Sẻ Kinh Nghiệm Hành Nghề Thực Tế Tại Việt Nam*).

Quang is the only Vietnamese lawyer named in *The Legal 500*'s Hall of Fame in both banking and finance and corporate and M&A practices. He is also one of the top 100 lawyers named by *Asia Business Law Journal* in its 2020 and 2021 editions.

NGUYEN VAN HAI

YKVN

Nguyen Van Hai has more than 10 years of experience in the practice of corporate, energy and capital markets. Hai has in-depth knowledge of the Vietnamese capital markets and energy sectors and the general legal landscape of Vietnam. Hai's current main areas of practice are capital markets and finance transactions and other corporate transactional and advisory matters.

Prior to joining YKVN, Hai spent five years in the corporate and international trade departments of Mayer Brown JSM in Ho Chi Minh City, Vietnam. Hai's practice is recognised by *International Financial Law Review* and *Chambers and Partners* and *The Legal 500 Asia*

Pacific. Hai is also the author of numerous publications covering a wide range of topics, including global trade, power and the Vietnamese legal framework in general and has had his articles published in *Infra Asia*, *Asian Power* and *Asian-mena Counsel Magazine*, to name a few.

KRISSEN PILLAY

YKVN

Krissen Pillay is a senior associate at the Ho Chi Minh City office. He focuses on mergers and acquisitions (M&A), private equity and corporate matters. Krissen is a South Africa-qualified lawyer and is registered with the Legal Practice Council of South Africa. Krissen has practised law at two of the largest firms in South Africa and has worked on M&A transactions across various sectors, including cross-border transactions. He advises, among other things, on joint ventures, restructuring and investments. He understands clients' commercial issues and grasps their business needs.

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