

The Introduction of De facto Director and Shadow Director into Taiwan in 2012

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Like in many jurisdictions, Taiwanese directors owe fiduciary duties to the company in which they serve. As fiduciaries, directors are liable for any damages incurred from their misconduct. But identifying directors will be a problem in Taiwan. Under the Taiwan Company Act (TCA),¹ the term “director” refers only to “De jure Directors,” persons who are validly elected and appointed by a given company. On the other hand, certain powerful persons in a company who actually exert the same (or similar) authority of director or have substantial influence on board’s decisions, legally speaking, are not directors. Since they are not directors, the obligation and liability rules imposed on directors are not applicable to them. Thus, they can easily insulate themselves from liability under such rules by not being elected as directors. However, they still may enjoy the authority of a director or have dominance in the boardroom through appointments of so-called dummy directors. The mechanism of accountability could be severely damaged by such an arrangement.

Article 27 of the TCA makes this type of problem worse. Under Paragraph 1,

¹ The English version of the TCA is *available at* <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0080001> (last visited 3/31/2014). Please note the official version of the TCA is written in Chinese.

Article 27 of the TCA (Paragraph 1), a juristic person who acts as a shareholder of a company can be elected as a director only if it designates a natural person as its representative to discharge duty on its behalf. Paragraph 2, Article 27 of the TCA (Paragraph 2) allows a juristic person as a shareholder of a company to appoint more than one representative to be elected as directors. Legally, the juristic person elected under Paragraph 1 is a director and the representative who in fact acts like a director is not director. However, the appointed representatives, but not the juristic person itself, are directors under Paragraph 2. The juristic person can replace its representative at anytime for any reason.² The juristic person in fact has a substantial influence on how the representatives discharge their duties as directors, but the juristic person is not a director.

This type of legal loophole is obvious. In response to this loophole, Taiwan in 2012 introduced De facto Director and Shadow Director by adding Paragraph 3, Article 8 of the TCA (the Paragraph). The Paragraph provides that a non-director in a publicly held company who de facto conducts business of a director or de facto controls the management of the personnel, financial or business operation of the company and de facto instructs a director to conduct business shall be liable for the civil, criminal and administrative liabilities as a director.

² See Paragraph 3, Article 27 of the TCA.

The De facto Director and Shadow Director positions derive from the U.K. Companies Act. According to Section 250 of the U.K. Companies Act of 2006, “director” includes any person occupying the position of director, by whatever name called. The approach to identifying a director is not based on form but substance.³ In addition to De jure Director, the meaning of director in the U.K. conceptually includes the De facto Director who actually occupies the position of director. Furthermore, Section 251 of the U.K. Companies Act of 2006 provides that “shadow director” means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. Basically the Shadow Director also bears similar obligations and liabilities as does the director in the U.K.⁴

In Taiwan, however, the approach to identifying a director is based on form, not substance, and the meaning of director is relatively narrow under the TCA. The De facto Director and Shadow Director are not real directors in Taiwan. A question thus arises over whether the De facto Director and Shadow Director in Taiwan are subject to all of the rules applicable to directors. For example, do the De facto Directors (and Shadow

³ U.K. Companies Act 2006 is available at <http://www.legislation.gov.uk/ukpga/2006/46/contents> (last visited 3/31/2014).

⁴ Section 170(5) of U.K. Companies Act 2006: “The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply.”

Directors) owe fiduciary duties to the company in which they serve? Or, are the De facto Directors (and Shadow Directors) required to disclose information concerning their holding of company's shares in accordance with securities regulation? Based on the purpose for which the Paragraph was enacted, answers to both questions should be affirmative, but they remain open. Unfortunately, even assuming that the De facto Directors (and Shadow Directors) should comply with all of the rules applicable to directors, enforcement of such rules could be another problem because De facto Directors (and particularly Shadow Directors) are not easily detected in practice.

As a matter of fact, the identification of De facto Directors and Shadow Directors will continue to be a key issue. Taiwan is a civil law jurisdiction in which judges must make decisions primarily based on statutes. The Paragraph, however, is literally unclear. Under what conditions do individuals “de facto conduct[] business of a director” or “de facto control[] . . . the management of the personnel, financial or business operation of the company and de facto instruct[] a director to conduct business?” As Taiwan has no prior judicial opinions with respect to the identification of De facto Director and Shadow Director, it will be challenging for Taiwan courts to apply the Paragraph.

In conclusion, the introduction of De facto Director and Shadow Director was

expected to help enforce the mechanism of accountability in the corporate governance context. However, the De facto Director and Shadow Director are new legal concepts for Taiwan corporate jurisprudence, and identification of De facto Directors or Shadow Directors in a given case remains an open question.