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PROTECTION OF MINORITY SHAREHOLDERS UNDER THE MERGER LAW IN VIETNAM

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PROTECTION OF MINORITY SHAREHOLDERS UNDER THE MERGER LAW IN VIETNAM

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ABSTRACT

Minority shareholders are the most vulnerable group amongst stakeholders in merger transactions and thus, need to be protected. Protection of minority shareholders has been deemed as one of effective ways to promote a robust stock market since potential investors are more willing to take risks in a market where they are well-protected. The stronger protections for the interests of minority shareholders, the more money people invest in the stock market. Statutory provisions for the protection of minority shareholders in general and those in merger transactions in particular are, therefore, of importance. This paper examines the statutory provisions of Vietnam governing merger transactions in comparison with those of the US and Japan and draws out some possible suggestions for the former.

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I. INTRODUCTION

In the last two decades, the number of mergers and acquisitions (M&A) transactions in Vietnam have been dramatically increased. It is reported that, the M&A market experienced a boom in 2017 with total M&A deals' value amounting to 10.2 billion USD.[1] In such a fast market expansion, shareholders, especially the minority ones of the constituent companies are the most vulnerable group amongst stakeholders to M&A transactions. They are company's owners having direct ownership interests in their company but do not have decision making power properly.

This paper argues that the law governing merger transactions in Vietnam cannot protect minority shareholders' lawful rights and interests in constituent companies to a merger, which might cause potential investors refraining from investing their money into companies' shares in the future while the Vietnamese courts might have to try hard to cope with accelerating rate of merger litigations in the next decade. The scope of the paper is confined to the legal rules governing mergers in their strict senses. It does not cover those governing corporate acquisitions, consolidations, splits, and other reorganization transactions. In practice, the number of acquisition deals outweigh that of mergers[2], but it seems that so far, only in the latter transactions, minority shareholders of the constituent companies complain seriously about being unfairly treated. Other ways of company reorganization have not been very widely used in Vietnam. The paper does not cover mergers whose parties' domiciles being in different countries rather focusing on the pure domestic merger transactions only.

The *second section* of this paper gives a quick look at the historical development of the Vietnam M&A market to date in order to demonstrate the urgent need for complete laws and regulation governing this newly emerging market. The *third section* focuses on a controversial merger transaction being effected between the two Vietnamese companies in 2017. The *fourth section* discusses weaknesses in statutory provisions under the current Vietnamese law that govern merger transactions. The *fifth section* discusses the US and Japan experience to draw out the possible suggestions for Vietnam. The US' experience is chosen because of the US being an original place where the very first waves of M&A transactions were observed, and several big waves followed to date; therefore the US' M&A law having become a major topic for world-wide legal scholars' discussions. So far, it has served as a model for so many countries around the world in shaping their M&A law. The Japan's experience is worth studying because as an economic power in the Asia, M&A between Japanese companies as well as between them and foreign companies is not rare phenomenon,[3] so Japanese law

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[1] See 'VN's MA Market declines in 2018', *Vietnam News* (25 Jul. 2018) <https://vietnamnews.vn/economy/462450/vns-ma-market-declines-in-2018.html> accessed 21 September 2018.

[2] To date, there has not been a separate statistics of total number of merger deals, but only acquisition deals (for concrete statistics on M&A deals, see Section II of this paper). However, in practice, a number of merger transactions have successfully been effectuated, such as those between Ha Tien 2 & Ha Tien 1; KMF & KMR/NKD; and KIDO & KDC. For more information, see: 'Two Issues Arising from M&A Activities on Securities Market' (Hai van de voi hoat dong M&A tren TTCK), *Người Đồng Hành* (27 May 2010) <https://ndh.vn/co-phieu/hai-van-e-voi-hoat-ong-manda-tren-ttck-1002868.html> accessed 25 September 2018.

[3] It is reported that M&A have sharply increased in Japan, & M&A transactions reached its peak in 2006 with almost 2800 deals and in 2013 that figure was over 2000 deals. For more information, see Ralf Bebenroth, *International Business Merger and Acquisitions in Japan*, (Springer Japan 2015) 173. It is also reported that more than 6 years after the massive earthquake and resulting tsunami as well as nuclear power plant accident, Japan is still struggling to rebuild its economy but business activities in other parts of the country has returned to normal and Japanese M&A activity in the following years has been active both inbound and outbound. For further

makers have strived hard to keep improving the laws governing M&A transactions. Furthermore, both Japan and Vietnam situate in the Asia, their social and legal cultures, thus, might resemble one another and, therefore, promise high possibility for Vietnam to learn effectively from Japanese experience in strengthening her merger law in general and shareholders protection rules in particular. The *last section* suggests how and what Vietnamese law-makers should learn from experience of the above-mentioned two world – ranking economic powers for the best protection of minority shareholders in the Vietnam's M&A market. To reach that end, a comparative law approach will be employed where appropriate, amongst the relevant statutory provisions made by the Japanese, the American, and the Vietnamese law-makers.

II. HISTORICAL DEVELOPMENT OF THE VIETNAMESE M&A MARKET IN BRIEF

On a global scale, M&A has been deemed as an effective way to expand companies' business[4] and has rather long history, spreading throughout more than a century from the late 19th century to date. In literatures, the history of M&A is often discussed evolving their seven waves occurring in seven different periods of time. The first five waves occurred in the US throughout the end of the 19th century to the new millennium. The first wave started in 1897 and ended in 1904 whose peak run from 1898 to 1902 and its life is half of the second wave's one, which began in 1916 and ended in 1929, and being the longest one. Compared with the first two waves, the third one seemed to be much shorter: initiated in 1965 and ended in 1969, while the fourth, the fifth, and the sixth waves' length are comparable to that of the first one, running from 1981 to 1989; 1992 to 2000; and 2001 to 2008, respectively. Furthermore, while the first six waves have widely been discussed, the last wave, from 2014 to 2017, is rarely mentioned in literature for being too recent phenomenon, and its closing date in some materials even remains open.[5] It is worth noting that the starting and closing yeas for those M&A waves are disputed in literature, especially the difference between the starting year of the first wave, according to legal scholars, amount to ten years.[6] However, generally speaking, most materials agree that the first wave was spreading from the last decade of 19th century to the first decade of 20th century.

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information, see Yuto Matsumura, Hideaki Roy Umetsu, Mori Hamada & Matsumoto, 'Japan', in Michael E Hatchard & Scott V Simpson, *Merger and Acquisitions* (7th Ed, Global Legal Insights 2018) 150 <http://www.mhmjapan.com/content/files/00031602/2018_MA7-Japan.pdf> accessed 21 October 2018.

[4] See, for example Patrick A Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (3rd edn, John Wiley & Sons 2002) 8.

[5] For the discussion of the first five waves, see for example, Gaughan (n.4) 23-54; Em and David Faulkner, Satu Teerikangas, and Rechard J. Joseph, *The Handbook of Mergers and Acquisitions* (Oxford Scholarship Online September 2012) 21-25; for the discussion of the first six waves, see Claire A Hill, Brian J M Quinn, Steven D Solomon, *Mergers and Acquisitions: Law, Theory, and Practice*, (West Academic Publishing 2016) 4-15; the 7th wave is mentioned in the recent brochure: Marcos Cordeiro, *The seventh M&A Wave*, (Camaya Partners September 2014) <https://camayapartners.com/wp-content/uploads/2016/06/The-seventh-MA-wave.pdf> accessed 21 September 2018.

[6] These two American legal scholars are William J Carney (in *Mergers and Acquisitions: Cases and Materials* [(Foundation Press, 2000) 2]) and Gaughan (n.4) 23. Carney points out, the first wave initiated in 1887 while according to Gaughan, it was in 1897. Other authors mentioned in n.3 are disputed on the starting and ending dates of the sixth one (some say from 2001-2008; others say 2008-2010). Marbos Cordeiro merely points out the starting year for the seventh wave is 2014, then Partrick Foulis says it ended in 2017. See "Business" (in *The Economist* at www.theworldin.com) accessed 21 September 2018.

In Vietnam, M&A activities appeared rather late compared with those in other countries around the world with the very first transactions being completed in 1990s.[7] The earliest M&A deals were said to be effected in 1995, when Unilever acquired P/S Toothpaste; and Colgate Palmolive's took over of Dalan Toothpaste. It is reported that in both cases, the foreign parties initially made a joint venture with a Vietnamese counterpart, and later, the former employed a new technology in production which caused the Vietnamese party facing two options of either subscribing further capital to the joint venture, or "being squeezed out" to give way for the foreign party running the whole business.[8]

Two years later, from 1997 to 2004, the M&A wave in banking sector arrived, when rural banks being merged into urban ones to implement the governmental policy of restructuring banking system.[9] However, a clear trend of M&A has merely been witnessed in Vietnam since the country's accession to the WTO in 2007. It is reported that, the M&A market volume and value had gradually increased every year from 2007 to 2010, being 108 deals with total value of 1.72 trillion USD in 2007; 146 deals with total value of 1.1 trillion USD in 2008; 295 deals with total value of 1.14 trillion USD in 2009; and 345 deals with total value of 1.75 trillion USD in 2010.[10] In 2017, as pointed out earlier, the market value reached its peak of more than 10 billion USD.

Vietnam has recently become one of the favorable M&A destinations for foreign investors, especially those from Japan, South Korea, and Singapore.[11] Key sectors becoming acquired targets by foreign investors include: real estate, food and beverage, retail, and manufacturing. Japan has been among the most active in M&A in real estate, retail, and banking sector. Some typical transactions that deserve to mention include: (1) Unicharm acquired 95% shares of Diana Vietnam and has run the business in Vietnam since November 25th 2011;[12] (2) Hankyu Realty and Nishi-Nippon Railroad acquired 50% of shares in APSL-PLB-Nam Long Co. Ltd in order to invest in Fuji Residence, a real estate project in Ho Chi Minh City.[13] Japanese financial institutions also show their interest in banking business in Vietnam by their stock acquisition of the two largest equitized-state-owned commercial

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[7] See, Hoang Q Vuong, Dung T Tran and Ha T C Nguyen, *Merger and Acquisitions in Vietnam's Emerging Market Economy, 1990-2009* (Centre Emile Bernheim, Research Institute in Management Sciences. Solvay Brussel School of Economics and Management) 6 <https://dipot.ulb.ac.be/ RePEc_sol_wpaper_09-045.pdf > accessed 5 February 2018. The authors while posing this observation do not invoke any example of the first M&A transaction. It is hard to find in literatures either which one is exactly the first M&A deal in Vietnam carried out in 1990s although quite few reports pointed out the same starting point for the first M&A in Vietnam.

[8] See Bao Linh, *How Unilever, Colgate "swallowed" Vietnamese Toothpastes* <https://vtc.vn/unilever-colgate-nuot-kem-danh-rang-viet-the-nao-d101962.html> accessed 22 September 2018.

[9] See Lan Thanh, *How are Rural Banks now?* <http://ndh.vn/nhung-ngan-hang-nong-thon-thoi-ay-gio-ra-sao--20170703101352126p4c149.news> accessed 22 September 2018.

[10] See Le Duy, '*The whole picture of the Global M&A and M&A trend in Vientam in the coming time*' (Toàn cảnh hoạt động M&A toàn cầu và xu hướng hoạt động M&A tại Việt Nam trong thời gian tới (22 June 2012) <https://thegioiluat.vn/bai-viet-hoc-thuat/TOAN-CANH-HOAT-DONG-MA-TOAN-CAU-VA-XU-HUONG-HOAT-DONG-MA-TAI-VIET-NAM-TRONG-THOI-GIAN-TOI-6997/> accessed 25 September 2018.

[11] See, Le Net, 'Mergers and Acquisitions in Vietnam – Pitfalls and Resolutions', *Financier Worldwide* (November 2014) <https://www.financierworldwide.com/mergers-and-acquisitions-in-vietnam-pitfalls-and-resolutions#.X-SQhy2B3v0> accessed 22 September 2018.

[12] See Thanh Thuong, 'Diana sold 95% shares of stock for Unicharm' (Diana ban 95% co phan cho Tap doan Unicharm), <http://ibsc.vn/home/Tin-tuc/Chuyen-muc,Tin-tuc,Tin-trong-nuoc/Diana-ban-95-co-phan-cho-tap-doan-Unicharm/> accessed 24 September 2018.

[13] See 'The Mergers & Acquisitions Review – Edition 11: Vietnam', *The Law Review* (Oct. 2017) <https://thelawreviews.co.uk/edition/the-mergers-acquistions-review-edition-11> accessed 23 September 2018.

banks in Vietnam, when Mizuho spending up to 562 million USD to become a 15% shareholder of VietcomBank in 2011[14]; and Mitsubishi UFJ paying ups to 743 millions USD to become a 20% shareholder of VietinBank in 2012.[15] These two banks, since being equitized to date, the government remains their controlling shareholder, with equity holding of 64.46% in VietinBank and of 77.11% in VietcomBank[16].

However, in the last two years, a reversed situation has been witnessed when the acquirers in M&A deals have no longer been confined within foreign investors but there have been a number of transactions where Vietnamese companies acquired foreign ones. Amongst such deals, those conducted by VinFast and FPT (currently, being the two Vietnamese economic giants) are the typical ones in 2017-2018. VinFast, a newly established automobile manufacturer (a subsidiary of Vingroup, a large Vietnamese multi-sectoral business group), acquired the whole manufacturing and distributing business of General Motors in Vietnam. While FPT (a Vietnamese leading information technology and telecommunication group) acquired Intellinet Consulting. Both of the acquired companies in the above-mentioned deals are the US ones (see table 1 below). If one merely looks at the statistic indicating the progress of M&A market in Vietnam, one might think that this new trend reflects the fast growth of Vietnam companies recently. However, if one further investigates in literature, then one might find that it is not always the case since it is reported that recently, US companies have employed tax-avoiding merger to lower their tax bill,[17] although this statement does not necessary imply that the two US companies, in the two above-mentioned cases, entered the merger transaction for that purpose.

Recently, “Bao Dau tu”, an online public media of the Ministry of Planning and Investment released a list of typical M&A deals in Vietnam in 2017-2018, according to which, apart from the two above-mentioned Vietnamese acquiring companies, others acquirers from Thailand, Japan and South Korea successfully effected remarkable deals in the said period of time (see table 1).

[14] See ‘Mizuho – VietcomBank: new Appearance in Cooperation’ (Mizuho – VietcomBank: Dien mao moi trong hop tac) *Tap Chi Tai Chinh* <http://tapchitaichinh.vn/tai-chinh-kinh-doanh/tai-chinh-doanh-nghiep/mizuho-vietcombank-dien-mao-moi-trong-hop-tac-52848.html> accessed 24 September 2018.

[15] See Phi Nga, ‘Comprehensive cooporation between VietinBank and Bank of Tokyo-Mitsubishi UFJ’ (Hợp tác toàn diện giữa VietinBank và Bank of Tokyo-Mitsubishi UFJ) <https://www.vietinbank.vn/web/home/vn/news/12/12/Hop-tac-toan-dien-giua-VietinBank-va-Bank-of-Tokyo-Mitsibishi-UFJ.html&p=1>, accessed 24 September 2018.

[16] See: ‘Shareholder Struture / Majority Shareholders’ (Co cau co dong / Co dong lon) <http://investor.vietinbank.vn/majorsharesholders.aspx>; see also ‘Investors / Shareholder Structure’ (Nha dau tu / Co cau co dong) <https://portal.vietcombank.com.vn/Investors/Pages/chi-tiet-nha-dau-tu.aspx?ItemID=2291&devicechannel=default> accessed 24 September 2018.

[17] See Carolyn Y. Johnson, ‘Tax-avoiding mergers allows US companies to lower their initial tax bill by 45 million USD, CBO says’ <https://www.washingtonpost.com/news/wonk/wp/2017/09/18/tax-avoiding-mergers-allowed-u-s-companies-to-lower-their-initial-tax-bill-by-45-million-cbo-says/> accessed 2 October 2018.

TABLE1. TYPICAL DEALS IN VIETNAM 2017 – 2018: ACQUISITIONS[18]

	Parties to the Deals	Transactions
1	Thaibev - Sabeco	ThaiBev acquired 53% shares of Saigon Beer – Alcohol -Beverage Joint stock Company (SABECO) at a price of 4.8 billion USD, which made the biggest M&A deal in 2017 and in Vientam M&A history.
2	Vinfast - GM Vietnam	In June 2018, VinFast and General Motors (GM) signed an agreement over a new strategic cooperation in Vietnam's Market. Under the agreement, VinFast acquire manufacturing and distributing business of GM in Vietnam.
3	FPT - Intellinet Consulting	On 12th July 2017, FPT declared the acquisition of 90% shares of Intellinet Consulting – one of the information technology consulting firms that have fastest growth in the US, with total value of the deal is 30 million USD.
4	Sojitz - Saigon Paper	Sojitz Group (Japan) declare to acquire Saigon Paper in order to reply to an increasingly demand on paper, hard covers, and paper towers in South East Asia region. The deal's value is 91.2 Billion USD
5	The Nawaplastic Industries - SCIC (Binh Minh Plastic)	Nawaplastic belongs to SCG Thailand acquired shares to increase ownership ratio in Binh Minh Plastic, a leading provider of plastic products in Vietnam.
6	Shinhan Card - Prudential Financial Company	In January 2018, Shinhan (a South Korean Financial Group), through Shinhan Card, reached an agreement to buy wholly Vietnam Prudential Financial Company at an intended price of 151 million USD.
7	Stripe Vietnam - NEM Fashion	Stripe International (Japanese group) pronounces their acquisition of Nem, a private fashion company, as part of the group's decision to join in Vietnam market.
8	Kyoei Vietnam -Viet Y Steel	In 2018, Kyoei Steel completed the acquisition of a controlling block of shares of Viet Y Steel with the deal's estimated value at 51 million USD.
9	Lotte - Techcom Finance	Lotte Card announces its acquisition of Techcom Finance at a price of 70 million USD, with a view to focus on the issuance of credit cards, consumer landing and installment financing.
10	Mirae Asset Life contribute equity to Prevoir Vietnam	With an investment of 52 million USD into Prevoir, Mirae Asset Prevoir is formed , which is a remarkable M&A deal in insurance sector last year.

All the figures and practically successful transactions show that a full- fledged M&A market has really come into existence in Vietnam for more than a decade. And such a market requires comprehensive legal rules to ensure that all stakeholders, including minority shareholders are well protected, which in turn, will promote a vibrant market in Vietnam. However, in practice, the current legal rules have exposed their weaknesses when minority shareholders of constituent companies seem to be entirely excluded from the decision making process before the two companies entering M&A transaction. The following case well illustrates such an observation.

[18] The list was released by Investment News, written in Vietnamese, translated into English by the author of this paper <https://baodautu.vn/danh-sach-cac-thuong-vu-va-nha-tu-van-ma-tieu-bieu-2017-2018-va-thap-ky-2009---2018-d86112.html> accessed 24 September 2018.

III. CASE STUDY: a merger between Mediplast and Vinamed[19]

The most typical merger transaction effectuated in 2017 is the one between Mediplast (Medical Plastic Join stock Company: Cong ty co phan Nhua Y te), and VINAMED (General Corporation for Vietnam Medical Equipment: Tong cong ty thiet bi y te Vietnam), where minority shareholders' right and interest were seriously impinged upon. Vinamed formally obtained an Enterprise Registration Certificate on September 6th 2017[20] by the Hanoi Investment and Planning Department.

Vinamed was a state-owned enterprise operating under the administration of the Ministry of Health (MoH), then being equitized under Decision No. 2265/QD-TTg dated December 15th 2015 (issued by the Prime Minister). Since July 12th 2016, it has formally become a joint stock company with 20% of its stated capital being held by the state, represented by the MoH, which later, transferred the state-ownership-representative to the State Capital Investment Corporation (SCIC). Before equitization, Vinamed had been a state representative holding the state investment in some joint stock companies, one of which was Mediplast.[21]

Mediplast used to be a state-owned enterprise, being equitized in 2006, with registered capital of 16.5 trillion VND, whose 48% was held by the state shareholder, represented by Vinamed. In a Mediplast's extraordinary shareholders meeting held in October 2016, Pham Quang Huy, the president of the management board announced that Vinamed further acquired shares from two individual shareholders of Mediplast which raised its equity ownership in Mediplast up to 69.32%. However, by the end of May 2017, such figure had declined to 23.86% because Vinamed silently sold about 45.5% of its equity ownership in Mediplast.[22] This was allegedly done on purpose in connection with the merger[23] because under Art.162.3 of the 2014 EL, as a related party in a merger transaction, Vinamed is not entitled to vote the transaction or contract, that brought to the shareholders' meeting for approval, whose value reaches 35% or a higher figure of the total company's assets). The finalized share exchange ratio is 3 Vinamed shares to 1 Mediplast share. It is worth noting that at that time Mr. Pham Quang Huy was also the president of the management board of Vinamed.[24]

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[19] This case has not brought into court yet, rather, minority shareholders merely filed their petition to the Ministry of Finance and then to the Vice Prime Minister Truong Hoa Binh. This case has been a controversial issue on public media. All relevant information about this case in this paper comes from the following online news: Ha Phuong – Long Nguyen, 'Ministry of Finance "taking part" in the merger between Mediplast and VINAMED' (3rd episode) ; Ha Phuong, 'Why are Mediplast Shareholders Crying when Merger Transaction Occurred' (Vi sao co dong nhua Mediplast 'khoc rong' khi sap nhap) (2nd episode); Ngoc Nhi, 'Reasons for Medical Plastic Mediplast merged into Vinamed?'. All the above-three news are < https://enternews.vn/vi-sao-co-dong-nhua-mediplast-khoc-rong-khi-sap-nhap-112974.html>; see also: Thong Chi 'Mediplast merged into Vinamed: Board of Management Ignored Minority Shareholders' Voice', < https://laodong.vn/kinh-te/sap-nhap-mediplast-vao-vinamed-hoi-dong-quan-tri-bo-qua-y-kien-co-dong-nho-520979.ldo>; and The Kha, 'The Ministry of Health reports to the Government about the merger between Mediplast and Vinamed' <https://dantri.com.vn/xa-hoi/bo-y-te-bao-cao-chinh-phu-lum-xum-sap-nhap-mediplast-vinamed-20171205110637794.htm> accessed 1 October 2018.

[20] See Ha Thuong, 'Mediplast formally merged into Vinamed', <https://suckhoedoisong.vn/chinh-thuc-sap-nhap-mediplast-vao-vinamed-n136277.html> accessed 1 October 2018.

[21] The Kha (n.19).

[22] See Thy Tho, "Mediplast's Shareholders worrying for State's Equity Ownership 'Evaporated'", <https://nld.com.vn/kinh-te/co-dong-mediplast-lo-von-nha-nuoc-boc-hoi-20171019211233742.htm> accessed 1 September 2018.

[23] See See Minh Trang, "Who stands behind the Mediplast-Vinamed Merger?" <https://nhadautu.vn/ai-dung-sau-thuong-vu-sap-nhap-mediplast--vinamed-d3658.html> accessed 20 October 2018.

[24] Minh Trang (n.23). According to this news, Mr. Pham Quang Huy, in 2016, was appointed MB president of Vietnam-Japan Medical Equipment Shareholding Company (JVC: cong ty co phan Thiet bi Y te Viet Nhat).

> Mediplast has produced medical equipment such as: syringes, infusion set, and etc… Its products have been widely used in almost every hospital in Vietnam and also in expanded program on immunization. Mediplast is also the sole company in Vietnam that has been a contracting party with a Japanese partner for plastic sex toys processing. Those contracts have generated a huge profit and promise a potential development future for Mediplast. It is reported that Mediplast's net profits in the last three years approximately equal to 100% of its registered capital. Apart from those values, Mediplast's assets even extend to some valuable tracts of land in one of the four original urban districts of Hanoi and in Bacninh.[25] In contrast, Vinamed has registered capital 6 times bigger than that of Mediplast, but for years, its net profits have remained too small compared to those of Mediplast.[26]

The merging proposal, contract and the charter of the post-transaction surviving company were all put into a discussion at both companies' shareholders meeting. At the Mediplast's shareholders meeting, the percentage of voting for the merger mounted to 81.4% of voting shares held by shareholders being present at the meeting (while such a number in Vinamed's shareholders meeting was 79.55%).[27] However, according to many Mediplast's shareholders, the merger did not get approval from minority shareholders because of the total contrast between the two companies' business performance results. Despite of a strong objection from the Mediplast's shareholders, the merger between Mediplast and Vinamed did occur, which resulted in the lamenting of the former's shareholders for the two following more concrete reasons.[28]

Firstly, the way of appraising companies' assets in order to determine share exchange ratio as well as the institutional evaluators for such appraisals remained unclear even at the date the shareholders meeting being held. However, the Mediplast president of management board maintains that before effecting the merger transaction, a merger proposal was brought into the shareholders' meeting, according to which, the share value of individual companies were defined by using arithmetic average of the four results coming from four calculating methods: (1) accounting book method; (2) asset method; (3) discounting of prospective profit line method; and (4) comparative method between the market value and the accounting book value. As a result, Vinamed share is valued at 11,512 VND while that of Mediplast is 34,946 VND, accordingly the share exchange ratio of Vinamed share for Mediplast shares is 1:3.

Secondly, the appraisal of company's shares ignored many Mediplast's tangible and intangible assets (such as: Mediplast's trade mark, know-how, machinery, and advantages of land-use-rights in Hanoi and Bacninh). Although Mediplast's registered capital is merely at 16.5 trillion VND, its share capital goes up to 54.8 trillion VND while Vinamed's stated capital is 88 trillion VND but share capital is merely 88.5 trillion VND… In 2016, Mediplast's turnover and net-profit are 108.5 trillion VND and 15.7 trillion VND, respectively. Its net-profit of the two preceding years are even higher at 18.1 trillion VND in 2014 and 19.8 trillion VND in 2015… Therefore, Mediplast's shareholders maintain that the share exchange ratio of 3 Vinamed shares for 1 Mediplast share causes substantial loss for them; and

[25] Ha Phuong; Ha Phuong & Long Nguyen (n.19).
[26] Thong Chi (n.19).
[27] The Kha (n.19).
[28] Ha Phuong; Thong Chi (n.19).

that without the merger, Mediplast would continue to be a “cash printer” for its shareholders with a potential turnover in 2017 would mount to 125.5 trillion VND, as well as its profit would approximately be equal to its registered capital.

A group of ten Mediplast’s shareholders (holding less than 5% Mediplast registered capital), therefore, filed their letter of claim on the above-mention issues to the Ministry of Finance (MoF). The MoF issued public letter No. 8282/BTC-TCDN requested the MoH to investigate and reply the Mediplast shareholders’ letter of claim. According to the MoH, on October 10th 2017, the MoH signed a minute to transfer the power of the state-ownership representative in Vinamed from the MoH to the SCIC and to withdraw all the state equity ownership in Vinamed. The MoH, therefore, would not be responsible for answering to the letter of claim from the former Mediplast shareholders because it is the responsibility of the state-ownership representative for capital managing at Vinamed, which used to be the SCIC but due to the withdrawal of all state-owned capital in the company, the duty to deal with the claim therefore passes to Vinamed; that the MoH already transferred all the documents of claim to Vinamed and Vinamed has to be formally responsible for handling the letter of claim file by the former Mediplast shareholders.[29]

In response to the above-mention claim, the general director of Vinamed, Trinh Van Mao, maintains that the merger between Mediplast and Vinamed were done inconformity with Article 195 Sub-article 2 of the Enterprises Law 2014: the two constituent companies prepared a merger agreement, a draft of the post-merger Vinamed charter, which were approved by majority shareholders at the two constituents companies’ shareholder meetings... He further argues that this group of shareholders (the claimants) should be subject to the Enterprise Law of 2014 to sue Vinamed to the court rather than sending their letter of claim with many distorted allegations that have conversely affected Vinamed’s image, which might in turn cause unwanted consequences to business performance of the company… By that argument, he even requests the government to employ suitable measures to protect the company and its employees.[30]

What can be learnt from the above-mentioned case is that all procedures for the merging transaction have been done inconformity with the law but the minority shareholders have remained unprotected. This suggested that currently, relevant statutory provisions are not adequately adopted to protect minority shareholders of the constituent companies in merger transactions.

IV. CURRENT LAW OF VIETNAM

1. Principal provisions under the current laws and regulations

At present, laws and regulations governing merger transactions in Vietnam include: the Civil Code of 2015 (hereinafter, the CC 2015); the Enterprise Law of 2014 (hereinafter, the EL 2014); the Securities Law of 2006 as amended in 2010 (hereinafter, the SL 2006-2010); Competition Law of

[29] See Nguyen Ha, ‘Around the merger between Mediplast and Vinamed: what the MoH says’ <https://baodautu.vn/bo-y-te-phan-hoi-ve-viec-sap-nhap-mediplast-vao-vinamed-d72806.html> accessed 6 October 2018.

[30] See Nguyen Ha, ‘Around the merger between Vinamed and Mediplast: suing to the court for deciding right or wrong’ <https://hplogistics.com.vn/xung-quanh-vu-sap-nhap-giua-vinamed-va-mediplast-dung-sai-can-khoi-kien-ra-toa/> accessed 6 October 2018.

2018 (hereinafter, the CL 2018)[31]; Decree No.78/2015ND-CP on Enterprise Registration, as amended by Decree No.108/2018/ND-CP; Decree No.126/2017/ND-CP on Conversion of State-owned Enterprises (SOEs) and Single Member Limited Liability Companies having 100% registered capital invested by a SOE; Decree 58/2012/ND-CP on Guiding the implementation of SL 2006-2010, as amended by Decree No.60/2015/ND-CP (hereinafter, Decree 58/2012) (hereinafter, Decree 60/2015); and Decree No. 35/2020/ND-CP on Guiding the implementation of CL 2018.

For mergers between credit institutions, parties have to be subject to further legislation, namely: Credit Institution Law of 2010 as amended in 2017; and Circular No.36/2015/TT-NHNN on Restructuring of Credits Institutions.

However, for the purpose of examining the above-mentioned case, this paper mainly focuses on those provisions of the EL 2014 and where relevant, provisions of the CC 2015, and of the CL 2018 will also be considered.

1.1. Provisions on parties to a merger being more flexible than those under the old law

The CC 2015 reserves one provision, Article 89 stipulating the mergers between legal entities. Accordingly, a legal entity (merged legal entity) can merge into another legal entity (merging legal entity). After the completion of the transaction, the merged legal entity ceases its existence; it rights, civil duties shall be transferred into the merging legal entity.

The purview of this provision seems to be broaden for recognizing the mergers between "legal entities" regardless of their organizational structures, whereas in the past, the CC 2005 (Art.95) merely recognized the mergers between legal entities of the same species.

Such a provision of the CC 2015 has been further developed by Article 195, the EL 2014. It reads:

> One or a number of companies [hereinafter, merged company (companies)] can merge into another company (hereinafter, merging company) by transferring all assets, rights, liabilities and other lawful interests to merging company, and ceases its existence.

Similar to the purview of Article 89 of the 2015 CC, that of Article 195 of the EL 2014 is also broaden than its counterpart (Art.153) laid down in the EL 2005, where only companies of the same species could merge into each other. For example, shareholding companies could merge into each other; and limited liability companies could merge into each other, but the former could not merge into the latter and vice versa. Such a limit is now abolished.

1.2. Provisions on Merging Procedure almost remaining intact compared with those in the past

Article 195.2 provides for the merger procedure, which consists of three steps.

Firstly, constituents companies prepare the merger agreement and the drafting charter of merging company. The agreement shall state: the name, domicile of the head office of the constituent

[31] The merger between Mediplast and Vinamed occurred in 2017, the applied law should be the Competition Law of 2004 because the CL 2018 has merely come into force since 1st July 2019). However, the relevant statutory provision in the two laws remain the same, therefore, the CL 2018 shall be discussed.

companies; merging procedures and conditions; employees usage plan; ways, procedures, terms and conditions for conversion of assets, subscribed capital, shares, and bonds of the merged company into those of the merging company; timespan for effectuating the merger transaction.

Secondly, members, owners, or shareholders of the constituent companies shall approve the merger agreement, the drafting charter of the merging company, and accomplish the enterprise registration for the merging company. The merger agreement must be sent to all company's creditors and announced to the employees within 15 days form the date of approval.

Thirdly, after the completion of enterprise registration, the merged company ceases its existence; and the merging company is entitled to enjoy all legal rights and interests, but being liable for all unpaid debts, employment contracts and other financial duties of the merged company.

1.3. Provisions on anti-trust totally remaining unchanged compared with those under the old law

Under Article 195.3, the EL 2014, in a merger where merging company having market share amounting from 30 to 50 percent of the relevant market, then the legal representative of the company is responsible to give a notice to the competition authority before the merger being effectuated unless otherwise provided for under the Competition Law. It further prohibits mergers in which merging company's market share exceeds 50 percent of the relevant market unless otherwise provided by the Competition Law. These thresholds seem agree with those provided for under Article 24 of the CL 2018. Pursuant to this Article, a company whose market share mounts to 30 percent of the relevant market is deemed having dominant market position; and two combined companies whose market share mounts to 50 percent of the relevant market shall be deemed as having dominant market position.

1.4. New provisions on post-merger registration being adopted

Compared with the previous Article 153 of EL 2005, Article 195 of the EL 2014 has two new sub-articles relating to registration of merging company.

Sub-article 4 lays down three kinds of document to be filed with the Enterprise Registration Authority (ERA), namely: (a) merger agreement; (b) merging company meeting's resolutions and minutes for approval of merger agreement; and (c) merged company meeting's resolutions and minutes for approval of merger agreement, except for when the merging company is a member or a shareholder holding more than 65 percent of registered capital or of voting shares of the merged company.

Sub-article 5 requires the ERA to update the legal status of the merged company in the National Database for Enterprise Registration and to process the changes in the enterprise registration for merging companies.

When merged companies have a head office located outside the province or city (which is under the administration of the central government) where merging companies' head office situated, then the ERA of the place where the merging company located shall inform the ERA of the place where

the merged company situated about such enterprise registration for the purpose of updating the legal status of the merged company in the above-mentioned database.

Previously, Article 153.2.b of the EL 2005 merely had a sentence saying that a copy of the merger agreement must be included in the documents filed with the ERA. The two new sub-articles of Article 195, the EL 2014, thus, provide for more details on the post-merger registration formalities for merging company.

1.5. Provisions on voting mechanism being slightly relaxed

Article 195 of the EL 2014 merely requires the approval of a merger agreement by the constituent companies' co-owners. Voting mechanism, therefore, shall be invoked from relevant provisions of the EL 2014. It is necessary to point out that the EL 2014 recognizes four types of enterprise: limited liability companies (LLCs); shareholding companies (SCs); partnership (PSs); and sole proprietorships (SPs). LLCs are further divided into two sub-categories, namely multiple members LLCs (MLLCs) and single member LLCs (SLLCs). Although Article 195.1 allows a merger agreement entered into by enterprises of different types and although Article 195.2.b requires approval of such an agreement by the constituent companies' co-owners/members, only shareholders in SCs, members in both MLLCs and SLLCs are statutorily given the rights to vote on company's reorganization.[32] The law, however, keeps silence on those rights of members in PSs.[33] When a PS merges into another PS, or into SC, or LLC, the voting mechanism of the merger agreement, thus, remains unclear.

Quorum to conduct a meeting: It is worth noting that unless otherwise provided for in company's charter, to hold a shareholder meeting in SCs, a quorum of at least 51% of total voting shares of the company is required for the first time the meeting being convened; if the quorum is not met, a quorum of 33% is required for the second time the meeting being summoned; and a quorum is not required for the third time the meeting being convened for failure of the first and the second ones due to ineligible quorums.[34] Those figures in MLLCs are 65%, 50% and non, respectively.[35] The voting mechanism in SLLCs is quite different for its different governance structure. SLLCs have only one owner being either an individual or an institution and the total number of the Board's members range from 03 to 07, appointed by the LLC's owner. The Board's president is either appointed by the LLC's owner or by simple majority vote of the Board's members.[36] To conduct a Board of members' meeting in the SLLCs, a quorum of 2/3 total Board's members is required and voting rule is one member one vote.[37]

Approval thresholds: Being governed by different provisions, the approval thresholds in a meeting of each type of company are therefore different as well, and subject to individual type of enterprise. In SCs, the affirmative vote of at least 65% of shares represented at the meeting is required

[32] See arts.: 144(1)(d); 60(3)(b); and 79(6), respectively. Under Art.4.25, company reorganization includes: division; split; consolidation; merger, and conversion of business forms.
[33] See Art.177(3).
[34] See Art. 141.
[35] See Art. 59.
[36] See Art. 79(1) and (3).
[37] See Art. 79(6).

for an approval of a merger agreement[38] (compared with a higher threshold of 75% under the EL 2005[39]). Such a figure in MLLCs is 75% of total subscribed capital represented at the meeting;[40] and in SLLCs is ¾ of the members attending the meeting[41]. The same approval thresholds in MLLCs and in SLLCs can be seen under the EL 2005, respectively.[42]

1.6. Provisions on dissenting shareholders or members being almost unchanged

Articles 52 and 129 of the EL 2014 lay down legal basis for MLLCs members and SCs shareholders to request the company buy back their subscribed equity (in MLLCs) or shares (in SCs) should he/she disagrees with the resolution on company reorganization (merger is one of which) of the Members' Board or of the shareholders' meeting, respectively. Upon such a request, an MLLC has to repurchase his/her equity at market value or at a price determined inconformity with appraisal rules under the company's charter. However, payment for that repurchase can only be made if after that the MLLC can discharge other debts and financial duties. Article 52 is merely a copy of Article 43 of EL 2005.

Similar provisions is applied to SCs in repurchase shares from dissenting shareholder, however, a SC and its shareholder has one more choice in appraisal of shares that is to use service of an institutional appraiser to determine shares' price. The SC shall introduce at least three institutional appraisers for the shareholder's choice which is final. Article 129 almost remains unchanged compared with Article 90 of the EL 2005.

2. Matching the current law against the specific case: a merger between Mediplast and Vinamed

2.1. The business form, size, and the components of Management Board (MB) of the constituent companies

a/ Scrutinizing the merger from its constituent companies' business forms

The merger between Mediplast and Vinamed was effectuated in 2017, therefore it falls into the purview of the current law (EL 2014 and subordinated legislation). In contrast to the EL 2005, the EL 2014 does not prohibit mergers between companies of different species, while both companies used to be a state-owned company being equitized and at the time the merger occurred, both are shareholding companies. The only difference between the two companies in terms of shareholder-structure is Vinamed having a state shareholder (holding 20% of its voting stock) but not Mediplast. Therefore, in terms of the business form of the constituent parties to the transaction, the merger is lawful. Even under Article 95 of the EL 2005 (that prohibits mergers between companies of different species), the transaction would not be void because the state's equity ownership in Vinamed does not

[38] See Art. 144(1).
[39] See Art. 104(3)(b).
[40] See Art. 60(3)(b).
[41] See Art. 79(6).
[42] See Art.52(2)(b) & Art. 68(6), respectively.

exceed 50% of the company's voting shares to cause Vinamed a SOE[43] whereas Mediplast being a pure shareholding company having no state invested capital after the equitization.

b/ Scrutinizing the merger from its constituent companies' size

The related figures show that Mediplast is much smaller than Vinamed in terms of size for the former's registered capital (16.5 trillion VND) being more than 4 times smaller than that of the latter (88 trillion VND); and the former's share capital (54.8 trillion VND) being smaller than that of the latter (88.5 trillion VND) as well. However, this does not make the transaction unlawful because the current law (similar to the previous law) does not prohibit mergers between companies of different sizes.

c/ *Scrutinizing the merger from its MB's components*

The MBs in the two constituent company have a common president, namely Mr. Pham Quang Huy. On public media, there have been a number of news with a topic of who being behind the merger between Mediplast and Vinamed as well as with the discussion of why Mr. Huy holding so many important positions in different companies doing business in medical equipment industry.[44] However, under Article 151.1.c and Article 152, the EL 2014, interlocking MB's members in general and interlocking MB president in particular are not banned.

Therefore, the results from scrutinizing all of the three aspects of the merger between Mediplast and Vinamed, show that the merger is perfectly lawful.

2.2. Merging procedure

Under the current law, merger procedure consists of three steps: (1) drafting relevant documents; (2) approving those documents; and (3) re-registering for the surviving company.

The Vinamed's director, Trinh Van Mao, maintains that the two constituent companies follow all those three steps: they did prepare a merger agreement and a draft of the surviving company's charter; they also went through a shareholder meeting in each constituent company, where the number of affirmative votes for the merger reach high levels at 81.4% and 79.55% in Mediplast and Vinamed, respectively. These results are quite high in comparison to the requirement of 65% under Article 144.1 of the EL 2014. Up to here, under the current law, the merger in question still remains lawful.

However, according to the groups of minority shareholders, the company's asset appraisal was not transparent. Even at the time of the meeting, they were not informed of which institution acting as an appraiser. So many tangible and intangible assets of Mediplast were not included into the company's value… Therefore, they do not agree with the share exchange ratio of 3 Vinamed shares for 1 Mediplast share.

So it appears that the problem that causes the unhappiness of minority shareholder lies in the company valuation requirement, which has not mentioned in the merger procedure under Article 195

[43] See EL2005, Art.4(22).
[44] See n.20.

of the EL 2014. As discussed in the above sub-section 1.6, Article 129 merely lays down legal basis for share appraisal where a shareholder disagrees with a decision over company reorganization and seeks to be bought out. Nowhere in the EL 2014 says anything about the duties of constituent companies in valuation of their asset before determining share exchange ratio, and in defining a fair value of shares where minority shareholders being squeezed out (not by their will); nor does it state out which consideration can be used in merger transactions, whereas these two issues are so much important in merger transactions for their strong impact on the interests of shareholders. Although it is not easy to define valuation methods of companies and their shares directly and clearly under the law, at least, the law should impose a duty of asset valuing on the constituent companies either by their own or by an institutional valuator of their choice before effectuating the merger transaction. It can, thus, be said that Article 195 was poorly drafted.

The study of foreign experience is, hence, necessary to further clarify weaknesses of the merger provisions under the law of Vietnam.

V. EXPERIENCE FROM THE US AND JAPAN

Protective measures being afforded shareholders of the constituent companies in merger transactions are available in a number of forms: (1) shareholders' rights to be advised and informed; (2) rights to vote; and (3) appraisal rights.[45]

1. The US experience

In the US, for the purpose of this research, merger transactions are governed by both federal law (the securities law and the rules of Securities and Exchange Commission, hereinafter, the SEC) and state corporation laws. Apart from federal and state law, merger transaction by listed corporations must observe stock exchanges' rules… Among state law, the Delaware General Corporation Law[46] (hereinafter, DGCL) is the most popular one for the State of Delaware having been chosen by a high number of corporate incorporators to set up their large business corporations.[47] This paper, therefore focuses on the DGCL when discussing the US merger law.

Mergers are governed by Subchapters IX of Chapter I, Title 8 (Corporation) of the State of Delaware Statutory Code (hereinafter, the DGCL), under which, mergers can be effectuated between any types of corporation. Subchapter IX of the DGCL provides for 8 types of merger between different kinds of business entities, including: (1) merger between domestic corporations (sec.251); (2) merger between domestic and foreign corporations (sec.252); (3) merger between parent corporation and subsidiary corporation (sec.253); (4) merger between domestic corporation and joint-stock or other association (sec.254); (5) merger between domestic nonstock corporation (sec.255); (6) merger between domestic and foreign nonstock corporations (sec.256); (7) merger between domestic and

[45] In both countries, shareholders of the constituent companies are entitled to seek an injunction from the court to cease the merger when the BODs accomplish a merger in breach of law and regulation or against the company's charter (eg.: see JCA, Art.796-2).

[46] The DGCL includes all acts effective as of Sept. 17, 2018 <delcode.delaware.gov/title8/title8.pdf>.

[47] See Nellie Akalp, *The Pros and Cons of Incorporating in Delaware*, <https://www.entrepreneur.com/article/287677> accessed 20 October 2018.

foreign nonstock corporations (sec.257); and (8) merger between domestic and foreign stock and nonstock corporations (sec.258). The following discussion shall not cover those transactions governed by Sections: 252, 256 and 258 because they involve corporations of different domiciles (one constituent company is a foreign one).

Those types of statutory merger seem to be so complicated. However, if relying on who being the parties to merger transactions as criterion for mergers classification, such mergers under the DGCL can be roughly classified into the following four categories: (1) direct mergers or long-form mergers (being those effectuated directly between an acquirer and a target company as provided for in sec.251); (2) indirect mergers or triangular mergers being those effectuated between a wholly-owned subsidiary corporation (set up for merger purpose only by a parent corporation - the true acquirer but not directly enter the transaction - thus, indirect triangular merger) and a target corporation, where the merger between the subsidiary and the target is also governed by sec.251); (3) short-form mergers (being those between a parent, holding at least 90% of voting shares of the subsidiary, and its subsidiary, governed by sec.253); and (4) miscellaneous mergers consist of mergers of different types of business entities. If setting aside all mergers between domestic and foreign corporations for not falling into the scope of this research, the remaining are those between different types of business organizations, governed by secs.: 254 and 257).

In order to effect a merger, the constituent corporations have to draft a merger agreement, then get an approval for such an agreement at both BODs meeting and then, shareholders meeting of the said corporations before the constituent corporations formally enter into the agreement. By these approval requirements over the merger, shareholders of the constituent corporations can exercise their rights of different types.

1.1. Rights to be advised and fully informed about the planned merger

Section 251(b) (DGCL) lays down legal foundation for both sets of right. However, to ensure shareholders being fully informed (the latter rights), the constituent companies in a merger might have to observe information disclosure requirements not only under the DGCL but also under federal law.

a/ Rights to be advised

Under Section 251(b), before two or more corporations merging into a single surviving constituent corporation, the BODs of each constituent corporation which desires to merge shall adopt a resolution approving a merger agreement and declare its advisability. By laying down such a statutory formality the BODs of each constituent corporations have to meet, sec.251(b) actually offers the shareholders an initial protective measure provided that the BODs totally observed relevant duties of directors in doing so. The reason lies in the fact that, although most of public corporations in the US today having many sophisticated institutional shareholders, it does not mean that they only have such a kind of shareholders nor does it mean that they do not have individual shareholders who might not be able to understand the complex financial and business issues behind a planned merger in order

to cast a prudent vote for approval or disapproval of the merger. Many of them are simply capital-laden investors seeking to invest into company's shares to receive dividends. Therefore, to ensure that shareholders exercise their voting rights meaningfully and effectively, they need professional advice before casting a vote. In a company, BODs consist of group of persons, who are in charge of handling the company's day to day business activities with two broad duties: duty of care and duty of loyalty.[48] The BODs, thus, must carry out pre-transaction due diligence to ensure that the merger will be effectuated for the best interests of the company, as well as all the terms and conditions included in the merger agreement have been carefully drafted to attain such best interests. When the law-makers require BODs to meet and discuss before adopting a resolution for the approval of a merger agreement, then to declare its advisability, they provide an initial protective tool for shareholders, because once the BODs bringing such an agreement to the shareholders meeting for further discussion and action on the agreement, it means that they finished due diligence and they have good cause to believe that the planned merger being advisable and for the best interests of the company, as far as the BODs fully observed their duties in so doing.

b/ Rights to be informed:

Shareholders of the constituent corporations shall be informed of the merger under both the state law (the DGCL), the Federal securities law and regulations, as well as the stock exchange rules.

b.1/ The DGCL

Sec.251(b) lists all details a merger agreement has to include such as: terms, and conditions of the merger; mode of carrying the same into effect; amendments or changes in the certificate of incorporation of the surviving corporation; the manner of shares conversion or treatment; other details such as: payment of cash in lieu of the issuance of fractional shares; rights or other securities of the surviving corporation; rights or other securities of which are to be received in the merger … The agreement will be submitted together with a notice to the shareholders before convening a shareholders' meeting [sec.251(c)], and by that way, shareholders are provided with necessary information which give them an image of how the merger will be transacted and how their investment interests will be treated if the merger is finally approved.

b.2/ Federal law

Where securities being used as consideration in a merger, the transaction is subject to registration under the Securities Act of 1933 (as enacted on May 24th 2018,[49] hereinafter, 1933SA) because in essence, the surviving corporation does issue its securities to shareholders of the merged corporation. Sec.5 of the 1933SA makes it unlawful to an offer or sale of a security being done without registration

[48] In the US, corporate directors have both duties, although sometimes not explicitly provided for in the state corporate law because they already have their roots in common law and tradition. For more information, see Robert W Hamilton, *The Law of Corporations in a Nutshell* (5th Edn, St. Paul, Minn 2000) 446.

[49] <https://legcounsel.house.gov/comps/securities%20Act%20Of%201933.pdf> accessed 13 October 2018.

with the Securities and Exchange Commission (SEC) except for those offers or sales being exempted under the Act. To implement Sec.5 of the 1933SA, the SEC issued Rule 145,[50] stating that when corporate shareholders having to receive shares of the other corporation in a merger, or where mergers involve the transfer of almost all of corporate assets to another company, then these transactions will be treated as an offer for sale of securities to the target's shareholders, which means that the acquirer shall be subject to registration requirement. To register with the SEC, the surviving corporation has to prepare a registration statement for the securities whose contents following Form S-4.[51]

Rule 145 is designed to make available protection to those who are offered securities, in a business combination in general and in a merger in particular, under the 1933SA. Accordingly, all material information concerning financial situation and business performance of the merging company shall be provided for the merged company shareholders to enable them judging the value of shares or other non-voting securities they are going to receive in exchange for the shares they own in their company pre-merger.

It can be said that constituent companies are subject to information disclosure duties under both the state and federal law to ensure that shareholders are fully informed of how and in what way, their investment interests will be continued post-merger to decide how to vote or whether or not they should keep investing or should disinvest before the merger being effectuated.

The necessary intertwinement of the two set of rights. In satisfying these statutory requirements under the state and federal law, the BODs of the constituent corporations in fact have to give advices as well as to fully disclose adequate information to their shareholders to enable them casting prudent vote later. These two advised and informed requirements must co-exist because in deficiency of the first one, even though shareholders are fully informed and have rights to vote for or against the planned merger, if they do not have necessary knowledge to judge the soundness of the merger, then their decision at the shareholders meeting might not prudent for lack of necessary knowledge to judge what are going on; whereas, in deficiency of the second one, shareholders even though being advised, they have no awareness of the financial and business situation of the acquirer to verify such an advice nor can they clarify how their current investment interests will be treated while the merger being effectuated. In other words, in laying down these statutory requirements and assuring that the corporate BODs fully meet them, the law-makers create a very first protective measures to shareholders of the constituent companies to a merger.

b.3/ The stock exchange rules[52]

The New York Stock Exchange issues a number of rules that require listed corporations to make timely information disclosure when an extraordinary shareholders meeting being convened (for their rights or privileges or any other matter not of routine nature being considered) (Rule 204.01); when

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[50] <https://www.sec.gov/rules/final/finalarchive/finalarchive2007.shtml> accessed 13 October 2018.

[51] The form used for a registration of securities issued by a domestic issuer in connection with a merger, consolidation, or exchange offer.

[52] See: NYSE Rule, s2: Disclosure and Reporting Material Information (as amended in Aug. 15th 2013) <http://wallstreet.cch.com/LCMTools/PlatformViewer> accessed 25 October 2018.

having any change in business purpose (Rule 204.04), director or executive officers (Rule 204.10), form and nature of listed securities (Rule 204.13), and in nature of business (Rule 204.19); and when the amount of outstanding securities increasing (Rule 204.20). Although these rule do not mention mergers, all those changes are very likely to attach with a merger, thus, in any circumstance, when the constituent corporations make any decision that leads to one of those changes, they are subject to timely disclosure duties under the NYSE rules.

These rules keep public investors in general and shareholders in particular being informed of what are going on in the listed corporations.

1.2. Voting rights

The constituent companies' shareholders can enjoy voting rights under the DGCL and in some curtained circumstances, also under either the stock exchange rules or the SEC rules. However, the SEC rule governing voting rights of shareholders being confined within those transaction between a US corporation and a foreign[53] one, therefore, will not be further discussed here.

a/ Voting rights under the DGCL

a.1/ Who are entitled to vote?

In all direct mergers, where one corporation merged with and into another, shareholders of both constituent companies can enjoy voting rights under section 251(c) to decide whether or not the merger will be effectuated finally. However, there have been some exceptions where the approval by shareholders of a surviving corporation is not required. Under section 251(f), such exceptions shall apply if: (1) the merger agreement does not result in any amendment in the survivor's certificate of incorporation; (2) the characteristics of the outstanding shares of the survivors remain intact; or (3) the surviving corporation newly issue less than 20% of its outstanding common shares prior to the effective date of the merger. It is not too complicated to understand the philosophy behind the first and second exceptions because when the merger does not trigger any change in the surviving corporation certificate of incorporation nor does it alter the characteristics of its outstanding shares, then there would be no harm to its shareholders that triggers the need for their protection. The third exception can be explained in circumstances where the acquiring corporation is much bigger than the merged corporation to the point that the consequences of the merger are very much similar to the case where the acquiring corporation purchasing a big asset so that convening shareholders' meeting for approval becomes unnecessary. For example, when a large corporation having a chain of plants where their best selling products in market being produced is seeking to acquire another plant which is even

[53]As pointed in section II of this paper, recently, many corporations in the US have sought to lower their tax bill by re-incorporating oversea through a merger transaction, where an US corporation acquires a foreign company and merged with and into the latter. In the next step, the surviving foreign company accomplishes a procedure to change its name into the name of the merged US corporation so that finally, the US corporation becomes re-domiciled in a foreign country with lower tax obligations.

To combat with this problem, the SEC revised Rule 14a-4(a)(3) to cause such a merger more unwieldy with one more vote by the acquirer's shareholders and by that way to slow down corporate inversions. Under this rule, shareholders' approval is required should a material amendment to the acquirer's organizational documents shall be made in relation to a statutory merger, while the acquirer is still subject to state law to get approval from its shareholders to amend its certificate of incorporation in connection with the merger.

smaller than its smallest plant through a merger. The post-merger results does not significantly affect the financial situation and business performance of the corporation.

By contrast, in indirect mergers (governed by sec.251), only an approval by the target's shareholders is required regardless of the transaction being reverse or forward triangular as far as the consideration is shares rather than cash. The subsidiary's single shareholder being the parent company, obviously need not vote because it is the will of the parent company to acquire the target by setting up its wholly owned subsidiary for that sole purpose to avoid the transfer of liabilities from the target to itself post-merger as well as to avoid a vote by shareholders of the parent corporation. Finally, shareholders of the true acquirer, the parent company, are not entitled to vote to approve the merger simply because the parent company is not a constituent party in the transaction.

The DGCL lays down two ways for short form mergers: those being effected under section 253, and others being effected under section 251(h). In the former, an approval of shareholders in the subsidiary corporations is not required in any such transaction. It would be pre-ordain-result vote when a controlling shareholder being the parent corporation owns at least 90% of outstanding shares of the subsidiary corporation which allows the will of such a controlling shareholder being always predominated over the minority's will. The approval by the shareholders of the parent corporation is not required if the parent is the surviving corporation and its articles of association is not changed by the merger. The reason is that the merger does not substantially affect shareholders' rights when their corporation holds up to 90% voting stock of the subsidiary corporation, the remaining 10% of voting stock generate little benefit to the parent corporation post-merger.

In the latter [short form mergers being effectuated under section 251(h)], an approval of the remaining target shareholders' is not required where a merger being accompanied by a friendly tender offer. In other words, the merging and the merged corporation carry out two activities at the same time, that is signing a merger agreement and announcing a tender offer for any or all of the target shares. The contents of such an agreement must explicitly state out that the merger is done pursuant to section 251(h); that the merging corporation will attain voting control of the corporation at the accomplishment of the tender offer; and that the same consideration will be offered in the tender of shares and in the merger that is carried out immediately prior to the merger under section 251(h).

As for the last category of mergers being those combined between corporations of different types (different in business forms or in the country of incorporation…), shareholders' voting rights will be exercised either under section 251 or under section 255 of the DGCL.

So what different between voting right under these two sections? The answer is those who fall into the purview of section 251 will exercise their voting rights in a shareholders' meeting while others who fall into that of section 255 will enjoy their voting rights in a members' meeting. The difference is not significant in terms of the rights and interests of those having voting right, it rather lays down legal basis for the co-owners of other types of business entity to vote since the law allows mergers between different forms of business entity while shareholders are only available in corporations, not in other forms of business organizations, whose co-owners are often referred to as members.

a.2/ How to exercise voting rights?

Unless all three conditions laid down in Section 251(f) are met or where indirect mergers or short form mergers are involved, an approval of shareholders of constituent corporations is required. Section 251(c) [and similarly sec.255(c)] requires the BODs (or governing body in other business forms, hereinafter, BODs) submit the merger agreement to shareholders (or members in other business forms, hereinafter, shareholders) of each constituent corporation (or other business entities, hereinafter, corporations) so that they can act on the agreement at a meeting. Prior to the date of voting at least 20 days, shareholders of the constituent corporations shall be noticed of the time, place, and purpose of the meeting. The notice shall be accompanied by a copy of the merger agreement or its summary for shareholders' reference.

At the meeting, shareholders will consider the agreement, then vote for either its adoption or rejection. The agreement shall only be approved if receiving affirmative vote from a majority of the outstanding voting shares in both the constituent corporations. When the law-makers give shareholders rights to vote for or against merger agreement before the transaction being effected, they equip them with another weapon to protect their investment interests in the constituent companies before a merger being effected.

b/ Voting rights under the stock exchange rules

With respect to corporations whose shares are listed or quoted on a stock exchange, even though an approval by their shareholders is not required under the DGCL, it can be triggered under the New York Stock Exchange[54] listing rule. However, the object of the vote according to the stock exchange rules is the issuance of additional shares while that under the DGCL is the merger; and not all share issuances trigger approval from shareholders of the issuing corporations, rather only those being equal to or in excess of 20% of the issuer's outstanding shares in connection with a merger transaction having to subject to such stock exchange requirements. Section 3 subsection 312.03(c)(1) & (2) of NYSE Rule (as amended Jul. 2013)[55] reads:

> Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transaction if: (1) the common stock has, or will have upon issuance, equal to or in excess of 20% of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or (2) the number of shares of common stock to be issued, or will be upon issuance, equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

On the appearance, the concern of the law-makers while drafting the DGCL and that of the creators of NYSE Rule look different because the former cares about how the investment interests of shareholders of constituent companies being treated in merger transaction while the latter cares about the dilutive possibility of shareholders' equity ownership if their company going to issue additional

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[54] NASDAQ also has a similar listing rule: Rule 4350(i), <https://www.nasdaq.com/about/rulefilings> accessed 20 October 2018.

[55] <wallstreet.cch.com/LCMTools/platformViewer.asp?> accessed 16 October 2018.

shares. However, in essence, both those groups have the same goal, that is to protect company shareholders' investment interests.

1.3. Appraisal rights

a/ Who entitled to appraisal rights?

The above-discussed provisions on shareholders' voting rights in connection with mergers under the DGCL show that a merger to be effected merely requires majority consent of shareholders, a question that may, therefore, arise is how to handle with the remaining minority shareholder who seem excluded from decision making process. The answer can be found in Section 262(a) of the DGCL, under which shareholders who oppose a merger are entitled to ask their corporation to buy back their shares at fair market value, determined by the Court of Chancery. Article 262(b)(1) makes appraisal rights available for the shares of any class or series of stock of a constituent corporation in a merger to be effected under Sections: 251, 252, 254, 255, 256, 257, 263, or 264. Article 262(b)(1), however, provides for a number of exception where the BODs shall complete a merger without shareholders' approval: where the target's shares being either (1) listed on a national securities exchange; or (2) held of record by more than 2,000 holders; and where a merger did not require for its approval by shareholders of the surviving corporation as provided in sec. 251(f), no appraisal rights are given to any shares of that corporation.

Furthermore, under Section 262(b)(2), shareholders are entitled to refuse anything in exchange for their shares except: (i) stock of the surviving corporation or depository receipts in respect thereof; (ii) stock of any other corporation that at the effective time of the merger will be listed on a national securities exchange or held of record by more than 2,000 holders; (iii) cash in lieu of fractional shares or fractional depository receipts in respect of the foregoing; or (iv) any combination of the above-mentioned shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts.

b/ How to exercise appraisal right?

Under Section 262(d), a dissenting shareholder shall exercise appraisal rights by delivering a written demand for appraisal rights of his/her shares to the corporation within 20 days from the date of mailing of the notice by the surviving corporation about the effective date of the merger. The demand is only sufficient if it clarifies the identity of the shareholder and his/her intention to demand appraisal rights of his/her shares.

Under Section 262(e), within 60 days after the effective date of the merger, any shareholder who has not commenced an appraisal proceeding shall have the right to withdraw such shareholder's demand for appraisal and to accept the terms offered upon the merger. By contrast, within 120 days after the effective date of the merger, the shareholder entitled to appraisal rights may commence an appraisal proceeding by filing a petition in the Court of Chancery for determination of their stock's value. At the hearing on such petition, if the Court determines the shareholders being entitled to appraisal rights, the appraisal proceeding shall be conducted in accordance with the rules of the Court

of Chancery. The Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger, together with interest, if any, to be paid upon the amount determined to be the fair value [(sec.262(g)(h)].

2. The Japan experienc*e*

In Japan, merger transactions are mainly governed by the Company Act of 2005 (hereinafter, JCA); and the Financial Instruments and Exchange Act of 1948 (hereinafter, FIEA).

Part V of the JCA provides for different ways of company's reorganization, including: conversion, merger, split, share exchange and share transfer. Merger under the JCA consists of "absorption-type merger" and "consolidation-type merger". However, this paper does not deal with consolidation, therefore, hereinafter, the term "merger" will be used as contracted form of "absorption-type merger" in discussing the law governing this type of transactions in Japan.

The JCA recognizes mergers between companies of different types,[56] and it also allows entrepreneurs set up their business entities in one of the following four vehicles: stock company; limited liability company; general partnership company; and limited partnership company. Consequently, apart from mergers between stock companies or between membership companies, mergers can be done between a stock company and a membership company. In other words, those four types of company can merge into each other under the current JCA.

The JCA adopts different types of merger: (1) direct or long-form mergers where the constituent companies shall directly go through the whole merger procedure (Arts. 749 and 783); (2) short-form mergers where a target company is not required to get shareholders' approval because of the surviving company being a special controlling shareholder (holding at least 90% of voting shares) of the disappearing companies (Arts.: 784, 796); (3) simplified mergers where the total net assets the acquiring company being paid to the target company's shareholders as consideration shall not exceed 20% of the total net assets of the former [Art.796(2)]; and (4) triangular mergers. Since Article 749(1)(ii), the JCA recognizes very flexible consideration that can be used in mergers, which can be either shares or non-voting securities, or cash or assets (including shares of other company rather than of the acquiring company), the cash-out mergers as well as triangular mergers have come into existence. However, cash-out mergers do not make a new type of merger, rather they can be any of the above-mentioned types of merger when the two following conditions are available: one is the cash-consideration being paid to the target company's shareholders; and the other is minority shareholders being squeeze-out. In triangular mergers, a subsidiary is set up for a sole purpose of acquiring another company (Arts.: 135 and 800). Article 135 and Article 800 seem disagree to each other when the language of the former merely permits triangular mergers where a party to the merger is a foreign company whereas that of the latter recognizes even triangular mergers amongst purely domestic companies. Triangular mergers have merely been introduced in Japan since the Company Act of 2006 being adopted, and have been deemed as the Japanese Government's intention to loosen the merger

[56] JCA, Art.748.

procedure to increase foreign direct investment into Japan.[57] Below, only merger transactions between domestic companies will be considered in all related issues.

In order to effectuate a merger transaction, the constituent companies shall enter into a merger agreement which was drafted by the constituent companies (Art.749 JCA). However, before concluding such an agreement, the draft agreement shall go through two steps: BODs' approval and then, shareholders' approval. These two levels of statutory approval reflect different rights of shareholders as true owners of the constituent companies, having supreme power in deciding important matters of the company. These rights now will be considered.

2.1. Right to be advised and informed

a/ Right to be advised

Article 298(4) of the JCA requires the BODs pass a resolution for all decision of all matters related to the shareholders' meeting to be convened. Those matters under Article 298(1)(ii) include "any matter which is the purpose of the shareholders meeting." By the language of these provisions, obviously, in order to decide whether or not a merger agreement shall be brought into shareholders meeting for approval, the BODs have to conduct due diligence before passing a resolution. Pre-transaction due diligence over a merger agreement to ensure that the merger truly benefits the company and its shareholders, therefore, is an indispensable task the BODs having to accomplish. Once the BODs submits the agreement to the shareholders' meeting for approval, such an agreement shall be advisable to enter into from the standpoint of the BODs. In other words, by seeking the approval of the merger agreement at the shareholders' meeting, the BODs declares its advisability to its shareholders.

By the same reason for the corresponding provisions under the DGCL which has been proven, it can be said that the JCA also provides shareholders of the constituent companies in a merger the first protective measure.

b/ Right to be informed

Shareholders of the constituent companies to merger transactions shall be informed under the JCA, the FIEA, and the stock exchange rules.

b.1/ The JCA information disclosure requirements

Article 748, the JCA merely requires the conclusion of a merger agreement to effect a merger transaction, and it gives way to Article 749 providing for all details of such an agreement. According to that, types of information to be included in a merger agreement include: (1) trade name and domicile of the constituent companies; (2) different forms of consideration (money, shares, bonds, stock options; bonds with share options or other property) and the method for calculating number or amount

[57] See William R Huss, Yuju Iwanaga, & Mariko Osawa, "Japan's New Triangular Merger Rule – Acquisition of Japanese Companies through share exchanges" <www.Mondaq.com/x48012/Corporate+Commercial+Law/Japans+New+Triangular> accessed 24 October 2018.

of each type of consideration in exchange for shares held by shareholders of the target company; (3) matters concerning the allotment of consideration to shareholders of the target company; (4) matters concerning share options issued by the target company and how the surviving company handle such share options; (5) matters concerning allotment of share options by the surviving company; and (6) the effective date of the merger. Articles 182 and 191 of the Regulation for Enforcement of the Company Act[58] further list information target companies and surviving companies have to make available, respectively. Those items required by both the JCA and Article 182 of the Ordinance show that the Japanese law-makers pay much attention to the consideration used in merger transaction and the way to define such consideration in relation to shares of the target company, which are prudent because consideration is the most important element that affects the investment interests of shareholders in the constituent companies, especially the target one.

Prior to the date of the shareholders' meeting, where the merger agreement shall be approved by a resolution, the constituent companies shall make the document available at their head office with contents of the merger agreement and the reasonableness of the consideration used in the merger for shareholders' and creditors' reference (JCA, Arts.: 782 & 794).

Under Article 299(1), prior to the date of shareholders meeting (two or one week depends on whether or not the stock company is a public company), the BODs shall file a written notice to the shareholders. The notice shall specify or record the following information: (1) date, time, place of the shareholders meeting; (2) matter being the purpose of the shareholders meeting; (3) the rights to vote in writing of shareholders who cannot attend the meeting; (4) rights to vote by electronic or magnetic means enjoyed by shareholders; (5) any matters provided for under the Ordinance of the Ministry of Justice [Art. 299(4), and Art.298(1)]. By this provision, shareholders are informed in advance the merger to have a prudent vote. Article 782 and 794 require both dissolving companies and surviving companies to keep all the said documents at the head offices of the companies from at least 2 weeks prior to the date of shareholders' meeting for viewing by shareholders or other specified persons. In addition, Article 794 also requires the surviving company to keep the same documents at the head office during 6 months from the effective date of the merger, since Art.828(1)(viii) allows specified persons (including shareholders) to appeal for invalidation of the merger during the period. Anyway, the JCA lengthens the time where shareholders of the constituent companies to a merger can investigate the relevant information to protect their lawful interests.

b.2/ Information disclosure under the FIEA

Under the FIEA, a surviving company need not to disclose information concerning the issuance of new shares in exchange for the shares held by shareholders of the target company. However, Article 24-5.2 of the FIEA requires reporting companies or listing companies to file an extraordinary report with the competent agency to be published on a governmental website namely the EDINET. The report

[58] Regulation for Enforcement of the Companies Act, Ministry of Justice Order No.12, Feb. 7th 2006, as amended by the Ordinance of the Ministry of Justice No.6 of 2015.

shall consist of certain categories of decisions made and event occurred during the course of business being deemed necessary and appropriate to protect public interests and investors. Under the Cabinet Office Ordinance on the Disclosure of Corporate Affairs,[59] among such decisions made by the above-mentioned companies are those on company's reorganization which covers mergers; and the competent authority is the Director-General of the Local Finance Bureau (Art.19).

In addition, Article 2-2 of the FIEA provides for companies undergo reorganization including mergers having to subject to disclosure duties of corporate affairs and other related matters. Article 4.1 of the FIEA requires those companies issuing shares in connection with a merger to file securities registration statement with the competent authority. However, the law gives broad exemptions to listing or reporting companies for the reason that they are already subject to periodic and extraordinary disclosure requirements. Article 4.1, thus, mainly apply to non-listed companies.

b.3/ Information disclosure under the stock exchange rules

Tokyo Stock Exchange has Securities Listing Regulations[60] whose Rules 402 to 420 governing timely disclosure of corporate information… Under Rule 402(1)k, a merger is one of the items which companies fall into subject to timely disclosure of information. Rule 402 requires listed companies to disclose decisions and event that might affect the share price in a timely and appropriate manner through their own website, TDnet system and other public media. Decisions and events companies having to disclose under the rule are even more than those required by the FIEA. Failure to comply with the rules shall cause the company being subject to sanction by the stock exchange.

2.2. Rights to vote

a/ Who entitled to vote?

Generally, in almost of all mergers, shareholders of both constituent companies are entitled to vote for or against the merger agreement (Arts.: 783 and 795). However, there are some circumstances where shareholders of the constituent companies are not required to vote. Firstly, in a merger between a special controlling company and its controlled company, if: (1) the controlling company is the survivor, then the target (controlled) company's shareholders need not vote [Art.784(1); and Art.468(1)]; (2) a target (controlling) company holds more than 90% of all voting shares of the acquiring (controlled) company, then shareholders of the acquiring company need not to give approval over the merger [Art.796(1)]. Secondly, in mergers, where the consideration to be paid to the target company's shareholders does not exceed 20% of the total net asset of the acquiring company, then, the shareholders of the acquiring company need not go through voting procedure [Art.796(3)].

b/ How to exercise voting rights?

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[59] See Ordinance No.5, issued by the Ministry of Finance on Jan. 30th 1973, as revised Jan. 26th 2018 <www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2341> accessed 23 October 2018.

[60] Securities Listing Regulations (Rule No.1 – Rule No.826, as revised of Jun. 1st 2018) <https://www.jpx.co.jp/english/equities/listing/disclosure/index/html> accessed 23 October 2018.

It is pointed out while discussing shareholders' rights to be informed, that the BODs of the constituent company shall file the notice to the shareholders prior to the date of shareholders meeting. The notice shall specify or record the meeting's agendas for shareholders' discussion and approval. Then, at the meeting, how shareholders in each constituent company exercise their voting rights is a complicated issue, and depends on individual circumstances provided for by the JCA.

In all long-form mergers (direct mergers), both constituent companies are required to get an approval by a resolution of shareholders meeting on the day immediately before the effective day of the agreement (Arts.: 783 and 795). Article 309(2) requires the approval by a majority of 2/3 of the affirmative votes of shareholders present at the meeting to approve a merger agreement. However, for more details, voting rights of shareholders in target company and surviving company are provided separately under Articles: 783 and 795, respectively.

As for target companies: Under Articles: 783(1), if all or part of the cash or other consideration to be handed over to the target's shareholders is certain equity interests of a membership company or those stipulated in the Ordinance of the Ministry of Justice, the consent of all the target's shareholders is required. Article: 783(3) requires an extraordinary resolution of the class shareholders where the target company is a corporation with class shares, and if all or part of the consideration is shares with transfer restrictions of the surviving company. Article 793 requires the approval of all members of the membership company where the target company is a membership company.

As for surviving companies: Article 795(2)(i)(ii) requires directors to explain at the shareholders meeting if: the liabilities the surviving company assumes from the target company exceeds its succeeded assets; or the book value of cash or other payments to the target shareholders exceed the difference between the value of assumed liabilities and the value of succeeded assets. Under Article 802(1)(2), the approval of all members is needed if a membership company is surviving post-transaction.

In short-form mergers, if the acquiring company holds more than 90% of all voting shares of the target company (being target's special controlling shareholder), no approval of the target company's shareholders is required [Art.784(1); and Art.468(1)]. This, however, shall not apply if all or part of the consideration to be delivered to the target company's shareholders is shares with transfer restrictions and the target company is a public company and not a corporation with class shares [Art.784(1)].

In contrast to the above-mentioned circumstance, where a target company holds more than 90% of all voting shares of the acquiring company, shareholders' approval in the acquiring company is not required [Art.796(1)]. This, however, shall not apply if all or part of consideration to be delivered to the target company's shareholders is share with transfer restrictions and the surviving company is not a public company, then the surviving company may have to get shareholders' approval [Art.796(1)].

In merger between companies of significantly different sizes, the voting requirements are simplified…. reducing the merger procedure where the target company is far smaller compared with the acquiring company, and more concretely, where the consideration to be paid to the target company's shareholders does not exceed 20% of the total net asset of the acquiring company, the latter

need not get approval from its shareholders [Article 796(3)] by, provided that the merger does not result in loss for the acquiring company, or the surviving company is a public company and all or part of the consideration to be paid to the target company's shareholders are not shares with transfer restrictions of the acquiring company [Art.796(3)].

2.3 Appraisal rights

a/ Who entitled to appraisal rights?

In discussing the shareholders' voting rights and the requirement for approval of a BODs decision, it can be seen that in some specific circumstances, the JCA seems to be so strict in requiring the consent of all company's members or shareholders in order to effect a merger agreement. However, in the remaining circumstances, to get an approval of shareholders, company needs 2/3 affirmative votes of shareholders present at the meeting, which means that the will of those that hold 1/3 of voting shares being ignored, and this figure is even sometimes bigger when the approval of shareholders may be omitted. Furthermore, the adoption of flexible consideration by the current JCA, under which cash consideration being recognized means that minority shareholders are statutorily squeezed out. Even with other types of consideration, if the way to determine exchange ratio is not fair or shares can be valued unfairly…, it may cause minority shareholders incurring loss. Such circumstances trigger the need for protection of minority shareholders, whose votes are either ignored or no voting at all sometimes. Under the JCA, minority shareholders who no longer want to continue their investment interests in the surviving company post-merger for not happy for unfair treatment prescribed in the merger agreement can dissent from the merger and they are dissenting shareholders.

However, under Article 785(2), dissenting shareholders is understood in a broader sense, consisting of those who give prior notice to the target company of his/her dissent from the merger being brought into a shareholders meeting's agendas for voting; those who cannot exercise voting rights; and others that are not special controlling companies [provided for in Art.784(1)]. To give protective measures to them, the law-makers create number of provisions under the JCA.

b/ How to exercise appraisal rights?

Upon the notice of the planned merger from the target company, shareholders who oppose to that merger are entitled to demand their company to purchase their shares at a fair price, following certain procedures (Art.785). This provision is aimed to ensure that dissenting shareholders' shares shall not be bought at unfair price because of the merger being done under unfavorable conditions.

To exercise appraisal rights for the shares they hold, the shareholders shall indicate number of shares they seek to be bought back and submit the share certificates to the target company. They may not withdraw their demand for appraisal without the approval of the target company; and their demand for appraisal rights shall lose effect if the merger being cancelled. The repurchase of such shares become effective on the effective date of the merger.

Where the dissenting shareholders and their company can successfully negotiate the share price, then the company must pay that price within 60 days from the effective date. Should the parties cannot

reach an agreement on the share price within 30 days from the effective day, the shareholders may file a petition with a court to determine the price within 30 days after the expiration of that period (Art.786).

3. Similarities and Differences between the US and Japan Law

3.1. Similarities

The above discussion over the US and Japan experience shows that both countries have extremely comprehensive law and regulations governing merger transactions. All the three sets of shareholders right are available in very details statutory provisions and even in stock exchange rules.

In both countries, the BODs are subject to duty of care in exercising due diligence before passing a merger agreement and making it available for shareholders' reference. Both countries offer three information channels to which shareholders can access, by requiring companies to disclose relevant information under company law, securities law and even stock exchange rules. It is necessary to point out that in providing for the information shareholders entitled to access, the law-makers in both countries seem to pay much attention to the conversion manners of shares and the kinds of consideration can be used in merger and the way to calculate consideration in relation to shares conversion of the target company. Sec.251(b) of the DGCL requires merger agreements to specify clearly the manner of shares conversion or treatment; other details such as: payment of cash in lieu of the issuance of fractional shares; rights or other securities of the surviving corporation; rights or other securities of which are to be received in the merger … Similarly, under Article 748, the JCA, merger agreements must state out different forms of consideration (money, shares, bonds, stock options; bonds with share options or other property). More importantly, the method for calculating number or amount of each type of consideration in exchange for shares of the target company must also specified in the agreement. These provisions are of importance for their potentially substantial impacts on shareholders' investment interest, and ensure that shareholders of target companies will be well informed of what they are going to receive when such a merger transaction really effectuate.

In both countries, shareholders enjoy the rights to vote to approve or disapprove a merger agreement their companies going to enter into and those who oppose the agreement are entitled to appraisal rights.

However, getting closer to individual rights provided for in the relevant law and regulations of the two countries, a number of differences still can be found.

3.2. Differences

As for the shareholders' rights to be advised, the protective measures under the DGCL seem to be broader and stronger than that under the JCA. Although both statutes require the BODs to pass a resolution to approve a merger agreement, the DGCL goes further in imposing another duty on BODs, that is to declare its advisability to shareholders. The drafters of the DGCL explicitly make the BODs being aware of their duty of care throughout the preparatory period of the merger agreement and the negotiating process (by "declare its advisability") to ensure that the merger proposal truly benefits the corporation and its shareholders before filing the agreement to shareholders for approval at a

shareholders meeting. It can be said that while the advising responsibility of BODs under the JCA is implicit, that under the DGCL is obviously explicit.

As for the shareholders' rights to be informed, a number of differences can be found.

Firstly, the American law-makers seem to pay better care for shareholders compared with the Japanese ones in requiring the corporations filing not only a notice of a merger but also a merger agreement to shareholders' residential address; in contrast, under the Japanese law, companies merely send the notice of the merger to shareholders whereas make merger agreement available at their head office for shareholder reference either in electronic or magnetic form. The law does not require the companies to post such document on their website, which is understandable for business confidential reason. However, in case of public companies which have shareholders living throughout the country and even abroad, then it is really troublesome for them to access such an agreement.

Secondly, perhaps, in compensation to the above-mentioned "hardship" facing Japanese shareholders, the JCA requires a merger agreement to be drafted in more details compared with that required by the DGCL. Pursuant to Art.749 of the JCA, six types of information must be included in the agreement, and four of which directly relate to financial interests of shareholders of the merged company. They are: different forms of consideration and the method for calculating of the number or amount of individual type of consideration in exchange for shares of the target company; matters concerning the allotment of consideration to shareholders of the target company; matters concerning the share options issued by the target company and to be handled in which way by the surviving company; matters concerning allotment of share options by the surviving company). By this statutory provision, shareholders in Japan are fully informed of what and how they will receive post-merger once they are present at the head office of their companies. However, this is not to say that the DGCL ignores shareholders' interests because Sec. 251(b), although does not go into such details, does require a merger agreement to include a number of information for the sake of shareholders such as: the manner of shares conversion or treatment, the payment of cash in lieu of the issuance of fractional sahres, rights or other securities of the surviving corporation, as well as rights and other securities to be received in the merger…

Thirdly, the information disclosure requirements under the rules of stock exchange in the two countries are somewhat different. The NYSE lists different kind of changes the relevant corporations having to make immediate report such as: changes in company directors, executive officers, business purpose and nature, characteristics and number of shares…; whereas, the Tokyo Stock Exchange rules seem to be adopted in a wiser manner by simply saying that listed companies have to report in a timely and appropriate manner if they have a decision or any event that might affect their shares price. The purview of the Tokyo Stock Exchange rules are, thus, obviously broader compared to those of the NYSE. Surprisingly, by that rule-making way, Japanese rule-makers tend to give more room for judges to interpret by handling the relevant problems brought into courts although Japan is a Civil Law country which opposes to a Common Law country as the US, where judge-made law has formally long been recognized.

As for the rights to vote, perhaps, some differences can be found in this set of rights. *Firstly,* in the US, constituent corporations have to offer voting rights to shareholders under both company law and stock exchange rules, whereas in Japan, such companies are subject to the company law only. *Secondly,* the number of exceptions where no voting rights to be exercised by shareholders in the two countries also differ where the DGCL offers more exceptions (5 exceptions) which means broader limit on shareholder voting rights than the JCA (only 2 exceptions: parent and the specially controlled subsidiary (i.e., subsidiary hold 90% or more of its voting rights by parent), merger where the subsidiary's shareholders need not vote; and where the consideration paid not exceed 20% of total net asset of the surviving company). *Thirdly,* it seems that in compensation to the broader limit on shareholder voting rights as above-mentioned, the DGCL merely require an approval of simple majority vote while the JCL is quite strict, in demanding up to 2/3 of affirmative vote and in some circumstances, that requirement amount to 100% (in membership companies…)

As for the appraisal rights, some differences can also be found. *Firstly*, the scope of shareholders entitled to appraise under the DGCL seems to be narrower than that under the JCL since the former allows only shareholders opposing a merger to enjoy the rights while the latter further covers even shareholders who cannot attend the shareholders meeting to exercise voting rights. That is not to mention a number of exceptions the DGCL adopts under which shareholders are not entitled to appraisal rights. *Secondly*, the JCA seems to adopt a very peaceful approach in dealing with the way shareholders enjoy their appraisal right by giving a chance for shareholders and their company to negotiate on the shares price and resource to court injunction is merely a second step; by contrast, the DGCL in the first step allows shareholders to seek justice in courts although such a proceeding shall be initiated after the effective date of the merger, which means that the written demand file to the corporation bears only the value of a notice not a negotiation request. *Thirdly*, while the JCL does not permit dissenting shareholders withdraw their dissenting demand once filed with the company without an approval of the company, such withdrawal within certain time after the effective date of the merger is permitted under the DGCL.

VI. WHAT CAN BE LEARNT FROM THE US AND JAPAN EXPERIENCE

It is hard to judge which country adopts better law since the DGCL seems to be stricter in some areas but more flexible in some others compared with JCA and vice versa. So what should be the best lessons for Vietnam from experience of the American and Japanese law-makers? Whether Vietnam should select all the strict provisions from the law of the two countries to ensure shareholders being well protected or in the opposite direction, Vietnam should choose all the flexible provisions from those oversea experience to create a favorable environment for merger transactions being effectuated so that enterprises in Vietnam can easily change their business and financial conditions for better business results? Perhaps the answer cannot be found in either directions, rather it depends on individual rights and with each right while being considered, should be put in a concrete business environment in today Vietnam and needless to say that it mainly depends on what the current law says. If the law already has good provisions compared with those of these two foreign countries then

alteration need not to be done. However, where it fails to govern merger transactions by its vague provisions or in the absence of necessary provisions, then new and adequate provisions should be introduced.

As pointed out earlier in Section IV of this paper, the most serious problems concerning the current law of Vietnam governing companies' merger are twofold. One is the absence of a statutory requirement on valuation of company assets pre-merger, which is of importance to define share exchange ratio fairly in merger transactions. The other is the lack of statutory provisions on the types of consideration that can be used in a merger transaction; on the calculation of the number or amount of consideration in exchange for shares of the target company; on the payment of cash in lieu of fractional shares; on the rights and other securities of surviving corporation; and on the share appraisal for the sake of squeezing-out-minority shareholders. Article 195 of the EL 2014 is too simple and its language is too vague with five sub-articles but only the first two of which are relevant to what have been discussed here.

Sub-article 1 clarifies the way to understand a merger by saying: "*One or a number of companies (hereinafter, merged companies) can merge into another company (hereinafter merging company) by transfer the whole assets, rights, obligations and legal interests into merging company, and the merged company cease to exist.*" This way of understanding merger is quite comparable to that in other corresponding laws in other countries.

The second sub-article has three items, item (a) reads:

> [T]he constituent companies prepare a merger agreement and a drafting charter of the merging company. Merger agreement must have the following contents: name, domicile of the head office of the merging company; and those of the merged company; procedure and conditions for a merger; employees usage proposal; way, procedure, and term as well as conditions for the conversion of assets, subscribed equity, shares, bonds of the target into those of the surviving company; and timespan for effectuating a merger

In order to judge this provision, relevant foreign experience might be useful. As previously discussed, in the US, before two or more corporations merging into a single surviving constituent corporation, the BODs of each constituent corporation which desires to merge shall scrutinize the drafting merger agreement in order to adopt a resolution approving the agreement (Section 251(b) of the DGCL). Similarly in Japan, the BODs is required to pass a resolution for all decision of all matters related to the shareholders' meeting to be convened (Article 298(4) of the JCA). Those matters are "any matter which is the purpose of the shareholders meeting" (Article 298(1)(ii)), which surely includes merger agreements should they be brought into shareholder meeting for approval. In such a circumstance, the BODs have to discuss the advisability of the agreement in order to decide pass or not pass a resolution. This means that the BODs must conduct due diligence over a merger agreement to ensure that the merger truly benefits the company and its shareholders.

However, in Vietnam, Item (a) of Art.195.2, the EL 2014, does not even mention the roles of "BODs" (under the Vietnam law, the Board of Members in LLCs and the Management Board in SCs. Hereinafter, the MB). Art.56.2, sub-article l and m, and Art.149.2.p of the EL 2014, while providing

for the rights and duties of MBs, merely say the MBs are entitled to propose changes including company reorganization, dilution, and bankruptcy to the shareholders' meeting. Art.162.2 confers upon the MB the right to approve all company's contracts or transactions whose value is less than 35% of the total company's asset reflected in the latest financial statement or a smaller percentage as prescribed in the company charter. These provisions obviously cannot "touch" most merger transactions because the changes in the constituent companies' assets cannot usually meet the above-mentioned statutory threshold. Even where a merger transaction merely results in a change of 34.9% of the merging company's asset, it always cause a 100% change in the merged company's asset. And only in such a rare circumstance, the merging company's MB is entitled to approve the merger agreement before submitting the agreement to the shareholders' meeting. It, thus, can be said that under the current law, the MB has no concrete duty in pre-merger period to adopt a resolution approving the merger agreement, to ensure the merger agreement being advisable and truly benefits the constituent companies and their shareholders; nor are they in charge of declaring the advisability of the merger to their companies' shareholders.

Furthermore, a number of significant contents concerning shareholders' rights and interests are not required to include in the merger agreement under Item (a), such as: list of consideration that can be used for share conversion; calculation of the exchange ratio for share conversion; refusal of a type of consideration in exchange for shares if dissenting shareholders do not like (as their counterpart in the US could do under Sec.262(b)(2), DGCL); treatment of rights and other securities of the merged and merging company; cash as a type of consideration… By ignoring these issues, minority shareholders might be put at a disadvantageous position. For example, since the law does not provide for concrete types of consideration nor does it prohibit some certain kinds of asset in exchange for shares, it seems that constituent companies can use whatever consideration for shares conversion in a merger transaction. Minority shareholders, therefore, are likely to be squeezed out simply for not being able to accept what they will receive for their shares, which also means that they reluctantly reject the merger plan.

Item (b) reads:

> Members, owners or shareholders of the constituent companies shall approve the merger agreement, the merging company's charter and then shall register the merging company inconformity with this Law. Merger agreement must be sent to all creditors and employees must be informed of the merger within 15 days from the effective date of the merger.

The failure of this provision is threefold. *Firstly,* the constituent companies' creditors and employees are entitled to be informed of the merger because they have financial interests in the companies to a merger transaction. However, in providing the right to information of these two groups of person, the second sentence in Item (b) ignored a very important and even more deserved group of person being entitled to enjoy this right, namely shareholders of the constituent companies. Apart from the EL 2014, the SL 2006-2010 can be expected as a source of law from which shareholders might rely on to obtain the right to information. However, it can hardly find anywhere in the SL laying down

legal basis for this right of shareholders. Decree No.58/2012 and Decree No.60/2015, in guiding the implementation of the SL 2006-2010, merely mention the term "merger" twice, in Art.18 and Art. 23.3, but none of them is relevant to the issue in discussion here.

Secondly, the approval right of shareholders under this provision is hard to enjoy effectively. Shareholders cannot access the merger agreement at all for reference before casting their vote to approve or disapprove the agreement at the shareholders meeting. Nowhere in Item (b) or even in the whole Art.195 requires the MB or any one in charge of company management to send such an agreement to the shareholders. In fact, apart from institutional shareholders, other individual shareholders might have no knowledge of M&A in general and of corporate finance in particular to cast a prudent vote… Obviously, the advising role of the MB is not employed, which also means that shareholders do not have the rights to be advised. So up to here, shareholders are not entitled to advice on the benefit of the merger transaction , and even to necessary information of what they are going to vote for or against at the coming shareholders' meeting. In such a circumstance, it is hard for even institutional investors to cast a prudent vote, as the merger agreement is not something simple that can be read and grasp all its meaning immediately at the meeting. Shareholders need to obtain such document in advance to study thoroughly in order to make a right decision at the shareholders' meeting. That is not to mention the surviving company's charter they are also entitled to approve but are not able to access beforehand. So although the law confers upon shareholders voting right to approve the two important documents, it does not equip them with necessary tools that enable them to enjoy their right fruitfully.

Thirdly, the task of shareholders to register the surviving company under this provision is somewhat abnormal because it is not the duty of shareholders, rather it is the task of the company promoters should the company is going to incorporated for the first time. However, in this situation, the surviving company is registered on the basis of an already-exist company pre-merger, and having just acquired more asset, value and maybe duties as well from the merged company post-merger, so registration of the merging company should be the task of the surviving company (either its MB or its statutory representative, or a person in charge as provided for in company charter). Even if it was the task of the shareholders, then, perhaps another shareholders' meeting needed to be convened in order to determine who amongst hundreds, thousands or even millions of shareholders in a public company will do the job. Under such a vague statutory provision, it is hard to define who shall exactly responsible for business registration of merging company, especially when the merging company is a public one, whose number of shareholders is unlimited.

Item (c) reads:

> After the completion of the enterprises registration, the merged company ceases its exist; the merging company enjoys legal rights and interests, is liable for unpaid debts, employment contracts and other assets obligations of merged company.

This provision fails to ensure that the merging company have to be responsible for liabilities of the merged company which both companies cannot foresee, for example, product liabilities of the merged company, which might incurred in the future. In the absence of this provision, consumers expose to danger of being unprotected.

Up to here, perhaps, the Vietnamese law-makers should revise the EL 2014 by omitting all redundant provisions as earlier pointed out, and amending others as well as putting in place the following provisions:

Firstly, creating a new provision to impose a concrete duty on company MBs of constituent companies in doing due diligence over the merger agreement, following by an approval process the MBs has to go through before proposing such an agreement to the shareholders' meeting. It might be useful to learn the experience of the American law-makers in requiring the BODs to adopt a resolution approving the merger agreement and to declare its advisability to shareholders. This duty shall ensure that the MBs take enough care in negotiating and drafting the agreement as well as assure that the agreement truly benefits the companies and their shareholders.

Secondly, revising the current provision on the contents of a merger agreement to ensure that it states clearly the manner of company asset evaluation; the way to define share exchange ratio; the types of consideration that can be used in merger transactions; the way to appraise shares in case cash consideration being used; the treatment of rights and other shares of merged company; the refusal of undesired consideration by squeezing-out-shareholder.

Thirdly, introducing a new provision that gives shareholder the right to be informed of the merger at least two weeks before the date of the shareholders meeting; that clearly requires the companies to send shareholders a notice of the meeting with agenda of the meeting as well as attached therewith a copy of a merger agreement for shareholders' reference to ensure that they are aware of what they are going to vote for or against.

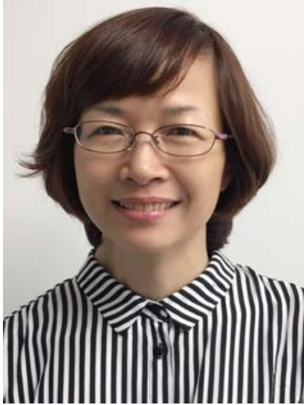
Fourthly, adding a new provision to confer upon shareholders the appraisal right when they are forcefully cashed out. Perhaps, here, lesson from the Japanese law-makers is useful by offering two steps for shareholders to enjoy their appraisal rights: one is to file a written demand of appraisal to the company for share price negotiation between shareholders and the company. In the failure of the negotiation, then the second step will be taken, that is to institute a proceeding to court for a fair share price. This peaceful approach employed by Japan can save both money and time since obviously any procedure taken in courts is more time consuming and costly than negotiation between disputed parties.

Fifthly, inserting a provision to ensure that merging company shall be liable to even unforeseen liabilities of the merged company for the reason already pointed out while discussing the relevant provision.

Sixthly, omitting a provision that imposes a duty of enterprise registration on shareholders of the merging company since if such a registration required, it is not the duty of shareholders but of the surviving company itself.

Seventhly, rewording the current provisions on drafting and approving of the merging company's charter to ensure that where the merger results in a change in the merging company's charter, then,

the MBs of the surviving companies shall amend the existing charter or draft the new one. However, the approval right of shareholders over the revised or new surviving company's charter should remain intact.



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UNDER THE MERGER LAW IN VIETNAM

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