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Business judgment rule application in company: a comparison based on the case in Indonesia and Malaysia

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Abstract. This article aims to analyze and compares the business decision in the value of justice in any case of the company losses according to the company law in Indonesia and Malaysia. Narrative review based on the study cases was used to make a comparison and conclusion regarding the problem. Based on several cases in Indonesian and Malaysian court regarding the director and non-director officer's decision that leads to company loss, it has been proven that Indonesia did not implement the protection for the directors even the decision is proven for the sake of the company. This makes the directors and officers became hesitant due to the fear of not having protection against the lawsuit should their decision causing deprivation for the company. Meanwhile, in Malaysia, the court has full protection for the director should their decision were proven for the sake of saving the company. Thus, it can be concluded that Indonesia has not fully implemented the business judgment rule compared to Malaysia.

Keywords: Business Law, Business Judgement Rule, Law, Company Law

1 Introduction

The constellation regimes of legal these days stirred towards a merging bridge between public law and private law, creating some uncertainties both legal and procedural in terms of corporate law and criminal law [1]. Moreover, the proliferation of news regarding the criminalization of corporate policies can be a bad precedent for law enforcement, human rights, also able to disrupt the economic stability and create an unconducive business climate [2]. Business is a risk which beyond control; it is not always profitable, but also can take the risk of loss [3]. When a business decision is taken and a problem occurs, it possibly contain a risk of loss for the company, the existence of legal provisions which should regulate as accountability, certainly raises some concerns in the business people, particularly the decision-makers in corporations, for lawsuits or criminalization related to corporate strategic decision making [3,4].

On its principality, business judgment rule is known as one of the company laws' doctrines that should there be a case where company suffers an investment loss due to the management decision, they will not be punished or took responsible based on good etiquette and prudence [5]. In the practice of courts in common law countries, this principle also states that when the directors have made a decision that previously preceded by careful and detailed business considerations, he will obtain

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immunity and cannot be held accountable for his responsibility, even though the decision taken turns out to be unprofitable the company does not necessarily that the resulted problem being his responsibility [5-6]. Therefore the court should have an outlook to the member board of directors or the representative officials in making business decisions in the company and or policies to not act negligently except in across negative way [7]. This article aims to analyze the similarities and differences in business decisions (business judgment rule), whether the convicted policy has fulfilled the value of justice, certainty and usefulness, in any case of the company experiences losses in business according to the law of companies in Indonesia and Malaysia.

2 Methodology

This article presents a comparative study between the application of Business Judgement Rule Law Application from the case in Indonesia and Malaysia. Narrative review based on the study cases was used to analyze and deliver a conclusion for its application and comparison in Indonesia and Malaysia.

3 Discussion

According to the business decision doctrine, should there be a loss for the company, it can still be tolerated to some extent considering that not every business has to make a profit. This means that the company must also bear business risks, including losses suffered in the form of investment loss; mismanagement; or elements of fraud [8]. Therefore, management (Structural Officers) has a role in helping the directors carry out their duty in a company that requires the availability of a legal basis or legal guarantees, both clearly and explicitly regulated, so that accountability is enforced due to their desire to be protected by the judges in a case, in defense that the actions are protected by the business judgment rule principle [5,9]. However, it is still needed a further investigation to conclude that the case turns out to be an honest mistake or has a different level of error.

There is some case of bad director decision that ends in a legal suit in Indonesia. For example, the Supreme Court Decree no.154 PK/Pid.Sus/2012 in the case of procuring Solenoid Valve and Thrustor Brake at PT Pupuk Sriwidjaja (Pusri) Palembang, where the responsibilities go to the head of the logistic department (Structural Official). With the consideration that the Head of the Logistic Department has been authorized (directors) and fully responsible (according to the SOP/Standard Operational Procedure/POB) for the actions, they have taken in the process of procuring Solenoid Valve and Thrustor Brake that resulting in state losses [10]. The Supreme Court Judge decided that the protection related to the Business Judgment Rule doctrine in the novum submitted for appeal was rejected on the grounds; due to the actions taken cannot be categorized as negligence. The defendant was pleaded guilty of his actions include intentions that interpreted as *willen and wetten* (want and know) in criminal law. Therefore, the Business Judgment Law cannot be applied to defend the officer's action.

Another related case is the case that befell the former General Manager of PT PLN in the North Sumatra Power Plant Area. The case started when PT PLN KITSBU proceeds to procure a flame tube DG 10530 Siemens brand, consisting of two sets of Gas Turbines (GT) requiring more than IDR 23 billion. The product was supplied through CV Sri Makmur. After the item arrives, it was approved according to the order/specification. However, it turns out the item was not following the required specifications and has been damaged [11]. According to the Supreme Court Decree no. 40/pid.sus.k/2014/PT-MDN, the defendant was declared guilty for violating Article 2 paragraph (1), article 3, article 9 juncto article 18 of Law Number 31 the year 1999 concerning Eradication of Corruption Crime as amended by Law Number 20 the year 2001 in conjunction with Article 55 paragraph (1) about Criminal Code. In contrast to the case in PT PLN, another case of corporate loss befell PT. Pertamina in the case of Blok Basker Manta Gummy (BMG) infestation in Australia that drags the former Pertamina director, Karen Agustiawan. The case begins in 2009, where the defendant with management decided to buy the ROC oil company ltd share in BMG Australia. ROC oil company then decided to stop the raw oil production because it is not economically beneficial in 2010, meanwhile Pertamina still has to pay for the company operation until 2012 according to the contract

that caused Pertamina suffer about 568 billion rupiahs [17]. The court decided the defendant was guilty due to negligence and abuse of power that cause the state loss due to the fact that the defendant did not conduct the feasibility study up until the due diligent stage for the investment forecast. However, the sentence was reduced from previously 15 years of prison and 1 billion fine within a subsidiary of 6 months imprisonment to 8 years of prison and 1 billion fine due to the fact that risk assessment of the investment has been analyzed before the acquisition and stated that it would be profitable according to the calculation [18]. Therefore, in some parts, the defendant has conducted the procedural terms before the decision but still pleaded guilty due to the “act that detrimental to the country’s finances”.

Given the case above, particularly regarding the Solenoid Valve and Thrustor Brake case in PT Pusri Palembang, business considerations of structural officials (Head of Procurement Department) certainly should have legal protection. This is due to business judgments or the decisions must have been calculated and evaluated risks that are being considered (fair principle of equality of opportunity / Rawls). The structural official as the delegate recipient in carrying out the company management has the legal position to represent the board directors according to Article 2 point 7 of Law no. 28 of 1999 concerning the Implementation of Clean and Free Corruption, Collusion and Nepotism, even though the authorization is limited by regulated norms or internal rules which are foundations to direct behavior to carry out their functions. Duties of directors that delegated to subordinates have assumed to be performed the task in honesty and have a degree of expertise as expected from experience and knowledgeable person.

The policy in the business judgment law described in Article 92 paragraph 2 of Law No. 40 of 2007 concerning Limited Liability Companies in the form of "policies per under the norms in similar business worlds." Except in setting these policies containing elements of authority abuse or obtaining benefits under the determined policies for individual or other purposes causing deprivation. This contradicts with the duty to exercise care principle in fiduciary duty, therefore the policy-makers can be held accountable for their actions. If the decided policy has caused no kickback, the referred official in the management of the company with full (carefully), diligently, and skillfully should not be held accountable. Unlike the case of PT PLN in the North Sumatra Generating Area according to decision No: 40/pid.sus.k/2014/PT-MDN contains elements of authority abuse.

Both of the problems in the case above occur in a State-Owned Business Entity (hereinafter referred to as SOBE) that holds a very strategic role that carrying out multiple functions as an agent of development and social functions for the welfare of its people. Therefore the dual function referred to in the SOBE management contains various risks, whether business risk or the risk of fraud that usually referred to as business crime. SOBE, as defined by Law No. 19 of 2003 concerning State-Owned Enterprises, which defined as a business entity that its asset (either partial or up to the hilt) is owned by the state by means of direct participation that derives from separate state assets. Whereas in paragraph 2 of Law No.19/2003, Limited Liability Company is a SOBE in the form of Limited Company. Therefore the company applies all provisions and principles according to those stipulated in Law Number 40 of 2007 concerning Limited Liability Companies.

At present, the problems concerning SOBE, especially those in the form of Limited Liability Companies, have received much attention and public attention from legal experts, non-governmental organizations and law enforcement officials. Business losses in SOBE will certainly relate to legal rules which are the responsibility of officials or directors in managing the company. This responsibility arises because of the rules of several laws and regulations, namely Law No. 19 of 2003 concerning SOBE, Law No. 40 of 2007 concerning Limited Liability Companies, Law No. 17 of 2003 concerning State Finance. In simple terms, it can be interpreted that SOBE is a business entity that carries out business activities which at least 51% of the capital owned by the state. It also confirmed by the existence of Law No. 17 of 2003 concerning State Finance that SOBE capital is separated from the state expenditure budget is still considered as state finance. Therefore in the business transactions conducted by SOBE Company and incidentally incur losses, are considered to be detrimental to the country's finances. The culprit, therefore, was accused of violating Law No. 20 of 2001 concerning

changes to Law No. 31 of 1999 concerning Eradication of Corruption Crime, because it inflicts a loss in state finances. Interesting characters in Limited Liability Company legal status as legal entities that have separate assets with their capital owners or separate legal entities and their capital is divided into shares. Such consequences for Liability company to separate themselves from their owner influence, regardless of SOBE controlled by the state and this to describe state assets deposited through SOBE is separated wealth because corporations or have their budget, recording process, and financial management which are backed up with the company internal rules and applies the legal principle (lex specialist).

There are some rules that address the director's responsibility related to company management detrimental based on Law Number 40 Year 2007 concerning Limited Liability Companies. It can be explained in Article 92 paragraph (I) of the Company Law which states that the directors carry out the management for the company benefit in accordance with the company goals and objectives. The responsibility implies that the directors are assigned and authorized to regulate or manage the activities of a limited liability company; take care of the limited company assets; must comply with the rules and not violate the company's articles of association rules. In Article 5 of the SOBE Law states "(1) Management of SOBE is carried out by directors; (2) directors are fully responsible for the management of SOBE both inside and outside the court; legislation and must implement the principles of professionalism, efficiency, transparency, independence, accountability, accountability and fairness".

In terms of the mission, definition, purpose and affirmation of the good corporate governance principles implementation, as affirmed in Article 5 paragraph (3) of the SOBE Law to different directors between Private Limited Companies and SOBE. Therefore, as in legal cases, law enforcement officials in deciding cases pay also attention to the two positions of the said legal rules. However, it can also be considered that based on the principles that apply to limited liability companies in general, a limited liability company as an independent legal entity has its assets or separate from the personal shareholder's assets. So that if a company experiences or suffers a loss, the shareholders are only limited to the amount of capital invested in the company and do not involve personal assets. While the state-owned assets of limited companies are unclear because they are included as state assets or state finances. What certain is when a state-owned company or a project that has the elements of State Capital Inclusion and the results turn out making the country a loss, the law enforcement officers would immediately ensnare it into the Corruption Law. This arising some concerns in making decisions that affect officials in managing the company, resulting in a hesitation that makes a slower and full consideration decision making.

Compared to Indonesia, The legal system in Malaysia applies Britain common law legal system, i.e. Companies Law Act 1965 as well as the Indonesian regulation in Company Law No. 40 the Year 2007. Company law in Malaysia, a Directors Board is required to disclose or declare if they have interests related to agreements, property or other matters relating to the company. Section 131 sub-section (1) Company Act 1965 states that "every director of a company who is anyway, whether direct or indirectly, is interested in a contract or proposed contract with the company, as soon as practicable after the relevant the facts have come to his knowledge, declaring the nature of his interest at a meeting of the directors of the company" [12]. Meanwhile, regarding to the properties authorization by the director that must be reported during the company director's meeting, section 131 sub-section (5) regulates that "every director of a company that holds any office or property is whether or not or interstitial be created in conflict with his duties or interests and directors meeting of the directors of the company and the nature, character and extent of the conflict" [12]. The Companies Act 1965 Malaysia also regulates business valuation (BJR) which provides directors protection from corporate claims if certain requirements are met based on section 132 (1B) of CA 1965. Therefore according to the CA 1965 referred to as long as business valuation does not violate legal obligations as required by section 132 (1B) directors are given legal protection [13].

According to those reasons, the directors' business judgment and management decisions were proven wrong and risk-taking that resulted in company loss. However, the decision can be considered

right if the wrong decision comes from an application of responsibility, honesty, and inset for the best interest for company [12]. Therefore the directors' duties are related to business decisions by taking into account the 1965 Malaysian Company Law (CA), obligations held by company directors are under general law and equality regulated in section 132 (1A) [14]. As an example, Elias [15] stated In Malaysia, the High Court in Mohd Shuaib Ishak v Celcom Berhad in the year 2011, said that the rule was inapplicable and that it has the discretion to interfere with the management decision in this case. However, the court decided that the Committee of Independent Director's decision was an exercise of the prudent business judgment rule by a completely honest and disinterested section based on independent legal advice. Another related case is the Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors, the High Court deliberately showed their repudiation to get involved or interfere with the so-called company directors' business wisdom or their management decisions. The court had said, "When hard-nosed businessmen enter into an investment opportunity, they have to expect a risk of loss, as well as an expectancy of profits [15]. The court cannot be expected to provide an exit mechanism for them when an investment turns sour. As is sometimes said, the court cannot be expected to conduct a judicial review of business judgments." The courts do not want to superimpose their views on the director's" business judgment.

One of the most recent case examples in Malaysia is the case of Petra Perdana Berhad Court in decision number No.02(f)-7-03/2016, where the three perpetrators were previously Executive Chairman, CEO, and one other person was a non-director member [16]. Due to cash flow problems, the defendant has decided to sell shares in a very significant amount to raise funds to respond to the problem. The defendant later was removed from their position as the directors due to a shareholder dispute, and under the new management, the company put a lawsuit for their decision. However, at the end of the High Court trial, the Court dismissed Petra Prime's suit. The Court essentially found that the directors had not breached their duty to act as the best interest of the company.

The Court of Appeal reversed the findings of the High Court. In particular, the Court of Appeal focused on the mandate provided by the shareholders. It was decided that the shareholders' resolution act as the assessment barometer of what is in the company's best interest when the directors are about to act in one. Therefore, due to the failure of complying the shareholders' restriction, the directors judged to be failed in act for the sake of company's best interest. Thus, it can be concluded that the Business Judgement Rules have been implied and protect the director from the lawsuit. This is different from the two example case in Indonesia where the defendant has been punished in jail due to his action.

4 Conclusion

Based on the above cases, it can be considered that the applied principles in limited liability companies in Indonesia generally act as an independent legal entity that has its assets or separates from the personal shareholders' assets. Therefore, if a company experiences or suffers a loss, the shareholders are only limited to the amount of capital invested in the company and do not involve personal assets. It should also be considered that the court in Indonesia must comprehend the policy taken must have been carefully thought by the top decision-makers and not repetitive or routine activities but activities related to the rules. However, due to the fear of the lack of protection that can ensnare officials and directors in criminal acts will raise a doubt caused by concerns in making decisions. This makes the decisions taken will be slow and considerate. In reality, there are profits and losses that the company gets in its business activities, but business ethics can be a limitation for the carried out business activities. In contrast to Indonesian court, several cases about director decisions in Malaysian court were proven to protect the director from the lawsuit when the decision has proven to be for the sake of company, even there is a loss. Thus, it can be concluded that Indonesia has not fully implemented the business judgment rule compared to Malaysia.

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