

**THAILAND'S NON-VOTING DEPOSITORY RECEIPTS AND THE DUAL-CLASS
NON-VOTING STOCKS OF THE UNITED STATES: LESSONS FOR THE
EMERGING CAPITAL MARKET OF VIETNAM**

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ABSTRACT

Vietnam and Thailand share similar general rules on foreign ownership limitation (FOL) for public companies. However, the Thai capital market maintained a far larger foreign trading volume and became a major emerging market in Asia. The success story of Thailand is due to its signature financial product: non-voting depository receipts (NVDR). In simplest terms, NVDR offers its holder financial interests but no voting rights, which allows foreign investors to invest in a Thai company without raising the proportion of foreign ownership. After two decades of implementation, NVDR has proved to be a prime tool for attracting foreign indirect investment despite tight foreign ownership restrictions. Following the successful steps of its neighbor, Vietnam is now constructing a legal framework for NVDR.

With the purpose of contributing recommendations for Vietnam's NVDR framework, this thesis will explore the legal and economic issues revolving around NVDR and non-voting shares, and solutions to such issues. For such purpose, the Thai NVDR framework is undoubtedly a benchmark. Another benchmark is the US' dual class stock structure, to the extent where non-voting shares are involved. The analysis herein is divided by two main coordinates. First, the author explores the factors contributing to the success of NVDR on the Thai capital market, including the legal engineering of Thai regulators to solve a number of unique issues related to NVDR, such as redefining the nature of FOL and the well-known problems of non-voting shares, i.e., the equity-control imbalance. Second, the thesis explores the US' legal framework for dual class stock structure and solutions for protecting minority stockholders in dual class firms. This second coordinate leads the author to believe that good practices on corporate governance are important tools to limit the harmful effects of non-voting shares and the equity-control imbalance. While Singapore and Hong Kong, two Asian financial centers, adopted a restricted approach to listing dual class shares and merit-based review

mechanism, the US' class action mechanism should also be considered as it allows more flexibility in protecting minority stockholders and investors. Finally, some policy recommendations are given for the incubation of Vietnam's NVDR market based on the previous analysis.

LIST OF ABBREVIATIONS

CG Code	The Thai Corporate Governance Code
CRI	Certificates Representing Interests from Underlying Securities
FOL	Foreign Ownership Limit
HKEx	Stock Exchange of Hong Kong
IPO	Initial Public Offering
MAI	Market for Alternative Investment
NVDR	Non-Voting Depository Receipts
NVDR Issuer	Thai NVDR Co., Ltd.
NVDR Shares	Underlying non-voting shares of NVDR
NYSE	New York Stock Exchange
Prospectus	Prospectus for the Issuance of Non-Voting Depository Receipts
SET	Stock Exchange of Thailand
SGX	Singapore Exchange
Thai Stewardship Code	The Thai Institutional Investor Stewardship Code
Thai SEC	Securities and Exchange Commission of Thailand
UK	United Kingdom
US	United States of America
US SEC	Securities and Exchange Commission of the US

INTRODUCTION

One of the very first steps any foreign investor would take before investing in a Vietnamese company is checking the foreign ownership limit (FOL). For the majority of listed companies, the FOL is 49%.¹ This has been a challenge to many investors and also local companies. Foreign investors lose an item in their investment portfolio, while local companies lose the opportunity to raise foreign fundings for a breakthrough business expansion. FOL is not a Vietnamese specialty. Every neighboring country in East Asia and Southeast Asia imposes FOL on certain industries. However, some governments have found solutions to maximize foreign equity investment while maintaining the statutory local ownership.

Thailand, the first benchmark jurisdiction of this thesis, with its signature non-voting depository receipts (NVDR) is one among those warriors. In brief, NVDR is an equity instrument issued on non-voting common shares, transferable subscription rights and warrants. Investors holding NVDRs on non-voting shares enjoy the same financial benefits as shareholders of the target company, such as dividends and NVDR subscription rights (in lieu of share subscription rights offered to shareholders), however cannot involve in any decision making of the company. The underlying securities of all target companies are held by Thai NVDR Co., Ltd., a subsidiary of the Stock Exchange of Thailand (SET). As the underlying securities are of non-ownership nature and not held by the NVDR investors, NVDR issuance and trading on the stock market does not change the ratio of ownership, whether local or foreign, in target companies. For the purpose of delivering policy recommendations for Vietnam's NVDR framework, this thesis focuses on NVDRs issued on non-voting shares.

¹ The revised Law on Securities 2019 allows listed companies to increase FOL up to 100%, however, subject to an application process to obtain the State Securities Commission's approval. Furthermore, a 100% FOL is only possible if the listed company's business lines are not subject to any foreign investment restrictions (including restrictions other than ownership limit).

Chapter I first provides a full picture of NVDR's function as an alternative investment channel, including the structure and problems entailed with it. Second, the concept of FOL is revisited to show a distinctive separation of ownership and control embedded at the core of this instrument. Third, Thailand's corporate governance reform is explored to show the importance of corporate governance in Thai corporations' performance and value – the main indicators that attract NVDR investors. In particular, the Thai Corporate Governance Code and Thai Stewardship Code have set out standards and requirements to protect the corporate health, hence protect investors from the growing equity-control imbalance and give investor more certainty in investment returns. Last but not least important, the Thai SEC's efforts to provide NVDR with high liquidity and the general reform of Thailand's capital market also contributed to the success of this instrument.

The second benchmark jurisdiction in this thesis, the United States, is considered the most tested market for the dual class stock structure, including the issuance of non-voting stocks, adopted by many major US companies. The dual class structure is discussed because companies with fundings raised from NVDR are indeed dual class companies. Chapter II is dedicated to discussing the advantages and disadvantages in the US, as well as possible policy response to those disadvantages with references to Singapore and Hong Kong. The two Asian jurisdictions provide a broader range of safeguarding measures, especially merit-based review mechanism and mandatory application of corporate governance best practices, hence are worth mentioning to offer more lessons for Vietnam.

Finally, this thesis concludes with a summary of lessons from the Thai NVDR model and the US' dual class shares for Vietnam's future NVDR framework. Although NVDR has been introduced into Vietnamese legislations such as the Enterprise Law and Securities Law, no concrete planning for this product has been made. There are currently discussions and debates on the feasibility of this instrument in Vietnam and how a legal framework for it should

look like (it should at least, obviously, serve the main purpose of attracting foreign investment, but also should not make loopholes for undermining FOL measures). There are also misconceptions about this instrument, which should be corrected. As NVDR is a great tool to overcome the barriers of FOL, the author hopes this thesis could serve as a policy brief to lawmakers in Vietnam for the incubation of a feasible and sustainable NVDR legal framework.

CHAPTER I: NVDR IN THAILAND – AN OVERVIEW OF THAILAND’S SIGNATURE EQUITY INSTRUMENT AND SUCCESS LESSONS

Since its introduction in 2000, NVDR is now among the most traded instruments by foreign investors on both Thailand’s Market for Alternative Investment (MAI) and the Stock Exchange of Thailand (SET).² As the companies listed on the MAI are qualified as “*innovative with high potential growth*”, NVDR appears to be an effective financing channel for the up-and-rising economic stars of Thailand. That said, even the largest corporations including major banks and conglomerates have utilized this instrument as well. Intended to be offered mainly to foreign investors, however, NVDRs are also traded by Thai investors. This theme shows that NVDR is not only a tool for overcoming the burdens of FOL, which is the ultimate purpose of this instrument, but also by nature a good investment channel. In fact, it is arguable that without being a good financial instrument itself, NVDR would not be as useful for its primary purpose. This chapter explores the legal engineering which formed the signature instrument of the Thai capital market and the factors leading to its success.

1. Overview of Thailand’s NVDR framework

NVDR is a common name on the Thai stock market, however, by the legal definition in the Thai SEC’s Notification No. Sor Jor. 38/2552³ and No. Tor Jor 32/2552,⁴ NVDR is categorized as a type of Certificate Representing Interests from Underlying Securities (CRI) instruments. The centerpiece of the Thai NVDR legal framework is the “Prospectus” for the

² “The “Market for Alternative Investment” (MAI) was established under The Securities Exchange of Thailand Act. The MAI’s purpose is to create new fund-raising opportunities for innovative business with high potential growth as well as provide a greater range of investment alternatives. It officially commenced operations on June 21, 1999,” <https://www.set.or.th/mai/en/about/vision.html> (last visited: April 11, 2022); NVDR accounts for 48.6% of the total volume of foreign trading on the MAI, and 10.61% of the total volume of foreign trading on the SET, <https://www.set.or.th/set/nvdroverview.do?language=en&country=US> (last visited: April 11, 2022).

³ Notification No. Sor Jor. 38/2552 dated August 3, 2009 of the Thai SEC, <https://publish.sec.or.th/nrs/4848se.pdf> (last visited: June 15, 2022).

⁴ Notification No. Tor Jor 32/2552 dated August 3, 2009 of the Thai SEC, <https://publish.sec.or.th/nrs/6982se.pdf> (last visited: June 15, 2022).

Issuance of Non-Voting Depository Receipts⁵ issued by Thai NVDR Co., Ltd. (the NVDR Issuer, a subsidiary of the SET).⁶ The Prospectus gives a concrete definition of NVDR as an equity instrument traded at the same price as its underlying assets.⁷ Most importantly, the Prospectus sets out the specific terms and conditions for the issuance and trading of NVDR as well as the rights and obligations of the NVDR holders. Hence, the legal characteristics of NVDR herein are largely based on this document.

1.1. The underlying securities and the Target Company

The underlying securities on which NVDRs are issued may be non-voting common or preferred shares, transferable subscription rights and warrants.⁸ However, for the purpose of this thesis, in the most part, only non-voting shares will be discussed. As the name suggests for itself, the underlying non-voting shares are the shares making up part of the Target Company's equity, however, without any voting rights. The only case where the underlying non-voting shares can have a vote is on the Target Company's plan to delist the NVDRs from the stock exchange.⁹

With respect to the Target Company, it must be a listed company first and foremost.¹⁰ The maximum limit of equity represented by NVDR in the equity of a Target Company is subject to approval of the Thai SEC on a case-by-case basis. For financial institutions, the NVDR limit is subject to the Bank of Thailand's approval, which is currently up to 25%.¹¹

1.2. The NVDR Issuer

⁵ Prospectus for the Issuance of Non-Voting Depository Receipts dated March 5, 2021 of Thai NVDR Co., Ltd., https://www.set.or.th/nvdr/en/info/files/Full_Prospectus_05032021.pdf (last visited: April 11, 2022).

⁶ Part I (Prospectus Summary) of the Prospectus.

⁷ *Ibid.*

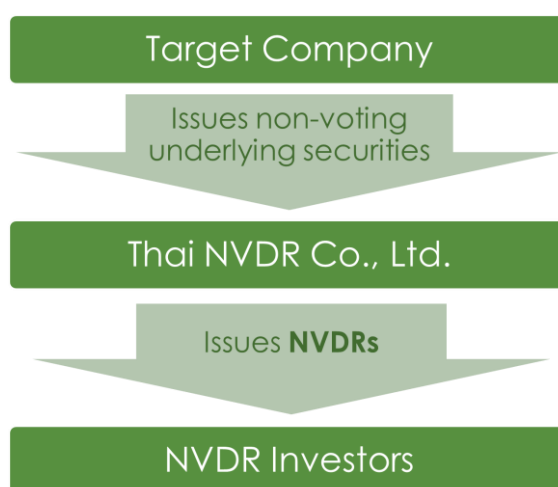
⁸ Part II (Definitions) of the Prospectus.

⁹ Part V (Terms and Conditions of the NVDR), Section 8 (Voting Rights) of the Prospectus.

¹⁰ Clause 2(4), Thai SEC's Notification No. Tor Jor 32/2552.

¹¹ Approval of the Bank of Thailand on the NVDR limit in financial institutions, https://www.set.or.th/nvdr/en/guide/BOT_conditions_p2.html (last visited: April 11, 2022).

NVDRs are issued by Thai NVDR Co., Ltd. (“Issuer”), a wholly-owned subsidiary of the Thai SEC. The Issuer is technically the shareholder holding the underlying shares in the Target Company.¹² This structure allows no share ownership to NVDR holders and enables a centrally-managed trading system for the listed NVDRs where the Issuer is the sole and sufficient market maker (in other words, liquidity provider) for this instrument. As NVDRs could have a vote in a meeting of the Target Company considering the delisting of NVDRs, the Issuer will vote on behalf of the NVDR holders in such case.¹³



The structuring layers of NVDR

1.3. The NVDRs and represented interests

NVDRs issued on non-voting common shares allows the investors to enjoy the same financial interest that the common shares offer, such as dividends and subscription rights. If the dividends are distributed in cash, the NVDR investors enjoy a payment from the Target Company. If the dividends are distributed in-kind such as in a number of common shares or transferable subscription rights, the NVDR investors may receive new NVDRs issued on such common shares or transferable subscription rights.

1.4. The NVDR holders and investment limitation

¹² Part I (Prospectus Summary) of the Prospectus.

¹³ Part V (Terms and Conditions of the NVDR), Section 8 (Voting Rights) of the Prospectus.

Although NVDR was invented for the main purpose of overcoming FOL barriers, it is offered not only to foreign investors but also local investors. Furthermore, to serve the purpose of overcoming investment barriers posed by FOL without undermining the function of FOL itself, there are certain investment limitations. Any investor is not allowed to hold any combination of NVDRs and shares in a Target Company which results in aggregate of 25% or more of the total number of voting rights in such Target Company, if each NVDR is considered as one common share with one voting right.¹⁴ This limitation provides a certain degree of protection for minority shareholders, as well as reinforces the growth objective of NVDR. Basically, the implications of this limitation are presented in two scenarios:

- (i) If a shareholder holds both Shares + NVDRs with 24.99% voting rights in the Target Company, they cannot purchase any additional NVDRs of the same Target Company. If such shareholder purchases additional any number of Shares, the Issuer shall repurchase an equivalent number of NVDRs.
- (ii) If a shareholder already holds Shares representing 25% or more voting rights in a Target Company, they cannot invest in NVDRs in the same Target Company. In other words, if a shareholder has any veto power in decisions on delisting NVDR from the stock exchange (including decisions on repurchase of the underlying Shares, settlements with or compensation for holders of the delisted NVDRs, etc.), such veto shareholder must not be also an NVDR holder.

(If treating 1 NVDR = 1 Share with 1 vote)

¹⁴ Part 5 (Terms and Conditions of the NVDR), Section 3.1 (Investment Limitation) of the Prospectus:

“No Investor may acquire or hold any combination of the NVDRs and the Shares of business if, as a result of that holding, that Investor would hold (treating each NVDR as the equivalent of one Share) in aggregate of 25% or more of the total number of voting rights of such business. In the event that any Investor reaches that threshold, the Issuer shall purchase the NVDRs from the Investor until the aggregate number of the Shares (treating each NVDR as the equivalent of one Share) held by such Investor is below 25% of the total number of voting rights of such business.

In determining whether the number of voting rights reaches the threshold percentage referenced in the previous paragraph, the Issuer will consider under Section 247 and 258 of the SEC Act and rules promulgated there under by the SEC or Financial Institutions Businesses Act B.E. 2551 are the governing laws.”

This investment limitation prevents a major shareholder with veto power from undermining corporate growth or risk management strategy. For example, if the Target Company needs to increase its retained earnings for future projects or risk management, which reduces the possible dividend paid to NVDR investors, the veto shareholder who also holds a large volume of NVDRs could veto such action to maximize their benefits from NVDRs. Meanwhile, the main goal that Thai regulators have for NVDRs is about growth and long-term value creation.¹⁵ In addition, this investment limitation sets out a clear line between NVDR holders and shareholders: a shareholder might have veto power, but an NVDR holder must not have veto power in any decisions of the Target Company.

1.5. NVDR offered on local market vs. depository receipts offered on foreign markets

Financial investors are familiar with depository receipts (DR) which are also issued on underlying securities such as shares in a Target Company. Both DR and NVDR are tools to raise foreign fundings, but there are differences between these financial instruments. First, DRs are listed on a foreign market other than the local market of the target company, and the underlying shares are held by the DR issuer residing in such foreign market; meanwhile, NVDRs are listed on the local market together with the underlying shares. Second, the underlying shares of NVDRs must be non-voting – i.e., giving no control rights to the investor, while DR investors and issuers might have some control rights in the Target Company's business (at least, DR issuers are shareholders of the target company). As such, DR does not solve the puzzles of FOL. It is a more popular instrument and has similar functions in most markets, such as the American Depository Receipts,¹⁶ the UK's Depository Receipts,¹⁷ and Singapore's Global Depository

¹⁵ *Supra* note 2.

¹⁶ US SEC, *Investor Bulletin: American Depository Receipts*, <https://www.sec.gov/investor/alerts/adr-bulletin.pdf> (last visited: June 15, 2022).

¹⁷ London Stock Exchange, *Depository Receipts – Guide to Depository Receipts on London Stock Exchange* <https://docs.londonstockexchange.com/sites/default/files/documents/dr-guide.pdf> (last visited: June 15, 2022).

Receipts,¹⁸ while NVDR is the name given for a special instrument of the Thai capital market with unique mission and design.

1.6. Why NVDR is a good financing channel for Thai companies

The dominance of NVDR in foreign trading on the MAI shows its importance as a major financing channel for young companies in the technology and innovation industry. The characteristics of NVDR also fits very well into the growth strategy of these young companies. First, it removes the hard barrier created by FOL and brings in the rich foreign capital. Second, young companies often lack the bargaining power in negotiating loans with credit institutions,¹⁹ while NVDR provides an alternative option to call for both institutional and individual investors who focus on growth and long-term value creation.²⁰ Third, together with the underlying non-voting securities, NVDR does not dilute the voting power, hence gives founders and managers more control to execute long-term goals and visions while reducing agency costs and transaction costs.²¹

From the investors' perspective, except for voting rights and distribution of assets in case of bankruptcy,²² the rest of benefits offered by common shares could be expected by NVDR investors, but mainly dividends and capital gains as sources of investment returns. While capital gains depend on more factors influencing the capital market, dividends depend almost completely on the Target Company's performance. That said, investors who focus on capital gains would still pay close attention to corporate performance because of its positive

¹⁸ Rule 251, SGX Mainboard Rules, <http://rulebook.sgx.com/rulebook/251-0> (last visited: June 15, 2022).

¹⁹ Xiao-Yong Wang et al., *Information and Bargaining Power: Evidence from SME Lending in China*, 14 INT. J. INFO. TECH. DEC. MAK. 901–913 (2015). There is “evidence suggesting that the length of borrowers' business affect the bargaining power” with lenders. See also Jens Grunert & Lars Norden, *Bargaining power and information in SME lending*, 39 SMALL BUS. ECON. 401–417 (2012).

²⁰ Success in attracting equity investors could also enhance SMEs' credibility and chance of securing loans from credit institutions.

²¹ See discussion in Chapter II, Section 2.3 of this Thesis.

²² NVDR holders' rights are uncertain upon the Target Company's insolvency or bankruptcy. Under Thailand's bankruptcy law, only shareholders and secured creditors are entitled to asset distribution. As NVDR holders are not shareholders of the Target Company and can only vote on matters related to the delisting of NVDRs, NVDR holders are not entitled to statutory rights to share the Target Company's assets.

correlation with stock liquidity.²³ Hence, in order to make the equity market more attractive, one of the central tasks is improving corporate performance. Continuing the discussion in this regard, the remaining of this Chapter explores how Thailand's reforms in corporate governance, capital market and financial system contributed to attractiveness of NVDR and also capital market of Thailand in general.

2. Problems entailed and Thailand's solutions for a feasible NVDR framework

NVDR has been feasible because the classic concept "separation of ownership and control" is seriously acknowledged in Thailand's business environment. In addition, one of the main goals of securities regulations, besides making and stabilizing the capital market, is investor protection. This Section is dedicated to exploring the key problems entailed with the introduction of NVDR on Thailand's capital market, and Thai regulators' response to such issues through securities regulations and corporate governance reforms. First, the most important factor that ensures NVDR may serve its mission is an acknowledgement of the true purpose of FOL as to reserve local control over regulated companies, rather than to reserve equity ownership therein. Second, non-voting equity gives rise to an imbalance between control rights and cash flow rights, which requires safeguards to protect NVDR investors. Thailand's safeguards in this regard are adopted through reforms in corporate governance, capital market and securities regulations, and even securities litigation.

2.1. FOL revisited: equity ownership or corporate control?

Among foreign investment restrictions, FOL is the most used and well-known measure. Typically, FOL takes the form of limiting foreign ownership of equity capital in restricted sector, e.g., to less than 50 per cent, or a complete ban of foreign ownership of any kind. Although there are scholarships discussing the importance of control as a central point in the relationship

²³ Vivian W. Fang, Thomas H. Noe & Sheri Tice, *Stock Market Liquidity and Firm Value*, 94 J. FINANC. ECON. 150–169 (2009).

between foreign investors and the host government,²⁴ many countries are reluctant to the nature of control and its implications for foreign investment restriction policies, hence the dominance of limits imposed on equity capital among the forms of FOL. Below, the author analysis different forms of FOL and discusses Thailand's approach in imposing FOL on voting power, which embodies the importance of control in foreign investment restriction policy.

2.1.1. *Revisiting the purpose of FOL through different approaches to FOL*

FOL may appear as a clear indication, but just like any legal terms, there may be countless ways to define and interpret it. On the terminology level, the key factor of FOL rests on the word "ownership". In many cases, the practical problems around FOL come from the definition of foreign ownership. What is the true meaning of ownership in a corporation? Is ownership of a corporation determined, or should it be, based on the ownership of equity capital, number of shares, number of voting shares, or number of votes represented by share ownership? The answers vary among different jurisdictions, depending on which of the two following central concepts is used to define ownership: "equity" and "control".²⁵ The variations of FOL, except for the case of complete ban on foreign investment, can be consolidated into the following approaches:

(1) Threshold on ownership of equity, which could be also termed as "registered capital" or "equity capital". This concerns all types of shares whether with or without voting rights;

(2) Threshold on ownership of voting capital. This concerns only the number of voting shares;

²⁴ DAVID CONKLIN & DON LECRAW, FOREIGN OWNERSHIP RESTRICTIONS AND LIBERALIZATION REFORMS 66 (1997); D. J. Lecraw & A. J. Morrison, *Transnational Corporations-Host Country. Relations: A Framework for Analysis*, The University of South California, Essays in International Business, No. 9 (1991); Leland B. Yeager, *Sovereignty at Bay: The multinational spread of U.S. enterprises*, 2 JOURNAL OF INTERNATIONAL ECONOMICS 455-462 (1972).

²⁵ *Id.*, at 63-66 (Conklin and Lecraw viewed foreign ownership restrictions as a method to limit foreign influence and control, and discussed a spectrum of defining foreign ownership: based on "equity ownership" on one end, and based on "legal control" on the other end).

(3) Threshold on ownership of voting power. This concerns the number of voting rights represented by voting shares, in other words: through this approach, FOL is about limiting foreign control over local businesses through voting rights;

(4) Threshold on control. This concerns any arrangements that give foreign stakeholders dominance influence over material corporate decision making; through this approach, FOL is about limiting foreign control over local businesses through any measures. This is a “catch-all” approach because the trigger events in this approach may include trigger events of all other approaches above, and also events where control is given to non-shareholding creditors.²⁶

On one end of the spectrum, the equity approach (1) is problematic because there is no precise link between equity ownership and control or influence. However, this is the approach of many developing countries including Vietnam. In recent years, the market has called out this approach as questionable, because it strictly limits the opportunities for local companies to welcome foreign capital even if local control is maintained; meanwhile, it fails to catch all of the cases where control may be given to foreign stakeholders. In practice, control over a company does not necessarily have to be obtained through direct share ownership. Control can be obtained through voting proxy, nominee arrangements, cross ownership of shares, or even loan covenants. In sum, this approach appears to be strict on limiting foreign participation in making corporate decisions, but it fails to prevent the cases where foreign shareholders could obtain control in the local company through arrangements other than major ownership of the company’s equity. Therefore, maybe it is time that countries adoring this equity approach

²⁶ The four different approaches to FOL are consolidation based on the author’s observation and analysis. See also *Id* (Conklin and Lecraw’s discussion on the two ends of the spectrum of foreign ownership definition. The “equity” approach is constructed with the definition of foreign ownership based on equity ownership – one end of the spectrum discussed by Conklin and Lecraw. The “control” approach is constructed with the other end of the spectrum. In the middle, the “voting capital” and “voting power” approaches are hybrid between the two ends of the spectrum.)

should seriously reassess the true purpose of FOL and give the concept of “foreign control” another thought.

On the other end of the spectrum, the control approach (4) is adopted by some developed countries such as the US, UK, France and Germany, probably because of their extensive exposure and experience with super-voting shares, such as triple class shares in the US and golden shares in the privatization of state-owned enterprises in Europe. Another reason could be that foreign investment is smaller in volume in those developed markets than developing markets, thus render this approach more practical in terms of the human resource needed for the screening process. In less developed countries, especially where foreign investment plays a more significant part in the national economy, the control approach might not be practical in terms of screening agencies’ resources and sophistication.

2.1.2. *Thailand’s FOL and the voting power approach*

Thai NVDR was designed as if the FOL in Thailand was set to limit foreign *control* rather than share *ownership*. This echoes Berle and Means’ separation of ownership and control. They argued that the control over a company is not in the hands of shareholders, but rather in the hands of corporate insiders with voting control or working control of the company.²⁷ The

²⁷ Berle, A. and Means, G., 2004. *The Modern Corporation and Private Property: with a New Introduction by Murray L. Weidenbaum and Mark Jensen*. 6th ed. New Brunswick: Transaction Publishers, p.244. Berle and Means classified three types of public corporations based on the separation between share ownership and voting control or working control: (i) *Majority control* where dominant shareholder(s) own(s) more than 50% of the outstanding shares; (ii) *Minority control* where dominant shareholder(s) own(s) less than 50% of the outstanding shares but still have effective voting control; and (iii) *Managerial control* where managers, and no shareholders, are given working control of the company. The first two types exhibit partial separation of ownership and control, and the third type exhibits a complete separation of ownership and control. In a public company, dispersed share ownership is prevalent, giving outside shareholders no material control of the company. See also *infra* note 75, at 8-10.

common laws²⁸ and the EU's FDI Screening Regulation²⁹ also shared this view. Meanwhile, in practice, the “foreign ownership limit” in Thailand is understood and applied as a limit on voting rights of foreign shareholders, regardless of equity capital structure.³⁰ In other words, “foreign *ownership* limit” in Thai companies could be interpreted as “foreign *control* limit”, which is destined with the ultimate purpose of keeping companies in certain industries under the control of Thai persons. As such, limiting foreign ownership or foreign control means limiting the voting power of foreign equity owners. With this in mind, Thai regulators introduced NVDR so that foreign investors could invest in equity but have no voting power attached to such equity.³¹ Thus, the issuance of NVDR to foreign investors would not raise the foreign control in a Thai company nor the room for foreign common shares, which means no triggers with regards to FOL. In other words, Thailand currently approaches FOL based on voting power.

The importance of this approach is that without it, the function of FOL is completely undermined and NVDR is no more than a broken deal. For instance, Company A has 1,000 shares with equal voting rights, has reached its FOL of 49% (i.e., 490 shares are held by foreign shareholders), and plans to issue NVDRs based on 100 newly issued non-voting shares; the total number of shares after the NVDR issuance is 1,100 shares. If the FOL is understood plainly as limit on ownership of shares, the room for foreign share ownership is increased from 490 shares to 539 shares. Then, foreign shareholders may acquire more existing shares with voting

²⁸ Mathew Lawrence, *Corporate Governance Reform: Turning business towards long-term success* (2017), at 15. It has been firmly settled in English case laws that “shareholders are not, in the eyes of the law, part owners of the company” (Short v. Treasury Commissioners (1948), Court of Appeal), and “shareholders hold no legal or equitable interest over any property owned by the company under English company law” (HMRC v. Laird Group PLC (2003), House of Lords), <https://www.ippr.org/files/2017-07/cej-cgr-dp-17-07-14.pdf> (last visited: May 11, 2022). Shares are viewed as a “bundle of rights and liabilities” allowing shareholders to receive a part of the company’s profit through the distribution of dividends, and to receive a part of the surplus of the company’s assets in case of winding up.

²⁹ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

³⁰ Patanaporn Kowpatanakit, *Nominee System and Abuses of Indirect Shareholding in Thailand’s Capital Market*, 1 JOURNAL OF THAI JUSTICE SYSTEM 39–57 (2008), at 54–5. See also further discussion in the following paragraph.

³¹ Part I (Prospectus Summary) of the Prospectus.

rights from local shareholders and hold up to 53.9% of the total voting rights, which means the corporate control over Company A falls into the hands of foreign shareholders. Such a scenario (as further illustrated in *Figure 2*) never happened thanks to Thai regulators' foreign voting power approach.

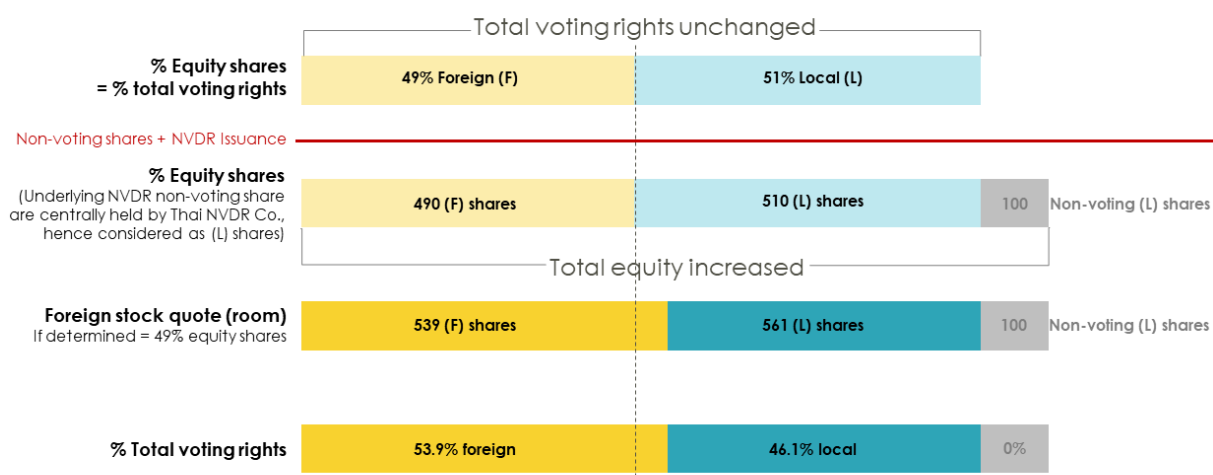


Illustration of an example where NVDR can undermine the purpose of FOL if FOL is determined by the equity approach.

In addition, each listed company on the SET or MAI has separate stock quotes (with equivalent trading boards) for local (L) shares and foreign (F) shares³² which are allocated without any concerns on the issuance of non-voting shares as NVDR underlying securities.³³ Such practice coincides with the interpretation above, although the Foreign Business Act's definition of foreign ownership does not fully reflect this foreign voting power approach.³⁴ Therefore, there has been a movement calling for the codification of the practically accepted approach to foreign ownership, in specific, to amend the definition of foreign ownership in the Foreign Business Act.

³² Including separate stock quotes for (L) common shares, (F) common shares, (L) preferred shares and (F) preferred shares. <https://classic.set.or.th/mkt/sectorquotation.do?sector=SET50&language=en&country=US>

³³ According to the author's observation of the SET's trading boards.

³⁴ *Supra* note 30, at 55.

Although FOL has been widely used as a mechanism for protecting economic sovereignty in certain industries, the nature of it being the problem of corporate control, rather than equity ownership, is often forgotten or misunderstood. Thailand's voting power approach is more practical than the equity capital approach in many other developing countries, although this approach does not capture all cases where foreigners could obtain de facto control of a local company.³⁵ Considering a corporate environment dominated by local family control,³⁶ the non-existence of super-voting shares in public companies, and the supporting role of merger control regulations, the current approach appears to be functioning well for Thailand. That said, more assessment is needed to conclude whether it is necessary for Thailand to "upgrade" to the control approach. For Vietnam, in order to build a feasible NVDR framework, this remains a puzzle to be solved.

While some countries practice very strict FOL,³⁷ and other developing countries, including Vietnam, are looking for a way to redefine FOL, by and large, NVDR provides a balanced approach to FOL in Thailand, even though the control approach is not yet codified in this jurisdiction.

2.2. Agency problems: the role of corporate governance in corporate performance, valuation, and investor protection

2.2.1. *The agency problem and why corporate governance matters*

³⁵ In fact, in developing countries with small capital markets, companies typically rely on funding from debt much more than equity, exposing them to more possibility of creditors' control.

³⁶ "Thai family members are the largest shareholders in 41% of SET100 companies. In addition, in 39% of SET100 companies, private companies are the largest shareholders – with 72% of these private companies being closely related to the family members who have effective control over these companies. [...] As such, it appears that family controllers are the dominant shareholders and de facto stewards in most of Thailand's largest listed companies." See Patanaporn Kowpatanakit & Piyabutr Bunaramrueang, *The Thai Institutional Investors Stewardship Code and Its Implementation*, in GLOBAL SHAREHOLDER STEWARDSHIP 335–359 (Dionysia Katelouzou & Dan W. Puchniak eds., 1 ed. 2022).

³⁷ Such as Brazil (foreigners can only invest in non-voting shares) and Qatar (FOL in all listed companies is strictly fixed at 25% of the free float). See *MSCI Global Market Accessibility Review* https://www.msci.com/documents/1296102/1330218/MSCI_Global_Market_Accessibility_Review_June2014.pdf/d2881900-bad5-40ab-abb0-964174636407

A Target Company, with part of its capital raised from NVDR issuance, is in fact a dual class company, and the central problem of all concerns around dual class shares is the agency problem.³⁸ In addition, with the dominance of family control in the largest companies, non-voting shares and NVDR even further the pre-existing issues of concentrated control and agency problems in Thai companies.³⁹ Therefore, improving corporate governance plays a very important role in Thailand's NVDR promotion plan.⁴⁰

In particular, first, corporate governance is positively relative to corporate performance, which means better corporate governance improves corporate performance and often results in more profit.⁴¹ This is what NVDR investors look for in a Target Company. When investors put their money into a company without obtaining voting rights, it is a fair assumption the company must have something to offer in exchange for taking away the voting rights from NVDRs which are traded at the same price as common shares. In the case of NVDR – a type of Certificates Representing Interests from Underlying Securities, as the name speaks for itself, investors expect economic benefits from the underlying shares and dividend is the most direct and basic benefit among them. Meanwhile, the key to stable dividend payment of a company is its performance. As for firm value, it is undoubtedly important to any investors on the capital market as it determines the value of what investors hold in their basket.⁴²

Second, good corporate governance provides more certainty and adequate protection measures for investors that hold little or no say in corporate decisions. In fact, corporate

³⁸ Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE (ECGI) - FINANCE WORKING PAPER NO. 209/2008 (2008).

³⁹ *Infra* note 43.

⁴⁰ Corporate governance in dual class companies influences stock pricing. See Scott B. Smart, Ramabhadran S. Thirumalai & Chad J. Zutter, *What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values*, 45 J. ACCOUNT. ECON. 94 (2008).

⁴¹ Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107–155 (2001).

⁴² Art Durnev & E. Han Kim, *To Steal or Not to Steal: Firm Attributes, Legal Environment, and Valuation*, 60 THE JOURNAL OF FINANCE 1461–1493 (2005) (discussing that companies with higher ranking in terms of corporate governance and transparency are valued higher on the stock market.)

governance reform was necessary not only because of the coming of NVDR, but also because the dominance of family control in Thailand's largest companies, as similar in many Asian and European markets.⁴³ Family control is not always a bad thing for either the company or minority investors,⁴⁴ but certain measures should be in place to prevent the controller from benefiting at the expense of other investors.

Last but not least, good corporate governance encourages the growth of company valuation and can be utilized to prevent shareholder activists from interrupting long-term value creation. In sum, corporate governance policies have two main objectives: minimizing agency costs and maximizing valuation. From an emerging market's perspective, corporate governance reform also helps improve the business environment, investors' confidence, and the capital market in general, as well as reduce vulnerability to financial crises.⁴⁵ This absolutely fits into the main objective of NVDR: growth. The sub-sections below discuss the particular effects of corporate governance reform in relation to the promotion of NVDR and Thailand's capital market.

2.2.2. *Corporate Governance Code for Listed Companies ("CG Code")*

Over twenty years after the start of a corporate governance reform triggered by the 1997 Asian Financial Crisis, and going through the 2008 Global Financial Crisis, Thailand has scored highly on an international scale in terms of corporate governance.⁴⁶ The corporate governance reform has been largely viewed as a great success of cooperation between Thailand's public sector and private sector, including the National Corporate Governance Committee, the Bank

⁴³ Ferdinand A Gul & Judy Tsui, *The Governance of East Asian Corporations Post Asian Financial Crisis* (2004).

⁴⁴ *Ibid.*

⁴⁵ WORLD BANK GROUP, *Thailand - Report on the Observance of Standards and Codes (ROSC): corporate governance country assessment* (2005), <https://documents1.worldbank.org/curated/en/560511468118458173/pdf/465430ESW0P0941BLIC10TH0rosc1cg1tha.pdf> (last visited: Jun 4, 2022).

⁴⁶ Thai Institute of Directors Association, *Corporate Governance Report of Thai Listed Companies 2018*, at 38, <http://www.thai-iod.com/en/publications-detail.asp?id=447> (last visited: Jun 4, 2022). The average CG score was exceptional [compared to other countries, especially Asian neighbors, and was marked as a historical high of 81%].

of Thailand, the Thai SEC, the SET, as well as professional organizations.⁴⁷ Thai regulators' initial purpose of strengthening corporate governance standards was to prevent future crisis, and the CG Code was a part of a strategy constructed on three pillars: regulatory discipline; market discipline; and, self-discipline.⁴⁸ Through several revisions in 2006, 2012⁴⁹ and most recently in 2017, with the OECD Principles of Corporate Governance reflected,⁵⁰ the CG Code paved a way for Thailand to quickly catch up with international corporate governance trends from time to time. One of those trends is the recent shareholder stewardship movement, which is discussed further in Section 2.2.3. Furthermore, the most recent CG Code 2017 added and emphasis on social and environment responsibilities, the business leadership concept, and the board's roles and responsibilities for the company's long-term sustainable value creation. As such, the Thai SEC affirmed the importance of the CG Code to "the capital market and the society at large", not only for shareholders and stakeholders.⁵¹

In general, the CG Code focuses on improving the accountability, responsibility, equitable treatment, and transparency of listed companies through eight Corporate Governance Principles ("CG Code Principles"):⁵²

Principle 1: Establish clear leadership role and responsibilities of the board

Principle 2: Define objectives that promote sustainable value creation

Principle 3: Strengthen board effectiveness

Principle 4: Ensure effective CEO and people management

Principle 5: Nurture innovation and responsible business

⁴⁷ Patanaporn Kowpatanakit & Piyabutr Bunaramrueang, *The Thai Institutional Investors Stewardship Code and Its Implementation* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563694 (last visited: June 15, 2022), at 3.

⁴⁸ *Ibid.*

⁴⁹ The CG Code was revised in 2012 in order to be compatible with the ASEAN Corporate Governance Scorecard.

⁵⁰ Thai SEC, Corporate Governance Code 2017 – Concept, <https://www.sec.or.th/cgthailand/EN/Pages/CGCODE/CGCODEINTRODUCTION.aspx> (last visited: June 15, 2022).

⁵¹ *Ibid.*

⁵² *Supra* note 47, at 3.

Principle 6: Strengthen effective risk management and internal control

Principle 7: Ensure disclosure and financial integrity

Principle 8: Ensure engagement and communication with shareholders

Those principles work together to achieve good corporate governance in the criteria of (i) rights of shareholders, (ii) equitable treatment of shareholders, (iii) role of shareholders in corporate governance, (iv) disclosure and transparency, and (v) board effectiveness.⁵³ Among them, NVDR investors may benefit the most from board effectiveness, disclosure and transparency.

First, board effectiveness in the Target Company is vital for the investment of NVDR investors. Particularly, besides procedural requirements, the CG Code Principle 3, on strengthening board effectiveness, emphasizes that the board must serve the company's best interest⁵⁴ based on the nature of the company's business and operations.⁵⁵ Together with the Thai SEC's requirement of at least three independent directors making up at least one third of the board,⁵⁶ the CG Code Principle 3 helps to ensure that the board's actions are not against the company's long-term value creation and growth. Second, disclosure and transparency are undoubtedly important as an anti-fraud device, as well as allowing investors to make informed investment decisions.

The CG Code is implemented on a "comply or explain" basis for each Principle. Listed companies are required to explain their compliance in annual registration statements and annual reports. Otherwise, opt-out of any principles has to be justified.⁵⁷

⁵³ *Supra* note 50.

⁵⁴ CG Code Principle 3.2.

⁵⁵ CG Code Principle 3.8.

⁵⁶ Clause 17, Notification No. Tor Jor. 39/2559 of the Thai SEC, <https://www.sec.or.th/EN/Documents/Share/7079se.pdf> (last visited: June 17, 2022).

⁵⁷ *Supra* note 50.

2.2.3. *Investment Governance Code for Institutional Investors 2017 (“Thai Stewardship Code”)*

The Thai Stewardship Code⁵⁸ was adopted in 2017 as the Thai SEC continues efforts to improve corporate governance, following the CG Code’s success. While the CG Code is a “comply or explain” code focusing on the responsibilities of the board of directors and the rights and equitable treatment of shareholders, the Thai Stewardship Code is a voluntary code focusing on another puzzle of the corporate governance picture: the responsibilities of institutional investors.⁵⁹ In particular, it aims to provide institutional investors with a set of best practices for acting in the best interest of their clients. Institutional investors – the corporate stewards – under the scope of this code are of three categories: (i) asset managers,⁶⁰ (ii) asset owners,⁶¹ and (iii) related services providers of asset managers and asset owners.⁶²

The Thai Stewardship Code was built based on the UK Stewardship Code 2012, getting even closer to the international standards, especially the OECD’s standards, during the global shareholder stewardship movement.⁶³ According to the Thai Stewardship Code, institutional investors should:⁶⁴

(Principle 1) Adopt a Clear Written Investment Governance Policy;

⁵⁸ Thai SEC, Investment Governance Code for Institutional Investors 2017, <https://www.sec.or.th/cgthailand/EN/Documents/ICode/ICodeBookEN.pdf> (last visited: June 17, 2022).

⁵⁹ *Supra* note 47, at 6.

⁶⁰ Asset managers are asset management companies licensed by the Thai SEC, “responsible for managing funds on behalf of their clients and asset owners through an investment mandate and generate returns for them” (Clause 2(1), Thai Stewardship Code).

⁶¹ Asset owners are “organizations who pool funds of clients in collective investment vehicles” including “government pension funds, social securities funds, insurance companies, provident funds, etc.” (Clause 2(2), Thai Stewardship Code).

⁶² Related service providers are “fund supervisors, (sub-) custodians, proxy advisers, investment consultants and trustees who are agents with responsibility for the maintenance and safekeeping of the records of the asset owners’ and asset managers’ assets, or who undertake functions mandated by asset owners and asset managers to support their activities” (Clause 2(3), Thai Stewardship Code).

⁶³ *Supra* note 47, at 5.

⁶⁴ Clause 3, Thai Stewardship Code.

- (Principle 2) Properly Prevent and Manage Conflicts of Interest and Prioritise Advancing the Best Interest of Clients;*
- (Principle 3) Make Informed Investment Decisions and Engage in Active Ongoing Monitoring of Investee Companies;*
- (Principle 4) Apply Enhanced Monitoring of and Engagement with the Investee Companies if Monitoring pursuant to Principle 3 is Considered Insufficient;*
- (Principle 5) Have a Clear Policy on Exercising Voting Rights and Disclosure of Voting Appropriate; and*
- (Principle 6) Act Collectively with Other Investors and Stakeholders as Appropriate.*
- (Principle 7) Regularly Disclose the Investment Governance Policy and Compliance with the Policy.*

In sum, the Thai Stewardship Code emphasizes two factors of institutional investors' responsibilities. First, in furthering the interests of their clients, institutional investors act as the main actor to escalate shareholders' engagement in monitoring the target company. Second, in creating long-term sustainable values, institutional investors should engage with the target company to improve the company's performance in terms of environment, social and governance factors.⁶⁵ Those responsibilities strengthen the goals of the CG Code on both investor protection and benefiting the society at large. Until now, all asset management companies in Thailand have voluntarily adopted the Thai Stewardship Code's principles, which appears to be a good start.⁶⁶ However, only a few private mutual funds have joined the force, and considering the dominance of family control as well as the fact that institutional investors usually hold tiny minority shares in Thai listed companies, the impact of the Thai Stewardship

⁶⁵ *Supra* note 47, at 6-7.

⁶⁶ *Supra* note 47, at 16.

Code on corporate governance in Thailand needs further assessment.⁶⁷ Adding family controllers into the collection of corporate stewards could be a way to better promote the code.⁶⁸

2.3. Better protection for NVDR investors with class actions

The corporate governance reform has made its marks in boosting Thailand's investment environment, but not less important are measures for NVDR investors to raise their voices, such as enforcement through private litigation, when they have no voting rights to exercise over corporate decisions. Company law provides extensively for the protection of minority shareholders, however, NVDR investors cannot rely on such provision because they are not shareholders. Emerging markets have much to learn about this from the US – the most tested capital market where investors are well aware of their rights and hundreds of securities class actions are brought by minority investors every year.⁶⁹ Thailand, indeed, learned from the best and tailored new legislations for class actions in the amended Civil Procedure Code, effective from December 2015.⁷⁰ Similar to many other Asian jurisdictions, Thailand previously did not have specific legal framework for class action lawsuits. Now, after half a decade since the Civil Procedure Code of Thailand was supplemented with specific provisions on class actions, this type of litigation is still considered new and not common. Only a few class actions on product liability have been resolved. Although Thailand's new legislations on class action deserves praises, practical outcome is still limited, especially for securities litigation.

NVDR has been a good financing channel for Thailand's companies across industries and sizes: from the largest financial institutions to the rising innovation stars. NVDR is also a

⁶⁷ *Supra* note 47, at 33.

⁶⁸ *Supra* note 47, at 33-4.

⁶⁹ See Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review*, (2021), https://www.nera.com/content/dam/nera/publications/2021/PUB_2020_Full-Year_Trends_0122_21.pdf (last visited: Jun 3, 2022).

⁷⁰ The new Chapter IV – Class Action, containing 49 articles, was added to the Civil Procedure Code of Thailand. See *Act Amending the Civil Procedure Code (No. 26)*, B.E. 2558 (2015), *Unofficial translation*: <https://www.krisdika.go.th/librarian/get?sysid=809762&ext=pdf> (last visited: June 5, 2022).

good investment channel for passive investors who do not seek involvement in the Target Company's decision making. The author opines that Thailand's success in promoting NVDR was supported, to a great extent, by (i) a renewed approach to FOL based on voting rights, and (ii) extensive reforms in corporate governance, including the introduction of the CG Code and Thai Stewardship Code. In addition, other reforms of the capital market and financial system, as well as a less protectionist approach to foreign investment than neighboring countries,⁷¹ also contributed to the NVDR success and, at large, the top tier position of Thailand's capital market in the Asia Pacific region. After all, the consistency in legal enforcement among Thai agencies, which is often a struggle among Vietnamese agencies, plays a decisive role to make all the reform efforts worthwhile.⁷²

⁷¹ William H. Overholt, *Thailand's Financial and Political Systems: Crisis and Rejuvenation*, 39 ASIAN SURV. 1019, 1026 (1999).

⁷² *Ibid.* (discussing that unlike Vietnam, Thailand did not need to spend extensive time to build a consensus among government and party officials).

CHAPTER II: LESSONS FROM DUAL CLASS AND NON-VOTING STOCKS IN THE UNITED STATES

The dual class stock structure has again stirred up discussions in the past few years as Asian financial centers such as Singapore and Hong Kong amended rules to allow listings of dual class shares, as well as the UK's plan to allow dual class firms' inclusion in the LSE's premium listings. Two main reasons behind this trend in those markets, among others, could be (i) the regulatory competition to attract innovative businesses, and (ii) the innovation competition to enable the rise of innovative firms in these markets to catch up with the US' giants such as Google, Facebook and Tesla.⁷³ The latter reason reflects exactly what Thailand aimed for with NVDR, which rings bells to the previous Chapter's discussion on NVDR and non-voting shares in Thailand. In fact, a Thai company having part of its equity capital attached to NVDR is a dual class company. Therefore, it would be useful to explore how developed markets have been dealing with the problems of this structure.

Of all major capital markets, the US is the most tested playground for dual class structures in public companies, hence provides valuable lessons for the developing markets like Thailand and Vietnam. In particular, Thailand has already embraced a form of dual class structure, however, the dual class structure in Thailand does not involve super-voting shares because those are not allowed in listed companies. Thai listed companies can have no more than two classes of shares: (i) one-share-one-vote class of shares, and (ii) non-voting class of shares (including preference shares and NVDR Shares). The agency problem attached with super-voting shares are more serious in the US where listed companies can have super-voting shares

⁷³ Bobby Reddy, *Finding the British Google: Relaxing the Prohibition of Dual-Class Stock from the Premium-Tier of the London Stock Exchange*, 79 CAMBRIDGE L. J. 315 (2020).

and even more than two classes of shares.⁷⁴ As such, the author dedicates this Chapter on dual class shares to explore the advantages of dual class shares that made it a recent trend in global sophisticated market, as well as the problems of this stock structure and solutions provided by those jurisdictions. Dual class shares' advantages, problems and solutions herein are found to be similar but further escalated compared to those related to NVDR in Chapter I, suggesting that the policy engineering around dual class shares may be helpful for Vietnam's NVDR framework – because the NVDR structure is indeed a dual class structure.

1. Overview of dual class stock structures

Dual class stock structures allow one class of shares to have superior voting rights than the other. The typical dual class structure in the US includes one “superior” class of shares with ten votes per share, and an “inferior” class of shares with one vote per share. The former superior class makes up a minority of the company's economic value but a majority of the voting rights. It is owned by corporate insiders, such as managers or family members in case of family-controlled companies, and not publicly traded. The latter inferior class is publicly traded and makes up the majority of the company's economic value. In many cases, the inferior class has no voting rights except for certain matters such as nonpayment of dividends.⁷⁵ Multiple class stock structures (e.g., tripple-class) may include a class of shares with even more superior voting rights (e.g., 100 votes per share) and a class of shares with no voting rights.⁷⁶

By structuring dual class shares with different voting rights, with superior voting rights offered to only corporate insiders and inferior voting rights offered to the public, corporate

⁷⁴ Marc T. Moore, *Designing Dual Class Sunsets: The Case for a Transfer-Centered Approach*, 12 WM. & MARY BUS. L. REV. 93 (2020). The standard “recipe” for US dual class firms already involves shares that carry 10 votes each, and the market have even seen shares that carry 20 votes at recent IPOs, as seen in most dual class IPOs (for instance, the recent IPOs of Lyft IP and Pinterest in 2019).

⁷⁵ STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 452 (2002). Non-voting shares came to a rise in the 20th century, with one of the earliest examples being the International Silver Company's non-voting common shares issued in 1898. Now, the typical dual class structure is as previously described in the paragraph. Non-voting shares are more often seen in companies with more than two classes of shares. See also *infra* note 76.

⁷⁶ Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FINANC. STUD. 1052 (2010).

insiders could raise huge funding without losing control over the company. This is the primary motivation of promoters of dual class structures.⁷⁷ It is beneficial to corporate insiders and arguably the company itself, but serious concerns have long been in place since it became popular in the early 20th century. Oppositions of prominent scholars in economics, mainly based on the argument that the dual class structure was designed to “disfranchise” public investors,⁷⁸ together with the spillover effect of the Great Depression, resulted in its decline and even the NYSE’s ban in 1940.⁷⁹ However, as the dual class structure is a very effective hostile takeover defense,⁸⁰ it regained popularity as soon as the myriad of hostile takeovers by corporate raiders in the 1980s.⁸¹ Furthermore, as elaborated in the following Section, dual class structures have more benefits to offer than just a hostile takeover defense.

2. Advantages of dual class structures and non-voting shares: evidence from innovative companies

The controversial around dual class shares has never stopped since its first emergence in the 1890s. Through a century-long history of oppositions, deregulation, major class action lawsuits, and ongoing petitions for more stringent regulations, it is easy to leave a bad impression about this structure. The exclusion or restriction from certain listings or indices even reinforce a negativity bias among novice investors.⁸² Nonetheless, many among the largest

⁷⁷ *Supra* note 75, at 454.

⁷⁸ WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* 77 (1927).

⁷⁹ *Supra* note 75. Non-voting common stock issues were still allowed on NASDAQ and AMEX at the time.

⁸⁰ *Supra* note 75, at 454. Gompers, et al., even put the anti-takeover effectiveness of the dual class structure on top of other takeover defenses. See *supra* note 76.

⁸¹ Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L. Q. 570-71 (1991); Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CAL. L. REV. 1713-15 (1988); Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 4 (1988).

⁸² For instance, at the time of writing, dual class companies are excluded from LSE’s premium listing and S&P’s indices. The S&P recently adopted a new rule to exclude new issues of dual class share from all of the S&P Composite 1500 indices. See also Bobby Reddy, *More than Meets the Eye: Reassessing the Empirical Evidence on US Dual-Class Stock*, 23 UNIV. PA. J. BUS. LAW 955 (2021). Several US SEC officials publicly expressed concerns about dual class shares with little reference to the benefits offered by the structure. For example, see

corporations in the world have dual class structure: technology firms such as Alibaba, Alphabet (Google), Meta (Facebook), Zynga, Groupon, and also mature firms in other industries such as Berkshire Hathaway and Ford Motors – stocks that have gained investors’ confidence. Dual class structures, as such, are not all bad. Especially, in the Industry 4.0 era, there is much more to the motivation of its promoters than just the greed for control of economic power. This Section, therefore, points out the main advantages of dual class structures with a focus on innovative companies, which embodies the benefits of non-voting equity instruments like NVDR.

2.1. Long-term value creation

There are significant literature supporting dual class structures, especially in highly innovative companies, as the concentrated control allow founders and managers to pursue long-term projects and visions.⁸³ Recent empirical studies show that dual class structures has a significantly positive correlation with the number of citation per patents in high-tech companies, which indicates that dual class structures improve high quality, high impact innovation.⁸⁴ In fact, impactful innovations usually require long-term research and development projects, putting high-tech corporations at greater competition overall because profitability is not instant. In such scenarios, dual class structures are particularly useful by allowing managers to make decisions on long-term plans for greater long-term benefits rather than pursuing short-term

Robert J. Jackson, *Perpetual Dual-Class Stock: The Case Against Corporate Royalty* (2018) <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty> (last visited: June 11, 2022); Rick Flemming (Investor Advocate), *Dual-Class Shares: A Recipe for Disaster* (2019) <https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster> (last visited: June 11, 2022).

⁸³ Harry DeAngelo & Linda DeAngelo, *Managerial ownership of voting rights*, 14 J. FINANC. ECON. 35 (1985); Van Thuan Nguyen & Li Xu, *The Impact of Dual Class Structure on Earnings Management Activities*, 37 J. BUS. FINANCE ACCOUNT. 456–485 (2010); Thomas J. Chemmanur & Yawen Jiao, *Dual class IPOs: A theoretical analysis*, 36 J. BANK. FINANCE 305–319 (2012).

⁸⁴ Xiaping Cao et al., *The innovation effect of dual-class shares: New evidence from US firms*, 91 ECONOMIC MODELLING 349–56 (2020). Note that the “effect on innovation only appears in the quality of patents (average citations per patent for a firm) but not the quantity of patents (patent counts)”, indicating that dual class structures “indeed improve high impact innovation but not necessarily quantity of innovation”.

profit, being affected by market pressure, shareholder activists,⁸⁵ or sub-optimal voting outcomes due to blind voting of weakly motivated shareholders.⁸⁶ Dual class structures as a hostile takeover defense also more certainty against external takeover threats that could terminate long-term innovation leadership.⁸⁷ This provides more certainty for innovative and visionary founders in going public, as losing control is among the main reasons for remaining private.⁸⁸ Furthermore, empirical evidence also shows that banning dual class has harmful effects on their research output, valuation, and profitability.⁸⁹

2.2. Maximization of performance

In the technology and innovation industry, recent evidence shows that dual-class companies have performed better than single class companies.⁹⁰ One of the main forces of better performance is the founder's skills, visions and image. Founders and insiders possess technical knowledge, such as information about new innovations and research projects, that can cause uncertainties if disclosed to outside investors and slow down the progress of those projects. As such, the information asymmetry is not all bad in tech companies: without disclosing too much information to outside investors, long-term projects suffer less from doubts and short-term urge for profit, hence the outcome of the innovation process and wealth may be

⁸⁵ Aurelio Gurrea-Martínez, *Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate*, 22 EUR. BUS. ORG. LAW. REV. 481 (2021).

⁸⁶ Dorothy Shapiro Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STANF. LAW. REV. 724-7 (2017).

⁸⁷ But note that the role of hostile takeover as disciplinary to the managers cannot be denied. As dual class structures minimize the chance of hostile takeovers, dual class companies should have good governance policy to monitor managers' performance. See David Scharfstein, *The Disciplinary Role of Takeovers*, 55 THE REVIEW OF ECONOMIC STUDIES 185 (1988).

⁸⁸ James C. Brau & Stanley E. Fawcett, *Initial Public Offerings: An Analysis of Theory and Practice*, 61 THE JOURNAL OF FINANCE 399-436 (2006).

⁸⁹ Ugur Lel et al., *Dual Class Shares and Firm Valuation: Evidence from SEC Rule 19c-4*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE – FINANCE WORKING PAPER NO. 807/2021 (2020), at 28-9, <https://www.ssrn.com/abstract=3729297> (last visited Jun 17, 2022). Note that the empirical result herein points out benefits of dual class structures only in research intensive companies with good governance and monitoring mechanisms. For poorly governed companies (i.e., without functioning monitoring mechanism), it is suggested that dual class structures are harmful. This also adds merit to the necessity of good corporate governance in dual class companies, including those that embraced fundings from NVDR in Thailand, as discussed in Chapter I.

⁹⁰ David J. Berger & Laurie Simon Hodrick, *Are Dual-Class Companies Harmful to Stockholders? A Preliminary Review of the Evidence*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2018).

generated earlier than in the cases where too much technical knowledge is shared with public investors.⁹¹

2.3. Reducing agency costs and transaction costs

First, despite triggering some serious agency problems (as discussed later), a dual class structure with non-voting shares can actually reduce agency costs because proxy contests are fewer and less expensive. When problems arise in the company's management, the board needs to negotiate with informed investors who actually understands the problems and are willing to find a solution, meaning proxy contest are less likely.⁹² If a proxy contest does happen, it could be less expensive than in the cases where proxy contests are prolonged by the weakly motivated and/or misguided uninformed investors who still have voting rights.⁹³ Second, non-voting shares help reduce the internal transaction costs from weakly motivated shareholders and their uninformed voting.⁹⁴ With non-voting shares, the company can reduce costs associated with managing a larger number of voting investors (voting materials, mailing expenses, the process of collecting votes, etc.), while weakly motivated investors in general do not wish to be involved in making decisions.⁹⁵ Furthermore, non-voting shares also reduce the costs associated with suboptimal voting outcomes caused by blind voting of weakly motivated investors, which may be detrimental to the company's wealth maximization goals.⁹⁶

⁹¹ Sudipto Bhattacharya & Jay R. Ritter, *Innovation and Communication: Signalizing with Partial Disclosure*, 50 REV. OF ECON. STUDIES 331 (1983); Vikas A. Aggarwal & David H. Hsu, *Entrepreneurial Exits and Innovation*, SSRN ELECTRONIC JOURNAL (2013), <http://www.ssrn.com/abstract=2306053> (last visited: Jun 17, 2022).

⁹² Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 720–1 (2019).

⁹³ *Supra* note 86, at 721–2.

⁹⁴ *Supra* note 86, at 723–4.

⁹⁵ *Supra* note 86, at 723.

⁹⁶ *Supra* note 86, at 724–6.

In practical senses, dual class structures are indeed founders' best friend⁹⁷ and in many cases pass the cost-benefit test, especially during the early years after IPOs.⁹⁸ However, benefits aside, identifying the problems that a dual class structure may cost the company and counteracting policies are nevertheless important. The following discussion continues to explore the "costing" part of the equation.

3. Curbing the problems of dual class structures

Major markets have identified the problems of dual class structures and come up with diverse responses. This section discusses the main perils of dual class shares as well as corresponding *ex ante* safeguards in Singapore and Hong Kong, compared to the US' *ex post* approach. Singapore and Hong Kong are discussed herein because of the well-known sophistication and caution of those market, which provides a broader range of measures to counteract the problems caused by dual class structures. As the US' *ex post* approach might be impossible to attain in an emerging market, Vietnam could relate more in terms of regulatory safeguards from the two Asian neighbors.

3.1. Disenfranchisement and the role of a maximum wedge between voting interests and ownership interests

All dual class structures propose a risk of disenfranchising the shareholders and the risk increases in correlation with the number of votes in the superior class of shares. In order to manage this type of risk, the following measures may be adopted:

⁹⁷ Scott Kupor, *Sorry CalPERS, Dual Class Shares Are a Founder's Best Friend* (May 14, 2013, Forbes magazine) <https://www.forbes.com/sites/ciocentral/2013/05/14/sorry-calpers-dual-class-shares-are-a-founders-best-friend/> (last visited: June 5, 2022).

⁹⁸ Laura Casares Field & Michelle B. Lowry, *Bucking the Trend: Why do IPOs Choose Controversial Governance Structures and Why do Investors Let Them* (2019), <https://www.law.nyu.edu/sites/default/files/Lowry%20-%20Bucking%20the%20Trend.pdf> (last visited: June 17, 2022). Field and Lowry found that "when insiders' power is smaller and less permanent, larger institutional investors with long-term holdings are less likely to vote against directors, suggesting the benefits outweigh the costs for these firms in the early stage of their public life cycle".

- Setting a maximum voting difference between classes of shares, so that the wedge does not become too large to monitor;⁹⁹
- Prohibiting post-IPO dual class issuance, with limited exceptions, so that shareholders' votes are not further diluted against their initial expectations;¹⁰⁰ and
- Sunset provisions: automatically convert super-voting shares to common shares with one vote after a certain period or upon certain trigger events.¹⁰¹ Depending on specific conditions and the regulatory purpose behind allowing dual class shares in listed companies, sunset provisions might be time-based, ownership-based, or transfer-based.¹⁰²

3.2. Moral hazard, entrenchment, and the role of corporate governance

Concentrated control may give rise to moral hazard and entrenchment by controllers and managers. Dual class structures provide those in control with the opportunity to extract private benefits from the company regardless of their contribution to the company's value.¹⁰³ Corporate governance is the tool to manage this risk. More enhance scrutiny may be increased size of the board and audit committee, increased number of independent directors and members of the audit committee, more responsibilities of the directors, more stringent risk management and internal control requirements, broader scope of related party transactions, etc. In addition, more stringent disclosure requirements, by reducing the information asymmetry, helps to prevent or at least discourage corporate insider from entrenchment. For example, Singapore and Hong

⁹⁹ Singapore: Rule 210(10)(d), SGX Main Board Rules, http://rulebook.sgx.com/sites/default/files/net_file_store/SGX_Mainboard_Rules_June_26_2018.pdf ("SGX Rules") (last visited: June 16, 2022); Hong Kong: Rule 8A.10 HKEx Main Board Listing Rules, https://en-rules.hkex.com.hk/sites/default/files/net_file_store/Update_119_Attachment_1.pdf ("HKEx Rules") (last visited: June 16, 2022).

¹⁰⁰ Singapore: Rule 210(10)(c), SGX Rules; Hong Kong: Rule 8A.16, HKEx Rules.

¹⁰¹ Rule 210(10)(f), SGX Rules; Hong Kong: Rule 8A.17–22, HKEx Rules.

¹⁰² Marc T. Moore, *Designing Dual Class Sunsets: The Case for a Transfer-Centered Approach*, 12 WM. & MARY BUS. L. REV. 104–5 (2020).

¹⁰³ *Supra* note 85, at 482.

Kong require listed dual class companies to comply with enhanced corporate governance standards, including more stringent disclosure requirements.¹⁰⁴

Sunset provisions also helps reduce entrenchment risks. As the visions, skills and characters of founders and controlling shareholders are among the rationale for investors to give up their voting power in dual class companies, it is important that founders and controlling shareholders keep their commitment to other shareholders by keeping a minimum stake in the company. As such, their interests are more closely allied with the company's, reducing the moral hazard and entrenchment risks.¹⁰⁵

3.3. Unmanageable risks in poorly governed, underperforming companies, and the role of merit-based regulation

The exacerbated agency problems in dual class companies could be curbed with the help of good corporate governance, as discussed above. However, in poorly governed companies, the risks might be out of hands, where merit-based regulation steps in. Responding to this issue, Singapore requires companies to go through the SGX's suitability assessment and approval for listing dual class shares.¹⁰⁶ In order to pass the SGX's assessment, an issuer company must prove that it is suitable for a dual class structure by demonstrating its business model, rationale for adopting a dual class structure, the controlling shareholder's skills and competence, and its corporate governance practice, etc.¹⁰⁷ Hong Kong also adopted this merit-based approach with conditions on market capitalization, corporate governance, and only companies able to demonstrate "innovation" and "growth" characteristics may list dual class shares.¹⁰⁸ However, while providing another layer of protection, this merit-based approach depends heavily on the

¹⁰⁴ Singapore: Rule 730B, 752, 753, SGX Rules; Hong Kong: Rule 8A.23–42, HKEx Rules.

¹⁰⁵ *Supra* note 85, at 494–5.

¹⁰⁶ Rule 210(10)(b), SGX Rules.

¹⁰⁷ Rule 610(10), SGX Rules.

¹⁰⁸ Rule 8A Introduction, Rule 8A.03–12, 8A.26–30, HKEx Rules.

sophistication, credibility and independence of the assessing authority, hence may not work any wonders in countries with unsophisticated securities authority or high level of corruption.¹⁰⁹

3.4. The United States' *ex post* approach

Different from Singapore and Hong Kong's *ex ante* approach and merit-based regulations to regulating dual class listing, the US' disclosure-based, *ex post* approach remains unchanged.¹¹⁰ Class actions in the US has been an effective investor protection measure and can make up for the absence of some measures, which enhances the protection offered to outside investors by exposing insiders to more possibilities of being sued, for any circumstances that outside investors' interests are affected. For example, class actions may be initiated when a company issues a new class of shares with no voting rights, or when insiders expropriate private benefits from the company, etc. Since settlement offer great relief for the aggrieved investors, proving the insiders' wrongdoing is not always necessary for a successful investors' class action. Instead, a successful class action may result in a good deal of settlement or stopping a proposed action that could harm investors. As such, the US' class action mechanism gives insiders more incentives to work for the benefit of the company and less incentives to pursue opportunistic behaviors, lowering the risks associated with agency problems in dual class companies and making up for the absence of other safeguards measures.¹¹¹

The advantages of dual class shares explored in this Chapter, especially for companies in the technology and innovation industry, are encouraging factors for Vietnam to embrace non-voting shares and NVDR. Although there are serious problems entailed with this capital structure, it is not unsolvable. The restrictive approach to listing dual class shares in Singapore

¹⁰⁹ *Supra* note 85, at 495–6.

¹¹⁰ *Supra* note 85, at 504–5.

¹¹¹ *Supra* note 85, at 505; Min Yan, *The myth of dual class shares: lessons from Asia's financial centres*, 21 JOURNAL OF CORPORATE LAW STUDIES 429–30 (2021).

and Hong Kong, two Asian sophisticated financial centers with certain similarities in corporate culture with Vietnam,¹¹² provides rich lessons for curbing those problems. However, some measures need customization in order to be suitable for implementation in Vietnam.

¹¹² *Supra* note 43.

CONCLUSION

From the discussions on NVDR and dual class shares above, in order to construct a feasible NVDR framework, most importantly, Vietnam first has to adopt a new approach to FOL. The room for foreign shareholding in a company should be determined based on voting power instead of equity shares as in the current practice. As long as Vietnamese regulators are willing to make a change, this is possible even though the equity approach is documented in Vietnam's executed FTAs and BITs, because the voting power approach is more beneficial to other stakeholders. The only question remains is the willingness and consensus among Vietnamese agencies to adopt this approach in both legislation and enforcement.

In addition, the following safeguarding measures should be adopted to curb the problems of non-voting equity ownership:

(i) Mandatory application of the Corporate Governance Code of Best Practices for companies wishing to list NVDR on the stock exchange;¹¹³

(ii) Incorporate the concept of “shareholders acting in concert” into Company Law and Securities Law to impose responsibility of the controlling shareholder on a group of shareholders acting in concert to gain control of the company;

(iii) Setting out a specific assessment process for listing NVDRs and specific requirements for companies to be eligible for issuing non-voting shares. However, it should be noted that the sophistication and transparency of the State Securities Commission is the key factor deciding the quality of the assessment process. With the presence of serious corruption

¹¹³ State Securities Commission of Vietnam, International Finance Corporation, *Vietnam Corporate Code of Best Practices*, https://vioc.vn/wp-content/uploads/2019/08/Vietnam-CG-Code-of-Best-practices_v1.0_English.pdf (last visited: June 17, 2022).

and lack of understanding about NVDR and non-voting shares, the assessment process would not provide protection and rather do more harm than good;¹¹⁴

(iv) Limiting the use of NVDR to certain industries. The author opines that real estate companies should not be allowed to raise fundings through NVDR, given that the real estate market in Vietnam has been unstable in recent years and the fear of a bubble is present. However, more review is needed with regards to this issue;

(v) Adopting a specific class action mechanism into the Civil Procedure Code to provide NVDR investors with a forum to advance negotiations with the target company.

Furthermore, cross-sector reforms are also necessary. The regulation and practice in the financial industry (such as foreign exchange management, intermediary services, custodian services, etc.), and the operation of stock exchanges need to catch up with international standards to provide a suitable infrastructure for NVDR, as well as to make foreign investment less troublesome. Thailand's structure of trading boards and securities listing is a good model for designing NVDR listings on the stock exchanges of Vietnam.

Last but not least, the transparency of all agencies and the regulatory environment in general must be improved. Recent arrests and sanctions against wrongdoings of securities agencies are a good sign that changes are coming. However, it takes more than arrests and sanctions to gain investors' trust in the system, especially foreign institutional investors. The author hopes to see more literature discussing measures to improve the transparency of Vietnam's capital market, especially in the State Securities Commission's dealings.

¹¹⁴ *Supra* note 85, at 507.

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