

Implementation of Business Judgment Rule Doctrine In Indonesia

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Abstract:- Business Judgment Rule as one of the important doctrine in managing limited liability company. Business decision that focus on avoiding lost and just enhancing profit is not the main aim of business judgment rule. Eventhough, shareholders invest their money to get much profit, but the concept of business is managing risk and information, not only to get much profit for company. In Indonesia, this doctrine is still new, therefore, in criminal law enforcement in Indonesia is still unclear how to ascertain that business decision that makes company lost is part of crime or not. Lost is tort, one of the frame of thinking in criminal law enforcement in Indonesia. There is a regulation, article 97, paragraph 5 in Law No.40 year 2007 concerning Company Limited. In this article 97, paragraph 5 stipulated that Directors can not be held responsible for losses of limited liability company if it can prove: a. The loss was no fault or negligence; b. Has been doing maintenance in good faith and in the interest of prudence and in accordance with the purposes and objectives of the company; c. Not a conflict of interest, either directly or indirectly for all acts of management, d. Have taken action to prevent such losses arising or continuing. These stipulations regulate how business judgment of directors must be appreciated if all those aspects have been implemented. Criminal law enforcement in Indonesia has not fully implemented the doctrine to assess whether losses incurred from a business decision is a criminal element.

Key words: *business judgment rule, losses, criminal law enforcement,*

I. INTRODUCTION

Decision making is an important part instrument in business, whether the decision will get benefit or not, it depends on situational and conditional and the way to decide business decision. Directors is one of the organ in Indonesian limited liability company law, have duty to manage risk and information to reach company's target. The decision of directors can create profit or losses. Law enforcement has to analyze the process, not merely the result of the decision.

Decision making process can be analyzed by science and art. Decision making as science :

- a. decision-making activities carried out by a systematic approach, organized and directed,
- b. the scientific approach by using the technique of decision-making on the basis of mathematical calculation and statistical,
- c. decision-making can be learned and analyzed.

While decision-making as an art, include:

- a. decision-making activities are always faced with the unique characteristic of internal and external factors. (internal factors: company structure, company culture. Decision maker characteristic, such as personality, intelligence, experience, preference toward problem. External factors: society, condition of economic, social politic) b. decision-making can not be learned and analyzed.¹

Business decision is a decision based on optimum consideration to reach profit, give benefit or loss by business operation. Business decision may not take the higher profit, but the rational decision, and it depends on the internal (financial condition and resources) and external factor (competition and economic condition). If business decision has been passed by strict process and and consider the best interest of the company, the decision is protected by business judgment rule doctrine, that must be respected in law enforcement.

Director has large authority in bringing the company's progress, and this authority needs assessment mechanism toward business decision, if there is no assessment standard, can loss stockholder and stakeholder interest. Assessment standard is important as protector for directors to prove that all decision have been taken with good faith, and there is no *mens rea* (guilty mind). The authority is parallel with assesment standard.

¹http://File.Upi.Edu/Direktori/Fpeb/Prodi._Manajemen_Fpeb/197302052005012-Rofi_Rofaida/Materi_Kuliah/Konsep_Dasar_Pengambilan_Keputusan.Pdf,

There are some directors in Indonesia, especially directors of state owned companies accused of corruption despite the business decision has been taken through mechanism of business judgment rule. One of the director of state owned enterprise is Hotasi Nababan (Director of Merpati Nusantara Airline/PT MNA). As a company that is experiencing a decrease in trust partner for financial condition, Merpati Nusantara Airline co,ltd (PT MNA) like getting a fresh breeze when there was a company that willing to lease aircraft to promote the airline operating the TALG in the United States, but PT MNA was required to deposit USD 1 million to TALG. After conducting a survey related to the company,s aircraft and, ultimately PT MNA to deposit of USD 1 million, but once deposited, the aircrafts was not sent to Indonesia by the TALG, then PT MNA sued TALG in the United States court and won the case. But strangely in Indonesia, the director of PT MNA accused of corruption by enriching element of another person or corporation.

Prosecutor made Hotasi Nababan (Director of PT MNA) as defendent but District Court of Central Jakarta acquitted the accused Hotasi Nababan corresponding decision number 36/Pid.B/TPK/2012/PN.JKT.PST dated 12th February 2013. Hotasi Nababan was managing director Merpati Nusantara Airlines (MNA) Co, Ltd, was accused of corruption related to lease Boeing 737-400 and Boeing 737-500 by prosecutor. In consideration of the Law, the judges stated : “Although the action plan of the company serves as a reference for the directors to run the company’s activities during that year, but in practice the board of directors must consider the situation and the growing conditions and faced during business decision to be made. So even though the lease procurement B737 series 400 and 500 did not explicitly planned or budgeted in the action plan of the company in 2006, when the board od directors looked at the decision taken very profitable for the company according to the judges so is not unlawful. Reference is a decision made carefully, in good faith, there is no conflict of interest and solely in the best interests of the company”.²

Prosecutors were not satisfied with the decision of the District court of Central Jakarta and appealed to the Supreme Court of the Republic of Indonesia. On appeal, the Supreme Court judges states that Hotasi Nababan has done corruption with the elements enriching others or corporation. The judges consideration is Hotasi deemed unlawful because no mechanism to pay the security deposit by Letter of Credit (L/C). Depositing it is considered a violation because it is done before the aircraft purchase agreement between TALG and East Dover Limited as the owner of the aircraft. Finally, Hotasi Nababan jailed for 4 years by the Supreme Court of Indonesia, even he ever acquitted by the District Court of Centra Jakarta.

Hotasi in not the only directors were sentenced to jail for their business decision, there some other directors of state owned enterprises such PT Chevron Pasific Indonesia (PT CPI) and PT IM2 were bad precedent in the enforcement of criminal law on business decisions were taken and implemented by the board of director. Almost all board of director of state owned enterprise find business judgment phobia, very easy to be accused wrong in taking business decision.

Directors of PT CPI (Chevron Pasific Indonesia) was accused of deliberately hire companies are not competent in working on bioremediation project resulting in state losses by inflating the budget. Besides, the company’s directors were working on bioremediation project partners, such as Green Planet Indonesia LLC and Sumigita Jaya LLC, both directors of the company was sentenced to 5 years in prison for alleged coorruption.

Supreme Court of Cassation sentenced 4 years and a fine of Rp.200 millions for a staff of Chevron Pasific Indonesia LLC, Bachtiar Abdul Fatah. And corresponding decision Number 2332 K/Pid.Sus/2013,Directors of Green Planet Indonesia (Risky Prematuri) sentenced to 5 years in prison and fined Rp.200 million and the corporation must pay compensation amounting to USD 3.089.281, 26. If the company is unable to pay within one month after the court decision is legally binding, the property owned by the company will be seized and auctioned by prosecutors to cover the compensation.

Another case is Indar Atmanto ensnare directors, former director of PT Indosat Mega Media (IM2 LLC), the case began with the signing of cooperation agreement with PT Indosat. Cooperation is intended for shared use frequency of 2,1 GHz. Audit Board and Development mention, as a result of the agreement, the state suffered losses of arround Rp.1,358 trillion. Losses are based on calculations of cooperation the period 2006 to 2012. Case began when the government auctioned 3G frequency in 2007, the auction was won by Indosat, Telkomsel and XL. However, PT IM2 who do not participate in the tender, put on the network. Directors do not benefit personally. The advantage enjoyed by the company.

Jakarta High Court rulling that aggravate punishment Indar Atmanto previously 4 years of imprisonment to 8 years in prison. Indar assembly appeals court consider guilty of corruption as article 2 paragraph (1) jo. article18 paragraph (1) and (3) Law of Corruption Eradication jo. Article 55 paragraph (1) 1st Book of Laws Criminal law. In its decision No.33/Pid/Tpk/2013/PT DKI dated December 12th, 2013, Indar Atmanto also convicted of Rp.200 million subsidiary 3 months in prison. Assembly appeals court also annuled a previous criminal restitution imposed on the corporation PT IM2, because it did not state the legal subject in the

² Decision No. 36/Pid.B/TPK/2012/PN.JKT.PST dated 12th February 2013

indictment. The prosecution and the defendant then appealed, even the defendant filed an international arbitration related to this case.

Trend penalize directors related business decision are increasing in Indonesia. The results of a business decision is often used as an indicator for board of director can be punished, who should analyze the law enforcement decision-making process rather than results. Because the task of directors is to manage risk and information. The doctrine of the business judgment rule is often ignored by law enforcement.

Based on the introduction above, author find some problems about penalize and criminalize directors' business decision. Comparative analysis of implementation of business judgment rule in some countries will fulfill this journal. Further more, author find how to protect director's business judgment, in order, law enforcement in ascertaining whether a business decision is crime or not, and able to contribute in making business judgement rule is universal doctrine that must be appreciated.

II. FORMULATION OF THE PROBLEM

Based on the above exposure to the issues to be analyzed in this paper is *First*, Why directors' business decision can be sued in criminal law enforcement? *Second*, How to protect directors' business decision?

III. RESEARCH METHOD

This study is normative law (normative legal research), the type of data used are secondary data, which consists of primary legal materials (various forms of legislation), consisting of secondary law (collection of data on the results of scientific work of scholars and research results are related to the position of directors' business judgment rule in criminal law enforcement in Indonesia), consisting of tertiary legal materials (materials that provide information about the primary legal materials and secondary legal materials, such as dictionaries and encyclopedias).

IV. RESULTS AND DISCUSSION

Directors' Business Decision in Criminal Law Enforcement

According to Black's Law Dictionary, Business Judgment Rule (BJR) is:

"The presumption that in making business decision not involving direct self interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the believe that their action are in the corporation's best interest. The rule shields directors and officers from liability for unprofitable or harmful corporate transaction if the transactions were made in good faith, with due care, and with in the directors' or officers' authority."

Further more, Kelly A. Alces stated that because directors are supposed to exercise independent judgment about which business decisions are in the best interests of the firm, corporate law focuses on ensuring that they do not place personal interest ahead of firm interest in their work for the corporation.³

Robert A.G Monks said: "Recently, however, there has been a trend to criminalize a broader category of behavior, often for political reasons. This began in the health and safety area, and has expanded to include other areas of social policy concern like discrimination, and areas of political sensitivity like government contracts. Regulation established a new standard in holding coporations liable for "flagrant indifference," "neglect," or "failure to perceive a substantial risk." Ignorance of the law is no excuse. Courts have held that corporate officers are presumed to know certain things, just because of their position. And the knowledge of any employee can be attributed to the company as a whole, even if the employee did not inform anyone else"⁴

Organ of limited liability company may be subject to punishment as a rule attached in accordance with article 155 Law No.40 of 2007 on Limited Liability Company, namely : The Provision regarding te responsibility of the directors and/or commisioners for mistakeand negligence stipulated in this law is without prejudice stipulated in the law on criminal law. Limited Liability Company is a legal entity which is a human engineering to form a body which has the status, position, authority togheter with nature. Because of Limited Liability Company manlike, it can be held accountable under the law, including criminal liability.

This provision staked principle civil liability or legal responsibility corporation does not remove or diminish the responsibility of the criminal legal responsibility for any errors or omissions committed directors and/or commissioners if it turns out errors or omissions it contains elements of criminal offense. The simplest example is, one of the directors or commissioner of embezzling the assets of the company. In such cases, simultaneously attached to civil and criminal liability. The civil responsibility can be prosecuted under article 1365 statue Books of Civil Law, which is doing an un lawfull act which resulted in the company suffered losses

³ Kelly A. Alces, *Beyond The Board of Director*, Florida State University, Florida, hal.50: <http://ssrn.com/abstract=1893207>

⁴ Robert A.G.Monks, & Minow Nell, *Corporate Governance*, third edition, Blackwell Publishing, USA, 2004, p. 31-32

as a result of the embezzlement. As for criminal responsibility, may be prosecuted under article 372 statute Books of Criminal Law, deliberately taking or have unlawfully something of goods wholly or partly belonged to the company that is in hand to administer.⁵

Associated with Business Judgment Rule, can be seen a few concept applied in several countries. The aim is that this journal to benefit academically and can be implemented as an existing rule. Some countries apply this doctrine to clarify legal certainty in business decision. Meanwhile, in Indonesia, this Business Judgment Rule doctrine is still new and need to socialize, especially toward prosecutor institution.

In England, the application of the Business Judgment Rule Doctrine specifically set forth in a regulation, but only based on the formulation of the doctrine of 1925 as defined by Re City Equitable Fire Insurance Co. Ltd, namely:

1. Director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience;
2. He is not bound to give continuous attention to the affairs of his company; Subject to the articles and business practice, a reasonable delegation of duties to officials is justified.⁶

Then Section 727 Company Act 1985 gives references related Business Judgment Rule, namely:

“If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company...it appears to the court hearing the case that the officer...is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fair to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as it thinks fit”⁷

Furthermore, in the American state, the factors that most influence Business Judgment Rule are:

- (a) the duty of care ;
- (b) the derivative litigation, and
- (c) courts legal position towards the liability of directors before the court’s bench.⁸

Related Business Judgment Rule in America, there are two general formulas often used as references, i.e the American Law Institute (ALI) and Delaware case-law. Formula applied by ALI influential state and has been regulated in the Business Corporation Act (4.01), states that a director or officer deemed appropriate business decisions as Business Judgment Rule doctrine, if :

- (1) is not interested in the subject of his business judgment;
- (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstance; and
- (3) rationally believes that the business judgment is in the best interests of the corporation.⁹

American Law Institute gives some notes related duty of directors, namely:

1. Elect, evaluate, and, where appropriate, dismiss the principle senior executives.
2. Oversee the conduct of the corporation’s business, with a view to evaluation on a consistent with (enhancing shareholder gain, within the law, within the ethical considerations, and while directing a reasonable amount of resources to public welfare and humanitarian purposes).
3. Review and approve corporate plans and actions that the board and principle senior executives consider major and changes in accounting principles that the board consider material.¹⁰

According to Company Directors Disqualification Act 1986 Section 214(4) states: “The facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both-

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
- (b) the general knowledge, skill and experience that director has.¹¹

⁵ M. Yahya Harahap, *Hukum Perseroan Terbatas*, 3rd Edition, Sinar Grafika, Jakarta, p.586

⁶ Carlos Andres Laguado Giraldo, *Factors Governing the Application of the Business Judgment Rule: An Empirical study of the US, UK, Australia and the EU*, Universitas Bogota, ISSN:0041-9060, 2006, p.133

⁷ *Ibid* , p.137

⁸ *Ibid*, p.126

⁹ American Law Institute, *Principles of Corporate Governance: Analysis and Recommendation* (1994)

¹⁰ Robert A.G. Monk and Nell Minow, *Op.cit.*, p 201

¹¹ Charllotte Villiers, *Corporate Reporting and Company Law*, Cambridge University Press, New York, 2006, p.63

In Australia, the codification of Business Judgment Rule considered by the Australian Parliament for the following reason:

“ A number of reasons were submitted as to why the rule did not find its way into the Corporate Reform Acts of the past. One reason for the delay was the thought that the most appropriate forum for the development and application of the rule was the court. Another reason was the argument that there was already sufficient protection available under the discretionary relief provisions in the Corporations Law, namely ss 1318 and 1317 JA. A further reason was the reluctance expressed by the court in scrutinizing business judgments made by the board”.¹²

Business Judgment Rule doctrine keep balancing in three issues, namely:

1. The duty of care;
2. The degree of litigation and the judicial resources offered by a legal system against directors and
3. The judicial doctrine upheld by the courts in this particular regard.¹³

In China, Business Judgment Rule implementation in countries adherents of Common law also indirectly affect China’s legal politics in maintaining a harmonious society (*hexie sheshui*).¹⁴ This policy is taken to avoid the curse of thousands of shareholders against unscrupulous directors and reckless in taking decision and the curse of shareholder against unfair court decision.¹⁵

While in Germany, the implementation of Business Judgement Rule includes:

1. Entrepreneurial decision (business judgment)
2. No conflict of interest
3. Taking of decision in good faith
4. Taking of decision on the basis of adequate information
5. Acting in the best interest of the legal entity.¹⁶

Further more, court in Canada, the judge will not give second guess the business decision taken by the board of directors if such a decision is taken and implemented by:

1. Independently, without conflict of interest ;
2. In good faith;
3. On a reasonably informed basis;
4. Based on information available at the time, where the decision falls within a range of reasonable options available at the time.¹⁷

Southern Africa as a country that has a dynamic business activity also regulate matters relating to the implementation of Business Judgment Rule within the scope of corporate law. Business Judgment Rule conditions prevailing concept in South Africa is not much different from European countries and America in general. The conditions governing the Business Judgment Rule in accordance with Article 76 paragraph 4 limited liability laws in force in South Africa read as follows:

“(a) will have satisfied the obligations of subsection (3)(b) and (c) if-

- (i) the director has taken reasonably diligent steps to become informed about the matter;
- (ii) either-
 - (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a financial interest in the matter; or
 - (bb) the director complied with the requirements of section with respect to any interest contemplated in subparagraph (aa); and

¹² Australian Government - Corporation and Markets Advisory Committee, *Personal Liability for corporate fault*, 2006, p.58

¹³ Carlos Andres Laguado Giraldo, *loc. Cit.*

¹⁴ *The construction of a “Harmonious Society” (hexie shehui) is a socio-economic vision that is said to be the result of Chinese leader Hu Jintao’s signature ideology of the Scientific Development Concept. Recently, Chinese authorities have responded to social unrest by tightening controls and drafting laws to placate society’s ire towards corrupt government and corporations. See Maureen Fan, China’s Party Leadership Declares New Priority: ‘Harmonious Society’: Doctrine Proposed by President Hu Formally Endorsed, WASH. POST, Oct. 12, 2006, at A18.*

¹⁵ Charlie Xiao-chuan Weng, *Assessing the Applicability of the Business Judgment Rule and the “Defensive” Business Judgment Rule in the Chinese Judiciary: A Perspective on Takeover Dispute Adjudication*, Fordham International Law Journal, Vol.34, Issue 1, Art.5, 2010, p.133

¹⁶ Johannes Gasser & Silvana Dorner, *The Business Judgment Rule in Liechtenstein with special emphasis on foundations, First Advisory Group*, 2 August 2011, p. 1-4

¹⁷ Jason Zibarras & Michael Herman, *Business Judgment Rule – Fiduciary Duties Arising from Administration of Assets and for Approving Transactions*, Gowlings, 2011, p.9

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company”.¹⁸

Kent Greenfield states:

”Someone versed in corporate law theory might respond to the assertion that corporate law imposes a strict duty of profit maximization by pointing out that this obligation is significantly weakened by the business judgment rule, a presumption of correctness that courts apply to the decisions of management when such decisions are challenged by shareholders. So even though the black letter law says that managers have a strict duty to maximize shareholder return, the business judgment rule weakens the obligation by making it very difficult for courts to enforce it.”¹⁹

Further more Carlos Andres Laguado Giraldo states:

“...it must be noted, Courts cannot replace the role of corporate directors, because they not only do not have the experienced and particular knowledge suitable for taking business decisions, but also because the corporate system suppose that it is the board and the managers who are the individuals in charge of running the company. Justices are not specialists in running companies, they are lawyers, not business managers, and thus they are not competent for managing human and physical resources, financial portfolios or specific commercial transactions”.²⁰

According to Melvin A. Eisenberg that Business Judgment Rule (BJR) should consist of four terms and a special review standard, namely:

1. Decision has been made, for example, errors in the investigation of a board of directors or other simple mistake, do not qualify protection provisions;
2. The board of directors or employees have to make sure he was familiar with digging up information related decisions, and should be pretty confident and proper under the circumstances a decision;
3. Decision should be taken in good faith, Business Judgment Rule protection requirements be met if directors or employees know that the decision was taken unlawfully;
4. Board of directors and employees do not have an interest financial risk related decision, as an example of Business Judgment Rule can not be applied in decisions related directors approval to buy property belonging to the company directors.²¹

In Indonesia, according to Alvi Syahrin, substantial aspect related to procurement of goods and services, especially in state owned enterprises are:

- a. does the procurement of goods and services carried out by the state arbitrarily ;
- b. does the procurement of goods and services are fit for purpose, i.e, the first relating to the arbitrary action (*willekeur*) or relating to abuses of authority (*detournement de pouvoir*) that is not fulfilled the requirements of legality (authorized procedure and substance) resulting in defective juridicial procurement services.²²

Articles in the limited liability company law is not the same as in the common law doctrine of Business Judgment Rule. In the 97 provision of paragraph 5, the burden of proof os on the board of directors, while the doctrine of Business Judgment Rule, on the board of directors adopted the presumption of innocent hope, so the burden of proof is on the party who assumes the directors have taken action or decision that is detrimental to the company.²³ Business Judgment Rule (BJR) becomes the main variable to be analyzed. According to the author that business decisions were taken in accordance with Article 97 paragraph 5 of Law No.40 of 2007 on Limited Liability Comanies have been bright and clear argued that the directors can not be held responsible for damages limited liability if it can prove:

- a. the loss was no fault or negligence;
- b. has been doing maintenance in good faith and in the interests of prudence and in accordance with the purposes and objectives of the company;
- c. not a conflict of interest, either directly or indirectly, for all acts of management resulting in losses, and
- d. have taken action to prevent such losses arising or continuing.

¹⁸ Linda Muswaka, *Directors' Duties and the Business Judgment Rule in South African Company Law: An Analysis*, International Journal of Humanities and Social Science, Vol. 3 No. 7; USA, April 2013, p. 3

¹⁹ Kent Greenfield *The Failure of Corporate Law – Fundamental Flaws and Progressive Possibilities*, The university of Chicago Press, Chicago & London, p.237

²⁰ Carlos Andres Laguado Giraldo, *Op. cit.*, p.122

²¹ Melvin A Eisenberg, *Whether The Business Judgment Rule Should be Codified*, California Law Revision Commision, USA, 1995, p. 40

²² Alvi Syahrin, *Tindak Pidana Korupsi dalam pengadaan Barang dan Jasa, Seminar Sehari Kriminalisasi Kontrak Pengadaan Barang dan Jasa BUMN*, Universitas Sumatera Utara, Medan, 02 juni 2014

²³ Prasetio, *Dilema BUMN – Benturan Penerapan Business Judgment Rule dalam Keputusan Bisnis Direksi BUMN*, RayyanaKomunikasindo, Jakarta, 2014, p.175

The law that apply in the common law system of rules related business decision have been transplanted into Law No.40 of 2007. In other words, the translation –business decisions according to the principles of this Business Judgment Rule guarantee that the directors can not be accused committing a crime and should not be imposed to sought-after guilt when decision are taken and implemented by the directors in accordance with Article 97 paragraph 5, eventhough the end of the decision caused losses to the company. Directors is not committing a crime.

Business decision should be taken in good faith, though somewhat difficult to prove good faith. Every business decision must expect the yield or at least a business decision taken just a far greater risk of loss. Business decision are just maintaining the condition in order to avoid the loss sustained is still debatable, there is space, because not all stakeholders of the corporation is limited liability company can measure the current state of the board of directors took the decision. For the Business Judgment Rule as a principle should be the benchmark of law enforcement agencies to find out whether any state of loss is the result of unlawful act, and even if there tort, should be sorted if the unlawful act is criminal or civil.

Business decision are taken and implemented directors caused losses and by the law enforcement considered a criminal offense. It will bring fear to the board of directors to make decision. This will affect Indonesia's economic progress slowly. Investment climate will be disturbed and there is no legal certainty in doing business in Indonesia as all the business decision can be criminalized, especially for the directors of state owned enterprises, easily to be criminalized as the capital of the state owned corporation comes from government. The main share-holders of the state owned enterprise is government itself. The losses of the state owned enterprise could have an impact on the permissibility of the state owned enterprise partners.

V. PROTECT DIRECTORS' BUSINESS DECISION

A standard of business decision in common law system as Business Judgment Rule give protection ratio and give legal certainty to directors if the decision based on the Business Judgment Rule and there is no reason to accuse directors. Good faith is one of the variable of Business Judgment Rule. Protection for directors' decision has been transplanted in Indonesia Limited Liability Company Law, but the implementation of protection is still lack and law enforcement is over-reaction, especially when a company get loss.

Salomon D. Lewis said : "Businessmen make business decisions. They are not courts, able and willing to pursue a matter to the last argument in the search of the 'right' answer." ²⁴ Further more, Kelly said : "The business judgment rule protects corporate decision-makers from liability for what turn out to be bad business decisions, leaving conflicts of interest as the only reliable basis for personal liability under Delaware Corporate Law". ²⁵ Meanwhile, Green How added : "The fact that there was no objective standard by which the correctness of the corporate decision may be measured, was the foundation of the rule." ²⁶

According to Salomon D. Lewis that Assume that questions have been asked and inquire made to a satisfactory extent, whatever that may mean. Now, as perceived by the legal writing, the board weighs the matter and makes a judgment, and it is that judgment that is protected by the business judgment rule. ²⁷

This business decision related doctrine, Munir Fuady stated that because the directors of the most competent to run and decided against the company's business, no one is authorized to issue a decision on the company's business, including the judge may not give comparative opinion (second-guess). ²⁸ In other words, all parties are obliged to respect the business decision taken by the board of directors, all such decisions meet the following requirements:

- a. Decision in accordance with applicable law;
- b. Done in good faith;
- c. Done with the correct purposes;

²⁴ Solomon D. Lewis, Schwartz E. Donald, Bauman D. Jeffery, *Corporations Law and Policy Materials and Problems*, Second Edition, USA, p. 596

²⁵ Kelly A Alice, *Op.cit.*, p.38. Further more stated : "*Breach of the duty to act in good faith can also lead to liability, but the meaning of that term has been debated. Most recently, bad faith has been characterized as malicious, willful behavior or behavior that evinces a complete disregard for the director or officer's duties to the corporation*".

²⁶ Carlos Andres Laguado Giraldo, *Op.cit.*, p.122

²⁷ Solomon D. Lewis, Schwartz E. Donald, Bauman D. Jeffery, *Op.cit.*, p. 602

²⁸ See Gianfranco A Pietrafesa, *Application of the Business Judgment Rule to Corporate Officers*, New Jersey Lawyer, 2006, p.73 stated : informed business decisions of the directors will not be second-guessed by a court when the directors in good faith have made what turns out to be the wrong decision, resulting in adverse consequences to the corporation or its shareholders.

- d. Such decisions have the basics of rational;
- e. Done with the caution as do people who are quite cautious in similar position;
- f. Done in a proper way is believed to be best for the company.²⁹

Professor Stephen Brainbridge from UCLA University expand the scope of Business Judgment Rule protection, not only for the board of directors but also for officer in a company that also every day make decision for operational limited liability company, and he stated: "Most of the theoretical justifications for the business judgment rule extend from the boardroom to corporate officers. Many corporate decision are made by officers, for example, who are likely to be even more risk averse than directors. Accordingly, insulation from liability may be necessary to encourage optimal levels of risk-taking by officers..."³⁰

The business decision of directors whoa have met the Business Judgment Rule principle that has been transplanted in to Article 97 paragraph 5 of Law No.40 of 2007 protects the decision itself, and if the parties demand that the directors related adverse business decisions of the company, then charged with the responsibility pursuant to Article 1865 book of the law of civil law (*burgelijk wetboek*), which reads: "Any person who claims to have right, or designate an event to affirm it or to deny the rights of rights of others, to prove the existence of such rights or events that raised it.

Court in United States offer useful guidance to measure directors' operational decision :

- a. Understanding related daily activities;
- b. From time to time determine the company's business activities
- c. To monitor the business activities of the company;
- d. Attend board meetings regularly;
- e. Review the company's financial reports regularly;
- f. Ask when encountering problems dubious;
- g. Objected to actions that clearly violate the law;
- h. Consult to company's councillor;
- i. Resign if improvements need to be done was not done.³¹

Some foreign court decisions can be reference for the clarify the concept of Business Judgment Rule, where

New Jersey court had conclusion related with PSE&G share-holders claim as follows:

"The business judgment rule protects a board of directors from being questioned or second-guessed on conduct of corporate affairs except in instances of fraud, self-dealing, or unconscionable conduct...New Jersey courts have long accepted that a decision made by a board of directors pertaining to the manner in which corporate affairs are to be conducted should not be tampered with by the judiciary so long as the decision is one within the power delegated to the directors and there is no showing of bad faith."³²

Further more, Connecticut court concluded :

"Although the business judgment rule is usually defined in terms of the role of corporate directors, it is equally applicable to corporate officers exercising their authority...Although [defendant] was an officer, director and controlling shareholder...it was the exercise of his discretion as a corporate officer of [the corporation] that gave rise to [plaintiff's] claim of mismanagement and to which the business judgment rule applies in this instance".³³

According to Edward in Douglas M Branson :

"The much misunderstood business judgment rule is not a "rule" at all. It has no mandatory content. It involves no substantive "do' s" or "don' ts" for corporate directors or officers. Instead, it is a standard of judicial review, entailing only slight review of business decisions. Alternatively, it could be called a standard of non-review, entailing no review of the merits of a business decision corporate officials have made."³⁴

The Main role of Business Judgment Rule is to reduce the external interference in the activities of directors and at the same time protecting the corporate structure and unity of director, limiting it to cases where synergies and trust among members of the board of directors has been tampered with, such fraud and transactions for personal gain, and when members act betrayed other members of the board of directors.

VI. CONCLUSSION AND SUGGESTION

²⁹ Munir Fuady, *Doktrin-Doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia*, Citra Aditya Bakti, Bandung, 2014, p.186

³⁰ Gianfranco A Pietrafesa, *Op.cit.*, p.75

³¹ Gunawan Widjaya, *Tanggung Jawab Direksi atas Kepailitan Perseroan*, Rajawali Press, p. 42

³² Gianfranco A Pietrafesa, *Op.cit.*,p.73

³³ Gianfranco A Pietrafesa, *Op.cit.*, p.75

³⁴ Douglas M. Branson, *The Rule that Isn't a Rule – Business Judgment Rule*, 36 Val. U. L. Rev. 631 (2002). <http://scholar.valpo.edu/vulr/vol36/iss3/3>

Based on previous descriptions associated with the existing problems, the authors concluded as follows:

1. Business Judgment Rule is an universal principle for the director's business decision, it means that director in deciding business decision must be in good faith, prudence, manage risk, no conflict of interest, for the best interest of the company. Prosecutor can not sue the director of a company (even state owned enterprise) in criminal process if the decision is following the Business Judgment Rule. Director is the main vital organ, not only in a company but also in a country.
2. Business Judgment Rule is a protector for director. Director can not be questioned either criminal or civil if a business decision taken in accordance with the Business Judgment Rule principle. It must be analyzed from the process of making business decision, not merely by the result of the decision.

After a discussion and analysis of the issues that have been mentioned previously, the authors suggest are:

1. Law enforcement in Indonesia do with excessive to business decision makers, so it needs firmness from the top of government to drive mind-set of Police, Prosecutor and Commission of Corruption Eradication. Business must run naturally, and outsiders are difficult to judge the business decision.

2. Keep protection for director who decide based on Business Judgment Rule, if not the investment and business climate will ruin.

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