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The International Comparative Legal Guide to: **Corporate Governance 2019**

12th Edition

A practical cross-border insight into corporate governance

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EDITORIAL

Welcome to the twelfth edition of The International Comparative Legal Guide to: Corporate Governance.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

Seven general chapters. These are designed to provide an overview of key issues affecting corporate governance law, particularly from a multi-jurisdictional perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 33 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Sabastian V. Niles & Adam O. Emmerich of Wachtell, Lipton, Rosen & Katz for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter will focus on corporations (*sociedad anónima*), which are the most common legal entity type in Peru; and, in particular, corporations whose securities (shares, bonds, etc.) are registered before the Superintendence of Securities Markets (“SSM”) (*Superintendencia del Mercado de Valores – SMV*), the governmental agency which oversees the securities markets, since these corporations generate greater interest from a corporate governance perspective.

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

Act N.º 26887, the General Corporations Act (“GCA”) (*Ley General de Sociedades*), is the primary source for corporate governance guidelines for corporations. Corporations may supplement the general guidelines from other sources such as the Articles of Association, Bylaws and, when applicable, Shareholder’s Agreements.

In addition, registered corporations are subject to the Supreme Decree N.º 093-2002-EF, Securities Market Act (“SMA”), and other regulations issued by the SSM.

In 2013, the SSM published the Code of Good Corporate Governance for Peruvian Companies (*Código de Buen Gobierno Corporativo para Sociedades Peruanas*). This document defines the best practices for corporate governance matters (soft law). Corporations must present a report to the SSM, along with the annual business report (*Memoria Anual*), documenting how the corporation fulfilled the Code. Deviations from the best practices must be disclosed and explained using the ‘comply or explain’ principle.

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

The current principal issues regarding corporate governance in our jurisdiction are the following:

- a) **Related party transactions:** Developing the literal c) of the article 51 of the SSA, the SSM published the Resolution SMV N.º 029-2018-SMV/01, about transactions between related parties. In our jurisdiction, the importance of

avoiding expropriation from a majority shareholder is clear. For that reason, there are specific procedures to approve this kind of transaction as the implementation of special committee of directors or the issue of a fairness opinion by an external entity.

- b) **Independent Directors:** Recently, SSM has published a project of guidelines for the appointment of independent directors. Also, as part of the reform of the CGA, these kind of directors have been proposed for all corporations.

Currently, certain entities, as financial entities and private management pension funds, registered before the Superintendence of Banking, Insurance, and Private Pension Funds (“SBI”) (*Superintendencia de Banca, Seguros y AFP*), are obligated to have these kind of directors.

- c) **Criminal Compliance:** With the implementation of the Act N.º 30424, Administrative Liability of Juridical Persons for Transnational Active Bribery Act, and its administrative consequences (penalties, close of offices, etc.), corporations need to implement a criminal compliance system to avoid these kind of results. The Board of Directors are mainly responsible for this implementation.

- d) **Investment Funds/Institutional Investors:** Participation of investment funds and other institutional investors in different kind of corporations has elevated the standards of the management of corporations and has raised the importance of mid-term investment perspectives. The improvement in corporate governance depends on the kind of inversion (equity, debt, etc.).

Unlike other jurisdictions, there are no visible developments about: (a) creation of value from a long-term perspective; (b) remuneration of directors; and (c) gender parity in boards or management teams.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

There is no consensus regarding the advantages of managing a corporation with a long-term perspective or the importance of promoting sustainable value creation. However, this new corporate governance perspective has been implemented at the major corporations in our jurisdiction. At the regulatory level, Regulation SBI 272-2017, applicable to financial institutions, insurance companies and private management pension funds, mentions the long-term perspective in a few dispositions, mainly, it states that the criteria to calculate the employees’ and director’s variable remuneration must consider the global performance and the long-term management of the corporation.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

In theory, the shareholders' power to directly influence the strategic direction, operation, and management of the corporation is limited because, according to the GCA, these powers are granted mainly to the Board of Directors and the Chief Executive Officer (CEO). In this case, we can say that the shareholders only have indirect influence. However, due to the concentrated ownership structure of corporations in our jurisdiction, shareholders have a direct impact on the strategic direction, operation, and management because majority shareholders have the power to appoint and dismiss (without reason) members of the Board of Directors and they usually elect related parties.

Additionally, shareholders have specific rights that can influence the operation of the corporation, such as: (a) approval of the financial statements and annual business report; (b) deciding on the distribution of profits; (c) deciding on the disposition of the corporation's assets whose accounting value represents more than 50% of the capital stock; and (d) approval of structure modifications (merger, split-off, reorganisation, winding-up and dissolution).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

In general, there are no specific or expressed responsibilities for shareholders for corporate governance matters. However, in specific situations, a shareholder (minority or majority) could be held responsible for the non-reasonable exercise of his rights based on the general remedies provided by the legal system.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two types of shareholder meetings:

1. **Ordinary Annual Mandatory Meeting:** This meeting must be held once per year no later than the first three months after the end of the previous fiscal year. According to the GCA, this meeting includes the following matters on the agenda:
 - a) Discussing corporate management and the financial statements.
 - b) Determining the distribution of profits, if applicable.
 - c) Appointing members of the Board of Directors and establishing their remuneration, if applicable.
 - d) Appointing the external auditors or delegating the appointment of an external auditor to the Board of Directors, if applicable.
2. **Extraordinary General Meeting:** This meeting can be held anytime throughout the year, and any topic can be discussed. The GCA provides examples of matters that could be discussed in this type of meeting:
 - a) Amending the Bylaws.
 - b) Increasing or reducing the capital stock.
 - c) Issuing debt securities.
 - d) Deciding on the disposition of the corporation's assets whose accounting value represents more than the 50% of the capital stock.

- e) Disposing investigations and special audits.
- f) Voting on the transformation, merger, split-off, reorganisation, dissolution, or winding-up of the company.

The shareholders have the following rights, among others, at a general shareholders' meeting:

- (i) **Right to Request Extraordinary General Meetings:** Shareholders who own at least 20% of the capital stock may request an Extraordinary General Meeting to the Board of Directors. If the request is not granted, shareholders can request the meeting from a judge or notary.
- (ii) **Right to Information:** Shareholders have the right to request, before or during the meeting, information regarding the topics discussed at the general meeting. The Board of Directors is obligated to provide the information, except in cases when disclosing the information could harm the corporate purpose. This exception does not apply when the request is made by shareholders who own at least 25% of the capital stock.
- (iii) **Right to Attend:** Shareholders have the right to attend the general meeting in person or by proxy. Shareholders can also attend by telephone, videoconference or other means if allowed by the Bylaws.
- (iv) **Voting Rights:** Shareholders have one vote per share owned.
- (v) **Opposition to Shareholder Resolution:** Shareholders who own any quantity of shares, including one share, have the right to challenge shareholder resolutions that contradict the law, the Articles of Association, the Bylaws or damage, directly or indirectly, the corporation's interest, in favour of one or more other shareholders.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?

From a corporate governance perspective, shareholders, minority or majority, do not have a special duty to the corporation or to other shareholders. However, as we said before (see the answer to question 2.2 above), actions by shareholders must be exercised in a reasonable way. In addition, if a shareholder has a conflict of interest regarding any matter that is discussed at the shareholders meeting, that shareholder cannot exercise his or her vote in the meeting.

On the other hand, shareholders cannot be liable for acts or omissions by the corporation. In the case of financial liabilities, the maximum amount shareholders can lose is the amount of their capital contribution to the company. Situations such as "piercing the corporate veil" are uncommon in our jurisdiction.

Concepts such as stewardship or fiduciary duties have not yet been developed in our jurisdiction.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders can seek enforcement against the corporation for failure to grant shareholders' rights or implement shareholders' resolutions.

The CGA provides two specific enforcement actions against the members of the Board of Directors:

- a) **The social claim:** If a shareholders' resolution about the social claim against the Board of Directors has not been initiated after three months of the date of the Shareholder's

Meeting, any shareholder can initiate a social claim on behalf of all the shareholders (regardless of the number of shares held) against the Board of Directors.

Also, pursuant the GCA, fulfilling specific requirements, shareholders representing one-third of the capital stock can promote this action. According to Act N.º 29720, *Ley que Promueve Las Emisiones de Valores Mobiliarios y Fortalece el Mercado de Capitales*, if the corporation is registered before a stock exchange, shareholders who own 10% of the capital stock may initiate a social claim.

- b) **The individual claim:** This claim is submitted by a single shareholder when the acts of a member of the Board of Directors damages that shareholder's interests directly.

According to the GCA, shareholders can also bring forth these claims to the Management Team.

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

There is no limit to the number of shares or ownership in securities that a shareholder can hold in the corporation. However: (1) a shareholder cannot have 100% of the shares issued for more than six months; and, as we mentioned previously (question 2.4), (2) if a shareholder has a conflict of interest regarding any matter, the shareholder cannot exercise his or her vote in the general meeting.

According to the SSM, issuers must disclose the names of shareholders who own more than 5% of the capital stock. This information must be always updated.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Regulation CONASEV N.º 009-2006-EF-94.10, *Reglamento de Oferta Pública de Adquisición y de Compra de Valores por Exclusión*, provides the obligation to make a tender offer when a shareholder reaches or crosses, in an onerous transaction, the thresholds of 25%, 50% or 60% of the voting rights in a registered corporation.

Regarding prior governmental approvals to increase the participation in a corporation, in our jurisdiction, recently the Peruvian Congress passed an act to control mergers and acquisitions. The National Institute of Antitrust Law and Protection of Intellectual Property is the government agency in charge of enforcing this act.

2.8 What is the role of shareholder activism in this jurisdiction and is shareholder activism regulated?

Shareholder activism is uncommon in our jurisdiction. The most significant developments of shareholder activism are found in the investment funds market, especially in private equity funds.

There is no specific regulations regarding shareholder activism.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A corporation is managed by the Board of Directors and the Management Team, specifically the Chief Executive Officer (CEO).

The Board of Directors has the power to implement management policies and to legally represent the corporation in accordance with the corporate purpose, except for matters reserved by the law or the Bylaws. Members of the Board of Directors must act as loyal and diligent representatives. Moreover, they have a reserve duty regarding the information that they have received. According to GCA, there are no specific requirements to become a member of the Board of Directors. On the contrary, in regulated sectors (securities, banking, insurance and private pension funds) there are specific experience, knowledge and independence requirements. The Board of Directors may act directly through approved corporate resolutions or delegate such actions to the management team.

Corporations regulated by the SSM must create a Risk Committee for controlling market risk and operational risk. Similarly, corporations regulated by SBA must create a diverse set of committees such as the Risk of Anti-Money Laundering Committee and Audit Committee.

The CEO oversees the day-to-day management activities and is responsible for executing the Board of Directors resolutions.

The Code of Good Corporate Governance suggests the establishment of the following committees:

- a) A Nomination and Remuneration Committee.
- b) An Audit Committee.

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

Members of the Board of Directors are appointed and/or removed through a shareholder resolution. Although this should be done at the Ordinary Annual Mandatory Meeting, a resolution can be adopted at any time.

The CEO is appointed and removed by the Board of Directors or through a shareholder resolution.

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

Remuneration for the Board of Directors is declared at the initial formation of the corporation, through the Bylaws or, if no provision exists in the Bylaws, at the moment a member of the Board of Directors is appointed through a resolution. Regarding limitations, the CGA establishes that participation in the profits by the Board of Directors can only be distributed from net profits and after the deduction for the legal reserve (10% of the distributable profits). Also, the SMA establishes that registered corporation may not distribute to the Board of Directors participation of more than 6% of the net profits of the fiscal year, unless disclosed as a material fact within the first month of the corresponding fiscal year.

The Board of Directors establishes the remuneration of the Management Team. There are no limitations to this resolution.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

Members of the Board of Directors are not prohibited from owning shares in the corporations they serve. Only general shareholder prohibitions apply, such as being unable to exercise voting rights when a conflict of interest arises.

Regarding disclosure obligations, members of the Board of Directors have the same obligations as any other shareholder (see question 2.6).

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

The Bylaws govern how the Board of Directors oversees the corporation. Additionally, the GCA provides default regulations.

The Bylaws specify the quorum for attendance and voting majorities. Only the Chairman of the Board may call a board meeting. However, to facilitate the meetings, the CGA provides an option for Board members to meet provided that all members attend the meeting, agree to the meeting, and agree to the discussion points in the agenda.

The Board has the discretion to determine the frequency of board meetings. However, the GCA requires the Board to meet at least once per year to approve the annual business report and the financial statements.

The Board of Directors can hold in-person meetings, or, if allowed by the Bylaws, the meeting can be held remotely.

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

The principal duties of the Board of Directors are the duty of care and the duty of loyalty. All actions by the Board should be performed in compliance with these duties and the corporate purpose.

Members of the Board of Directors are fully and personally liable to the corporation, shareholders and third parties for damages caused by its resolutions and acts against the Law, the Bylaws or, if intentionally performed, abuse of powers and gross negligence. A claim against a member of the Board can be initiated through a social or individual claim (see question 2.5).

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The Board of Directors is responsible for the establishing of the general guidelines of the corporation (approving the corporation's business plan and budgets) and overseeing the Management Team. The Board is also responsible for: (a) providing accurate and timely information to the shareholders regarding the legal, economic and financial situation of the corporation; (b) formulating, approving and presenting the annual business report and the financial statements at the Ordinary Mandatory Annual Meeting; (c) keeping information about the affairs of the corporation and the corporate matters confidential; and (d) identifying any conflict of interests and refraining from participating in any deliberations regarding the conflicted matter.

Additionally, new regulations have increased the responsibilities of the Board of Directors. Key current challenges include: (1) implementation of an anti-money laundering system of compliance, mandatory in certain sectors as the regulated by SSM and SBI; (2) implementation of a criminal compliance system, optional but necessary to avoid administrative consequences on the corporation due to the commission of certain crimes by its principal officials; and (3) establishment of a fiscal internal policy in order to avoid tax evasion practices.

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

Yes, both practices are permitted.

From a legal perspective, indemnities are only valid if they are expressed in the Bylaws, as a resolution or through contracts provided that a breach is not due to intentional or gross negligence. The GCA expressly invalidates all Bylaw clauses, shareholder resolutions, or Board of Directors resolutions that absolve, in advance, the responsibility of a member of the Management Team.

D&O liability insurance is typically found in sectors regulated by the SSM and the SBI; however, this is rarely present in the Peruvian market. Usually, these insurances do not cover intentional misconduct or criminal offences.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Board of Directors is responsible for setting and changing the strategy of the corporation, in accordance with the guidelines set forth by the shareholders through the Bylaws, resolutions or shareholders' agreements. If conflicts with shareholders guidelines arises, shareholders can remove members of the Board.

4 Other Stakeholders

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

There are no mandatory regulations or provisions regarding any special role of employees in establishing corporate governance policies.

Corporations regulated by the SSM must include a "Corporate Sustainability Report" section within the annual business report which addresses environmental, labour, community, providers, and client matters.

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

There are no mandatory regulations or provisions regarding any special role of other stakeholders in the establishment of corporate governance.

However, corporations regulated by the SSM must include a "Corporate Sustainability Report" section within the annual business report which addresses environmental, labour, community, providers, and client matters.

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

There are no laws or regulations dictating corporate social responsibility and so, implementation of such policies are not mandatory. However, in practice, corporations in the extractive industries (mining, petroleum, gas, etc.), have special departments dedicated to the management of corporate social responsibility practices. In these cases, corporations have developed special

policies and procedures to address the communities near the extraction sites, the natural resources, the workers and the environment (additionally to those provided by law).

Corporations regulated by the SSM must include a “Corporate Sustainability Report” section within the annual business report which addresses environmental, labour, community, providers, and client matters.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Board of Directors must provide to the shareholders accurate and timely information regarding the legal, economic and financial situation of the corporation. Additionally, the Management Team must inform the Board of Directors of all matters related to corporate operations.

5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?

Shareholders have two main rights to obtain information:

- a) Information outside meetings: Corporations must provide at any moment to any shareholder who owns at least 5% of the capital stock, information regarding the corporation and its operations, provided that the information is not confidential or could cause harm to corporate operations if disclosed. In case of discrepancies regarding the nature of the information, the judge within the corporation’s domicile shall resolve the matter.
- b) Information inside or regarding meetings: Corporations must provide information regarding shareholders’ meetings to the shareholders. The Board of Directors oversees the release of such information except in cases where disclosure of information could cause harm corporate operations. This exception does not apply when the request is made by shareholders who own at least 25% of the capital stock with voting rights.

By means of these two rights, shareholders can request access to the financial statements, corporate books, contracts, and any other information regarding the legal, economic and financial situation of the corporation.

Corporations regulated by SSM must disclose market information such as: (a) financial status, quarterly unaudited and annual audited individual or consolidated financial statements, and annual business reports, containing business and operational information; (b) material events that can affect the decision of an investor to invest or the liquidity, list value or share price of corporation’s securities; and (c) economic group composition. All information is published on the SSM website.

Additionally, SSM regulation provides that registered corporations must publish the following reports on their corporate websites:

- (i) Annual Audited Individual Financial Reports.
- (ii) Annual Audited Consolidated Financial Reports, if applicable.
- (iii) Quarterly Individual Financial Reports.
- (iv) Quarterly Consolidated Financial Reports, if applicable.
- (v) Annual Business Report.
- (vi) Material events.

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

Audited financial statements are not mandatory for all corporations. Only registered corporations must present audited financial statements. The Shareholder General Meeting or Board of Directors appoint the auditor of the financial statements. Audit firms are in charge of the reviewing the financial statements, and they must issue an opinion about whether the financial statements conform to IFRS.



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