Implementation of the Principle of Business Judgement Rule Doctrine to State-Owned Companies as an Effort to Protect Directors in Good Faith

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Abstract

The Business Judgement Rule is a doctrine that protects Directors in good faith for the Company's losses. The point is that as long as the Board of Directors acts in good faith and solely for the Company's benefit. However, it turns out that the Company still suffers losses. It does not necessarily become the burden of the Board of Directors personal responsibility. Therefore, the Board of Directors cannot be held responsible for the Company's losses if the Board of Directors, in carrying out actions, has fulfilled all its obligations with the principles of good corporate Governance (GCG). If all GCG obligations and principles have been fulfilled, the Board of Directors is categorized as having good faith and cannot be declared wrong. The results of the author's study, in the context of the Business Judgment Rule Doctrine, the losses incurred are normal or reasonable business losses, and therefore the Company is responsible. And no one can be punished if there is no mistake. With the background of the Constitutional Court Decision Number 01/PHPUPres/XVII/2019 (Constitutional Court Decision 01) and two Supreme Court Decisions, the author tries to examine in more detail related to Decision No. 3849/K/Pid.Sus/2019 dated December 2, 2019, on behalf of Defendant Frederick ST Siahaan (former Finance Director of Pertamina) / (Supreme Court Decision 3849) and Decision No. 121K/Pid.Sus/2020 dated March 9, 2020, on behalf of Defendant Karen Agustiawan (former President Director of Pertamina).

I. Introduction

Good corporate governance (GCG) must be applied in every company management, including State-Owned Enterprises (SOEs). One of the important issues that will never be left behind in terms of limited liability company management is the responsibility of the Board of Directors and the principle of business judgment rule, which is a protection for a company, especially State-Owned Enterprises (SOEs) whose capital is partly owned by the state. As a state-owned enterprise, paradigmatically as an extension of the state to control important branches of production for the state, as actors of the national economy must also carry out social functions to prosper the people who are also oriented towards pursuing profits. [1]

State-Owned Enterprises (SOEs) are business entities whose entire or majority of the capital is owned by the state through direct capital participation derived from separated state assets. SOEs are divided into Public Companies (Perum) and Persero Companies (Persero). Perum is a state-owned enterprise whose entire capital is owned by the state and is not divided into shares with the aim of public benefit by providing high-quality goods and services and pursuing profits based on company management principles. Meanwhile, the Company is a state-owned enterprise whose entire or at least 51% (fifty-one per cent) shares are owned by the state to pursue profits.[2] The Company, after this referred to as Limited Liability Company (PT), is a legal entity that is a capital partnership, established based on an agreement, conducts business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in the Law (Law) and its implementing regulations.[3]

However, in its journey, SOE businesses sometimes face laws and regulations if they cause state financial losses. The Board of Directors is faced with legal consequences as mentioned in article 2 and or Article 3 of Law No. 20 of 2001 jo Law No. 31 of 1999 concerning the Eradication of Corruption Criminal Acts (Tipikor Law), administrators and employees of SOEs can be held criminally responsible for alleged criminal acts of corruption for causing state financial losses.

The Company's directors are fiduciary trustees who must behave as trustees. Here the Board of Directors has a fiduciary position in the management of the Company and the mechanism of fair relations. According to the experience of business people adhering to common Law, the relationship can be based on the fiduciary duty theory[4]. The Board of Directors is the life of a company that acts as a management and manager of the Company well or good corporate governance in good faith and full of responsibility. The actions of directors in good faith and responsibility are 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 cause the Company to suffer losses.

However, if in making decisions against the Company, the directors have done it carefully, in good faith, and full of responsibility, then the directors have been protected by the principle of the Business Judgment Rule even though the decision can harm the Company indeed, as the management and manager of the Company, the Board of Directors should be obliged to manage the Company well

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[1] Refly Harun, *BUMN dalam Sudut Pandang Tata Negara, Privatisasi, Holdingisasi, Kontrol, dan Pengawasan, Balai Pustaka*, Jakarta, 2019, hal. 3

[2] Pasal 1 ayat (1), (2), dan (4), Undang-undang Nomor 19 Tahun 200 Tentang Badan Usaha Milik Negara.

[3] Pasal 1 ayat (1) dan (2), Undang-undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas.

[4] Bismar Nasution, "Prinsip Fiduciary Duty dari Direksi" disampaikan pada Seminar Sehari Good Corporate Governance (GCG) PT PLN (Persero), 29 Agustus 2009, www.bismarnasutiom.com, diakses pada tanggal 10 Maret 2023.

(good corporate governance).[5] In good faith and full of responsibility as mandated by article 97 of Law Number 40 of 2007 concerning Limited Liability Companies, the management, as in paragraph 1, must be carried out by every board of directors member with good faith and full of responsibility. As mentioned above, every action of the board of directors based on good faith will certainly be protected by Law as long as the action can be proven by avoiding actions that benefit the personal directors in making an important decision against the Company that results in the Company experiencing losses.

A director can be held personally liable if the management of the Company is carried out not carefully (fiduciary duty), which harms the Company. If in making decisions against the Company, the directors have done so carefully, in good faith and full of 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 derived from the common law system. It is a derivative of United States corporate law to protect the Board of Directors in every decision carried out carefully, in good faith and full of responsibility not to be held criminally and civilly responsible.[6]

But it is not uncommon that his decisions are motivated by personal interests, making them illegal. SOEs are one of the bodies that have always been the attention of the Corruption Eradication Commission as a place prone to corruption in Indonesia. If the Board of Directors conducts transactions without approval from the Board of Commissioners and GMS while it has been regulated as such and results in company losses, then, of course, the actions taken by the Board of Directors are unlawful acts that meet the elements of state losses. The second element is enriching oneself or others. If traced, it can be concluded that in the act of enrichment, there must be an element of acquiring wealth, the acquisition of wealth beyond the acquisition of legitimate sources of wealth, and the existence of wealth sourced from illegitimate sources of wealth, and this act is an unlawful act.

Against the background of Constitutional Court Decision Number 01/ PHPUPres/XVII/2019 (Constitutional Court Decision 01) and two Supreme Court Decisions.[7] The author tries to examine in more detail related to Decision No. 3849/K/Pid.Sus/2019 dated December 2, 2019, on behalf of Defendant Ferederick ST Siahaan (former Finance Director of Pertamina) / (Supreme Court Decision 3849) and Decision No. 121K/Pid.Sus/2020, dated March 9, 2020, on behalf of Defendant Karen Agustiawan (former President Director of Pertamina), on Supreme Court Decision 121, a subsidiary of a state-owned enterprise that is not a state-owned enterprise. The subsidiaries of SOEs have also not been expressly

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[5] Bismar Nasution, *Prinsip Good Corporate Governance pada Perseroan*, USU Press, Medan, 2009, hlm. 45.

[6] Munir Fuadi, *Prinsip Business Judgement Rule*, (Jakarta : Pustaka Yustisia, 2008), hlm 9.

[7] Anak Perusahaan BUMN (https://www.putusan3.mahkamahagung.go.id) diakses 9 Nopember 2022.

defined in Law and regulation, although in principle, they should have a definition similar to the definition of subsidiaries of SOEs.

It is interesting to be studied by the author because the District Court and the High Court consider the defendants legally and convincingly guilty and commit corruption crimes together. But it is different from the decision of the Supreme Court (MA), which in its consideration states that the finances of the SOE subsidiary are not included in state finances as Constitutional Court Decision No. 01/PHPUPres/XVII/2019. This means that the losses suffered by PT Pertamina Hulu Energi, a subsidiary of PT Pertamina (Persero), are not state financial losses. 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 to determine whether exploration can succeed or fail. In this case, legal rules regarding losses due to implementing the Business Judgment Rule were born, excluding criminal acts as long as there was no fraud, conflict of interest, unlawful acts, and intentional errors.

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2. Research Method

The research method used is the standardization of juridical examination, through a literature study supported by additional information that combines primary, secondary and tertiary legal materials. The methodology used is the methodology referring to the Law. The information collected was checked using qualitative normative analysis.

3. Results and Discussion

Application of the Doctrine of Business Judgment Rule Principles in State-Owned Companies as an Effort to Protect Directors in Faith.

Business Judgement Rule is a doctrine that applies that directors' decisions regarding the Company's activities cannot be directly disputed by anyone, even though the decisions taken are detrimental to the Company. Business Judgement Rule, as a division of responsibility among the Company and its management organs, especially directors and shareholders, if there is a loss to the Company caused by personal or individual mistakes of the directors. To protect directors with good intentions, the "business judgement rule theory" emerged, one of the most popular theories to ensure fairness for directors with good faith. The application of this theory has a main mission: to achieve justice, especially for the directors of a company incorporated as a Limited Liability Company in making business decisions.[8]

The background to enacting this doctrine is because among all parties in the Company, by their position as directors, the directors are the most powerful and professional to decide what is best done for the Company. In contrast, if the directors' business decisions incur losses for the Company, to some extent, it is still tolerable, considering that not all businesses must make a profit. In other words, the Company must also bear business risks, including the risk of loss. Therefore, directors cannot hold them liable only for a wrong decision or loss of the Company.[9]

In addition, the author can explain that the birth of the Business Judgment Rule comes from the consideration that the directors are the most authoritative and professional parties in deciding matters related to the Company. Matters relating to the responsibilities of the Board of Directors have been regulated in Article 92 paragraph (1) of Law Number 4O Year 2OO7 concerning Limited Liability Companies, after this referred to as the Limited Liability Company Law. Management, as referred to in paragraph (1), must be carried out by every member of the Board of Directors well and responsibly, each member of the Board of Directors is fully responsible personally for the Company's losses, the responsibility as referred to in paragraph (3) applies jointly to each member of the Board of Directors.

Further regulation regarding the Business Judgment Rule is contained in Article 97, paragraph 5 of the Limited Liability Company Law.[10] According to M. Yahya Harahap, in his book entitled Limited Liability Company Law, the quality

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[8] Dennis J. Block, Nancy R. barton dan Stephen A. Radin, *The Business Judgement Rule Fiduciary Duties of Corporate Directors, Prentice Hall law & Bussines*, Third edition, 1990, hlm. 4

[9] Munir Fuadi, *Prinsip Bussines Judgement Rule*, (Pustaka Yustisia, Jakarta,2008) hal 159

[10] Pengaturan Lebih lanjut mengenai Business Judgement Rule tertuang pada Pasal 97 ayat 5 Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas

of authority of the Board of Directors representing the Company is unlimited and unconditional. In this case, the capacity or authority of the Board of Directors to represent the Company is due to the Law.[11] That is, the Law itself, in this case, Article 1 point 5 and Article 92 paragraph (1) of the Law, which authorizes the Board of Directors to represent the Company inside and outside the Court. Therefore, its capacity is the power or representative of the Law (wettelijke vertegenwoordig, legal or statutory representative).

The Business Judgement Rule aims to provide immunity for individual directors from liability and damages stemming from certain decisions. In litigation proceedings, Business Judgement Rule, as a means used to preserve judicial resources so that the Court of justice is not mired in repeating its decisions, is inherently subjective and unsuitable for judges. This is useful because judges are not business people. The Business Judgement Rule is the legal implementation of broad economic policy built on economic freedom and a good impetus for risk-taking based on sufficient information. In company law in Indonesia, Business Judgement Rule is one of the doctrines of company law.

However, there is no comprehensive regulation regarding Business Judgement Rule in Indonesia. The doctrine of business judgment rule develops in common law legal systems such as England, the United States, Australia and others. A doctrine is a form of protection for directors. The Business Judgment Rule, according to Roger LeRoy and Gaylord A. Jentz, is both the power of the corporation and the Board of Directors in making decisions". From the above understanding, it can be seen that the business judgment rule protects directors for business decisions that are company transactions as long as they are carried out within the limits of their authority with prudence and good faith.

Furthermore, Robert Charles Clark viewed this doctrine as a simple rule of directors' business considerations that the courts and shareholders would not dispute. The Board of Directors cannot be held liable for the consequences arising from its business decisions. So if it is related to fiduciary obligations, the doctrine of business judgment rule is a reaction to the settlement of discretion arising from fiduciary obligations for directors in managing the Company.[12]

However, in managing the Company, the Board of Directors must follow" policies deemed appropriate" within limits specified in Law No. 4O of 2OO7 concerning Limited Liability Companies and Articles of Association. What is

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[11] M. Yahya Harahap, *Hukum Perseroan Terbatas,* (Sinar Grafika, Jakarta, 2O21), hal 349

[12] Freddy Harris, *Hukum Perseroan Terbatas: Kewajiban Pemberitahuan oleh Direksi,* (Ghalia Indonesia, Bogor, 2010) hal 59

meant by an approach that is considered appropriate according to the explanation of Article 92 paragraph (2) is a policy that, among others, is related to expertise. Directors must carry out management with understanding and skills following knowledge and experience. In that case, carrying out the command is competent according to knowledge and experience.[13]

In Indonesia, which adheres to the Civil Law legal system, the source of Law is in the laws and regulations as the highest hierarchy. Thus, the Court should have the task of interpreting the doctrine of the Business Judgment Rule, and this is because there is no comprehensive regulation of this doctrine. What needs to be known and underlined is that this doctrine protects directors from escaping responsibility for losses incurred. However, there are still limitations contained in the management, namely following the "interests" of the Company and following the "aims and objectives" of the establishment of the Company. In the UK, since 1929, all public companies must have at least two members on the Board of Directors, depending on the type of business activity.[14]

As explained above, each member of the Board of Directors must 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 implementation of management by members of the board of directors in practice and legal doctrine has a wide range, among others; A director must be trusted (fiduciary duty in carrying out the responsibility of managing the Company. This means that every member of the board of directors is forever "trustworthy" (must always be bona fide) and must always be "honest" (must always be honest). Regarding the meaning of good faith and must be trustworthy and forever honest in assuming responsibility for implementing the Company's management, MC Oliver and EA Marshall stated: ...... a director is permitted to be very stupid so long as he is honest.[15] Although this expression contains a legal statement, justified by a Director who is ignorant as long as he is real, it does not mean it can be approved to appoint a stupid board of directors member. And the statement wants to appoint board members who are 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

[13] WJS Poerwadarminta, *Kamus Umum Bahasa Indonesia, (*PN Balai Pustaka 1976), hal 19
[14] Charlesworth and Morse, *Company Law ELBS, (*Fourteenth edition, 1991), hal 348
[15] *Ibid*, hlm 313.

management of the Company's assets depends entirely on the directors, including the management of the Company's assets, the management of the Company by the directors also includes the Company's mandate. This means that the mandate of managing the Company by the director also includes relying entirely on the Company's directors. This means that the mandate for managing the Company by the directors also includes the mandate for managing the Company's wealth.[16] Therefore, if there is a loss due to the director not carrying out his duties in good faith, the loss the Company bears becomes the director's responsibility.

Regarding applying duty care obligations in the management of the Company, it is necessary to put forward a generally accepted principle, commonly called "business judgment risk." That is if the members of the Board of Directors are honest in carrying out their responsibilities for managing the Company. Careful consideration of reasonable judgment accompanies honesty following experience, knowledge, and standard business practice, but the consideration is wrong and erroneous (error judgment). Then, in this case, there is an error judgment. The members of the Board of Directors cannot be held accountable for honest mistakes of judgment or not liable for any error judgment. Such events fall into the category of business judgment risk principle.[17]

As explained earlier, business activities full of competition and high competition require prudence from the Board of Directors to make decisions appropriately and quickly. It is something unfair when carrying out his management. Directors are always overshadowed by fear of making wrong decisions that harm the Company. This condition will interfere with the Company's performance and damage the Company. The Business Judgement Rule encourages directors to dare to make decisions and take risks in carrying out their duties and obligations to manage the Company and not to be afraid, and not to be excessively careful of threats that result in directors being personally responsible for company losses that may arise as a result of the directors' actions or business decisions.

According to Susan Ellis Wild, United States Attorney and Politician, the Business Judgment Rule is the legal doctrine that officers and directors of a

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[16] Fred BG Tumbuan, *"Tanggungjawab Direksi dan Komisaris Serta Kedudukan RUPS Perseroan Terbatas menurut UU NO 1 Tahun 1995,* (Makalah Kuliah S2 Fakultas Hukum Universitas Indonesia Tahun Ajaran 2001-2002), hal 9-10.

[17] Howell, Allison and Printice, *Business Law Text and Cases,* (Forth Edition, The Dayden Press, 1988), hal 870.

corporation cannot be liable for losses to shareholders for business decisions that prove to be unfavourable or harmful to the corporation as long as those decisions are within the discretion of officers or directors and are made on an informed basis, in good faith without direct conflict of interest, and with an honest and reasonable belief that it is in the best interest of the corporation. "Business Judgement Rule is the legal doctrine that a corporation's officers and director cannot be liable for damages to stockholders for a business decision that proved 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".[18]

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 judgments to business decisions taken by directors. The Board of Directors is considered to have made the right decisions by their expertise and habits that occur in business. The Court can only intervene in the event of violations committed by directors in making decisions or implementing the management of the Company. The relationship between the Business Judgement Rule Doctrine and Article 97 paragraph (5) of the Limited Liability Company Law.

Business Judgment Rule is one of the self-defence efforts for directors in managing the Company. The rules of business valuation postulate that a director cannot be held personally liable for actions committed in his position if the director believes that the actions taken are best for the Company and are done honestly and in good faith only for the benefit of the Company.[19]

4. Conclusion (bold, 14 pt)

The responsibility of the Board of Directors has been regulated in Article 92 paragraph (1) of Law Number 4O Year 2OO7 concerning Limited Liability Companies after this, referred to as the Limited Liability Company Law. Management, as referred to in paragraph (1), must be carried out by every member of the Board of Directors well and responsibly, each member of the Board of Directors is fully responsible personally for the Company's losses, the

[18] Susan Ellis Wild, *Webster's Law Dictionary* (Canadian Publishing, Inc, 2006), hal 58.
[19] Ridwan Khairandi, *Hukum Perseroan Terbatas, Cetakan Pertama,* (Fakultas Hukum UII Press, Yogyakarta, 2014), hal 266

responsibility as referred to in paragraph (3) applies jointly to each member of the Board of Directors.

According to the author, applying the Business Judgment Rule principle to directors who carry out policies that harm companies in Indonesia has not been optimal. The lack of human resources in our law enforcement, especially the prosecutor's office, can drag directors who perform 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 self-defence efforts for directors in managing the Company. The Business Judgement Rule postulates that a Director cannot be held personally liable for actions taken in his position as a Board of Directors if the board of directors believes that the actions he takes are the best, then for the Company and carried out honestly, in good faith only for the benefit of the Company. So hopefully, protection for Directors who carry out policies that harm the Company is minimal in Indonesia. The absence of a good faith benchmark is a scourge that law enforcement can abuse to drag directors into the realm of Law.

The author hopes that the Company's management and law enforcement must be more careful and intelligent in imposing mistakes on the directors related to the management of the directors running the Company so that the application of the "business judgment rule principle" to directors who manage the Company carefully, in good faith and responsibly can run well. I suggest that the framers of the Law, namely the Government of Indonesia and the Legislature, make a derivative of Law number 40 of 2007 concerning Limited Liability Companies, which regulates this more clearly and in detail "business judgment rule principle." These derivatives can be in the form of Government Regulations and Regulations of the Minister of Law and Human Rights to provide legal certainty and protection for the Board of Directors in running the Company.

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