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Global Legal Group

The International Comparative Legal Guide to: Corporate Governance 2010

A practical insight to cross-border Corporate Governance

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Vietnam

John R. Davis



Mai Kim Dzung



YKVN Lawyers

1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

The Law on Enterprises provides for the following types of companies: (i) joint stock company; (ii) limited liability company; (iii) limited liability company with one member; (iv) partnership; and (v) private enterprise. It also provides for “business households” that are not legal entities.

Among these forms of company, only the joint stock company is allowed to issue shares to the public. If a joint stock company does so by: (i) making a public offer of shares; (ii) having shares listed on the Ho Chi Minh City Stock Exchange (HOSE) or the Hanoi Securities Trading Centre (HaSTC); or (iii) having shares owned by at least one hundred investors excluding professional securities investors together with paid-up charter capital of 10 billion Vietnamese dong or more, it will be a public company and thereby be subject to additional regulation under the Law on Securities. Public companies that are listed are subject to additional regulations for listed companies.

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

Provisions on corporate governance are found in the Law on Enterprises, the Law on Securities and their implementing regulations. Provisions of the Law on Enterprises will be applicable to all companies except that legal provisions in other legal documents on companies in specialised fields such as banking, finance, securities services, insurance, law and accounting supersede corresponding provisions of the Law on Enterprises. Companies subject to the Law on Securities as well as the Law on Enterprises and their implementing regulations are subject to overlapping provisions in certain areas of corporate governance, as noted below. All companies also are subject to their individual charters, and the charters of listed companies and companies in certain specialised fields must include the provisions of model charters included in applicable regulations.

The key documents applicable to the corporate governance of Vietnamese companies are the following:

- (a) Law on Enterprises.
- (b) Law on Securities.
- (c) Decree 139/2007/ND-CP of the Government providing detailed guidelines for implementation of a number of articles of the Law on Enterprises.
- (d) Decision 12/2007/QD-BTC of the Minister of Finance

promulgating regulations on corporate governance applicable to companies listed on the stock exchange or a securities trading centre.

- (e) Decision 15/2007/QD-BTC of the Minister of Finance on promulgation of the model charter applicable for companies listed on the stock exchange or a securities trading centre.
- (f) Circular 09/2010/TT-BTC of the Minister of Finance on providing information in the securities market.

Additional documents govern corporate governance for companies in each of several specialised fields.

As the sources of the above legal documents suggest, there are a number of regulatory authorities involved in administering regulations on the corporate governance of companies. For most companies, the business registrars under the local Departments of Planning & Investment handle business registration and reporting. Companies in specialised fields register with and are regulated by the relevant specialised agencies or ministries. Large or otherwise significant foreign investment projects will need an investment certificate issued by a local or central office of planning and investment and such certificate will also evidence business registration. Public and listed companies are subject to the additional regulation of the State Securities Commission, which is an agency under the Ministry of Finance.

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

Protection of minority and outside shareholders is the most important topical issue. Many investors and multilateral organisations are concerned that an insider in a company may have opportunities to abuse his or her position for his or her own, or own group’s, advantage. The available evidence on this issue is thin and mostly anecdotal. The SSC has continued strengthening disclosure requirements for public and listed companies but the public understanding of shareholder rights including disclosure is still limited.

An additional concern is that shareholders are not easily able to enforce their rights under existing legal provisions. The Law on Enterprises has a very broad provision authorising administrative, criminal and civil proceedings in case of breach of the law’s provisions and for payment of damages to a company or to shareholders as well as other stakeholders in case of a breach that causes injury. But there has been almost no use of such provision for any type of enforcement action. On the part of shareholders it may be because the provision does not clearly authorise shareholders to bring a derivative suit. As a result, the Government is now considering a draft revision of the main implementing

regulation for the Law on Enterprises that will specifically provide for derivative suits for joint stock companies when brought by shareholders that are representing a minimum proportion of outstanding shares and that have first brought the matter to the company's Board of Inspection (BOI). (In some translations, the BOI is referred to as the Board of Controllers or Board of Supervisors.) The same revision will also provide more detailed regulations on cumulative voting, which is already mandatory for board elections.

2 Shareholders

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

Ordinary shareholders have the right to vote directly or through an authorised representative and each ordinary share carries one vote. In addition, a shareholder or a group of shareholders holding more than 10% of the total ordinary shares (or such percentage as stipulated in the company charter, and for listed companies, shareholders only need to hold 5%) for a consecutive period of six months or more, or holding a smaller percentage as stipulated in the charter of the company, have the following rights in management and operation of the company: (i) to nominate candidates to the Board of Management (BOM) and the BOI; (ii) to request the BOI to inspect each particular issue relating to the management and administration of the operation of the company where it is considered necessary; and (iii) to request the convening of a Shareholders Meeting (SM) in the following cases: (x) the BOM makes a serious breach of rights of shareholders, obligations of managers or makes a decision which falls outside its delegated authority; and (y) the term of the BOM has expired for more than six months and no new BOM has been elected to replace it.

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

No. Shareholders ordinarily can be held liable for the debts and other property obligations of the enterprise only within the amount of capital contributed or promised to be contributed to the enterprise. However, a shareholder can be individually liable when the shareholder acts for the company (i) in violating the law, (ii) carrying on business or transactions for personal profit or that of a third party, or (iii) paying off debts that are not yet due when the company is facing financial difficulties. Founding shareholders will be jointly liable as individuals for debts and liabilities up to the unpaid amounts of founders' shares.

2.3 Can shareholders be disenfranchised?

No. However, founding shareholders who fail to complete their capital contributions within a specified time period will have their names removed from the company's share register. In addition, contracts between a company and a 35% shareholder or a BOM member, the General Director or a manager or their related persons with value greater than 50% of the company's assets must be approved by the SM without such shareholder, BOM member or manager voting. (See question 2.5 for an additional restriction on founding shareholders.)

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

There is as yet no clear answer to this question in Vietnamese law. The Law on Enterprises, as noted above, has a very broad provision authorising: (i) administrative, criminal and civil proceedings in case of breach of the law's provisions by any person affecting the company, a shareholder or other stakeholder; and (ii) payment of damages to a company or to shareholders as well as other stakeholders in case of a breach that causes injury. But little or no use has been made of this provision and as a result, it is uncertain how readily the relevant agencies and courts will entertain any enforcement actions. Decision 15, requiring incorporation of provisions of a model charter in the charters of listed companies, adds a provision giving a shareholder the right to bring a complaint about the operation of a company or violation of a shareholder right to economic arbitration or to the courts upon failure of a company's internal dispute resolution procedure to resolve such a complaint or violation.

In addition, the Law on Enterprises, and, for listed companies, Decision 15's model charter, provide for additional within-company dispute resolution procedures for complaints against the company, one of its management bodies or any BOM member or a manager, including the right for a five percent six-month shareholder or group of shareholders to (i) request review of a matter by the BOI, (ii) request the BOM to call an extraordinary SM, and (iii) request suspension of implementation or non-implementation of a BOM decision that a shareholder wishes to challenge. Presumably, the failure to treat a shareholder complaint seriously in one of these procedures would permit the shareholder to invoke one of the procedures mentioned in the previous paragraph leading to arbitration or court review.

In all of the procedures just referred to, it seems likely a shareholder can act on behalf of the company and request payment of compensation by a director or manager to the company for injury to the company or to the shareholder for injury to the shareholder. It is less clear, however, that in court or economic arbitration a shareholder can proceed derivatively to seek damages for the company. No derivative suit is known to have been litigated in Vietnam so far and the reason is most likely that a shareholder would be too uncertain about a court's or arbitrator's reception of such a suit to take the risk of filing it. The revised implementing decree for the Law on Enterprises when it is issued seems likely to clarify this issue as noted above.

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

Under the current legal framework, shareholders are subject to the following limitations: (i) shareholders who hold from five percent or more of voting shares of a public company must report their ownership to the local Department of Planning and Investment within seven working days from the date of acquiring shares at such ownership level; (ii) within a period of three years from company establishment, founding shareholders may only assign their shares to persons not being founding shareholders if approved by the SM. In this case, shareholders intending to assign shares may not vote on the assignment of such shares and the assignee shall automatically become a founding shareholder of the company.

For a listed company, at least three days before conducting any share transaction, a founding shareholder must report to the SSC and the HOSE or HaSTC. Three days after such a share transaction, the founding shareholder also must report to the SSC and HOSE or

HaSTC about the result of the transaction. After three years from the date of issuance of the business registration certificate to the company, all restrictions on ordinary shares of founding shareholders are lifted.

For banks and other companies in special fields there are additional approval and notice requirements for share transactions, including especially share transactions of foreign shareholders.

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

The SM takes place on an annual or extraordinary basis. The annual SM must be held within a time-limit of four months from the end of the financial year. An extraordinary SM can be convened in the following cases:

- (a) the BOM considers it necessary to do so in the interests of the company;
- (b) the number of remaining members of the BOM is less than the number of members required by law;
- (c) upon request by a shareholder or a group of shareholders holding more than 10 percent of the total ordinary shares for a consecutive period of six months or more; and
- (d) upon demand of the BOI.

The SM passes resolutions which fall within its power by way of voting in the meeting or collecting written opinions. Where a resolution is passed by collecting written opinions, a resolution of the SM shall be passed when it is approved by a number of shareholders representing at least 75 percent of the total voting shares or a specific percentage stipulated in the charter of the company. A resolution of the SM is passed in a meeting by a number of shareholders representing at least 65 percent of the total voting shares of all attending shareholders or a different percentage stipulated in the charter of the company.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Under the Law on Enterprises, the bodies which manage a joint stock company are the SM, BOM, BOI and the General Director. There must also be a legal representative who is the Chairman of the BOM or the General Director - which one it is must be stipulated in the company charter. The legal representative of the company must permanently reside in Vietnam; if he or she is absent from Vietnam for more than 30 days, he or she must provide a power of attorney to another person to exercise the rights and discharge the duties of the legal representative of the company.

1. The SM is stated in the law to be the highest decision-making authority of a joint stock company. However, it is unclear under the Law on Enterprises whether the SM can cancel a decision of the BOM. Nevertheless, since the SM can replace members of the BOM at any time, for any reason or no reason, the SM should be able to obtain any decision it wants from the BOM.
2. The BOM manages the company by issuing decisions in the name of the company. Such decisions are passed by way of voting at meetings, obtaining written opinions, or as otherwise stipulated in the charter of the company, with each member of the BOM having one vote. For listed companies, a BOM should have five to 11 members elected for five-year terms with one-third being independent, non-executive members. A member does not have to be a shareholder. None of the BOM members may concurrently serve on the

boards of more than five other companies. The work of the BOM may be allocated to sub-committees for audit, compensation and personnel and where it is not, the BOM must appoint a member to be in charge of each of these three (3) issues.

3. The General Director (who would be called the CEO elsewhere) manages the day-to-day business operations of the company, is supervised by the BOM and is responsible to the BOM and before the law for the exercise of his or her delegated powers and the performance of his or her delegated duties. The General Director will make decisions on all issues relating to the day-to-day business operation of the company not requiring resolutions of the BOM. Specifically, the General Director has the following powers and duties: (i) to organise the implementation of resolutions of the BOM, business and investment plans; (ii) to make recommendations with respect to the organisational structure and internal management rules of the company; (iii) to appoint, remove and dismiss management personnel in the company; (iv) to make decisions on salary and allowances for employees of the company; and (v) to make recommendations on methods of paying dividends and of dealing with losses in business.
4. The BOI supervises the BOM and General Director and is responsible to the SM. For listed companies, a BOI should have three to five members elected for five-year terms, with at least one accountant or auditor who is not from the accounting department of the company or the company's auditor. The chair of the BOI also may not be from the financial department of the company. A BOI member does not have to be a shareholder.

The BOI has the following specific duties:

- (a) inspect truthfulness and prudence in management and administration of business activities, in organisation of statistics and accounting work and preparation of financial statements;
- (b) evaluate reports on business, semi-annual or annual financial statements and reports on evaluation of the BOM;
- (c) review books of accounts and other documents of the company, the management and administration of the SM or as requested by a 10 percent (five percent for listed companies) six-month shareholder or group of shareholders and such inspection must be carried out within a period of seven working days from the date of receipt of the request; and
- (d) give immediate written notice to the BOM upon discovery of a member of the BOM or the General Director in breach of the obligations of a manager of the company and request the person in breach to cease the breach and take measures to remedy any consequences.

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

Members of the BOM and BOI are elected or removed by the SM. Voting to elect board members must be implemented by the method of cumulative voting.

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

The company is entitled to pay salary and bonus to members of the BOM, and to the General Director and other managers based on the business situation. Salary for work shall be calculated on the basis

of the working days which are necessary to fulfill the obligations of the members of the BOM and the daily rate. The BOM must agree on the remuneration for each member unanimously. The total amount of remuneration for the BOM is decided by the annual SM. Members of the BOM also are entitled to reimbursement of meals, accommodation, travel and other reasonable expenses. The salary of the General Director is decided by the BOM.

The remuneration of members of the BOM and General Director and other managers must be presented in a separate item in the annual financial statements of the company and reported to the annual SM.

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?

Members of the BOM, BOI, the General Director and other managers must declare their own (at any level of charter capital) and their related parties' (at 35 percent or more of charter capital) relevant business interests to the company. The declaration must be conducted within seven working days from the date any relevant interest arises.

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

Meetings of the BOM may be held on a periodical basis and extraordinary meetings also may be held. The chairman may convene a periodical meeting of the BOM at any time he considers it necessary, but there must be at least one meeting every quarter. Extraordinary meetings of the BOM must be convened by the chairman of the BOM upon request of the BOI, at least two members of the BOM, the General Director or at least five other managers, or as otherwise stipulated in the charter of the company.

A meeting of the BOM may be opened when three-quarters (3/4) or more of the total members are in attendance. Members not attending a meeting in person have the right to vote by way of sending a written vote or such member may authorise another person to attend in his or her place. A resolution of the BOM is passed only when it is approved by the majority of the members in attendance (including those submitting written votes); in case of a tied vote, the vote of the chairman will break the tie.

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

The BOM has the following general legal duties:

- (a) to exercise their delegated powers and perform their delegated duties in accordance with the Law on Enterprises, other relevant laws, the charter of the company, and resolutions of the SM;
- (b) to exercise their delegated powers and perform their delegated duties honestly, diligently and optimally in the interest of the company and its shareholders;
- (c) to be loyal to the interest of the company and its shareholders; to not use information, know-how, business opportunities of the company, not to abuse their positions and powers or to use assets of the company for the personal benefit of themselves or other organisations and persons; and
- (d) to timely, fully and correctly notify the company of other enterprises in which they or their related persons are owners or major shareholders or capital contributors; this notice shall be displayed at the head office and branches of the company.

In addition to obligations stipulated above, the BOM is not permitted to increase salary and pay bonus where the company has not paid in full all the debts due and payable. If the BOM passes a resolution which is contrary to law or contrary to the provisions of the charter of the company, thereby causing damage to the company, the members who agreed to pass such resolution will be personally jointly liable for such resolution and must compensate the company for the damage; any member who opposed the passing of such resolution will be exempt from liability.

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

The standard of performance of the rights and duties of the BOM in general and of individual members (and the General Director and other managers) was presented in the answer to question 3.6, above. The BOM has rights and duties as follows:

- (a) to make decisions on medium term development strategies, annual business plans, and investment plans and projects of the company;
- (b) to recommend the classes of shares and total number of shares of each class which may be offered, their prices and the prices of bonds;
- (c) to make decisions on offering new shares within the number of shares of each class which may be offered for sale; to make decisions on raising additional funds in other forms;
- (d) to make decisions on redemption of shares;
- (e) to make decisions on market expansion, marketing and technology; to approve contracts for purchase, sale, borrowing, lending and other contracts valued at fifty (50) or more percent of the total value of assets or a smaller percentage as stipulated in the charter of the company;
- (f) to appoint, dismiss or remove, to sign contracts or to terminate contracts with, and to supervise the General Director and other key managers; to appoint an authorised representative to exercise ownership rights of shares or of capital contributed to other companies;
- (g) to make decisions on the organisational structure and internal management rules of the company, on the establishment of subsidiary companies and branches and representative offices, and on capital contribution to or purchase of shares of other enterprises;
- (h) to approve the agenda and documents (including annual final financial reports) for, and convene, the SM or to obtain written opinions in order for the SM to pass resolutions;
- (i) to recommend the rates and procedures for dividends or methods for dealing with losses incurred in the business operation; and
- (j) to recommend reorganisation or dissolution of the company, or request bankruptcy of the company.

Contracts and transactions between the company and (i) the members of the BOM or the General Director, or (ii) related persons of members of the BOM or the General Director, must be approved by the SM or BOM depending on the value of the contract or transaction. The Law on Enterprises and, for listed companies, Decision 12 and Decision 15's model charter, reserve a number of other specific issues for decision by the BOM.

3.8 What public disclosures concerning management body practices are required?

The Law on Enterprises has no specific requirement for public disclosure of management body practices. However, the disclosure

rules for listed companies include “internal management rules” as a category of disclosure on a company’s website. It is uncertain whether the provision is intended to require disclosure of such rules. In addition, one-year shareholders have access to BOM and BOI reports, including performance evaluations of the BOM as noted below.

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

There is no provision related to the indemnities of members of the BOM in the Law on Enterprises. However, in the model charter attached to Decision 15, indemnification is required for members of the BOM and General Director except in cases of violations of law or of the company’s charter and D&O liability insurance may be purchased by the company.

4 Corporate Social Responsibility

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

Corporate social responsibility is not a specific obligation under the Law on Enterprises except that a company must comply with the law generally and, in particular, with the requirements of the law on labour, health insurance, safety and hygiene, occupational and environment standards, etc. Decision 12 imposes the requirements for a listed company to (i) respect the rights of stakeholders including creditors, employees, consumers, suppliers and the community and to actively coordinate with such stakeholders, and (ii) “be concerned about welfare issues, the protection of the environment, the general interests of the community and the social responsibility of the company.”

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

Employees do not play any specific role in corporate governance.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

The legal representative of a company is responsible for information disclosure, which may be conducted by the following means:

- (a) annual report, website and other publication of the company making the disclosure;
- (b) information disclosure media of the SSC: website, newsletter, and other publications; and
- (c) information disclosure media of the HOSE or HaSTC:

website, newsletter, and electronic display board at the HOSE or HaSTC and other mass media as stipulated in the law.

5.2 What corporate governance related disclosures are required?

A joint stock company’s audited financial statements must be submitted for approval by all shareholders in the SM. Shareholders for one year additionally have the right to review the BOM’s and BOI’s annual reports and evaluations. For listed companies, a five percent six-month shareholder or group of shareholders has the right to inspect and copy the list of shareholders and minutes of the SM.

For public companies, periodic disclosure of information including the annual audit report and audited financial statement is required. Extraordinary disclosure of information must be conducted within 24 hours or 72 hours of the occurrence of one of several specified events that may affect the company’s business.

Enterprises also have to disclose information about trading of shares by major shareholders, trading of treasury shares, trading of shares by founding shareholders during the period the assignment is restricted, and about public offers.

If any error in disclosure of information affects the price of securities, the legal representative or the person authorised to disclose information must certify or correct such information within 24 hours from the time of becoming aware of such information or at the request of the regulatory authority.

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

For joint stock companies, the annual financial statements must have been audited before submission to the SM for consideration and approval.

Auditors will not have to bear any responsibility regarding disclosure requirements. The company which conducts such disclosures must be responsible. Auditors are not allowed to collude with the company to falsify the contents of financial statement.

5.4 What corporate governance information should be published on websites?

Public companies must have a publicly-announced website that sets out the required disclosure content: shareholder information, corporate charter, internal management rules, annual reports, periodical financial statements and matters relevant to the general shareholders’ meetings. The website must also be regularly updated.

**John R. Davis**

YKVN Lawyers
17 Ngo Quyen Street
Hanoi
Vietnam

Tel: +84 4 3934 5410
Fax: +84 4 3934 5412
Email: john.davis@ykvnlaw.com
URL: www.ykvnlaw.com

John R. Davis is of counsel to YKVN and has more than 20 years of experience as a lawyer in both Asia and the U.S. His practice focuses on corporate, financial and securities transactions, especially cross-border ones, for domestic and international investors. He has worked on legal matters in Vietnam and most of the other ASEAN countries and China. He is licensed by Vietnam's Ministry of Justice as a foreign lawyer in Vietnam. In addition to his transactional practice, Mr. Davis is active as a consultant to governments in the region. He advises them on the reform of laws affecting commerce and on regulatory issues, especially those related to company law and competition law. He also is Adjunct Professor in the Faculty of Economics, Chulalongkorn University, Bangkok, where he teaches courses in the economics of law, of corporate governance and of corporate restructuring.

**Mai Kim Dzung**

YKVN Lawyers
17 Ngo Quyen Street
Hanoi
Vietnam

Tel: +84 4 3934 5410
Fax: +84 4 3934 5412
Email: dzung.mai@ykvnlaw.com
URL: www.ykvnlaw.com

Mai Kim Dzung is a lawyer in YKVN's Hanoi Office, where she concentrates her practice in the areas of corporate law, real estate law, telecommunication law and tax law. Ms. Dzung has extensive experience in corporate governance. She regularly advises foreign investors on a wide range of issues relating to their operations and investment activities in Vietnam. Ms. Dzung received a B.A. in Law from Hanoi University of Law in 2001, and an LL.M. from Nagoya University - School of Law in Japan 2008.



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