Representing a corporation

1. Ultra vires

Contracts of a corporation which lie outside of its scope of business recognised by statute and by memorandum of incorporation shall be null and void. Art. 34. No protection for ‘innocent’ counterpart or third parties. They are deemed to know (to have ‘constructive notice’ of) the scope of business.

> *Supreme Court 72Da801*
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> *A branch manager of the Mutual Fund for Construction Industry guaranteed the repayment of a loan which was made to a non-member. The guarantee lies outside the scope of business permitted under the relevant statute. The guarantee is void. The Mutual Fund shall not be held liable by virtue of ostensible authority, either.*
>
> *Supreme Court 98Da2488*
>
> *Whether a transaction falls within the corporation’s scope of business shall be determined by the objective nature of the transaction. The subjective intention of the particular author of the transaction is irrelevant.*

Tort liability in such a case is dealt with by Article 35(2) (Directors and constituent members who were involved in committing such an ultra vires act shall be “personally” held liable.

The non-profit corporation itself shall not be held liable in tort for an ultra vires act of its organ. 64Da1321 (Non-profit corporation is incapable of committing a tort outside the permitted scope of business. The case was about a branch manager of the agricultural coop borrowing money from a lender

from whom the coop may not borrow money.)

Conf. Section 35(1) of the UK Companies Act 1985 (as amended): “validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s memorandum’.

2. Powers of directors

(1) Internal rules

Directors should abide by the MOI and should act in accordance with the resolution of the general meeting of the constituent members. Art 59(1)

Powers of directors may not be restricted unless the restriction is stipulated in the memorandum of incorporation. Art. 41.

Can a director’s representative powers be restricted by a resolution of the General Meeting of the non-profit corporation? (cf. Art 59(1), last sentence?)

(2) External rules

Provisions on power of attorney shall apply mutatis mutandis to representation of a corporation. Art 59(2)

In the case of non-profit corporations, the issue is whether the restrictions are registered. In the case of commercial corporations, the issue is whether the counterpart was in good faith (i.e., believed that the contract was executed by the representative who had proper powers). The reason is that non-profit corporations are small in number and the registration is tightly supervised and policed. Registration is therefore a workable, reliable indicator. It is not feasible to ensure that commercial corporations diligently register the restrictions placed on their RD’s powers.

Non-profit corporations

If the restrictions are not registered with the Register of Non-profit Corporations (Civil Code deals with non-profit corporations only), the corporation may not plead them against the counterpart or against a third party. Art. 60.

Even if the counterpart had known that the transaction was in violation of the restrictions set out in the memorandum of incorporation, the corporation shall nevertheless be bound by the transaction as long as the restrictions are not registered. 91Da24564

Once the restrictions are registered, the corporation may plead them even against an ‘innocent’ party.

- Can the innocent counterpart rely on the rule of apparent authority to bind the corporation? (Prob. not. □□□□□□ 1998. 12. 8 □□ 96□49423 □□: “□□□□□ □□ □□□□ □□□ □□ □□□ □□□ □ □□□□□ □□□ □□□ □□ □□ □□□□ □□□□□ □□□ □□□ □□□(□ □ □□ □□ □□□□ □□□□□ □□□ □□□□□□□) □ □□□ □□□□ □□□ □□ □□□□ □□□ □□ □□□□ □□□ □□□ □□□ □□□□□ □□□□ □□□ □□, □ □□□ □□ □□□□ □□□ □□□ □□ □□□□ □□”)
- 2001Da57679
- However, if a non-director acted as if he had the representative power, it is unclear whether Art 126 may apply. 87Daka2152 (applicable), 66Da2477 (inapplicable).

Unincorporated body (e.g., housing redevelopment coop): Restrictions to the director’s powers (as they cannot be registered) may not be pleaded against third parties unless it is shown that the third party knew or should have known about the restrictions. (2002Da64780: □□□□□□ □□□□ □□□□ □□□□□ □□□ □□□ □□□ □□□ □□□ □□□□□ □□□ □□ □□□ □□□ □□□□, □□ □□ □□□□ □□□□□ □□□□□□ □□□ □□□□□ □□□□ □ □□□□, □ □□ □□□□ □□ □□ □□□ □□ □□□ □□□□ □ □ □□□ □□□ □□□□ □ □□□□□ □□□□□ □□ □□□□, □ □□ □□□ □□□□ □□□ □□ □□□ □□□□ □ □ □□□□ □□ □□□□ □□□□□□□ □□□□□□□□ □□.)

Commercial companies

Commercial companies are different from non profit corporation.

- The power to represent a joint stock company: only the representative director(s) shall have the power. Comm. Code, Art 389. (However, partnership company is represented by each partner. Comm. Code, Art 207)
- When non-representative director acted as if he had the power to represent the joint stock company, Commercial Code, Art 395 may apply. Thus, the company shall be bound by a contract concluded by such a person if the counterpart proves that (1) the company allowed a person to describe himself as having the representative power (chairman, president, vice-president, executive director, etc.), and (2) that the counterpart honestly believed that the person had the representative power.
- Commercial Code, Art. 209 provides: “Restrictions to the powers of representation may not be pleaded against a third party in good faith.” The expression “third party” here includes the counterpart as well. Thus, a commercial company may not plead restrictions to the powers of directors, even if the restrictions are registered with the Companies Register, against a party who had dealings with the company in good faith. However, if the restrictions are registered, it would be difficult for the counterpart to successfully plead that it did not know.
- Even if the restrictions are not registered with the Companies Register, the counterpart who actually knew, or grossly negligent in not knowing, that the transaction was in violation of the restrictions to the powers of directors may not compel the corporation to perform the contract. 2005Da480 (Company, without the BOD approval, became the guarantor for its RD’s debt. The creditor did not know that the guarantee was without

BOD approval. Guarantee held to be valid. Even though Art 398 of Commercial Code requires a BOD approval for certain transations, the lack of BOD approval may not be pleaded against the counterpart who had no knowledge of the lack of BOD approval.) What if the counterpart knew that there was no BOD approval but did not know that the transaction required a BOD approval under the MOI? Counterpart's "ignorance of law" shall not be taken into account. If the requirement of BOD approval is not a statutory requirement, the counterpart's ignorance of such non-statutory requirement (a requirement which is solely based on a particular MOI of a particular company) shall be taken into account and will constitute good faith.

- Commercial Code, Art. 393(1) provides that "disposal or transfer of important assets of the company … shall require a resolution of the board of directors." If the other party could (easily) have known that there was no resolution of the board of directors, the company shall not be bound by the transaction, even if the company's internal rules do not require such a resolution. 2005Da3649 ("important assets of the company" shall be objectively determined, not necessarily bound by BOD rules; to avoid liability, the company must prove that the counterpart knew that there was no BOD resolution).
- A company would usually and normally conduct its business in accordance with the relevant statutes and internal rules. Counterpart has no 'duty' to investigate whether the RD complied with these rules. 2005Da480 □□□ □□□ □□ □ □□□□□□□□□□ □□□ □□□□ □□□ □□□ □□□ □□□□□ □□□ □□□ □□ □□□□ □□ □□ □□ □□□□ □□□□ □□□□ □ □.

3. Abuse of power

If a transaction is within the powers of a representative director, the corporation shall, in principle, be bound by it even if the director carried it out for a purpose which is

unrelated to the company's business but to further his or other individual's personal gain.

However, if the corporations proves that the counterpart knew, or should have known, that the transaction was carried out for such an abusive purpose, the corporation shall not be bound by it. 2003Da34045, 97Da18059. Art. 107

In some cases, the court held that the company shall be exonerated only if the corporation proves that it is against good faith to hold it liable, i.e. if it is proven that the counterpart had actual knowledge of the director's abusive purpose. 86Daka1522, 89Daka24360, 2016Da222453

4. Tort liability of a corporation

A corporation shall be held liable for the loss caused by its 'representative organs' (or any person who acted as the respresentative organ) in connection with execution of its business. The aggrieved party may sue the director(s) who are directly responsible or the corporation, or both. Art. 35(1), The same rule applies to unincorporated organisations, too. 2008Da15438. Also see 92Da49300 (Representative of a family clan forged the minutes of the clan meeting to show that the sale was approved, when it fact it was not).

A corporation shall not be held liable in tort if the director's action (the contract concluded by a director) lies outside the purpose of the corporation. But the director or the constitutent member involved in the action shall be personally held liable. Art 35(2).

Whether the loss was caused "in connection with execution of business of the corporation" shall be determined by looking at the objective nature of the transaction or the conduct which caused the loss. The subjective motive or purpose of the director in question is irrelevant except where the victim was also aware, or grossly negligent in not knowing, that the director was engaged in the conduct for a purpose which is

unrelated to the corporation’s business.

2002Da27088 (Reps. of a redevelopment cooperative fraudulently recruited members who do not qualify, sold surplus apartments to more buyers than the number of units available for sale. Victims not held to have been grossly negligent, but the amount of damage was reduced in light of their carelessness.)

Victim’s gross negligenc:

- lack of attention so severe as to be verging on ‘deliberate’ conduct (culpa lata dolus est)
- when, in view of equity, there is no need to protect the victim (for example, victim’s conduct is also motivated by greed)

79Da49978, 2001Da58443, 2003Da36133 (golf club membership sale)
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