

What do we “EXPECT” from the Board?

*Fiduciary Duty...what exactly are duties of director?
(Continued from the last issue)*



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In order to determine relationship between “director” and “company”, in the legal aspect, the concept of Representative Body or Agency can be used to explain “Principal-Agent relationship” by viewing “director” as an “ordinary person”.

It is stipulated in the Thai legislation that only “ordinary person” (agent) can “act” on behalf of the company (principal) as director of a “private company” or “public company”. Meanwhile, “juristic person” is not eligible to be director because the director qualification is “personal” and the director position is not “distributable”. Moreover, director cannot authorize others to perform “duties of directors” such as attend Board meeting in the capacity of absence director. The director can, however, authorize others to act as “company representative”. Most importantly, directorship is not an asset and cannot be inherited. The directorship ends as director passes away.

Which Court to file the case on director dispute?

If a director has legal dispute in “civil case” with the company, the case must be filed to the “Civil Court” not the “Labour Court”. Since a relationship between the company and director is governed by “corporate law” and not “hiring contract”, the “Labour law” should not apply in this case.

In a case study of a case concerning “rubber production” business, the Supreme Court ruled in 2014 that a former director “filed petition to the wrong court”. As the “parent company” held a majority stake in a subsidiary and “appointed an executive director” at the subsidiary, the director is not governed by the subsidiary despite being deducted withholding tax and social security contribution. However, it did not reflect a relationship of an employer and an employee. Therefore, any legal relations between the “subsidiary” and the “director” fall under “corporate law” not “Labour Law”. In conclusion, although the “executive director” was authorized to sign legal contracts on behalf of the subsidiary, the director is not considered an employee of the subsidiary. Thus, the Labour Court refused to accept the petition (which must be filed to the Civil Court in accordance with Corporate Law).

This relationship can be explained in accordance with the Spirit of Law that a “director” has a duty to “act on behalf of” the company (External Role) under the “authority” of director in compliance with the Corporate Law and other legislations (Compliance Role) to engage in binding obligations with external parties such as legal action, contracts, and accountability by the company toward others.

From the organization chart aspect, “director” is on the top of corporate structure at the Board of Director level. It provides top-down direction via policies and operating guidelines for the Management Team through various departments with “leaders” who will be accountable for each function & business unit). They include C-Level executives i.e. **CEO** (Chief Executive Officer), **CFO** (Chief Finance Officer), and **COO** (Chief Operating Officer). Some companies with sizable corporate structure may also have **CTO** (Chief Technology Officer) **CIO** (Chief Investment Officer), **CLO** (Chief Legal Officer), and **CPO** (Chief People Officer).

Another case study is the “crocodile farm” business. The Key Man, son of the owner, is not included in the “organization structure” of this family business. He is neither an employee nor director. The Supreme Court ruled in 2015 that

“The owner’s son” (Plaintiff in labour case) had no official responsibility and was not required to go to work on a daily basis. This implied that he was not governed by company executives (the company is the defendant of the case). The son’s work in the company is viewed as an attempt to help out father as the shareholder (owner). It is a personal matter and cannot be considered that the “father hired the son on behalf of the company” and therefore the son is not considered an employee of the company.

This case study demonstrated that “legal action” or legal relationship must be “clear” and comprise evidence of proof. Without solid proof of relationship, the Court will not accept the relationship. The person will not be deemed “company representative” (director) nor “employee” but mere “personal relationship”.

Proofs “directorship” in accordance with Corporate Law are (1) Minutes of shareholders’ meeting to appoint new director or (2) Minutes of Board meeting to appoint “Replacement Director” to replace vacancy in the case of resignation, death, etc. and (3) Registration documents issued by the Ministry of Commerce’s Department of Business Development in accordance with the Company Certificate.

Determination of director’s authority?

Naturally, a company can only take actions within its “objectives” and is not eligible to perform any action beyond its objectives. Therefore, a director (agent) is not authorized to take actions beyond company objectives on behalf of the company. The company will not be binding with such actions and the director will be held responsible personally (*Ultra Vires*). For example, if the company did not specify “guarantee other company” in its objectives but the Board approved guarantee for subsidiaries, the company will not be binding to the Board’s resolution on the guarantee while directors will be held personally responsible. More importantly, the company cannot ratify or accept benefit from such actions because they are beyond the company’s “capacity”.

Fiduciary Duty also involves with Trust of “shareholders”, who are “beneficiary” of company’s operations. Directors are performing their duties on other people’s money. In the next article, I will analyze the “Duty of Care” and “Duty of Loyalty”, which are considered the “personal mantra of director” and the “key elements of Fiduciary Duty”.



Fiduciary duty