

The Concept of Legal Representative in China Corporate Laws

Description

When advising foreign investor clients (esp, those from common law jurisdictions) on corporate governance structure of the company they invest, the concept of legal representative often causes great confusion and puzzle. There have been also frequent inquiries from people on what it means to them to be a legal representative of a company in China, as such a concept appears alien to them. This article intends to provide information (not legal opinions) that helps foreign investors to better understand the concept of legal representative in China context.

1. Definition and Understanding of the Term

As a legal terminology, it is important in the first place to define the meaning of the term. Legal representative is widely used in many social organizations in China. For purpose of this article, we focus on the legal representative of companies incorporated in accordance with China Company Law (the "Company Law").

The term of legal representative (法定代表人) as used in substantive law made its debut in the Implementation Rules for Sino-Foreign Equity Joint Venture Law enacted in 1983 without clear definition. Article 37 thereof reads "The chairman of the board of director shall be the legal representative of the joint venture." Later in the General Provisions of the Civil Code of China (the "Civil Code") enacted in 1986, the term is more clearly used. According to Article 38 of the Civil Code, a legal representative of a legal person is defined to be the person-in-charge who discharges powers and duties on behalf of the legal person in accordance with laws or the constitutional charter of the legal person. The constitutional charter of a company means the articles of association/memorandum of the company.

The current Company Law does not have a definition for the term, but directly provides that "the legal representative of a company shall be served, pursuant to its articles of association, by the chairman, executive director (as in the case of a company without a board of director) OR general manager."

In practice, the legal representative is the only one (1) person of a company that can legally represent the company in all occasions without being challenged in terms of the legality of such representation. In other words, any conducts, decisions, representation made by the legal representative of a company for and on behalf of the said company shall be taken for granted as binding the company.

2. Powers of Legal Representative

As manifested by the term itself, the basic function of a corporate legal representative is to represent the company in various business activities to the outside. We may look at and understand the term from the following three angles.

(1) Representation not decision-making

A legal representative has the general and all-in powers to represent the company. But representation does not mean decision-making. In other words, a legal representative does not have such general powers in the company to make business decisions, no matter the legal representative is served by the chairman or general manager.

From the perspective of organizational structure, the legal representative is simply a part of the corporate organization which consists of the shareholders meeting, board of directors, and board of supervisors as well that make most corporate business decisions. The legal representative shall act in accordance with decisions made by shareholders meeting or boards.

(2) Scope of representing powers

As mentioned above, the legal representative has the general and all-in powers to represent the company. But only a portion of those representations are statutorily provided solely to be made by the legal representative, including:

- (a) Sign the company's share certificates when the company issues stocks (Article 129 of Company Law);
- (b) Sign the corporate bonds when the company conducts debt financing (Article 156 of Company Law);
- (c) Sign application forms when the company is being incorporated or effects changes to its articles of association, names, registered capital and so on, as required in the China Regulations on Registration of Companies.
- (d) Other specific rules requiring signature of the legal representative scattering in different laws and regulations.

Except as provided expressly by laws and regulations, pursuant to the definition in the Civil Code, the articles of association of the company shall also specify and qualify the representations by the legal representative. The articles of association should be well employed by shareholders of the company in order to guard against and forestall abuse of representation by the legal representative.

(3) Legal representative not the sole person being able to represent the company

It is an established practice in China that a company shall only have one (1) legal representative. This differs a lot from some western corporations whose members of the board of directors all have the power to represent the corporation in furtherance of the corporate business.

However it shall be noted that the power of representation is NOT monopolized by this one single person. In case that the legal representative fails or is unable to discharge his powers and duties, the legal representative can authorize someone else to act on his behalf. Further, if the legal representative is in row with the board of directors of the company and refuses to cooperate, the board shall have the right to appoint another person to act, in given occasion, on behalf of the company in lieu of the incumbent legal representative.

When discussing representation of a company, we shall give full attention and regard to another important practice in China, the use of corporate stamp/seal/chop which is widely used in business activities to bind companies. But this will require a separate article to discourse on this important topic

which is already on my to-do list, and will be coming soon.

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Date Created

November 2011

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