Edunity

Volume 2 Number 10, October, 2023
p- ISSN 2963-3648- e-ISSN 2964-8653

Doi:

https://edunity.publikasikupublisher.com/index.php/Edunity/index

DOCTRIN BUSINESS JUDGMENT RULE ANALYSIS AS AN EFFORT TO PROTECT THE LAW OF DIRECTORS OF LIMITED LIABILITY COMPANIES IN INDONESIA AND THE UNITED STATES

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ABSTRACT

Abstract: The provisions and implementation of BJR in Indonesia and the United States need to be studied because the latest Company Laws of both countries have codified the principles of BJR generated by court practice so far where BJR elements are regulated imitatively in the Company Law and accompanied by an explanation of the concept of the core elements of BJR. The formulation of the problems in writing this journal are 1) How are the regulations governing the application of the business judgment rule in Indonesia and the United States? 2) how is the application of the business judgment rule principle as a legal protection effort against directors in Indonesia and the United States? The research method used in this journal is normative juridical research with qualitative data analysis. The results showed that 1) regulations governing the application of the business judgment rule in Indonesia are regulated in Law Number 40 of 2007 concerning limited liability companies and OJK Regulation Number 33 / PJOK.04 / 2014 related to BJR which provides protection for directors and commissioners in carrying out their duties are sufficient. Meanwhile, regulations governing the application of the business judgment rule in the United States are regulated in the MBCA 2016. 2) The application of the business judgment rule principle as an effort to protect the law against directors in Indonesia can be applied to protect directors from legal liability as long as there are no elements of fraud, conflict of interest, unlawful acts and intentional misconduct as in the case of Decision Number 121 K/Pid.Sus/2020. Meanwhile, the application of the business judgment rule principle as an effort to protect the law against directors in the United States in accordance with the scope of the directors' responsibilities as in the Disney dispute case, Delaware Supreme Court.

Keywords: Business Judgement Rule; Directors; Protection; Limited Liability Company

Introduction

Indonesia is a country that puts economic development and strengthening as an effort to realize general welfare. The country's economy is greatly influenced by corporate life. One form of incorporated company that plays a role in determining the national economy is the Limited Liability Company (Perseroan). (Gunatri & Sukihana, 2019). The Company as a company has characteristics where management is centralized under the board of directors.

The Board of Directors is an organ of a limited liability company that has the authority to carry out management or carry out business activities of a limited liability company. The general definition of management includes the duties and functions of carrying out the power of administration and maintenance of the company's assets, in accordance with the aims and objectives and activities of the company within the limits of power or capabilities granted by the law and articles of association to the board of directors. (Harahap, 2021). The Board of Directors has the right and obligation to decide what is important for the company. The Board of Directors has the authority and freedom to decide whether or not a legal action is in the interests of the company as a whole, not in the interests of the shareholders. (Ais, 2017). Every decision made by the board of directors in a company can have significant consequences for those who have an interest in the company, such as shareholders and employees, and even the wider community. For this reason, in carrying out their duties and responsibilities as directors, they must have confidence, expertise, rigor, and a high sense of responsibility. (Sembiring, 2007).

The existence of directors in the company is a must, or in other words, the company must have directors, because the company as an artifical person cannot do anything without the help of members of the board of directors as natural persons. (Arifin & Nindyo Pramono, N.D.). The Board of Directors in a Limited Liability Company is like the life of the company. It is impossible for a company to exist without directors. Conversely, there can be no directors without a company. Therefore, the existence of directors for the company is very important. Even though the Limited Liability Company as a legal entity that has separate assets from the directors, but it is only based on legal fiction, that the company is considered as if it were a legal subject, just like a human being. (Widiyono, 2008).

Directors who make business decisions in good faith can be protected from being held legally liable under the Business Judgment Rule. This is because there are many other variables that influence the outcome of business decisions, even though the directors have followed the right steps in the business decision-making process. (Giraldo & Cañon, 2005).

The Business Judgement Rule ("BJR") according to Merriam Webster is defined as a legal rule that grants immunity to corporate directors protecting them from liability for the consequences of decisions made in good faith. (Basri, n.d.). The doctrine of Business Judgment Rules exists to fully protect and support the authority of the board of directors, as the center and final decision maker of the company's business from court intervention into the substance of business decisions taken by the board of directors. (Wardani, 2023a).

Indonesia, which adheres to the civil law legal system, the source of law is the laws and regulations as the highest hierarchy. Therefore, the court should have the task of interpreting the Business Judgment Rule doctrine because there is no comprehensive

regulation regarding this doctrine. What needs to be known and underlined, although this doctrine provides protection to directors to escape responsibility for losses incurred. However, there are still limitations contained in the management, namely in accordance with the "interests" of the company and in accordance with the "purpose and objectives" of the establishment of the company. Meanwhile, the United States recognizes the Business Judgment Rule as a product of case law that the courts in America have followed in their decisions. The regulation of the duties of a director is contained in The MBCA 2016 (Model Business Corporate Act) as a result of the formulation of the Business judgment Rule as a legal obligation. According to The MBCA, the main duties of directors are duty of care and duty of loyalty. Where in the duty of care, directors must act with prudence, care, and attention., which in carrying out its duties and authority needs to be supported by reliable information. Meanwhile, in the duty of loyalty, directors must act in good faith for the benefit of the company. This study addresses the important issues of when and how courts examine the application of BJR by directors and how BJR is codified in the American Company Law. The provisions and implementation of BJR in Indonesia and the US need to be examined because the current Company Laws of both countries have codified the principles of BJR generated by the court practice over the years where the elements of BJR are set out limitingly in the Company Law and accompanied by a conceptual explanation of the core elements of BJR. The aim is to avoid biased interpretation and implementation of the BJR principles by one court and another. Meanwhile, Indonesia has also questioned the adoption of BJR in Law No. 40 of 2007 by outlining a number of its fundamental flaws.

Research Method

The research method is basically a series of stage procedures or systematic ways used to find the truth in a scientific work, in this case, journal writing, so that it can produce a quality journal, namely a journal that meets the research requirements. (Soemitro, 1990). The type of research in this journal is literaur or library research (library research), meaning a study by reviewing books or research journals related to this journal that come from libraries (library materials). All sources come from written (printed) materials related to research problems and other literature (electronic). (Bektiningsih, 2008).

In writing this journal, the approach used is a qualitative approach, namely an approach that in processing and analyzing data does not use numbers, symbols and or mathematical variables but with in-depth understanding (in depth analysis). In the discussion, researchers use a juridical-normative approach, which is a type of approach using statutory provisions applicable to a country or doctrinal legal approach methods, namely legal theories and opinions of legal scientists, especially those related to the issues discussed. (Soemitro, 1990). The juridical-normative approach used in this research is an approach through positive law, namely examining positive legal rules related to the themes in this journal.

The writing of this journal is based on primary research sources and secondary research sources, namely:(Kunto, 2010).

1. Primary legal materials, namely legal materials that bind (Soemitro, 1990) such as laws and regulations.
2. Secondary legal materials that provide explanations of primary legal materials, such as journals, research results, or opinions of legal experts.
3. Tertiary legal materials that provide guidance and explanations of primary and secondary legal materials such as dictionaries and encyclopedias. (Asikin, 2004).

In writing this journal, the data analysis method used is qualitative analysis. (Irianto, 2017).

Result And Discussion

Regulations Governing the Application of the Business Judgment Rule in Indonesia and the US

Indonesia adopted BJR in Law No. 40 of 2007 to protect directors and commissioners. Regarding the liability of directors and commissioners, it is expressly stipulated that both are personally or jointly liable if the director is negligent or careless in performing his duties in good faith and with full responsibility or the commissioner is negligent and careless in performing supervisory duties resulting in loss or bankruptcy for the company (Article 97 paragraph (3, 4), Article 104 paragraph (2, 3), Article 108 (1), Article 114 paragraph (2, 3, 4), Article 115 paragraph (1, 2) of the 2007 Company Law). However, according to Article 97 paragraph (5), Article 104 paragraph (4), Article 114 paragraph (5) and Article 115 paragraph (3) of the PT Law 2007, directors and commissioners cannot be held liable for losses and bankruptcy suffered by the company if the directors and commissioners can prove otherwise that they were not negligent and innocent in carrying out their duties. (Rissy, 2020a).

Based on the above provisions is the construction of the PT Law on BJR for directors and commissioners related to company losses and bankruptcy. Article 104 paragraph (4) of the PT Law 2007 regulates the concept of BJR for directors in the event of bankruptcy, where the full text of this provision is: Members of the Board of Directors shall not be liable for the bankruptcy of the Company as referred to in paragraph (2) if they can prove:

a. The bankruptcy is not due to his/her fault or negligence;
b. He/she has carried out the management in good faith, prudence, and full responsibility for the interests of the Company and in accordance with the purposes and objectives of the Company;
c. Has no conflict of interest either directly or indirectly over the management actions taken; and
d. Has taken measures to prevent the occurrence of bankruptcy. (Soliman, Hagar, Ibid, & El Ashry, 2015).

Meanwhile, Article 115 paragraph (3) of the 2007 PT Law regulates the concept of BJR for commissioners in the event of bankruptcy, where the full formulation of the provisions is as follows: Members of the Board of Commissioners cannot be held responsible for the Company's bankruptcy as referred to in paragraph (1) if they can prove:

a. the insolvency was not due to his fault or negligence;;
b. has carried out supervisory duties in good faith and prudence for the interests of the Company and in accordance with the aims and objectives of the Company;
c. does not have a personal interest, either directly or indirectly, in the management actions by the Board of Directors that result in bankruptcy; and
d. has provided advice to the Board of Directors to prevent insolvency (Soliman et al., 2015) .

Regulations governing the Business Judgment Rule are also adopted by the Authority Based on the above provisions is the construction of the PT Law on BJR for directors and commissioners related to company losses and bankruptcy. Article 104 paragraph (4) of the PT Law 2007 regulates the concept of BJR for directors in the event of bankruptcy, where the full text of this provision is: Members of the Board of Directors shall not be liable for the bankruptcy of the Company as referred to in paragraph (2) if they can prove:

a. the bankruptcy is not due to his/her fault or negligence;
b. he/she has carried out the management in good faith, prudence, and full responsibility for the interests of the Company and in accordance with the purposes and objectives of the Company;
c. has no conflict of interest either directly or indirectly over the management actions taken; and
d. has taken measures to prevent the occurrence of bankruptcy. (Soliman et al., 2015).

Other than in Indonesia, BJR in America is a product of case law that has been wrestled with by American courts in their decisions in the last century. The duties of directors, in particular the duty of care and the duty to act in good faith and in the best interest of the company as well as other directors' duties formulated in the MBCA 2016 are more the result of a long journey of efforts to formulate BJR as a statutory obligation. This effort was undertaken by the American courts, particularly the Delaware Court, which is famous for its decisions related to BJR, and the systematic (scientific) struggle of the American Law Institute (ALI) in its efforts to formulate BJR to be subsequently adopted in legislation both at the state and federal levels as seen in the MBCA 2016. Before further discussing the role of the Delaware Court and the ALI in formulating the BJR, we will first look at the substance of the director's duties in the MBCA 2016. The MBCA 2016 provides for two main duties of directors namely duty of care and duty of loyalty (the term used for fiduciary duty in America). Under the duty of care, directors must act with prudence, care and attention and these actions need to be supported by information worthy of belief (s 8.30(b) the MBCA 2016Under the duty of loyalty (fiduciary duty),

directors are required to act in good faith in the best interests of the company (s 8.30(a) of the MBCA 2016). If a director has performed the above duties in good faith, with due care and information, and in the best interests of the company, in the context of American business decision-making, he or she has acted within the framework of the BJR. In other words, a director who acts in accordance with both of the above primary duties has, at the same time, exercised BJR and, accordingly, that action or business decision cannot be prosecuted. (Corporate Laws Committee, 2016).

The explanation of s 8.31 of the MBCA 2016 reiterates the relationship of duty of care and duty of loyalty to BJR. It is explained that directors' liability may be eliminated or limited by provisions in the company's deed of incorporation. But there are a number of limits to which directors cannot be protected (can be sued) in making business decisions. There are a number of actions that if taken by a director, he or she could be liable to be sued for breach of the BJR, including when the director: take a number of financial benefits to which the director should not be entitled;

a. has a deliberate intention to harm the company or shareholders;
b. knowingly commits a criminal act (s 2.02(b)(4) the MBCA 2016);
c. directly or indirectly taking a business opportunity for himself or giving it to another person before first giving or offering it to the company (Ss 2.02(b) (6), 8.61 (a), 8.70 the MBCA 2016);
d. entering into a transaction in which the director has a conflict of interest (s 8.61(b) the MBCA 2016); and
e. knowingly making an unlawful distribution of assets or shares (s 8.32 the MBCA 2016).

Meanwhile, it must be recognized that the ALI played a major role in formulating a general rule for BJR, which was later widely adopted in America. In its document, article 4 (c) (1) (2) (3), the ALI (The American Law Institute, 1994) (1994) formulated BJR as follows:

(c) A director or officer who makes a business decision in good faith satisfies the [duty of care] if the director or officer

(1) is not interested in the subject of his business judgment;

(2) is informed in relation to the subject of the business judgment to the extent that the director or officer reasonably believes to be appropriate in the circumstances; and

(3) rationally believes that the business judgment is in the best interests of the corporation.

Based on the above provisions, the author analyzes that the PT Law 2007 and OJK Regulation No. 33/PJOK.04/2014 related to BJR that provide protection for directors and commissioners in carrying out their duties are sufficient. It's just that, unlike what is regulated in the MBCA 2016 in America, the PT Law 2007 and POJK No. 33/PJOK.04/2014, do not explicitly use the term BJR. The regulation and explanation of the essential elements of BJR in the Company Law 2007 and POJK No. 33/PJOK.04/2014

are placed as if they are separate from the performance of the duty to act with care and skill (common law duties of directors) and the duty to act in good faith and in the best interests of the company (fiduciary duties of directors). In addition, the four essential elements of BJR in the PT Law 2007 and POJK No. 33/PJOK.04/2014 do not sufficiently draw the concept of BJR. Therefore, another element of BJR needs to be added, namely that directors and commissioners cannot be sued if:

a. business decisions taken have been made based on sufficient, reliable and rational information and data;
b. does not contain elements of fraud;
c. there is no element of abuse of position as a director or commissioner; and
d. directors and commissioners do not take personal advantage of their decisions.

Application of the Business Judgment Rule as a Legal Protection Effort for Directors in Indonesia and the United States

The Board of Directors as an organ of a Limited Liability Company ("PT") has the obligation to carry out the management of the company. The main duties of the board of directors of a limited liability company include managing the company's activities so that the main objective of seeking profit can be realized, recording or making books of all company assets, and representing the company in taking legal actions for the benefit of the company. (Abas,Muhamad : Citra,Helfira ; Amalia,Mia; Lawra,Rifqi Devi ;Kamilah,Anita ;Fajrina, Rahma Melisha ;Elwidarifa, Marwenny; Nizwana, 2023).

Regarding the application of the business judgment rule doctrine, it must fulfill several conditions, so that in implementing the business judgment rule doctrine there will be no abuse of rights and power against it. The conditions referred to are that the policy (a) is carried out in good faith (good faith) (b) is carried out with a proper purpose (proper purpose) (c) the decision has a rational basis (rational basis) (d) is carried out with prudence (due care) (e) is carried out in a way that is worthy of belief (reasonable belief) as the best (best interest) for the company (fiduciary duty).(Akbar, 2016). Hikmahanto Juwana, a professor of law at the University of Indonesia, explained that basically, if the Board of Directors fulfills the principles of decision-making and is able to prove that the actions were taken in the framework of BJR, then the Board of Directors cannot be held personally liable for the decisions it makes. (Wardani, 2023b). In the implementation of the BJR doctrine in Indonesia, although policies taken by directors fall into the realm of BJR, law enforcers tend to ignore this.

One of the applications of the business judgment rules doctrine in courts in Indonesia is the case in Decision Number 121 K/Pid.Sus/2020 with the defendant GK. In this case, the defendant as Acting Upstream Director of Pertamina for the 2008-2009 period and Managing Director of PT Pertamina (Persero) for the 2009-2014 period had received an offer from Citi Group regarding the investment of Participating Interest in the Australian BMG Block. The Board of Directors, in the defense memorandum of its legal counsel, has received volledig acquitet de charge (full release and discharge) from the GMS so that

the responsibility for the project that has been accounted for by the board of directors is transferred to the shareholders of the company. (Wardani, 2023b). Consideration of the BJR is seen in this case, that what was done by the defendant and the board of directors of PT Pertamina was solely in the context of developing PT Pertamina, namely trying to increase oil and gas reserves so that the steps taken by the defendant as President Director of PT Pertamina did not go beyond the realm of the Business Judgement Rule, marked by the absence of elements of fraud, conflict of interest, unlawful acts and intentional misconduct. The judge's decision at the cassation level upheld the appeal level which stated that the defendant was proven to have committed the act as charged by the public prosecutor, but it did not constitute a criminal offense, thus releasing the defendant from all legal charges.

Whereas in the development of the application of BJR in the United States, initially an abstention doctrine, the court will not interfere in the affairs of the board of directors unless the directors exercise their authority in bad faith and damage the rights of shareholders. So in this sense, the Daleware Court applies BJR which aims to protect and fully support the management authority given by the directors. (Bainbridge, 2004) However, the concept of BJR has evolved into a modern "standard of review", whereby the court examines the decision-making procedures substantively, and looks at the scope of the directors' responsibilities. (Mantili, 2014). Thus, the BJR, which is interpreted as a new presumption, can protect directors if the fiduciary duty is not violated by the directors. The Delware Court in its landmark decision case, the dispute between Aronson v. Lewis (1984) defines the concept of Business Judgment Rule as "a presumption that in making a business decision the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action taken was in the best interest of the company". (Gold, 2006).

Based on this understanding, the Business Judgement Rules is a presumption that in making business decisions the directors are not personally interested in the relevant transaction, and are done for the sake of the company. The directors are believed to have used sufficient information, in good faith and in the belief that the action taken is in the best interests of the company. (Wardani, 2023b).

Previously the BJR itself had been introduced by the Delaware Supreme Court as early as 1927 when it dealt with the case of Bodell v. General Gas & Electric Corp. In this case the Delaware Supreme Court held that the actions of directors who had 'acted in good faith, exercised in their best judgment, and for what they believed to be the benefit of the corporation and all its stockholders' could not be impugned

Furthermore, the Delaware Supreme Court, in the case of Smith v. Van Gorkom, linked BJR to decisions based on sufficient information. The court held that directors' actions or decisions that are not based on sufficient information constitute a breach of fiduciary duty generally and more specifically duty of care. The directors, before deciding to sell

the Trans Union shares, should have consulted outside financial experts regarding the share price. In fact, the directors, when deciding to sell the shares, only took advice from the company's chief financial officer (CFO). This sale decision has harmed Trans Union's shareholders. This decision of the Delaware Supreme Court also overturns the previous decision (Trial Court/the Chancery Court) which had wrongly applied the BJR for the directors. (Wagner, 1985).

When handling the case of Cede & Co. v. Technicolor, Inc. in 1993, the Delaware Supreme Court also stated that directors in carrying out their duty of care must not act fraudulently and engage in unfair dealing. That directors therefore, in the sale of company shares for example, must play a direct role in the context of the sale of company shares from beginning to end, directors must not be passive instrumentalists during the merger process, and directors must seek all material information that is reasonable to them before deciding on the merger or share sale action. (Rissy, 2020b).
The Delaware Supreme Court has also provided guidance in relation to the concept of directors having to inform themselves of all material information related to the subject matter, namely that directors should conduct a number of searches or researches and make decisions based on the information searched. This process should be carried out before any business decision or judgment is made. (Soliman et al., 2015).

Another application of the business judgment rule doctrine can be seen in the Disney dispute, the Delaware Supreme Court considered that the decision of the board of directors will be respected by the court, unless the directors are interested or not independent in making decisions, do not act in good faith, act in a way that cannot be attributed to a rational business purpose, with a grossly negligent decision-making process that includes a failure to consider the material facts available. (Gold, 2006). Gross negligence is applied to answer whether the board of directors has had sufficient information in making decisions, so that it is known whether the board of directors has fulfilled its "duty of care". (Binawan & Soetopo, 2022).

Although directors are expected to act with reasonable diligence, the court will only intervene if the director drastically contravenes the expectation of fulfilling the fiduciary duty. (Wardani, 2023b). To be able to apply the Business Judgment Rule doctrine based on the common law system, especially the United States, the first element must be a business decision. A business decision is defined as any decision to take or not to take an action that is necessary for the running of the company. There are two points in this element, namely that there must be an assessment to reach a conclusion but the assessment does not increase the success or failure of a decision, besides that the problem in the assessment must be relevant to the continuity of the company's business.

The problem in question can be in the form of planning, budgeting, promoting the company's business, obtaining credit. Second, there is no personal interest or self-dealing of directors when making decisions. This is that directors must not personally benefit

financially from business decisions that are contrary to the interests of the company. Third, the board of directors in making decisions should have obtained information and reflected efforts to obtain relevant information. This is in accordance with the obligation of due care of the directors in managing the company. Fourth, it can be reasonably believed that the decisions taken by the board of directors are in the interests of the company, and fifth, there is no abuse of decision-making discretion. (Ashraf, 2022).

Conclusion

Based on the discussion above, the author concludes, among others: 1) regulations governing the application of the business judgment rule in Indonesia are regulated in Law Number 40 of 2007 concerning limited liability companies and OJK Regulation Number 33 / PJOK.04 / 2014 related to BJR which provides protection for directors and commissioners in carrying out their duties are sufficient. Meanwhile, regulations governing the application of the business judgment rule in the United States are regulated in the MBCA 2016. 2) The application of the business judgment rule principle as a legal protection effort against directors in Indonesia is popular not for derivative lawsuits of shareholders, but for prosecutors' charges against directors in corruption cases. BJR can be applied to protect directors from legal liability as long as there are no elements of fraud, conflict of interest, unlawful acts and willful misconduct as in the case of Decision Number 121 K/Pid.Sus/2020.. While the application of the principle of business judgment rule as an effort to protect the law against directors in the United States initially applied "classic BJR", namely as an abstention doctrine, the court will not interfere in the affairs of the board of directors unless the directors exercise their authority in bad faith and damage the rights of shareholders, and developed towards a modern direction, namely the court examines the decision-making procedure substantively, and looks at the scope of the directors' responsibility as in the Disney dispute case, Delaware Supreme Court.

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