

# Remuneration of Directors Under the Commercial Code



## I. Overview and Types of Directors' Remuneration

The remuneration of a director of a company is important for corporate management purposes in the sense that it represents a reward for the director's past performance and offers an incentive for his/her future contribution to the value of the company. As it is also closely related to directors' compliance with the duty of care and the duty of good faith, it has recently emerged as a key issue in corporate governance. As such, directors' remuneration has received recently more attention.

Remuneration of a directors paid not only in typical forms such as base salary, short-term performance pay, long-term performance pay, and severance pay but also in the form of stock-based compensations such as stock option (Article 340-2 of the Commercial Code), stock grant, restricted stock unit, restricted stock award, and performance-based stock. The form of payment is being further developed.

## II. Remuneration Determination Procedures

Article 388 of the Commercial Code provides that "[i]f the amount of remuneration to be received by directors is not prescribed by the articles of incorporation, such amount shall be determined by a resolution of a general meeting of shareholders." Still, the general meeting of shareholders is not required to specifically determine individual directors' remunerations, and it may determine only the total or cap of all directors' remuneration in aggregate, leaving determination of individual directors' remunerations to the board of directors. In practice, the general meeting of shareholders first sets the cap, following which the board of directors determines each director's remuneration in greater detail.

It should be noted that, regardless of how remuneration is named, such as monthly salary and bonus, directors' remuneration includes all compensation items that are paid in return for their service (Supreme Court Decision 2015Da51968 rendered on

May 30, 2018), and thus, any agreement on remuneration that is not based on the articles of incorporation or a resolution by a general meeting of shareholders is invalid (Supreme Court Decision 79Da1599 rendered on November 27, 1979).

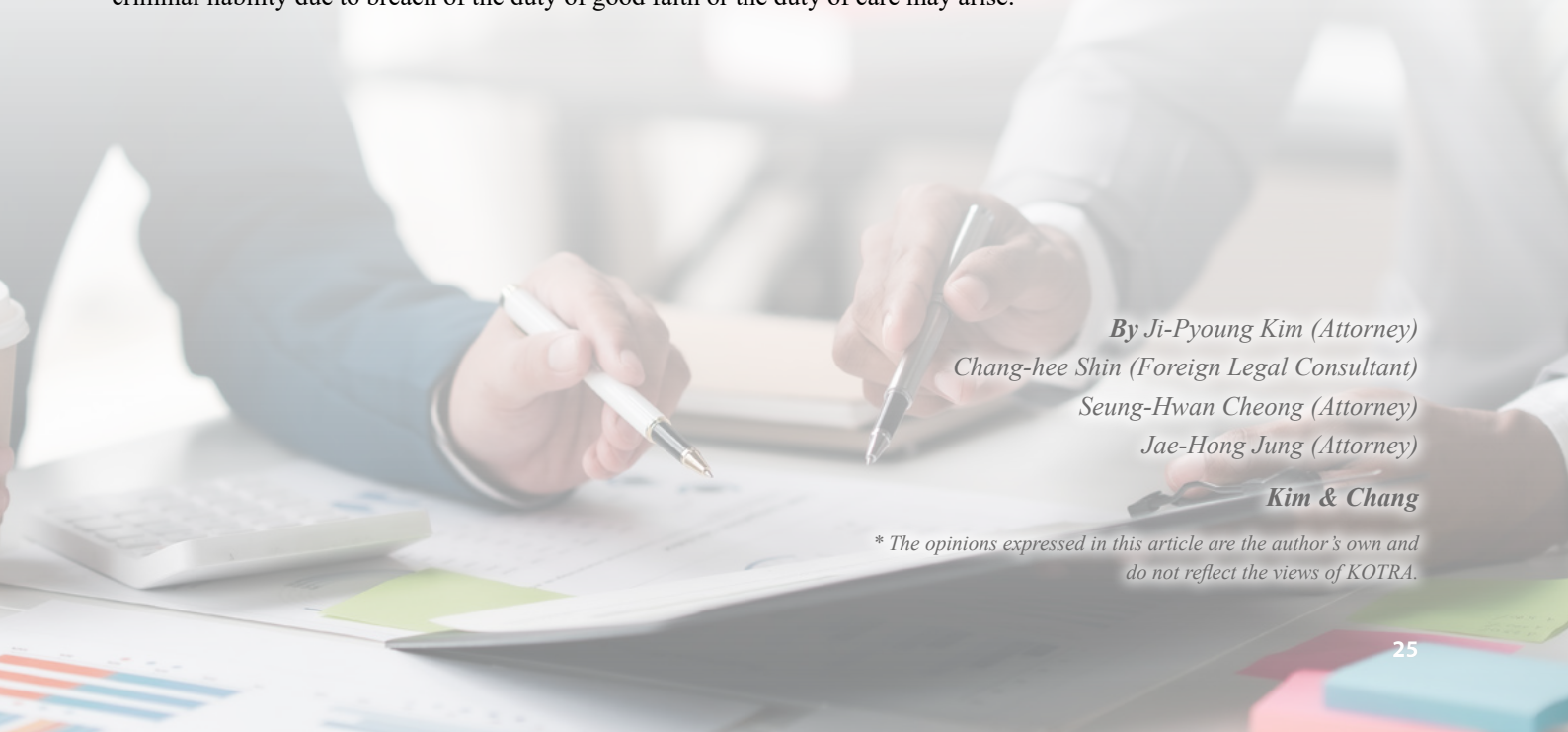
In order for a company to grant stock options to a director, it should be (i) based on its articles of incorporation (Article 340-2(1) of the Commercial Code) and (ii) approved by a special resolution of a general meeting of shareholders as provided for in Article 434 (Article 340-2(1) of the Commercial Code). The company (iii) should reach agreement with the director regarding the stock option and prepare a written contract within a reasonable period (Article 340-3(3) of the Commercial Code), and (iv) should furnish the written contract at the head office until the period for exercising the stock option expires (Article 340-3(4)). Since grant to stock option should be approved by a special resolution by a general meeting of shareholders, it is not included in directors' remuneration, which is to be determined by a general meeting of shareholders under Article 388 of the Commercial Code.

As the director himself/herself may be involved in the procedures above, issues such as conflict of interests or pursuit of private interest may arise. As such, it is necessary to establish an appropriate decision-making process to secure appropriateness in the remuneration determination process.

### III. Appropriate Remuneration for Directors

Regarding the appropriate amount of a director's remuneration, the Supreme Court ruled that "[t]here shall be a reasonable proportionate relationship between service provided by a director to the company and the remuneration paid in return therefor, and it shall not go off balance beyond the reasonable level, reflecting company's financial status or business performance" (Supreme Court Decision 2014Da11888 rendered on January 28, 2016).

Therefore, a reasonable and proportionate relationship should be maintained between service provided by a director to the company and the director's remuneration, and if it is excessive beyond the reasonable level considering the company's financial status or business performance, the directors who have decided on the remuneration may be subject to civil and criminal liability due to breach of the duty of good faith or the duty of care may arise.



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*\* The opinions expressed in this article are the author's own and do not reflect the views of KOTRA.*