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RELEASE OF DIRECTORS' RESPONSIBILITIES AT THE GENERAL MEETING OF SHAREHOLDERS (GMS) IN THE PERSPECTIVE OF BUSINESS JUDGMENT RULE

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Abstract

The issue of accountability of directors that arises that delegitimizes a director which leads to the removal of the position of directors, civil liability of directors even leads to crime. On the other hand, there is the principle of release of directors in responsibilities legitimized by the GMS, namely the principle of acquit et de charge. From this, the formulation of the problem taken: 1) What is the ratio legis arrangement for the release of responsibility of the directors at the GMS? and 2) How is the arrangement for the release of directors from legal responsibility by the GMS in the perspective of business judgment rules? The method used in this study is a type of normative legal research with a statutory approach (statue approach) and a conceptual approach (conceptual approach). The results of the study explain the basis for the release of directors based on the principle of acquit et de charge stated by the GMS regulated in the 2007 Law but has limitations not violating the provisions of the Articles of Association and GMS, so the Board of Directors cannot be prosecuted for their actions. The Board of Directors assumes that if you obtain acquit et de charge , it will be completely free from all liability, but what needs to be straightened out is that acquit et de charge is only given for actions that meet the principles of business judgment rules.

Keywords: GMS, business judgment rules and acquit et de charge

INTRODUCTION

The term Limited Liability Company (hereinafter referred to as PT) used today, was formerly known as *(Naamloze Vennootschap)* (Haryowardani, 2022). Limited Liability Company consists of two words, namely Company and Limited (Sili et al., 2022). Company refers to the capital of a Limited Liability Company consisting of sero-seros or shares. While the word Limited refers to the responsibility of shareholders whose extent is only limited to the nominal value of the shares they own. As a legal entity or *artificial person*, a Limited Liability Company is able to act to carry out legal acts through its "representative". For this reason, there is a so-called "*agent*", namely a person who represents the Company and acts for and on behalf of the Company. Therefore, the Company is also a legal subject, namely an independent legal subject or *persona standi in judicio*. He can have the same rights and obligations in legal relations as a *natural person*

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or *natuurlijke persoon*. He can sue or be sued, can make decisions and can have rights and obligations, receivables, have wealth like a human being.

A Limited Liability Company is a legal entity that is a capital partnership established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in Law Number 40 of 2007 concerning Limited Liability Companies and its implementation. To become a legal entity, a limited liability company must meet the requirements and procedures for ratifying a Limited Liability Company as stipulated in the Law, namely an endorsement from the Minister of Law and Human Rights of the Republic of Indonesia. These procedures include submitting and examining the name of the Limited Liability Company to be established, making the Articles of Association, and ratifying the Articles of Association by the Minister. As a capital partnership, the wealth of a PT consists of capital that is entirely divided into shares. The founders of the PT are obliged to take part of the capital in the form of shares, and they get proof of share letters as a form of capital participation. Responsibilities of the holder. Shares are limited only to the capital or shares they put into the company (limited liability). All debts of the company cannot be attributed to the personal assets of the shareholders, but only limited to the share capital of the shareholders deposited with the company.

The establishment of a PT is carried out based on an agreement. As an agreement, the establishment of a PT must be carried out by more than one person who promises each other to establish a company, and those who promise to put their capital into the company in the form of shares. The agreement must be made in the form of a notarial deed in Indonesian. The notary in question is a notary whose working area is in accordance with the company's domicile. To be a legal entity, the notarial deed must be ratified by the minister of Law and Human Rights of the Republic of Indonesia.

In this case, the General Meeting of Shareholders (GMS) is an organ of the company that has authority not granted to the board of directors or the board of commissioners within the limits specified in this law and/or the articles of association. Regulations regarding GMS are contained in the Limited Liability Company Law Chapter VI regarding GMS Articles 75 to 91. In its concrete form, GMS is a forum, where shareholders have the authority to obtain information about the Company, both from the Board of Directors and the Board of Commissioners. These statements are the basis for the GMS to determine the Company's policies and strategic steps in making decisions as a legal entity. In the GMS forum, the mechanism for submitting information and decisions is arranged regularly and systematically according to its agenda. Article 1 of Law Number 40 of 2007 regulates Limited Liability Company Organs consisting of: (General Meeting of Shareholders, Board of Directors; and Board of Commissioners)

However, in practice there are issues of accountability of directors that arise that delegitimize a director which leads to the removal of the position of directors, civil liability of directors and even leads to crime. Research on the practice of refusing to hold an Extraordinary General Meeting of Shareholders by the Board of Directors has been conducted by several previous researchers, including: The first study, Journal entitled "Dismissal of the Directors of Limited Liability Companies in Bankruptcy Through Circular Resolution" by Nalendra Pradipto, Clara Renny Kartika, Agung Jaya Kusuma. This research focuses on the party that has the right to determine changes to the articles of association is the GMS (General Meeting of Shareholders), but in the event of bankruptcy in a limited liability company, the curator has a role in approving the changes to the articles of association. The GMS itself consists of the Annual GMS and other GMS which includes the EGMS (Extraordinary GMS) and there is a circular resolution where the decision is also legally binding and has legal force if all shareholders agree in writing by signing the relevant proposal even though in its implementation all shareholders are not physically present.

The issue of accountability of directors that arises that delegitimizes a director which leads to the removal of the position of directors, civil liability of directors even leads to crime. On the other hand, there is the principle of release of directors in responsibilities legitimized by the GMS, namely the principle of acquit et de charge. Of the ten previous studies above, the focus of the Thesis study lies in the analysis of the application of *Acquit et de charge*. This thesis research is different from previous research with the focus of the study lies on the concept of exemption of directors' responsibilities and its limitations in protecting directors from legal liability. Based on the background described above, the author is interested in analyzing and pouring it into a scientific paper in the form of a thesis entitled "**Arrangements for Release of Responsibility of Directors at the General Meeting of Shareholders (GMS) in the Perspective of *Business Judgment Rules*".**

RESEARCH METHODS

The method used in this study is a type of normative legal research that analyzes legal issues regarding the regulation of the release of responsibility of directors at the GMS in the perspective of *business judgment rules*. The type of approach carried out in this legal research is the statutory approach (*statue appraouch*) and conceptual approach (*conceptual approach*). The secondary data can be primary, secondary or tertiary legal material.

DISCUSSION

For the Board of Directors, as the organ responsible for the day-to-day management of the Company, to achieve optimal outcomes in the Company's best interest, it is crucial to grant them specific authorities. Along with the authority granted, the Board of Directors must also be entrusted with corresponding responsibilities to ensure the effective oversight of the Company. Therefore, discussions about the authority of the Board of Directors should be accompanied by a clear understanding of their responsibilities.

Responsibility, in this context, refers to the obligation of the Board of Directors to carry out assigned activities to the best of their abilities and in accordance with their expertise. This responsibility may be ongoing or may cease upon the completion of specific tasks. Typically, in a company, the authority and responsibility of a director are expected to be at an equivalent level.

In practical terms, the authority granted to a director empowers them to make decisions and execute actions within their designated area of responsibility. The corresponding responsibility in that area creates an obligation for the director to fulfill their duties using the granted authority to achieve the Company's objectives.

In the Company, the responsibility of directors comes into play when they start utilizing their authority. To ensure that the authority or obligation of the Board of Directors is exercised for the benefit of the Company in alignment with its goals and objectives, it is ideal for the authority to be exercised in tandem with corresponding responsibilities. Similarly, responsibilities should be assigned in accordance with the existing authority to facilitate effective management and decision-making in the Company. This symbiotic relationship between authority and responsibility is essential for the efficient functioning and success of the Company.

The Limited Liability Company Law establishes that the Board of Directors represents the Company both internally and externally. If the Board of Directors consists of multiple members, each individual member is granted the authority to represent the company, unless the Articles of Association specify otherwise. This legal provision emphasizes that, in a Limited Liability Company, each member of the Board of Directors holds the authority to act on behalf of the company unless otherwise indicated in the Articles of Association.

From a doctrinal perspective, every organ of the company, including the General Meeting of Shareholders (GMS), Board of Commissioners, and Board of Directors, is essentially regarded with the same level of importance or equality. No single organ is considered superior or inferior to the others, with each having its own designated responsibilities as defined by the Law and Articles of Association.

Consequently, the implication is that the focus of the Board of Directors and/or the Board of Commissioners in managing the Company is not solely directed towards the shareholders. Instead, it extends to the broader interests of the Company itself, which encompasses considerations beyond the immediate interests of the shareholders. This framework underscores the idea that the management of the Company involves a comprehensive approach that prioritizes the overall well-being and sustainability of the business entity.

In simpler terms, Easterbrook and Fischel express concern about legal provisions that overly restrict a board of directors, creating constant apprehension about personal liability. Their worry stems from the potential negative impacts, including (1) a decrease in investor profits and (2) a decline in the interest of capable individuals aspiring to become directors. This concern underlies the philosophy behind the business judgment rule.

In essence, the business judgment rule serves as a protective mechanism for directors when making business decisions or engaging in company transactions, as long as these actions are conducted within the confines of the authority outlined in the Articles of Association and with due prudence and good faith. Robert Charles Clark goes further to perceive the business judgment rule as a straightforward guideline for directors' business considerations, asserting that decisions made within its parameters should not be disputed by the court. Shareholders and directors, under this view, are shielded from liability for the consequences that may arise from their business decisions.

The presented scenario highlights important considerations regarding the legal implications of granting the Acquit et de Charge Principle to the Board of Directors and the Board of Commissioners, particularly when errors are later identified in the Annual Financial Statements presented during the Annual General Meeting of Shareholders (GMS).

An essential aspect of concern revolves around determining the accountability of the Board of Directors and the Board of Commissioners in relation to the financial statements submitted to the Annual GMS. The validity of the Acquit et de Charge Principle often depends on a thorough liability mechanism and stringent control functions. Various factors, such as natural disasters and changes in government regulations, can influence the application of this principle.

It is crucial to acknowledge that the Acquit et de Charge is considered valid after undergoing a rigorous evaluation process, offering a form of protection for directors and commissioners. However, questions arise regarding their accountability if errors are discovered in the financial statements post the Acquit et de Charge grant.

In situations where mistakes occur due to uncontrollable factors—such as natural disasters or regulatory changes—it could be argued that holding these individuals responsible for resulting harm may be unjust. The principle recognizes that certain circumstances are beyond the control of the involved parties, and accountability should be assessed in a context where individuals had the ability to exercise due care and responsibility. The interplay between the Acquit et de Charge Principle, external factors, and subsequent accountability underscores the intricate nature of corporate governance and legal frameworks.

BJR related to *fiduciary* arises when one party does something for the interests of another party to the exclusion of his own personal interests. *The Fiduciary Duties* of the Board of Directors contain the following principles:

a. The Board of Directors in performing its duties may not do so for personal interests or the interests of third parties without the consent and or knowledge of the company;

b. The Board of Directors shall not use its position as a management to obtain profits, either for itself or third parties except with the approval of the company;

c. The Board of Directors shall not use or misuse the company's assets for its own and/or third parties' interests.

In essence, directors are bound by the principle of Fiduciary Duties to the company rather than to shareholders. As a result, it is the company itself that possesses the authority to compel directors to adhere to the principles of Fiduciary Duties. Nevertheless, while fulfilling their responsibilities as directors, they are generally expected to consider the interests of shareholders. Despite being guided by the principle of Fiduciary Duties, directors retain the freedom to vote and express opinions based on their convictions and interests during meetings they attend.

Furthermore, the Board of Directors has the autonomy to make decisions aligned with business considerations and common business sense, as long as these decisions do not inflict harm upon the company. This underlines the delicate balance directors must maintain, prioritizing the company's interests while still acknowledging the legitimate concerns and rights of shareholders.

In practical terms, it is common to observe situations where the Board of Directors, entrusted with the duty and authority to manage a company, becomes entangled in legal issues stemming from the decisions or policies they enact. This scenario underscores the critical nature of decisions made by the board of directors as a key organ of the company. When these decisions result in losses for the company, it is not uncommon for directors to face personal lawsuits brought by law enforcement authorities, spanning both criminal and civil jurisdictions.

The statement attributed to Solomon, "Blessed are those who keep the law, who do justice at all times," implies that individuals who refrain from breaking the law or committing crimes are likely to experience mental well-being and avoid suffering in both their youth and old age. This applies regardless of whether their actions are discovered by law enforcement. Solomon further emphasizes that those who adhere to the law are considered understanding or wise, contrasting them with individuals who associate with gluttons, bringing humiliation to their parents.

In this context, being an understanding son is equated with wisdom. Therefore, maintaining a righteous and lawful attitude is seen as a wise choice. Conversely, individuals who engage in criminal activities not only subject themselves to shame and humiliation in society but also bring disgrace to their parents. Solomon's words highlight the broader consequences of one's actions, suggesting that adherence to the law is not only a matter of societal norms but also a manifestation of wisdom and understanding.

The core of applying the doctrine of the business judgment rule primarily focuses on the mechanisms and procedures employed by the board of directors before a decision is made, rather than delving into the content of the decision itself. In essence, the business judgment rule is intricately connected to whether the board of directors exhibited intentional elements, specifically knowledge (willens) and will (wettens), during the decision-making process. Personal liability for the board of directors can arise if their actions lead to losses resulting from errors or negligence.

The evaluation of any errors or negligence by the board of directors centers on the formalities of their actions, ensuring compliance with laws, regulations, and the company's Articles of Association. The application of the Business Judgment Rule in Law No. 40 of 2007 concerning Limited Liability Companies is relevant to the board of commissioners as well, as stipulated in Article 114 and Article 115, with adjustments made as needed (mutatis mutandis).

With fiduciary duty, directors are required to uphold a high standard of good faith and loyalty in the execution of their responsibilities. Simultaneously, the company must place significant trust in its directors. Therefore, if directors merely fulfill their duties with caution, good faith, or loyalty, it does not necessarily absolve them from legal responsibility in cases where their actions result in harm to others.

In the context of fiduciary duty, the director's legal accountability goes beyond merely exercising prudence. Even if a director performs their duties with due care, it does not guarantee freedom from legal responsibility if their actions cause harm to parties involved. On the other hand, if a director neglects their responsibilities to the company, they can be held legally accountable. It is essential to understand that, according to fiduciary duty theory, the threshold for legal liability extends beyond exercising caution alone. In essence, legal prudence alone is insufficient to shield directors from potential legal consequences.

Then to find out how the principle of this business judgment rule is used. this principle of *business judgment rule* is often interpreted differently when applied to cases like this:

a. The existence of a more persuasive business judgment rule, in this case the court not only applies the business judgment rule, but makes the primary application.
b. If it appears that there is a personal interest from the board of directors / management on issues that focus more on the motive of an action, but the court still applies the principle of *business judgment rule.*
c. There is a personal interest from the director / management, in this case usually the *business judgment rule* is not applied.
d. If a business decision is contrary to certain policies or rules from the government, in this case the business judgment rule cannot be applied and it can even be said that the director violated *fiduciary duty* to the company.

To effectively apply the principles of the Business Judgment Rule, a comprehensive and thorough comprehension is essential. Therefore, there is a necessity to refine and enhance the laws and regulations associated with this rule, as the existing understanding is deemed limited and incomplete. It is crucial to focus on improving the legal frameworks to ensure a more nuanced understanding.

The harmonization of laws and regulations becomes imperative to establish consistency and coherence across different legislative domains. This harmonization aims to create a cohesive legal structure, prevent conflicts, and maintain a clear and continuous legal framework. The objective is to avoid situations where laws and regulations may inadvertently undermine each other, ultimately strengthening the overall legal infrastructure.

In summary, an improved understanding of the Business Judgment Rule, coupled with enhanced and harmonized laws and regulations, is vital for establishing a legal environment conducive to responsible corporate governance and the effective application of the Business Judgment Rule in the decision-making processes of businesses.

If the directors' losses are duly reported during the annual General Meeting of Shareholders (GMS) and the GMS acknowledges that such actions fall under the purview of the Business Judgment Rule, with the company accepting all associated losses, a legal doctrine known as Acquit De Charge comes into play. This doctrine involves the release or discharge of directors and commissioners from all responsibilities that may arise in the future due to legal actions committed during the acknowledged year. Essentially, Acquit De Charge shields the directors and commissioners from future liability for reported actions within the specified year.

Acquit De Charge is a mechanism that absolves directors and commissioners from potential future claims related to legal actions within the granted year. It operates as a release from ongoing responsibilities that may still be held against them in the future.

Underlining this, the Board of Directors, as the managers of the company, is obligated to diligently oversee the company in accordance with principles of good corporate governance. This responsibility is outlined in Article 97, paragraph 1 of Law Number 40 of 2007 concerning Limited Liability Companies, emphasizing that management duties must be carried out by every member of the board of directors in good faith and with full responsibility. This underscores the importance of managing the company ethically, responsibly, and in compliance with legal requirements.

The principle of openness or transparency, namely openness to the decision-making process and delivery of information about all aspects of the company, especially those related to the interests of stackholders and the public correctly and on time. The principle of accountability, namely the clarity of the division of duties, authorities, and responsibilities of each company organ appointed through fit and proper tests so that company management can be carried out effectively and efficiently. The principle of responsibility, namely the realization of the obligation of the company's organs to report the conformity of the company's management with applicable laws and regulations, and its success or failure in achieving the vision, mission, goals, and objectives of the company that have been set. The principle of independence or independency, which is a condition, the company is managed professionally without conflict of interest and influence or pressure manaun, especially the majority shareholder, which is contrary to applicable laws and regulations and sound corposari principles.

Fundamentally, the connection between a Company and its Board of Directors transcends a mere employment arrangement akin to that between employers and employees. Instead, it involves a bond of trust, with the Company entrusting responsibilities to the Board of Directors as the recipient of this trust. The Board of Directors, functioning as an organ vested with duties and responsibilities in managing the Company, assumes a critical and indispensable role. Without this organ, a Company would struggle to conduct its business activities efficiently and consistently, making the realization of its goals and objectives virtually impossible.

Post the enactment of Law No. 40 of 2007 concerning Limited Liability Companies, numerous legal theories and doctrines, previously non-existent or applicable, found adoption and implementation in Indonesia. One such theory is the fiduciary duty, which was incorporated into the legal framework by Law No. 40 of 2007 concerning Limited Liability Companies. Fiduciary duty represents a commitment by directors to act with complete responsibility, prioritizing the interests of others or entities, particularly the Company itself.

The Board of Directors, as a form of accountability, so that the board of directors is obliged to submit the Annual Report Article 66 of Law Number 40 of 2007 concerning Limited Liability Companies. The Annual Report is a comprehensive report on the development and achievements, as well as the performance of the company in the current year. The report must obtain approval at the Annual General Meeting of Shareholders The authority of the Board of Directors to perform acts is not limited to acts expressly stated in the aims and objectives:

1) 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.
2) The Board of Directors is authorized to carry out management as referred to in but also includes other actions, namely actions according to custom, fairness and propriety that can be inferred from the aims and objectives of the company. Based on Article 92 paragraph (1) and paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies which states that paragraph (1) is in accordance with policies deemed appropriate, within the limits specified in this Law and/or articles of association.

This provision regarding release and release of liability (acquit et de charge) is given because the Board of Directors' Report is in accordance with the facts and performance that has met the requirements and most importantly contains profits and losses in one financial year. If the actions of the Board of Directors are outside the valid annual report or the submitted annual report is incorrect and misleading, the Board of Directors can be held jointly liable by the aggrieved party and cannot be released from such responsibility (aquit et de charge).

The Limited Liability Company's grant of acquit et de charge to the Board of Directors is specifically confined to civil law actions. Accountability remains for actions and management falling outside the purview of the General Meeting of Shareholders' authority. As a result, there has never been an instance where acquit et de charge was extended to Directors suspected of exceeding their authority, engaging in actions without shareholder approval, or acting contrary to the Company's Articles of Association. Such actions are deemed personal and cannot be represented or transferred.

In cases where the Board of Directors, exercising due diligence and full responsibility, makes decisions in a climate of uncertainty, they can still be held personally liable if subsequent events reveal the decisions to be erroneous. This is in line with the fundamental concept of applying the Business Judgment Rule, where the Board of Directors bears personal responsibility if the company incurs losses due to their decisions, even if made with careful consideration.

It can be said that the decision taken by the Board of Directors must be the decision that according to him is the best for the Company considering the dynamic business world. The dynamics of the business world also affect the quality of a Board of Directors' business decisions, a business thinking may be a fatal mistake. Thus, there is no standard formula to define a good business decision. The Board of Directors cannot be held liable, based on the following company law:

1) There must be losses, either to the Company or to shareholders, losses can also be caused by loss of profits.
2) The Board of Directors applies its fiduciary duty.
3) There is a causal relationship between losses incurred and not the actions of the Board of Directors.
4) Whether there is negligence or intentionality on the part of the Board of Directors.

CONCLUSION

The decisions made by a board of directors must be rooted in good faith and adhere to the business judgment rules. Simultaneously, there exists the principle of releasing directors from their responsibilities, known as "acquit et de charge," which can be sanctioned by the General Meeting of Shareholders (GMS). However, this release has limitations, particularly concerning actions that deviate from the fiduciary duty principle. Notably, Law Number 40 of 2007 on Limited Liability Companies does not explicitly define the conditions for granting acquit et de charge, leading to legal ambiguity. It is crucial to clarify that obtaining acquit et de charge does not grant complete immunity; rather, it is applicable only to actions in line with the business judgment rules. The board of directors may mistakenly believe that this release offers absolute freedom from liability. Therefore, it is essential to emphasize that acquit et de charge is contingent on actions aligning with the principles of business judgment rules.

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