

## LEGAL ARTICLE

*Consider the case where a dispute has erupted, here's the critical question: what should a shareholder do?*

# PARTNERSHIP FALLOUT – PART 2: WINNING THE SHAREHOLDER DISPUTE

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**In the first part** of our writing on the partnership fallout, we have covered what are common grounds of shareholder disputes. Now let's consider the case where a dispute has sparked, what shareholder(s) can do to resolve the dispute? What approach should be taken to possibly win the boardroom battle? Read on to find out.

- Do the shareholders have any Shareholders Agreement and any tailor made Articles of Association or not?
- Do the Shareholders Agreement and the Articles of Association set forth any reserved matters, which requires more than the simple majority votes of the shareholders or not?

## EVALUATION OF EACH SHAREHOLDER'S OWN POSITION

**At the outset** of a shareholder dispute, a shareholder should evaluate his or her own position under the relevant law, the Shareholders Agreement and the Articles of Association. The position may be strong or terribly weak in this dispute. The following questionnaire can be used to evaluate a shareholder's position.

- How much percentage of the total shares does such shareholder own?
- Does the shareholder hold the controlling shares (the majority shares)?
- How many directors are nominated and controlled by each group of shareholders?
- Does the shareholder have a complete control over the board of directors of the company?

So, before the shareholder pursues any action to resolve the dispute, these questions must be carefully addressed.

## IDENTIFICATION OF GOAL

**Given the dispute has arisen**, the shareholder should determine what he or she wants to get out of this conflict. For example, an inactive shareholder may want the director and an active shareholder to return the cash or the assets to the company. Some shareholders may prefer to sell the shares at a reasonable price to whomever is willing to purchase and get out of this hassle altogether. Alternatively, a shareholder may prefer to buy out other shareholders to gain the complete control. An inactive shareholder may want some sort of representation in the board of directors. Some shareholders may prefer to remove certain directors and executives.

## STRATEGIZING COURSE OF ACTION

**Once the shareholder** has identified the goal, the shareholder can strategize the course of action. If the shareholder suspects and reasonably believes any criminal offence is committed by the counterparty, then the shareholder needs to decide whether the legal action should be taken first before any negotiation with another shareholder or not. It is noted that some criminal offences, i.e. misappropriation of company's assets, must be reported to the police or be filed to the court within 90 days from the date that the shareholder is aware of such offences, otherwise the statutory limitation on time will run out. As always, any legal action must be supported by the evidence.

In the event that the shareholder has the sufficient votes in the shareholders' meeting to vote out any undesirable directors, the shareholder has to factor in the timeframe that it takes to remove those directors, and any agreement or any arrangement that the shareholder has with other shareholders. If the shareholder has to call for the shareholders' meeting by himself or herself, typically the entire process will take some time.

It is always a good idea to strictly comply with the corporate formalities (i.e. calling and properly holding an annual general meeting of shareholders, filing a financial statement and tax returns to the government). Whenever any of corporate formalities has not been complied properly, it could be a setback for the shareholder who operates the company. Besides the failure to comply with the corporate formalities, if in the process any criminal offence is committed (i.e. misappropriation of assets and fraud) by any shareholder or any breach of a fiduciary duty or a duty of care by any director or any executive (a person who is delegated by a director) occurs, the criminal offence and the breach of duties automatically become a leverage to be effectively used by the counterparty.

## COURT OF THE LAST RESORT

### Eventually, if the negotiation

cannot resolve anything and ultimately breaks down, going to court or arbitration as provided in the Shareholders Agreement may be inevitable for the shareholder. At this

point, the shareholder should collect whatever evidence in support of his or her claims. It is noted that the negotiation may be a never-ending game as the court may try to get the parties to settle again once the case hits the courtroom. So be prepared for another set of the negotiation.

In Thailand, the delay to justice occurs. Due to the long line in the court, the court proceeding will take at least a year. Strategically, if any shareholder files a civil lawsuit, it may take a long time – some party thinks it takes forever – before the plaintiff can recover any damage (if any). While a civil lawsuit may be inevitable, a criminal charge works rather more effectively than a civil claim.

When the friendly negotiation ends without any satisfactory result, increasingly a criminal charge is used as an effective leverage by the shareholder. In the event that it is possible for the shareholder (claimant) to file a criminal charge against the counterparty shareholder, it is quicker to use the criminal charge as a leverage to force the counterparty shareholder to agree on any settlement desirable to the shareholder who is a claimant. Even the slightest prospect of going to prison definitely forces the counterparty

shareholder who is accused of committing any criminal offence to provide the remedy to the claimant shareholder in the manner that only two or three years of a civil lawsuit could do.

But be care with the use of the criminal charge, the claimant shareholder must prove beyond any reasonable doubt that the counterparty shareholder commits any criminal offence. This means the evidence must be thoroughly examined before any criminal charge is filed to the court or reported to the police. It is noteworthy that filing any criminal charge without any genuine merit is also a criminal offence.

*This legal article was written by Narit Direkwattanachai, a corporate & tax attorney at NARIT & Associates with expertise in shareholder dispute. He holds a bachelor of laws (1<sup>st</sup> class honors) from Chulalongkorn University, a master of law from the University of Cambridge, UK and an MBA in finance from the Georgia Institute of Technology, USA. He can be reached at [narit@naritlaw.com](mailto:narit@naritlaw.com)*

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