



Implementation of Business Judgement Rules in Indonesia: Theories, Practices, and Contemporary Cases

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Abstract: Business judgment rule considerations were born with a background of problems where they are always blamed for losses suffered by the company, the impression that is built basically does not reflect the values in the company's business operations. This research aims to analyze how is the adoption process Business Judgement Rule in Indonesian law, and how to apply Business Judgement Rule in Indonesian. This research also intended to understand the application of the Business Judgment Rule doctrine in Indonesia. This research is normative juridical research conducted through library research and analyzed by qualitative research methods on the secondary data found. The results of this study indicate that the application of the Business Judgment Rule can provide legal protection for the board of directors for business policies taken even though the business policy results in losses for the company, as long as the business decisions are made with prudence, in good faith, and in the scope of authority and responsibility.

Keywords: Business Judgment Rule; directors; legal liability

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A. Introduction

Business Judgment Rule considerations were born with a background of problems where they are always blamed for losses suffered by the company, the impression that is built basically does not reflect the values in the company's business operations. The Board of Directors is basically an object that can be blamed for everything experienced by the company or cannot be fully charged. The burden becomes a burden on the burden of making decisions and taking risks in every decision. Autonomy is needed by the board of directors in developing the company, but the abuse of autonomy cannot simply be ignored. Supervision is one way to control the authority and abuse of the authority of the board of directors in the company's operational processes as outlined in the form of standard business decisions in Anglo Saxon countries known as with the term business judgement rule. Initially, this concept was initiated in the United States, the business judgment rule doctrine is based on common law, as the United States is known to adhere to the precedent principle.¹

Born with a background of problems where the board of directors is always blamed for the losses suffered by the company, the impression that is built basically does not reflect the value of justice in the company's business operations. The Board of Directors is basically not an object that can be blamed for all the dynamics experienced by a company, or the responsibility cannot be charged to the board of directors in full. The burden becomes a burden on the board of directors in innovating and taking risks in every decision.

Autonomy is needed by the board of directors in developing the company, but the abuse of autonomy cannot simply be ignored. Supervision is one way to control the authority and abuse of the authority of the board of directors in the company's operational processes as outlined in the form of standard business decisions in Anglo Saxon countries known as with the term *business judgement rule*. At first, this concept was initiated in the United States, the doctrine *business judgement rule* based on *Common Law*, as is known, the United States adheres to the Precedent Principle.

Doctrine *business judgement rule* in general, is a doctrine formed to protect the board of directors from making business decisions. This doctrine is based on the court's acknowledgment that it is the nature of doing business that there are risks involved. Therefore, to develop a business in a world full of such risks, the board of directors must be free from excessive pressure and

¹ Douglas M Brandson, "The Rule that isn't A Rule-The Business Judgement Rule," *Valparaiso University Law Review* 36, No. 3 (2002): 631-654.

pressure from legal snares that may not be appropriate to apply to them. The pressure can influence the board of directors in making decisions that have the potential to hinder the development company.²

The point of this doctrine is that every party, even the courts, should respect the business decisions that have been taken by directors who have views and experience in the business field. In addition to protecting the board of directors from legal snares for their decisions, traditionally this doctrine is also intended to protect members of the board of directors in their interests from being responsible for business decisions they take that cause losses to the company.

In general, there are no documents or literature stating when *business judgment rule* is beginning, but it is clear that the development of *business judgment rule* is in line with the development of developing doctrines in corporate law in the country anglo Saxon which is the basis for judges in making decisions in court, especially in the United States.

In his literary theory, the term Business Judgement Rule (BJR) is a corporate law doctrine originating from America that adheres to the legal system of common law. Business Judgement Rule is one of several doctrines in company law that must be carried out by directors to fulfill the fiduciary duty. According to Angela Schneeman, Business Judgement Rule is a doctrine that teaches that the company's directors can be released from responsibility for losses arising from an action by a decision-maker, where the decision-making action has gone through a process, prudence, and good faith.³

The concept of the Business Judgment Rule is applied in one of the states of the United States of America (Delaware), which adheres to the legal system common law since 173 years ago. According to the applicable company law in Delaware, Business Judgement Rule is a derivative of the basic principle that a company is managed by its directors. The directors in running the company are required not to give up on fulfilling fiduciary duty for the benefit of the company and its shareholders.

The interest in protecting the board of directors from liability for losses suffered by the company arising from the decisions of the board of directors also arises in various countries, especially countries that follow the legal system *common law* like England or Canada. This arises from the dynamics of business development and the accompanying regulations. As is well known in these countries, market competition tends to be very tight so that

² Hari Sutra Disemadi, Mochammad Abizar Yusro, and Ali Ismail Shaleh, "Perlindungan Hukum Keputusan Bisnis Direksi BUMN Melalui Business Judgement Rule Doctrine," *Jurnal Jurisprudence* 10, No. 1 (2020): 127–145.

³ Prasetyo, *Dilema BUMN Benturan Penerapan Business Judgment Rule (BJR)*, (PT Rayyana Komunikasindo, Jakarta, 2014), 143–144.

innovative and risky steps are needed, so that there is an interest in protecting directors from legal snares for their decisions that can encourage innovative steps in developing the company. Indonesia as a citizen of the world cannot be separated from the influence of globalization, including the legal system in force in the United States, Britain, or Canada.

Some understanding Business Judgement Rule can be seen, as defined Black Law Dictionary:

Business Judgment Rule is the presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and the honest belief that their actions are in the corporation best interest.⁴

Furthermore, Hendra Setiawan Boen emphasized that *Business Judgment Rule* arises as a result of having carried out fiduciary duty by a director, namely the principle of duty of skill and care. All the errors that arise after implementing the principle, as the consequence, the board of directors gets a personal release of responsibility if there is an error in their decision.⁵

Meanwhile in Indonesia, Sutan Remy Sjahdeini in the same contest explained that *Business Judgment Rule* is a business consideration of the members of the board of directors that cannot be challenged or contested or rejected by the court or shareholders. The members of the board of directors cannot be held responsible for the consequences that arise, because a business consideration has been taken by the member, the board of directors concerned even though the business consideration is wrong, except in certain cases.⁶

Business risk cannot always be measured mathematically, and is not solely based on factual information, both qualitative and quantitative, that is available during decision making. People who are experienced in a business also use their instincts, or hindsight in understanding the size of a business risk.⁷

It is a general conclusion that decisions made by groups are better than decisions made by individuals. Although generally decision makers are rational, individual cognitive abilities are limited, or referred to as bounded

⁴ Bryan A Garner, *Black's Law Dictionary*, (Thomson West, Massachusetts, 2019).

⁵ Hendra Setiawan Boen, *Bianglala Business Judgment Rule* (Jakarta: PT Tata Nusa, 2008).

⁶ Sutan Remy Sjahdeini, "Tanggungjawab Pribadi Direksi dan Komisaris," *Jurnal Hukum Bisnis* 14, No. 1 (2001): 96-108.

⁷ Stephen M. Bainbridge, "The Business Judgment Rule as Abstention Doctrine," *Vanderbilt Law Review* 57, No. 1 (2004): 81-130, <https://doi.org/10.2139/ssrn.429260>.

rationality. Stephen M. Bainbridge, in his free translation, makes this point based on his observations from a number of studies, including those conducted by Blinder and Morgan. The conclusion is that two heads are better than one, so it is wiser to assign a committee to make important decisions.⁸

State losses resulting from losses suffered by SOEs generally come from wrong business decisions. Understanding that business decisions have risks, profits, or losses, but the essence of consideration and business decision making is balancing or balancing the risks to be faced with the benefits or benefits to be obtained or expected.⁹

A professional, in this case, the board of directors, in making business decisions is strongly influenced by his instincts (hindsight) to assess business risks. In addition to being based on these instincts, the information or data obtained need to be weighed and digested again to produce the right decision. Douglas M. Branson gives the opinion that in business decisions, the instincts that are in it often cannot be translated into systematic analysis so that decisions are rarely understood by other parties.¹⁰

Even if all decision-making requirements and procedures have been complied with, there is no guarantee that the decision will always produce the predicted result it can sometimes result in the opposite of the initial prediction, in Stephen M. Bainbridge's opinion, such a risk is a normal business risk (normal business risks).¹¹ This is where the business judgment rule doctrine comes to protect decision-makers.

State losses are based on Article 1 point 15 law of financial audit agency and Article 1 number 22 of the State Treasury Law. State losses are determined by a real and definite reduction in money, securities, or state property resulting from unlawful acts, whether intentional or negligent. However, when talking about the reasons for the occurrence of losses in a State-Owned Enterprise, it can lead to various factors as follows:¹²

1. Market factors, exchange rates, government policies in maintaining

⁸ Stephen M. Bainbridge.

⁹ Arus Akbar and Andi Fariana, *Aspek Hukum Dalam Ekonomi Dan Bisnis* (Jakarta: Mitra Kencana Media, 2010), 7.

¹⁰ Brandson, "The Rule That Isn't A Rule-The Business Judgment Rule."

¹¹ Stephen M. Bainbridge, 81–130.

¹² Ivan Satria Wijaya, "Pertanggungjawaban Pengurus Badan Usaha Milik Negara Terhadap Kerugian Keuangan Negara Pada Pengelolaan Persero" *CALYPTRA* 4, No. 2 (2015): 1–21; Rani Lestari, Isis Ikhwanasyah, and Pupung Faisal, "Konsistensi Pengukuhan Kedudukan Kekayaan Negara Yang Dipisahkan Pada Badan Usaha Milik Negara Menurut Pelaku Kekuasaan Kehakiman Dalam Kaitannya Dengan Doktrin Business Judgement Rule," *Acta Diurnal Jurnal Ilmu Hukum Kenotariatan dan Ke-PPAT-An* 1, No. 2 (2018): 236-249; Dian Ety Mayasari, "Kedudukan BUMN Sebagai Kekayaan Negara dalam Kaitannya dengan Kerugian Keuangan Negara," *Jurnal Sapientia et Virtus* 1, No. 1 (2014): 82–102.

market prices that are beyond the control of State-Owned Enterprises which have the potential to harm the company and the state if referring to the State Finance Law and will be a business risk if referring to the Agency Law—State-Owned Enterprises;

2. Procurement of goods and services will be difficult to carry out if the results of the tender for similar types of goods/services from one State-Owned Enterprise are compared with the results of the tender for another State-Owned Enterprise where the difference in the excess of the tender price is assessed as a state loss; and
3. The absence of policy considerations between the element of profit certainty and the element of trying to create doubts and concerns for the implementers of State-Owned Enterprises to take a decision or the ability to act in carrying out corporate acting by considering the absence of business risk factors considered by the Government against the Business Entity—State-Owned.

Starting from the background of the problem that has been described in the introduction, then two formulations of the problem can be formulated, namely: How is the adoption process Business Judgement Rule in Indonesian law, and how to apply Business Judgement Rule in Indonesian.

Research conducted by Bismar Nasution, Mahmul Siregar, and Mahmud Mulyadi with the title Business Judgment Rule Associated with Corruption Crimes Performed by Directors of State-Owned Enterprises Against Business Decisions Taken. The results of this study indicate that: Consideration of the importance of the Business Judgment Rule being applied and implemented in the development of corporate law in Indonesia because not all business decisions are taken by the Directors of BUMN Persero are the personal responsibility of the directors. It is recommended that the board of directors in making these business decisions must first be studied in depth; The Business Judgment Rule can be applied and used by the Directors of BUMN Persero who are suspected of having committed criminal acts of corruption that harm state finances because every Director of BUMN Persero which is a limited liability company can be defended by using Article 97 of the Company Law if demanded by its Shareholders (in this case the State) or the Board of Commissioners regarding the policies it has taken.

Research conducted by Douglas M Brandson with the title The Rule that isn't A Rule-The Business Judgment Rule indicates that: the debate on the issue of corporate administrator responsibilities. An open view of the principles of Good Corporate Governance, on which high hopes are placed as an instrument to avoid business malfunctions and macroeconomic problems in this area of corporate function and administrator duties, local or global.

The experience of the American courts offers interesting guidelines to make in dealing with the implicit rights in what has just been revealed, and it is interesting to analyze the possible diversion of them to other regulations.

Research conducted by Hari Sutra Disemadi, Mochammad Abizar Yusro, and Ali Ismail Shaleh with the title Legal protection of SOE directors' business decisions through the Business Judgment rule doctrine, which is detrimental to the state and this research focuses on the legal protection of the business decisions of the SOE Directors after the Constitutional Court Decision No. 48/PUU-XI/2013 and 62/PUU-XI/2013.

Research conducted by Rizky Novian Hartono, Sriwati, and Wafia Silvi Dhesinta Rini with entitled State Financial Losses in State-Owned Enterprises (BUMN) in the perspective of the Business Judgment Rule Doctrine aims to examine whether the losses suffered by BUMN can be classified as the state financial losses in perspective of the business judgment rule doctrine.

Research conducted by Sutan Remy Sjahdeini with the title Personal Responsibility of Directors and Commissioners. The focus of the research is on the business judgment rule which is implicitly regulated in Article 92 paragraph 1 and 97 paragraph 5 of Law no. 40 of 2007 concerning Limited Liability Companies, several cases related to the business judgment rule, this paper intends to analyze the implementation of the business judgment rule doctrine in Indonesia.

B. Method

The research approach method is a series of phases that are interrelated and inseparable from one another. The approach can be used in a way the author examines the problem to realize the goals to be achieved in this study. Judging from the type of research, the author uses qualitative research. Methods of data collection and data analysis, the author uses a literature review or literature and interviews both academics and practitioners of history. The collected data is analyzed by technical content analysis (content analysis).

The types of data used in this research are primary data and secondary data. The primary data in this study consists of empirical data in the form of behavior (behavior) and non-empirical data (symbolic meaning) that exist in the minds of the informants that underlie the behavior of the informants. Secondary data consists of primary legal materials, secondary legal materials, tertiary legal materials. The primary legal material used is statutory regulations. Secondary materials are materials that provide an

explanation of primary legal materials, in the form of publications on the law, both books, research results, magazines, journals, which are related to the research of this journal. For tertiary legal materials, relevant materials such as dictionaries and encyclopedias are used. In addition to legal materials, this research will also use non-legal materials, namely books with the theme of philosophy, economics, politics, and culture, as long as they are used to assist and enrich the discussion. This study uses primary data and secondary data. Secondary data includes (1) primary legal materials, (2) secondary legal materials, and (3) tertiary legal materials.¹³ Primary data in legal research can be seen as data that is the legal behavior of citizens.¹⁴

C. Result and Discussion

1. Business Judgement Rules in Indonesian Law

Indonesia is one of the countries with the largest economic growth in the world by clearly adopting *business judgment rule* through Law Number 40 of 2007 concerning Limited Liability Companies as a protective measure for the directors and commissioners. The responsibility of the board of directors can be in the form of personal responsibility or joint responsibility if the board of directors is proven guilty in carrying out their duties or is negligent or acts not in good faith and full of responsibility so as to cause losses to the company as stated through chapter 97 paragraph 3 and 4, Limited Liability Company Law.¹⁵

When referring to chapter 97 paragraph (5), Limited Liability Company Law, the board of directors cannot be held responsible for the losses suffered by the company if the board of directors can prove that the allegations made against him are not true. In full, this is formulated as follows:

Chapter 97 paragraph (5) Limited Liability Company Law,
Members of the Board of Directors cannot be accounted for losses as referred to in paragraph (3) if they can prove:

- a. The loss is not due to his fault or negligence;
- b. Have carried out management in good faith and prudence for the benefit and by the aims and objectives of the Company;
- c. Does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and

¹³ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif. Suatu Tinjauan Singkat*, (PT Rajagrafindo, Jakarta, 2007), 7.

¹⁴ Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*,” (Pustaka Pelajar, Yogyakarta, 2010), 156.

¹⁵ Alum Simbolon, “Penerapan Prinsip Business Judgement Rule di Indonesia,” *SIPENDIKUM*, (2018): 339–353.

- d. Have taken action to prevent the occurrence or continuation of the loss.

The same thing also arises about bankruptcy that the directors must be personally or jointly responsible for paying off all outstanding company obligations from company assets if the directors are found ***guilty or negligent*** in carrying out their duties to cause bankruptcy for the company. Even in certain cases/conditions the liability for the bankruptcy of the company may apply retroactively to the board of directors for a period of 5 years before the bankruptcy decision is pronounced as stated in chapter 104 paragraph (2) and (3) Limited Liability Company Law.

Refer to chapter 104 paragraph (4) Limited Liability Company Law it is stated that the board of directors cannot be held responsible for the bankruptcy of the company if the board of directors can prove otherwise. Through this formulation, it is clear that the construction of the Limited Liability Company Law is the idea of the *business judgment rule* and for that, it can be said that Indonesia has adopted the concept of the *business judgment rule*. We can clearly see the formula as follows:

Chapter 107 paragraph (4) Limited Liability Company Law

Members of the board of directors are not responsible for the bankruptcy of the Company as referred to in paragraph (2) if they can prove:

- a. The bankruptcy is not due to his fault or negligence;
- b. Have carried out management in good faith, prudence, and full responsibility for the interests of the Company and in accordance with the aims and objectives of the Company;
- c. Does not have a conflict of interest, either directly or indirectly, over the management actions taken; and
- d. Have taken Actions to prevent bankruptcy.

And *vice versa*, the directors or commissioners are personally or jointly responsible for the losses suffered by the company if the directors/commissioners are ***guilty or negligent*** in carrying out their duties based on good faith, prudence, and responsibility. Providing advice to the board of directors for the benefit of the company in accordance with the aims and objectives of the company as stated in chapter 114 paragraph (2), (3), (4); chapter 108 paragraph (1) Limited Liability Company Law, and for the record that the commissioner cannot be held responsible for the company's losses if the commissioner can prove otherwise. The formula is clearly stated by:

Chapter 114 paragraph (5) Limited Liability Company Law
Members of the Board of Commissioners cannot be held responsible for the losses as referred to in paragraph (3) if they can prove:

- a. has carried out supervision in good faith and prudence for the benefit of the Company and in accordance with the aims and objectives of the Company;
- b. does not have a personal interest, either directly or indirectly, in the actions of the management of the Board of Directors that result in losses; and
- c. has provided advice to the Board of Directors to prevent the occurrence or continuation of such losses.

As in the liability of directors in bankruptcy, commissioners are personally or jointly responsible for paying all outstanding company obligations from company assets if the commissioner is ***guilty or negligent*** in carrying out his duties, resulting in the bankruptcy of the company. This responsibility also applies retroactively within a period of 5 years before the bankruptcy decision is pronounced in court as stated in chapter 115 paragraph (1) dan (2) Limited Liability Company Law unless the Commissioner can prove otherwise. The evidence in question is listed in chapter 115 paragraph (3) Limited Liability Company Law as follows:

Members of the Board of Commissioners cannot be held responsible for the bankruptcy of the Company as referred to in paragraph (1) if they can prove:

- a. The bankruptcy is not due to his fault or negligence;
- b. Has carried out supervisory duties in good faith and prudence for the benefit of the Company and in accordance with the aims and objectives of the Company;
- c. Does not have a personal interest, either directly or indirectly, in the management actions by the Board of Directors that result in bankruptcy; and
- d. Has provided advice to the Board of Directors to prevent bankruptcy.

In addition, the business judgment rule doctrine has also been adopted by the Financial Services Authority for public companies through the Financial Services Authority Regulation No. 33/ PJOK.04/2014 regarding the Board of Directors and Board of Commissioners of Issuers or Public Companies, especially those related to losses suffered by the company. This is stated in chapter 13 paragraph (2) No. 33/PJOK.04/2014 which confirms

that the members of the board of directors cannot be held responsible for the loss of the Issuer or Public Company if they can prove that the decisions taken meet the following elements:

1. the loss occurred not because of his fault or negligence;
2. has carried out management in good faith, full of responsibility, prudence in the interests of and in accordance with the aims and objectives of the Issuer/Public Company Liability;
3. does not have a direct or indirect conflict of interest; and
4. have taken action to prevent the occurrence or continuation of the loss

The Board of Directors in carrying out their duties has two functions, namely management and representation, all of which have been determined in ADRT PT. The Board of Directors is the only organ of the company that has the power, authority and full responsibility for the management of the company solely for the benefit of the company, in accordance with the aims and objectives of the company, and has the power, authority and full responsibility to represent the company, both inside and outside the court in accordance with with the provisions of the articles of association.¹⁶

The Board of Directors must always act in good faith by referring to sufficient information and processed proficiently based on their abilities. In implementing the business judgment rule doctrine, certain conditions must be met, so that in implementing the business judgment rule doctrine there will be no abuse of rights and power against it. the conditions in question are that the policy is (a) carried out in good faith (b) carried out with the right purpose (c) the decision has rational basis (d) carried out with prudence Due care (e) is carried out in a manner that is worthy of trust (reasonable belief) as the best interest for the company (fiduciary duty).¹⁷

According to Nindyo Pramono, the Business Judgment Rule is used to protect the board of directors and their staff from any policies or business decisions, or business transactions carried out for the benefit of the company in accordance with the aims and objectives of the company, provided that as long as the policies or business decisions or business transactions are carried out in accordance with their authority. and by prioritizing the principles of prudence, good faith, and full of responsibility (accountable/responsible).¹⁸

Fiduciary duty will be created through good fiduciary relations. Fiduciary relation is a two-party relationship that arises when one party

¹⁶ Hasbullah F. Sjawie, "Tanggung Jawab Direksi Perseroan Terbatas Atas Tindakan Ultra Vires," *Jurnal Hukum Prioris* 6, No. 1 (2017): 23.

¹⁷ Muhammad Gary Akbar, "Business Judgement Rule Sebagai Perlindungan Hukum Bagi Direksi Perseroan dalam Melakukan Transaksi Bisnis," *Jurnal Justisi Ilmu Hukum* 1, No 1 (2016): 11.

¹⁸ Akbar.

(beneficiary) has an obligation to act or provide advice for and for the benefit of the second party (fiduciary) regarding certain issues that are within the scope of the relationship.¹⁹

The fiduciary duty relationship is based on trust and confidence, which in this role includes scrupulous, good faith, and candor. In understanding the fiduciary relationship, common law recognizes that people who hold trust (fiduciary) naturally have the potential to abuse their authority. Therefore, the trust-holder relationship must be based on a high standard.²⁰

Duty of loyalty is an important part of fiduciary duty, and more important than duty of care. Duty of loyalty requires a fiduciary to always adjust his behavior continuously to avoid selfish behavior, which is an act that is wrong for the beneficiary.²¹

Duty of loyalty contains a dimension of non-treachery and a positive aspect of devotion, which not only keeps the company from harming the company but demands the directors to advance the company. This also means that the duty of loyalty avoids wrongdoing, conflicts of interest, and willful dishonesty.²²

2. Application of the Business Judgment Rule in Indonesia

Business judgment as a doctrine or rule is one of the main teachings in corporate law.²³ But in practice and literature, these two concepts; business judgment as a doctrine (business judgment doctrine, BJD) and business judgment as a rule (BJR) are often misinterpreted, as if they both have the same meaning. There are experts who try to distinguish BJD and BJR but there are also experts who argue that BJD and BJR have the same meaning. Hensey, tries to distinguish BJR and BJD by arguing that BJR provides immunity for individual directors from liability for damages resulting from certain decisions.²⁴ A similar opinion was given by Farrar who said that BJR

¹⁹ Andrew D. Shaffer, "Corporate Fiduciary-Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About," *American Bankruptcy Law Review* 8, (2000): 483.

²⁰ Charity Scott, "Caveat Vendor: Broker-Dealer Liability Under The Securities Exchange Act," *Securities Regulation Law Journal* 17, No. 3 (1989): 274-296.

²¹ Charles M. Yablon Cunningham, Lawrence A., "Delaware Fiduciary Duty Law After QVC and Technicolor: A Unified Standard (and the End of Revlon Duties?)," *The Business Lawyer* 49 (1994).

²² Lyman P.Q. Johnson, and David Millon, "Recalling Why Corporate Officers Are Fiduciaries," *William & Mary Law Review* 46, No. 5 (2005): 1597-1653.

²³ Bainbridge, "The Business Judgment Rule as Abstention Doctrine," 2004.

²⁴ Joseph Hinsey IV, "Business Judgment and The American Law Institute's Corporate Governance Project: The Rule, The Doctrine and The Reality," *George Washington Law Review* 52 No. 4-5 (1983): 609.

is a rule or presumption of no liability.²⁵ from the director. While the BJD, according to Hensey, protects the decision-making itself, recognizes the legitimacy of the board of directors as a decision maker and respects the judicial autonomy granted to the board of directors.²⁶

Block et al outline three rationale for BJD. *First*, the acknowledgment of human error. *Second*, recognition of the role of risk taking in business decisions. *Third*, to emphasize that courts are not trapped in complex corporate and management decisions and are trapped in second guesses that the courts themselves are not prepared to do.²⁷ BJD and BJR are basically related to each other. McMillan argues BJR is “a doctrine created by the courts to protect directors from personal civil liability for decisions made on behalf of the company”.²⁸

The protection given to the Board of Directors/Commissioners through various legal instruments in Indonesia reflects that Indonesia has adopted the business judgment rule into the mechanism for resolving cases related to the decisions of the directors/commissioners that cause losses to the company, although it is not explicitly stated so. In addition, if further observed, the elements that can provide immunity to the directors/commissioners above are in line with the important elements in the business judgment rule. Even though it appears that there is a gap between carrying out duties to act with care and expertise (as which is declared as a task *common law* Directors or *good faith*) and the duty to act in good faith and the best interest of the company (fiduciary directors). While it should be that the important elements of the business judgment rule are explained and correlated with the task *common law/good faith* dan *fiduciary* directors as is done in the UK and Canada.

Seeing the fact that there is a separation between the elements of the business judgment rule and the duties of the common law and fiduciary directors, of course, it is necessary to do an elaboration and linkage between the two in the renewal of Limited Liability Company Law. In addition, it should also be noted that there are several important elements that are passed through Limited Liability Company Law And POJK NO. 33/PJOK.04/2014 namely that the directors/ commissioners cannot be

²⁵ John Farrar, “Corporate Governance Theories, Principles, And Practices,” *Oxford University Press, Oxford*, 2001, 143.

²⁶ IV, “Business Judgment and The American Law Institute’s Corporate Governance Project: The Rule, The Doctrine and The Reality.”

²⁷ Dennis J. Block, et.al. *The Business Judgment Rule - Fiduciary Duties of Corporate Directors and Officers*, (Prentice, Clifton New Jersey, 1987), 1–5.

²⁸ Lori Mcmillan, The Business Judgment Rule as An Immunity Doctrine,” *William And Mary Business Law* 4 No. 2 (2013): 521.

prosecuted if the business decisions have been made based on sufficient information, reliable and rational data, and do not contain elements of fraud and abuse of position as directors/ commissioners, and do not take personal benefits/benefits from the decisions made.

A lawsuit against the decision of the board of directors in Indonesia can also be filed through a derivative lawsuit that can be made by minority shareholders who also have the legal power to hold the board of directors accountable as stated in chapter 97 paragraph (6) Limited Liability Company Law:

On behalf of the Company, shareholders who represent at least 1/10 (one-tenth) of the total shares with voting rights may file a lawsuit through a district court against a member of the Board of Directors who due to his/her mistake or negligence has caused losses to the Company.

It is explained through the article that in the event that the actions of the Board of Directors cause losses to the company, shareholders who meet the requirements as stipulated in the paragraph may represent the company to sue or sue the board of directors for their decisions through the courts. However, this is actually full of shortcomings, where the only party who can file a lawsuit is only a minority shareholder, whereas all parties involved in the company's business, including creditors, can file a lawsuit in court as is done in Canada if the party is harmed by the decision of the board of directors.²⁹

The settlement of cases related to company losses in Indonesia is dominated by the construction of criminal corruption,³⁰ as was the case with the allegations against Hotasi Nababan (Former Director of Merpati Nusantara Airlines) in which the Court refused to apply the business judgment rule principle and punished the director's business decisions with corruption. The discussion of business judgment rules in Indonesia is more normative in nature regarding its regulation in Limited Liability Company Law which leaves a lack of understanding of the business judgment rule in Indonesia, both from law enforcement circles to the directors of State-Owned Enterprises (BUMN) so that there are doubts for the board of directors to

²⁹ Yafet Yosafet Wilben Rissy, "Business Judgement Rule: Ketentuan Dan Pelaksanaannya Oleh Pengadilan di Inggris, Kanada dan Indonesia," *Mimbar Hukum* 32, No. 2 (2020): 275.

³⁰ Bismar Nasution, Mahmul Siregar, and Mahmud Mulyadi, "Business Judgement Rule Dikaitkan Dengan Tindak Pidana Korupsi Yang Dilakukan Oleh Direksi Badan Usaha Milik Negara Terhadap Keputusan Bisnis Yang Diambil," *USU Law Journal* 4, No. 1 (2015): 33–44.

make strategic and high-risk business decisions.³¹

Even so, the application of the business judgment rule has been successfully applied to the release of former Pertamina President Director Karen Agustiawan from the corruption case by taking into account the principle of business judgment rule which in its consideration states that “the decision of the board of directors in a company activity cannot be contested by anyone. Even this causes losses for the company, but it is a risk in doing business which starts from business characteristics that are difficult to predict and cannot be determined with certainty”.³²

Through the Supreme Court’s Considerations, it is shown that the Supreme Court tends to follow the approach as in the UK and Canada where the courts do not have the capability and are not entitled to question (second guest) the business decisions of the board of directors.³³ This is because the court does not have the expertise to carry out such a test.

Indonesia as one of the countries with the largest economic growth in the world has clearly adopted the business judgment rule through Law Number 40 of 2007 concerning Limited Liability Companies as a protective measure for directors and commissioners. The responsibility of the board of directors can be in the form of personal responsibility or joint responsibility if the board of directors is proven guilty in carrying out their duties or is negligent, or acting not in good faith and full of responsibility, causing losses to the company as stated through chapter 97 paragraph 3 and 4 Limited Liability Company Law.³⁴

When referring to chapter 97 paragraph (5) of the Limited Liability Company Law, the board of directors cannot be held responsible for the losses suffered by the company if the directors can prove that the accusations made against him are not true. In full this is formulated as follows:

Chapter 97 paragraph (5) Limited Liability Company Law

Members of the Board of Directors cannot be accounted for losses as referred to in paragraph (3) if they can prove:

- a. The loss is not due to his fault or negligence;
- b. Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the

³¹ Rizky Novian Hartono, Sriwati, and Wafia Silvi Dhesinta Rini, “Kerugian Keuangan Negara Pada Badan Usaha Milik Negara (BUMN) Dalam Perspektif Doktrin Business Judgement Rule,” *KELUWIH: Jurnal Sosial dan Humaniora* 2, No. 1 (2021): 23–33.

³² Rizky Novian Hartono, Sriwati, and Wafia Silvi Dhesinta Rini.

³³ Rissy, “Business Judgement Rule: Ketentuan dan Pelaksanaannya oleh Pengadilan di Inggris, Kanada dan Indonesia.”

³⁴ Alum Simbolon, “Penerapan Prinsip business Judgement Rule di Indonesia,” *SIPENDIKUM*, (2018): 339–353.

- Company;
- c. Does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and
 - d. Have taken action to prevent the occurrence or continuation of the loss.

The same thing also arises about bankruptcy that the directors must be personally or jointly responsible for paying off all outstanding company obligations from company assets if the directors are found to be clearly guilty or negligent in carrying out their duties so as to cause bankruptcy for the company. Even in certain cases/conditions liability for corporate bankruptcy may apply retroactively to the board of directors for a period of 5 years before the bankruptcy decision is pronounced as stated in chapter 104 paragraphs (2) and (3) of the Limited Liability Company Law.

Referring to chapter 104 paragraph (4) of the Limited Liability Company Law, it is stated that the board of directors cannot be held responsible for the bankruptcy of the company if the board of directors can prove otherwise. Through this formulation, it is clear that the construction of the Limited Liability Company Law is the idea of the business judgment rule and for that, it can be said that Indonesia has adopted the concept of the business judgment rule. We can clearly see the formulation as follows:

Chapter 107 paragraph (4) Limited Liability Company Law:

Members of the board of directors are not responsible for the bankruptcy of the Company as referred to in paragraph (2) if they can prove:

- a. the bankruptcy is not due to his fault or negligence;
- b. Has carried out management in good faith, prudence, and full responsibility for the interests of the Company and in accordance with the aims and objectives of the Company;
- c. Does not have a conflict of interest, either directly or indirectly, over the management actions taken; and
- d. Has taken action to prevent bankruptcy.

And conversely, the directors or commissioners are personally or jointly responsible for the losses suffered by the company if the directors/commissioners are guilty or negligent in carrying out their duties based on good faith, prudence, and responsibility. Providing advice to the board of directors for the benefit of the company in accordance with the aims and objectives of the company as stated in chapter 114 paragraphs (2), (3), (4); chapter 108 paragraph (1) Limited Liability Company Law, and for the record

that the commissioner cannot be held responsible for the company's losses if the commissioner can prove otherwise. The formulation is clearly stated by:

Chapter 114 paragraph (5) Limited Liability Company Law:

Members of the Board of Commissioners cannot be held responsible for the losses as referred to in paragraph (3) if they can prove:

- a. has carried out supervision in good faith and prudence for the benefit of the Company and in accordance with the aims and objectives of the Company;
- b. does not have a personal interest, either directly or indirectly, in the actions of the management of the Board of Directors that result in losses; and
- c. has provided advice to the Board of Directors to prevent the occurrence or continuation of such losses.

As in the liability of directors in bankruptcy, commissioners are personally or jointly responsible for paying all outstanding company obligations from company assets if the commissioner is guilty or negligent in carrying out his duties, resulting in the bankruptcy of the company. This responsibility also applies retroactively within a period of 5 years before the bankruptcy decision is pronounced in court as stated in chapter 115 paragraphs (1) and (2) Limited Liability Company Law unless the Commissioner can prove otherwise. The said evidence is stated in chapter 115 paragraph (3) Limited Liability Company Law as follows:

Members of the Board of Commissioners cannot be held responsible for the bankruptcy of the Company as referred to in paragraph (1) if they can prove:

- a. the bankruptcy is not due to his fault or negligence;
- b. Has carried out supervisory duties in good faith and prudence for the benefit of the Company and in accordance with the aims and objectives of the Company;
- c. Has no personal interest, either directly or indirectly, in the management actions by the Board of Directors that result in bankruptcy; and
- d. Has provided advice to the Board of Directors to prevent bankruptcy.

In addition, the business judgment rule doctrine has also been adopted by the Financial Services Authority for public companies through the Financial Services Authority Regulation No. 33/ PJOK.04/2014 regarding the

Board of Directors and Board of Commissioners of Issuers or Public Companies, especially those related to losses suffered by the company. This is stated in chapter 13 paragraph (2) No. 33/PJOK.04/2014 which confirms that the members of the board of directors cannot be held responsible for the loss of the Issuer or Public Company if they can prove that the decisions taken meet the following elements:

1. the loss occurred not because of his fault or negligence;
2. has carried out the management in good faith, full of responsibility, prudence for the interest and in accordance with the aims and objectives of the Issuer/Public Company Liability;
3. does not have a direct or indirect conflict of interest; and
4. has taken action to prevent the loss from arising or continuing.

The protection given to the Board of Directors/Commissioners through various legal instruments in Indonesia reflects that Indonesia has adopted the business judgment rule into the mechanism for resolving cases related to the decisions of the directors/commissioners that cause losses to the company, although it is not explicitly stated so. In addition, if further observed, the elements that can provide immunity to the directors/commissioners above are in line with the important elements in the business judgment rule, even though it appears that there is a gap between carrying out duties to act with care and expertise (as which is stated as a common law duty of directors or good faith) and duty to act in good faith and in the best interest of the company (fiduciary directors). Meanwhile, it should be that the important elements of the business judgment rule are explained and correlated with the duties of the common law/good faith and fiduciary (fiduciary) directors as has been done in the UK and Canada.

Seeing the fact that there is a separation between the elements of the business judgment rule and the duties of the common law and fiduciary directors, of course, it is necessary to do an elaboration and linkage between the two in the renewal of the Limited Liability Company Law. In addition, it should also be noted that there are several important elements that are passed through the Limited Liability Company Law and POJK NO. 33/PJOK.04/2014 namely that the directors/ commissioners cannot be prosecuted if the business decisions have been made based on sufficient information, reliable and rational data, and do not contain elements of fraud and abuse of position as directors/ commissioners, and do not take personal benefits/benefits from the decisions made.

A lawsuit against the decision of the board of directors in Indonesia can also be filed through a derivative lawsuit that can be made by minority shareholders who also have the legal power to hold the board of directors

accountable as stated in chapter 97 paragraph (6) of the Limited Liability Company Law:

On behalf of the Company, shareholders who represent at least 1/10 (one-tenth) of the total shares with voting rights may file a lawsuit through a district court against a member of the Board of Directors who due to his/her mistake or negligence has caused losses to the Company.

It is explained through the article that in the event that the actions of the Board of Directors cause losses to the company, shareholders who meet the requirements as stipulated in the paragraph may represent the company to sue or sue the board of directors for their decisions through the courts. However, this is actually full of shortcomings, where the only party who can file a lawsuit is only a minority shareholder, whereas all parties involved in the company's business, including creditors, can file a lawsuit in court as is done in Canada if the party is harmed by the decision of the board of directors.³⁵

In Indonesia, what happens is that the director's business decisions are more dominantly prosecuted through the construction of corruption crimes³⁶ (not derivative lawsuits). One of them is the accusation against Hotasi Nababan (former Director of Merpati Nusantara Airlines).³⁷ In the Hotasi Nababan case, the Indonesian Criminal Court chose to ignore the application of BJR principles and sentenced the director's business decision to corruption. The rest, discussion of BJR in Indonesia is more normative in terms of its regulation in the 2007 PT Law. ³⁸ This also leaves a lack of uniformity in understanding about BJR in Indonesia, both among law enforcers ³⁹ and

³⁵ Rissy, "Business Judgement Rule: Ketentuan Dan Pelaksanaannya Oleh Pengadilan Di Inggris, Kanada Dan Indonesia."

³⁶ Bambang Sugeng Rukmono and Soehartono, "Some Problems in the Implementation of the Business Judgment Rule Principles to the Directors of State-Owned Enterprises in Indonesia," *Advances in Social Science, Education and Humanities Research, 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW)*, 2019, 233. See also Muhtar Hadi Wibowo, "Corporate Responsibility in Money Laundering Crime (Perspective Criminal Law Policy in Crime of Corruption in Indonesia)". *JILS (Journal of Indonesian Legal Studies)* 3, No. 2 (2018), 213-36; Shubhan Noor Hidayat, Lego Karjoko, and Sapto Hermawan. "Discourse on Legal Expression in Arrangements of Corruption Eradication in Indonesia". *JILS (Journal of Indonesian Legal Studies)* 5, No. 2 (2020): 391-418. <https://doi.org/10.15294/jils.v5i2.40670>.

³⁷ Muhamad Hafizh Akram & Nisrina Primadani Fanaro, "Implementasi Doktrin Business Judgement Rule Di Indonesia," *Ganesha Law Review* 1, No. 1 (2019): 86.

³⁸ Sartika Nanda Lestari, "Business Judgment Rule Sebagai Immunity Doctrine Bagi Direksi Badan Usaha Milik Negara Di Indonesia," *Notarius* 8, No. 2 (2015): 302.

³⁹ Andika Wijaya, "Implementation of the Doctrine of the Business Judgment Rule on Bankruptcy Law in Indonesia," *Yuridika* 35 No. 1 (2020): 1-14.

among directors of State-Owned Enterprises (BUMN) which makes them hesitant to make decisions. high risk strategic business.⁴⁰

However, the Supreme Court has made an extraordinary legal breakthrough by freeing former Pertamina President Director Karen Agustiawan from corruption under the consideration of BJR. To be precise, according to the explanation of the MA spokesman, one of the considerations of the Supreme Court Judge who tried this case stated that: 'the decision of the board of directors in a company activity cannot be contested by anyone. Although the decision ultimately causes losses to the company, it is a business risk. Starting from the business characteristics that are difficult to predict (unpredictable) and cannot be determined with certainty'.⁴¹ The considerations above give very clear indications that the Supreme Court chose to follow the British and Canadian models, as discussed above, which traditionally forbid courts to conduct second guests on business decisions because the courts do not have the expertise to carry out such tests.⁴²

D. Conclusion

The settlement of cases related to the company losses in Indonesia is dominated by the construction of corruption crimes as the case with the allegations against Hotasi Nababan (Former Director of Merpati Nusantara Airlines) in which the Court refused to apply the principle of the business judgment rule and punished the director's business decisions with corruption. The discussion of the business judgment rules in Indonesia is more normative in nature regarding its regulation in Limited Liability Company Law which leaves a lack of understanding of the business judgment rule in Indonesia, both from law enforcement circles to the directors of State-Owned Enterprises (BUMN) so that there are doubts for the board of directors to make strategic and high-risk business decisions. Furthermore, the application of the business judgment rule has been successfully applied to the release of former Pertamina President Director Karen Agustiawan from the indictment of a corruption case by considering the principle of the business judgment rule. In his consideration states that the decision of the board of directors in a

⁴⁰ Prasetyo et al, "Dilemma in the Implementation of Business Judgment Rule in Commercial Transactions of State-Owned Enterprises," *Talent Development & Excellence* 2, No. 2 Special Issue (2020): 1541.

⁴¹ Detik.com, "MA Lepaskan Eks Dirut Pertamina Karen Di Kasus Korupsi Rp 568 M," https://news.detik.com/berita/d-4931904/ma-lepaskan-eks-dirut-pertamina-karen-di-kasus-korupsi-rp-568-m?_ga=2.21407481.332223227.1583567161-84216239.1549435714, diakses 9 Maret 2020.

⁴² Rissy, "Business Judgement Rule: Ketentuan dan Pelaksanaannya oleh Pengadilan di Inggris, Kanada dan Indonesia."

company activity cannot be contested by anyone, even this causes losses for the company, but it is a risk in doing business which starts from business characteristics that are difficult to predict and cannot be determined with certainty. The results of this study indicate that in its application the Business Judgment Rule can provide legal protection for the board of directors for business policies taken by the board of directors even though the business policy results in losses for the company, as long as the business decisions are made with prudence, good faith, and in the scope of authority and responsibility.

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