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# **IMPROVING THE LAW ON CONTROLLING RELATED PARTY TRANSACTIONS**

*Field of study* : Economic Law

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**ABSTRACT OF DOCTORAL THESIS ON LAW STUDIES**

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# INTRODUCTION

## 1. Justification

Along with the development of the economy is the development of different types of enterprises in terms of size and activity areas. In limited company, the organization and management of the company is determined by investor's capital. This demands corporate governance must ensure the interest of company, shareholders, especially minority shareholders, including the protection against the abuse of large shareholders and the company managers.

Related party transaction is approached in the party criteria, in which a party is company and the contracting party is "related person". The "related parties" are those who hold power in company or be capable of dominating the content transaction or affect the decision – making. These transactions are signed based on the principle of equality, voluntary agreement but risk losing balance of interests by these subject who hold important management positions in company or use their influence to procure such contract and influence the terms of the contract in their favor.

The legislation on controlled related party transactions are defined as monitoring, preventing and handling violation of related person provisions. Related party transaction is a new issue in Vietnam and has attracted the attention of scholars. I selected thesis topic "Improving the law on controlling related party transaction" to research because of following reasons:

*Firstly*, the definition of related person and characteristic to identify related party transaction need to be controlled are not provided clearly and specifically. Procedures for controlling related party transaction have not been defined clearly and fully enough, in terms of obligation of related person. As a result, there are difficulties in implementing the legislation in practice.

*Secondly*, there are not enough legislation provisions on handling the consequence of related party transactions that do not followed the procedures provided by law and Company's Charter. What is the reason for invalidity? The sanctions that people violating have to take responsibility?

*Thirdly*, the control of related party transaction in company in the companies' operating regulation are limited. In corporate governance, shareholders and management bodies were unaware of the importance of controlling related party transactions. Therefore, companies have not identified related party transactions need to be controlled, disclosure requirement and signing procedure. This is a big gap in the legal framework for corporate governance in Vietnam.

In conclusion, the study of theoretical issues of identifying related party transactions as well as improving the controlling mechanism related party transactions are necessary for company in order to meet corporate governance, resolving contract disputes and creating a healthy business environment.

## **2. Object and the limitation of study**

The subject of study is the legislative provisions of controlling related party transactions as well as the provisions in Charter and operating regulation of the company.

The limitation of dissertation: as a doctoral thesis in law, dissertation research controlled related party transaction in term of legal science. Source of law on controlling related party transaction typically included: company act, stock market act and regulations, stock exchange listing rules, law on banking, civil and commercial code, civil procedure code, criminal law, administrative law.

In term of doctoral thesis, study focused on: (i) legislative regulation on identifying related party transactions need to be controlled, signing procedure and handling consequence of transaction that disobey controlling regulations; comparison these regulations in company law, security law, accounting law and banking law and contract law; (ii) the law on handling administrative violations to person violates the regulations of signing procedure; (iii) the criminal law provisions of sanctions to person violates the regulations of signing procedure. According to the company law, enterprises' Charter regulate related party transactions need to be controlled and signing procedure compatible with themselves. The thesis analyzed Charters of joint stock company having issued shares on the stock market and of a bank to have profound understanding the

concretization the law into company's Charter and the control of related party transaction in practice.

### **3. Objectives and tasks of study**

#### ***Objectives of study***

The aim of thesis is the study of controlling related party transaction in term of law and suggest some solution to improving the law on controlling related party transactions in Vietnam.

To achieve these purposes, the thesis poses following tasks:

*Firstly*, study the basic theoretical issues on related party transactions; the philosophy of controlling related party transactions; the nature of related party transaction; the contents of law on controlling related party transactions; the role of law on controlling related party transaction; the legal consequence of related party transaction not following the signing procedure; the sanctions that related person violating the regulation on controlling related party transaction have to take responsibility; the law and regulation on controlling related party transactions.

*Secondly*, analyze and evaluate the current legislative provisions and regulations on controlling related party transaction, including the provisions on identifying related party transactions, the provision on signing procedure, the provision on legal consequences of related party transaction not obeying the approval procedure, the provisions on responsibility of person that do not follow the signing procedure. On the basis of analyzing the status law, the thesis assess the application of the law on controlling related party transaction in reality and analyzes the regulations in operating company's Charters. The dissertation also indicates limited, inappropriate issues that need to be improved.

*Thirdly*, study requirements, solutions to improve the law on controlling related party transactions as well as efficient solution to improve the law applicable in order to protect interest of company, investors and ensure a healthy business environment.

### **4. Methodology**

To clarify studies issues above, the thesis uses different scientific research methods, such as the descriptive method, synthesis method, analysis, statistical method, comparative method... These methods are used on the basis of methodology of historical materialism, dialectical

materialism; on the basis of the opinion, the way in politics, economy, culture and society of Communist Party of Vietnam and Ho chi minh Thought.

## **5. Research findings and contributions**

On the basis of the selective inheritance of the previous studies on self-dealing, insider trading of Vietnam researches and studies of foreign scholars, together with the independent and serious research of the candidate, the thesis has made new scientific contributions as follows:

*Firstly*, the thesis has constructed theoretical foundations of the law on controlling related party transactions in Vietnam. The thesis has researched on the foundation philosophy of controlling related party transactions, identifying related party transactions need to be controlled. The study has pointed out the content of the law on controlling related party transactions and its roles to the efficient operation of business and against abuse of power within the company. The thesis defining legal basis of controlling related party transactions are the provisions of law and the Charter of enterprise. The thesis also analyzes the specificity in organization, management of enterprises in Vietnam that affect to the mechanism of controlling related party transactions. Besides, the thesis has given some international experience in the law of other countries of controlling related party transactions.

*Secondly*, the thesis evaluated relatively comprehensive the current status of legal system of controlling related party transactions in Vietnam and analyzed some Charters of companies regulating related party transactions. As a result, the thesis pointed out the inadequacies of legal system and the problems of enforcement practices.

*Thirdly*, the thesis proposed elements should be guaranteed and specific measures to strengthening the law on controlling related party transactions, to meet the needs of developing healthy business environment in market economy as well as international integration in Vietnam. These solutions are improving the law to create institutional basis for controlling related party transaction, enhancing corporate governance and strengthening the law application of controlling related party transactions.

## **6. Structure of the Dissertation**

In addition to the Preamble, the Literature review and related issues of the topic research, Conclusion and Reference List, the main content of the dissertation was structured into 3 chapters with the following specific content:

*Chapter 1:* Some of the basic theoretical issues on controlling related party transactions.

*Chapter 2:* Controlling related party transaction in effective law and Charters of operating companies.

*Chapter 3:* Improving the law on controlling related party transactions

## **OVERVIEW ON RESEARCHING CONTENT OF THE THESIS**

Law on transaction between company and related persons is a new issue in the world as well as in Viet Nam and it has not attracted interest of scholars. Some researching works mention this type of transaction and call transactions as transaction which easily causes self-interest or one type of self-interest contract. Researching works can be mentioned as follows:

*Information of Institute of Legal Science –Ministry of Justice No. 11/1998* about “Prevention of self-interest contract in business”. Articles “*Controlling self-interest transaction in company under Enterprise Law*” written by Le Dinh Vinh on Journal of Jurisprudence No. 1/2004, “Controlling transactions which can cause self-interest under Enterprise Law 2005” written by Tran Thi Bao Anh on Journal of Jurisprudence. No. 9/2010, “*Trading infiltrator in operation of companies on security market*” written by Prof. Dr. Le Hong Hanh on Journal of Jurisprudence No. 5/1999. Bachelor thesis “*Controlling transactions which can cause self-interest under Enterprise Law 2005*” written by Ngo Thi Bich Phuong, Doctoral thesis “*Self-interest contract in market economy in our country and legal solutions to limit, prevent*” written by Vu Thi Thanh Tam. Book “*Handbook to manage company*” of State Security Committee in coordination with International Finance Organization. Research Articles of Organization of Economic Development “*Guiding prevention of abusing transaction between company and related persons in Asian*

*Countries*”, “*Transaction between company and related persons and rights and interest of minority share holders*”, Article “*Self-interest transaction, fair transaction and related party transaction*” written John H. Farrar and Susan Watson of Auckland, New Zealand, “*Law on transaction between company with director-from the comparative viewpoint*” written by Luca Enriques, Bologna University, Italia...

From different aspects, researching on activity of controlling transaction between company with related persons is mentioned by above writers but it only mentions specific content as transaction with conflict of interest, transaction with director... but not have condition to solve comprehensively and profoundly all aspects of activity of controlling transaction. Therefore, researching more comprehensively, deeply, fully and systematically law on controlling transaction between company with related persons in Viet Nam in recent period is necessary.

Author of the thesis will analyze to recognize transaction between company and related persons to be controlled, characteristics of this transaction, content and legal ground of controlling activities between company and related persons. Specific characteristics in management organization of Vietnam enterprises affect controlling between company and related persons. Regulations on solving consequences on transaction not complying to procedure of contract, civil responsibility, administrative responsibility, criminal responsibility of person committing violation. Basing on analyzing limitations of law, the thesis brings out some solutions to finalize law on controlling transaction between company and related persons. This is approaching content on controlling transaction between company with related persons in scientific works of national and international authors.

## **Chapter 1**

### **SOME OF THE BASIC THEORETICAL ISSUES ON CONTROLLING RELATED PARTY TRANSACTION**

#### **1.1. Argumentative ground of controlling related party transaction**

Among types of partnership enterprise, law is not needed to intervene to control transaction between company and related persons basing on its

characteristic that members must hold unlimited responsibility and relevant to operation activity of the company. Therefore, interests of company, shareholders as well as the third party (employees, trading partner, state) are always ensured.

In capital –contributing company, because company’s characteristic is an independent legal entity and its members only take limited responsibility for the contributed capital so law must control transaction between company and related persons to prevent related persons from having self-interest from transaction. Explanation can be given for controlling transaction between company and related persons for following reasons:

Firstly, related party transaction establish transaction with specific subjects who can make decisions and affect terms of transaction.

Secondly, this transaction is established basing on agreed equality with conflicts of interests from subject and related persons so it can lead to inequality of interest.

Thirdly, though duty of the company’s representative is defined as being loyal to interest of the company but law is needed to control transaction to ensure mechanism of loss compensation, applying administrative responsibility, civil responsibility against person committing violation.

Fourthly, controlling related party transaction to ensure interests of company, shareholders and the third party. This is foreseen by law makers to demolish the wall of limited responsibility of shareholders.

## **1.2. Recognizing related party transaction to be controlled**

### ***1.2.1. Related persons and characteristics to define related persons***

Basing on analysis about relation and entrustment duty of managers and members, shareholder owning contributed capital, large share with company, the thesis has brought out concept of related persons as follows:

*Related persons are individual, organization having direct relation or indirect relation with company basing on capital contribution, internal management relation or having relation with managers, person contributing capital and being granted with the right to make decision or being able to dominate establishment of transaction.*

Related persons have following characteristics:

(i) Having direct or indirect relation with company. Direct relation can be managers, members, shareholder with contributed capital, majority share. Indirect relation with company can be relatives (blood relation, marital relation) of above-mentioned persons, enterprises to which those persons contribute capital, dominating share or holding management post.

(ii) Being granted with the right to establish transaction or being able to dominate establishment of transaction. Persons having management post are able to make decision on transaction are members, shareholders with significant votes in enterprise are able to dominate transaction.

### ***1.2.2 Recognizing related party transaction to be controlled***

Basing on analysis on related persons, the thesis has briefly mentioned transaction between company and related persons as follows: *Being transaction established between company and related persons of company-is party granted with the right to make decision or able to dominate establishment of transaction with feature of interest conflict.*

The thesis analyzes some concepts similar to transactions between company with related persons such as infiltrator transaction, self-interest transaction

*Related party transaction has some specific characteristics as follows:*

*Firstly*, transaction is made between company and special subject-related persons having direct relation or indirect relation with company through internal management relation or capital-contributing relation and ability to affect, dominate decision of transaction.

*Secondly*, transaction having conflict of interest. Managers, members, shareholders owning contributed capital, majority share when participating in transaction with company shall represent for interest of company and represent for their own interest so conflict of interest is formed between contract engagement with interest for company they represent or for their own interest. Other organization, individuals having relation with above-mentioned persons make contract with company then conflict of interest is not directly seen and it can be seen through transaction.

*Thirdly*, transaction with property feature. Through transaction with property feature shareholder can divert corporate wealth to themselves.

### ***1.2.3. Types of related party transaction***

It can be classified under criteria of related persons or nature of transaction to define type of transaction between company and related persons.

### **1.3. Content of law on activity of controlling related party transaction**

Content of law on controlling transaction between company and related persons are measures given by law to supervise, prevent and solve violation in transaction between company and related persons. Basing on nature of controlling transaction it can be classified as law on controlling to prevent violation law on controlling to repair violation.

Law on controlling related party transaction to prevent violation is considered as measure of self-implementation from company. It includes regulations on making transaction public; regulation on procedure via transaction such as order to go through, authorized agencies to go through and regulation to go through; regulation on report of transaction sent to member, shareholders.

Laws on controlling related party transaction to repair and solve violation are implementation measures from the state to ensure that companies, members, shareholders can protect their rights and interests when violation is made. It includes starting a lawsuit requesting to declare the transaction null and void, requesting related persons to refund interest gained from transaction and compensation for the loss. Besides above mentioned civil sanction, the law also stipulates measures of solving the act of committing violation including administrative sanction, criminal sanction against person who commits violation.

### **1.4. The role of controlling transaction related party transaction by law**

Firstly, controlling transaction between company and related persons to ensure interest of company, persons contributing capital and the third party.

Secondly, controlling transaction between company and related persons to ensure effectiveness of enterprise.

Thirdly, controlling transaction between company and related persons with prevention of abusing power in the company

Fourthly, controlling transaction between company and related persons with finalization of enterprise management mechanism.

### **1.5. Source of law and regulation on controlling related party transaction**

#### ***1.5.1. Text law***

Legal regulations on activity of controlling transaction between company and related persons are found in legal documents on company, law on securities, law on bank, law on accounting, law governing contract relation, law on civil procedure, administrative law, criminal law. In addition, case law or precedent of hearing the case can be considered as the source of law to help the solving dispute between company and related persons is applied consistently.

#### ***1.5.2. Company's Charter and internal regulation of organization and operation***

Charter and regulation of organization, operation of enterprise are considered as "law" of the company governing internal activity of the company including activity of controlling transaction between company and related persons.

Applying regulations to control transaction between company and related persons must give priority to Company's charter as contract between parties. Issues not regulated in Company's charter or illegally regulated shall be referred to legal regulations.

### **1.6. Specific characteristics in organization, management of enterprise in Vietnam affect mechanism of controlling related party transaction**

Specific characteristics of Vietnam affect legal regulations on controlling transaction between company and related persons are: specific characteristics about structure of capital ownership is centralized ownership; specific characteristics about management structure is mixed between one- tier board and two-tier board; specific characteristics about management have no separation between the right to own and the right to manage.

### **1.7. Law in some countries on controlling transaction between company and related persons**

Thesis analyzes law of the United States, a specific country of English Law, law of the Republic of France- a specific country of intercontinental Europe law and civil, commercial law of France deeply affect the thought of legislation of Viet Nam and law of the People Republic of China-a country with economic transition similar to Viet Nam to find out experience can be applied in Vietnam regarding to regulations on controlling transaction between company and related persons.

### **Conclusion chapter 1**

1. Related party transaction is transaction between company and related person who is vested or able to affect the terms of transaction. Characteristics of related transactions includes: (i) the contracting party is related person; (ii) transaction involves conflict of interest; (iii) transaction has money or asset transfer. The content of the law on controlling related party transaction include legal provisions to prevent and remedy the violation of signing related party transaction procedure. The role of controlling related party transaction is guaranteed the interest of company, investor and the others. Controlling related party transaction also have significance to the performance of business, fighting the abuse of power within company and enhance corporate governance.

2. Source of law on controlling related party transaction are enterprise law, stock law, banking law, accounting law, contract law, administrative law and criminal law. Besides, as a private enforcement, procedure to control related party transaction are also regulated in company's Charter and organization and operation regulation. To control related party transaction must first prioritize the company's Charter as a "institution" of company and company's organization regulation because this regulation is the concretization of the company's Charter. Issues that are not regulated in company's Charter or contrary to the provisions' company act should apply the provisions of law.

3. In Vietnam, the characteristics in company's organization and management can influence legislation on controlling related party transactions as well as the ability of enforcement in practice. They are ownership structure of concentration, internal governance structure of

enterprise and there is no explicit division between ownership and management rights.

## **Chapter 2**

### **CONTROLLING RELATED PARTY TRANSACTIONS IN EFFECTIVE LAW AND CHARTER OF OPERATING ENTERPRISES**

#### **2.1. Law on controlling related party transactions**

##### ***2.1.1. Legal regulations on recognizing related party transactions to be controlled***

First, recognizing related party transactions to be controlled in accordance with laws on enterprise. Law on Enterprise 2005 has identified some types of companies including one member limited company, limited company and joint stock company when concluding transactions with related parties need to comply specific procedures. Each of these types of companies listed above were identified various related party. Basically, covering the relevant when dealing with established companies need to control also confusion in approaches are concerned the company or the individual, not yet fully determined to who are considered related.

Second, identify the transaction between the company and persons related to control under securities law. In governance regulations applicable to public companies regulated transactions between companies with managers and groups with ties to the manager needs to control the program obligations and responsibilities of the manager, would lack provisions related parties are major shareholders. This leads to difficulties in practical implementation. Also some regulations prohibit transactions between the company and related parties in the business of securities companies.

Third, identify transactions between the company and related parties to legal controls on bank credit. Related groups are defined in the Credit Institutions Act was expanded compared with the Enterprise Law in determining Supervisory Board members and members, shareholders owning 5% of the charter capital of the bank or shares with voting rights of the bank and older. Also, transactions between banks extend credit to some relevant regulations are controlled by prohibition.

##### ***2.1.2. Legal provisions on procedures of concluding transactions***

*First*, the provisions on publicly announced transactions between the company and related parties. Enterprise Law of 2005 stipulates that legal representatives are obliged to publicize the draft contract between the

company and parties related to entities authorized trading decisions. Enterprise Act 2014 amended obligors are publicly traded contract because under the provisions of this Act, the company may have more than one legal representative to represent the company who obligations contracted with public transactions. However, regulations on public trading obligation not just stop at the manager (legal representative of the company), but also other related parties have a direct relationship with the business.

*Secondly*, the provisions on jurisdiction decides transactions between companies with related parties. Unlike other ordinary transactions, the decision to establish the transaction between the company and related parties by bodies corporate management decisions. For companies, the competence Limited trading decisions belong to the Council members. For company shares, depending on the value of transactions (from 50% of the total value of assets recorded in corporate financial statements nearest upwards or a larger proportion recorded in the company's charter) which belongs to the Board or the General Meeting of Shareholders. Enterprise Act 2014 has amended this provision from 35% of total enterprise value of the assets recorded in the most recent financial statements and older. Regulations may extend wasteful administration costs for companies.

*Thirdly*, the provisions on conditions through transactions between the company and related parties. For limited company with two members or more, the proportion of voting via the transaction is 75% of the voting capital (Enterprise Act 2014 changed the ratio is 65%); for company shares, as approved at the General Meeting of Shareholders, the proportion was 65%. As approved at the Board shall follow the principle of majority. Related parties have no right to vote. In one member limited liability company is an organization, through strict conditions than other types of companies. Not only prescribed conditions on majority rule as adopted at the council members that must meet the conditions of use in contract price is the market price at the time the contract was signed or executed.

Securities law for stricter provisions on procedures for the conclusion of such regulations through trading conditions in the public company that contracts must be an independent consulting organization for the fair and equitable review of all aspects related to the shareholder at the time of adoption.

***2.1.3. Legal consequences of the transactions between the company and related persons not established in accordance with statutory procedures***

*Firstly*, the transactions between the company and related parties not following the conclusion of the procedure prescribed by the charter company and the Enterprise Law will take effect from the time of entering into and deal with the consequences of delivery void services as prescribed by law. The transaction declared void under the jurisdiction of the dispute settlement body on the basis of a petition of a member, the company's shareholders. Enterprise Law 2014 Additional conditions for the transaction is to be disabled, causing damage to the company to avoid wasted costs petitioner, however, demonstrate the damage to the company for the members, shareholders nor is it easy. Find stipulated in the Civil Code and the current draft of the Civil Code nor the most recent regulations pursuant to an invalid transaction is not complied with the order and procedures for conclusion. This demonstrates the lack of compatibility of the legislation.

*Secondly*, the handling of assets when the transaction between the company and related parties void. The legal representative and the related parties shall be obliged to return the assets to the company, reimbursement of the benefits gained from the implementation of the contract and compensation for damages incurred (if any).

#### ***2.1.4. Responsibility of individuals violating regulations of procedure of establishing transaction between company and related persons***

Civil responsibility is responsibility to compensate for losses happened in the case that transaction between company and related persons affects interest of enterprise.

Person establishing transaction between company and related persons shall hold administrative or criminal responsibility depending on nature and level of violation he does not comply with. However, Resolution No. 155/2013/N -CP on solving administrative violation in Planning and Investment does not focus on this violation that means there is no regulation on solving administrative violation against person committing violation. Criminal Code in 1999 amended, supplemented in 2009 has made regulation on crime applied against person violating procedure of making contract which causes loss to company at a certain level stipulated at Article 165 as crime of intentionally not following regulations of the state on economic management causing serious consequence. However, this crime is only applied to managers of enterprise while other related

persons committing violation of procedure to make transaction are hold for criminal responsibility.

## **2.2. Specifying legal regulations on controlling related party transaction in Charters of operating enterprise**

The thesis analyses Operation Charter of Hau Giang Pharmaceutical Joint Stock Company and Joint-Stock Bank for Foreign Trade. Because Company's Charter must follow legal regulations while most of legal regulations on controlling between company and related persons are compulsory not allowing company to make agreement on its own in Company's Charter. Company is allowed to make its own agreement only in the case that regulation on value of transaction at a certain level is decided by the Council of shareholders or management Council.

Charter of Hau Giang Pharmaceutical Joint Stock Company copies regulations in Regulations of company management applied to general companies so there are limitations as legal regulations while Charter of the Joint-Stock Bank for Foreign Trade is not within legal regulations to be suitable with reality of execution but this charter is contrary to the law.

### **Conclusion of charter 2**

1. Legal provision of identifying related party transaction, approval procedure, how the transactions' validity could be challenged and individual liability of violation legal provision of related party transaction is inadequate, unclear and not easy to implement in practice. In fact, the implement these provisions have not been guaranteed in the operating business.

2. Through analyzing company's Charter of Hau Giang Pharmaceutical Joint Stock and Bank for Foreign Trade, it is easy to realize that specification of the law into company's Charter belong to each company. Charter of Hau Giang Joint stock company comply with the law but it has inadequacies in the practical implementation. Charter of Bank for Foreign Trade is suitable to business performance, facilitate the practical application but it does not comply with the law. Shareholders and company could only manage within the framework of legal provisions of controlling related party transaction, however, it is inadequate, then company's charter is still limited.

## **Chapter 3**

### **IMPROVING THE LAW ON CONTROLLING RELATED PARTY TRANSACTION**

**3.1. The factors should be ensured to improve the law on controlling related party transaction**

*3.1.1. The principles of free market and requirement of controlling related party transaction*

*3.1.2. Ensuring comprehensive and systematic of the law on controlling related party transaction*

*3.1.3. Ensuring the compatibility with international law and rules on controlling related party transaction*

*3.1.4. The specific requirement of corporate governance demand the law on related party transaction*

*Firstly*, requirement of framework for effective corporate governance

*Secondly*, requirement of ensuring shareholder's right and the ability to execute in practice.

*Thirdly*, requirement of ensuring equal treatment between shareholders

*Fourthly*, requirement of information transparency

*Fifthly*, requirement of maximum responsibility of Board of Management

**3.2. Some solutions to improve mechanism of controlling related party transaction**

*3.2.1. Improve the law on controlling related party transaction*

Firstly, improve legal provisions to identify related party transaction

On the approach and structure of legal provisions of related person and related party transaction in each type of enterprises, enterprise law should provide related person list in relationship with company. In addition to the list, company's Charter refer more related person that suit to itself. Legal provision of related party transaction need to be controlled should prescribe specific of each type of business without listing again because that will lack coherence and consistency in related person.

About Security legislation, it is necessary to identify related person prescribed in Security Act instead of what provided in Model Charter of

listing company. Provision of related party transaction should be added in Security Act to connect with the definition of related person.

Secondly, improving the legal provision of approval procedure

Requirement of disclosure transactions need to be defined who have obligations to disclose transaction. There are related party transactions covered by subtly complex relationship that legal representatives themselves cannot know. Therefore, obligation of disclosure must be applied to related person having direct relationship with company. The information need be disclosed is more about the relationship between related person and company as well as interest he can achieve if the transaction is approved.

About competence of approving transaction, in joint stock company, company's charter should regulate competence agency approve related transaction depending on transaction value. In sole member limited liability company owning by one organization, it is necessary to classify steering, administration and control right. It is necessary to not prescribe that supervisor has right to approve transaction.

About principle of approving transaction, in sole member limited liability company owning by one organization with the provision of reasonable price of transaction at approving time, it is strict but difficult to implement in practice if there is no professional organization of pricing. Therefore it should be added the provision of professional organization of pricing.

There is no legal provision of controlling related partnership in partnership meanwhile related party transaction can expropriate interest of limited partners, third party and State. It is necessary to regulate more about voting right of limited partner to approve related party transaction.

Thirdly, improving legal provision of facilitation of private litigation when related party transaction is invalid.

The draft of Civil Code amendment should supplement regulation of reason for invalid transaction is not to comply with provision of approval procedure so that dispute settlement body has clear legal basis.

Enterprise law should not prescribe related party transaction is invalid unless it comply with legal provision of approval procedure. If shareholder's Meeting of Board of Management approve transaction, it

should be valid. This can be seen as ex post approval procedure in a limit time. Because, sometimes disobeying mandatory approval procedure transaction does not mean company's interest be deprived. Therefore, statement of transaction is void can cause damage to the company if the transaction is necessary for company and comply with the law of supply and demand.

Fourthly, legal liability for individual violate provision of controlling related party transaction.

Regarding to civil liability, Enterprise Law should prescribe clearly that the obligation of individual when violations the law and he is liable for company's damage. Enterprise Law should not regulate in general that company's representative and related person have to compensate together. Regarding to administrative liability, it is necessary to supplement violation of the law on controlling related party transaction must be fine. Regarding to criminal liability, it is necessary to supplement major shareholder abuse related party transaction to divert company's property to himself must be punished.

### ***3.2.2. Improving corporate governance mechanism to efficiently control related party transaction***

Good corporate governance is considered key factor to access capital market and confirming the value of business in the economy, thereby effectively controlling related party transaction. Solutions to construct an effective corporate governance mechanism may be mentioned include: (i) improving model of corporate governance; (ii) limiting the intervention of the authorities on corporate governance.

To enhance legal framework for corporate governance, it is necessary to concern about some of recommendations as follow: amending and improving the legal provisions of the Board of Management and the Supervisory Board; strengthen mechanisms to protect minority shareholders; construction and enhancing appropriate remedies for violations of corporate governance; improving the law on accounting and auditing enterprises agency to clear related party transaction.

### ***3.2.3. Solution to strengthen efficiently implement of the law on controlling related party transaction***

At present, the implement of legal provisions of controlling related party transactions is weak and still has not become an efficient measure of legal protection of shareholder's and company's interest. The biggest challenge to developing countries is not the issue that how to make law or regulation of controlling related party transaction because they were available but how to enforce legal provisions effectively. This is common in the economy transition countries where business and legal culture is not good. Shareholders or company do not sue manager or related person for compensation because they cannot detect violation or even when they detect violation. The compensation is only made when related person take criminal responsibility. In the future, measures to improve efficiently enforcement the law on monitoring related party transaction are as follow:

*Firstly*, it is necessary to enhance the awareness of enterprises and investors to comply the law on monitoring related party transactions.

*Secondly*, it is necessary to improve the awareness of the role of company's Charter and internal regulation of organization and operation in monitoring related party transactions.

*Thirdly*, it is necessary to improve the role of supervisory institutions and material liability sanction. Sanction should be serious enough to ensure deterrence and enforcement the law on monitoring related party transaction in the context of Vietnam is transferring from management system based on relationship to management system based on law.

*Fourthly*, it is necessary to strengthen the performance of courts and judicial capacity of Judges to settle violations of approval procedure of related party transaction.

### **Conclusion of chapter 3**

1. The factors should take into account to improve the law on controlling related party transactions are: the principle of market economy; the principle of uniform and systematic law on controlling related party transaction; the principle of compatibility with the international rules on controlling related party transaction and the principle of ensuring corporate governance requirement set out for law on controlling related party transaction.

2. To improve the mechanism of controlling related party transaction, it is required to perform synchronously three following solutions: Solution

to improve the law to create institutional basis for controlling related party transaction; solutions to enhance corporate governance and strengthen the law application of controlling related party transactions. The solution to improve the law on controlling related party transactions is considered key issue. It includes improving provisions of identifying related person and related party transaction, provisions of procedure for controlling related party transaction, provisions of legal consequence of unavoidable transaction, provisions of dealing with people who violate the regulation on procedure for controlling related party transactions.

## **CONCLUSION**

1. Related party transaction is transaction between company and related person who is vested or able to affect the terms of transaction and involves conflict of interest. The law on controlling related party transaction prevent related person to use their power to divert corporate wealth to themselves rather than sharing it with the other investor.

2. Factors determine the structure of the regulation of related party transactions are different in different countries. It belongs to country's legal origin, ownership structure and internal governance structure. To control related party transactions, the law must provide legal norms to identify related person and their obligation to disclose interest; procedure for approving related party transactions; the legal consequence of the transaction if not following the signing procedure and handling individuals violate the law on controlling related party transactions. Source of law on controlling related party transaction are enterprise law, stock law, banking law, accounting law, contract law, administrative law and criminal law. Besides, company's Charter and organization and operation regulation are also binding to the company to control related party transaction because they are agreement between company and shareholders and shareholders together.

3. Current legislation on controlling related party transaction in Vietnam is inadequate. The legislation on identifying related party transaction missing some related subjects in different types of enterprises; still confusing when approaching related person with individuals rather than company; unclear and inconsistent with their practical

implementation. The provisions of transaction approval procedures are unclear, specific and inadequate. Meanwhile, the legislation of handling legal consequence of contraction not obey to signing procedures and individual responsibility who violate the law on related party transaction are inadequate such as the reason for invalid transaction makes weak enforcement of related party transaction. This situation require to improve the law on controlling related party transaction. The thesis has analyzed Charter of Hau Giang Pharmaceutical joint stock company and Bank for Foreign Trade of Vietnam to consider the possibility of application the law in the charter.

4. To improve the mechanism for controlling related party transaction, the thesis proposes some basic solutions: Solution to improve the law to create institutional basis for controlling related party transaction; solutions to enhance corporate governance and strengthen the law application of controlling related party transactions in condition of Vietnam.

The solution to improve the law on controlling related party transactions is considered key issue. It includes improving provisions of identifying related person and related party transaction need to be controlled in different type of enterprises, provisions of procedure for controlling related party transaction, provisions of legal consequence of unavoidable transaction, provisions of dealing with people who violate the regulation on procedure for controlling related party transactions. The approach is the explanation of terms in Company Act listed related person and enterprise's Charter should regulate those are related to company belongs to its circumstance.

Legal provisions of related party transaction need to be controlled should be more clear. Regulations of procedure for controlling related party transactions should specific the disclosure obligation of related person and the principles for transaction approval should regulate in company's Charter. Unless related party transaction is approved that do not follow the provisions of signing procedures, it is not easily avoided that it should be ex- post approved by shareholders at Shareholder's Meeting or at Board of Management. Fine and criminal sanctions to deal with violation of monitoring related party transaction procedure need to be added and more specify in order to efficiently implement these provisions.

## **LIST OF RESEARCH PROJECTS RELATED TO AUTHOR'S PUBLISHED THESIS**

1. Nguyen Thi Van Anh (2012), "Some of manager's duties in Joint Stock Company according to 2005 Enterprise Law", *Journal of Legal Profession*, (2).
2. Nguyen Thi Van Anh (2012), "The law of Federal Republic of Germany and Republic of France on controlling related party transaction and some lesson for Vietnam ", *Journal of Legal Profession*, (6).
3. Nguyen Thi Van Anh (2013), "Identifying related party transactions", *Journal of Jurisprudence*, (12).
4. Nguyen Thi Van Anh (2013), "Related party transactions according to Vietnam 2005 Enterprise Law and experience of some countries", *Journal of Democracy and Law*, (12).

