

The Principle of Legal Accountability of Local Company in Indonesian Legal System

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Abstract : *Local company has an important role in empowering local potency, regional income, and public service. Local company is included in public legal entity because it uses regional budgets (nations) to conduct its business. As a legal entity, the company has legal rights and liability. In addition to civil accountability, local company also has contractual responsibility and civil liability arising from illegal actions committed by the company. Seen from legal action of local government, legal accountability of local company to the shareholders is included in limited responsibility. In addition, legal accountability of board of directors to the losses suffered by the company is a common responsibility by which in its operation is also supported supervisory board.*

Keywords –*Accountability, company, Indonesian legal system*

I. INTRODUCTION

Local Company as one of economic pillars in Indonesian economic system has an important role in empowering local potency, regional income and public service. Local company becomes a tool of production and distribution in implementing the Article 33 of Indonesian constitution and as a means to realize the principle of decentralization as set up in the Article 18 of 1945 Constitution.

The formation of and management of local company is conducted based on the Act No. 5 of 1962 on Local Company (hereinafter called UUPD). UUPD is the Act by which its formation was inspired by the Government Regulation to Replace the Act (hereinafter called PERPU) No. 17 of 1960 on State's Company. Basically this Act has accommodated basic things about functions and tasks of local company; however, many articles in this Act are no longer appropriate with current development of economic demand, particularly with the existence of regional autonomy. UUPD has been voided by the Act No. 6 of 1969; but in its explanation is stated that UUPD is not applicable since the enactment of substitute law by which until now new Act does not exist yet. As a replacement of UUPD the government has set it in the Act No. 23 of 2014 on Local Government. Further provisions this Act will be regulated in Government Regulation. As long as new rules are not enacted yet, all regulations as a follow up of UUPD¹ are declared effective.

Regional company can be founded by provincial government and district governments based on local regulation.² This local regulation comes into force after having approval from the Interior Ministry³. This ratification is one of preventive forms to make sure that the activity of local company can be adjusted with national economic policy so that business duplication between central and local government can be avoided.⁴

Local company is legal entity by which its position as legal entity is obtained through the formulation of local regulation above (Article 4 (2) of UUPD). In UUPD is not specified the status of legal entity of local

¹ Article 405 of the Act on Local Government.

² Article 4 (1) of UUPD.

³ Article 4 (3) of UUPD.

⁴ Edi Siswadi, *Reengineering BUMD, Mengoptimalkan Kualitas Pelayanan yang Unggul*, (Bandung: Mutiara Press, 2012), pp. 150-151.

company. Legal entity consists of public legal entity and private legal entity.⁵ The ownership of government capital in local company comes from regional budgets and other local revenue. Seen from these funding sources, local company becomes under the domain of public law.

Referred to the above concept, local company is included into public legal entity because it uses state finance to carry out its business activities. In this case what is meant by local budget is "all the rights and state obligations that can be valued either money or other things that can be used as state property in relation to the implementation of those rights and obligations"⁶. Thus, it is clear that local company's capital is included into the definition and scope of state finance.

Local company is also declared as public entity as stated in the Act No. 14 of 2008 on Public Information (hereinafter called UUKIP). UUKIP expands the openness of local company and its accountability to public sphere. In fact, disclosure of local company has been set up in various legislations, especially openness to its owner, namely shareholders. According to Shohibul Anshor Siregar, the expansion of local company is due to the company's finance is part of state's finance so that it cannot be separated from public accountability.⁷

State Finance Act determines that the company's assets included into region's wealth; therefore, its debt and capital are included into region's debt and capital. Local company has its own property which is separated from the owner/shareholder's property. This property is gained from shares of the founders by then they become the owners/shareholders.⁸ Wealth is needed as a mean to achieve company's goals. If legal obligation arises, then this obligation is solely borne under the assets of local company.

From management aspect, local company is subject to private law. Accordingly, the company's asset is not local government's wealth. Local government's wealth is only limited to the amount of shares shared in that company. The nature of establishment of local company is to gain profit, independent, and to free itself from dependence on local government budget. This aim is a form of implementation of democratic economic system and to make local company as one of economic backbone of local economic to create significant contribution to national revenue.

Local company as a legal entity is organized by management board. The appointment of board should be in line with the spirit of company's management, namely based on trust, responsibility and job performance, not based on absolute power of local government as the majority shareholder. By doing so, the persons elected to be the board of directors fully has capacity and professional.⁹

Local company should be relevant with world business development and professional human resources as well as powerful information systems and capable internal controls. However, in fact these expectations do not work. Supreme Audit Agency (BPK) found indications of problems in some local company which includes the Regional Development Bank (BPD), Rural banks (BPR), Local Water Company (PDAM), Market Local Company (PDPasar), Local Mining Company, and many other local companies. Some important issues are as follows; first, a number of local government-owned rural banks are indicated imprudent; second, privatization and cooperation in many Local Water Companies are not fully pay attention to the companies and services provided by the companies are not optimal yet; third, development of Market Local Company are not yet supported by regulation and strong commitment from local government; fourth, the establishment of mining local company is not appropriate yet and its cooperation does not consider the interest of the company itself; and fifth, impropriety of establishment and mismanagement of various other local business.¹⁰

⁵ Mukti Fajar. *Tanggung Sosial Perusahaan di Indonesia*, (Yogyakarta: Pustaka Pelajar, 2010), p. 50: *Public Corporation: A corporation that is formed to meet specific governmental or political purpose. Private Corporation: A corporation that is formed to to conduct privately owned business.*

⁶ Article 1 number 1 the Act No. 17 of 2003 on State Finance.

⁷ Shohibul Anshor Siregar, "Badan Usaha Milik Negara", *Harian Waspada*, Medan, 21 Januari 2013, p. B7.

⁸ Article 8 (3) UUPD: Shares of local company can be owned by local government, citizen of Indonesia and/or legal entity which is formed based on Indonesian legislation by which its members consists of Indonesian citizens.

⁹ <http://koran-jakarta.com/>, Bhakti Pundhowo, "Perusahaan Daerah: Intervensi Pengelolaan Menyulitkan Pengembangan Bisnis," accessed on 31st May 2013 at 10.15 AM and <http://koran-jakarta.com/>, "Pemilihan direksi BUMD masih ditentukan dan diintervensi kelompok politik tertentu, dan kalangan profesional kehilangan kesempatan mengelola BUMD secara mandiri", accessed on 12th March 2012, at 10.21 AM.

¹⁰ Rizal Jalil, "Kondisi BUMD", *Bisnis.com*, accessed on 28th August 2013 at 1.00 PM..

These issues have led to the loss always suffered by the local companies. In addition, the local companies were also ordered to finance activities which are not relevant to its core business, such as financing local football clubs and acting as a cash cow for political parties.¹¹ Those problems dismantle the companies' capability to contribute to the local income local and national revenue.¹² The condition results in not only the dismantlement of companies' capability to contribute to local revenue, but also add the additional burden to the local government budget, causing financial losses to the local government, and raising legal issues concerning accountability. The legal accountability of Local Company as a legal entity is reported to the local government as the shareholder, the supervisory board and the board directors who hold the mandate for the responsible and proper management of the company.

Local Company as a legal subject is the supporter of the rights and obligations. If a legal obligation not implemented it will cause the loss to other party, the party that suffers the loss may sue a lawsuit against the Local Company. Preliminary data from various sources show that the Local Company was once sued and taken to the District Court and State Administrative Court.¹³

Drawing from the background discussed above this study formulated the following problems:

- (1) What are the capacity and the legal standing of the Local Company?
- (2) What is the responsibility of Local Government as the shareholder of the Local Company?
- (3) What is the responsibility of the company's Board of Directors and the Supervisory Board regarding the management and the loss of the company?

II. RESEARCH METHOD

This study employs normative legal research¹⁴ and is prescriptive¹⁵; in order to assess legal liability of Local Company in the Indonesian legal system. The study incorporates the statute approach, the concept approach and the comparative approach. Data collected through library research and field research were used to obtain information about the Local Company. Data were processed using qualitative analysis and logical and systematic interpretation.

III. DISCUSSION

A. The Responsibility of Local Company as a Legal Entity

As a legal entity, the Local Company is liable to legal accountability. The company has the legal rights and obligations such as rights to ownership, rights to organize joint agreements, and liability to court processes. The company also must obey the rules of law and must fulfill any penalties in case of violations.

B. The Civil Responsibility

Local Company as a legal entity has legal personality as a legal subject. This was confirmed also in Supreme Court Decision No. 047 K/Pdt/1988, dated January 20, 1993¹⁶. This decision stated that the Director of the Local Company cannot be sued based on agreements made for and on behalf of the company. Instead, the one that can be sued is the company itself as it has a separate legal entity status because it has a legal subject unattached to the Board of Directors. Therefore, the company holds responsibility (liability) for any act committed to a third party.

In the perspective of civil law, there are some responsibilities that are attached to each company as a separate legal entity which is separate from shareholders and managers. Civil liability (liability under civil law) is a corporate responsibility concerning the domains of Civil Law in a broad sense. Basically, Civil Law responsibility does not cause legal problems. This is because the company is recognized as having the capacity to commit legal actions with third parties provided that they are consistent with the aims and objectives and business activities specified in the company's regulation.

¹¹ Edi Siswadi, *Op cit*, p. viii

¹² Dahlan Iskan, "BUMD Perlu UU yang Memihak", 20 September 2012: State's owned companies contribute around 40 percent to GNP. Therefore, dependency of Indonesian economic is strong enough. This condition can be seen from the fact that Indonesian economic has been survived from global economic crisis.

¹³ Verdict of District Court that have final decision toward Local Company is a verdict of District Court in civil cases (35 cases), criminal cases (26 cases), as well as verdict of Administrative Court (27 cases).

¹⁴ Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: PT Raja Grafindo Persada, 2006), p. 118.

¹⁵ M. Solly Lubis, *Filsafat Ilmudan Penelitian*, (Medan: PT Sofmedia, 2012), hal. 107-108.

¹⁶ Gautama, *Himpunan Yurisprudensi Indonesia yang Penting untuk Praktik (Hand Mark)*, (Bandung: Citra Aditya Bakti, 1995), p. 347.

In addition to having the capacity to the contract or the transaction with a third party pursuant to Article 1315 and Article 1320 of the Civil Code, the company can also carry out engagements arising from legislation or as a result of actions of the company pursuant to Article 1352 of the Civil Code. Actions can be a lawful act in accordance with Article 1354 of the Civil Code as representing the affairs of another person without his consent and orders (*zaakwarrneming*). Moreover, it can also constitute a tort (wrongful act) that harms others, as specified in Article 1365 of the Civil Code.

Contractual Responsibility

Different from shareholders and the management, inherent to the company is the contractual liability for all agreements or transactions made for and on behalf of the company. Contractual liability is derived from and attached to the company for the agreements made with other parties. According to the law, the company as a legal entity can conduct business in accordance with its objectives and purposes. The company can sign any form of agreement justified by the law as long as it is in accordance with the capacity set out in the Articles of Association. Companies are no different from an individual subject of law, having rights and duty. The Company reserves the right to seek assistance and legal protection in court as any individual does¹⁷.

In the course of business, the company can make the legal relationship (*rechtsbetrekking*) and the legal act (*rechtshandeling*) with other parties either by individuals or by legal entities. Relationships and the legal action are represented by the Board of Director. If the company held an agreement (*overeenkomst*) or engagement (*verbintenis*) with other parties then pursuant to Article 1338 of the Civil Code, the company has tied itself to another person or party. If the engagement is done in accordance with the provisions of Article 1320 of the Civil Code, Article 1338 of the Civil Code then the agreement is a binding law to the company and should be implemented.

When the agreement takes effect, legal obligation is incurred for the company to meet (*nakoming*, performance) the contents of the agreement and at the same time to the company is inherent the contractual responsibility to the other party. If the company violates the promises (defaults) it will be qualified as violation of the agreement (breach of contract) or say does not meet the obligation (*nietnakoming*, non-performance), and it could be required to fulfill the agreement and pay replacement cost (cost), loss (*schade*, damage), and interest (interest) pursuant to Article 1243 and Article 1267 of the Civil Code.

This is affirmed in Supreme Court Decision No. 695 K / PDT / 2010 stating that the agreement made by the directors of the company in the case is for and on behalf of the company. If the company does not fulfill the committed agreement, it is qualified as a breach of contract. Therefore, the opposing party may require the company to fulfill the obligations stated in the agreement. Such provisions are also contained in Decree no 776 / K / PDT.SUS /2012. In the consideration of the decree, among others, it is described that *PD Pasar Surya* assumes contractual liability to pay to the Plaintiff /Appellant/applicant of the Cassation Mslda Ferywati/Tanjung the rent plus interest.

Furthermore, the Supreme Court Decree No. 2990 K / Pdt /1989¹⁸, dated May 23, 1992 considers that PD PasarDwiwarna Bank as a legal entity is not able to restore customers' deposits after maturity. Refund of the deposit to the customer is the legal responsibility of the Bank as a legal entity, and therefore, the Board of Directors is not held accountable. In relation to the contractual liability, the Company may also be jointly and severally liable to persecution (*hooftdelijkaansraakelijkheid*) by other parties. Among others, this can be seen in the decree No. 09/Pdt.G /2010 / PN WRP.

C. Responsibility in Reference to Article 1365 of Civil Code

In addition to contractual responsibility which was the result of agreements pursuant to Article 1313 *juncto* Article 1320 Civil Code, there is also civil responsibility incurred from the company's acts against the law. Looking from the perspective of von Savigny's Fiction Theory, the company as a legal entity is only a mere metaphor. Separated from its owner and the boards, the company is never authorized to perform legal acts and criminal activities¹⁹. The same is stated in Winscheid's Theory of asset goal (*leer van doelvernogen*) which proposed that the company as a legal entity is wealth without the subject. The intention is the wealth, not the human. Therefore, it is impossible the company to commit unlawful acts. But the notion that the company not be held liable for its acts against the law on the grounds that the company is unlikely to take legal actions has long been abandoned and excluded by the Organ Theory (*organenTheorie*) taught by von Gierke²⁰.

¹⁷ Gautama, *Ibid*, hal 349

¹⁸ Ali Boediarto, *Kompilasi Putusan MA tentang Hukum Utang-Piutang*, (Jakarta: IKAHI, 1995), p. 152.

¹⁹ Chaidir, *Badan Hukum*, (Bandung: Alumni, 2005), Page. 26

²⁰ MA Moegni Djodirdjo, *Perbuatan Melawan Hukum*, (Jakarta: Pradnya Pramita, 1979), p. 175.

Furthermore, in the judicial practice of HogeRaad (HG) Netherlands tend to embrace the theory that spawned jurisprudence that the company as a legal entity may be held accountable under Article 1365 of the Civil Code if the organ committed an unlawful act²¹. As for who can be considered as an organ of the company is the person who performs the functions of companies, which have the effect of shaping the will of the Company. Therefore, if the Company's acts committed by its organs and these actions violated the law or the rights of others then the company is considered to meet the elements of guilt (Schuld, wrongful) under Article 1365 of the Civil Code.

In UUPD it is stipulated that organs of Local Company consist of Meeting of Shareholders, the Supervisory Board and the Board of Directors. Furthermore, in Article 335 paragraph (1) of the Act 23 of 2014 Local Public Companies it is mentioned that the organs are the head of the region, the supervisory board and the board of directors. While Article 340 paragraph (1) stated that the organs of Local Company is the General Meeting, the Board of Commissioners and Board of Directors.

If the starting point is the provision associated with the Theory of Organ then all actions of AGM (Annual general Meeting), the Board of Directors and Board of Supervisors conducted are on behalf of the company. If it is found unlawful the Local Company may be held responsible under Article 1365 of the Civil Code. Any unlawful action committed by Directors may be held accountable under Article 1365 of the Civil Code if it is done for and on behalf of the company as long as all the actions are within the context of carrying out the intent and purpose as well as business activities the company.

This can be seen in the Supreme Court Decision/Verdict No. 104 / Pdt / 2013 / PT Sing. At the appeal level, there are considerations that states that actions of the Directors of PD Bank PDI which cashed a blank check on behalf of the bank with dishonest intentions and abuse of personal responsibility (personal liability) of the Board of Directors. In this case, the company cannot be held accountable for the unlawful acts. According to the Supreme Court, the Supreme Court has disagreement with the consideration of judicial appeal with the following reasons/considerations:

- The director is a person specified by the Bank to cash Banker's Cheques on behalf of the Bank;
- Therefore, any result of the actions of the Director is liable to PD Bank PDI, because apparently the check in this case has been withdrawn without coercion and trickery.

Thus the Company is responsible for the loss of the other party as a result of an unlawful act committed by its organ. The responsibility is in accordance with the principles of justice and the provisions of Article 1365 of the Civil Code.

D. Responsibility Pursuant to Article 1367 paragraph (3) of the Civil Code

The responsibility of the the second form of company's unlawful action is based on Article 1367 paragraph (3) of the Civil Code , which reads: employers and those who appoint others to represent their affairs is in charge of losses issued by their subordinates hired to perform the tasks²².

The responsibility for the unlawful acts defined in Article 1367 paragraph (3) of the Civil Code is referred to the responsibility of the representatives or *vicarious liability* or *vicarious responsibility*. It is the responsibility imposed by civil law (imposed by law) to someone for the unlawful acts committed by others as the act of the offender is considered valid or constructed in relation to the others²³.

Such accountability system is constructed based on the principle of responsibility for the unlawful act committed by agents (subordinate), the liability of a principal for the tort of his agents²⁴. This doctrine is codified in the terminology: *respondent superior* that means the superior is responsible for the illegal acts of his subordinates (a master liable to the wrong of a servant)²⁵. This doctrine is in line with the Agency Theory and the provisions of Article 1367 paragraph (3) of the Civil Code so that it can be applied within the framework of the legal relationship between an employer or principal and its employees or agents provided there is evidence that the acts were committed within the scope of the execution of company's tasks.

From both provisions Article 1367 paragraph (3) of the Civil Code and the doctrine of vicarious liability, a legal expression was coined: employers are held accountable for tort committed by their workers or employees (*ondernemeersfouten van zijnvooraansprakelijk ondergeschikten hum*) or employers are liable to the fault of their employees. The imposition of corporate responsibility through the provisions of Article 1367

²¹ Yahya Harahap, *Hukum Perusahaan*, (Jakarta: Sinar Grafika, 2009), p. 11.

²² KUH Perdata, Terjemahan R. Subektidan R. Tjitrosudibio, (Jakarta, Pradnya Paramita, 1980) p. 310.

²³ Winfeld-Jelowiez, *On Tort*, Thirteenth Edition, (London: Sweet & Maxwell, 1989), p. 560.

²⁴ *Ibid*, hal. 430.

²⁵ *Loc. cit*

paragraph (3) of the Civil Code is executable provided that there is a legal relationship (or partnership agreements, labor agreements) between the company and the employee / employees.

Tort committed by organs are considered and qualified as an act against the law of the firm under Article 1365 of the Civil Code, when the acts occurred in the formal scope of the authority and capacity mandated to the organs. Conversely, if the people who work for the company are bound to the employment agreement, either as employees, officers, authority or agency, they are categorized as subordinates (*ondergeschikt*, subordinate, servant), thus, torts committed within the framework of implementing the tasks given by the company to him cannot be held accountable under Article 1365 of the Civil Code, but through vicarious liability under Article 1367 paragraph (3) of the Civil Code.

E. Legal Acts of Local Government

One of the principles of nation is the principle of legality which implies that any legal action should be ruled based on laws and regulations and authorities regulated by laws. On these foundations lies the legality of local government as the owner or the shareholder to establish a Local Company. Any exercise of the authority requires accountability. Ancient doctrine allows participants to delegate their responsibilities through various means. For example, the Eastern Roman (Byzantine) imposed *chreokoinonia* doctrine. This doctrine provides a means for passive investors to profit from marine commercial activities with a fixed limit of losses only to the extent the amount of investment.²⁶

In the Middle Ages, several European traders use *commenda* principles in business activities which are mostly conducted in marine trade. *Commenda* was commonly found in the limited modern civil partnership (limited partnership), namely the limited responsibility for passive shareholders. According to the *commenda* principle, the responsibilities of these shareholders are limited to the amount of their investment. Using this principle, the Continental European regimes began to ratify the Civil Code for Limited Company. This policy was followed by England and the United States.

One of the greatest advantages enjoyed by shareholders are limited liability (limited liability). Limited liability of Local Government regarding Local Company is the consequence of the Local Company as a legal entity. Such responsibilities are not regulated in UUPD, Local Government regulations, the Decree of Minister of Domestic Affairs, the Regulation on the Establishment of Local Company. This limited responsibility of shareholders is formalized under the term "limited liability" (*beperkte aanspraakelijkheid*, limited liability)²⁷. Thus, the concept and the principle of *separate entity* and corporate entity gave birth to limited responsibility of shareholders.

The main objective to be achieved through the principle of limited liability is to make the company an attractive investment vehicle. This is because through the principle of separate entity, the law provides protection innocent shareholder so as to be independent and free from any third party claims arising from contracts or transactions committed the company. Thus, limited liability shield is intended to cultivate a passive investors, in which the shareholders can invest in a business managed by the company without bearing the risks which can reach his personal possessions.

This arrangement comes from the idea that the company is a legal entity. That means that the Local Company is viewed as something that stands alone, apart from the individuals in it²⁸. In *common law system*, this principle is referred to as a separate legal entity, which means that the company is a separate legal entity from its shareholders. Therefore, these companies bear the burden of his actions in connection with obligations to creditors²⁹. It means that the company has unlimited responsibility for the debts and obligations in the conduct of its business, while shareholders have limited liability³⁰.

This can be explicated for example, through Decree No. 07 / Pdt.G / 2014/PN Snb, which states that although Simeulue Regent (Defendant) was present to sign the agreement, but the participation of the Regent was not the individual to perform the agreement with managers of oil palm plantations, but only as a person who was present and signed in the agreement but was involved in performing the negotiation in the agreement.

Limited liability of shareholders does not apply in certain cases. Article 29 paragraph (4) UUPD explained that in the event of liquidation, the Local Government referred to in paragraph (1) is liable for losses

²⁶ *Loc. cit*

²⁷ *Loc. cit*

²⁸ Rudhi Prasetya, *Kedudukan Mandiri Perusahaan Daerah*, (Bandung: Citra Aditya Bakti, 1996), p. 9

²⁹ Allan Blake dan Helen J. Bond, *Company Law*, (London: Blackstone Press Limited, 1995), p. 40.

³⁰ Robert W. Hamilton, *Op cit*, p. 2.

suffered by third parties if the loss was caused by the approved balance sheet of profit and loss statement which does not describe the state of the actual company.

In this case, the shareholder's action is against the law. These actions cause unlimited responsibility of shareholders of the Local Company to a third party, which is known as the doctrine of *piercing the corporate veil*. Thus, personal responsibility of shareholders is incurred to a third party based on this doctrine of *piercing the corporate veil*³¹.

By using this doctrine, Local Company as a separate legal entity from its organs can no longer be defended³². In the United States for example, because the shareholders were found to use the company to commit fraud, the court imposed a personal responsibility to shareholders³³. Therefore, in general, if the special rights of shareholders of companies are abused for personal gain, the doctrine of piercing the corporate veil is applied³⁴.

It is applied in judicial court practice, in which the local government serves as the primary defendant (I) and the Local Company was acted on behalf local government. This was found in Case No. 2592 K / PDT / 2003, Case No. 13 / PDT / 2013 / PT BTN, and Case No. 488 PK / PDT / 2007. Local government was also sued along with the Local Company. This occurred in Case No. 09 / Pdt.G / 2010 / PN.WNP , Case No. 19 / PDT / 2013 / PT Palu, Case No. 2010 PK / Pdt / 2008, Case No. 337 K / Pdt.Sus / 201, Case No. 912 K / Pdt / 2002, and Case No. 1404 K / Pdt / 2008. In addition, the Head of Local Government also served as Co-Defendant in Case No. 4 K / Pdt / Sus / 2013.

F. Constraints in the Application of the Principle of Piercing the Corporate Veil

The responsibility of Head of Local government for the losses of the Local Company in excess of capital (shares) which are invested can qualify for the application of the principle of *Piercing the Corporate Veil*. The application of this principle to the heads of local government can strengthen the protection of creditors because local government as a public legal entity has a relatively stronger financial capacity. However, government assets cannot act as debt guarantee, security, or appropriation for repayment of debt to third parties (debtor). It is stipulated in Article 49 paragraph (5) and Article 50 of Law No. 1 of 2004 on State Treasury. In addition, the Local Company that has gone bankrupt can only be dissolved (liquidation) as desired by the Head of Local Government. In Article 29 paragraph (1) UUPD it is confirmed that the Company's liquidation and the appointment of its liquidator is stipulated in the Local Regulation where it is established and takes effect after the approval of its superior agency. Paragraph (2) confirms that all the Company's assets are divided by the nominal value of the shares after liquidation.

The aforementioned provision only regulates the distribution of the assets of liquidation to shareholders according to the balance of the nominal value of its shares. This can only be done in the case that the company still possesses assets after liquidation. Issues arise when the value of the remaining assets of the company is not sufficient for debt payments to creditors. It is not regulated in UUPD and its implementing regulations and therefore, the legal principle that creditors take responsibility for the loss of the debtor (Local Company) applies.

G. Responsibilities of the Board of Directors for the Management and Company Losses

Article 14 paragraph (1) UUPD conjunction with Article 6 letter e and g Decree No. 50 in 1999 showed that the company's board of directors is the company organ and is fully responsible for the management of the company as well as represents the company, both inside and outside the court. The responsibility of directors is inherent in their existence, duties, authorities, rights and obligations attached to him. Basically directors are only entitled and authorized to act on behalf and for the benefit of the company within the limits permitted by legislations and the articles of association of the company. Any action performed by directors outside the granted authority does not bind the company. This means that the directors have limitations in acting on behalf of and for the benefit of the company.

H. Theory of Liability of Directors

Pursuant to Article 14 paragraph (1) and Article 15 (2) of UUPD, the directors are responsible for managing and representing the owner of the company. Sutan Remy Sjandeni found such liability created by

³¹ *Loc. cit*

³² Robert W. Hamilton, *Op. cit*, p. 67

³³ Roger Leroy Miler dan Gaylor A. Jent, *Fundamental of Business Law*, (Texas: Thomson South Western West, 2005), p. 527

³⁴ *Loc. cit*

applying the doctrine or principles of company law or corporation law of England and other countries embracing *common law system*³⁵. When viewed from the standpoint of legislation theory, definition of actions to be taken by the board of directors is the primary legal norms³⁶.

From the point of principle of civil liability, the Board of Directors is responsible only to the party that appointed him, the General Meeting of Shareholders (AGM) or the owner of the company. That is, if the appointment is an agreement between the AGM and the directors the legal subjects of the agreement are the AGM and the Board of Directors and therefore, directors should be accountable to the AGM. That is, when viewed from the source of the binding, the binding between the directors and the AGM is the appointment in the AGM that can be viewed as an agreement. When linked with personal principles in the Civil Code, the agreement applies to the parties that committed the agreement (Article 1315 *juncto* Article 1340 of the Civil Code).

In Article 20 (1) UUPD it is mentioned that all employees of the Local Company, including members of the Board of Directors in their capacity as such, which is not burdened with the task of keeping the money, securities and goods inventories, who act against the law or because of malpractice and tasks assigned to them which directly or indirectly cause losses to the Local Company, are required to replace the losses.

This responsibility is logical because in the exercise of their rights to manage and represent the company, the directors may breach *fiduciary duties* through acts of abuse of rights (*ultra vires*). In Article 20 (1) UUPD the term/notion that director committed an unlawful act or neglect of obligation and duty is used. However, if there are no errors or imprudence, directors of the company may be exempted from personal liability to the company's losses. The measures used to determine whether the directors have made a mistake or committed an act of negligence in the management of the company that resulted in losses is not set explicitly in UUPD.

I. Collegial Responsibilities of the Directors and Exemption

The Board of Directors as a collegial organ of Local Company. The board of directors consists of all directors, including the chief executive appointed by the AGM. The provision of *principle of collegial presumption* that can be used as a legal basis that the directors have a collegial responsibility is UUPD Article 14, paragraph 15 and Article 20, and the Ministry of Domestic Affairs No. 50 1999 Article 12 letter e. Thus, it is clear that the responsibility of the directors is the responsibility of the collegial management of the company.

If the number of members of the Board of Directors is more than two (2) people, Article 11 UUPD enforce the application of the principle of jointly and severally liable (*hoofdelijk en gezamenlikaansprakelijk*). If one member of the Board of Directors neglect or abuse the management obligations as assigned to them, each member of the Board of Directors share responsibility jointly and severally for the losses experienced by the company.

Therefore, if wrongful actions, acts of negligence, or violation is made by a member of the Board of Directors without the knowledge or participation of other members of the Board of Directors, other members of Directors do not take responsibility for him. It is unfair if a director or more who do not approve the act that caused the company's losses, they have to liable to the losses. However, it can be justified to put a liability on director if it is only to perform the principle of collegial responsibility to find out a solution.

J. Responsibilities of the Supervisory Board

After the issue of the Minister of Domestic Affairs' Decree No 18 and No. 50, 1999, the formation of regulatory body is no longer voluntary, but compulsory. This can be seen in Article 2 stating: Management of Local Company consisting of: a. Board of Directors; b. Board of Supervisors. In fact, according to Article 19 of the Decree, the number members of of Supervisory Board should be no more than three (3) members, one of whom was elected Chairperson and concurrent Member. Supervisory Board members come from professional people relevant with the business the company is concerned (Article 18 paragraph (2)).

Supervisory Board is included as one of the Company's boards. This regulatory body is an organ of Local Company in charge of supervising the general and/or specific to the operations of the Local Company (Article 21 letter a Decree No. 50, 1999) and provides advice to the board of directors (Article 21 letter e of Decree No. 50 of 1999). Supervision is done at the discretion of the management, the course of the management of the Local Company in general, both the Company and the Company's Local Area.

³⁵ *Loc. cit*

³⁶ Maria Farida Inrati, S., *Ilmu Perundang-undangan*, (Jakarta: Kanisius, 2007), p. 31. Primary legal norm is legal norm that consists of legislation or guideline about how someone in this case is director should carry out the company.

K. Personal Responsibility of Supervisory Board Members

Juridical accountability of Supervisory Board members for any unlawful acts and acts of negligence in supervisory and advisory not set explicitly in UUPD and its implementing regulations, but implicit in Article 9 paragraph (2) and article 12 of Decree No. 50 of 1999.

If members of the Supervisory Board committed unlawful acts or neglected the duties supervisory and advisory, and the company suffered losses due to these unlawful acts and negligence, every member of the Supervisory Board is personally liable (personal liability) for the losses.

If there is only one member of the Supervisory Board, the responsibilities become his personal responsibility. However, when members of the Supervisory Board consist of two (2) or more persons, they are jointly and severally liable.

L. Matters Removing Personal Responsibility from Supervisory Board Members

Personal responsibility and shared responsibility to Supervisory Board can be ruled out in a particular case. This is called a limitative determination when the followings can be proven:

1. has performed supervision duty properly and carefully for the interests of the Company and in accordance with the goals and objectives of the Company;
2. does not have a personal interest, either directly or indirectly, for all acts of management Board of Directors resulting in losses ; and
3. has provided advice to the Board of Directors to prevent the continuation of such losses from arising³⁷

Those conditions can remove personal responsibility from Supervisory Board members for losses suffered by Local Company. This removal is subject to the capability of the Supervisory Board members concerned to prove that the losses are not the results of their fault or negligence.

IV. CONCLUSIONS AND SUGGESTIONS

Conclusions

Local Company as a legal entity is the subject of legal rights and obligations. Rights and responsibilities are carried out by its officials and the company responsible for all legal consequences arising from the activities of the board corresponding legislation, objectives and interests of the company.

Heads of Local Government as the shareholders are only liable for damages if the company's verified balance sheet and financial statements contain misinformation. The Board of Supervisors is responsible for the company's losses arising from their fault or negligence in monitoring and providing advice to the Board of Directors.

Directors and employees of the company responsible for the losses incurred due to the negligence and the tort committed. Losses arising out of negligence and the tort committed by the Head of Local Government, Board of Trustees, Directors and Employees of the company are the responsibility of the creditor.

Suggestions

It is recommended that the Government and Parliament establish a comprehensive and integral law on Local Company in order to become a legal basis that has the power and legal certainty and can be applied effectively. It is recommended that the Government establish an independent government agency, autonomous and independent of the Interior Ministry to conduct training and supervision for the Local Company from the aspects of planning, implementation, training, empowerment and supervision.

Accountability of Head Local Government as shareholders are not only against losses incurred to third parties as a result of verified balance sheet and the financial statements containing errors or untruth, but extended to other third-party losses due to various irregularities committed in the establishment and management of the company.

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REFERENCES

Books:

³⁷ Rudhi Prasetya, *Op. cit*, p. 22-24.

- [1] A. Blake dan H. J. Bond, *Company Law*, (London: Blackstone Press Limited, 1995).
- [2] A.Boediarto, *Kompilasi Putusan MA tentang Hukum Utang-Piutang*, (Jakarta: IKAHI, 1995).
- [3] A.K. Muhammad, *Hukum dan Penelitian Hukum*, (Bandung: PT Citra AdityaBakti, 2004).
- [4] Amiruddin & Z.Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: PT Raja GrafindoPersada, 2006).
- [5] Chidir, *Badan Hukum*, (Bandung: Alumni, 2005).
- [6] E.Siswadi, *Reengineering BUMD, Mengoptimalkan Kualitas Pelayanan yang Unggul*, (Bandung: Mutiara Press, 2012).
- [7] Gautama, *Himpunan Yurisprudensi Indonesia yang Penting untuk Praktik (Hand Mark)*, (Bandung: Citra AdityaBakti, 1995).
- [8] M.Fajar. *Tanggung Sosial Perusahaan di Indonesia*, (Yogyakarta: PustakaPelajar, 2010).
- [9] M.Fajardan Y.Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, (Yogyakarta: PustakaPelajar, 2010).
- [10] M. M.Djojodirdjo, *Perbuatan Melawan Hukum*, (Jakarta: PradnyaPramita, 1979).
- [11] M. S.Lubis, *Filsafat Ilmu dan Penelitian*, (Medan: PT Sofmedia, 2012).
- [12] M. F. Indrati, *Ilmu Perundang-undangan*, (Jakarta: Kanisius, 2007).
- [13] R. L. Miler dan G. A. Jent, *Fundamental of Business Law*, (Texas: Thomson South Western West, 2005).
- [14] R.Prasetya, *Kedudukan Mandiri Perusahaan Daerah*, (Bandung: Citra AdityaBakti, 1996).
- [15] S.Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 2008).
- [16] W. Jelowiez, *On Tort*, Thirteenth Edition, (London: Sweet & Maxwell, 1989).
- [17] Y. Harahap, *Hukum Perusahaan*, (Jakarta: SinarGrafika, 2009).

Paper:

- [18] B.Pundhowo, "Perusahaan Daerah: Intervensi Pengelolaan Menyulitkan Pengembangan Bisnis," <http://koran-jakarta.com/>, Jumat, 31 Mei 2013/Senin, 12 Maret 2012, 10:21:29 WIB.
- [19] R.Jalil, "Kondisi BUMD", *Bisnis.com*, Selasa, 28 Agustus 2013.
- [20] S. A.Siregar, "Badan Usaha Milik Negara", *HarianWaspada*, Medan, 21 Januari 2013.