Thai Institute of Directors

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What do we "EXPECT" from the Board?

Fiduciary Duty...does the director's mantra actually exist?
(Continued from the last issue)

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Along with "trust" from shareholders comes Fiduciary Duty of directors. This duty also apply to "similar issues" by using Corporate Law Concept to determine relationship between the "owners of money" (i.e. shareholders) and "trustees" (i.e. representatives or directors) such as in a Trust.

Thailand has accepted the idea of "Trust" as found in the "Law for Trust for Transactions in Capital Market Act 2007, and since then the Real Estate Investment Trusts (REIT) have been listing on the Stock Exchange of Thailand since 2014.

Under the concept of Fiduciary Duty, "directors" or "trustees" are bound to perform Duty of Care and Duty of Loyalty on "other people's money" and "financial benefits".

Such expectations go beyond the standard of common people because this "special relationship" involves financial benefits and, therefore, requires greater qualifications, competencies, expertise, and experiences from the "directors" as the person responsible for the "shareholders' benefits" rather than a regular bag checker or custodian.

What is the concrete form of Duty of Care?

Who can "measure" the Duty of Care of directors?

The Duty of Care is such "subjective" qualification that the law "demands" and "expects" from "corporate directors" to act as a "treasure guardian" or "trustee" for shareholders. Then, how can the Duty of Care be measured objectively?

Each director "may" wear "several hats" or assume many roles, particularly Triple Hat Director whose roles include

(1) Owner (shareholder) reflecting control power though voting rights.
(2) Employee (management) reflecting "legal relation" in the aspect of "employment contract" which is a reciprocal contract between the "employer" and "employee".
(3) Authorized person of a juristic person (director) reflecting "legal relation" between "shareholders" and "directors" in accordance with corporate law and agency law

Directors must be cautious on actions that could be regarded as "lack of carefulness" because of the different hats being worn. The conflict of roles and responsibilities may cause director's decision to be "interfered" from the angle of "owner" or "management" that may differ from that of "juristic person's representative". (Mis-Position)

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How to "concretely" proof director's Duly of Care?

1. Regularly attend "pre-scheduled" board meeting.
2. Raise significant questions during the board meeting and ensure "minutes of the meetings" are appropriately taken in accordance with the law.
3. Offer useful comments in various issues discussed at the board meeting and such comments are used for the company or director's reference in the future.

Some directors are "frequently absent" from a board meeting while some quiet ones attend regularly but never ask "relevant questions" that are useful for the company. These directors let the "management" lead the board while they played no role in "directing" the company (Director = Direction). These directors performance results in the company's poor tone at the top and the management carrying out the work without supervision from the board. In addition, in "minutes of the board of directors meeting", which is regarded as "reference document" (Minute of BOD Meeting = Reference = Storyteller), there are no existing records of these directors providing any useful comment for the company.

When the company runs into trouble, "shareholders" may ask the directors about their "contribution" to the company or "how they perform their duties as directors".

In a Supreme Court case in 1976, a Receiver (Bankruptcy Court) filed a case against the "board of directors" and "managing director" of a life insurance company because the Receiver found that

a) The company was continuously in loss position for a long period of time.
b) The company had excessive debt that cause it to bankrupt and eventually was ordered by the Bankruptcy Court to enter court receivership.
c) Insurance premiums collected from clients were lost.
d) There was no debt collection process for outstanding premium receivables.

Regardless of the facts set out above, the directors did not take any actions to resolve the matters. They also failed to inform the shareholders but acted as mere silent director. Given the intermediary business model of insurance business, similar to commercial banks or financial institutions, directors are required to put in their best efforts to supervise the benefit of shareholders.

The Supreme Court ruled in this case that directors and the Chairman of the board were accountable for the damage though their negligence was "blemish" but the one solely to be held accountable was the managing director.

If such a case were to occur these days, do you think the board will "get away" smoothly? It should be noted that standards of corporate law, insurance law, and expectations of shareholders are substantially higher now than in the past. Especially in the corporate governance aspect, both company and shareholders are now pinning high expectations on corporate directors.

BJR: Business Judgment Rule.

Directors must beware that nowadays they cannot afford to be inactive. Shareholders as well as stakeholders (i.e. employees, suppliers, clients, and creditors) are placing high expectations on directors, expecting them to have "influence" over how "management" run the company and that they perform beyond minimum requirement.

Inactive directors waited for damage to occur and then fixed them, while proactive directors use all "resources" to prevent damages. Preventive approach starts with the "director" first before "extending impact" to the "management" and employees then to stakeholders. It is crucial to mitigate risks, by not bringing the company to risky spots and not waiting for damage to occur because:

"The preventive cost is controllable and cheaper while the cost of fixing damage is uncontrollable and will have be to paid regardless of how costly it might be."

If we were to ask if a director has adequately performed the duty of care?

To respond to this question, it depends on whether the director has met "minimum requirements" according to the law. If not, it simply means that the duty of care is lacking.

If the minimum requirement is met, the next question is whether board decisions are made in accordance with the proper Business Judgment Rule?

This is not easy because the "Business Judgment Rule" involves factors surrounding directors i.e. knowledge, expertise, experience, contextual factors (such as financial condition of the company, personnel capability).

So far, there has been no court case regarding dispute over "the board's decision" in a private company. The law governing private companies stipulated minimum requirements for Duty of Care and Duty of Loyalty of corporate directors and the use of "Business Judgment Rule" to set norm for director's mistakes that caused direct damages to the company.

On the other hand, securities law sets clear guidelines on BJR for directors of listed companies and put relative higher expectations for them because listed companies consist of numerous shareholders.

In the next chapter, I will talk about the next Fiduciary Duty that is the "Duty of Loyalty". I will share cases of "Disloyal" directors that were brought to the Court as well as verdicts of these cases.