Working Paper Series No. 041

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ASLI Visiting Fellow
(September 2017 to November 2017)

January 2018

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CONTROLLING CONTROLLING SHAREHOLDERS IN THAI PRIVATE COMPANIES

NILUBOL LERTNUWAT*

In a private company, conflicts mostly arise from disagreements between controlling and non-controlling shareholders. Controlling shareholders may be involved in the management and active monitoring of directors in order to maximize the value of the company. On the other hand, they may also use their power to benefit themselves at the expense of the company and other shareholders such as by appointing their family members or acquaintances to be on the board of directors regardless their qualification and performance and granting them high remuneration. Controlling shareholders can also oppress non-controlling shareholders by removing the latter from management positions and refusing to distribute dividends even when the company has sufficient profits to do so. This leaves non-controlling shareholders with no financial benefits and eventually these shareholders involuntarily decide to leave the company.

This paper discusses how controlling shareholders dominate the company and examines how Thai laws, particularly the *Civil and Commercial Code* which governs private companies, prevent controlling shareholders from exploiting the benefits of the company and non-controlling shareholders and provide remedies for both the company and non-controlling shareholders. The author argues that the legal mechanisms for deterring controlling shareholders from wrongdoing and providing remedies are not effective enough.

I. INTRODUCTION

Shareholders in most private companies can be categorized into two groups—controlling and non-controlling shareholders. Controlling shareholders have significant control over the decision-making process of the company at the levels of the board of directors and shareholders' meetings. Based on their large stake in the company, controlling shareholders have strong incentives to both continually be involved in and to monitor the management. Their active role increases firm performance and maximises the value of the company. This benefits all shareholders including non-controlling ones.

Controlling shareholders, however, may not always act in the best interests of the company. They tend to appoint their family members or those whom they have close connections with to sit on the board of directors despite the fact that their representatives are not qualified, and to reappoint them regardless their performance. These directors enjoy the benefits of being in the executive positions by approving high salaries and bonuses for themselves, using the company's capital to fund their personal living expenses. Also, given the controlling shareholder's voting power, they could dominate the shareholders' meeting to approve any matters proposed at the meeting including self-dealing transactions.

Apart from exploiting the company's interests, the controlling shareholders may extract private benefits of control at the expense of non-controlling shareholders. In a small company, shareholders are often involved in the management of the company and are usually employed or appointed to key positions such as managers or board members. This allows the shareholders to take part in management of the company and to earn salary or bonus as a way of getting a return on their investment. However, working closely may lead to disagreement among the shareholders which could affect their relationships and result in conflict. The disputes between shareholders may come into an irretrievable breakdown in mutual trust and confidence or a

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deadlock in the management of the company. Given their power, the controlling shareholders could terminate the employment contracts of non-controlling shareholders or remove them from the board of directors in order to deprive them of any participation in company management. The conflict within private companies therefore is a result of the divergent interests between controlling and non-controlling shareholders.

From the above observations, the controlling shareholders are in the position to enjoy their control and exploit the benefits of the company and non-controlling shareholders. This paper therefore aims to study how Thai laws prevent the controlling shareholders from misusing their controlling power. The key research questions of this paper are: firstly, to what extent the controlling shareholders dominate the company; and secondly, whether Thai laws provide sufficient and effective legal measures to deter the controlling shareholders from exploiting the benefits of the company and non-controlling shareholders and to provide remedies to compensate the damage caused.

As the purpose of this paper is to study the legal mechanisms which deters controlling shareholders from wrongdoing and provides remedies to the company and non-controlling shareholders, it assumes the lack of any shareholders' agreement between controlling and non-controlling shareholders which may impose terms forbidding the controlling shareholders from exercising their rights. This is to ensure that the outcome of the study reflects the effectiveness of Thai laws in preventing and providing remedies. The paper focuses on the study of Book Three of the Civil and Commercial Code[1] which is the primary law governing private companies and further examines other related regulations.

This paper's outline is as follows: first, it considers the kind of control a shareholder needs to have to be characterized as a controlling shareholder and points out how controlling shareholders employ their power to exploit the benefits of the company and non-controlling shareholders. The second part examines the power of the controlling shareholders in two governance levels of the company—the shareholders' meeting and the board of directors—to observe how controlling shareholders dominate the company. The paper then analyses the legal mechanisms available in the Thai legal system for deterring the controlling shareholders from misusing their power and providing remedies to the company and the non-controlling shareholders. Finally, the research provides the conclusion of the study.

II. Controlling Shareholders

As this paper focuses on the study of controlling shareholders, the first key question to consider is which shareholders should be classified as "controlling shareholders". Fama and Jensen consider the concept of control of a firm by focusing on the corporate decision-making process. Such process consists of four steps—initiation, ratification, implementation, and monitoring.[2] They referred to the initiation and the implementation of decisions as "decision management" and to the ratification and the monitoring of decisions as "decision control".[3] The power to initiate and implement a decision belongs to the managers, while the power to ratify and monitor a decision belongs to the shareholders.[4] Therefore, the corporate controller is an individual or a group who could effectively control all the decision-making processes within the firm. Cubbin and Leech further examine the concept of control by investigating two

1 BE 2468 (Thailand) [*CCC*].

2 Eugene F Fama and Michael Jensen, "Separation of Ownership and Control" (1983) 26 Journal of Law and Economics 301 at 303 [*Fama and Jensen*].

3 *Ibid* at 303, 304.

4 *Ibid* at 304.

dimensions of control—the location of control and the degree of control.[5] Regarding location, control could either be inside or outside the management.[6] The internal controllers are expected to have a higher degree of control than other shareholders outside the internal management.[7] The degree of control is measured by the voting power exercised by a group of shareholders.[8] Cubbin and Leech define controlling shareholders as those who have a specified high voting power and is able to control the discretion exercised by the management.[9] From the above studies, the controlling shareholders must have a substantial degree of control or influence over the management of the company. The controlling power is not only limited to direct control but also indirect control. The direct control refers to the voting power of the shareholders based on the shares registered in their names, while indirect control refers to the voting power of the shareholders based on the shares held by entities that the ultimate shareholders control. Indirect control over the company could be attained in several ways, one such way being the pyramidal corporate structure.[10] This business structure strengthens the controlling power of the shareholders.

The further issue is whether it is possible to specify the shareholding threshold to be used as the criteria to define controlling shareholders. In Thailand, the *CCC* does not define the concepts of 'control' or 'controlling shareholders'. The definition of controlling shareholders is however present in the listing rules. The rules state that "controlling shareholders" are those who have significant influence over a company's policy processes, management, or operations.[11] The shareholding threshold applied to define a controlling shareholder is at least 25 percent of a company's voting rights.[12] The listing rules refer to the shareholding threshold of 25 percent of a company's voting rights as, to have the ultimate control which gives a shareholder sufficient power to influence a company's decision, as discussed below, the shareholding of 75 percent of all voting rights is required. However, using the shareholding threshold as a cut-off level may not be suitable as the sizes of controlling shareholdings vary according to the number of shareholders and the shareholding dispersion within firms.[13]

The paper suggests that the controlling shareholders are those who have a substantial degree of control over the decision-making and the management of the company. These shareholders directly or indirectly hold sufficient voting power to pass any resolutions at the shareholders' meeting and be able to appoint at least half of the board of directors and have an influence over the decisions of the board. Non-controlling shareholders, on the contrary, have no ability to control a firm. They may be appointed as the director but have no influence over corporate strategy decisions.[14]

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5 John Cubbin and Dennis Leech, "The Effect of Shareholding Dispersion on the Degree of Control in British Companies: Theory and Measurement" (1983) 93 The Economic Journal 351 at 354 [*Cubbin and Leech*].

6 *Ibid*.

7 *Ibid* at 355.

8 *Ibid*.

9 *Ibid* at 367.

10 Randall Morck, Daniel Wolfenzon and Bernard Yeung, "Corporate Governance, Economic Entrenchment, and Growth" (2005) 43:3 Journal of Economic Literature 655 at 663.

11 Stock Exchange of Thailand Listing Rules (Bor Jor /Ror 01-11), Attachment 1.

12 *Ibid*.

13 *Cubbin and Leech*, *supra* note 5 at 367.

14 See also *Fama and Jensen*, *supra* note 2.

A. *The Exploitation of Benefit*

Given their large stake in the company, controlling shareholders have a strong incentive to maximise the company's value.[15] They pay much attention to the monitoring of managers to ensure that the managers do not put their interests before the shareholders'.[16] This minimises the risk of agency problems—the conflict between managers and shareholders.[17] The power of the controlling shareholders over the management is significantly strong as they have sufficient voting powers to remove incompetent managers.[18] This active role played by the controlling shareholders benefits non-controlling shareholders as the controlling shareholders solely bear the costs of monitoring. The controlling shareholders themselves may serve as the company's directors. They could contribute substantial amounts of time and energy to improve the firm's performance. In terms of performance, the studies affirmed that there is a connection between firm performance and concentrated-ownership structure.[19] Alba *et al* compared the performance of Thai firms in 1992 and 1996, before and after concentrated ownership was significantly diluted, and found that 'ownership concentration [was] positively (and significantly) related to profitability in 1992' but the performance had turned negative by 1996.[20]

Although the studies have recognised the benefit of having controlling shareholders in the company, the controlling shareholders may not always act in the best interests of the company. Controlling shareholders have less incentive to prioritise the company's benefit especially when their cash flow right is lower than their control right.[21] The controlling shareholders may personally benefit at the non-controlling shareholders' expenses in different ways. Dominant shareholders tend to position themselves, family members, relatives or trusted associates, rather than capable managers, in executive levels of the firm.[22] Regardless their poor performance, controlling shareholders are unlikely to remove them.[23] Furthermore, controlling shareholder-directors or their representatives can exploit the benefit of the company by approving high

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[15] Andrei Shleifer and Robert W Vishny, "A Survey of Corporate Governance" (1997) 52:2 The Journal of Finance 737 at 754.

[16] Jeremy Edwards and Alfons J Weichenrieder, "Ownership Concentration and Share Valuation" (2004) 5:2 German Economic Review 143 at 165 [*Edwards and Weichenrieder*].

[17] See Michael Jensen and William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305 at 308.

[18] *Edwards and Weichenrieder*, *supra* note 166 at 165.

[19] Christian Andres, "Large shareholders and firm performance—An empirical examination of founding-family ownership" (2008) 14:4 Journal of Corporate Finance 431; Alessandro Minichilli, Marina Brogi and Andrea Calabrò, "Weathering the Storm: Family Ownership, Governance, and Performance Through the Financial and Economic Crisis" (2016) 24:6 Corporate Governance: An International Review 552.

[20] Pedro Alba, Stijn Claessens and Simeon Djankov, "Thailand's Corporate Financing and Governance Structure" (1998) World Bank Working Paper No 2003, online: World Bank <http://documents.worldbank.org/curated/en/399271468764098295/pdf/multi-page.pdf> at 18.

[21] Stijn Claessens *et al*, "Disentangling the Incentive and Entrenchment Effects of Large Shareholdings" (2002) 57:6 The Journal of Finance 2741 at 2770.

[22] Caselli, F and N Gennaioli, "Dynastic Management" (2003) National Bureau of Economic Research Working Paper No 9442; Marianne Bertrand *et al*, "Mixing Family with Business: A Study of Thai Business Groups and the Families behind them" (2008) 88:3 Journal of Financial Economics 466 at 479. Bertrand *et al* found that the founders of a firm tended to appoint their sons rather than outside managers.

[23] Micheal S Gibson, "Is Corporate Governance Ineffective in Emerging Markets?" (2002) Fedural Reserve Board FEDS Working Paper No 99-63, online: Poseidon (website) <https://poseidon01.ssrn.com/delivery.php?ID=437004004092118098121086012115090100081004071015039058088006017104001106061004025120105016098003017088000020102022026090065067127092073008118073007017021075059026083069012097108012119002126123081114115025127023081076120093020112119115094126020&EXT=pdf> at 23, 24; Yves Bozec and Richard Bozec, "Ownership Concentration and Corporate Governance Practices: Substitution or Expropriation Effects?" (2007) 24 Canadian Journal of Administrative Sciences 182 at 184.

remuneration for themselves.[24] The controlling shareholders can gain private benefits by spending corporate money for their own desire, moving resources out of the firm for their benefit, or approving unfair self-related party transactions.[25] The controlling shareholders can easily make these transfers possible as they are either the managers or have the managers who would do so on their demand.[26] Also, when the company is operating with profits, generally some profits should be distributed in the form of dividends, however, the company with concentrated ownership prefers retaining dividends rather than distributing them to the shareholders.[27] This suggests the possibility of high expropriation in the firm by controlling shareholders as the controlling shareholders could retain the capital within the company and use it in the way they wish, showing the power of the controlling shareholders over the company. Furthermore, a number of studies affirmed the negative effect of concentrated ownership and firm performance.[28]

Apart from exploiting the benefit of the company, the controlling shareholders may treat non-controlling shareholders unfairly or take their benefits. The controlling shareholders could employ their power to seek ways to keep the profit for themselves and wrongfully lock the non-controlling shareholders out. This is known as an oppressive conduct.[29] In a closely held company, the shareholders often participate in the management of the company by holding positions on the board of directors or by being employees.[30] Holding a position in the company allows the shareholders to manage the company and receive fixed income in the form of directors' remuneration, salaries or bonuses. Once there is an irretrievable conflict between controlling and non-controlling shareholders, the controlling shareholders may wish to squeeze the non-controlling shareholders out. The controlling shareholders might then engage in removing the non-controlling shareholders from the board without cause, terminating the employment contract, or declining to declare dividends even when the company has sufficient profits and large reserves.[31] The exclusion of directorship and employment of non-controlling shareholders significantly affects them as the small company generally does not declare dividends.[32] The salary received is the way by which non-controlling shareholders gain their

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24 Simon Johnson *et al*, "Tunneling" (2000) 90 The American Economic Review 22 at 22.

25 *Ibid* at 22; Simon Johnson *et al*, "Corporate Governance in the Asian Financial Crisis" (2000) 58 Journal of Financial Economics 141 at Table 1 [*Johnson et al*]; Deunden Nikomborirak, "Corruption in the Business Sector and Corporate Governance in Thailand" (TDRI Report No 29, Thailand Development Research Institute, 2001) at 2.

26 *Johnson et al*, *supra* note 255 at 143.

27 M Faccio, Larry HP Lang & Young L, "Dividends and Expropriation" (2001) 91:2 The American Economic Review at 54-78.

28 Todd Mitton, "A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis" (2002) 64:2 Journal of Financial Economics 215 at 215, 229; Michael L Lemmon and Karl V Lins, "Ownership Structure, Corporate Governance, and FirmValue: Evidence from the East Asian Financial Crisis" (2003) 58:4 The Journal of Finance 1445 at 1466; Yupana Wiwattanakantang, "Controlling Shareholders and Corporate Value: Evidence from Thailand" (2001) 9 Pacific-Basin Financial Journal 323 at 359. Wiwattanakantang found that Thai firms with controlling shareholders performed well. However, when controlling shareholders were involved in the management, a negative effect was detected and such an effect became greater when controlling-and-manager shareholders" ownership represented 25 to 50 percent of firm stocks.

29 For the history of the development of the oppression of minority shareholders, see A J Boyle, *Minority Shareholders' Remedies* (United Kingdom: Cambridge University Press, 2002) at ch 4,5 [*Boyle*].

30 Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 University of Pennsylvania Journal of International. Business Law 305 at 323, 324 [*Cheffins*].

31 In Australia for example, Ramsay reported that 40.9 percent of the cases concerned exclusive from management, 26.1 percent of the cases concerned breach of fiduciary duty and 15.9 percent of the cases concerned no or insufficient remuneration or dividends: Ian Ramsay, "An Empirical Study of the Use of the Oppression Remedy" (1999) 27:1 Australian Business Law Review 23 at 33.

32 Steven Stern, "Proposals to Help the Minority Stockholder Receive Fairer Dividend Treatment from the Closely Held Corporation" (1961-1962) 56 Northwestern University Law Review 503 at 507-508.

return on investment. Without the declaration of dividends, the non-controlling shareholders' investment appropriates no return.[33] In addition, controlling shareholders may further establish the policy of providing bonuses to management to benefit themselves.[34] Apart from leaving the non-controlling shareholders with no financial benefit, through the shareholders' meeting, the controlling shareholders could increase the capital with the purpose of diluting the non-controlling shareholders' shares in order to reduce their voting power.[35] Ultimately, the non-controlling shareholders may involuntarily decide to leave the company.[36] However, it is unlikely for the non-controlling shareholders to be able to sell their shares to outsiders as no one would wish to buy the shares. The only option which the non-controlling shareholders have is to sell their shares to the controlling shareholders. Without a stock market, this leads to an issue of the disagreement on share price valuation method.[37] Given their strong negotiating power, the controlling shareholders may attempt to purchase the shares of non-controlling shareholders at an unfair price by including discounts for minority status or lack of marketability.[38]

III. THE POWER OF THE CONTROLLING SHAREHOLDERS

This part of the paper considers how controlling shareholders dominate the company by examining their power in two levels—the shareholders' meeting and the board of directors. The power of the controlling shareholders to dominate the shareholders' meeting and the board of directors reflects the level of control over the governance of the company and the ability to ensure that their interests are well protected.

A. *Shareholders' Meeting*

The right to attend a shareholders' meeting is one of the most crucial rights of all shareholders as it is the only venue where all shareholders can gather and have their opinions heard by other shareholders and the directors.[39] The shareholders' meeting plays an important role in approving important matters of the company in terms of management and the financial structure including director election and removal, auditor appointment and removal, increase of capital, reduction of capital, and amendment of the memorandum of association or the

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[33] Douglas K Moll, "Shareholder Oppression & Dividend Policy in the Close Corporation" (2003) 60:3 Washington and Lee Law Review at 859, 860.

[34] *Shamsallah Holding Pty Limited v CBD Refrigeration and Airconditioning Services Pty Limited* [2001] 19 ACLC 517.

[35] For *eg*, *Over & Over Ltd v Bonvests Holding Ltd* [2010] 2 SLR 776; *Re Dalkeith Investments Pty Ltd* [1985] 3 ACLC 74. The meeting resolution to issue new shares was passed to gain control and dilute the equity of a minority shareholder in the company.

[36] Henry G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53:2 Virginia Law Review 259 at 280, 281.

[37] See Zenichi Shishido, "The Fair Value of Minority Stock in Closely Held Corporations" (1993) 62:1 Fordham Law Review 65.

[38] See Sandra K Miller, "Discounts and Buyouts in Minority Investor LLC Valuation Disputes Involving Oppression or Divorce" (2011) 13:3 University of Pennsylvania Journal of Business Law 607 at 612-617; Stephen J Leacock, "Lack of Marketability and Minority Discounts in Valuing Close Corporation Stock: Elusiveness and Judicial Synchrony in Pursuit of Equitable Consensus" (2016) 7:3 William & Mary Business Law Review 683 at 701, 702.

[39] Buxbaum and Hopt argued that the role of the general shareholders' meeting was unclear. It seemed necessary for exceptional circumstances but this was a mere formality so could be left without harm. See Richard M Buxbaum and Klaus J Hopt, *Legal Harmonization and the Business Enterprise* (Florence: European University Inistitute, 1988) at 181, 182.

articles of association.[40] The resolution of the shareholders' meeting binds the management and all shareholders, and thus the shareholders who are able to determine the outcome of the meeting could dominate the entire company.

Under the *CCC*, the company is required to hold a shareholders' general meeting within six months after the registration of the company and at least once every 12 months.[41] The company must therefore hold a meeting once a year. All other general meetings are called extraordinary meetings.[42] The directors are entitled to call for extraordinary meetings whenever they think fit.[43] One of the issues that have arisen is whether the approval of the board of directors is required to call a shareholders' meeting. The Supreme Court decided on this matter, interpreting the *CCC* to mean that the directors alone have no power to call for an extraordinary meeting.[44] The directors who wish to call for the extraordinary meeting must propose their intention to the board of directors to obtain the resolution of the board.[45] In addition, the directors are required to call for the extraordinary meeting without delay if the company has lost half the amount of its capital to inform the shareholders of such loss.[46]

The law also empowers the shareholders to call for a shareholders' meeting. The meeting which the shareholders are allowed to call for is an extraordinary meeting. The shareholders are not entitled to call a general meeting as the power to call such a meeting is vested in the board of directors. The eligible shareholders must hold not less than 20 percent of the shares of the company. A request in writing must be submitted by the eligible shareholders to demand the directors call for the extraordinary meeting. Together with the written request, the eligible shareholders must include the objectives for which the meeting is called for.[47] Once the request is received, the directors must call the meeting without delay. If the directors do not call for the meeting within 30 days after the date of the requisition, the shareholders who submitted the demand to the directors or any other shareholders amounting to not less than 20 percent of the shares of the company may call for the meeting themselves.[48] The non-controlling shareholders therefore could employ this legal mechanism to balance the power of the controlling shareholders; for instance, the non-controlling shareholders call the meeting to remove non-competent directors appointed by the controlling shareholders from their positions.

To inform the shareholders of the meeting, the notification of the meeting must be published at least once in a local paper not later than seven days before the meeting date. Besides, the notification must be sent by post not later than seven days before the meeting date to every shareholder whose name appears in the register of shareholders. The notification must include the place, the day and the hour of meeting, and the nature of the business to be discussed at the meeting.[49] As the notifications must be sent to the shareholders whose name appear in the register of shareholders, the law enables the company to close the register of shareholders 14 days preceding the shareholders' meeting.[50] This is to facilitate the company to locate the shareholders who are entitled to receive the notifications. Although the register of shareholders is closed, the shareholders can still transfer their shares freely. In this case, although the share

[40] As residual claimants, the shareholders also have the incentives to exercise material discretion of the company. Frank H Easterbrook and Daniel R Fischel, "Voting in Corporate Law" (1983) 26:2 The Journal of Law & Economics 395 at 403.
[41] *CCC*, *supra* note 1, s 1171 at para 1.
[42] *Ibid* at s 1171 at para 2.
[43] *Ibid* at s 1172 para 1.
[44] Supreme Court decision No 452/2518.
[45] Supreme Court decision No 2564/2532.
[46] *CCC*, *supra* note 1, s 1172 at para 2.
[47] *Ibid*, s 1173.
[48] *Ibid*, s 1174.
[49] *Ibid*, s 1175.
[50] *Ibid*, s 1131.

transferor is no longer the actual shareholder and has no interest in the company matter, he still receives the meeting notification. The share transferee, the actual shareholder, on the contrary, will neither receive the meeting notification nor be able to attend the meeting.

In every shareholders' meeting, there must be a chairman of the meeting. A chairman of the board of directors presides at the shareholder's meeting.[51] If there is no chairman of the board of directors, or he is not present within 15 minutes after the time the meeting is appointed to hold, the shareholders who present at the meeting may elect one of them to be a chairman of the board. The main duty of the chairman is to ensure that the meeting is conducted in accordance with the law and the company regulation. The chairman is empowered to adjourn any meeting with the consent of the meeting.[52] At any adjourned meeting, shareholders can only transact the businesses left unfinished at the original meeting.[53]

All shareholders are entitled to vote in any general meetings unless the articles of association provides otherwise. The articles of association may prohibit a shareholder to vote unless he is in possession of a certain number of shares. The shareholder who does not process sufficient number of shares to vote may join with other shareholders to form the said number of shares. The shareholders must then appoint one of them as a proxy to represent them and vote at the general meeting.[54] Apart from the regulations of the company, the law imposes a few exceptions to the shareholders' right to vote. First, the shareholder who fails to make a share payment called by the company is not entitled to vote in any resolution.[55] Secondly, the shareholder who has a special interest in a resolution cannot vote on such a resolution.[56] Thirdly, the shareholder who holds a bearer certificate is not able to vote unless he deposits his bearer certificate with the company before the meeting.[57]

The shareholder may attend a general meeting to vote or assign someone to vote on his behalf.[58] The proxy must be made in writing with the details of name of the proxy, the number of shares held by the shareholders and the meeting or meetings or the period of which the proxy is appointed indicated in the document.[59] The proxy holder must deposit the proxy with the chairman of the meeting at or before the beginning of the meeting.[60]

There are two means to vote—a show of hand and a poll. The articles of association may specify which voting method is applied. If the articles of association do not stipulate the voting method, a resolution put to the vote must be decided on a show of hand and each of the shareholders has one vote. When two shareholders demand to vote by a poll before or on the declaration of the result of the show of hands, the vote by a poll is applied and the chairman will decide how the poll is taken.[61] In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting is entitled to a casting vote.[62]

[51] *Ibid*, s 1180 at para 1.
[52] *Ibid*, s 1180 at para 2.
[53] *Ibid*, s 1181.
[54] *Ibid*, s 1183.
[55] *Ibid*, s 1184.
[56] *Ibid*, s 1185.
[57] *Ibid*, s 1186.
[58] *Ibid*, s 1187.
[59] *Ibid*, s 1188.
[60] *Ibid*, s 1189.
[61] *Ibid*, s 1190.
[62] *Ibid*, s 1193.

B. *The Control of the Controlling Shareholders over the Shareholders' Meeting*

This part of the paper analyzes whether the law governing the shareholders' meeting facilitates the controlling shareholders to employ their control to dominate the shareholders' meeting to benefit their interest.

1. *Quorum Requirement*

Every shareholder has the right to be present at any general meeting[63] and the company is not allowed to impose any limitations on the right to attend the meeting of shareholders. Unless specified otherwise in the articles of association, a quorum of a shareholders' meeting is at least 25 percent of the capital of the company.[64] If the quorum is not formed within an hour after the appointed time, and such meeting is called by shareholders, the meeting must be dissolved. However, if the meeting is called by the directors, the directors may call another meeting held within 14 days after the prior meeting date and at such meeting no quorum is necessary.[65] As the controlling shareholders normally hold more than 25 percent of the capital, the presence of the controlling shareholders alone is sufficient to constitute the quorum. The controlling shareholders therefore could commence the meeting and decide on the matters proposed at the meeting even though the non-controlling shareholders are not present at the meeting.

In addition, when the meeting is called due to the demand of the non-controlling shareholders holding at least 20 percent of the capital, if the shareholding of the non-controlling shareholders is less than 25 percent of the capital, the number of shares is not sufficient to constitute the quorum and the meeting must be dissolved. Therefore, when the shares of more than 75 percent of the capital are held by the controlling shareholders, it is impossible for the non-controlling shareholders to commence the meeting despite the fact that all of them were present at the meeting.

2. *Voting Method*

As mentioned above, the voting methods specified under the *CCC* are a show of hands or a poll. The voting method reflects the number of votes each shareholder has. When the show of hands is applied, each shareholder has one vote. On the contrary, every shareholder has one vote for each share held by them when the resolution is voted by the secret ballot.[66] The law specifies that a resolution put on vote shall be decided by a show of hands, unless a secret ballot is demanded by at least two shareholders.[67] The show of hands voting method empowers the non-controlling shareholders to have equal votes with the controlling shareholders. However, the articles of association generally employs the secret ballot. This is to ensure that the controlling shareholders will gain the benefit of the one-share-one-vote method.

3. *Matters*

Generally, the matters to be considered in the shareholders' meeting are set by the board of directors. The *CCC* does not allow any shareholders to submit a proposal to the meeting. The non-controlling shareholders therefore have no opportunity to propose any additional matters

[63] *Ibid*, s 1176.
[64] *Ibid*, s 1178.
[65] *Ibid*, s 1179.
[66] *Ibid*, s 1182.
[67] *Ibid*, s 1190.

for the consideration of the shareholders' meeting. Also, under the *CCC*, neither the board nor the shareholders are allowed to propose any additional matters to the meeting apart from those appeared on the meeting notification. This is to ensure that the shareholders are well informed of the matters to be considered at the meeting in advance. Nonetheless, in practice the last agenda appearing on the meeting notification sent to all shareholders is usually: "*other matters (if any)*". This is to give flexibility to the board to include any urgent matters for the consideration of the meeting in order to enable the company to manage its business in a timely manner and reduce the costs of holding another shareholders' meeting. Despite some advantages, this practice has a strong negative effect on the shareholders especially the non-controlling shareholders and allows the controlling shareholders through the board of directors to include any controversial issues without informing other shareholders in advance. The other shareholders therefore have no opportunity to be informed of the matters to be considered at the meeting.

4. *Resolutions*

At the shareholders' meeting, there are two types of resolutions—ordinary resolution and special resolution. The ordinary resolution requires the majority vote of the total number of shareholders presenting at the meeting. This type of resolution is required to pass general matters such as director election, auditor election, and dividend distribution. The special resolution requires the vote of shareholders holding 75 percent of total shares present at the meeting.[68] The special resolution is applied to pass particular matters such as capital reduction, amendment of the memorandum of association or the articles of association, dissolution and amalgamation. As the controlling shareholders tend to hold the majority of all shares, their vote alone could pass the ordinary resolution. They could also completely dominate the shareholders' meeting if their shareholding is more than 75 percent of all shares.

Besides, in the case of an equality of votes, the chairman of the meeting is entitled to have an additional vote called a casting vote.[69] The chairman of every meeting is the chairman of the board of directors. The chairman of the meeting is generally the representative of the controlling shareholders, as the controlling shareholders tend to appoint the majority of the board of directors and elect one as the chairman of the board. Therefore, even where the votes of controlling and non-controlling shareholders are equal, the controlling shareholders would still be able to pass any resolutions required a majority vote.

C. *Board of directors*

The other organ within the company responsible for the management of the company is the board of directors. Once appointed, the director will be in his post until the end of his term. The director may resign from the post by tendering his resignation letter to the company. The effect of the resignation takes place from the date of resignation letter reaches the company unless the resignation letter provides otherwise.[70] If a director becomes bankrupt or incapacitated, his office is also vacated.[71] Each director of the company has the power to conduct the business of the company as a representative of the company. In some cases, the articles of association may specify the sufficient number of directors or the name of the director who is empowered to enter into a transaction on behalf of the company.

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[68] *Ibid*, s 1194.
[69] *Ibid*, s 1193.
[70] *Ibid*, s 1153/1.
[71] *Ibid*, s 1154.

D. *The power of the controlling shareholders over the board of directors*

1. *The Appointment of Directors*

Unless the articles of association state otherwise, the director appointment method is a rotation system. At the first ordinary meeting after the registration of the company and at every annual meeting, one-third of the directors must retire from their office. If the number of directors is not a multiple of three, the number of nearest to one-third of the directors must retire.[72] Based on the rotation method, the director term is three years. The retired directors may be reappointed. To appoint the director, a majority vote of all votes is required. As the controlling shareholders generally hold the majority of the shares, they clearly have sufficient voting power to appoint their acquaintances to be on the board.

Alternatively, the directors may be appointed by the board of directors in the circumstance that a post is vacated otherwise than by rotation. The replacing director can retain the post during such time only as the vacated director. The board of directors however has no power to appoint the replacing director when the number of the subsisting directors is reduced below the number of directors sufficient to form a quorum. When the number of the subsisting directors is reduced to said number, the subsisting directors are only empowered to call for a general meeting to appoint replacing directors.[73] In both circumstances, the controlling shareholders could appoint the replacing directors. As the majority of the board of directors is elected by the controlling shareholders, their representatives therefore could appoint replacing directors. Also if the number of subsisting directors is not sufficient to form a quorum and the general meeting is summoned to have the replacing directors appointed by the general meeting, the controlling shareholders could appoint the replacing directors.

2. *The Removal of Directors*

The controlling shareholders tend to appoint their family members or close acquaintances on the board of directors. Their close connection ensures that the board members will exercise their discretion to benefit the interests of the controlling shareholders. Besides, if the directors do not answer to the demand of the controlling shareholders, the controlling shareholders could remove them from the board. The power to remove the directors solely belongs to the shareholders' meeting.[74] The general meeting of shareholders with the majority vote could remove a director before the expiration of his period of office, and appoint another person in his place.[75] As the controlling shareholders have sufficient votes to represent the majority vote, they could remove the undesired directors. This allows the controlling shareholders to ensure that the directors are absolutely under their control.

3. *The Resolution*

The *CCC* does not specify the voting methods applied for the meeting of the board of directors. The regulation of the company may impose the preferred voting method. If there are questions arising at the meeting of directors, the questions will be decided by the majority vote of directors.[76] The controlling shareholders could dominate the resolution of the board of directors by appointing sufficient number of directors to be a majority of the board. Besides, the majority

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[72] *Ibid*, s 1152.
[73] *Ibid*, s 1159.
[74] *Ibid*, s 1151.
[75] *Ibid*, s 1156.
[76] *Ibid*, s 1164.

of the board may appoint one of them to be the chairman of the board. Having their representative as the chairman of the board benefits the controlling shareholders as, in case of an equality of votes, the chairman of the board has an additional vote as a casting vote to obtain the resolution.[77]

IV. LEGAL PREVENTIVE MEASURES AND REMEDIES

As the controlling shareholders can enjoy their power to entirely dominate the company and may exploit the benefits of the company and of the shareholders, this part of the paper examines if there are any measures preventing the controlling shareholders and the directors, their representatives, from acting unfairly or fraudulently, and providing remedies to the company and the shareholders to compensate damage.

A. *Monitoring System*

If appointed as the director or employed in a key management position, non-controlling shareholders could take part in management and access financial documents of the company. This allows the non-controlling shareholders to monitor the directors appointed by the controlling shareholders, balance their power and possibly deter any fraudulent acts. However, non-controlling shareholders who are not appointed as the board member or later removed from the management would not able to closely monitor the management. To provide the right of the shareholders to monitor the management, the *CCC* imposes that every shareholder has the right to inspect the financial documents of the company.[78] In addition to the right provided, the *CCC* sets up the system to internally and externally monitor the management.

1. *Auditor*

Every company must appoint one or more auditors.[79] The auditor is appointed by the shareholders' meeting every year and the retiring auditor is eligible for re-election. If there are any vacancies during the term of the auditors, the directors must call an extraordinary meeting to elect an auditor to fill the vacancy.[80] If the directors fails to call for the extraordinary meeting, a group of at least five shareholders could submit the application to the court asking to appoint the replacing auditor for the current year.[81] The shareholders themselves could be the auditors of the company. To ensure the independence of the auditor, directors and persons who have interests in the company business cannot be appointed as the auditor. The restriction extends to the agent or the employee of the company. However, the former directors, agents or employees are not prohibited from being an auditor.[82]

The main responsibility of the auditor is to make a report on the balance sheet and accounts of the company. The opinion of the auditor determines whether the balance sheet is properly drawn up and the affairs of the company are exhibited correctly. The auditor's report must also be submitted to the shareholders' meeting every year.[83] To fulfill its responsibility, the auditor is empowered to have access to the books and accounts of the company within a reasonable

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77 *Ibid*, s 1164.
78 *Ibid*, s 1197 para 3.
79 *Ibid*, s1108(6). It is necessary to have an auditor before the registration of the company.
80 *Ibid*, s 1211.
81 *Ibid*, s 1212.
82 *Ibid*, s 1208.
83 *Ibid*, s 1214.

time. With regard to such books and accounts, the auditor could investigate the directors, their agents, and other employees of the company.[84]

To ensure the accountability of the auditor, all auditors must be members of the Federation of Accounting Professions ("FAP").[85] The FAP is a self-regulatory body for the accounting and auditing profession.[86] It is the core organization for developing and reviewing accounting standards and audit and ethics standards.[87] The standards known as Thai Accounting Standards ("TAS") and Thai Financial Reporting Standards ("TFRS") are in line with international practices. The FAP registers and licenses all auditors.[88] The auditor who is entitled to audit private companies must be a certified public accountant ("CPA").[89] To be awarded the certification, the accountant must be the members of the FAP, have qualifications, and do not have the prohibited characteristics as specified by law such as being imprisoned by a final judgement to a term of imprisonment for an offense against property and not having been bankrupt.[90] Besides, the accountant must complete a practical training arrangement and pass the professional CPA examinations.[91] The number of candidates attempting the professional CPA examinations are over 10,000 people however the result overtime shows that only approximately 17 percent of the candidates pass the examinations.[92]

To ensure the integrity of the auditor, the FAP issues the regulations on Code of Ethics for all accounting professions to follow.[93] The regulation establishes ethical requirements consisting of transparency, independence, honesty, and responsibility.[94] In terms of independence, the auditor must ensure that he exercises his professional judgement without any influences.[95] The Ethics Committee is formed to supervise the auditors. If found to be contravened, the FAP will forward the issues of non-compliance or misconduct to the Ethics Committee to have the Committee investigate the claim.[96] The penalties for the misconduct imposed on the accused include written warning, probation, suspending the license for no more than 3 years, and revoking the license.[97] Both the FAP and the Committee however have no power to bring criminal or civil actions against the wrongdoers.

A significant change made in December 2013 by the FAP is the issue of the regulation limiting the number of financial statements that an auditor could sign in a given year. Previously there were no limitations imposed. From 2014, the auditor is only able to conduct an audit and to give an opinion on not more than 200 financial statements in a financial year.[98] The purpose of this regulation is to improve the audit quality and to ensure that the auditor

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[84] *Ibid*, s 1213.

[85] The Accounting Professions Act BE 2547 (Thailand), s 39 [*APA*].

[86] For the history of the FAP, see Deunden Nikomborirak, "Building Good Corporate Governance After the Crisis: The Experience of Thailand" in Ho Khai Leong, ed, *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (Singapore: Institute of Southeast Asian Studies, 2005) 200.

[87] *APA*, *supra* note 85, s 7.

[88] See *ibid* at Division 5.

[89] *Ibid*, s 37.

[90] *Ibid*, s 39.

[91] *Ibid*.

[92] Thailand, Federation of Accounting Professions, *Annual Report 2015* at 41.

[93] *APA*, *supra* note 85, s 46; The Regulation of the Federation of Accounting Professions (Issue No 9) on Code of Ethics for Professional Accountants BE 2553.

[94] *APA*, *supra* note 85, s 47.

[95] The Regulation of the Federation of Accounting Professions (Issue No 9) on Code of Ethics for Professional Accountants BE 2553, art 9.

[96] *APA*, *supra* note 85, s 53.

[97] *Ibid*, s 49.

[98] The Regulation of the Federation of Accounting Profession re Reporting requirements and working criteria of certified public accountants BE 2556, art 4.

provides competent professional service. Such a limitation aims to ensure that the auditor contributes sufficient time and effort to auditing the company books and records.[99]

Given the standards applied and passing rate, obtaining the certificate to be the qualified auditor is relatively difficult. The auditor who wishes to build a reputation will provide higher quality auditing and refrain from opportunistic behaviour. It is the cost of the auditor to develop their reputation.[100] The non-controlling shareholders may in some levels rely on the auditor, as a gate keeper, to inspect the financial statement of the company.[101] However, it is arguable that the auditor may not function as the proper gatekeeper as expected. The evidence shows that large audit firms such as Arthur Anderson are willing to sacrifice its reputation by assisting their clients to cover their financial statements.[102] Besides, the connection between controlling shareholders and auditors remains close. As mentioned earlier, the auditor is appointed by the shareholders' meeting with the majority vote of the shareholders attending the meeting. Given the power of the controlling shareholders, they have the power to appoint their acquaintance to be the auditor. Maintaining a professional auditor-client relationship is therefore not likely possible. The controlling shareholders may also hire a low-quality auditor to maintain opaqueness gain which allows the controlling shareholders to continue tunneling the company's assets.[103] To minimize the risk of auditor malpractice, the non-controlling shareholders have to investigate the connection between the controlling shareholders and the auditor, inspect the qualifications of the auditor and continually monitor the auditor. Instead of relying on the gatekeeper, the non-controlling shareholders have the burden of monitoring them.

2. *Official Inspector*

In addition to the inspection of the company financial documents by the auditor, the *CCC* provides an additional legal measure by which the non-controlling shareholders could employ to deter the fraudulent acts. The shareholders may submit the application to the Director-General of the Department of Business Development[104] to appoint one or more competent inspectors to examine the business operation of the company.[105]

To be eligible to submit the application to the Director-General, the shareholders must hold not less than 20 percent of the shares of the company.[106] The Director-General then appoints the inspector to inspect the affairs and financial status of the company, as well as the operation of the board of directors. To ensure that the inspector can fulfil his responsibility, he is authorized to demand the directors, employees, and agents of the company to produce the books and documents in their custody or power to him.[107] Also, the inspector can demand the

[99] *The Ministry of Commerce Explanation on Working Criteria of Certified Public Accountants* Department of Business Development <http://www.dbd.go.th/ewt_news.php?nid=7085>.

[100] Thomas E Wilson Jr and Richard A Grimlund, "An Examination of the Importance of an Auditor"s Reputation" (1990) 9:2 Auditing: A Journal of Practice & Theory 43.

[101] D Paul Newman, Evelyn R Patterson and J Reed Smith, "The Role of Auditing in Investor Protection" (2005) 80:1 The Accounting Review 289.

[102] See John C. Coffee, "Understanding Enron: It's About the Gatekeepers, Stupid" (2002) 57:4 The Business Lawyer 1403.

[103] See Z Jun Lin and Ming Liu, "The Determinants of Auditor Switching from the Perspective of Corporate Governance in China" (2009) 17:4 Corporate Governance: An International Review 476 at 476-491; Salim Darmadi, "Ownership Concentration, Family Control, and Auditor Choice: Evidence from an Emerging Market" 24:1 Asian Review of Accounting 19.

[104] The Minister delegates his power to appoint the inspector to the Director-General of the Department of Business Development. See The Notification of the Ministry of Commerce No 647/2557.

[105] *CCC*, *supra* note 1, s 1216.

[106] *Ibid*, s 1216.

[107] *Ibid*, s 1216 at para 1.

directors, employees, and agents of the company to give oath before proceeding to examine them in relation to the business of the company.[108] This is to ensure the credibility of the information provided. After the inspection, the inspector must prepare an inspection report and submit it to the Director-General. The copies of this report must be sent to the registered office of the company and the shareholders who submitted the application for the inspection.[109] Regarding the expenses incurred, the shareholders must bear the inspection cost and give security for payment of expenses of the inspection when the application is submitted.[110] The expenses may be reimbursed if, in the first shareholders' meeting after the inspection is finished, the majority of all votes agrees to have the company bear the expenses of the inspection.[111]

The main benefit of this legal mechanism is to have the business of the company inspected by those who are not under the command of the controlling shareholders or the board of directors. This competent officer is also able to access documents and acquire further information in the way which non-controlling shareholders could not possibly do. Also, as the inspector is required to send the copy of an inspection report to the shareholder who submitted the request, the non-controlling shareholders could use the information and evidence in the report to support their claim against wrongdoers, if there were any. Despite the advantages of this mechanism, the requirement of at least 20 percent shareholding may be an obstacle for small non-controlling shareholders seeking to make a request. Also, the applicant must bear the inspection cost and would only be reimbursed if the shareholders' meeting approves the inspection. Even though the inspection is done for the benefit of the company, the non-controlling shareholders are unlikely to get the expenses reimbursed as the controlling shareholders who dominate the shareholders' meeting tend not to vote in favour of the non-controlling shareholders.

B. *Derivative Action*

Similar to the fiduciary duties of directors under the common law system, the duty of directors under Thai law is divided into two categories—the duty of care and the duty of loyalty. To discharge the duty of care, a director must apply the diligence of a careful businessman in conducting the business of company.[112] In particular, the directors are jointly responsible for the collection of share payments made by shareholders, the existence and regular keeping of books and documents as prescribed by law, the proper distribution of the dividend or interest, and the proper enforcement of the resolutions of the general meetings of shareholders.[113] Regarding the duty of loyalty, the *CCC* does not provide the scope of the duty. The only provision imposed is the prohibition on the competition with the company's business. The director is not allowed to be involved in any commercial transactions of the same nature as or in competition with those of the company either on his own or a third person's account. Also, the director must not be a partner with unlimited liability in another commercial organization carrying a business of the same nature as and in competition with that of the company. The

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[108] *Ibid*, s 1216 at para 2.
[109] *Ibid*, s 1217.
[110] *Ibid*, s 1215.
[111] *Ibid*, s 1218.
[112] *Ibid*, s 1168 at para 1. Compared with the standard of care applied to the directors in listed companies, the *CCC* imposes the standard of care on the directors in private companies is relatively high. The Securities and Exchange Act BE 2535 (1992) (Thailand) as amended in 2008 applies the standard of ordinary person undertaking the like business under the similar circumstance. This standard has been applied since 1925 and has not been amended. See the Securities and Exchange Act BE 2535 (1992) (Thailand), s 89/8.
[113] *CCC*, *supra* note 1, s 1168 para 2.

only exception is where the shareholders in a general meeting give consent to the director to compete with the company.[114]

According to the concept of the separation of corporate personality, the company has its own legal entity separate from its shareholders.[115] Although appointed by the shareholders' meeting, the directors are the representatives of the company, not the shareholders. The directors are therefore the fiduciaries of the company, the beneficiary.[116] Acts of the directors must be done in the best interests of the company. The directors who breach their duties or violate the laws or regulations of the company are liable to the company. The company could bring an action against wrongful directors for damages. However, because of conflict of interests in bringing an action against itself, the board is unlikely to exercise the power to initiate an action.[117] Shareholders instead are permitted to make a claim in the name of the company in order to obtain the compensation to be returned to the company. This concept is known as derivative actions.

Thai law adopts the concept of derivative actions allowing the shareholders to bring a case against errant directors. The shareholders are entitled to bring an action on the conditions that the company refuses to do so.[118] As the *CCC* does not impose a shareholding requirement, any shareholder could initiate a claim. To bring an action, the shareholders must state in the plaint that the company refuses to bring an action to the court.[119] The plaintiff shareholder must prove that the damage is caused by the act of the directors and ask the court to demand the directors compensate damages.[120] As there is no shareholding requirement imposed on the eligible shareholders who could bring a derivative action, non-controlling shareholders can easily bring a case against errant directors to get remedies for the damage caused by them. Besides, this legal mechanism can deter the director from causing damage to the company.[121]

Despite the advantages of derivative actions, it is questionable whether non-controlling shareholders could actually win an action brought against wrongful directors. Given the fact that the information and evidence of the unjust act is retained within the possession of the directors, it is unlikely that the non-controlling shareholders, especially those who do not take part in management, can acquire any documents proving that the damage is the consequence of the act of the directors. The *CCC* provides the right to the shareholders to access only the balance-sheet of the company,[122] minutes and resolutions of meetings of shareholders and directors.[123] The information in these documents may not be sufficient to support the claim. Besides, when required by the shareholders, the company may refuse to provide any other information or documents claiming that it is not required by law or such information is confidential or sensitive.[124]

Also, even though the non-controlling shareholders could win the case against the directors, they will not directly gain any financial benefits from the compensation obtained from the

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[114] *Ibid*, s 1168 at para 3.

[115] *Ibid*, s 1197 at para 3.

[116] Tim Oliver Brandi, "The Strike Suit: A Common Problem of the Derivative Suit and the Shareholders Class Action" (1994) 98 Dickinson Law Review 355 at 359.

[117] Edward P Welch *et al*, *Folk on the Delaware General Corporation Law: Fundamentals* (New York: Wolters Kluwer, 2017) at 279.

[118] *CCC*, *supra* note 1, s 1169.

[119] However, the *CCC* does not specify the demand process.

[120] *CCC*, *supra* note 1, s 1169.

[121] John C Coffee Jr and Donald E Schwartz, "The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform" (1981) 81 Columbia Law Review 261 at 302.

[122] *CCC*, *supra* note 1, s 1197 at para 3.

[123] *Ibid*, s 1207 at para 2.

[124] Despite the shareholders are entitled to access the information, there is also the need to balance between the right of the shareholders and the interest of the company. See *News-Journal Corp v State, Ex Rel* [1939] 187 So 271 (Florida SC); *Professional Microfilming Inc v Houston* [1983] 661 SW2d 767 (Texas CA).

errant directors as the compensation will be returned to the company.[125] Although one may argue that the returned compensation could increase the value of total assets underlying each share,[126] without direct benefits, the shareholders may be reluctant to initiate an action. As the act of the plaintiff shareholders benefits the interests of the company and all shareholders, they should be compensated by the company for litigation cost and expenses advanced by them. The *CCC* however does not require the company to compensate the plaintiff shareholders. Regarding the Civil Procedure Code, the losing party is liable for the ultimate liability for costs of the parties.[127] Having considered the reasonableness and good faith of the parties, the court may demand that the wining party bear the cost or that each party bear their own cost.[128] Although the court is empowered to reimburse the cost to the plaintiff shareholders, it remains uncertain whether the court will do so. Without the clear provision ensuring that the plaintiff shareholders will be reimbursed, it is economically irrational for any shareholders to spend their time, effort and resources to initiate an action.[129]

The further issue regarding derivative actions is whether it is possible for the shareholders to cancel fraudulent transactions to have the property returned to the company, instead of claiming damages from errant directors. For instance, the board of directors transferred the material property of the company to himself at a lower price. The shareholders prefer revoking the fraudulent transactions done by the board to have the property returned to the company rather than claiming for damages. Under the *CCC*, the cancellation of fraudulent acts could be done if such act would prejudice the creditor. The only person who could request the court to have the act cancelled is a creditor of the company.[130] The shareholders therefore cannot ask for the cancellation of the fraudulent act done by the director. In addition, the provision of derivative actions only allows the shareholder to bring an action against errant directors to retrieve damages caused by them but does not empower the shareholders to cancel fraudulent transactions. However, the plaintiff shareholders in a number of cases requested the court to demand the property fraudulently transferred to be returned to the company. The Supreme Court decided that the shareholders may ask the court to order the transferee to return the property to the company as returning the property is a way to compensate damage.[131] However, the Court's order has no effect when the transferee is the third party. In this case, the right of the shareholders is limited to claiming damages from errant directors.[132]

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[125] *Boyle, supra* note 9, 63.

[126] Daniel R Fischel and Michael Bradley, "Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis" (1986) 71 Cornell University Law Library at 261.

[127] *The Civil Procedure Code*, s 161.

[128] *Ibid*.

[129] See Andrew Keay, *Board Accountability in Corporate Governance* (United Kingdom: Routledge, 2015) at 219, 220. Without monetary incentives, the shareholders are unlikely to make derivative actions. Harald Baum and Dan W Puchniak, "The Derivative Action: Economy, History and Practice-oriented Approach" in Dan W Puchniak, Harald Baum and Michael Ewing-Chow, eds, *The Derivative Action in Asia: A Comparative and Functional Approach* (United Kingdom: Cambridge University Press, 2012) 1 at 35-37.

[130] *CCC*, *supra* note 1, s 237.

[131] Supreme Court decision no 10878/2551. The board of directors transferred the company's assets to some directors, shareholders and the third persons at a price unreasonably lower than the market price. The plaintiff shareholders asked the Court asking for damages. The plaintiff further requested the Court to order all the transferees to return the property to the company. The Court ruled in favour of the plaintiff ordering the directors to return the property to the company.

[132] See also Supreme Court decision no 1426/2542, 3250/2545. The Court rendered the decision that the shareholders had no power to bring a case against the third person as such power solely belonged to the management of the company. The shareholders could not intervene the directors' power in managing the company.

C. *Criminal Liability*

Apart from a civil action, criminal charges could be made against directors and controlling shareholders who committed crimes. The criminal offenses could be categorized into two main groups—the offences under the Penal Code and the offences under the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations B.E. 2499 (1956) [Act Prescribing Offences].

The Penal Code imposes a wide range of criminal offenses which could be classified into 12 kinds of offenses such as offenses against the security of the Kingdom, offenses relating to public administration, offences relating to counterfeit, offences relating to trade, and offenses against property. The wrongful act done by the directors and controlling shareholders mainly relates to the offences of embezzlement,[133] theft,[134] and fraud.[135] For instance, the directors who fraudulently transfer funds or property of the company to themselves or the controlling shareholders or use the property of the company for their own benefit are guilty of the offence of embezzlement.

The offences under the Act Prescribing Offences are specially related to the act of the directors. The offences under this Act can be categorized into two groups—offences of failing to perform his duties and offences of fraudulent acts. The *CCC* specifies particular duties of the directors to fulfil such as the duty to send a copy of every balance sheet to the Registrar within one month from the date of its approval by the general meeting[136] and the duty to keep true accounts of the assets and liabilities of the company.[137] The directors who fail to comply with the law are liable to be fined.[138] The directors are liable for the offences of fraudulent acts when they act or refrain from acting with the intention to seek any benefit otherwise unobtainable by a law for themselves or for any person and thereby causes loss to the company.[139] If the fraudulent act committed by the directors involves the financial statement of the company; for instance, the directors alter, lessen or forgo any accounts with the intention to frequently deprive the company of benefit, they are guilty of another offence.[140]

As the company is the injured person from the act of the directors who commit the crime, its representatives—the directors—could act on behalf of the company to institute criminal prosecution in court.[141] Similar to civil cases, the directors are unlikely to bring a case against themselves. It is questionable whether the shareholders can bring a criminal action against the directors on behalf of the company. In this matter, the Supreme Court rendered the decision that, although the concept of derivative actions does not exist in the Criminal Procedure Code, the shareholders can bring an action against the directors who committed a crime. The act of the shareholders to institute criminal prosecution in court however is not done on behalf of the

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[133] *The Penal Code*, ss 352 and 353. The offence of embezzlement is for those who possess the property belonging to the other person dishonestly convert such property to himself or a third person. The punishment for this offence is imprisonment not exceeding 3 years and fined not exceeding 60,000 baht, or both.

[134] *Ibid*, s 334. The offence of theft is for those dishonestly takes away the thing for other person. The punishment for this offence is imprisonment not out of 3 years and fined not exceeding 60,000 baht.

[135] *Ibid*, s 341. The offence of fraud is for those dishonestly deceives a person with the assertion of a falsehood or the concealment of the facts which should be revealed obtains property from the person so deceived. The punishment for this offence is imprisonment not exceeding 3 years or fined not exceeding 60,000 baht, or both.

[136] *CCC*, *supra* note 1, s 1199.

[137] *Ibid*, s 1206.

[138] *The Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations* BE 2499 (1956) (Thailand), s 28. The director is liable for the fine of not exceeding 50,000 baht.

[139] *Ibid*, s 41. The director is liable for the fine of not exceeding 50,000 baht.

[140] *Ibid*, s 42. The directors are liable for the fine of not exceeding 50,000 baht.

[141] *The Criminal Procedure Code*, ss 2(4) and 5.

company. The shareholders have their own right to bring an action as, based on their interest in the company, they are the injured persons under the Criminal Procedure Code.[142] In addition to instituting prosecution in the criminal court, the shareholders can bring an action for damages at the same time. If the directors are found guilty in the criminal case, the directors are likely to be liable under the civil case as the court in the civil case is bound by the facts in the judgment in the criminal case.[143]

Another related issue is whether the company could withdraw the criminal prosecution[144] instituted by the shareholders from the court without the approval of the plaintiff shareholders. The controlling shareholders may hold the meetings of the board of directors or of the shareholders to deliver the resolution dropping the charge against the directors. With their voting power, the controlling shareholders can easily pass the resolution. The Supreme Court rendered the decision affirming that the company could not drop or withdraw the charge against the accused directors brought by the shareholders as the shareholders do not institute the case on behalf of the company but act in their own right.[145] The charge therefore cannot be dropped without the approval of the plaintiff shareholders.

D. *Related Party Transactions*

One crucial issue arising in companies with concentrated ownership structure is the controlling shareholders approving transactions in which they have an interest in. Although a related party transaction is typical in commerce and business, frequently it is not conducted at arm's length or in a fair manner to the company.[146] The related party transaction regularly benefits the related person, not the company. As a result, the value of the company is negatively affected.[147]

Despite the fact that all shareholders are entitled to vote in the meeting of shareholders, the shareholders who have a direct interest in the matter should not be allowed to vote. To ensure that the decision is made in the best interests of the company, only the votes of disinterested persons should be counted. The *CCC* imposes three voting limitations[148] including the prohibition on the shareholder with special interests in the matter on which a resolution is to be passed at a meeting from voting on such matter.[149] A special interest refers to the circumstance that the shareholder personally gains or loses benefits from the resolution to be passed apart from the benefits retrieved as the shareholder.[150] This voting limitation prohibits the controlling shareholders from using their majority voting power to approve a related party transaction.

Although the law aims to exclude interested shareholders from approving related party transactions, the application of this prohibition is problematic. The law clearly imposes voting limitation on the shareholder when he has a special interest in the matter but does not extend to the circumstance when a related person of the shareholder has an interest in the matter. For instance, the shareholder may not directly engage in the transaction with the company but his family member or a company of which he is a majority shareholder of does. In this regard, it

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[142] Supreme Court decision no 313/2542, 1041/2558. *The Criminal Procedure Code*, ss 2(4) and 28(2).

[143] *The Criminal Procedure Code*, s 46. The case which could be brought in both civil and criminal courts is called civil case in connection with an offence.

[144] Only the offences of embezzlement and fraud are compoundable: *The Penal Code*, s 348, 365.

[145] See Supreme Court decision no 1041/2558.

[146] Michael Backman and Charlotte Butler, *Big in Asia: 25 Strategies for Business Success* (United States: Palgrave Macmillan, 2003) at 239-240.

[147] Abbas Mirza, Graham Holt and Liesel Knorr, *Practical Implementation Guide and Workbook* (United States: John Wiley, 2011) at 199.

[148] *CCC*, *supra* note 1, ss 1183, 1184.

[149] *Ibid*, s 1185.

[150] Matter for Corporate Consultant of Ministry of Commerce Por Nor 0805.14/3746, 19 October 2010.

is unclear if the controlling shareholders are prohibited to vote to approve the transaction. One may argue that the law only prohibits the shareholder to vote where he has a special interest in the matter. Although the shareholder has an interest in the transaction which the related person of such shareholder is involved with the company, such an interest is considered as a general interest, not a special one. The shareholder is therefore not prohibited to vote. Others may interpret that the shareholder is prohibited to vote as he gains additional personal benefit if the transaction is approved. He is thus not allowed to vote. Without the clarification, the uncertainty of legal application remains.

Apart from the legal confusion, this voting limitation is not generally applied as related party transactions are mostly approved by the board of directors. As mentioned earlier, the matters proposed to the shareholders' meeting for an approval are limited to certain matters which have a critical effect on the fundamental structure of the company such as increase of capital, decrease of capital, dividend distribution, and director election. Apart from these substantial matters, the law does not require the approval from the shareholders' meeting.[151] Therefore, the board of directors has the power to decide whether to approve any other transactions regardless of how significant they are to the company. For instance, the board of directors has the power to sell the material property of the company or transfer the whole or important parts of the business or the property of the company to themselves or the controlling shareholders without the acknowledgment or approval of the shareholders' meeting.

From the above observation, the further issue to consider is whether the *CCC* allows the directors to engage in related party transactions or prohibits them to vote when they have an interest in the transactions. The *CCC* has no provision allowing or prohibiting the directors to engage or vote in the matter in which he has an interest. However, there is a provision under the General Provisions of the Juristic Persons stating that when the interests of a juristic person conflict with the interests of the presentative of the juristic person, the representative has no representative power.[152] This provision is generally applied to the situation where the director stands on both sides of the transaction. For instance, the company engages in an agreement to purchase a piece of land owned by the director. To avoid the conflict of interests, such a director has no power to enter into the land purchase agreement. As a result, the other directors must act on behalf of the company. This is to ensure that interested directors are not involved in the transaction.

The further issue to be considered is, apart from being prohibited from engaging in related party transactions, whether the interested directors are allowed to vote in the meeting of the board of director to approve such a transaction. As previously mentioned, the only provision governing this matter specifies that the director has no representative power where his interest conflicts with the interests of the company. From this provision, it is arguable that the "representative power" of the director extends to his power to vote in the meeting of the board of directors. In a narrow sense, the representative power refers to the power of the representative to negotiate the terms of the transaction or engage in the transaction on behalf of the juristic person. However, in a broader sense, the representative power extends to the power to vote. The directors, the representatives of the company, have representative power to manage the company.[153] The act of managing the company includes engaging in transactions binding the company and making business decisions.[154] The representative power of the

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151 The Articles of Association of the company however may extend the scope of the matters to be considered in the shareholders' meeting.

152 *CCC*, *supra* note 1, s 74.

153 *Ibid*, s 70.

154 Committee on Corporate Laws, *Model Business Corporation Act: Official Text with Official Comment and Statutory Cross-references Revised through* 2007 (American Bar Association, 2008) 8-37-8-38. This leads to the concept of business judgment rule which acknowledges the board of directors' authority to make business

directors therefore includes the power to make business decisions in the meeting of the board of directors. When the directors vote in the matter in which they have an interest, such directors are not allowed to vote as voting is a part of exercising the representative power of the representative of the company.

Another debatable matter is where the director is not a related person but is directed by the controlling shareholders to vote in their favor. This is a typical situation in private companies as the directors are generally appointed by the controlling shareholders. Their close and personal connection is inevitable. The *CCC*, however, does not impose any provision to deal with this matter. Without any limitation, the controlling shareholders could use this loophole to have the board of directors approve related party transactions.

Also, the law preventing the controlling shareholders from benefiting from a related party transaction is limited. The purpose of the regulation is to prohibit the controlling shareholders from voting in a related party transaction but their roles in engaging or influencing the transaction are overlooked. Despite the lack of voting power, the controlling shareholders may take part in negotiating the transaction themselves. As excluding the controlling shareholders from participating in the related party transaction is not likely possible, additional legal mechanisms are required to ensure that the process in approving the transaction is objectively fair to the company.

E. *Oppressive Acts*

The controlling shareholders could vote in the shareholders' meeting in a way which benefits their economic interests the most. However, some of the decisions made by the controlling shareholders have a strong negative effect on other shareholders; for instance, the controlling shareholders vote in the shareholders' meeting to remove non-controlling shareholders from the board of the directors.[155] On one hand, the controlling shareholders could remove a board member and appoint someone they trust as a replacing director or pass any resolutions that only benefit their interests.[156] Besides, given their large stake, under the majority rule, it is normal for the controlling shareholders to dominate the resolutions of the shareholder's meeting. On the other hand, the act of controlling shareholders may be conducted in an oppressive or unfair manner to the company or the shareholders. The controlling shareholders remove the non-controlling shareholders from the board to exclude them from the management of the company so that the controlling shareholders can operate the company without having the non-controlling shareholders second-guess their decisions. The controlling shareholders then appoint their family members or acquaintances as replacing directors rather than capable managers. Despite their poor performance, the controlling shareholders are unlikely to remove them from office but would instead continue to reappoint them at the end of their term. These managers are also paid with highly excessive remuneration. These acts of the controlling shareholders oppress all shareholders as they appoint incompetent persons on the board. Despite their strong intention to challenge the managerial wrongs, it is difficult for the non-controlling shareholders to do so. Without the evidence showing the breach of directors' duties causing damage to the company, the non-controlling shareholders cannot bring a derivative action against incompetent directors.[157] In the absence of any other options, the non-controlling shareholders therefore decide to leave the company.

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decision: Ralph C Ferrara, Kevin T Abikoff and Laura Leedy Gansler, *Shareholder Derivative Litigation: Besieging the Board* (New York: Law Journal Press, 2013) at 5-10.

[155] The power of removing directors solely belong to the shareholders' meeting: *CCC*, *supra* note 1, s 1151.

[156] Mathias M Siems, *Convergence in Shareholder Law* (United Kingdom: Cambridge University Press, 2007) at 199, 200.

[157] See *CCC*, *supra* note 1, s 1179.

In several jurisdictions especially the common law ones, there is a legal concept known as the oppression remedy[158] which provides the remedy granted by the court to minority shareholders in the circumstance where the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to them.[159] Where oppression is proven, the court can make any order it considers appropriate to give relief including orders for the company refrain from doing the conduct complained,[160] for the company to be dissolved,[161] or for the member's shares be purchased by the company or other member.[162] The purpose of this remedy is to reimburse the minority shareholders for their damage caused by the corporate controllers exercising their power unfairly.[163]

Although various corporate law concepts are adopted into the Thai legal system, the oppression remedy is not one of them. Based on the idea of functional convergence, which suggests that the different rules should generate the same result,[164] it is worthwhile to consider if there are any available legal principles in the Thai legal system which could provide a comparable outcome.

Under the *CCC*, there is a provision providing an opportunity to the shareholders to request the court to wind up the company. This legal remedy was included into the *CCC* in early 2017. By virtue of Section 44 of the Interim Constitution of Thailand B.E. 2557, the Head of National Council for Peace and Order ("NCPO") issued the Order[165] to amend the *CCC* to allow the shareholder to request the court to wind up the company where there is any cause making the continuance of the company an impossibility.[166] The purpose of the current amendment is to put an end to a deadlock situation. After the company is dissolved by the court order, the company must go through the liquidation process.[167] The assets of the company will be gathered and distributed to the creditors and the shareholders respectively.[168] In the circumstance where there is a substantive conflict between controlling and non-controlling shareholders making the continuance of the company an impossibility, the non-controlling shareholders may decide to terminate the company and get his investment back.

The concept of allowing a member to dissolve the business organization to end the conflict within is not new. Partnership law which came into force since 1925 provides the exact remedy.[169] A partner in an ordinary partnership could request the court to dissolve the partnership where there is any cause making the continuance of the partnership an impossibility.[170] The Supreme Court interpreted the condition of "the continuance of the partnership an impossibility" to mean a deadlock within the partnership. For instance, this is fulfilled where a conflict between the partners and they have brought many cases against each

158 For example, Companies Act 2006 (UK) [*UK Companies Act*], s 994; Canada Business Corporation Act 1985, s 241[*Canada Business Corporation Act*].
159 *Ibid*.
160 *Canada Business Corporation Act*, *supra* note 158, s 241(3)(a).
161 *Ibid*, s 241(3)(l).
162 *UK Companies Act*, *supra* note 158, section 996(e).
163 *Cheffins, supra* note 30 at 314; Gordon Williams, *Corporations and Partnerships in New Zealand* (New York: Wolters Kluwer, 2011) at 215.
164 See Ronald J Gilson, "Globalizing Corporate Governance: Convergence of Form or Function" (2001) 49:2 The American Journal of Comparative Law 329.
165 The Order of NCPO No 21/2560 regarding the amendment to the law for the ease of doing business (Order) to improve and facilitate business doing in Thailand. The Order was published in the Government Gazette and become effective on 4 April 2017.
166 *CCC*, *supra* note 1, s 1237(5).
167 See *ibid*, s 1250.
168 *Ibid*, s 1269.
169 See *ibid*, s 2.
170 *Ibid*, s 1057(3).

other;[171] a partner withdraws the power of the other partner to make a payment and refuses to distribute profit to him.[172] Based on the line of Supreme Court decisions in partnership law cases, to wind up the company, non-controlling shareholders must show that, due to the conflict between the controlling and non-controlling shareholders, there is no trust among the shareholders and the business of the company could not be continued. In the context of a partnership, as the partners generally are working closely in managing the partnership, its business cannot continue so long as there is a conflict between those who operate it. The impossibility of the continuance of the partnership can be clearly seen and proven. However, in the context of a company, the conflict between controlling and non-controlling shareholders may have no effect on the continuance of the company. The non-controlling shareholders may keep raising issues in the shareholders' meeting or the board of directors but that may not disrupt the operation of the management. Besides, given their small stake, the controlling shareholders cannot cause a deadlock in the company. Therefore, the non-controlling shareholders are unlikely to benefit from this remedy.

As the non-controlling shareholders may not be able to ask the court to wind up the company, the research further considers if there are any other legal principles which could provide a remedy to non-controlling shareholders injured by the unfair act of the controlling shareholders. The basic issue to analyze is if there is any relationship between controlling and non-controlling shareholders. The study of their relationship leads to the answer of whether one party owns the duty to the other. The *CCC* mainly governs the relationships between the company and the shareholders, and the company and directors. The only provision which indicates the relationship between shareholders is found in the fundamental provision governing the contract for the organization of the company which states that the shareholders bind themselves to unite to form a company for a common undertaking with a view of sharing profits which may be derived from it.[173] The details of their agreement are reflected in the articles of association and the memorandum of association. Therefore, apart from the duty of the shareholders to fulfill their commitment to organize the company and operate it in accordance with the law and its regulation, there is no other relationship between controlling and non-controlling shareholders. Consequently, the controlling shareholders neither act on behalf of the non-controlling shareholders nor have the duty to non-controlling shareholders. The controlling shareholders therefore could act in the best interests of no one but themselves.

Despite their freedom to exercise their right to pursue their economic interest, some acts of the controlling shareholders may injure the non-controlling shareholders. It is unclear whether such act is considered a wrongful act. For example, in the shareholders' meeting, controlling shareholders could employ their majority vote to remove non-controlling shareholders from the board of directors and refuse the declaration of dividends. Apart from losing their directorship and the benefits attached to the post, the non-controlling shareholders also receive no returns on their investment. Under the law of tort, a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.[174] Although the act of controlling shareholders injures the non-controlling shareholders, the controlling shareholders could claim that it is their legal right to vote in the shareholder's meeting in the way which they please. Such act is therefore lawful. To prevent the abuse of said right, the *CCC* further states that the exercise of a right which can only have the purpose of causing injury to another person is unlawful.[175] From this provision, even though the wrongdoer acts within his power,

[171] Supreme Court decision no 10068/2551, 8680/2551.
[172] Supreme Court decision no 2838/2536.
[173] *CCC*, s 1012.
[174] *Ibid*, s 420.
[175] *Ibid*, s 421.

if he exercises his right with the sole purpose to harm others, such act is unlawful. The wrongdoer must compensate the injured person for such act.

Most of the cases brought to the Supreme Court concerning the abuse of right under tort law relate to the conflict between the owners of two properties and one of them is affected by the other exercising his ownership right. From the line of the decisions of the Supreme Court, it could be concluded that a person abuses his right when he should have known the negative effect of his act on the others[176] and there is no benefit that he would gain from his act.[177] The act of the person to pursue his general interest which he is legally entitled is not considered as an abuse of right.[178] Also, where the injured should have foreseen possible injury or reasonable damage,[179] he cannot claim for damages.

Based on the previous Supreme Court decisions, to prove that the controlling shareholders abuse their right, there must be evidence showing that the act of the controlling shareholders is solely to harm the non-controlling shareholders and there is no other benefit or reason for the controlling shareholders to do so. However, proving that the controlling shareholders exercise their rights to pass a resolution which has the effect on non-controlling shareholders is the abuse of right is not easy. The controlling shareholders may claim that they exercise their voting right as a shareholder to pursue their general interest and the non-controlling shareholders should have known that the operation of the company is governed by the majority rule.

Apart from the difficulty in applying them, the remedies provided under the *CCC* are limited. The non-controlling shareholders can only demand for winding up or damages from wrongdoers. The law gives no flexibility to the court or the non-controlling shareholders to have a different way such as repurchasing shares or restraining a problematic conduct to relieve the injury.

V. Conclusion

It is accepted that the operation of the company is governed by the majority rule. The majority shareholders can exercise their power to pursue their economic interest or vote in the way which benefits them the most. However, the controlling shareholders may act with the intention to exploit the benefit of the company or treat the non-controlling shareholder unfairly. It is therefore necessary to have legal measures protecting or providing remedies to the company or the shareholders when the controlling shareholders gain private benefit of control. Such remedies play an important role in compensating damage and deterring the controlling shareholders from harming the company and non-controlling shareholders. The legal measures

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[176] Supreme Court decision no 12973/2555. The plaintiff had benefited from using the waterway for over 10 years. The defendant managed to dry up the waterway causing damage to the plaintiff. The Court ruled that the defendant should have known that his act had a strong negative effect on the plaintiff and it appeared that the act of the plaintiff was done to solely harm the defendant. The defendant was liable.

[177] Supreme Court decision no 15674/2555. The defendant owned a small piece of land surrounded by the properties of the plaintiff and others. The defendant then built the 2.7 metre concrete wall on his land impinging on the other's view. The defendant gained no benefit from building such a wall. The defendant abused his right and was liable for damages.

[178] Supreme Court decision no 5576/2545, 387-388/2550. The Court ruled that, as the owner, the plaintiff was entitled to use his property in the way which benefits him most. Without the intention to harm others, the plaintiff did not abuse his right.

[179] Supreme Court decision no 2573/2554. The plaintiff built the 3 metre wall in his land. The defendant claimed the act of the plaintiff affected the defendant's right to use his property as such wall blocked the light and wind. The Court ruled that, although the defendant was affected by the act of the plaintiff, the defendant should have foreseen the possibility of having a construction built next to his. The plaintiff exercised his right within the reasonable ground to benefit him. See also Supreme Court decision no 3815/2540.

also encourage small investors to invest in a company as they know that their right will be well protected.

The research found that the controlling shareholders can entirely dominate the company. In the shareholders' meeting, the majority vote exercised by the controlling shareholders prevails. In the management level, they appoint closely connected persons to be on the board of directors regardless of their qualifications or expertise, and remove those who refuse to answer to their demands. It is also not likely possible for non-controlling shareholders to balance the power of controlling shareholders. This suggests the level of control which the controlling shareholders have over the company is very strong and indicates the necessity for legal mechanisms to ensure that the controlling shareholders do not misuse their power.

It is found that Thai laws provide various legal mechanisms to deter wrongdoings and unfair acts. Apart from providing every shareholder with the right to access financial documents, the law sets up both internal and external monitoring systems to overlook the management. The company is required to have an auditor make an annual report on the balance sheet and accounts of the company and report it to the shareholders. The shareholders are also able to appoint an official inspector to inspect the business of the company. Having the auditor and official inspector continually monitor the company may deter the directors from wrongdoing. In addition, to prevent the controlling shareholders from influencing the decision of the company to engage in a related party transaction, the law prohibits them from voting in a shareholders' meeting where they have an interest in the matter. To provide remedies for damage done by errant directors, Thai company law adopts the concept of derivative actions to allow the shareholders to bring an action on behalf of the company against the errant directors where the company refuses to do so. The remedy received from the directors will be returned to the company. Aside from a civil action, shareholders can also bring a criminal action against errant directors for fraudulent acts. The research found that the criminal liability is the strongest available mechanism which could ensure that the directors perform his duty according to the law and deter controlling shareholders from fraudulent acts.

The research however points out that the above-mentioned mechanisms may not effectively regulate controlling shareholders. Although non-controlling shareholders could rely on the auditor to inspect the wrongdoing, it is questionable whether the auditor could perform his duty properly. The auditor is appointed by the shareholders' meeting which is entirely controlled by the controlling shareholders. The controlling shareholders may elect their acquaintances to be the auditor. The independence of the auditor from the controlling shareholders is therefore doubtful. Besides, to appoint the official inspector, the non-controlling shareholders must bear the cost and it is unlikely for them to get reimbursed by the company despite the fact that the inspection directly benefits the company. In terms of obtaining remedy for damage, although the shareholders could bring a derivative action against the errant directors, proving that the damage is caused by the act of wrongdoing directors is not easy as the evidence of the unjust act is retained within the possession of the directors. In addition, non-controlling shareholders have less incentive to bring a derivative action as they must bear all litigation costs and may not be reimbursed. To prevent the controlling shareholders from approving related party transactions, the controlling shareholders are not allowed to vote in the matter which they have interest in. However, the related party transactions generally do not require the approval from the shareholders' meeting as most of these transactions are approved by the meeting of the board of directors. The controlling shareholders therefore may not acknowledge the existence of the transactions unless they are on the board. The research also points out that there is no clear provision ensuring that the related party transactions are fair to the company.

Importantly where the conflict between controlling and non-controlling shareholders becomes apparent, one party may act in a way that oppresses the other. The controlling shareholders are in the position to exercise their control power to treat non-controlling

shareholders unfairly. The remedies provided to non-controlling shareholders are vital. Under the latest amendment on Thai company law, the non-controlling shareholders could ask the court to wind up the company. Despite the remedy provided, it is not likely possible for the non-controlling shareholders to fulfil the requirement to make a winding-up request. Apart from company law, the research found that another possible remedy provided to non-controlling shareholders is under the law of tort. The controlling shareholders are liable to non-controlling shareholders if the controlling shareholders exercise their right which can only have the purpose of causing injury to non-controlling shareholders. However, the concept of abuse of right is very vague. Besides, as there is no Supreme Court decision on this issue, it is questionable whether the concept of abuse of right is applicable.

From above observations, the paper suggests that, to improve the effectiveness of legal mechanisms regulating controlling shareholders, Thai company law should be amended to reimburse the shareholders who appoint the official inspector to inspect the business of the company or bring an action against errant directors on behalf of the company as the company directly benefits from their action. As it is unlikely possible to exclude the controlling shareholders from engaging in related party transactions, the legal mechanism must be strengthened to ensure that controlling shareholders cannot gain private benefits from related party transactions by setting up a procedure to ensure the fairness of the transactions. The research further points out the necessity of adopting the concept of the oppression remedy as the existing laws are not sufficient to provide remedies to non-controlling shareholders.