APPLICATION OF THE BUSINESS JUDGMENT RULE DOCTRINE IN INDONESIAN COMPANIES

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Abstract: *The Business Judgment Rule Doctrine is a doctrine that provides protection to Directors who have good faith in the loss of the company. The point is that as long as the Board of Directors acts in good faith and acts solely for the benefit of the company, but it turns out that the company continues to suffer losses, it does not necessarily become the personal responsibility of the Board of Directors. Therefore, the Board of Directors cannot be held responsible for the company's losses if the Board of Directors in taking action has fulfilled all of its obligations with the principles of Good Corporate Governance (GCG). If all the obligations and GCG principles have been fulfilled, then the Board of Directors is categorized as having good faith and cannot be declared wrong. This research is normative legal research with a legal approach. The results of the author's study, in the context of the Business Judgment Rule Doctrine, the losses that occur are normal or reasonable business losses and therefore the company is responsible, and no one can be punished if there is no mistake.*

Keywords: *Doctrine of Business Judgment Rule, Company, Director of Good Faith, Good Corporate Governance (GCG), Legal Protection.*

Introduction

Good governance or "good corporate governance (GCG)" is important to implement in every company management including State-Owned Enterprises (BUMN). One important issue that will never be left behind in the management of a limited liability company is regarding the accountability of the Board of Directors and the principle of business judgment rule which is a protection for a company, especially State-Owned Enterprises (BUMN), whose capital is partly owned by the state. As BUMN, paradigmatically as an extension of the state to control important production branches for the state, as actors in the national economy must also carry out social functions for the welfare of the people who are also profit-oriented (Harun, 2019). State-Owned Enterprises (BUMN) are business entities whose capital is wholly or substantially owned by the state through direct equity participation originating from separated state assets. SOEs are divided into public companies (Perum) and state-owned companies (Persero). Perum is a BUMN whose capital is wholly owned by the state and is not divided into shares with the aim of public benefit in the form of providing high quality goods and services and pursuing profits based on the principles of corporate management. Meanwhile, a Persero is a State Owned Enterprise whose entire or at least 51% (fifty one percent) shares are owned by the state with the main objective of pursuing profit. Persero, hereinafter referred to as Limited Liability Company (PT), is a legal entity which is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills the requirements stipulated in the Law (UU) and its implementing regulations.

However, along the way, sometimes BUMN businesses are faced with statutory regulations, if they cause state financial losses. The Board of Directors is faced with legal consequences as stated in Article 2 and/or Article 3 of Law No. 20 of 2001 in conjunction with Law No. 31 of 1999 concerning the Eradication of Corruption Crimes (Tipikor Law), SOE management and employees can be held criminally responsible for alleged corruption because it causes losses to state finances. The board of directors of the company is a fiduciary who must behave like a trustee. Here the Board of Directors has a fiduciary position in managing the company and the relationship mechanism is fair. According to the experience of business people in common law countries, this relationship can be based on the theory of fiduciary duty (Nasution, 2009). The Board of Directors is the lifeblood of a company that acts as a board and manager of the company with good or good corporate governance in good faith and full responsibility. The actions of the directors in good faith and responsibility are what is protected by law, of course as long as these actions can be proven by avoiding actions that benefit the directors personally in making important decisions that result in the company experiencing losses.

However, if in making decisions about the company, the directors have acted carefully, in good faith and with full responsibility, then the directors have been protected by the principles of the Business Judgment Rule even though the decision could be detrimental to the company. Indeed, the Board of Directors as management and company manager is obliged to manage the company well (good corporate governance) with good faith and full responsibility as mandated by article 97 of Law Number 40 of 2007 concerning Limited Liability Companies that the management as referred to in paragraph 1 must carried out by each member of the board of directors in good faith and with full responsibility (Nasution, 2009). Any actions of the directors based on good faith as mentioned above will certainly be protected by law as long as these actions can be proven by avoiding actions that benefit the directors personally in making an important decision for the company which results in the company experiencing losses.

A director can be held personally liable if the management of the company is not carried out carefully (fiduciary duty) which results in losses for the company. If in making decisions about the company, the directors have done it carefully, in good faith and with full responsibility, then the directors have been protected by the principle of business judgment rule even though the decision has harmed the company. The principle of business judgment rule is a legal principle that originates from the common law system and is a derivative of United States corporate law to protect the Board of Directors in every decision making that is carried out carefully, in good faith and with full responsibility not to be held liable either criminally or legally as well as civil (Fuadi, 2008).

However, it is not uncommon for decisions to be made based on personal interests that result in decisions being illegal. BUMN is one of the bodies that has always been a concern of the Corruption Eradication Commission as a place prone to corruption in Indonesia. In the event that the Board of Directors conducts a transaction without the approval of the Board of Commissioners and/or the GMS while the matter has been regulated as such, and results in a loss to the company, then of course the action taken by the Board of Directors is an unlawful act which fulfills the element of loss to the state. The second element is enriching oneself or others. If traced, it can be concluded that in the act of enriching there must be an element of obtaining wealth, the acquisition of wealth exceeds the acquisition of legal sources of wealth, and the existence of wealth originating from sources of wealth that are not legal and this act is an act against the law.

Against the background of the Constitutional Court Decision Number 01/PHUPres/XVII/2019 (MK Decision 01) and two Supreme Court Decisions, the author tries to examine in more detail regarding Decision No. 3849/K/Pid.Sus/2019 dated 2 December 2019 on behalf of the Defendant Ferederick ST Siahaan (former Pertamina Finance Director) / (MA Decision 3849) and Decision No. 121K/Pid.Sus/2020 dated 9 March 2020 in the name of the Defendant Karen Agustiawan (former Main Director of Pertamina), on the MA 121 Decision, a BUMN subsidiary which is not actually a BUMN. As for BUMD subsidiaries, they have not been explicitly defined in a statutory regulation, although in principle they should have a similar definition to the definition of a BUMN subsidiary.

It is interesting to study by the author, because the District Court and the High Court consider the defendant legally and convincingly guilty of committing the crime of corruption together. But it is different from the decision of the Supreme Court (MA), which in its consideration stated that the finances of the BUMN subsidiary were not included in the state finances as in the Constitutional Court Decision No. 01/PHUPres/XVII/2019. This means that the losses experienced by PT Pertamina Hulu Energi, which is a subsidiary of PT Pertamina (Persero), are not a loss to the state's finances. In addition, the Panel of Judges (Suhadi, Prof. Krisna Harahap, Prof. Abdul Latif, Sofyan Sitompul, and Prof. Mohammad Askin) also considered that it is a fact that oil companies are full of risks, and there are no definite parameters that determine successful exploration or fail. Based on this case, the rule of law regarding losses due to the implementation of the Business Judgment Rule was born, not including a crime as long as there is no fraud, conflict of interest, unlawful acts, and intentional mistakes.

Result and discussion

The Business Judgment Rule is actually a doctrine that applies that the decisions of the board of directors regarding company activities cannot be directly disputed by anyone, even if the decisions taken are detrimental to the company. Business Judgment Rule, as the division of responsibilities between the company and its management organs, especially the directors, as well as shareholders in the event that a loss occurs to the company caused by personal or individual errors of the directors. To protect directors with good intentions, the "business judgment rule theory" emerged which is one of the most popular theories to ensure fairness for directors with good intentions. The application of this theory has the main mission, namely to achieve justice, especially for the directors of a company incorporated as a Limited Liability Company in making business decisions (Block et al., 1990).

The background to the enactment of this doctrine is because among all parties in the company, in accordance with their position as a director, it is the directors who are the most powerful and most professional to decide what is best for the company, meanwhile if a business decision from the directors results in a loss for the company, until certain limits can still be tolerated considering that not all businesses have to make a profit. In other words, the company must also bear the business risk, including the risk of loss. Therefore, the director cannot ask for his responsibility just because of wrong reasons in deciding or just because of the company's loss (Fuadi, 2008).

In addition, the author can explain that the birth of the Business Judgment Rule stems from the consideration that the directors are the most authorized and professional party in deciding matters relating to the company. Matters relating to the responsibilities of the Board of Directors have been regulated in Article 92 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, hereinafter referred to as the Limited Liability Company Law. Management as referred to in paragraph (1) must be carried out by each member of the Board of Directors properly and responsibly, each member of the Board of Directors is personally fully responsible for the loss of the company, the responsibility referred to in paragraph (3) applies jointly and severally to each member of the Board of Directors.

Further arrangements regarding the Business Judgment Rule are contained in Article 97 paragraph 5 of the Limited Liability Company Law. According to Harahap (2021), in his book entitled Limited Liability Company Law, that the quality of the Board of Directors' authority to represent the Company is unlimited and unconditional. In this case the capacity or authority possessed by the Board of Directors represents the Company because of the law. That is, the law itself in this case Article 1 point 5 and Article 92 paragraph (1) UUPT which gives the Board of Directors the authority to represent the Company inside and outside the Court. Therefore, the capacity it has, is the power of attorney or representative of the law (wettelijke vertegenwoordig, legal or statuory representative).

The Business Judgment Rule has the objective of providing immunity for individual directors from responsibility and damages resulting from certain decisions. In the litigation process, the Business Judgment Rule is a means used to preserve judicial resources, so that courts are not mired in repeating decisions which are inherently subjective and unsuitable for judges, this is useful because judges are not business people. Business Judgment Rule as the implementation of a broad economic policy law, which is built on economic freedom and encouragement that is useful for taking risks based on sufficient information. In company law in Indonesia Business Judgment Rule as one of the doctrines in company law. However, there is no comprehensive arrangement regarding the Business Judgment Rule in Indonesia. The business judgment rule doctrine has developed in common law legal systems such as the United Kingdom, the United States, Australia and others. This doctrine is a form of protection for directors, the Business Judgment Rule according to Roger LeRoy and Gaylod A. Jentz is: both the power of the corporation and the Directors in making decisions", as long as it is done within the limits of its authority with utmost care and good faith.

Furthermore, Robert Charles Clark viewed this doctrine as a simple rule of directors' business judgment that courts and shareholders would not challenge. Directors cannot be held responsible for the consequences arising from their business decisions. So if it is related to fiduciary obligations, the business judgment rule doctrine is a reaction to discretionary settlements that arise due to fiduciary obligations for directors in managing the company (Harris, 2010).

However, in carrying out the management authority of the Company, the Board of Directors must comply with the "policy that is deemed appropriate", within the limits specified in Law No. 40 of 2007 concerning Limited Liability Companies and or the Articles of Association. What is meant by policies that are considered appropriate according to the elucidation of Article 92 paragraph (2) are policies which, among other things, are related to skills. Management must be carried out by directors with understanding and skills in accordance with knowledge and experience. If so, in carrying out the management really smart in accordance with the knowledge and experience (Poerwadarminta, 1976).

Indonesia, which adheres to the Civil Law legal system, sources of law are in statutory regulations as the highest hierarchy. So, the court should have the task of interpreting the Business Judgment Rule doctrine, this is because there is no comprehensive regulation regarding this doctrine. What needs to be known and underlined is, even though this doctrine provides protection to directors to escape responsibility for losses that occur. However, there are still limitations contained in the management, namely in accordance with the "interests" of the company and in accordance with the "purpose and objectives" of the establishment of the company. In England, since 1929 all public companies are required to have at least two members of the Board of Directors regardless of the type of business activity (Charlesworth & Morse, 1991).

As explained above, each member of the Board of Directors is required to manage the Company. The obligation to carry out the Company must also be in "good faith" (e goeder trouw, good faith). The meaning of good faith in the context of the implementation of management by members of the board of directors in practice and legal doctrine, has a broad reach, including; a director must be trusted (fiduciary duty in carrying out the responsibilities of managing the company. This means that every member of the board of directors is forever "trustworthy" (must always be bonafide) and must always be "honest" (must always be honest). Regarding the meaning of good faith and the obligation to be trusted, and always honest in taking responsibility for the management of the company, MC Oliver and EA Marshall stated: ……a director is permitted to be very stupid so long as he is honest (Tumbuan, 2002). Although this expression contains a legal statement, justifying a director who is stupid as long as he is honest, does not mean that he can be approved to appoint members of the board of directors who are stupid. And what the statement wanted was to appoint a board member who was both capable and honest, rather than smart but dishonest and untrustworthy.

As the only organ in the company that is given the right and authority to act on behalf of the company. Of course, this position of the Board of Directors has the consequence that the management of the company, including the management of the company's assets, depends entirely on the board of directors, including the management of the company's assets, the management of the company by the director also includes the company's mandate. This means that the director's mandate to manage the company also includes a mandate, including being completely dependent on the company's directors. This means that the director's mandate to manage the company also includes the mandate to manage the company's assets. Therefore, if there is a loss because the director does not carry out his duties in good faith, the loss borne by the company becomes the director's personal responsibility.

With regard to the issue of the application of duty of care in the management of a company, it is necessary to put forward a generally accepted principle, which is commonly called "business judgment risk". That is, if members of the Board of Directors are truly honest in carrying out their responsibilities in managing the company, and that honesty is accompanied by reasonable comprehensive judgment in accordance with experience and knowledge as well as common business practice, then that judgment is wrong and wrong (error judgment), in this case an error judgment occurs, then the member of the board of directors cannot be held accountable for any error in judgment made honestly (does not liable for honest mistakes of judgment) or not liable for any error judgment. Such events are included in the category of business judgment risk principles (Howel & Printice, 1988). As previously explained, business activities are full of competition and high competition, requiring the Board of Directors to be careful and able to make decisions quickly and accurately. It is something that is unfair when carrying out its management, the director is always overshadowed by the fear of making the wrong decision and will harm the company. It is clear that this condition will disrupt the company's performance and will actually harm the company. The Business Judgment Rule encourages directors to be brave in making decisions and taking risks in carrying out their duties and responsibilities in managing the company and not to be afraid and not to be overly careful about threats that cause the director to be personally responsible for the company's losses that may arise as a result of actions or the director's business decisions.

According to Wild (2006), United States Attorney and Politician, the Business Judgment Rule is a legal doctrine that officers and directors of a corporation cannot be held liable for losses to shareholders for business decisions that are proven to be unfavorable or harmful to the corporation as long as those decisions are within the discretion of the officials. or director and is made on an informed basis, in good faith without any direct conflict of interest, and with an honest and reasonable belief that it is in the best interest of the corporation. “Business Judgment Rule is the legal doctrine that a corporation's officers and directors cannot be liable for damages to stockholders for a business decision that proves unprofitable or harmful to the corporations so long as the decisions were within the officers' or discretions power and was made on an informed basis, in good faith without any direct conflict of interest, and in the honest and reasonable belief that it was in the corporation's best interest.”(Khairand, 2014).

According to the Business Judgment Rule doctrine, judges are considered to have no business skills, therefore, the court has no right to interfere in giving an assessment of business decisions taken by directors. The Board of Directors is deemed to have made the right decision in accordance with their expertise and habits that occur in the business. The court can only intervene in the event that there is a violation committed by the director in making decisions or implementing the management of the company. The link between the Business Judgment Rule Doctrine and Article 97 paragraph (5) of the Limited Liability Company Law.

Business Judgment Rule as a self-defense effort for directors in managing the company. The rules of business valuation postulate that a director cannot be held personally responsible for his actions taken in his position as a director, if the director believes that the actions taken are the best for the company and are carried out honestly, in good faith only for the benefit of the company.

Conclusion

The responsibilities of the Board of Directors are regulated in Article 92 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, hereinafter referred to as the Limited Liability Company Law. Management as referred to in paragraph (1) must be carried out by each member of the Board of Directors properly and responsibly, each member of the Board of Directors is personally fully responsible for the loss of the company, the responsibility referred to in paragraph (3) applies jointly and severally to each member of the Board of Directors. According to the author, the application of the Business Judgment Rule principles to directors who carry out policies that are detrimental to companies in Indonesia has so far not been maximized. The lack of human resources in our law enforcement, especially the prosecutor's office, which has the opportunity to drag directors who carry out their duties based on the principles of good faith, prudence and responsibility into the criminal realm if the company he leads is a state-owned company (Persero). Law enforcement officials must understand that the Business Judgment Rule is one of the directors' self-defense efforts in managing the company. The Business Judgment Rule postulates that a director cannot be held personally responsible for the actions he takes as a director, if the directors believe that the actions he takes are the best, then for the company and he does them honestly, with good faith only for the benefit of the company. So the hope is that protection for Directors who carry out policies that are detrimental to the company is very minimal in Indonesia. The absence of a benchmark for good faith is a scourge that can be misused by law enforcers to drag directors into the realm of law.

The author hopes that the management of the company as well as law enforcers must be more careful and intelligent in imposing blame on the directors regarding the management of the directors in running the company so that the application of the "principle of business judgment rule" to directors who manage the company with care, good faith and responsibility can go well. My suggestion is for the legislators, namely the Government of Indonesia and the Legislature to make derivatives of Law number 40 of 2007 concerning Limited Liability Companies which regulates more clearly and in detail regarding this "principle of business judgment rule". These derivatives can be in the form of Government Regulations and Regulations of the Minister of Law and Human Rights so as to provide legal certainty and legal protection for the Board of Directors in running the company.

References

1. Block, D.J.; Barton, N.R.; and Radin, R.A. The Business Judgment Rule Fiduciary Duties of Corporate Directors. New York, Prentice Hall law & Bussines, 1990, p. 4.
2. Fuadi, M. Prinsip Bussines Judment Rule. Jakarta, Pustaka Yustisia, 2008, p. 159.
3. Harahap, H.B.; Nasution, B.;Juwana, H.; Siregar, M. The Dilemma of Managing Limited Liability State-Owned Enterprises in Applying the Business Judgment Rule. Proceedings of the 2nd International Conference on Law, Economic, Governance, ICOLEG 2021, 29-30 June 2021, Semarang, Indonesia. DOI http://dx.doi.org/10.4108/eai.29-6-2021.2312616
4. Harahap, M.Y. Hukum Perseroan Terbatas. Jakarta, Sinar Grafika, 2021, p. 349.

5. Harris, F. Hukum Perseroan Terbatas: Kewajiban Pemberitahuan oleh Direksi. Bogor, Ghalia Indonesia, 2010, p. 59.

6. Harun, R. BUMN dalam Sudut Pandang Tata Negara, Privatisasi, Holdingisasi, Kontrol, dan Pengawasan. Jakarta, Balai Pustaka, 2019, p. 3.

7. Howell, A.; and Printice. Business Law Text and Cases, Forth Edition. New Jersey, The Dayden Press, 1988, p. 870.

8. Indonesia, Law on Limited Liability Company, Law Number 40 of 2007, State Gazette of the Republic Indonesia Number 106 of 2007, Additional Gazette Republic of Indonesia Number 5305. Available online on https://irmadevita.com/wp-content/uploads/2008/04/company-law-uu-40-2007.pdf . (Accessed on March 28, 2021).

9. Khairand, R. Hukum Perseroan Terbatas, First Printed. Yogyakarta, Faculty of Law Universitas Islam Indonesia Press, 2014, p. 266.

10. Morse, G. Charlesworth and Morse: Company Law (Hukum). London, ELBS, 1991, pp. 313 – 348.

11. Poerwadarminta, W.J.S. Kamus Umum Bahasa Indonesia. Jakarta, PN Balasi Pustaka 1976, p. 19.

12. Tumbuan, F.B.G. Tanggungjawab Direksi dan Komisaris Serta Kedudukan RUPS Perseroan Terbatas menurut UU NO 1 Tahun 1995. Depok, Universitas Indonesia, 2002, pp. 9 – 10.

13. Wild, S.E. Webster’s Law Dictionary. Canada, Canadian Publishing, Inc, 2006, p. 69.

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