

RUSSIN & VECCHI

PROTECTING THE COMPANY FROM A MALIGN LEGAL REPRESENTATIVE

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What is a “Legal Representative”

Simply stated, the Legal Representative (“LR”) acts for the company when the company exercises its rights and obligations. S/he represents the company in court and in arbitration proceedings. His/her signature obligates the company.

Who can be Legal Representative?

Enterprise Law no. 59/2020/QH14 dated June 17, 2020 (“Enterprise Law”), does not specify criteria to be an LR. The Enterprise Law permits multiple LRs. But only one need reside in Vietnam. Some companies find that having two LRs is convenient. In such case, the company divides the duties. Perhaps the more senior person or the person with the larger responsibilities resides in Vietnam or, in some circumstances that person resides abroad.

The LR can be a Vietnamese or a foreigner. The key is that s/he (or at least one) must reside in Vietnam. While residence is important, the Enterprise Law does not define “residence”. Under the Law on Residence, residence includes both permanent residence and temporary residence. A foreigner is required to have at least temporary residence to stay in Vietnam.

In *a limited liability company*, the company must have an LR who is President/Chairman of the Members’ Council and/or General Director/Director. If the charter does not specify who shall be the LR, the President/Chairman of the Members’ Council will be the LR.

In *a joint stock company*, the LR must be Chairman of the Board of Directors and/or General Director/Director. If the charter does not specify who shall be the LR, the Chairman of the Board of Directors will be the LR by default. Where there is more than one LR (say, two LRs), one LR will be the Chairman of the Board of Directors and the other will be the General Director/Director. Because of these uncertainties, it is important to identify the LR’s position in the charter. If an LR holds other positions (Chairman, General Director, etc), s/he needs to satisfy requirements that apply to those positions.

Legal Representative’s responsibilities

Generally speaking, an LR runs the company’s business day-to-day and must follow the company’s licensed businesses.

Under the Enterprise Law, an LR has the following responsibilities:

- (i) exercise the delegated rights and obligations honestly and prudently and to her/his best ability, in order to pursue the company's lawful interests;
- (ii) not use information, know-how or business opportunities of the company for her/his personal benefit; not abuse his or her position and power nor use assets of the company for her/his personal benefit or that of other organizations or individuals;
- (iii) notify the company in a timely, complete and accurate manner whenever s/he or a person related to her/him owns or holds controlling shares or a controlling capital contribution in any other company.

Such responsibilities are very broad. The company can and should provide detail and any limitation on the LR in its charter (articles of association). For example, a monetary limit on authority.

There is another point. If there are multiple LRs, their duties should be separated. The Enterprise Law specifically provides that the charter should set out each LR's rights and obligations in detail. In case the charter is unclear or does not identify LR's separate power, then all LRs will be deemed to have equal powers vis-a-vis a third party and all LRs will be jointly responsible for damages caused by either LR. For these reasons, it is important for each LR to be sure his/her powers are specified in the charter.

If an LR is absent from Vietnam, s/he must authorize another person to act as LR in her/his absence. In such case, the LR remains responsible for the discharge of her/his duties even if another person acts in her/his place.

In addition to the responsibilities of an LR, if an LR has another position, s/he will have the duties of that other position (President/Chairman of Members' Council, General Director, etc.). The duties of these offices are set out in the Enterprise Law as well as in the charter.

If the LR acts beyond her/his scope and thereby causes damage to the company, s/he is liable to compensate for damages. The Civil Code no. 91/2015/QH13 dated November 24, 2015 ("Civil Code 2015") also says that if an LR goes beyond the scope of his/her authorized limits, the part of the transaction which exceeded the scope will not give rise to rights and obligations for the company, unless (i) the company agrees; (ii) the company knew but did not object within a reasonable period [*the Civil Code 2015 does not define a "reasonable period"*]. The counter party is not bound if it could not have known that the LR was acting beyond his/her scope because of the company's fault. If the LR acts beyond the scope of its authority, the counter party has the right to terminate the transaction unilaterally or to rescind any part of it which is beyond the scope (or indeed the whole transaction) and may even demand compensation for any loss. Of course, if the counter party knew that the LR has exceeded her/his scope of authority, but still carried out the transaction, it will be unable to claim compensation.

Key Corporate Management Tips

The LR's authority to bind the company is broad unless it has been clearly limited. Below are several steps which a company should take to mitigate risks caused by an LR's malign or imprudent acts:

- ① Each LR's rights and duties should be clearly set out in the charter. Because the LR's natural authority to bind the company is broad, the charter can provide limits on the transaction value or type of transaction which the LR is permitted to execute (eg, certain transaction may require the Board of Directors/Members' Council approval or may require dual signatures). In case the company has more than one LR, the charter should separate each person's rights and duties and limitations. A counter party can require a review of the charter and quickly learn if the LR's authority is conditional. To be safe, an executed copy of the charter should be requested.
- ② There should be rules of usage and control of the company seal because the seal is necessary for many corporate transactions. Rules of usage should be specified in the company's charter (eg, when a seal is required and who keeps it). Of note, the company seal should not be kept by an LR. It should be kept by another responsible person, with written protocols on its release and use.
- ③ Prior to execution by the LR, contracts/engagements should be reviewed and confirmed by a responsible other party to ensure that they are legal and enforceable.
- ④ A writing to be signed by the LR setting out his/her rights, liabilities and commitments should be prepared and kept as an important corporate document. This document is intended to ensure that the LR clearly understands her/his obligations and the risks s/he assumes for improper acts.
- ⑤ Dual signatures are an option. The company can require dual signatures for certain important documents. Depending on a company's characteristics, dual signatures can be varied--for example, signatures of an LR and the chief financial officer, or, say, of a major shareholder and the LR, or both LRs if there are two LRs. In such cases, the charter would spell out such matters.