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Conflict of Interest by Director Which Also Act as Liquidator for Company Liquidation Process

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Abstract. *This article delves into the complexities surrounding conflicts of interest faced by directors involved in company liquidation processes. Furthermore, the article also examines the legal and ethical dimensions of such conflicts, considering the director's fiduciary duties and responsibilities to act in the best interests of the company, shareholders, and creditors. Conflicts may arise when directors have personal interests or relationships that diverge from their duty to prioritize the company's welfare. The abstract underscores the significance of transparency, disclosure, and adherence to corporate governance principles in navigating these conflicts effectively. Through an analysis of relevant regulation frameworks, this article examines insights into identifying conflicts of interest within the Company, especially when the Director are appointed as the liquidator.*
Keywords*: Conflict; Directors; Interest; Liquidation.*

1. INTRODUCTION

In regard the regulation regarding Limited Liability Companies ("Company") in Indonesia, it is governed by Law No. 40 of 2007 concerning Limited Liability Companies ("Company Law"), partially amended by Law No. 6 of 2023 concerning Job Creation ("Job Creation Law"). [1] Furthermore, before discussing the responsibilities of shareholders in the dissolution of a Company, we will need to understand and identify the organs within a Company along with their authorities. Further explanation regarding the mentioned organs can be found in Article 1 para. (2) of the Company Law, namely the Board of Directors ("Directors"), the Board of Commissioners ("Commissioners"), and the General Meeting of Shareholders ("GMS"),[2] whereas the definitions along with each function and authorities are as follows:

1) The GMS can be defined as Company's Organ that has different authority from Directors or Commissioners within the limits specified in this law and/or the articles of association. GMS consist of the shareholders of the Company.
2) Directors are Company's Organ that has full responsibility to manage the Company

[1] Company Law, Law No. 40 of 2007, State Gazette of the Republic of Indonesia ("State Gazette") of 2007 No. 106, Supplement to the State Gazette Number 4756, as amended by Law No. 6 of 2023 concerning Job Creation, State Gazette Year 2023 Number 41, Supplement to the State Gazette Number 6856. ("Company Law as amended by Job Creation Law").
[2] Company Law as amended by Job Creation Law, Article 1 para. (2).

for the Company's interests, in accordance with the purposes and objectives of the Company and represents the Company, both in and out of court in accordance with the provisions of the articles of association.
3) Commissioners defined as Company's Organ that responsible for conducting general and/or specific supervision in accordance with the articles of association and providing advice to the Board of Directors.[3]

According to its status as a legal entity, a Company will be considered as a separate legal subject, and in principle, the shareholders are not personally liable for contracts made on behalf of the Company and are not liable for Company losses exceeding the shares they have deposited.[4] However, the Company Law also makes exceptions to this as regulated in Article 3 paragraph (2), namely:[5]

1) The requirements of the Company as a legal entity have not been or are not fulfilled;
2) The relevant shareholders, directly or indirectly with bad faith, exploit the Company for personal interests;
3) The relevant shareholders are involved in illegal acts committed by the Company; or
4) The relevant shareholders, directly or indirectly, unlawfully use Company assets, resulting in the Company's assets being insufficient to settle Company debts.

Based on the description of the regulations applicable to the Company in Indonesia as mentioned above, we can conclude that the rules in the Company Law are applicable equally in principle to every Company that have foreign investment status or even domestic investment status, including the rules regarding the procedures and responsibilities of each organ within the Company.

For the matter of dissolution or liquidation of the Company, the Company Law does not specifically regulate the requirements for parties that can be appointed as liquidators. In practice, the GMS can determine anyone, even parties outside to participate in the dissolution or liquidation of the Company, as long as that the legally parties involve are capable, willing, and agree to be appointed as liquidators. However, the Company Law does not differentiate the procedures or responsibilities of shareholders and directors in the dissolution and liquidation process. The Company only regulates the liquidation process without further regulation of the liquidator.

This matter may cause conflicts of interest internally within the Company, especially when the Director are appointed as the liquidator. Therefore, the Author is interested in creating an article on issues regarding the Company Liquidation process based on applicable laws and regulations along with the responsibilities of the Directors if there are any conflicts of interest during the liquidation process.

2. RESEARCH METHODS

[3] Company Law as amended by Job Creation Law, Article 1 para. (4) – (6).
[4] Zainal Asikin dan Wira Pria Suhartana, *Pengantar Hukum Perusahaan*, cet. 1, (Jakarta: Kencana, 2016), p. 81.
[5] Company Law as amended by Job Creation Law, Article 3 para. (2).

Methods can be defined as a series of procedure that used to obtain accurate knowledge through a systematic approach.[6] This article will use juridical-normative methods whereas the methods are usually conduct by examining existed norms in laws and regulation.[7] Hence, juridical-normative methods are legal methods that done by researching secondary data consist of laws and regulation, doctrine or expert opinion, and latest research.[8]

3. RESULT AND DISCUSSION

3.1. Company Liquidation Based on Indonesia Laws and Regulation

As previously stated, there is also the possibility of potential losses that may be suffered by a Company besides that the Company are gaining profit, which result the Company having to be closed or dissolved.[9] In accordance with Chapter X of the Company Law, the liquidation process of a Company is referred to as the dissolution of Company. However, the Company does not provide clear definition regarding what is meant by the liquidation or dissolution of the Company.[10] Nevertheless, it must first be distinguished between liquidation and bankruptcy. Based on Article 1 No 1 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations ("Bankruptcy Law"), Bankruptcy is defined as the general seizure of all assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge as regulated in the law.[11] Meanwhile, liquidation is the dissolution of a company as a legal entity, which includes the payment of obligations to creditors and the distribution of remaining assets to shareholders.[12] Thus, it can be concluded that the liquidation process is carried out in the context of the dissolution of a legal entity, while the bankruptcy process does not automatically result in the dissolution of the legal entity.[13] As for the reasons that can cause the liquidation of a Company, consist of:[14]

a. Based on the decision of the GMS;
b. The expiration of the establishment period of the Company based on the provisions in the Articles of Association;
c. Based on a court decision;
d. In the event the Company is declared bankrupt by the Commercial Court and then the bankruptcy decision is revoked, the bankrupt company's assets are insufficient to pay the bankruptcy costs;
e. The assets of the bankrupt Company that already declared bankrupt are in an insolvent condition; or

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[6] Soerjono Soekanto, *Pengantar Penelitian Hukum,* cet. 3, (Jakarta: UI-Press, 1986), p. 1.
[7] *Ibid.*, p. 10.
[8] *Ibid.*, p. 13.
[9] Puspita Ika Hapsari, Sihabudin, Budi Santoso, "Perlindungan Hukum Para Pemegang Saham dalam Proses Permohonan Pembubaran Perseroan Terbatas kepada Pengadilan: Studi Putusan Nomor: 534K/Pdt/2014," *Jurisdictie* Vol. 10, No. 2 (2019), p. 233.
[10] Rudhi Prasetya, *Perseroan Terbatas Teori dan Praktik*, (Jakarta: Sinar Grafika, 2014), p. 166.
[11] Article 1 para. (1), Bankruptcy Law.
[12] Asikin dan Suhartana, *Pengantar Hukum Perseroan*, (Jakarta: Prenadamedia Group, 2016), p. 123.
[13] *Ibid.*
[14] Company Law as amended by Job Creation Law, Article 142 para. (1).

f. The Company's business license is revoked, so the Company is obliged to liquidate.

Based on the above reasons, it can be understood that the decision of shareholders can be one of the reasons for the dissolution of a Company. Furthermore, the Company Law also regulates that there are subsequent stages that must be implemented and completed for a Company related to the aforementioned dissolution. In general, the Company Law regulates the stages of the liquidation of a Company based on the decision of the GMS in 3 (three) stages, namely; the first stage are the dissolution stage, that after the GMS issues a decision to dissolve the Company, the GMS must be followed by a liquidation process and then a liquidator must be appointed who functions as the party responsible for liquidating the assets of the Company in the liquidation process.[15] If the GMS does not appoint a liquidator, then the Directors at that time will automatically act as the liquidator.[16] In this stage, the Company can no longer carry out legal acts except for matters necessary for the purposes of liquidating the Company.

The second stage is the liquidation process by the liquidator, where the liquidator has an obligation to make an announcement within a period of 30 (thirty) days to all creditors regarding the dissolution of the Company through newspapers, including information about the deadline for submitting claims for 60 (sixty) days from the date of the announcement. Furthermore, the liquidator must also notify the Minister of Law and Human Rights of the Republic of Indonesia ("MoLHR") to be recorded in the Company list that the Company is in liquidation. [17] After the aforementioned announcement and notification are made, the liquidator is obliged to record and collect the debts of the Company, and if there are no claims or the company's assets are insufficient to pay the company's debts, then the liquidator will then make another announcement in a national newspaper and the State Gazette of the Republic of Indonesia ("State Gazette") regarding the distribution of the remaining proceeds of the liquidation. If within a period of 60 (sixty) days from the announcement there are no objections from creditors, then the liquidator may make payments to creditors, distribute the remaining proceeds to shareholders, and take other actions related to the liquidation of the Company's assets. After this process is completed, the liquidator will then provide a report of accountability to the GMS and then be granted discharge and settlement to the liquidator.

The third or final stage is that the liquidator will notify the MoLHR and announce again through a national newspaper regarding the final results of the liquidation within a maximum period of 30 (thirty) days from the receipt of the liquidator's accountability report by the GMS. Furthermore, based on the aforementioned notification to the MoLHR, the Minister will record the termination status of the legal entity and remove the name of the Company from the Company list, which will then be followed by an announcement of the termination of the legal entity status of the Company in the State Gazette that indicating the completion of all stages of the dissolution of the Company.

In addition, Company Law requires that a proposal for dissolution can be submitted by the Board of Directors, the Board of Commissioners, or 1 (one) or more shareholders

[15] Company Law as amended by Job Creation Law, Article 142 para. (2) (a).
[16] Company Law as amended by Job Creation Law, Article 142 para. (3).
[17] Company Law as amended by Job Creation Law, Article 147 para. (1) (b).

representing at least 1/10 (one-tenth) of the total voting shares. Decision-making is conducted through deliberation for consensus, or if not achieved, by considering the larger vote count, taking into account the quorum limits as stipulated by the Company Law and/or the Articles of Association. In accordance with the Company Law, if the GMS has decided to dissolve their company, then this must be followed by a liquidation process and the appointment of a liquidator. In the condition that the GMS does not appoint a liquidator, then the Board of Directors of the company to be dissolved will automatically become the liquidator.

3.2. The Liquidation Procedure Overseas

Generally, company's liquidation is usually for reorganization proceedings that can be carried out in two different ways: (1) by order of the court outside the plan of reorganization, and (2) as part of a plan of reorganization.[18] The process of liquidation can also be done with the agreement of the organs of the Company and its creditors to process a voluntary liquidation or dissolution. In Indonesia, the liquidation process for reorganization generally refers to the provisions set forth in the Bankruptcy Law which provides a legal basis for companies experiencing financial difficulties to undergo reorganization and financial restructuring.

Referring to prevailing laws and regulation in Indonesia, liquidation may occur as part of the corporate restructuring process in the context of reorganization. However, liquidation in the context of reorganization often differs from liquidation in conventional bankruptcy contexts. In reorganization, liquidation may be carried out to close or divest certain parts of the company that are no longer deemed viable or beneficial to retain. Moreover, liquidation in the context of reorganization often involves the sale of company assets or debt restructuring to generate resources that can be used to finance agreed-upon restructuring plans. The liquidation process for reorganization may involve various parties, including company management, creditors, and commercial courts.

In Germany, for example, under a comparatively new process, all processing of Company begins as a liquidation but can then be converted into reorganization proceedings. The company is then administered by an administrator, appointed by the court or elected by the creditors.[19] The administrator has the exclusive right to dispose of the company assets.

Meanwhile, according to France Commercial Law, the Company shall through the dissolution phase that can be done voluntary or ordered by the court. After the dissolution is agreed upon or ordered, the liquidation phase begins. During this time, the Company still exists, but its sole purpose is to settle any existing debts. After the liquidation process is complete, then the Company is removed from the Company Register. When the dissolution is requested internally, a liquidation is appointed during a shareholder meeting that must be transmitted to the Company Register within 45 (forty-five) days. They can be a professional liquidator or one of the former company

[18] William L. Cary, "Liquidation of Corporations in Bankruptcy Reorganization", *Harvard Law Review,* Vol. 60, No. 2, 1946, p. 176.
[19] Gerard McCormack, "Control and Corporate Rescue: An Anglo-American Evaluation", *The International and Comparative Law Quarterly,* Vol. 56, No. 3, 2007, p. 523.

managers who undertakes to perform this phase. The individual will represent the Company throughout the liquidation procedure and will perform all necessary activities for completing the liquidation. In the condition that the liquidation is ordered by a court in France, hence the liquidator will be appointed by the court. The Company's representative will have to prepare the documents needed for company liquidation in France.

If a Company faces difficulty, the directors should act early in order to take the appropriate steps to prevent the difficulties from worsening. In the condition that during a liquidation process it is revealed that there is a deficit in assets compared to liabilities, and the court determines that this deficit is due to mismanagement which has contributed to the company's insolvency, hence the court has the authority to hold de jure or de facto directors, managers, or officers responsible for part or all of this deficit.[20] This responsibility can be held jointly or severally. Such legal action may be initiated by the Judicial Liquidator or the public prosecutor. If a majority of appointed creditors acting as "controllers" have unsuccessfully requested the Judicial Liquidator to pursue such a claim, they may themselves initiate legal proceedings.

It can be concluded that there are states with differences procedure of liquidation. As per example in Germany whereas the Court shall appoint the administrator to assist for the liquidation process. Meanwhile, there are not so much differences between the procedure of liquidation process in Indonesia and France. Both states require the dissolution of the Company first before continuation to the liquidation. However, it seems that all States regulate that the procedure of liquidation can be done through the court. In Indonesia, the reasons for liquidation are more specific beside the other country, i.e., that the reasons of liquidation are stated in Article 142 para. (1) of Company Law. If compared with other countries, generally the process of liquidation can be done in regard to restructure the Company but not with Indonesia.

3.3. The Grey Areas Between the Directors' Role in Liquidation and Conflict of Interest

According to Company Law, there is a stage of announcement to creditors through newspapers, including a period of 60 (sixty) days from the announcement for creditors to submit their claims. If the liquidator neglects and/or fails to carry out the aforementioned announcement and notification, the dissolution of the company does not apply to third parties. Additionally, if the liquidator neglects and/or fails to carry out the aforementioned announcement and notification, the liquidator will be jointly liable with the company for any losses incurred by third parties.

Another important point to remember is that even though the liquidator has completed all stages up to the stage of announcement of the termination of legal entity status by the Minister of Law and Human Rights, there is a provision that if within a period of 2 (two) years from the announcement of the company, creditors may still file claims through the appropriate district court where the company is domiciled. If it turns out

[20] Clifford Chance Global Restructuring and Insolvency Group, "A Guide To Restructuring and Insolvency Procedures in Europe", https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/07/a-guide-to-restructuring-and-insolvency-procedures-in-europe.pdf, p. 62.

that there are remaining assets from the liquidation process intended for shareholders, the said district court will order the liquidator to retrieve the remaining assets distributed to the shareholders.

For many years, there has yet to be provided any protection for the Company's creditors from the actions of its directors; creditors had to rely solely on their contractual rights and proprietary rights against the Company. The Director in carrying out his duties in the Company must not engage in Conflict of Interest since, if the Director's actions are suspected to no longer be objective and not in the interest of the Company. Therefore, if someone engages in transactions that involve Conflict of Interest, it is said that the Director has violated the fiduciary duties principle that applies to him. All organs of the Company deserve the protection against unfair and unreasonable actions, it is not only limited to actions by majority shareholders but also extends to the directors and board of commissioners. In accordance with the Company Law, the organs designated to support the legal entity's functions are the GMS, Directors, and Commissioners. Both the Directors and Commissioners are required to carry out their duties with good faith and full responsibility. Each member of the Directors is personally liable if they are at fault or negligent in performing their duties, and the same applies to the Commissioners.

The relationship between conflicts of interest and fiduciary duties by directors lies in the obligation of directors to act in the best interests of the company and its stakeholders. Conflicts of interest arise when directors have personal interests or relationships that may interfere with their ability to make impartial decisions in the best interests of the company. Fiduciary duties, on the other hand, encompass the duty of loyalty, duty of care, duty of good faith, and duty of disclosure, requiring directors to prioritize the company's interests over their own. The Directors as well as the Commissioners indeed have fiduciary duties arising from a fiduciary relationship to genuinely consider the interests of the company. The fiduciary duties of both the Directors and the Commissioners consist of the duty of skill and care, duty of loyalty, the no secret profit rule, and the doctrine of corporate opportunity. However, in practice, it is often found that the Board of Directors and the Board of Commissioners exploit the company for personal gain, thus relying solely on doctrine is insufficient.

A company director is considered to have a Conflict of Interest if the following situations occur:[21]

1. Representing the company in a lawsuit in which the opposing party has a relationship with the director.
2. A director must not take hidden or undisclosed benefits from a company transaction (Corporate Opportunity).
3. Engaging in transactions for personal gain (Self-Dealing).
4. A director must not engage in Conflict of Interest while carrying out duties in the company, as doubts arise regarding the director's objectivity and commitment to the company's interests.

[21] Dhita Destria, "Tindakan Benturan Kepentingan Yang Dilakukan Oleh Direksi Perusahaan Sebagai Bentuk Pelanggaran Prinsip *Good Corporate Governance"*, *Jurnal Ilmu Sosial dan Pendidikan,* Vol. 5. No. 2, 2021, p. 152.

Therefore, if someone engages in transactions involving Conflict of Interest, it is considered a violation of the fiduciary duties principle that applies to the director. When conflicts of interest arise, directors must disclose them to the board and abstain from participating in decisions where they have a personal interest. Failure to manage conflicts of interest appropriately may breach the fiduciary duties owed by directors to the company, potentially resulting in legal liabilities and reputational damage. Therefore, directors must remain vigilant in identifying and addressing conflicts of interest to fulfill their fiduciary duties and uphold corporate governance standards.

4. CONCLUSION

In general, the Company Law regulates the stages of the liquidation of a Company based on the decision of the GMS in 3 (three) stages, namely; the first stage are the dissolution stage, that after the GMS issues a decision to dissolve the Company, the GMS must be followed by a liquidation process and then a liquidator must be appointed who functions as the party responsible for liquidating the assets of the Company in the liquidation process. It can be concluded that there are states with differences procedure of liquidation. As per example in Germany whereas the Court shall appoint the administrator to assist for the liquidation process. Meanwhile, there are not so much differences between the procedure of liquidation process in Indonesia and France. Both states require the dissolution for the Company first before continue to the liquidation. However, it seems that all States regulate that the procedure of liquidation can be done through the court or voluntary. Transactions involving conflicts of interest conducted by the Director can lead to financial harm for the company. When overseeing the company, the Board of Directors must consistently act with integrity when making decisions or taking actions in regard of the liquidation. It is crucial to closely monitor the responsibilities entrusted to directors, not limited to all the organs of the Company. If the company incurs losses due to the actions of its directors or other executives, it not only faces financial setbacks but also risks bankruptcy. Enforcement of laws concerning conflict of interest transactions initiated by directors has not been sufficiently clarified, and regulations require ongoing examination to ensure that the company and other shareholders are not disadvantaged. Therefore, the author suggest that the government shall have clear regulation on requirement and criteria for the eligibility of someone to become a liquidator and also for the scope of work of the liquidator especially if the director(s) of the liquidated company appointed to become the liquidator.

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