



## The Nature of the Legal Relationship Between the Board of Directors Member and the Corporation

**Author:** Atty. M. Tarık Güleryüz // Elif Sena Güvenç

The relationship between a joint stock corporation and its board of directors ["**Board**"] is established by the acceptance of duty by the Board member, who is elected by the general assembly of shareholders or exceptionally by the Board [cooptation: [see our article](#)]. As a result, a contractual relationship is established between the corporation and the Board member.

Although the nature of the contractual relationship between the corporation and the Board member as well as the consequences connected to it is a controversial issue, there are basically two differing opinions in jurisprudence and among legal scholars regarding the type of contract between the parties: the employment contract view and the proxy contract view. Correct determination of the nature of the legal relationship is extremely important in terms of identifying the debts and rights arising from the relationship and the procedure for the termination of the relationship. It is even instrumental in terms of finding the competent court for the dispute. In this article of our series of articles on the Liability of Board of Directors Members, the debate on the nature of the legal relationship between the Board member and the corporation and the importance of these discussions in terms of practice will be elaborated.

### I. Type of Contract Between the Board Member and the Corporation

#### A. Employment Contract View

An employment contract is an agreement that establishes basic rights and responsibilities between an employee and an employer. In an employment contract, one of the parties [employee] undertakes to work as a dependent of the employer and the other one [employer] undertakes to pay a salary. Therefore, the three basic elements of this type of contract are salary, employment, and dependency.

The main argument behind the employment contract view is that the legal relationship between the Board member and the corporation is continuous in this way and the contract contains the benefits of an employment contract such as salary and leave. Critics of the view generally focus on the fact that contrary to an employment contract, salary is not included as an essential element in the contract of the Board member and that Board members are considered as employers due to the function of the Board as a body of the corporation. Another point is the element of dependency in an employment relationship. Dependency is the employer's authority to give instructions and the

worker's responsibility to fulfill these. Nevertheless, due to the -limited- autonomy and authority they have in fulfilling their duties, the Board members do not receive direct instructions in this way.

This view is opposed on the grounds that the Board member, who is authorized to represent the corporation, is accepted as a “person-body” and the “actual employer” [1]. Moreover, the decision of the Court of Cassation Assembly of Civil Chambers dated 18.10.2021 and numbered E. 2017/3176, K. 2018/1470 emphasizes the fact that the legal characterization of each relationship should be evaluated according to the case in hand. In the decision, the court stated that it is acceptable to define the contract as an employment contract if the person does not represent the corporation or has no influence on the resolutions adopted on behalf of the corporation.

## **B. Proxy Contract View**

A proxy contract is an agreement that allows and obliges the proxy to perform a duty of or act on behalf of the principal. Scholars in this view argue that the liability of Board members arises from a proxy contract and therefore, they can be held liable towards the corporation like a proxy.

According to this view, a proxy contract between the Board member and the corporation is established with the acceptance of duty. There are many decisions of the Court of Cassation favoring this view. For instance, the decision of the Court of Cassation Assembly of Civil Chambers dated T. 07.07.2010 and numbered E. 2010/9-328, K. 2010/370 clearly states that the relationship between the members of the Board and the corporation is based on a proxy contract, and thus, the members should be responsible to the corporation as a proxy.

## **II. Some Issues Regarding Determination of Contract Type**

### **A. Competent Court in Case of Dispute**

In Turkish law, the competent court for the dispute is determined by the legal nature of the relationship between the parties. Therefore, identifying the nature of the legal relationship between the Board member and the joint stock corporation also clarifies which court has jurisdiction on the dispute.

The Labor Courts Law No. 7036, which regulates the jurisdiction of labor courts, sets out that a dispute must arise from the law or contract "due to an employment relationship" for a dispute to be heard in labor courts [Art. 5/1-a]. Therefore, if the relationship between a Board member and the corporation is deemed as an employment contract, potential disputes will be under the jurisdiction of labor courts.

On the other hand, Art. 4/1-a of the Turkish Commercial Code [“TCC”] provides that the lawsuits arising from the issues regulated in the TCC are “absolute commercial lawsuits”. Given that the duties, authorities, rights, and responsibilities of the members of the Board of joint stock corporations, which have the title of body-person, are regulated in the TCC, commercial courts will have jurisdiction over the disputes, if the relationship between the two is accepted as a proxy contract.

### **B. Can a Board Member Claim Employment Benefits Such as Seniority or Notice Pay and Salary?**

Another matter of debate is whether a Board member has the right to ask for compensation for employment benefits such as severance and notice pay upon termination. If the legal relationship is deemed to be of employment nature, the Board member will be considered as an employee, and as a result, will be able to claim benefits arising from the employment relationship.

If the view of proxy contract is prevailed, the Board member will be held responsible as a proxy and will not have the rights and benefits arising from the employment relationship. In such case, although the Board member will not have the right to request employment benefits, it is possible to claim the rights set forth in the TCC and those arising from the proxy contract. For instance, the general assembly of shareholders has the authority to dismiss the members of the Board. However, if a Board member, for whom an attendance fee has been decided, is dismissed before the expiry of the term of office without a justified reason, the member can request attendance fee for the remaining term of service based on unfair dismissal.

### III. In Conclusion

Determining the legal nature of the relationship between the Board member and the joint stock corporation is crucial in terms of defining the method of termination, the competent court as well as the debts and rights arising from the relationship. Even though there are opinions to the contrary, Turkish jurisprudence and legal scholars are inclined to describe the relationship between Board members and the corporation as a proxy contract. Yet, depending on the case, it is also possible to claim the relationship to be an employment contract, and sometimes it can even be argued that the individual possesses both the title of an employee and a Board member.

[1] SÜZEK, S. İş Hukuku, İstanbul 2015, p. 147 ff.; 9<sup>th</sup> Civil Division of Court of Cassation decision dated 14.9.2015 and numbered E. 2015/17740, K. 2015/25602; 9<sup>th</sup> Civil Division of Court of Cassation decision dated 25.10.2016 and numbered E. 2016/32565, K. 2016/18467.

#### For further information please contact:



**Dr. Zahide Altunbaş Sancak**  
[z.sancak@guleryuz.av.tr](mailto:z.sancak@guleryuz.av.tr)



**M. Tarık Gülerüz**  
[t.guleryuz@guleryuz.av.tr](mailto:t.guleryuz@guleryuz.av.tr)

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