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Responsibility of Majority Shareholders in Adopting Limited Liability Company Policies Affecting Minority Shareholders in Terms of Business Judgment Rule and Good Faith Principles

大股東在採用有限責任公司政策影響小股東的商業判斷規則和誠信原則方面的責任

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Abstract

In an increasingly complex world, humans frequently do business not only alone but more often in groups which is very profitable because it can produce enough significant capital. One form of the joint venture is a limited liability company (LLC), a business with capital divided into shares. This shared ownership can determine the policy direction in the LLC, and there is a majority shareholder. The policies taken by the majority shareholder can sometimes harm the company if the shareholder does not use good faith. Law No. 40 of 2007 on LLCs does not regulate good faith in the majority shareholder. This ambiguity can make the majority shareholder to harm the minority shareholder because of the bad faith made by the majority shareholder toward the assessment or policymaking in the LLC that the business judgment rule principles are the responsibility of the majority shareholder. This research aims to know and understand the majority shareholder's responsibilities by looking at the aspect of good faith in policy-making in the LLC and applying the business judgment rule principles in policymaking by the majority shareholder so as not to the detriment of the minority shareholders. This research used normative juridical research methods using literature as the primary material to explore information in applying business judgment rules in several countries. Common law countries first proposed the principle of business judgment rule. Indonesia absorbed this principle incorporated into Law No. 40 of 2007 on LLCs, where the implementation of this principle concerns only the management, in this case, the director, but not the shareholders.

Keywords: Business Judgment Rule, Good Faith, Majority Shareholder, Responsibility

摘要 在一個日益複雜的世界中，人們經常不僅單獨開展業務，而且更經常地以團隊形式開展業務，這種業務非常有利可圖，因為它可以產生足夠多的重要資本。合資企業的一種形式是有限責任公司(有限责任公司)，這是一種資本分為股份的企業。這種共享所有權可以決定有限責任公司的政策方向，並且有大股東。如果大股東不善意，其採取的政策有時會對公司造成損害。2007 年關於有限責任公司的第 40 號法律未對大股東的誠信作出規定。這種模糊性會使大股東損害小股東利益，因為大股東在有限責任公司的評估或決策中不誠實地認為商業判斷規則原則是大股東的責任。本研究旨在通過審視有限責任公司決策中的誠信方面，並在大股東決策中運用商業判斷規則原則，從而了解和理解大股東的責任，以免損害小股東的利益。本研究採用規範的司法研究方法，以文獻為主要材料，探索在幾個國家適用商業判斷規則的信息。英美法系國家最先提出商事判斷規則原則。印度尼西亞將這一原則納入了關於有限責任公司的 2007 年第 40 號法律，該原則的實施僅涉及管理層，在本例中為董事，而不涉及股東。

关键词: 商業判斷規則、誠信、大股東、責任

I. Introduction

The business world in Indonesia is developing rapidly. This development coincides with government policies that support investment in Indonesia and provides Indonesia with many businesses and investments from countries considered advanced in implementing their business. One example is a limited liability company (LLC) forming a legal entity. In this regulation regarding LLCs, legal cultures from outside Indonesia also affect Indonesia. A system that influences the implementation of Law No. 40 of 2007 concerning Limited Liability Companies is the principle of the Business Judgment t Rule. In this principle, Law No. 40 of 2007 concerning Limited Liability Companies only regulates the good faith of the management of an LLC, in this case, the directors. The good faith of the board of directors' decisions in managing the LLC is a point to determine whether the directors are indeed doing things beneficial or damaging LLC itself.

The problem arises when the policy makers or those who can determine the direction of the goals of the LLC are not only the management of the LLC but also the shareholders. The majority shareholder also has a role in which the decisions made are favorable or unfavorable to the LLC not regulated in Law No. 40 of 2007 concerning LCCs. Therefore, several countries must adhere to the common law legal system as a comparison to enrich the regulation regarding majority shareholders in Indonesia.

The specific purpose of this research is to understand the implementation of good faith from the parties in the LLC, not only the management of the LLC but also those who take the policy of the LLC, namely, the majority shareholder, so as not to harm the minority shareholders in the LLC [14], [15], [16].

The urgency taken in this study is that the humanities issue, namely good faith in decision-making within an LLC, needs regulating in such a way for the proper conducting of business and investment life in Indonesia that supports policies from the government along with the implementation of the mental revolution, which is the aim of the current government. It must consider the level of technological readiness with a policy when the organs of an LLC are regulated to conduct all their duties in good faith according to laws and rules. Only in readiness has there been no regulation on the LLC business model in which the majority shareholder can harm the minority shareholder.

II. Method

This research used normative juridical research methods using literature as the primary material to explore information in applying business judgment rules in several countries. Common law countries first proposed the principle of business judgment rule. Indonesia absorbed this principle incorporated into Law No. 40 of 2007 on LLCs, where the implementation of this principle concerns only the management, in this case, the director, but not the shareholders.

III. Results and Discussion

A. Limited Liability Company

An LLC is a legal entity. This LLC is not something new in the business world and legal world. Many legal experts provide an understanding of this LLC in terms of legislation and through the doctrine of legal experts. The definition of LLC in Dutch is called *Naamloze*

Venn o otschap (NV), an anonymous company without the name of the individual who enters the capital; this form originates from the French language called *Societe Anonyme* (SA). In the Indonesian language, it is called an LLC, taken from the English language, namely Limited, which means limited or finite to the company's capital and assets, not including the personal assets of the participant [1], [17], [18].

Additionally, an LLC is also an association of shareholders created by law

and treated as an artificial person by the court, a legal entity, and therefore completely separate from the people who founded it with the capacity for continuous existence, and as a legal entity, authorized to receive, hold, and transfer assets, sue, or be sued and conduct other powers granted by applicable law [2]. This pseudo-human is also taken from the theory of legal entities, where a legal entity is pseudo and has no real form or form, so it has organs to conduct daily tasks in an LLC.

Article 1, Point 1 of Law Number 40 of 2007 concerning LLCs provides a definition of LLC, namely limited liability company, a capital partnership established based on an agreement, conducting business activities with authorized capital entirely divided into shares, and fulfilling the requirements stipulated in this law and implementing regulations.

The authors conclude that an LLC is a company similar to a partnership, but here, the difference is stock. An LLC has capital divided into shares where the owner of the capital or this shareholder has limited liability to the company, which is only limited to the shares owned, so that liability to third parties is only to the extent of the shares paid up as capital in the LLC.

B. Business Judgment Rules

The concept of the business judgment rule, which originated from the United States, prevents American courts from questioning the business decisions of the Board of Directors taken in good faith, without self-interest, and with a justifiable belief that they have made a decision that is u profit the company [3], [19], [20]. Therefore, it is appropriate if a company's Board of Directors is not responsible for mistakes in making decisions (mere error of judgment) without considering the human element.

The Business Judgment Rule doctrine is the only defense by the board of directors who have good intentions in protecting themselves from lawsuits by the LLC, shareholders, and/or creditors of the LLC concerning losses due to wrong decisions taken by the Board of Directors. The business judgment rule doctrine reflects the independence and wisdom of the Board of Directors in making business decisions.

Further in its development, we can see one of the landmark cases in Singapore. In the legal system of Singapore, there are no rules regarding the business judgment rule. However, in *Vita Health Laboratories Pte Ltd* and *Ors v Pang Seng Meng [2004] 4 SLR(R) 162*, it is stated that incompetence is not *ipso facto* (Latin, interpreted as by the fact itself, translated into Indonesian into facts) considered a violation of fiduciary duty, although it may attract other leaders as obligations. A director whose action or inaction causes harm to the company is very likely must be questioned. Without evidence of a lack of *bona fides* [21] (*bona fides* comes from Latin translated into English into good faith or in Indonesian, known as good faith), it cannot be justified to argue that directors are always responsible for their failure in business judgment for all losses suffered by the company.

C. Application of Business Judgment Rule and Good Faith in Decisions in Limited Liability Companies

After discussing that the majority shareholder can also make decisions in an LLC, the next question is whether the business judgment rule principles can apply to the majority shareholder. The business judgment rule was first used in the United States to protect company directors who make business decisions based on good faith [4]. Good faith is the key to implementing the business judgment rule for every policy based on fair business considerations; this is part of the overall corporate legal system in the United States [5], [22], [23].

The U.S. corporate system stipulates that every decision of the board of directors based on business decisions can benefit the company but also lead to losses. This is commonplace, but certain restrictions must be for the board of directors in its duties, namely that business decisions must consider the interests of the company rather than personal interests, prioritizing prudence and good faith.

Implementing this good faith must consider a scientific perspective and cannot be viewed from the viewpoint of feelings. In Indonesian law, good faith has two meanings, objective and subjective. In an objective sense, good faith is heeding the norms of propriety and decency, which means that conducting civil activities should not harm all parties, whereas, in a subjective sense, good faith is in one's inner attitude and honesty [6].

Both of these views can be scientifically proven by looking at a person's actions and deeds. From an objective perspective, the actions and behavior of that party are under the norms of decency, decency, and law (if it is related to company law, then it is following the interests of the company without prioritizing its personal affairs), from a subjective viewpoint, stated and expressed by a person is following the reality. Therefore, the accommodation of good faith closely relates to decency, custom, and law [7].

Let us return to the business judgment rule. The existence of this good faith must be in the decision of the board of directors to obtain the right of immunity. With this good faith, the board of directors is personally protected from the burdens of its duties and responsibilities [8]. Therefore, some criteria can issue to a director so that he cannot be punished for losses based on the policies he has taken, namely, if there is good faith in it, has a strong business decision basis, and does not contain a conflict of interest [9, 24].

Furthermore, if we link the relationship between the concept of the business judgment rule and the board of directors, it has a very close relationship. The Board of Directors, according to Article 1, clause 5 of Law Number 40 of 2007 concerning LLCs, is "The company organ that is authorized and fully responsible for managing the Company for the benefit of the Company, following the purposes and objectives of the Company and representing the Company, both inside and outside the court under the provisions of the articles of association."

From this understanding, the board of directors has enormous duties and responsibilities in determining the direction of the business policies of a company. Looking into the common law system in the United States, the directors themselves have the authority and responsibility divided into two things, namely:

1. Obligations based on the principle of fiduciary duty in good faith and responsibility; and
2. Good management obligations and acting with the company's expertise.

From this authority and responsibility, the board of directors gets a larger portion of the company, although its position is still under the General Meeting of Shareholders (GMS) as the owner of the capital. If you continue the research with legal points, the board of directors represents the company. The legal basis for the board of directors to represent the company is the LLC Act No. 40 of 2007, the company's articles of association, and SBM decisions. From this, the board of directors having considerable authority to determine the direction of a company's business policy has a big responsibility because it is under the GMS.

Due to its position under the GMS, the Board of Directors also deserves to be protected in conducting their duties and obligations. This is natural because the GMS will ask for accountability for every business policy issued by the board of directors, and if it turns out that the business policy results in a loss to the company, then the GMS may determine that the board of directors is personally responsible, even though the actions of the board of directors relied on good faith. There is no conflict of interest in it based on business considerations (but because business conditions can change at any time, there will be losses) [10].

Due to the concept of the business judgment rule, directors with great responsibility and authority have protection if their business policies rely on the business judgment rule. The next question is whether the business judgment rule that applies to the board of directors can also apply to the majority shareholder, who can also set policy direction and then influence minority shareholders. For a complete picture, it is necessary to distinguish the relationship of responsibility between the business judgment rule applied to the board of directors in general and to shareholders.

First, the relationship of responsibility from applying the business judgment rule concept to the board of directors is a relationship between the directors themselves as representatives and the company as the representative. The legal basis for this relationship is Law Number 40 of 2007 concerning Limited Liability Companies, the Company's Articles of Association, and the GMS. Because of its representational nature, the representation process may involve policies detrimental to the represented party, i.e., the company. Because the representative process impacts losses, it is natural for the company to ask for accountability from the board of directors, but it is also natural that the board of directors has legal protection not to be personally responsible based on the concept of the business judgment rule. However, this relation becomes irrelevant if the business judgment rule also applies to the majority shareholder.

Therefore, new construction is necessary for that. This new construction is a basis for justification so that the business judgment rule doctrine originally applied to protect the directors can also protect the majority shareholders who make policies on behalf of the company. There are three possibilities for how the majority shareholder can take a policy in a company. First, the majority shareholder also serves as a director; second, the majority shareholder serves as a commissioner, who oversees the course of the directors' policies; and third, the majority shareholder does not hold any concurrent position and is purely a majority shareholder who has a shared ownership greater than other shareholders - it is the limitation imposed by the authors.

From this limitation, it will continue to be a relationship that can be accounted for by the majority shareholder who makes a policy for the company. As explained in the previous section, the relationship between the majority shareholder in applying the business judgment rule doctrine and the board of directors in applying the business judgment rule doctrine is very different. The construction that the authors can provide in implementing the business judgment rule concept to the majority shareholder is when the policy directly affects the company and the minority shareholders. The purpose of this direct influence can be seen from the authority and rights of the majority shareholder to determine the direction of the company's policy from the decisions taken during the GMS.

In making decisions at the GMS, the majority shareholder will consciously know that his decision will affect the course of company policy due to the majority attached to it; the majority shareholder must deliberately accept the advantages and disadvantages of his decision. From here, there is no accountability like the board of directors. However, the policy taken by the majority shareholder will also affect the minority shareholder. There is a causal relationship even though the majority shareholder has majority rights limited by a moral responsibility to the minority shareholder. Furthermore, in addition to moral responsibility, majority shareholders are also constrained by the alter ego doctrine, which does not make it possible to use the company for their interests only [11].

From this reality, the minority shareholders have an unequal position, or it is not as strong as the position of the majority shareholders. Under this condition, there is a possibility of abuse and coercion by the majority shareholder. Therefore, in addition to the alter ego doctrine, in exercising their authority, the principle of piercing the corporate veil also limits the majority shareholder. These two principles will constrain the actions and behavior of the majority shareholder in making decisions. This restriction also prevents the majority shareholder from making decisions arbitrarily because if the decision directly causes losses, the majority shareholder can be held personally responsible.

A little explanation regarding the doctrine of piercing the corporate veil and alter ego, both of these doctrines apply if the shareholders take actions that use the company for their interests, such as their decision against the law directly or indirectly, using the company's assets for their interests, using influence or influence in the company for his gain alone, resulting in the company's assets being insufficient to pay off the company's debts and so on [12]. In addition, the doctrine of piercing the corporate veil can arise if a shareholder feels that he has more rights over the company so he acts arbitrarily and commits self-deception of his own company; this makes his actions alter ego.

In this condition, the shareholder controls the company too far so that the functions of the other company bodies cannot work well, being pawns to serve the interests of shareholders. The provisions regarding the doctrine of piercing the corporate veil and alter ego are under Article 3 paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies, which states that in certain circumstances (such as alter ego and self-fraud), shareholders no longer have limited liability and can be held personally liable [13]. The application of the corporate veil piercing, in this case, maybe permitted if the alter ego's actions have caused violations, such as third parties believing that they have been defrauded in conducting business activities or transactions with the company or these activities violate the law, and so on.

However, several cases require the majority shareholder to make decisions unilaterally and quickly. For example, if there are compelling circumstances, such as changes in laws and regulations that change the direction of the company's business, quick changes in the company's organs due to certain things (such as death, entangled in legal cases, etc.) or in a force majeure situation that requires quick decision making. From these conditions, the majority shareholder should be able to use their majority rights to make decisions quickly and accurately. Therefore, it is necessary to ensure quick decision-making so that the company's activities go as they should.

Several paragraphs above describe the urgency and state of the relationship between the majority shareholders with the application of the concept of the business judgment rule, namely, decision-making that must be carried out quickly and precisely in certain circumstances for the well-running of the company's activities. However, as has been stated in the paragraph above, it is possible that decision-making in these critical times causes losses to minority shareholders and can also be categorized as alter ego actions due to policies that have conflicts of interest (for example, appointing himself or his closest people as directors or commissioners). If so, the application of the business judgment rule becomes relevant.

The relevance of the business judgment rule doctrine and decision-making by the majority shareholder can occur under certain conditions so that the majority shareholder is not personally responsible. These conditions include some circumstances that force a quick and accurate decision based on careful consideration and good faith and should be under statutory norms, decency, and propriety.

In contrast to the business judgment rule applied to the board of directors and shareholders, the authors add to certain circumstances that force them to make decisions quickly and accurately. The majority shareholder in such a state has the right to make decisions unilaterally or to exercise his majority rights if the business, political or social conditions do not permit decisions in the ordinary business situation. Examples of business, political, or social conditions in question are economic crises, pandemics, wars, changes in laws and regulations that are quick they affect market conditions, and so on. In these conditions, the majority shareholder gets justification to exercise their majority rights.

IV. CONCLUSION

However, applying this condition cannot stand independently but must also include other conditions that the authors have mentioned based on careful consideration, good faith, and under statutory norms, decency, and propriety. All of these conditions must be met in the actions taken by the majority shareholder in making policies that affect the company's business. The above means that these conditions do not stand alone and are optional but cumulative and the majority shareholder must fulfill this so that they are not suspected of practicing alter ego or self-fraud.

Therefore, constructing the relations and relevance of the business judgment rule to the majority shareholder, as described above, can free shareholders from their responsibility if the decisions they make cause losses.

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