The Seventh Meeting of the
Latin American Corporate Governance Roundtable

22-23 June, 2006
Buenos Aires, Argentina

Non-Listed Companies in Peru

By

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1.- What is the legal framework for non-listed company corporate governance-related requirements in your country?

The legal framework is the Ley General de Sociedades (LGS) which is the Corporations Law.

The Board

In order to get minority representation on the board, cumulative voting is used to elect the members of the board. The LGS clearly defines the responsibilities of the directors. Directors are bound by their duties of care and loyalty. Directors must maintain confidentiality on company matters, even after leaving the company. Directors must not participate in the discussion of items were they have a conflict of interest nor can they vote on these issues. Transactions by directors with the company that are not part of the regular business of the company must be approved by at least two-thirds of the board.

Shareholders Meetings, Voting rights

The notice calling for the meeting must be published at least ten days in advance of the meeting. If shareholders representing at least 20% of voting shares request a meeting, the board must publish the notice calling for the meeting no later than 15 days after the request has been made. The meeting must be held within 15 days after the notice has been published.

Documents related to the items in the agenda are to be made available at no cost to the shareholders at the companies' office or at the site of the meeting, from the date when the notice is published. Shareholders can be represented at the meetings by non-shareholders, unless the by-laws restrict representation and only other shareholders, directors or managers can act as representatives.

If shareholders holding at least 20% of the voting stock request a cash dividend payment of up to half of the distributable profits of the company, the dividend becomes mandatory.

Agreements reached at shareholders meetings can be contested in the judiciary if the agreements are against the law or the by-laws; or produce any type of damage to the corporation while benefiting one or more shareholders.

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A derivative suit requires an agreement by the AGM. If no agreement is reached in the AGM, a derivative suit can be initiated by shareholders representing at least one third of voting stock. The high threshold required limits effectiveness.

Shareholders have withdrawal rights in the case of major decisions, like mergers and spin-offs.

Other stakeholders:
Creditors have the right to oppose a capital reduction if their credits are not adequately guaranteed.

2. What are the practices and trends regarding disclosure by non-listed companies?

The financial statements have to comply with IAS since 1994 and must apply norms that were modified and issued by the International Accounting Standards Board in December 2003 and March 2004 (IAS and International Financial Reporting Standards) starting January 1st 2006.

Shareholders representing at least 10% of voting shares can request an audit.

Until July 2000 corporations were required to file their annual financial statements with CONASEV. Law 27323 of July 2000 restricted CONASEV's financial supervision to listed companies, mutual and investment fund administrators, brokers and securitization companies.

The main reason to eliminate this reporting was its cost for the corporations. Also, CONASEV didn't evaluate the quality of the reporting and there was the risk that the public's perception would be that the filed statements were "approved" by CONASEV.

Given that the main beneficiaries of disclosure are the corporations, each company should be capable to decide when the benefits associated with disclosure are higher than the costs.

Also, there is a private market for information. Proof of this is the information provided by private credit reporting agencies (called centrals privadas de información de riesgos). Also, there is a yearly publication by a private company that lists the top 10,000 corporations by revenue. It provides basic data on revenues and net income. It also gives some information about selected economic groups.

3. What further changes to legal and regulatory requirements may be desirable, and what would be their costs and benefits?

- The fact that a Director represents all shareholders and not just the ones that elected him should be clearly spelled out in the law.

- To contest the agreements that harm the company, you have to prove both that damage was produced and that the agreement gives an improper benefit to one or more shareholders. This could be simplified to include proof of damage to the company only.

- Shareholders can request, prior to the shareholders meeting or during the meeting, reports or explanations related to the items in the agenda. The board must comply with the shareholders request, unless the board considers that diffusion of the solicited data can cause a prejudice to the company. This exception is not valid when shareholders representing at least 25% of voting rights make the request. This threshold should be reduced.

- Reduce the 20% threshold needed to request a shareholders meeting.

- Share valuation procedures used when exercising withdrawal rights should be improved.

- The 15-day maximum period between the issuance of the notice calling for the AGM and the date of the meeting should be extended.

- No generic items should be allowed on the agenda.

Of course my suggestion to reduce the thresholds has to be measured against practical experience and balanced with the fact that we don't want the board and the management of the company to be held permanently hostage by a small group of shareholders.

4. How should this be balanced with voluntary efforts to promote better corporate governance of non-listed companies?

In 2002, "The Principles of Good Corporate Governance for Peruvian Corporations" were published. A voluntary code, it suggested that the principles were applicable to non-listed companies.

The Corporación Andina de Fomento (CAF), a development of the Andean Region, has developed a Andean Corporate Governance Code. This code makes a distinction between those recommendations that are specific to public companies and those that are specific to private companies.

Current efforts to promote better corporate governance are related to the work being done by private equity funds. Many of the non-listed companies are family firms that need to be organized in a more professional way.

Corporate governance awareness is being raised by isolated efforts. For example, a private university has a training programme that combines strategic and financial planning with corporate governance. This is a 4-month programme with an attendance of approximately 20 persons from non-listed companies. Though the main concern of the persons that take the course is centered on financial issues, the programme raises corporate governance awareness.

Private equity is also helping to introduce corporate governance in non-listed companies. Along with the managerial and strategic planning assistance that they provide, private equity funds request the companies to adopt good corporate governance practices.

Private consultants are also training family firms in the use of family protocols to organize the firm (See below).

Recently, a corporate governance contest had 24 contestants, two of which were non-listed corporations.

ANNEX. Qualitative Data on non-listed Corporations in Perú [1]

What Generation is currently at the helm of the company?

- 48% first generation
- 41% second generation
- 11% third generation
- Non in more than the third generation

Which Companies have a Family Protocol?

- 7% have a Family Protocol
- 37% don't have, but expect to prepare one.
- 48% don't know what a Family Protocol is.
- 7% don't have, and don't expect to prepare one.

Board Composition

- 22% have directors that are not family members
- 37% are considering electing external (non-family) directors
- 41% consider that there is no need for external (non-family) directors

General Managers:

- 19% are not family members
- 15% are considering hiring an external general manager

[1] The data was collected by CENDEF (A consulting company for the Family Firm). Persons surveyed: 183. The persons voluntarily answered a questionnaire. The questionnaire was given to participants in many presentations and workshops, during a period that lasted from March to November 2005. Participants belonged to small enterprises (10 to 49 workers and sales of up to Euro 7 million) and medium enterprises (less than 250 workers and sales of up to Euro 40 million).

- 66% consider that they don't need an external general manager, since they have family members capable of working as general managers.

The Company's biggest challenge is:

- To be Competitive: 24%
- Strategic Planning: 22%
- Organization: 22%
- Implantation of New Technologies: 22%
- Financing: 9%