

INTERNAL GOVERNANCE STRUCTURES IN VIETNAMESE COMPANIES

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Abstract

This paper examines internal governance structures in Vietnamese companies under the Enterprise Law 2005. It first looks at board models in some jurisdictions and then discusses on contemporary board structures in types of company under the 2005 company legislation of Vietnam to argue for a further reform.

I. Board Structures in Some Jurisdictions

The classic study, *The Modern Corporation and Private Property*, by Berle and Means contends that shareholdings in many larger companies are generally dispersed such that no shareholder or group of shareholders has any real control over management and the board of directors and there is a separation of ownership from control of the corporation.¹ In a leading company law book, *Gower and Davies' Principles of Modern Company Law*, Davies observes that:

One consequence of the artificial nature of a company as a legal person is that inevitably decisions for, and actions by, it have to be taken for it by natural persons. Decisions on its behalf may be taken either (a) by its primary organs (the board of directors or the members in general meeting) or (b) by officers, agents or employees of the company.²

The allocation of power within a company, especially in large companies, forms the internal governance structure (hierarchy) within which a set of decision-making bodies are conferred

¹ See generally, Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (revised ed, 1968); R. P. Austin, H.A.J. Ford and I. M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 62-3.

² Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (7th ed, 2003) 129.

certain powers of the company. In *The Principles of Corporate Governance: Analysis and Recommendations*, the American Law Institute comments that the structure of a company should 'reflect two highly important social needs': (i) permitting 'a corporation to be highly flexible in structuring its operational management', and (ii), 'processes that ensure managerial accountability to shareholders for accomplishing the objective of the corporation.'³ The division of power between governance bodies is designed to achieve efficient corporate governance, and may vary from jurisdiction to jurisdiction, company to company.

It is widely accepted that the one-tier board and two-tier board structures are the major board models for companies, especially public companies, around the world.⁴ The unitary board model is predominant in the U.S., the U.K., Australia, New Zealand, and most of the EU members (such as Ireland, Italy, Spain, Portugal and Greece) whilst the dual board structure is predominant in Germany, Austria, Switzerland, and the Netherlands.⁵ Nevertheless, other board models can also be found in countries with one-tier board structures such as France, Belgium, Finland, and Greece.⁶

Mallin states that:

³ American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Vol.1, 1994) 77.

⁴ See Jean Jacques du Plessis, James McConvill and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2005) 58; Caspar Rose, 'The Composition of Semi-Two-Tier Corporate Boards and Firm Performance' (2005) 13(5) *Corporate Governance: An International Review* 691, 691; Christine A. Mallin, *Corporate Governance* (2004) 93. For a discussion of types of board structures, see also, Robert I. Tricker, *International Corporate Governance: Text, Readings and Cases* (1994) 44-5.

⁵ See Klaus J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in Klaus J. Hopt et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 227, 228; Mallin, *ibid.* 93-4, 125; Weil, Gotshal & Manges LLP (on behalf of the European Commission, Internal Market Directorate General), *Comparative Study of Corporate Governance Codes Relevant to the European Union and its Members* (2002) 43-44; Gregory Maassen and Frans van den Bosch, 'On the Supposed Independence of Two-tier Boards: Formal Structure and Reality in the Netherlands' (1999) 7 (1) *Corporate Governance: An International Review* 31, 31.

⁶ See, eg, Weil, Gotshal & Manges LLP, *ibid.* 44; Hopt, *ibid.* 228. For corporate governance structures in France, see Joelle Simon, 'Corporate Governance in France: Company Law and Corporate Governance Codes' in Klaus Hopt et al (ed), *European Corporate Governance in Company Law and Codes* (2004) 11, 12-3; Association Française des Entreprises Privées (AFEP) and Mouvement des Entreprises de France (MEDEF), *The Corporate Governance of Listed Corporations* (2003) [3.1].

A unitary board of directors is the form of board structure in the UK and the US and is characterized by one single board comprising of both executive and non-executives directors. The unitary board is responsible for all aspects of the company's activities, and all the directors are working to achieve the same ends. The shareholders elect the directors to the board at the company's annual general meeting.

A dual board system consists of a supervisory board and an executive board of management. However in a dual board system there is a clear separation between the functions of supervision (monitoring) and that of management. The supervisory board oversees the direction of the business whilst the management board is responsible for the running of the business. Members of one board cannot be members of another so there is a clear distinction between management and control. Shareholders appoint the members of the supervisory board (other than the employee members) whilst the supervisory board appoints the members of the management board.⁷

Additionally, some jurisdictions develop "hybrid" board structures – neither a "pure" one-tier board system nor a "pure" two-tier board structure. These types of boards can be found in Denmark, China and Japan.⁸ In Denmark, for example, the company law requires a firm to have a supervisory board (*bestyrelse*) and a board of managing directors (*direktion*) with statutory responsibilities, and, distinct from the dual board model - the latter can occupy half of the seats on the supervisory board.⁹ The Danish supervisory board's main function is to monitor and control the board of managing directors, and it has power to decide on extra-ordinary matters of the company.¹⁰

The U.S. has a typical one-tier board system while Germany is the most well-known for a typical two-tier board structure.¹¹ The company law of Anglo-American jurisdictions often recognizes two sites of decision-making power within a company - the shareholders' meeting and a board of

⁷ Christine A. Mallin, *Corporate Governance* (2004) 94.

⁸ For a discussion of Danish board structures, see Caspar Rose, 'The Composition of Semi-Two-Tier Corporate Boards and Firm Performance' (2005) 13(5) *Corporate Governance: An International Review* 691, 691-2. For Chinese internal governance structures, see Articles 37, 45, 51, 52, 99, 109, 114, and 118 of the China's *Company Law 2005*. For a discussion of Japanese board structures, see Yuwa Wei, *Comparative Corporate Governance: A Chinese Perspective* (2003) 150-1; Hideki Kanda, 'Comparative Corporate Governance - Country Report: Japan' in Klaus J. Hopt et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 921, 926.

⁹ Caspar Rose, 'The Composition of Semi-Two-Tier Corporate Boards and Firm Performance' (2005) 13(5) *Corporate Governance: An International Review* 691, 691-2.

¹⁰ *Ibid* 692.

¹¹ See also, Klaus J. Hopt and Eddy Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (1997) preface.

directors, and, the distribution of decision-making power is considered as a contractual matter.¹² In principle, power in a U.S. company is divided between the shareholders via the general meeting and the board of directors. Nonetheless, the internal governance structure of a U.S. corporation appears to have three layers: the shareholders' meeting; a board of directors, and, the daily management,¹³ which form a corporate decision-making hierarchy of the corporation.¹⁴

A board of directors, led by a chairperson, appoints, dismisses, monitors, and compensates the daily management, all with an eye towards maximizing shareholder value.¹⁵ In addition, the *Delaware General Corporation Law* – a leading company statute in the U.S. - provides that the business and affairs of every corporation is 'managed by or under the direction of a board of directors,' except as may be otherwise provided for in the law or its constitution.¹⁶ Similar provisions can also be found in the *Corporations Act 2001* (Cth) of Australia and the *Companies Act 1993* of New Zealand.¹⁷

¹² See, eg, Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2nd ed, 2002) 263. See also, Robert A.G. Monks and Nell Minow, *Corporate Governance* (2004) 195; Caspar Rose, 'The Composition of Semi-Two-Tier Corporate Boards and Firm Performance' (2005) 13(5) *Corporate Governance: An International Review* 691, 691.

¹³ For a discussion of U.S board models before and after Enron, see Bernard Taylor, 'Leading the Boardroom Revolution ' (2004) 12(4) *Corporate Governance: An International Review* 415, 418. For a discussion of the history of Anglo-American boards, see Monks and Minow, *ibid.* 197.

¹⁴ Cynthia A. Glassman, 'Corporate Governance in the United States' (Paper presented at the ECGI/ALI 2006 Transatlantic Corporate Governance Conference, Brussels, June 2006).

¹⁵ Diane K. Denis and John J. McConnell, *International Corporate Governance* (Finance Working Paper No. 5/2003, European Corporate Governance Institute, 2003) 2, 7. See also, Business Roundtable, *Principles of Corporate Governance* (2005) 1.

¹⁶ Section 141 of *Delaware General Corporation Law*. The U.S. has a state-based company regime, and each state develops its company law in order to attract investors. Consequently, a few states appear to be dominant, and Delaware is the best example with many large U.S corporations (including more than a half of the top 500 U.S firms) have registered under Delaware's company statute. See Cally Jordan, *International Survey of Corporate Law in Asia, Europe, North America and the Commonwealth* (1997) 51, 54; Wei, above n 8, 134-5.

¹⁷ See, eg, s 198A of the *Corporations Act 2001* (Cth) of Australia; s 128 of the *Companies Act 1993* of New Zealand.

In short, the internal governance structures of U.S. corporations appear to consist of three layers: the shareholders' meeting; the board of directors, and, the daily management led by a CEO.¹⁸ The company law of the U.S. allows for powers of a company to be invested into a single board of directors, except as when otherwise provided for in the law and the company's constitution. The board delegates its powers to, and monitors, daily management. U.S. corporations traditionally have no separate supervisory body from the board of directors, and employees in U.S. companies have no role in governance structures as do their German counterparts.

German company law traditionally relies on legislation. Nonetheless, non-statutory rules have recently become a significant supplementing regime with the introduction of the *German Corporate Governance Code*.¹⁹ Germany has a corporate governance system with two significant features: a two-tier board structure and labour co-determination.²⁰

In Germany, *Aktiengesellschaften* (AG) (as a shareholding company) and *Gesellschaft mit beschränkter Haftung* (GmbH) (as a limited liability company) are governed by different laws.²¹

¹⁸ It should be noted that a majority of U.S. states have adopted the *Model Business Corporation Act* (MBCA) by the American Bar Association (ABA). By 1977, 34 of the 50 states had adopted MBCA. For a discussion of the harmonisation trend in U.S. company laws, see also, Jordan, above n 19, 50-1; Glassman, above n 14.

¹⁹ See Klaus J. Hopt and Patrick C. Leyens, *Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy* (Law Working Paper No. 18/2004, European Corporate Governance Institute, 2004) 4. For a discussion of German corporate governance law; see generally, Michael Nietsch, 'Corporate Governance and Company Law Reform: a German Perspective' (2005) 13(3) *Corporate Governance: An International Review* 368, 368-74. For a discussion of the *German Corporate Governance Code*, see Gerhard Cromme, 'Corporate Governance in Germany and the German Corporate Governance Code' (2005) 13(3) *Corporate Governance: An International Review* 362, 364. It should be noted that the *German Corporate Governance Code* was last revised on 12 June 2006.

²⁰ See, Weil, Gosthal & Manges LLP, above n 5, 3. For a discussion of issues of corporate laws of the European Union, see generally, John Armour, *Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition* (Law Working Paper No. 54/2005, European Corporate Governance Institute, June 2005). For a discussion on corporate governance in Germany, see du Plessis, McConvill and Bagaric, above 4, 307-15.

²¹ AGs are governed by the *Aktiengesetz* (*Stock Corporation Act - AktG*). GmbHs are operating under the *GmbH-Gesetz* (*Limited Liability Companies Act*). See, Theodor Baums, 'Corporate Governance: National Report on Germany' (Paper presented at the XV International Congress of Comparative Law (Académie Internationale de Droit Comparé), Bristol, 1998) 2, 13. For a discussion of AG and GmbH, see further, Ekkehart Boehmer, *Corporate Governance in Germany: Institutional Background and Empirical Results* (1999) Social Science Research Network, at <http://ssrn.com/abstract=157823>, visited 5 March 2007, at 2, 24. By the 21st century, there were about 5,500

An AG is required to have a two-tier board structure with governance functions are divided between a supervisory board (*Aufsichtsrat*) and a managing board (*Vorstand*).²² Whereas, the governance structure of a GmbH is not required as a two-tier board model unless the company is subject to co-determination legislation.

The presence of employee representatives with three different levels (one-third, full-parity, and quasi-parity co-determination) in German supervisory boards is a significant difference compared to Anglo-American board structures.²³ The ratio of labour representatives in a supervisory board of a German company depends on the number of employees of the firm under the *Industrial Constitution Act 1952 (Betriebsverfassungsgesetz)* and the *Co-determination Act 1976 (Mitbestimmungsgesetz)*.²⁴

In short, unlike the U.S. one-tier board model, internal governance structures of German companies have two significant characteristics: a two-tier board structure with a supervisory board and a managing board, and, labour co-determination in the upper board of large corporations. Compared to one-tier board models, a two-tier board structure has a more formal separation between supervision and management. Nevertheless, it may need more time for decision-making and meets more difficulties when changing direction, thus, this may produce an adverse result in taking business opportunities.²⁵

II. *Internal Governance Structures of Vietnamese Companies under the Enterprise Law 2005*

1. Overview

In November 2005, in order to create a convenient environment for investors and support international economic integration, especially the WTO accession, the National Assembly of

AGs and a some of 650,000 GmbHs in Germany, see Klaus J Hopt, 'Common Principles of Corporate Governance in Europe?' in B. Markesinis (ed.), *The Clifford Chance Millennium Lectures* (2000) 108.

²² Horst Siebert, 'Corporatist Versus Market Approaches to Governance' in Klaus J. Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (2005) 281, 287.

²³ For a discussion of German co-determination, see generally, Siebert, above n 22, 287-92;

²⁴ See Hopt, above n 21, 7. Klaus J. Hopt, 'The German Two-Tier Board (Aufsichtsrat): A German View on Corporate Governance' in Klaus J. Hopt and Eddy Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (1997) 3

²⁵ See also, *ibid* 290; Wei, above n 8, 144.

Vietnam enacted the new *Enterprise Law (Luật Doanh nghiệp - the Enterprise Law 2005)*. According to the Vietnamese legislature and officials, the Enterprise Law 2005 was enacted on the basis of (or its aims are): (i) abandonment of discrimination between economic sectors; (ii) respect for business freedom; (iii) concentration on the state's assistance to enterprises, and (iv) good corporate governance in Vietnam.²⁶

This statute came into force on 01 July 2006 to replace the *Enterprise Law 1999*, the *State Enterprise Law 2003 (Luật Doanh nghiệp nhà nước 2003)*, and regulation on management organization and operation of enterprises in the *Law on Foreign Investment in Vietnam 1996* (as amended) (*Luật Đầu tư nước ngoài tại Việt Nam*).²⁷ With 172 articles, the *Enterprise Law 2005*, which is largely based on the 1999 Law, is the most complex corporate statute in Vietnam's company law history.

Through the introduction of the *Enterprises Law 2005*, Vietnamese company law, or in other words the laws on business organization, has been reformed significantly. The 2005 Law governs all company types of Vietnam and provides the most fundamental statutory rules for corporate governance of Vietnamese companies. This paper looks at the internal governance structures of Vietnamese companies under the *Enterprise Law 2005* in order to explore shortcomings that need to be addressed.

Since Vietnamese company law provides different internal governance structures for limited liability companies (LLCs) and shareholding companies (SCs), this section examines these systems in separate sub-sections. This section concludes that the *Enterprise Law 2005* provides different fixed internal governance structures for company types with mandatory powers and functions for each corporate governance body.²⁸

²⁶ See, eg, Prime Minister's Research Unit (*Ban Nghiên cứu của Thủ tướng*), *Official Letter No. 285/BNC*, dated 26 April 2005; Vietnam Chamber of Commerce and Industry (VCCI), *Comments on the Draft of Unified Enterprise Law (Góp ý Dự thảo Luật Doanh nghiệp thống nhất)* (2005) (unpublished).

²⁷ Article 171 of the Enterprise Law 2005 (hereinafter, the EL 2005).

²⁸ For internal governance structures of Vietnamese companies, see generally, Bui Xuan Hai, 'A Comparison of Internal Governance Structures of Vietnamese Shareholding Companies and Leading Models around the World (*So*

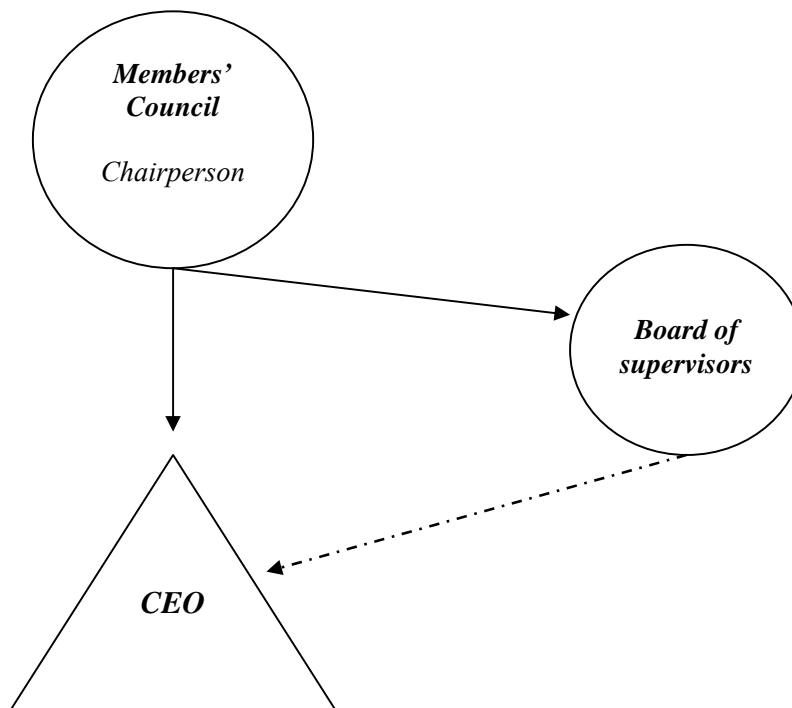
2. Internal Governance Structures of Limited Liability Companies (LLCs)

Under the *Enterprise Law 2005*, LLCs are classified into two forms: (i) LLCs with two or more shareholders;²⁹ and (ii) single-member LLCs. Unlike the company law of the U.S. and Germany discussed above, the 2005 Law provides different internal governance structures for LLCs.

a. Limited Liability Companies with Two or More Shareholders

Under the *Enterprise Law 2005*, the mandatory governance structure of a multiple-shareholder LLC consists of a members' council (*hoi dong thanh vien* – hereinafter, MC); a chairperson of the MC (*chu tich hoi dong thanh vien*); a CEO (*giam doc* or *tong giam doc*), and, if the company has more than 10 shareholders, a board of supervisors (*ban kiem soat*) (see Figure 1 below).³⁰ The Law also provides in detail statutory powers and tasks of corporate governance bodies mentioned above.

Figure 1: *Internal corporate governance structure of an LLC with two or more members*



sanh cau truc quan tri noi bo cua CTCP Viet Nam voi cac mo hinh dien hinh tren the gioi' (2006) 37 *Legal Science Journal (Tap chi Khoa hoc Phap ly)* 14 - 21.

²⁹ For a definition of this company type, see Article 38 of the *Enterprise Law 2005* (hereinafter, the EL 2005).

³⁰ Article 46 of the EL 2005.

- : appointment and removal
 -----→ : supervision

The Members' Council (MC) and its Chairperson

The members' council (MC) - consisting of all natural shareholders and representatives of the shareholders who are organisations - is the highest decision-making body of the company.³¹ The MC is ordinarily convened at least once a year but a meeting can be called at any time on the request of the chairperson of the MC or a shareholder (or a group of shareholders) holding at least 25 per cent of the share capital.³² A meeting is effective if all participating members represent at least 75 per cent of the share capital.³³ The chairperson, who is elected by the MC, is responsible for preparing meeting agendas, convening meetings, and signing documents on behalf of the MC.³⁴ The statutory powers of the chairperson prescribed in the Law may be expanded by the company's constitution.

Under the *Enterprise Law 2005*, the MC is mandated many powers and appears as a body of both ownership and management, possibly comparable to the board of management of an SC, and is involved more directly in managerial decisions.³⁵ In this way, shareholders of a Vietnamese LLC enjoy more statutory powers than their counterparts in Anglo-American jurisdictions. The MC can decide on matters of the company by either a meeting or another way prescribed in the company's constitution.³⁶ Depending on the matter and provisions of the constitution, a resolution of the MC is passed if it is approved by at least 65 or 75 per cent of the voting rights of the attending shareholders.³⁷ Nevertheless, a higher requirement for passing a resolution may be stipulated in the company's constitution as a way to enhance minority shareholder protection

³¹ Article 47 of the EL 2005.

³² Article 50 of the EL 2005.

³³ If the first meeting fails, other meetings can be convened at lower requirements; see more at Article 51 of the EL 2005.

³⁴ Article 49 of the EL 2005.

³⁵ For powers of the MC, see Clause 2 of Article 47 of the EL 2005. See also, Nguyen Dinh Cung and Scott Robertson, *Corporate Governance in Vietnam* (Policy Brief # 36, William Davidson Institute, University of Michigan (2005)) 7.

³⁶ See Article 54 of the EL 2005.

³⁷ Clauses 2, 3 of Article 52 of the EL 2005.

The Chief Executive Officer (CEO)

The CEO selected by the MC runs daily operations of the company with powers prescribed in the Law, the constitution, and the employment agreement.³⁸ A major task of the CEO is to implement resolutions of the MC; nevertheless, he/she also has the right to decide on matters regarding daily operations of the company, and, appoint company managers/officers who are not under power of the MC. The Law, however, does not give the CEO a right to request the chairperson of the MC to convene a meeting of shareholders to deal with matters that occur in the company's operations. Further, the Law does not provide for communication mechanisms between the CEO and the MC. This restriction of management information flow is not helpful.

The Board of Supervisors (BOS)

An LLC with more than 10 shareholders must form a board of supervisors (BOS).³⁹ However, the *Enterprise Law 2005* does not provide any provisions on the formation, operation, powers, and functions of the BOS. Thus, these matters must be prescribed in the company's constitution, and, in this way, controlling shareholders may undermine supervisory issues and ignore the participation of minority shareholders.

In short, the *Enterprise Law 2005* provides the internal governance structure of a multiple-shareholder LLC including three bodies: the MC, a CEO, and a BOS. Whilst the Law prescribes in detail statutory powers, functions, and operation of the MC, the CEO, and the MC's chairperson, it does not provide those for the BOS.

b. Internal Governance Structures of One-Shareholder Limited Liability Companies (LLCs)

The *Enterprise Law 2005* provides for two types of one-member LLCs, organization-owner versus human-being owner, with two different mandatory internal governance structures.

³⁸ Article 55 of the EL 2005.

³⁹ Article 46 of the EL 2005.

One-Organisation-Owned Limited Liability Companies (LLCs)

In general, the mandatory governance structure of this company type is more complicated than that of a one-natural-shareholder-owned LLC and consists of the three following constituents (see Figure 11 below):

(1) The Company President and the Members' Council

In general, power of the members' council (MC) of a multiple-shareholder LLC (discussed above) is divided between the owner and its authorized representatives (*nguoi dai dien theo uy quyen*) of a one-organisation-owned LLC. The *Enterprise Law 2005* does not formally consider the company owner as the highest decision-making body of the company but the owner is mandated powers that are similar to those of the general meeting of a multiple-shareholder LLC. The Law requires the owner to appoint one or more authorised representatives to exercise the owner's powers and obligations as laws provided for.⁴⁰

(i) If only one authorised representative is appointed, this person is the company president (*chu tich cong ty*),⁴¹ and the internal governance structure of the company consists of a company president, a CEO, and a supervisor (*kiem soat vien*).⁴² Powers, obligations, and duties of the company president are provided for by the Law, and may be expanded by the company's constitution. The company president acts on behalf of (i) the owner in exercising the owner's rights and obligations (with approval of the owner), and, (ii) the company in exercising the company's rights and obligations.

(ii) If two or more authorised representatives are appointed, the corporate governance structure of the company includes: a members' council (*hoi dong thanh vien* - MC) including all

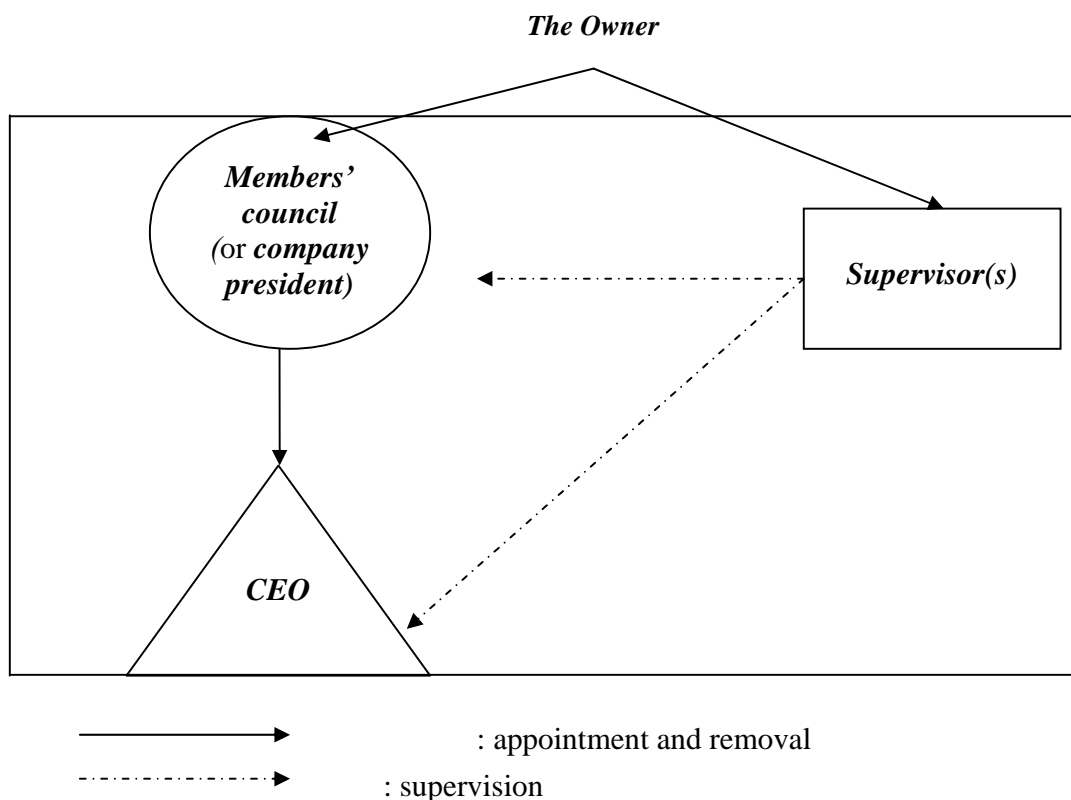
⁴⁰ Article 67 of the EL 2005.

⁴¹ For details, see Article 69 of the EL 2005.

⁴² It should be noted that '*kiem soat vien*' in Vietnamese can be translated into English as 'supervisor' or 'controller'. In this thesis, the term is translated as 'supervisor'.

authorised representatives, a CEO, and supervisors.⁴³ In this model, the MC has powers and functions identical to the company president of the above governance structure (see Figure 2 below). Each member of the MC has a voting right, and a resolution is passed if it is approved by more than a half of the members.

Figure 2: *Internal governance structure of a one-organisation-owned LLC*



(2) Chief Executive Officer

The CEO of a one-organisation-owned LLC is selected by either the MC or the company president to run daily operations of the company.⁴⁴ The powers and duties of the CEO are the same as those of the CEO of an LLC with two or more shareholders discussed above.⁴⁵

⁴³ Clause 3 of Article 67 of the EL 2005.

⁴⁴ Clause 1 of Article 70 of the EL 2005.

⁴⁵ See and compare, Clause 2 of Article 55 and Clause 2 of Article 70 of the EL 2005.

(3) Supervisors

The *Enterprise Law 2005* does not provide a statutory collective supervisory body as a board of supervisors for this company type but the owner can appoint no more than three supervisors to oversee the management. A main function of supervisors is to monitor and check (if necessary) the work of the MC, the company president, and the CEO in operating the company.⁴⁶

In the mandatory governance structures discussed above, the *Enterprise Law 2005* does not state the owner as a corporate decision-making body in the governance structure. Nevertheless, the owner has many powers as prescribed by the Law, and which may also be expanded through the company's constitution.⁴⁷ This may result in potential interference of the owner, especially the governmental agency as the sole owner of state-owned companies, in the company management.

One-Natural-Person-Owned Limited Liability Companies

Compared to single-organization-owned LLCs, the internal governance structure of a single-natural-shareholder LLC is much simpler. The mandatory internal governance structure of this company type comprises a company president (*chu tich cong ty*) and a CEO.⁴⁸ The company owner is established as the company president, and, the powers and obligations of the president are also as those of the company owner who has the supreme power to decide upon any matter of the company. The CEO is selected by the owner to run daily operations of the company. However, unlike other LLCs, the *Enterprise Law 2005* does not provide statutory powers and functions for the CEO. The law also does not provide any rules for supervision mechanisms of the company.

In conclusion, unlike the company law of the U.S. and Germany, the *Enterprise Law 2005* provides different statutory internal governance structures for LLCs owned by single shareholder and multiple shareholders with particular mandatory powers of corporate governance bodies. These powers may be expanded, but not decreased, by the company's constitution.

3. The Internal Governance Structure of a Shareholding Company

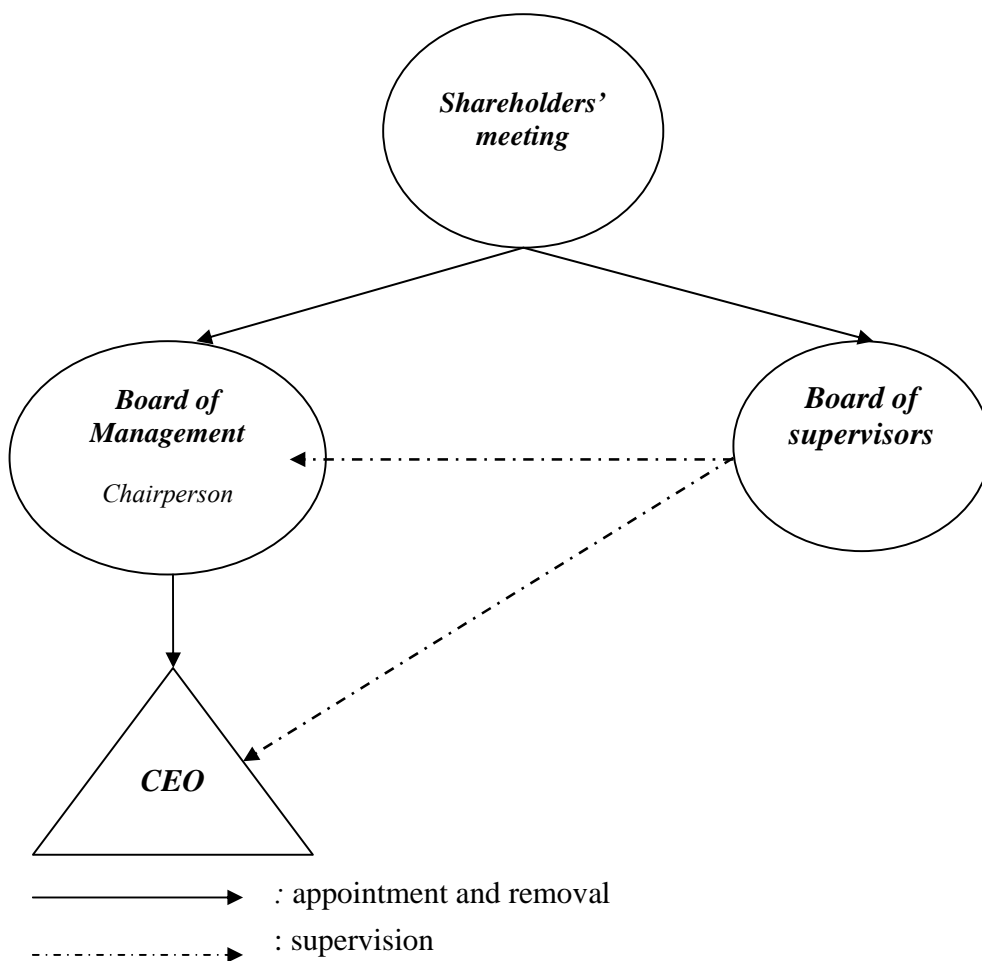
⁴⁶ Article 71 of the EL 2005.

⁴⁷ For details, see Clause 1 of Article 64 of the EL 2005.

⁴⁸ Article 74 of the EL 2005.

The mandatory governance structure of a shareholding company consists of four governance bodies: (i) the shareholders' meeting (*dai hoi dong co dong* – hereinafter, SM); (ii) a board of management (*hoi dong quan tri* – hereinafter, BOM); (iii) a CEO (*giam doc* or *tong giam doc*), and (iv), if the company has more than 11 shareholders being natural persons or one (or more) institutional shareholder(s) holding more than 50 per cent of the equity capital, a board of supervisors (*bankiem soat* – hereinafter, BOS) (see Figure 3 below).⁴⁹

Figure 3: *Internal governance structure of a shareholding company*



a. Shareholders' Meeting (SM)

⁴⁹ See Article 95 of the EL 2005.

The *Enterprise Law 2005* sets out in detail provisions on procedures of, and other matters concerning, shareholders' meetings (SM).⁵⁰ The SM comprising all shareholders who have a right to vote is the highest decision making body of an SC.⁵¹ The *Enterprise Law 2005* retains many powers of the company for the SM, and such mandated powers can be expanded by the company's constitution.⁵² The SM can be convened in an ordinary (at least once a year) or an extra-ordinary mode through a call by the BOM, the BOS, or a shareholder (or a group of shareholder) in particular circumstances provided for by the 2005 Law and the company constitution. A meeting of shareholders must be attended by shareholders holding at least 65 per cent of the voting shares.⁵³

A resolution can be passed by the shareholders at a meeting or via collecting written votes conducted by the BOM. At meetings, depending on the matter, a resolution is adopted if it is approved by at least 65 or 75 per cent of total voting shares of all attending shareholders.⁵⁴ If a resolution is passed via written votes of shareholders, it must be approved by at least 75 per cent of total votes.⁵⁵ These high requirements may help to protect minority shareholders of the company.

Additionally, the *Enterprise Law 2005* allows a shareholder, a member of the BOM, the CEO, and the BOS to request a court to review and cancel a resolution of the shareholders if (i) the order and procedures for convening the meeting were unlawful, or (ii) procedures for issuing the

⁵⁰ For the shareholders' meeting of LLCs, see Articles 47, 50 – 54. For the shareholders' meeting of SCs, see Articles 96 -107 of the EL 2005.

⁵¹ Clause 1 of Article 96 of the EL 2005. According to the EL 2005 (Article 78), an SC must have ordinary shares and may have preference shares. Preference shares can be voting preference (*uu dai bieu quyet*), dividend preference (*uu dai co tuc*), redeemable preference (*uu dai hoan lai*), and other preference shares as provided for in the company's constitution. Redeemable and dividend preference shareholders are not entitled to vote at shareholders' meeting. For details, see Articles 81- 83 of the EL 2005.

⁵² See Clause 2 of Article 96 of the EL 2005.

⁵³ Article 102 of the EL 2005.

⁵⁴ Clause 3 of Article 104 of the EL 2005.

⁵⁵ For collecting written votes of shareholders, see Article 105 of the EL 2005.

resolution or its contents break laws or/and the company's constitution.⁵⁶ These rules may help to protect investors and keep the company operating lawfully.

b. The Board of Management (BOM)

The board of management (BOM) with from three to eleven members elected by the SM has an essential role in corporate governance of an SC.⁵⁷ The board shares decision-making power with the SM and appears as a decision-making and management body. The board manages the company and has authority to deal with all matters in the name of the company except for issues that fall within the powers of the SM prescribed in the Law and the company's constitution.⁵⁸ This means that matters of a company not under the powers of the SM can fall to the BOM. In this way, the BOM appears to have a more direct role in operations of the company (daily management) than the supervisory board of Germany's two-tier board structure discussed before. The *Enterprise Law 2005* prescribes a list of statutory matters (some similar to those of the MC of LLCs) that the board can decide or propose to the SM.⁵⁹ Statutory powers of the board can be divided into four major areas: (i) making decisions on management matters; (ii) selecting the CEO and other senior managers; (iii) supervising the daily management, and, (iv) proposing matters that are under power of the SM.

The board can adopt a decision via a meeting, collecting written votes, and other ways provided for by the company's constitution. The board's meetings are convened in an ordinary (at least once every three months) or an extra-ordinary manner as called by the chairperson. The chairperson has to convene an irregular board meeting if there is a request of the BOS, the CEO, at least two board members, or five managers, or other circumstances provided for by the constitution.⁶⁰ If the chairperson fails to convene a requested meeting, he/she is responsible for

⁵⁶ Article 107 of the EL 2005.

⁵⁷ Articles 108, Clause 1 of Article 109 of the EL 2005.

⁵⁸ Article 108 of the EL 2005.

⁵⁹ Clause 2 of Article 108 of the EL 2005.

⁶⁰ Clauses 3, 4, 5 of Article 112 of the EL 2005.

losses that may occur, and the requester has the right to convene a board's meeting. A meeting must be attended by at least three quarters of the members and a board's decision is adopted if it is approved by a majority of participating members. If the numbers of votes for and against are equal, the vote of the chairperson is effective.⁶¹

It is an improvement of the *Enterprise Law 2005* in comparison to the *Enterprise Law 1999* when the 2005 Law provides that the CEO and members of the BOS have the right to attend and discuss, but not to vote, at all meetings of the BOM. This is a significant way for supervisors to monitor the board, and for the CEO to make proposals and obtain opinions of the board in running the company. On the other hand, a board member has the right to request the CEO and other managers to provide information and materials related to operation of the company.⁶² This may assist the board to oversee the daily management.

The head of the BOM is a chairperson (*chu tich hoi dong quan tri*), who - unlike the 1999 Law - is elected by either the SM or the BOM in accordance with the company constitution.⁶³ The chairperson of the board can also be the CEO of the company, unless otherwise provided for by the constitution. A major mandatory function of the chairperson is to chair meetings of the board and the SM, plan the board's operation, and supervise the implementation of the board's decisions.⁶⁴ Nevertheless, the company's constitution can allocate wider powers to the chairperson. Consequently, as other corporate governance bodies, the powers of the chairperson can vary from company to company.

c. Chief Executive Officer (CEO)

An SC must have a CEO selected by the BOM to run daily operations of the company.⁶⁵ Interestingly, unlike the 1999 Law and company law of some other jurisdictions, the *Enterprise Law 2005* provides that the CEO of an SC cannot be concurrently the CEO of another enterprise

⁶¹ Clause 8 of Article 112 of the EL 2005.

⁶² Clause 1 of Article 114 of the EL 2005.

⁶³ See and compare Article 111 of the EL 2005 and Clause 1 of Article 81 of the *Enterprise Law 1999*.

⁶⁴ Clause 2 of Article 111 of the EL 2005.

⁶⁵ Article 116 of the EL 2005.

in order to prevent conflicts of interests.⁶⁶ The CEO has statutory powers to manage and decide on matters regarding daily operations of the company, implement decisions of the BOM, and select managers and officers who are not under the power of the board.⁶⁷ Beside statutory powers prescribed in the Law, the powers of the CEO can be expanded by the company constitution.

d. The Board of Supervisors (BOS)

The *Enterprise Law 2005* provides that a board of supervisors (*ban kiem soat* - BOS) must be established in an SC with more than 11 natural shareholders or more than 50 per cent of the share capital held by one or more organisation shareholder(s).⁶⁸ Unlike Anglo-American jurisdictions, where a supervisory body often belongs to a board of directors, the supervisory body of a Vietnamese SC is a body elected by shareholders and separated from the BOM.⁶⁹

Supervisors elect one of their number as chief of the BOS. Nonetheless, the *Enterprise Law 2005* does not state the powers and duties for this position. More than one half of the BOS members must reside permanently in Vietnam and at least one supervisor must be an accountant or auditor. Interestingly, in order to assure the independence of the BOS, company managers and their relatives cannot become a supervisor of the company.⁷⁰

A major function of the BOS is to supervise the BOM and the CEO in managing and running the company.⁷¹ In particular, the BOS (i) checks the reasonability, reliability, legality, truthfulness and carefulness of the management in directing and managing the company, and, (ii) evaluates business reports, annual financial reports, and management reports of the BOM. The *Enterprise Law 2005* also ensures that supervisors have access to management information. For example, a supervisor has the statutory right to attend meetings of the BOM, and the CEO has to report to

⁶⁶ Clause 2 of Article 116 of the EL 2005.

⁶⁷ For powers, duties, and obligations of the CEO, see Clause 3 of Article 116 of the EL 2005.

⁶⁸ Article 95 of the EL 2005.

⁶⁹ See Clause 2 (c) of Article 96 and Article 121 of the EL 2005.

⁷⁰ For the definition of a manager's relatives, see Clause 1 (b) of Article 122 of the EL 2005.

⁷¹ See Article 123 of the EL 2005.

the BOM and the BOS in the same manner.⁷² Supervisors also have the right to access the company's files and locations where the company managers and employees are working. Further, the BOM, its members, the CEO and other managers have to provide, without delay, full materials for the BOS as requested. In addition to statutory powers provided for by the Law, the company's constitution can also enlarge powers of the BOS. Compared to the 1999 Law, the principles discussed above are an improvement of the *Enterprise Law 2005*.

The *Enterprise Law 2005* has enhanced the supervisory mechanisms in SCs. However, it does not provide for the operation of the BOS as a collective corporate body, and does not specify how this body adopts a decision. Further, the efficiency of a BOS's operations depends upon various factors. A survey conducted by MPDF in 2004 found that 36 per cent of the respondents believe that the BOS "just exists on paper" because it is required by law.⁷³

In short, the mandatory internal governance structure of an SC under the *Enterprise Law 2005* comprises four constituents: the general meeting, a BOM, a CEO, and a BOS with statutory powers and functions respectively. Besides statutory powers prescribed in the Law, the company's constitution can expand, but not decrease, powers of the above corporate governance bodies.

In conclusion, the *Enterprise Law 2005* provides different fixed internal governance structures for company types: (i) multiple-shareholder LLCs; (ii) one shareholder LLCs, and, (iii) shareholding companies. An internal governance structure often consists of four constituents: the general meeting, a BOM, a CEO, and a BOS with statutory powers and functions of each constituent (excluding those of the BOS of multiple-shareholder LLCs, and those of the CEO of one-natural-member LLCs). Further, powers of each corporate governance body of an internal governance structure are mandatory under the *Enterprise Law 2005*, and, can be expanded, but not decreased, by the company's constitution.

⁷² Article 124, Clauses 7 of Article 112 of the EL 2005.

⁷³ Nguyen Van Lan - MPDF, '*Corporate Governance Practice in Vietnam: Initial Research Results (Thuc tien quan tri doanh nghiep o Viet Nam: Mot so ket qua nghien cuu ban dau)*' (Paper presented at the IFC/OECD International Corporate Governance Meeting: Why Corporate Governance Matters for Vietnam, Ha Noi, Vietnam, 6 December, 2004).

4. Vietnamese Board Structures: One-Tier or Two-Tier Board Structure?

Even though internal governance structures of companies in the U.S., Germany, and Vietnam appear to have three layers (the shareholders' meeting, a board of management or a board of directors, and the daily management), the governance structures of Vietnamese companies neither adopted the Anglo-American one-tier board models nor the German two-tier board structures. The Vietnamese board models appear to be somewhere between the two models as a "hybrid" board structure.

First, mandatory supervisory bodies in governance structures under the *Enterprise Law 2005* are different from the U.S. and German corporate governance systems. Internal governance structures of the American one-tier board and the German two-tier board models allocate a supervisory function to a board of directors, or a supervisory board, that has powers to select the daily management whilst there is no separate body to oversee these boards. By contrast, the *Enterprise Law 2005* mandates supervisory functions for a separate corporate body (BOS) elected by shareholders that is independent from the board of management and executives to monitor the board and managers. A BOS has no power to appoint and dismiss managers. This model of supervision appears to be more independent and formalised.

Second, the company law of some Anglo-American jurisdictions, for example, the U.K.'s company law, provides little or no instructions on the structure and composition of a board of directors.⁷⁴ By contrast, the *Enterprise Law 2005* describes the board in detail. While company laws of various common law jurisdictions emphasize duties of individual directors and managers rather than functions and powers of the board as a collective corporate body, the 2005 Law concentrates on mandatory functions and powers of the board and the CEO rather than their duties as known in Anglo-American jurisdictions. Nevertheless, like the board of directors in a U.S. corporation and the supervisory board in a German company, the BOM of a Vietnamese SC also appoints and dismisses the CEO and senior managers.

⁷⁴ ⁷⁴ Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (7th ed, 2003) 293.

Third, German employees have the statutory right to elect their representatives on the supervisory boards of large companies. By contrast, like their American counterparts, Vietnamese employees have no mandatory right to participate in boards of a company. Thus, Vietnamese board structures are neither “pure” unitary board nor “pure” dual board systems as those of the U.S. or Germany discussed above. They appear to stand between the two.

5. Problems that need to be addressed

a. Mandatory Internal Governance Structures for Company Types: A Lack of Flexibility and Efficiency

The first working postulate presumes that “good” corporate governance requires the efficiency and accountability of the board (or internal governance structure). However, internal governance structures of company types under the *Enterprise Law 2005* lack flexibility, efficiency, and accountability.

First, unlike company law of some other jurisdictions such as the U.S., the U.K, and Australia,⁷⁵ the *Enterprise Law 2005* provides different mandatory internal governance structures for company types. Hence, the internal governance structure depends on the legal form of a company. The internal governance structure of an LLC is different from that of an SC; and, the internal governance structure of a multiple-shareholder LLC is also different from that of a single-member LLC. Consequently, when a company changes its legal form (company type), it has to change the internal governance structure prescribed by the Law. This procedure appears costly and inflexible.

Second, unlike the U.S., Germany, and Australia, the mandatory internal governance structure of a Vietnamese company depends on the number of shareholders when setting up a mandatory board of supervisors.⁷⁶ Under the *Enterprise Law 2005*, if an LLC has more than 10 shareholders, or an SC has more than 11 natural shareholders or at least one organisation-shareholder holding more than 50 per cent of the equity capital, they are required to have a BOS.

⁷⁵ For a discussion of board structures in Australia, see generally, Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (2nd ed, 2002) 262-91. For a discussion of board structures in the U.K., see generally, Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (7th ed, 2003) 294-326.

⁷⁶ See Articles 46 and 95 of the EL 2005.

Further, the internal governance structure of a single-member LLC depends on the status of equity investor. If the owner is a natural-person, the company's mandatory internal governance structure is different from that of the owner being an organisation.

Third, compared to those of the U.S. and Germany, internal governance structures of Vietnamese companies are more complex, particularly those of single-member LLCs. Cally Jordan comments that there is no reason for Vietnamese law-makers to differ between single and multiple members LLCs,⁷⁷ and then, to mandate different internal governance structures for these company types. Mandatory governance structures of one-organisation-owned LLCs tend to be designed for companies that are owned by the government, but not for non-state owners. The owner is not set up as a constituent of the internal governance structure of a one-organisation-owned company, but still has many powers as the supreme decision-making body of the company beside a members' council - already being an ownership's representative body. This illustrates an issue of the *Enterprise Law 2005* - a lack of clarity and accountability.

The mandatory internal governance structures under the *Enterprise Law 2005* are even more problematic as they do not allow a company to form an appropriate governance structure, and, in particular, other corporate governance bodies. For instance, an LLC cannot set up a BOM because there is no rule permitting the company to do so, and no provision to allow fixed governance bodies to share their statutory powers.⁷⁸ By contrast, common law jurisdictions often allow shareholders to decide internal governance structures.⁷⁹ Australian Justice Neville Owen states accurately that:

⁷⁷ Center for Information, Library and Research Science (CILRS – *Trung tam thong tin, Thu vien va Nghien cuu khoa hoc*) of the National Assembly and Mekong Private Development Facility (MPDF) of the International Finance Corporation (IFC), *Synthesizing Analyses, Assessments, and Comments on the Unified Enterprise Law and the Common Investment Law (Tong hop cac phan tich, danh gia va binh luan ve: Du an Luat Doanh nghiep thong nhat va Luat Dau tu chung)* (2005) 42.

⁷⁸ For a discussion of this issue, see Phan Huy Hong, 'Commentary and 10 Selected Proposals for the Draft of the (Unified) Enterprise Law (*Binh luan va 10 kien nghi chon loc ve Du thao Luat Doanh nghiep thong nhat*)' (2005) 4 *Legal Sciences Journal (Tap chi Khoa hoc phap ly)* 3, 11-2.

⁷⁹ See also, Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2003) 23(4) *University of Pennsylvania, Journal of International Economic Law* 791-871. Available at the website of SSRN at <http://ssrn.com/abstract=419881>, visited 20 February 2007, at 19.

Any attempt to impose governance systems or structures that are overly prescriptive or specific is fraught with danger. By its very nature corporate governance is not something where 'one size fits all.' ... It would be impracticable and undesirable to attempt to place them all within a single strait-jacket of structures and processes. A degree of flexibility and an acceptance that systems can and should be modified to suit the particular attributes and needs of each company is necessary if the objectives of improved corporate governance are to be achieved.⁸⁰

The American Law Institute identifies two goals of governance structures: managerial flexibility and accountability to shareholders, and proposes flexible rules of governance structures to permit a company to respond rapidly to change in the business or social environment.⁸¹ The flexible regulatory approach of corporate law of common law jurisdictions has proffered the possibility for substantially more experimentation of companies, and appears more flexible and efficient in corporate governance practices.⁸²

In conclusion, mandatory internal governance structures with fixed constituents for each company type under the *Enterprise Law 2005* shows problems, and may result in a lack of flexibility and efficiency of corporate governance practices. They do not support "good" corporate governance in Vietnamese companies.

b. The Legal Representative of Company

A company is an artificial legal person, and must have people to act on its behalf. Unlike the corporation law of Australia and some other countries,⁸³ the *Enterprise Law 2005* requires the company's constitution to decide upon the legal representative (*nguoai dai dien theo phap luat*) of the company. According to Vietnamese law, the legal representative is the only person who has statutory powers to represent the company (such as signing in contracts and documents on behalf

⁸⁰ Report of the HIH Royal Commission (Owen Report) (2003) 105. For a discussion of this issue, see generally, Jean Jacques du Plessis, James McConvill and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2005) 11-2.

⁸¹ See generally, American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Vol.1, 1994) 77-78; see further, *ibid.* Part III.

⁸² See also, Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2003) 23(4) *University of Pennsylvania, Journal of International Economic Law* 791-871. Available at the website of SSRN at <http://ssrn.com/abstract=419881>, visited 20 February 2007, at 29.

⁸³ For a discussion of the authority to act for a company under the company law of Australia and New Zealand, see generally, P. R. Austin and I. M. Ramsay, *Ford's Principles of Corporations Law* (13th ed, 2007) 758-63.

of the company), unless he/she properly delegates this authority to other people.⁸⁴ By contrast, the *Corporations Act 2001* (Cth) of Australia stipulates that ‘any 2 directors of a company that has 2 or more directors, or the director of a proprietary company that has only 1 director, may sign, draw, accept, endorse, or otherwise execute a negotiable instrument.’⁸⁵ Under Australian corporations law, a company can execute a document without using a common seal when it is signed by two directors, or a director and a company secretary, or the sole director of the company.⁸⁶

The *Enterprise Law 2005* provides that the legal representative of an LLC is either the chairperson of the MC or the CEO, and that of an SC is either the chairperson of the BOM or the CEO. These provisions appear to be flexible, but inappropriate. It means that the chairperson of the MC, who is the head of an ownership body and not involved in the daily management, can be the legal representative of an LLC. If so, the powers of the CEO are restricted by the chairperson and the CEO may have no authority to decide on contracts and sign in documents on behalf of the company. This can adversely affect the company’s business and present difficulties in daily management.

c. The Mandatory Supervision

Efficient supervisory mechanisms are important to “good” corporate governance. However, the *Enterprise Law 2005* does not provide any provisions on the formation, operation, powers, and functions of the mandatory BOS of a multiple-shareholder LLC. These matters must be prescribed in the company’s constitution, and, in this way, controlling shareholders may undermine supervisory issues and ignore the participation of minority shareholders. The *Enterprise Law 2005* requires that a BOS must be established when an SC has more than 11 natural shareholders or one (or more) organisation shareholder(s) holding more than 50 per cent of the equity capital.⁸⁷ Thus, it could be assumed that an SC that may have 10 natural shareholders holding 51 per cent and 490 organisation shareholders holding 49 per cent of the

⁸⁴ See Clause 3 of Article 86, Article 91, and Clause 1 of Article 93 of the *Civil Code 2005* (*Bo luật Dân sự*).

⁸⁵ Section 198B(1) of the *Corporations Act 2001* (Cth).

⁸⁶ See further, sub-sections 127(1) and 127(2) of the *Corporations Act 2001* (Cth).

⁸⁷ Article 95 of the EL 2005.

share capital would have no mandatory supervisor. In public companies with a large number of shareholders, mandatory supervisory mechanisms are necessary to protect minority investors. Thus, it is inappropriate that an SC having 500 shareholders has no supervisor. This is an erroneous provision of the 2005 Law.

Conclusions

This paper has explored internal governance (board) structures of Vietnamese companies under the *Enterprise Law 2005*. It has argued that the internal governance structures of Vietnamese companies are neither a “pure” unitary board nor a “pure” dual board structure, but somewhere between the two. Nevertheless, the internal governance structures of companies in the U.S., Germany, and Vietnam appear to have three layers: the shareholders’ meeting, a board of management (or board of directors), and the daily management led by the CEO.

This paper has shown that the 2005 Law stipulates a mandatory internal governance structure for each company type with fixed governance bodies and statutory powers and functions of each body. It has then argued that the powers of each governance body of an internal governance structure can only be expanded, but not lowered, by the company’s constitution. The *Enterprise Law 2005* does not provide provisions that allow (i) a company to set up an appropriate and flexible governance structure and other governance bodies, and, (ii) a decision-making body (such as the BOM) to delegate its statutory powers to others. Further, there are also inappropriate provisions on the legal representative of a company and the mandatory establishment of a supervisory body in SCs. The above shortcomings may result in the shortage of flexibility, accountability, and efficiency of corporate governance practices of Vietnamese companies. Therefore, a further reform of company law as well as corporate governance rules need to be considered by Vietnamese lawmakers.