



New law imposes super-majority rule

Talking Law

New law imposes super-majority rule by Nguyen Dang Viet, BIZCONSULT The now-defunct Law on Enterprises of 1999 set out a simple majority vote rule of 51 per cent for passing the Board of Management (BOM) decisions in limited liability companies or shareholding companies. The new, uniform Law on Enterprises of 2005 increases this threshold to 65 per cent (Articles 52 and 104).

Although intended to better protect the interests of minority shareholders, this super-majority rule is expected to make it harder for the BOM to make decisions and may produce deadlock in some companies.

Article 52 of the 2005 Law on Enterprises stipulates that the BOM may pass resolutions if receiving the vote of BOM members representing at least 65 per cent capital contribution of the attendees at the BOM meeting. The super-majority requirement increases to 75 per cent when selling company assets equal to 50 per cent or more of the total company assets, amending the company's charter, or reorganising or dissolving the company.

Suppose that a limited liability company has two members, one owning 51 per cent of capital and the other holding 49 per cent. Under the new Law on Enterprises, the board can only make a decision if both members unanimously voted in favour. This would be the case in any company of only two members, neither of whom owns more than a 65 per cent share. This gives the minority member enormous veto power.

Looking at laws of neighboring nations like China, India, Indonesia, Malaysia, Singapore, and South Korea, they all apply a simple majority vote rule of 51 per cent to most cases. Those jurisdictions only require higher voting percentages in certain cases, such as removal of directors (Hong Kong, 75 per cent; South Korea, 67 per cent; and Thailand, 75 per cent); authorising and issuing shares (India, Singapore and Thailand, 75 per cent; Taiwan, 67 per cent); and waiver of pre-emptive rights (India, 75 per cent).

Only for important matters, such as modifications of articles of incorporation (or charter), mergers and acquisitions, disposals, takeovers, and changes to the company's business objectives, do laws of these nations impose a super-majority rule, typically of 75 per cent.

The simple 51 per cent majority vote is widely applied in the US and European countries, to corporations of all sizes. Simple majority is consistently regarded by scholars as the best method for elections and meetings.

It's difficult to ascertain a consistent rationale for Viet Nam's deviation from international practice. On one hand, the super-majority rule could be seen as favourable to foreign investors who typically hold a minority stake in joint ventures with Vietnamese businesses.

On the other hand, the super-majority rule can be seen as favourable to the State at a time when many State-owned enterprises are being equitised. In many of these equitised enterprises, converted into joint stock companies, the State continues to own a sizeable minority interest. The super-majority rule gives the company's former State managers a veto power against a majority of the company's new shareholders, many of whom could be foreign investors.

To be consistent with international practice, however, legislators should discard the super-majority rule in the law. The National Assembly should make an amendment to the 2005 Law on Enterprises to facilitate corporate governance in Viet Nam.

Pending (or barring) an amendment to the new law, the Government, at the very least, should allow by means of a guiding decree or regulation that company members or shareholders may agree and state in the charter a lower majority threshold for passing BOM decisions. The wording of the 2005 Law on Enterprises (Articles 52 and 104) opens a narrow possibility for company charters to set a lower threshold, which means the super-majority rule in the law could simply become a default rule in cases where the company charter is silent on the issue.

It is important, however, that the Government's forthcoming decree guiding implementation of the Law on Enterprises specifically uphold the right of companies' to dispense with the super-majority rule in their charters. Without such a regulation, there's a high possibility that a lower majority rule stated in a proposed company charter would be rejected by business registrars.

Lawmakers also need to note how to deal with the joint ventures. The uniform Law on Enterprises allows foreign-invested enterprises to remain unchanged or re-register themselves under the new law. If a joint venture keeps a different voting regime in its charter, would the new Law on Enterprises prevail over the pre-existing joint venture charter?

Meanwhile, it's recommended that new enterprises specifically stipulate in their articles of incorporation the issues on which unanimous or super-majority votes are required. This would leave the door open for the BOM to make decisions by a simple majority vote on other issues.

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