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Implementation of the Doctrine of Business Judgment Rule in Management of Limited Liability Companies

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Abstract

This research was conducted to determine the implementation of the business judgment rule doctrine in the management of a limited liability company. The problems are going to study are: first a pa duties, obligations and powers of directors under the company law? The second problem, namely what are the elements of prudence and good faith in relation to the responsibilities of the board of directors? The approach used in this study is the approach of legislation (statute approach), and the conceptual approach. The method of analysis of legal materials used in this study is a normative method, namely prescription with deductive-indicative reasoning to produce propositions or concepts as an answer to the problem under study. The results showed that the first, directors in carrying out the duties, obligations and authority under company law should be based on the principles of fiduciary duty, namely that of directors in managing and running the company must comply with the intent and purpose as well as the company's business. The Board of Directors carries out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company. In addition, the board of directors has the authority to carry out management in accordance with the policies that are deemed appropriate, within the limits stipulated in the laws and / or articles of association of the company. Second, the element of prudence and good faith in relation to the responsibilities of the board of directors, namely as referred to in Article 97 paragraph (5), that members of the board of directors cannot be held responsible for personal losses if they can prove that: (a) the loss was not due to their fault or negligence. ; (b) the board of directors has carried out the management in good faith and prudently for the interest of and in accordance with the aims and objectives of the company; (c) the board of directors does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and (d) have taken steps to prevent the loss from arising or continuing.

Keywords: *Directors; Business Judgment Rule*

Introduction

1. Background

The provisions of Article 1 number 5 of Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPT) explain that the board of directors is a corporate organ that has the authority and full responsibility for the management of the company for the interests of the company, in accordance with the company's aims and objectives and representing the company, both inside and outside the court in accordance with the provisions of the articles of association. Furthermore,

the provisions of Article 92 paragraph (1) of the Company Law state that the directors in carrying out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company. This provision means that the trust given by the company to the board of directors is based on the principle of *fiduciary duty,* so as an organ of the company that carries out business activities according to the company's goals and objectives, the directors are certainly exposed to business risks. The business risk is sometimes beyond the maximum ability of the board of directors. Therefore, in order to protect the inability caused by human limitations, directors are protected by the *business judgment rule* doctrine.

What the business judgment rule and how can doctrine be reason justification for directors in performing the maintenance of the company in the event of losses suffered by the company? In fact, these losses are used as the basis for errors which should be accounted for by the board of directors. That is why the business judgment rule doctrine exists to provide legal protection to directors who should be held accountable.

Business judgment rule (the principle of fair business management) is a doctrine or principle in company law which states that company managers are obliged to carry out their duties in managing the company based on fair, sound and wise business principles.[1] The same thing was stated by Henry Campbell Black in Black's Law Dictionary[2] which states that *this rule(business judgment rule) immunizes management from liability in corporate transactions undertaken within both power of corporation and authority of management where there is reasonable basis to indicate that the transaction was made with due care and in good faith* . (This rule provides immunity to management from corporate responsibility taken in terms of corporate power and management authority where there are reasonable grounds to indicate that the transaction was conducted with care and in good faith).

Description in Black's Law mentioned above illustrates that the trust / trustee company to the directors to be executed as well as possible in order all business risks in the form of loss that may arise in the management of the company in question, can be accounted for by rational and have a strong reason from a legal standpoint. That reason is what frees the board of directors from all legal responsibility in relation to elements of errors that may occur.

Another opinion was expressed by Angela Schneeman, as quoted by Ridwan Khairandy,[3] whereas the company directors are not responsible for losses arising from an act of decision making, if the action is based on good faith and prudence. The problem is that good faith and conscience are vague norms that can be interpreted unilaterally by each party according to their respective interests. In connection with the vagueness of the norm, the study was designed to answer what just elements of faith better and elements of the precautionary principle that, which should be owned by directors in carrying out its duties and authorities, as a justification in making business decisions so they can freely from legal liability.

Based on the background as described above, this research focuses on reviewing the duties, obligations and authority of the board of directors according to company law on the one hand and on the other hand examines the elements of prudence and good faith in relation to the responsibilities of the directors.

2. Formulation of the Problem

a. What are the duties, obligations and authorities of the board of directors according to company law?

[1] Normin S. Pakpahan, *ELIPS Economic Law Dictionary,* ELIPS Project, Jakarta, 1997, p. 17.
[2] Henry Campbell Black, *Black Law Dictionary,* West Publishing Co, ST. Paul Minn, 1990, p. 200.
[3] Ridwan Khairandy, *Limited Liability Company Law,* UII Press, Yogyakarta, 2004, p. 303.

b. What are the elements of prudence and good faith in relation to the responsibilities of the board of directors?

3. Specific Purpose and Benefits

a. To review the duties, obligations and authority of the board of directors according to company law
b. To examine the elements of prudence and good faith in relation to the responsibilities of the board of directors

4. Urgency (Priority) of Research

a. Get an overview of the responsibilities of the board of directors based on the source of their authority and skills.
b. Get an overview of the collegial responsibilities of directors and their exceptions.
c. Get an idea of the urgency of the dissenting opinion.
d. Enrich the study of limited liability companies for legal education both for students, the general public and for corporate law practitioners.

5. Findings / Innovations and Targeted Social Engineering

This research is expected to contribute to legal development in general and corporate law in particular. In the sense that the results of this study are expected to be answered a description of the responsibilities of directors based on the source of authority and skill, collegial responsibility of directors and its exceptions as well as the urgency of a dissenting opinion that in the end the directors have a strong legal reasons for not blamed legally.

Literature Review

1. Requirements to become a Director of a Private Company

The general requirements to become a member of the board of directors of a limited liability company are very simple, namely an individual who is capable of taking legal actions (Article 93 paragraph (1) of the Company Law). Understanding sentences of "individuals" in the origin 93 paragraph (1) of the Company Law that clearly show the "human being" (*natural person*) and prohibit members of the board of directors chaired by a body of law (*rechtpersoon*) as recognized in several other countries including Hong Kong.[4]

The understanding of being able to do legal acts is also very important. Is every person legally competent? Indeed, basically everyone is capable of doing legal actions, unless prohibited by law. This means that there are people who are legally unable to carry out legal actions because they are prohibited by law. M hey incompetent to do law because: (a) In reality *(feitelijke handelings-onbekwaam)* like crazy, drunk people; (b) juridically *(jurudictie handelingsonbekwaam)*, namely those who are declared incapable of carrying out certain legal acts, such as minors.[5]

In civil law, there is also a group of people who are "not or less competent" in committing legal actions, namely those who are placed under supervision (*curatele*) who always have to be represented by their parents, guardians or curators. Those who are put under the supervision (*curatele*) are adults who

[4] Benny S. Tabalujan, and Valeri Du Toit-Low, *Singapore Business Law,* Business Law Asia, Singapore, 2003, p. 267.
[5] H.Mashudi and Mohammad Chidir Ali,*Chapters of Engagement Law(Elementary Definitions)* Mandar Maju,Bandung,1995, p. 120.

suffer from mental illness and have given up their wealth. The position of an immature person where the person concerned can no longer perform legal actions legally.[6]

The general requirement to become a member of the board of directors is stated by P origin 93 paragraph (1) of the Company Law, namely those who are capable of committing legal actions do not automatically apply, but there are filters that must be passed, namely people who are capable of carrying out such legal acts within a period of 5 (five) years prior to their appointment: (i) Never been declared bankrupt; (ii) Has never been a member of the board of directors or board of commissioners who was found guilty of causing a company to go bankrupt; or (iii) Never been convicted of committing a crime that caused losses to state finances and / or was related to the financial sector.

The determination of the period of 5 (five) years is from the date of issuance of a court decision which has permanent legal force (Explanation of P origin 93 paragraph (1) of the Company Law). In order to prove the fulfillment of the requirements for bankruptcy exemption, freedom as a cause of bankruptcy, and freedom from the convicted status, the P of 93 paragraphs (2) of the Company Law requires that prospective members of the board of directors submit this statement letter to be kept by the company.

The requirement for a statement letter from a candidate for a member of the board of directors becomes the basis for the company's proactive action (for the board of directors), and not passive, to request the statement letter before the candidate for a member of the board of directors is passed to become a member of the company's board of directors through the GMS. This action is certainly not related to an independent examination at judicial bodies (both commercial and state courts, including the Supreme Court of the Republic of Indonesia) regarding whether the candidate for a member of the board of directors is in fact correct according to the contents of the statement letter submitted by the candidate for member of the board of directors to the company.

Even though the P origin 93 UUPT solely regulates the obligations of a candidate member of the board of directors with the company in relation to a statement letter, the candidate member of the board of directors should issue a statement letter with the content (substance) that matches the actual facts, because according to the original P of 95 paragraph (1) The Company Law, the appointment of a candidate member of the board of directors will be null and void if the other members of the board of directors (if there is more than one member of the board of directors) or the board of commissioners know that the requirements as contained in the original P 93 UUPT are not fulfilled . Article 95 paragraph (1) of the Company Law states that the suspicion of a member of the board of directors who does not meet the requirements as meant in P of 93 is null and void because of the law since the other member of the board of directors or the board of commissioners finds out that these requirements have not been fulfilled.

2. Requirements of Being the Director of Public Companies

The general requirements for members of the board of directors by the relevant agencies can be added with requirements (Article 93 paragraph (2) Company Law). Directors of a listed company (PT Tbk / *Public Company*), for example, emphasize "good reputation" as evidenced by:

a. There was never convicted of committing criminal offense within 10 (ten) years;
b. Has never been declared bankrupt;
c. Has never been found guilty of causing a company that was or is being led to be declared bankrupt;
d. Has never been dishonorably dismissed from a job within the last 5 (five) years;
e. Not under interdiction.[7]

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[6] Subekti, *Principles of Civil Law,* Intermasa, Jakarta, 1982, p. 20-57.

[7] Part III. 1.10 of regulation No. 1-A regarding the listing of shares and equity securities other than shares issued by the Listed Company (Decree of the Board of Directors of the Jakarta Stock Exchange No. KEP-305 / BEJ / 07-2004 dated 19 July

Clearly, the requirement to become the director of a public company (public) are "heavy" and these terms will tend to be more robust and heavy considering the development of capital markets are rapidly coupled with the variety of capital markets transactions, all of which require the directors listed company reliable, capable, and consistently implement *fiduciary duties* - her and certainly understand the prevailing capital market regulations. Understanding of statutory regulations, including capital market regulations, is essential for the board of public companies regardless of the academic background and work experience of the director concerned, one way or another in order to apply the principles of *good operational governance* (GCG) and to avoid cases. - Capital market cases.[8]

3. Preliminary Study and Research *Roadmap*

The previous research road map of this group that is relevant to this research: Issuers Responsibilities due to Securities *Delisting* on the Exchange (2019).

Research Method

1. Types of Research and Methods of Approach

The approach used in this study is the approach of legislation (statute approach), and the conceptual approach to law (statute approach), which is an approach to legal research emphasis on finding the norms contained in the statutory provisions. A conceptual approach, which is an approach that departs from the views and doctrines that develop in legal science. Thus, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the legal issues at hand. An understanding of these views and doctrines is the basis for researchers in building a legal argumentation in solving the issues at hand.

2. Sources and Types of Legal Materials

The legal materials used in this research are primary and secondary legal materials. Primary legal materials are legal materials that are authoritative in nature, meaning they have authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation and judges' decisions. Meanwhile, secondary legal materials are in the form of all legal publications which are not official documents. Publications on law include text books, legal dictionaries, legal journals, and commentaries on court decisions. In investigating existing legal materials, the researcher also conducted tracing to the OJK, the Indonesia Stock Exchange in Jakarta and HKHPM in Jakarta.

3. Legal Material Collection Techniques

Legal materials, both primary and secondary obtained will be inventoried and identified for further use in analyzing problems related to this research study. It is hoped that the inventory and identification of legal sources will facilitate the flow of this research. After the sources of legal materials have been inventoried and identified, then all existing sources of legal materials are systematized. This systematization process is also applied to theories, concepts, doctrines and other reference materials.

2004).See Cornelius Simanjuntak *Merger of Public Companies,A Study of Corporate Law,*Citra Aditya Bakti,Bandung,2006, p. 245.

[8] Regarding understanding of Capital Market regulations, the Capital Market-Financial Institution Supervisory Agency (Bapepam-LK) estimates that around 50% of Directors and employees of companies listed in Indonesian companies do not know about Capital Market regulations. The indication can be seen from the Capital Market cases examined by Bapepam LK. See Newspapers about Indonesia Edition dated 29 December 2007

4. Engineering Materials Analysis of Law

The series of stages of inventory, identification and systematization is intended to facilitate research on problems. The series next stage is to conduct analysis using deductive reasoning descriptions are descriptive analytical.

Results and Discussion

1. Duties, Obligations and Authorities of the Board of Directors according to Company Law

The management of the company or often referred to as the board of directors is a company organ that carries out all corporate management activities for the interest and in accordance with the aims and objectives of the company and represents the company both inside and outside the court. Thus, the main task of the board of directors is to manage the company and also its representative functions.

Based on the provisions of Article 92 paragraph (1) of the Company Law, it is stated that the directors carry out the management of the company for the benefits of the company and in accordance with the aims and objectives of the company. Furthermore, Article 92 paragraph (2) of the Company Law states that the board of directors is authorized to run the arrangement in accordance with the development policy that is deemed appropriate, within the limits prescribed in the Company Law or Budget Association of PT. Based on the provisions as described, it can be concluded that the directors of the company has two functions, namely the maintenance functions (management) and representative functions (representation).

In closed companies, shareholders often also become members of the board of directors of the company concerned. Although the director is a shareholder, but when Holders g shares to directors, the shareholder there is a working relationship with the company. In other words, the director or a member of the board of directors is basically a company employee.[9]

In a public company, people who are members of the board of directors are often professionals who are not shareholders in the company concerned. In such conditions, members of the board of directors are purely employees or employees of the company. As a consequence and position, the legal relationship between the board of directors and the company is a work relationship that is subject to labor law or labor law. The consequence and the relationship is the right of members of the board of directors to receive a wage or salary from the company.[10]

Article 96 paragraph (1) of the Company Law states that the provisions for the amount of salary and allowances for members of the board of directors are determined based on the decision of the GMS. Based on the provisions of Article 96 paragraph (2) of the Company Law, it is determined that the authority of the GMS can be delegated to the Board of Commissioners. Then further Article 96 paragraph (3) of the Company Law is added that in this authority delegated to the board of commissioners, the amount and allowances for members of the board of directors are determined based on the decision of the board of directors.

The relationship between the board of directors and the company is not only based on a working relationship, but also a fiduciary relationship with the company. The Board of Directors has a *fiduciary position* in the company.[11] The company as a legal entity performs legal dressings by its

[9] Ridwan Khairandy, *Limited Liability Company Law* , UII Press, Yogyakarta, 2014, p. 256.
[10] *Ibid*
[11] *Ibid*

management. Without a management, the legal entity will not be able to function. Dependence between legal entities and officials be why among legal entities and administrators born fiduciary relationship (*fiduciary duties*) where the board is a party believed to act and to use its influence only for the benefit of the company alone.[12]

Fiduciary (fiduciary) in Latin known as fiduciaries means belief. Technically this term is interpreted as "holding something in trust or someone who holds something in trust for the benefit of people." "Someone has the duty of fiduciary (fiduciary duty) when he has the capacity of a fiduciary (fiduciary capacity). Someone is said to have a capacity of fiduciary if the transaction is business, property or assets they control not for him but for the benefits of others. People who me m give him that authority, have great confidence to him. The trustee must have good faith in carrying out their duties.[13]

Fiduciary duty will be created if there is a fiduciary relationship. Fiduciary relationships have been part of the Anglo-American legal jurisdiction for nearly 250 years. Previously, the definition of a fiduciary relationship was still a long debate. In addition, legal experts and legal practitioners cannot explain when the fiduciary relationship occurred,what actions constitute a fiduciary relationship violation, and what the legal consequences are for the violation.[14] After through a long process of debate, jurists and legal practitioners eventually agree on an initial concept of fiduciary relationship. This concept states that a fiduciary relationship occurs when there are two parties in which one party or (beneficiary) has an obligation to act or provide advice sake and for the benefits of both parties (fiduciary) on issues certain that there is within the scope of the relationship.[15]

The most common forms of fiduciary relationships include trustee beneficiary, principal-agent, corporate director/officer-corporation, and partner-partnership. However, the court emphasized that the form of a fiduciary relationship is not just that.

Fiduciary duty in correcting will provide meaningful protection for shareholders and the company. H a l is due to the shareholders and the company cannot fully protect itself and directors adverse action where the board of directors acting on behalf of companies and shareholders. Thus, in order to avoid misuse of company assets and authority by the board of directors, the board of directors is charged with a fiduciary duty.[16] Usually, the directors' fiduciary duty is divided into two main components, namely the duty of care and the duty of loyalty. Duty of care is essentially an obligation of directors to not act negligently, apply a high level of accuracy in gathering the information used to make business decisions, and execute business management with reasonable care and prudence that makes sense. The duty of loyalty includes the obligation of the board of directors not to place their personal interests above the company's interests in conducting transactions where the transactions can benefit the directors by using fees borne by the company or corporate opportunity. Duty of loyalty can also be understood as an obligation to act without selfishness or the obligation of the beneficiary to prioritize his fiduciary interests.[17]

These two obligations are often subdivided into several obligations such as the duty of honesty, duty of condor, and duty of disclosure. These obligations constitute the development and application of the directors' fiduciary duties in general for certain circumstances. Words other, these obligations only boasts a convenient model for t u makes it easy to explore the concept of fiduciary duty if applied in a particular situation.[18]

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[12] Bambang Kesowo, *Fiduciary Dimes Directors of Limited Liability Companies According to Law no. 1 of 1995, Newslatter* , NO. 23 / VI / December / 1995. p.1.
[13] Munir Fuady, *Modern Doctrines in Corporate Law in Indonesian Law,* Citra Aditya Bakti Bandung, 2002, p.33.
[14] Ridwan Khairandi, Op. Cit. p. 258
[15] *Ibid*
[16] *Ibid*
[17] *Ibid*
[18] *Ibid*

The daily management of a limited liability company is carried out by the board of directors. The existence of the board of directors in an organ of the company is a must. This means that the company is essentially a legal entity, namely an artificial person, where the company cannot do anything without the assistance of a member of the board of directors as a natural person.

Based on fiduciary duty, the directors of a company are given high trust by the company to manage a company. In this case, the board of directors must have high standards of integrity and loyalty, appear and act in the interests of the company, in a good manner (bonafides).[19]

The Board of Directors must also be able to interpret and implement the company's policies properly in the interests of the company, promote the company, increase the value of the company's shares, generate profits for the company, shareholders and stakeholders. Based on the authority that is in it (purposes*)*, the board of directors must be able to express and carry out their duties properly, so that the company always runs in the right or proper path. Thus, the board of directors must be able to avoid the company and actions that are illegal, contrary to regulations and public interest and contrary to agreements made with other corporate organs, shareholders and stakeholders.[20]

Based on the various descriptions above, it can be said that a fiduciary relationship arises when one party is doing something for the benefit of another party to the exclusion of its own personal interests. Fiduciary duty contains the following principles:[21]

a. The Board of Directors does not perform its duties by doing it for personal interest or the interest of a third party without the consent and or the company's knowledge;
b. The Board of Directors may not take advantage of its position as a manager to gain benefits, either for itself or a third party, except with the company's approval; and
c. The board of directors does not use or manipulate the company's assets for its own or third party interests.

In addition, the boards of directors in the company also have to pay attention to things -things that are negative on the company, such as unfettered discretion, meaning her that directors should not be shackled by the desire to make policy outside the authority. In this sense, directors must be able to resist various interventions from shareholders that force them to take policies for their personal interests or motives.[22]

Because of the position of directors who are fiduciary who by the Company Law to certain limits is recognized, then the sole responsibility of the directors to be very high (high degree). Not only is responsible against intentional dishonesty (Dishonesty), but he also takes responsibility legally to act mismanagement, negligence or failure or not doing something important for the company.[23]

Article 97 paragraph (2) of Company Law states that every member of the board of directors is obliged to carry out their duties in good faith and full of responsibility for the interests and business of the company. Thus the board of directors is fully responsible for the management of the company, which means that fiduciary must implement the d of care standard. Fiduciary duty is a task carried out by the director with full responsibility for the benefit of other people or parties (the company).

[19] *Ibid*
[20] Misahardi Wilamarta, *Op.Cit* . p. 135.
[21] Chatatmarrasjid, Breakthrough of the *Company's veil and corporate legal* matters, Citra Aditya Bakti, Bandung, 2004, p. 196-197
[22] Misahardi Wilamarta, *Op. Cit* , p. 135-136
[23] *ibid*

In carrying out the task of *fiduciary duties* a dire k s i duties as follows:[24]

a. Done with good faith;
b. Performed with proper purposes;
c. Performed with responsible freedom; and
d. Do not have a conflict duty of interest.

Therefore, in case of conflict of obligations (conflict of duty) and conflicts of interest at the time of running the company, the directors must be able to manage wisely various conflicts as a result of differences in the interests of shareholders. However, in practice, the management of these differing interests can appear in many forms, for example made various agreements benefiting the company, do not hide any information for personal gain, abuse trust and commit unfair competition.[25]

In addition to obligations based on *fiduciary duty,* directors still have obligations, namely:

a. Duty of care ;
b. Duties of loyalty;
c. Duty of skill ; and
d. Duty to act lawfully.

Ad 1. Duty of Care

The director in running the company based on the existing authority must always be alert and act with careful calculations. In the policies he makes, the director must always act with caution and consider the circumstances, conditions and large management costs. In their duty of care, directors are required to be legally responsible and this duty of care must be applied to directors in making any company policies and in supervising and monitoring the company's activities. With this duty of care, directors are required to act prudently in making all decisions and company policies. In making each policy, the board of directors must take into account all the information properly and fairly.[26]

Standard of care is a sign that required someone to act unt uk regard to all ri siko, dangers and pitfalls that exist and either be a yes u ntuk minimizing the emergence of risk-ri siko, so that in the acts of the directors should apply the precautionary principle and precision, in order to avoid all unwanted possibilities.[27]

In connection with the *duty reasonable care* , then *busines s judgment rule* in an effort pembel a late ourselves for directors in managing the company. *Busines s judgment rule* postulates that seor a ng directors shall not be accountable jawabanny a personally for actions undertaken in their capacity as directors when the board of directors believes that the actions taken his is the best for the company and is fair, let t i kad good only for the benefit of the company.[28]

Ad.2. Duties of Loy alty

A loyal attitude that must be shown by the board of directors in the company is one based on rational and professional considerations. In other words, the board of directors must be able to act firmly in accordance with the vision and mission equivalent to the company's articles of association. The purpose of loyalty is that directors must always think about the interests of the company they lead.

[24] Munir Fuady, *New Paradikma Limited Liability Company* , Citra Aditya Bakti, Bandung, 2003, p.82
[25] Misahardi Wilamarta, *Op. Cit* , p. 135-136
[26] *ibid*
[27] *ibid*
[28] *ibid*

Directors who are entrusted by shareholders must act in the interests of shareholders and stakeholders, act for the interests and objectives of the company, and act with the interests of the company above personal interests first.[29]

So in this case, obedience and dedication to the company are the main duties and obligations of the board of directors. The Board of Directors is prohibited from using their position to prioritize personal interests over the interests of the company that have given them confidence and any legal actions that benefit the directors personally and harm the company are contrary to the duty of loyalty.

Regarding the duty of loyalty, directors are also prohibited from doing things such as competing with companies that aim to destroy the company, seizing opportunities that exist in the company, realizing personal benefits derived from material information using company assets for their personal interests, and participating as well as in making agreements that give rise to a conflict of interest.[30]

Ad. 3. Duties of S kill

The ability or expertise to manage a company is a requirement that must be possessed by directors and commissioners. S sa helm of a company, a professional qualification is a requirement that cannot be compromised.

Directors must have the expertise and knowledge to manage a company. Several provisions regarding the requirements to be appointed as a director are between the ages of 21-55 years, a minimum of S1 education, passing a psychological test and have had work experience at a similar company for at least 5 years. For certain companies, directors must first have a fit and proper test.

Ad.4. Duties to Act Lawfully

Directors who are entrusted by shareholders are obliged to lead the company in accordance with applicable laws or regulations. If the board of directors knows that the act they are about to commit is contrary to applicable laws or regulations, the management of the company should not have done so. In carrying out the duties of the company, the Board of Directors must comply with the provisions of the Company Law and the company's articles of association, these duties must be carried out with due care, good faith, consequence and consistency.

The Board of Directors must also comply with all kinds of applicable legal provisions, especially laws concerning PT business entities, such as tax law, civil law, labor law, land law, environmental law, and building law as long as they are related to the company's business activities and implementing regulations has to do with the company.

In connection with these fiduciary obligations, traditionally in the common law system, there is a distinction between the duty of care (the obligation to be careful and the duty of good faith) and the duty of loyalty. In Dutch law, the duty of care is formulated with the term "properly carrying out the obligation to manage or supervise the company." Duty of good faith is a part that requires the act to be proper and rational. It has been explained above that directors have the obligation to carry out the mandate given by the company (fiduciary duties). With this mandate, members of the board of directors are obliged to carry out the management of the company as best as possible, solely for the benefit of the company. Members of the board of directors may not use the company for their personal gain. In addition, members of the board of directors are also required to carry out the management of the company based on the principle of prudence and accuracy (duty of care).

[29] Ridwan Khairandy, *Op.Cit* , p. 260
[30] *ibid*

If a member of the board of directors abuses his position as a trustee of the company or if he is guilty or negligent in carrying out his duties which has resulted in the company suffering a loss, then each member of the board of directors is personally responsible. In this regard, Article 97 paragraph (3) of the Company Law determines that each member of the board of directors is fully responsible personally for this loss of the company if the person concerned is guilty or negligent in carrying out his duties in managing the company.

Article 97 paragraph (4) of the Company Law determines that if the board of directors consists of 2 (two) or more members of the board of directors, this individual responsibility shall jointly and severally apply to each member of the board of directors. However, if members of the board of directors can prove that as determined by Article 97 paragraph (5) of the Company Law, then the members of the board of directors are not personally responsible. This provision states that a member of the board of directors cannot be held personally accountable for losses that befell the company if he can prove:

a. The loss is not due to his fault or negligence;
b. Has carried out the management in good faith and prudently in accordance with the aims and objectives of the company;
c. Do not have a conflict of interest, either directly or indirectly, on management actions that result in losses; and
d. Have taken steps to prevent the loss from arising or continuing.

Actually, the directors are only entitled and authorized to act on behalf of and for the interests of the company within the limits permitted by the prevailing laws and regulations and its articles of association. Any action taken by the board of directors outside of the given authority is known as ultra vires action. The legal action of the board of directors is said to be ultra vires if it exceeds the limits of authority stated in the articles of association and statutory regulations.[31]

In carrying out the management of the company, the Board of Directors is not only bound by what is expressly stated in the aims and objectives and business activities of the company but can also support or expedite its (secondary) duties, but still within the permitted limits or within the scope of its duties and obligations. (intra vires) as long as it is in accordance with habit, reasonableness, and propriety (no ultra vires).[32] Fred B. G. Tumbuan[33] distinguish between acts *intra vires* and *ultra vires* . Actions that are explicitly or implicitly included in the ability to act of a limited liability company (including the aims and objectives of the limited liability company) are *intra vires* actions. Actions that are outside the limited liability company (not covered by the aims and objectives of the limited liability company) are *ultra vires* actions. The definition of ultra vires contains the sense that certain actions, which, if humans do is legitimate, it is in the outside prowess limited liability act as stipulated in the articles of association, or are beyond the scope of the intent and purpose.

According to Fred BG Tumbuan,[34] A legal act is outside the aims and objectives of a limited liability company if one or more of the following criteria are met:

a. The legal actions concerned are expressly prohibited by the articles of association.
b. Taking into account the special circumstances the legal act concerned cannot be said to support the activities mentioned in the articles of association.
c. Taking into account special circumstances, the legal action concerned cannot be interpreted as directed at the interests of a limited liability company.

[31] Gunawan Widjaja, *Responsibilities of the Board of Directors for Limited Liability Company Bankruptcy,* Rajagrafindo Persada, Jakarta, 2003, p. 23
[32] IG Ray Wijaya, *Corporate Law* , Megapoint Division and Kesaint Blanc, Jakarta, 2000, p. 226
[33] Fred BG Tumbuan, *Limited Liability Company and Its Organs (A Sketch),* Paper in Refresher Course at the Indonesian Noaris Association, Surabaya, 1988, p. 4.
[34] *Ibid*

Based on the description above, it can be seen that basically the directors are only entitled and authorized to act on behalf of and for the benefit of the company and within the limits permitted by the laws and regulations and the company's articles of association. Any action taken by the board of directors outside the authority given is not binding on the company. This means that the directors have limitations in acting on behalf of and for the benefit of the company.[35]

The ultra vires doctrine is intended to protect investors or shareholders, namely to prevent directors from committing ultra vires actions or later to obtain compensation from the Company. This is referred to as the internal aspect of ultra vires, while the external and ultra vires aspects are a matter of whether the ultra vires contract binds the third party and the company concerned. Basically, an ultra vires contract is invalid (unlawfully), null and void and cannot be ratified later by a GMS. Thus, the Company may refuse to carry out its obligations under the contract,[36] because it is not binding on the company.

4.2. Elements of Care and Goodwill in Relation to the Responsibilities of the Board of Directors

Every company in carrying out business activities always hopes to get benefits, but in reality this is not always the case. Often in business transactions, the company experiences losses. In fact, it can also end in bankruptcy. Loss is a risk inherent in business activities. All of the company's business activities are carried out by the board of directors. The decision of the board of directors in a corporate transaction contains a number of risks that will result in losses for the company.

Apart from the business judgment rule, in the United States of America, the doctrine of the duty of care is also known. These two principles work together, even though they often seem to clash with each other. The enactment of this doctrine has provided relief because the doctrine of the duty of care has raised deep concerns for members of the company's board of directors in the United States. According to the business judgment rule, the business judgment of members of the board of directors will not be challenged (contested) or rejected by the court or by the shareholders, and these members of the board of directors cannot be held responsible for the consequences arising out of a business judgment has been taken by the member of the board of directors concerned, even if the consideration is wrong, except in certain cases. The business judgment rule is "a presumption that in making a business decision, the directors of corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interest of the company.

Regarding what business actions and considerations are not protected by the business judgment rule, it is very important to be known by the public and judges. According to Sutan Remy Sjahdeini,[37] if we study the decisions of the United States courts, it can be seen that the courts are not uniform in formulating exceptions to the rule. Some courts are of the opinion that a member of the board of directors' judgment can be contested unless the judgment is based on fraud, or creates a conflict of interest, or is an act that violates the law (illegality). Meanwhile, several other courts are of the opinion that a director, who in taking considerations that has caused losses to the company, is not protected by the business judgment rule if the loss is if the loss is the result of gross negligence of the member of the board of directors concerned.

The basic idea of not applying the protection of the business judgment rule for members of the company's board of directors in the event of fraud and conflict of interest , while the members of the board of directors have tried to put their personal interests first or have been compelled to make The conditions for transactions carried out for his personal gain are because the judgment he has taken cannot be said to be "discretionary exercises of power on behalf of the corporation " which the rule wishes to protect. Meanwhile, the idea behind the exception to the enactment of the business judgment rule if there

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[35] Gunawan Widjaja, *Op. Cit* , p. 23
[36] Chatamarrarasjid, *Op.Cit.* , pg. 44-41.
[37] Sutan Remy Sjahdeini, *Bankruptcy Law,* Pustaka Utama Grafiti, Jakarta, 2002, p. 430.

is an illegality exception is that “shareholders derivative suits can be a useful supplement to the enforcement activities of public prosecutors and regulatory agencies.[38]

At first glance it seems doctrine business judgment rule designated enactment force doctrine duty of care. Practically all courts in the United States agree that members of the Board of Directors do not have to be responsible for the loss of the company if the members of the Board of Directors take a judgment in good faith. However, most of the courts also argued that the members of the board of directors should not act negligently or commit serious negligence (act in a grossly negligent way). If this is the case, then the member of the board of directors concerned must be responsible for the losses the company has caused.

According to Prof. Clark, a law professor at Harvard University Law School, as quoted by Prof. Sutan Remy Sjahdeini,[39] that so that these two doctrines do not collide with each other but can be in line with one another, it is necessary to adhere to the following formulation: “ the directors’ business judgment cannot be attacked unless their judgment was arrived at in negligent manner, or was tainted by fraud, conflict of interest, or illegality . Or otherwise it is formulated that “ the business judgment rule presupposes that reasonable diligence lies behind the judgment in question . Prof. Clark admits that making the two concepts consistent with each other is not easy because separating what is called an honest mistake and a negligent mistake is very difficult to do.

United States court jurisprudence in the case of Francis v. United Jersey Bank, 432 A.2d 814 (NJ 1981) offers very useful guidelines to serve as guidance for every member of the company’s board of directors in carrying out their duties, namely that members of the board of directors must:[40]

a. Have a good understanding of the company business he leads.
b. From time to time know about the company’s business activities.
c. Monitor the company’s activities.
d. Attend Board of Directors meetings regularly.
e. Reviewing the company’s financial reports regularly.
f. Ask if you have questionable problems.
g. Express an objection to the conduct of acts that are clearly against the law.
h. Consult with company *counsel.*
i. Resign if the improvements that must be made are not carried out.

That is why the recommendations submitted by Prof. Sutan Remy Sjahdeini stated that the contents of the two doctrines above can be used to fill in or be used as a reference in applying the principles of good faith “and” the principle of responsibility “as meant in Article 92 of the Company Law, details of these references should be specified in a new law as completeness of the Company Law, namely the Law on “Responsibilities of Directors of Limited Liability Companies”. England has such a law, namely the Directors Liability Act (1890). The Indonesian courts should also actively develop a standard of care through various sentence.[41]

In connection with the company’s losses, this loss does not automatically become the responsibility of the directors. Sometimes the directors are released to assume this responsibility. Issues relating to the possibility that directors not be held by the responsibility of on losses that, then it certainly should be considered legal doctrine in company law that is doctrine of law business judgment rule.[42]

[38] *Ibid*
[39] *Ibid*
[40] *Ibid*
[41] *Ibid*
[42] http://law.academic.ru/ IO9995 / business_judment_rule

According to the Academic Dictionary and Encyclopedia, business judgment rule is a legal doctrine that teaches that the director or employee of the company responsible to shareholders for a loss because of a judgment or business actions that result in the loss of the company in all such decisions are still within the scope of its authority, based on good faith without any conflict of interest, honest and rational, and the action is carried out solely for the benefit of the company.

According to Angela Schneeman, the doctrine of *business judgment rule* is taught that company directors are not liable for losses incurred and a decision-making action, if such action is based on good faith and careful. The Board of Directors has legal protection without the need to obtain justification from the shareholders or the court for the decisions they make in the context of managing the company.[43]

The court acknowledged that the decisions made by the directors involved a number of risks, including: that the business judgment rule encouraged directors to take risks rather than be too careful, so that the company did not work as it should. This principle reflects the assumption that courts cannot make better certainty in the field of business than that of directors. Judges generally lack business skills and start studying problems after the facts have emerged.

Thus, the actions taken by several company directors who run the company, including making investments that are deemed to be detrimental to the state and subsequently being accused of corruption, should be questioned for their correctness or accuracy. Moreover, if the thing that is being accused to the directors is a loss that has occurred in a business transaction due to an error by the directors, he can be held accountable.

If the actions of the board of directors that cause losses are not based on good faith, then this can be categorized as a violation of fiduciary duty which creates personal responsibility. For example, if the board of directors invests the funds owned by the company which is based on good faith and solely for the interests and profits of the company, the investment action is based on the consideration of an investment analyst who works according to professional standards, but in fact causes losses to the company does not automatically arise. Personal responsibility of the board of directors. According to Angela Schneeman, the business judgment rule doctrine protects a director or company employee for the responsibility of business decisions made based on:[44]

a. Good faith;
b. The director or employee of the company has no interest in the business decision;
c. D he Director or employee of the company acting on matters relating to the business decision taken directors or employees terse but rational and appropriate; and
d. D he Director or employee of the company in a rational business decisions are solely for the benefit of the company.

The doctrine of business judgment (business judgment rule), which is a reflection of the independence of discretion and the board of directors in providing business decisions, is a protection for directors who have good faith in carrying out their duties as directors. Only mistakes in making decisions (mere error of judgment or honest mistakes) cannot be held responsible to the board of directors.[45] This business judgment rule doctrine applies side by side with other doctrines that are more burdensome to the position of the board of directors, such as the doctrine of fiduciary duty due care and loyalty, derivative suits, piercing the corporate veil, ultra vires, proper our dose, and others. Each of these doctrines emphasizes a certain different area. On the other hand, in order to fulfill the demands of justice, the business judgment rule doctrine is different in its operational steps. There are directors who are charged with major responsibility for business decisions, such as bank directors; insurance company; fund

[43] *Ibid*
[44] *Ibid*
[45] Munir Fuady, *Modern Doctrines in Corporate Law and Their Existence in Indonesian Law,* Aditya Bakti, Jakarta, 2010, p. 185

management companies, such as mutual funds; and publicly listed companies. In addition, it turns out that to a certain extent and within a certain corridor, the Limited Liability Company Law also enforces the business judgment rule so that this issue becomes even more lively and interesting to discuss.

This business judgment rule is a doctrine that teaches that a decision of the board of directors regarding the company's activities should not be contested by anyone even though the decision later turns out to be wrong or detrimental to the company, as long as the decision meets the following requirements:[46]

a. Decision according to applicable law.
b. Done in good faith.
c. Done with the right purpose (proper purpose).
d. This decision has a rational basis.
e. Done with caution (due care) as practiced by someone who is quite prudent in a similar position.
f. Conducted in a manner that is reasonable (reasonable belief) as the best (best interest) for the company.

Thus, it differs (but does not contradict) other doctrines that are more burdensome to the board of directors, such as the doctrine of fiduciary duty, due care, skill and prudence, derivative lawsuits, piercing the corporate veil, ultra vires, and others. Therefore, the business decision doctrine is more in favor of the board of directors, but it is still within the corridor of general corporate law that the court can conduct scrutiny (assessment) of every decision and board of directors, including business decisions that have been approved by the general meeting of shareholders, as long as to decide whether the decision is in accordance with the applicable law or not. However, this business judgment doctrine is not to judge whether or not it is appropriate with business policy.

The background to the application of this business decision doctrine is because among all parties in the company, it is in accordance with their position. As the board of directors, it is the board of directors who are most authorized and most professional in deciding what is best to do for the company. Meanwhile, if due to the business decision and the board of directors there is a loss for the company, it can still be tolerated to a certain extent considering that not all businesses have to make a profit. In other words, the company must also bear business risks, including the risk of loss. Therefore, the board of directors cannot be held responsible either only for reasons of wrong decision (mere error of judgment) or only for reasons of loss of the company, or only because of actions that fall into the category of miscalculation or mismanagement.

According to the teachings and doctrines of this business decision, because directors are the most competent to run and decide something on the company's business, no one person has the authority to make decisions about the company's business other than the directors. In fact, the court is not allowed to make a second guess on the business decision of the board of directors. Therefore, the lawsuit against the directors in connection with their business decisions based on the error of the board of directors' decisions, are often rejected by courts based on the doctrine of this business decision even though the directors are charged with fiduciary duty which imposes large responsibilities on the shoulders of the directors.

Thus, the real essence of the application of the business decision doctrine is that all parties, including the court, must respect the business decisions taken by people who really understand and have experience in their business, especially in complex business problems. Therefore, they should be given great discretion. Those with experience have knowledge of business, of course, the directors. At least they are more experienced than the judges in court, who know absolutely no business and decide on a number of pointers and opinions from lawyers.

[46] *Ibid*

In principle, the business judgment rule and business judgment doctrine are the same. Only the pronunciation is different.[47] Although it is recognized that there is some literature that tries to distinguish between the term business judgment rule and the term business judgment doctrine. According to them, the term business judgment rule is used as a protection for the board of directors and their responsibility for the legal actions they have taken for the company, while the term business judgment doctrine is used in terms of protecting and avoiding messy transactions made by the directors.

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As has been stated that according to the business decision doctrine, if due to the decision of the business and the directors there is a loss for the company, to a certain extent it is tolerable considering that not all businesses have to make a profit. In other words, the company must also bear business risks, including the risk of loss. Therefore, the board of directors cannot be held responsible just because of the wrong reason in deciding (them error of judgment).

Legal tolerance for errors of directors is only up to certain limits. This means that there are mistakes of directors who are tolerated, but there are also mistakes of directors that cannot be tolerated at all and therefore must be held accountable for the law.

In the company's legal literature, it is often stated that the mistakes of the directors that can be tolerated are as follows:

a. Only wrong in making decisions (them error of judgment).
b. Honest mistakes (honest mistake, honest error in judgment).
c. Company losses due to mistakes of company employees (unless there is no good supervision system).

Meanwhile, the mistakes of the board of directors that must be held accountable are:

a. Errors that are against the principle of fiduciary duty. This includes any elements of a conflict of interest.
b. Errors that are against the principle of due care. In this case, including if there is an element of intent or negligence.
c. Errors that go against the principle of prudence.
d. Mistakes that go against the principle of good faith.
e. Errors that go against the principle of proper purpose.
f. Directors' fault for incompetence.
g. Mistakes because they violate applicable laws and regulations.
h. Errors due to lack of information (ill informed).
i. Mistake because in taking action/decision, the board of directors was too hasty (hasty action).
j. Errors because decisions are made without investigation and rational consideration.

In principle, if the board of directors and a company want to be protected by a judge in a case, then the easiest way for them to obtain such protection is by arguing that the actions of the board of directors are protected by the principle of the business judgment rule.[48] However, in the science of company law, there is a growing teaching that the implementation of the doctrine of business judgment

[47] *Ibid*
[48] Abdurrahman, *A. Encyclopedia of Economics, Finance and Trade,* Pradnja Paramita, Jakarta, 1991, p. 54.

rule is of different degrees and very much depends on the type of company that the directors are concerned with. For the several types of companies listed below, the principles of business judgment rule are more relaxed so that the consequence is that the court will have greater discretion or are more likely to convict the board of directors if there is a loss. The directors who will be asked for greater responsibility are as follows:

a. Bank directors;
b. *Trust* company board of directors;
c. Insurance company directors;
d. Directors of managing companies and a, such as mutual funds; and
e. Directors of public companies / public companies.

For directors like the one above,it is true that a greater legal responsibility is required than other types of directors,based on the following juridical arguments:(1).The directors managing public funds which are already in place must require a greater degree of discretion, greater prudence, and more precise and accurate decisions. (2) The directors are professional directors, with a background, experience, good education, and high salary levels, and are directors who work *full time* for the company.

As already explained, the indications of the application of the *fiduciary duty* theory for directors are seen, among others, in Article 97 and Article 99 of the Company Law, namely as follows:

Article 97 paragraph (1) and (2)

(1) The Board of Directors is responsible for managing the company as referred to in Article 92 paragraph (1).
(2) The management as referred to in paragraph (1), must be carried out by each member of the board of directors in good faith and full of responsibility.

Article 99 paragraph (1)

A member of the board of directors is not authorized to represent the company if:

a. There is a case before the court between the company and the members of the board of directors who travel ; or
b. The member of the board of directors concerned has a conflict of interest with the company.

The agreed provisions and especially Article 97 and also Article 1 paragraph (5) emphasize the duties of fiduciary duties and directors, but in fact only these articles can draw conclusions about whether the business judgment rule is applicable. Article 97 paragraphs (1) and (2) of the Limited Liability Company Law indicates that the Limited Liability Company Law applies the business judgment rule doctrine. And the provisions in Article 97 paragraph (2) and Article 92 paragraph (1) can be concluded that the actions of the directors against the company must be carried out by fulfilling the following three juridical requirements:

a. Good faith;
b. Full of responsibility; and
c. For the interests of the company (proper purpose).

When one and the three juridical elements are not fulfilled, the board of directors is deemed guilty (in anti-intentional) or at least negligent in carrying out his duties so that he must be personally responsible. Thus, it can be concluded juridical that miscalculations, mistakes were honest (honest mistake), or a mistake in taking the decision (mere error in judgment), during not violated one or l ore and the three elements mentioned above, does not yet charged legal obligations to the directors personally,

even though it is possible that the company or shareholders have suffered materially or nonmaterial losses. Therefore, it can be said that up to certain limits, of Law Company Limited is a business decision to impose doctrine (business judgment rule) is.

The validity of this business decision doctrine is more firmly acknowledged by Article 92 paragraph (2) and the official explanation of the Article, by stating that the board of directors is authorized to carry out the management in accordance with policies which he deems appropriate, namely policies which, among other things, are based on expertise, opportunities available, and common in the world of similar businesses.

Conclusion

1. The Board of Directors in carrying out its duties, obligations and authorities according to company law must be based on the principle of fiduciary duty, namely that the directors in managing and running the company must be in accordance with the aims and objectives as well as the company's business. The Board of Directors carries out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company. Apart from that, the board of directors has the authority to carry out the management in accordance with the policies deemed appropriate, within the limits specified in this law and / or the company's articles of association.

2. The element of prudence and good faith in relation to the responsibilities of the board of directors, namely as referred to in Article 97 paragraph (5), that members of the board of directors cannot be held responsible for personal losses if they can prove that: (a) the loss was not due to their fault or negligence ; (b) the board of directors has carried out the management in good faith and prudently for the interest of and in accordance with the aims and objectives of the company; (c) the board of directors does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and (d) have taken steps to prevent the loss from arising or continuing. The errors of the board of directors that can be tolerated are as follows: (a) Only mistakes of judgment; (b) Honest mistakes (honest mistake, honest error in judgment); (c) Company losses due to company employee errors (unless there is no good supervisory system. Meanwhile, the mistakes of directors that must be held accountable are: (a) Errors that are contrary to the principle of fiduciary duty. In this case, this includes if there is an element of a conflict of interest; (b) Errors that are contrary to the principal of prudence (due care). In this case, including if there is an element of intent or negligence; (c) Errors that are contrary to the principle of prudence); (d) Errors contrary to the principle of good faith; (e) Errors contrary to the principle of proper purpose of business (f) Errors of directors due to incompetence; (g) Errors due to violation of laws and regulations applicable; (h) Errors due to lack of information (ill informed); (j) Errors because in taking actions / decisions, directors are too hasty (hasty action); (k) Errors due to decisions taken without investigation and rational judgment.

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