

## Abstract

This thesis focuses on Business Judgment Rule (“BJR”), under US, Australian and Thai laws, to analyze duty of care standard to be implemented to director of financial institutions in Thailand.

According to the concept of legal personality, a company is a legal entity separate from its shareholders. Its intention shall be declared by its directors as representatives of company. Directors shall have independent powers in performing their duties on behalf of company, within their scope of authority. Directors shall work together as a board, called the Board of Directors. The Board of Directors shall make a collective decision by discussing, debating and passing its resolution thereon. Directors shall perform their duties in accordance with two principles, Duty of Loyalty and Duty of Care, for the interest of a company.

Financial business is highly important to economy of Thailand. The commercial banks act as mediators in the economy by raising deposit from people and lending money to customers, who need funds. The efficiency and stability of commercial banks is significant condition of a stable economic growth. Therefore, the relevant authorities are required to supervise commercial banks’ operation and performance of their directors who manage commercial banks to ensure the appropriateness.

With respect of BJR in the United States of America, as it is presumed that the business decision be made by a disinterested director, with good faith, on an informed basis, with honest belief that it is for the best interest of company and without the abuse of discretions. Following these, the competent court will not review the merit of such business decision. BJR, therefore, is deemed a safe harbor for directors from personal liabilities and being reviewed their business decision by the court. However, the presumption of BJR can be rebutted. Plaintiff is responsible to prove to the court that, at the moment the decision is made, the director does not comply with the BJR elements. As a result, directors are not protected by BJR and their business decision will be reviewed by the court.

According to BJR in Australia, a good faith business decision is the business decision that is made in accordance with the following criteria:

- (1) in good faith and for proper purpose;
- (2) without material personal interest in the subject matter;
- (3) inform themselves about the subject matter, to the extent they reasonably believe to be appropriate; and
- (4) Rationally believe that it is in the best interests of the company.

The decision that is made in accordance with the above criteria shall not be reviewed by the relevant court. It is deemed that directors have performed duty with due care and diligence. Directors will be protected from non-compliance of duty of care and diligence if directors can prove to the court that they completely perform their duty in accordance with BJR prescribed by law. However, failure to comply all of the above criteria is not considered as failure to perform duty with due care. Directors will not be entitled to the protection by BJR.

BJR in Thailand adopted from Australia laws, is legislated in writing in the Securities and Exchange Act (No. 4) B.E. 2551, Section 89/8, (Securities and Exchange Act), which governs financial institutions listed in the Stock Exchange of Thailand. The Notification of the Bank of Thailand governs both listed and non-listed financial institutions. Although those two provisions are similar, but the principle of “honestly belief” is only prescribed in the Securities and Exchange Act.

<u>The Securities and Exchange Act</u>	<u>Notification of the Bank of Thailand</u>
1. Acting with honest belief and reasonable ground that it is for the best interest of the company (Section 89/8(1))	1. The decision or resolution must be rational (Clause 5.3 (3))
2. Acting in reliance of information honestly belief that it is sufficient (Section 89/8(2))	2. The decision or resolves must be on sufficient information (Clause 5.3(2))

3. acting without his interest whether directly or indirectly in such matter (Section 89/8(3))

3. The directors must not have self-dealing or interest whether directly or indirectly in such matter (Clause 5.3(1))

The notification of the Bank of Thailand provides that the director of the financial institutions must use higher “level” of duty of care by applying the Objective Test, which is different from the Securities, and Exchange Act which applies the Subjective Test. Directors of financial institutions listed in the Stock Exchange of Thailand and under the supervision of the Bank of Thailand shall be protected from the liabilities when they are claimed on their duty of care only if they perform their duties in accordance with criteria prescribed in the notification of the Bank of Thailand as follows:

1. that decision or resolution is rational;
2. that sufficient information be provided prior to making decision or resolving a resolution; and
3. that directors must have no interest and related benefits

Section 84 of the Financial Institution Business Act B.E. 2551 provides that the Bank of Thailand is empowered to order all financial institutions to set up several committees, their numbers, qualifications and authorities, not the duty of directors. As a result, the legality of the notification of the Bank of Thailand may be objected whether or not such notification are in effect as they have been issued beyond the scope provided by its legal framework. Moreover Section 84 imposes the criminal charge may be inconsistent with the intention of BJR which aims to protect directors from their liabilities.

I would like to propose the amendment to the first paragraph of Section 27 of the Financial Institutions Businesses Act B.E. 2551 to read “In operating a business of a Financial Institution, directors shall perform duty of care *at the level that financiers or bankers shall perform under the same circumstance...*” and add the second paragraph

to read *“directors shall be deemed to perform duty of care in accordance with the first paragraph if the following criteria have been met:*

*1. decision or resolution be made or passed with rational and proper objectives*

*2. such decision or resolution be made or passed on an informed basis*

*3. no self-dealing or conflict of interest, directly or indirectly, on the matter to be decided or the resolution to be passed”*