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Corporate Organs' Accountability in Case of Sole Proprietorship Bankruptcy

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ABSTRACT

Job creation provides ease of doing business for the public, especially MSMEs, by allowing them the opportunity to start their own company, which can be founded by one person or can be called as a sole proprietorship. The allowance of forming a limited liability company by one person for MSME business actors has caused legal uncertainty whether its Shareholder General Assembly, Board of Directors, and Board of Commissioners can be appointed by one person, since the Job Creation Law has not amended the provisions of Article 1 point 2 of Law No. 40/2007 on Limited Liability Companies which stipulates that the company's organs must include the General Meeting of Shareholders, Board of Directors, and Board of Commissioners. This research used normative legal research methods combined with statutory and conceptual approaches. Based on the provisions of Article 7 Paragraphs (1) and (2) of Government Regulation No. 8/2021 concerning that a sole proprietorship company is set up with a deed of establishment equipped with identification of the founders or directors and shareholders of the sole proprietorship company, the company's organ position in a sole proprietorship company only consists of directors and shareholders, excluding commissioners. Liability when bankruptcy occurs due to negligence or fault of the management can be held personally liable, while shareholders can only be liable to their extent due to the shares they own in the sole proprietorship.

Keywords: *Company Organ, Responsibility, Sole Proprietorship Company*

INTRODUCTION

Global economic changes are a major challenge for Indonesia. Nowadays, global marketing is important for business growth. Indonesia's economic growth in the industry and trade sectors, especially in the digital trade era, is making positive progress. It can be recognized by the increasing amount of operating firms in Indonesia. The Indonesian government also encourages people to become entrepreneurs to increase their income and create more jobs.

The government encourages the establishment of various types of companies by creating laws that regulate them. These types include Sole Proprietorships, Civil Partnerships, Firms, Limited Partnerships (Commanditaire Vennotschap), and Limited Liability Companies (LLC).¹ Each type of company has different characteristics. One of the most popular types is the LLC because it is an entity that is separated from the assets of their shareholders. At first, an LLC was under the old Commercial Code (KUHD), which had been rendered completely outdated because of economic and business developments. Additional regulations were created for different groups, causing dual legal systems for LLCs in Indonesia.² After independence, regulations on LLCs continued to evolve, culminating in the 2007 Limited Liability Company Law (Law No. 40/2007). This law defines an LLC as a legal entity under the agreement, doing the business with split shares, and complying with legal requirement. This definition confirms that an LLC is recognized as a legal person. The LLC can be seen as both an association of capital (gathering funds from various parties) and an association of people (bringing together individuals to achieve shared goals). The establishment of a LLC is further regulated by Article 7 of the law, which requires at least two founders with a notarial deed.

Limited liability companies are more popular with business people than other forms of companies. According to Sri Rejeki Hartono, limited liability companies are in high demand because they have many advantages, both from an economic and legal perspective. From a legal perspective, it provides security and balance, so that the interests of all parties can be properly safeguarded in supporting economic activities. In addition, there are several other reasons that people choose a LLC. For instance, it is suitable for a wide range of businesses, and it is often required to obtain operational licenses and business licenses within a certain scope. Companies in the financial sector also usually have to be a LLC, and only companies that can utilize the mechanism of being listed on the Capital

¹ Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia*, 1st ed. (Yogyakarta: FH UII Press, 2013).

² Sandra Dewi, "Karakteristik Perseroan Terbatas Sebagai Badan Hukum," *Ensiklopedia of Journal* 1, no. 3 (2019): 114–119.

Market. Therefore, it is only logical that financial companies are the first option for people to operate their companies.³

Even though LLC are very popular among businessmen, their incorporation requires more complicated processes and stages compared to unincorporated companies. Therefore, it is difficult for micro and small businesses with low capital to establish a limited liability company. The government is trying to ease the business and investment climate in Indonesia by issuing Law No. 11/2020 on Job Creation (Job Creation Law). One of the objectives of the Job Creation Law is to facilitate business activities (ease of doing business). Ease of Doing Business (EoDB) consists of 11 indicators set by the World Bank, such as starting a business, construction permits, property registration, electricity connection, obtaining credit, protection for investors, tax obligations, cross-border trade, labor rules, aspects of the agreement, and bankruptcy resolution.⁴

The Job Creation Law is the first law in Indonesia that is in the form of an Omnibus Law, which is a law that can amend or repeal many other laws. Omnibus Law is typically adopted by certain common law countries. In Indonesia, the Omnibus Law is expected to overcome the problem of bureaucracy and overlapping regulations, and facilitate services for the public and increase investment from investors. The Job Creation Law in Indonesia amends and repeals 82 laws. One of the amended laws related to corporate legal entities is the Limited Liability Company Law.⁵

The most important change is the renewal of the concept of limited liability company. In the Job Creation Law, Article 109 Paragraph (1) changes the definition of Limited Liability Company, which is a legal entity that is a capital partnership, established based on an agreement, conducting business activities with authorized capital divided into shares, or an individual legal entity that meets the criteria of micro and small enterprises. In addition, Article 109 Paragraph (2) of the Job Creation Law also amends the provisions of Article 7 of the Limited Liability Company Law. Article 7 Paragraph (1) of the Limited Liability Company Law that requires a limited liability company to be established by 2 people still applies, but there is an exception in Article 7 Paragraph (7). This restriction is applied to state-owned companies, regional-owned enterprises (BUMD), village-owned enterprises (BUMDes), those companies which operate in the capital market, and those categorized as MSMEs (micro and small enterprises).

³ Wetria Fauzi, *Hukum Asuransi Di Indonesia*, 1st ed. (Padang: Andalas University Press, 2019), [http://repo.unand.ac.id/37110/4/Buku Hukum Asuransi.pdf](http://repo.unand.ac.id/37110/4/Buku%20Hukum%20Asuransi.pdf).

⁴ Teguh Tresna Puja Asmara, Isis Ikhwanasyah, and Anita Afriana, "Ease of Doing Business: Gagasan Pembaruan Hukum Penyelesaian Sengketa Investasi Di Indonesia," *University Of Bengkulu Law Journal* 4, no. 2 (October 24, 2019): 118–136, <https://ejournal.unib.ac.id/index.php/ubelaj/article/view/7458>.

⁵ I Kadek Semara Atmika, I Nyoman Budiarta, and Ida Ayu Putu Widiathi, "Analisis Yuridis Omnibus Law Dalam Penyusunan Rancangan Undang-Undang Cipta Kerja," *Jurnal Konstruksi Hukum* 2, no. 3 (2021): 645–649.

Based on the mentioned regulation, the Job Creation Law makes it easier for people, especially MSEs, to establish a company like a limited liability company (PT) that can be founded by one person. However, this creates legal uncertainty because the Job Creation Law does not change the provision that a limited liability company must have a General Meeting of Shareholders, Board of Directors, and Board of Commissioners. In addition, the Job Creation Law also does not clearly explain the responsibilities of company organs if the sole proprietorship goes bankrupt.

The research focuses on (1) how the Job Creation Law affects the position of the company's organs in an individual company; (2) how the responsibility of the company's organs if the individual company suffers bankruptcy. Therefore, this research is conducted to analyze the impact of the Job Creation Law on the position of the company's organs in a sole proprietorship company; and to find out the responsibilities of the company's organs if the sole proprietorship company suffers bankruptcy.

RESEARCH METHODOLOGY

The research method used in this research is the normative research method, which is legal research that places the law as a system of norms. The system of norms that is constructed is about principles, norms, rules from laws and regulations, court decisions, agreements, and doctrines.⁶ Normative type research means that in addition to examining the content of the legislation itself, this research also finds the truth based on scientific logic from the normative side. The collection of legal materials, both primary and secondary legal materials, is then inventoried after which it will be processed and analyzed in depth in order to obtain the ratio legis of the legal issues studied. The approach method used in this research is a statute approach and conceptual approach. The problem approach used is based on legislation carried out by examining all laws. The legal issues examined in the research are related to the implications of the regulation of the Job Creation Law on the position of corporate organs in individual companies, and the responsibility of shareholders to individual companies if they experience bankruptcy. In addition, another approach method used in this research is the conceptual approach method, which departs from various views and doctrines that have developed in law.

⁶ Johnny Efendi, Jonaedi & Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 1st ed. (Depok: Prenada Media Group, 2016).

RESULT AND DISCUSSION

The Implications of Job Creation Law Arrangement towards the Company's Organ Position in a Sole Proprietorship Company

PT stands for 'Perseroan Terbatas'. 'Perseroan' means capital consisting of shares, while 'terbatas' means that the liability of shareholders is limited to the value of the shares they own.⁷ According to Article 1 point 1 of this LLC Law, is a legal entity formed based on an agreement and performs its business activities with an authorized capital that is entirely dividable into shares. A limited liability company must fulfill the requirements set out in the relevant laws and regulations. In addition, a LLC must have a specific purpose that must not violate the law.

A Limited Liability Company (PT) is a legal entity (rechtspersoon) that is acknowledged under the law as if it were a human being (natuurlijk persoon). Since limited liability companies are not actual people, they require the existence of organs that are representative of the company in performing their business and doing their legal act. These organs are the General Meeting of Shareholders (GMS), the Board of Directors, and the Board of Commissioners. The GMS is the highest organ that makes important decisions and has ultimate authority.⁸ The Board of Directors is responsible for managing the company on a day-to-day basis and representing the limited liability company in legal matters, while the Board of Commissioners supervises and advises the Board of Directors. The Board of Directors and Commissioners may consist of shareholders or other persons, and commissioners are now mandatory under the Limited Liability Company Law.

The latest Job Creation Law amends several provisions regarding Limited Liability Companies (PT) to facilitate and simplify the process for the public and business actors, especially micro and small businesses. This is due to the rapid development of the micro and small business sector which has the potential to increase domestic products. The Job Creation Law updates the concept of a limited liability company, which previously had to be established by a minimum of two people based on an agreement, to be able to be established by one person if it meets the criteria of micro and small businesses. The rules on the criteria of MSEs and the establishment of a limited liability company that meets these criteria can be found in Government Regulation No. 7/2021 and Government Regulation No. 8/2021.

After the issuance of Government Regulation No. 8/2021, an implementing regulation was made through Minister of Law and Human Rights Regulation No. 21/2021 on the procedures for establishing, changing, and dissolving a limited liability company. This regulation categorizes limited liability companies into two

⁷ M. Teguh Pangestu and Nurul Aulia, "Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia," *Business Law Review* 3 (2017).

⁸ Yanuar Agung Sudjateruna and Gde Made Swardhana, "Pengaturan Organ Komisaris Dalam Perseroan Terbatas Perseorangan Menurut Perspektif Undang-Undang Cipta Kerja," *Acta Comitas : Jurnal Hukum Kenotariatan* 6, no. 3 (2021): 474–490.

types: companies as capital partnerships and individual companies. An individual company, although like a limited liability company in general, still requires corporate organs to perform legal actions. According to the Limited Liability Company Law and the Job Creation Law, the organs of a limited liability company still consist of a GMS, Board of Directors, and Board of Commissioners with their respective duties and authorities. In general limited liability companies, which are set up by at least two persons, this will not be a concern. However, in an individual company, which can be established by one person, the provisions regarding the company's organs still apply as stipulated in the Job Creation Law.⁹

Government Regulation No. 8/2021 does not specifically regulate the organs of an individual company. However, Article 7 Paragraphs (1) and (2) states that a sole proprietorship company is established with a statement of establishment that includes the identity of the founders, directors, and shareholders. This means that in a sole proprietorship company, the existing organs only consist of directors or directors who also double as shareholders, and there is no Board of Commissioners.

Company Organ Liability in the Case of Bankruptcy of a Sole Proprietorship Company

The Job Creation Law allows an individual Limited Liability Company (PT) to qualify as a micro, small, or medium enterprise (MSE). Most LLCs are founded on an agreement, although it can be challenging to maintain that agreement. According to the Limited Liability Company Law (UUPT), a limited liability company must be established by a minimum of two people with a notarial deed. If this requirement is not met, the liability of the company may change from limited liability to unlimited liability, which means that the shareholders will be personally liable for all liabilities and losses of the company. This contradicts the 'limited' principle on which the company is based. Therefore, the establishment of a limited liability company by one person only is not in accordance with this principle, as the management of a limited liability company must involve more than one person to ensure control and balance in decision-making.¹⁰

According to Fuady, the main corporate organ is the General Meeting of Shareholders (GMS), not the shareholders. Based on Article 1 point 2 of the Company Law, company organs include the GMS, Board of Directors, and Board of Commissioners. On Limited Liability Companies (PT), which includes MSMEs, changes in incorporation and disbandment are determined by

⁹ Moody Rizqy Syailendra Putra and Hanz Bryan Joeliant, "Kedudukan Organ Perseroan Perorangan Pada Usaha Mikro Kecil Dan Menengah Pasca Berlakunya Undang-Undang Nomor 6 Tahun 2023," *UNES Law Review* 6, no. 2 (2023).

¹⁰ Yuliana Duti Harahap, Budi Santoso, and Mujiono Hafidh Prasetyo, "Pendirian Perseroan Terbatas Perseorangan Serta Tanggung Jawab Hukum Pemegang Saham Berdasarkan Undang-Undang Cipta Kerja," *NOTARIUS* 14, no. 2 (2021).

shareholder decisions similar to the GMS.¹¹ On Limited Liability Companies (PT), which includes MSMEs, changes in incorporation and disbandment are determined by shareholder decisions similar to the GMS. The BOD is responsible for controlling the company in accordance with its goals, with appropriate business policies. They must prepare financial statements and report them electronically within six months after the accounting period.

Prof. Sutan Remy Sjahdeni is divided into two obligations of limited liability company operations, such as:

1. Statutory Duties: Obligations that are prescribed by law.
2. Fiduciary Duties: according to Gunawan Widjaja fiduciary duties there are two obligations of the Board of Directors to the company, which are:
 - a. Duty of Loyalty and Faith Good, directors not only perform their duties for the benefit of the company, but also the stakeholders in the company.
 - b. Duty of Care and Diligences, is a requirement to be careful, meaning that as employees in the board of directors at a PT, they must behave and act: they must exercise that degree of skill, diligence, and care that a reasonably prudent person would exercise in similar circumstances.

If the Board of Directors violates this obligation, they can be held personally liable. However, in some cases, the principle of 'piercing the corporate veil' can be applied, whereby shareholder liability can extend beyond the shares held if there is bad faith or confusion of personal assets with company assets.

In certain events, the principle of separate LLC does not apply or known as piercing the corporate veil. In Article 153J Paragraph (2) which determines detailed as follow:

1. The requirements as a legal entity have not been complied with or are not fulfilled.
2. The shareholder concerned, both directly and indirectly, in bad faith, exploits the company for personal purposes.
3. The shareholder concerned is involved in illegal acts committed by the company.

In the event of bankruptcy, which is a situation where a debtor does not pay his debts that have fallen due and collectible. Bankruptcy is the position or condition of the debtor being unable to pay his debts to creditors. A situation that requires the intervention of the Panel of Judges in order to guarantee the common interests of its creditors. In an individual company that is bankrupt, the

¹¹ Wiwin Ariesta, "Prinsip Berlindungan Hukum Seimbang Bagi Pemegang Saham Minoritas Dalam Tata Hukum Perseroan" (2019).

responsibility of the company's organs, including the directors who are also shareholders, is that if the bankruptcy is caused by negligence or fault of the directors, they can be held personally liable, in the Job Creation Law and government regulations and implementing regulations do not regulate the responsibility of directors in the event of bankruptcy. If reviewed based on Law Number 40 of 2007 concerning Limited Liability Companies, the responsibility of the Board of Directors for the bankruptcy of a limited liability company is regulated in Article 104 paragraph (2), which determines that in the event of bankruptcy that occurs due to the fault or negligence of the board of directors and the bankruptcy assets are not sufficient to pay for all the obligations of the company in bankruptcy, each member of the board of directors is jointly and severally liable for all obligations that are not paid from the bankruptcy assets. Article 104 paragraph (5) stipulates that the board of directors is not liable for the bankruptcy of the company as referred to in paragraph (2) if it can be proven that the bankruptcy is not due to their fault or negligence, they have managed in good faith, prudence, and full responsibility for the company's interests and in accordance with the aims and objectives of the company, they do not have a conflict of interest either directly or indirectly for the management actions taken, and they have taken measures to prevent bankruptcy.

The relevant shareholder, both direct and indirect, has used the property of the company illegally, which has made the wealth of the company insufficient to pay off the company's debts. If a company is unable to pay its debts, the directors may be held accountable for their personal liability if the bankruptcy was caused by their negligence. Under Law No. 40/2007, if bankruptcy is caused by the misdeeds of the BOD, they are personally liable for unpaid obligations from the bankruptcy assets. However, BODs are not liable if they can prove that the insolvency was not their fault and that they have acted in good faith. Shareholders are only liable to the extent of their shares. Their liability does not exceed the number of shares, unless there are matters excluded by law that require unlimited liability.

Meanwhile, shareholders can only be held liable to the extent of the shares included or owned in the individual company in accordance with the provisions of Article 153 letter J of the Job Creation Law that shareholders in MSE companies including individual companies are not personally liable for all agreements made by the company and are not responsible for more than the number of shares owned, while the limitation of responsibility can be applied as long as there are no things that are excluded in the law so as to oblige them to be charged with unlimited liability as known in the doctrine of piercing the corporate veil.

CONCLUSION

Regarding the organ of a sole proprietorship company, Article 7 Paragraphs (1) and (2) of Government Regulation No. 8/2021 regulates that a sole proprietorship company is incorporated by a deed of establishment equipped with personal identities of the founders and shareholders of the sole proprietorship company. Founder known as directors and individual company shareholders in Article 7 Paragraph (2) letter g of Government Regulation No. 8/2021 refers to individual company organs consisting only of founders or directors who also serve as shareholders, but does not regulate and eliminates the organ of BOC. From this provision of Article 7 Paragraph (2) letter g of Government Regulation No. 8/2021, the position of the corporate organ in a sole proprietorship company is that it only comprises directors and shareholders, without the organ of commissioners.

The company's organ liabilities, that is, its directors who are also shareholders, are if the bankruptcy is caused by the negligence or mistakes of the directors, then they can be held personal liabilities. The Law on Limited Liability Companies and its government regulations and implementing regulations do not regulate the liability of directors in the event of bankruptcy, but based on Law No. 40/2007 on Limited Liability Companies, it is regulated regarding the liability of directors in the event of bankruptcy. Article 104 Paragraph (2) of Law No. 40/2007 on Limited Liability Companies stipulates that if the bankruptcy is caused by negligence and misconduct, the board of directors is liable for the bankruptcy. Meanwhile, shareholders can only be held liable to the extent of the shares included or owned in the individual company in accordance with the provisions of Article 153 letter j of the Company Law.

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