

Construction application by business judgment rule principle as legal protection against directors' decisions that harm the company

Shinta Zahara

Master of Law, Faculty of Law, University of Indonesia

ARTICLE INFO

Article history:

Received Nov 15, 2022

Revised Dec 13, 2022

Accepted Dec 30, 2022

Keywords:

Business Judgment Rule;
Liability;
Directors;
Losses;
Company.

ABSTRACT

Based on the principle of business judgment rule, the Board of Directors is not personally responsible for actions committed for and on behalf of the company based on the authority it has, this is because the actions of the board of Directors are the act of making decisions for and on behalf of the company which is the subject of independent law so that the company is responsible for the actions of the company itself which in this case is represented by the Board of Directors. The problem in this study is the application of the Judgment rule principle which is used as legal protection against Directors' decisions that harm the company and to what extent the limit of liability of the Company's directors is either on personal behalf or on behalf of the directors representing the company under the Limited Liability Company Law.

ABSTRAK

Berdasarkan prinsip *business judgment rule* Direksi tidak bertanggung jawab secara pribadi terhadap perbuatan yang dilakukan untuk dan atas nama perseroan berdasarkan wewenang yang dimilikinya. Hal tersebut dikarenakan perbuatan Direksi merupakan perbuatan mengambil keputusan untuk dan atas nama perseroan yang merupakan subjek hukum mandiri sehingga perseroanlah yang bertanggung jawab terhadap perbuatan perseroan itu sendiri yang dalam hal ini direpresentasikan oleh Direksi. Permasalahan dalam penelitian ini adalah penerapan prinsip *business judgment rule* yang digunakan sebagai perlindungan hukum terhadap keputusan Direksi yang merugikan perusahaan dan sejauh mana batas pertanggungjawaban Direksi Perseroan baik atas nama pribadi ataupun atas nama direksi yang mewakili perusahaan berdasarkan Undang-Undang Perseroan Terbatas.

This is an open access article under the [CC BY-NC](#) license.



Corresponding Author:

Shinta Zahara,
Master of Law,
Faculty of Law,
University of Indonesia,
Pondok Cina, Beji, Depok, Indonesia.
Email: shintazahara@gmail.com

I. INTRODUCTION

The *business judgment rule* is a concept when the board of Company Directors cannot be legally charged with decisions that have been taken even though the decision causes losses to the company where the decision is carried out in a good faith, with purpose, and rational which means and basis and prioritizes prudence. Asep Mulyana., *Business Judgment Rule, Praktik Peradilan Terhadap Penyimpangan Dalam Pengelolaan BUMN/ BUMD* (Jakarta: PT Grasindo, 2018). Basically, the doctrine of *business judgment rule* comes from adherents of the common law system which was born and rooted in the doctrine of *fiduciary duty* or responsibility of the Board of Company Directors where the business judgment rule arises as a result of the implementation of *fiduciary duty* by a Board of Directors based on the principle of duty of *skill and care*, then all errors arising after the

implementation of the principle will result in the consequences of the Board of Directors will get a personal responsibility if there is an error in making the decision. Hendra Setiawan Boen, *Bianglala Business Judgment Rule* (Jakarta: PT Tatanusa, 2008).

In addition, the function of the business judgment rule doctrine is not to be rash in the issuance of business decisions so that every decision that is born does not have a crucial impact on the company so that a Board of Directors in making his decisions must be based on the norms contained in the dokrin business judgment rule, namely upholding the principles of prudence, good faith and focusing on the interests of the company and subject to the provisions of the articles of association and laws and regulations invitation. Basically, the principle of business judgment rule is a legal principle derived from the common law system and is a derivative of United States corporate law that is carried out with care and good faith and full of responsibility for not being able to be held legally accountable both criminally and civilly. Every action of the Board of Directors based on good faith will be protected by statutory provisions as long as the actions can be proven by avoiding acts that benefit the Board of Directors personally in making important decisions about the company, which results in the company experiencing losses. "According to Ningrum Natasya Sirait, Fiduciary Duty Is a Very Important to Be Carried out by All Organs of the Company in Order to Increase the Company's Productivity and Prevent All Stakeholders from Legal Liability."

In carrying out its obligations and duties, the Board of Directors has the full power and right to carry out actions accompanied by consequences and actions of the company as long as it is still carrying it out as specified in the company's Articles of Association. As long as the Board of Directors does not commit violations, the company will bear all the consequences of the actions of the Board of Directors. The problem that arises is when a business decision taken by the Board of Directors causes losses and if a decision taken by the Board of Directors is a decision taken with due regard to the principle of *fiduciary duty* but causes losses to the company, then the Board of Directors cannot be held personally liable because it is protected by this principle.

The reason for the application of *the business judgment rule* is to maintain investor confidence and profits and prevent the decline of talented people who want to become Directors in the corporation. This philosophy is what exists from the doctrine of business judgment rule. And the doctrine is a shield from the Board of Directors in good faith to be protected from lawsuits from corporations, shareholders, or creditors against losses arising from decisions taken and resulting in losses for the Company. Misahardi Wilamarta, *Doktrin-Doktrin Fiduciary Duty Dan Business Judgement Rule Dalam Pengelolaan Perseroan Terbatas, Cet.I, Center for Education and Legal Studies (CELS)*, (Depok, 2007). This application is not only regulated based on *the principle of business judgment rule* but also regulated in Article 97 paragraph (5) of Law Number 11 of 2007 concerning Limited Liability Companies (UUPT) which also regulates the exclusion of liability from the Board of Directors personally for losses suffered by the Company as long as the members of the Board of Directors do not make mistakes or omissions, manage the company in good faith, be prudent and have no conflict of interest and have taken measures to prevent prolonged losses from arising.

The actions of the Board of Directors are seen as the actions of a PT which is the subject of independent law so the company is responsible for the actions of the company itself which in this case is represented by the Board of Directors. However, with the application of this principle, the authority or power possessed by a director of a company is based on its position as an organ of the company, meaning that it is a tool of the company's equipment (legal entity). M. Gary Gagarin Akbar, "Perlindungan Hukum Terhadap Direksi Yang Telah Menggunakan Business Judgment Rule Dalam Mengelola Perseroan" (Thesis, Universitas Islam Indonesia, 2014). In its position as an organ of the company in acting is limited to the authority granted to it as a party representing the company (legal entity). A person occupying a position as a director may be personally responsible for actions or deeds committed for the company he represents. This can happen if he commits an action on an act that is not within his authority or exceeds the limits of his authority. Based on the problems that have been

previously presented, the formulation of the problem is as follows: How is the application of the business judgment rule principle used as legal protection against directors' decisions that harm the company? What is the limit of liability of the company's directors either on personal behalf or on behalf of the directors representing the company under the 2007 Tax Law?

II. RESEARCH METHODS

This research uses a normative juridical method approach. "Research with a normative juridical approach examines data derived from or sourced from legal norms found in the community and contained in laws and regulations." Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Depok: PT RajaGrafindo Persada, , 2019). This research uses the study of documents related to the problem under study whose data is taken from literature, scientific papers, books, and laws, and regulations as well as documents or other library sources.

III. RESULT AND DISCUSSION

1. Application of the *Business Judgment Rule Principle* as Legal Protection against Board of Directors' Decisions That Harm the Company

In general, one would argue that a company in its incorporation is intended to run a company with a certain corporate capital divided into shares in which the shareholders take part by taking one or more shares and doing legal action in the common name by jointly liable to the consent of the company which is limited solely to the paid-up capital. The Company is a forum for self-development, holding capitalization as a vehicle that can obtain profits for both the institution and its supporters in this case shareholders or investors. Therefore, the form of a Limited Liability Company business entity is in great demand by the public to obtain economic benefits and more value than other business entities. The basis for consideration by applying the principle of *business judgment rule* to the decision of the board of directors is that it can provide benefits for the company that affects the running of the company and shareholders. Like the business world, decisions made can result in profits and losses.

In every decision-making, the board of directors must place themselves for and on behalf of the company. So the good consequences of everything made, in principle, are shouldered by the company itself. The principle itself applies in both the common law system and the civil law system. However, that principle is not standard because in certain cases these consequences and actions must be carried out personally by the Director himself even though he is acting for and on behalf of the company. Purwosutjipto, *Pokok Hukum Dagang Indonesia* (Jakarta: Djambatan, 2001).

Business judgment rule according to Ridwan Khairandy, is a doctrine that teaches that the company's directors are not responsible for losses arising from an act of making a decision if the action is based on good faith and caution. The Board of Directors receives legal protection without the need to obtain justification from shareholders or courts for decisions taken in the context of managing the company. Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia* (Yogyakarta, 2014).

According to the law in the United States, the Director will be personally responsible if he performs his duties not by certain standards, for example by deliberately misusing and misappropriating company funds. The act of disputing shares as fully paid-up shares when they have not been paid up at all is also contrary to good standards. Several cases in the United States form the basis of *the business judgment rule*, including the case taken into consideration by the Delaware Supreme Court which states that the business judgment rule involves 2 (two) things, namely process and substance.

When doing the process *business judgment rule* involves the formality of decision-making within the company whereas as a substance, the business judgment rule cannot be enforced in a transaction.

It must be proved that the action did not substantially benefit the Company. In another case, Grobow V. Perot explained that to implement the business judgment rule, the board of directors pays attention to good faith, gives the best consideration to the company, and conducts a review based on loyalty to the company. Notarius, “, Business Judgement Rule Sebagai Imunity Bagi Direksi BUMN Di Indonesia,” *Jurnal Hukum Bisnis* 8, no. 2 (2015): 1–19.

It is necessary to know how this principle of *business judgment rule* is used. The principle of the Business Judgment Rule is often interpreted differently when applied to cases like this: Robin Panjaitan, Martono Anggusti, and Roida Nababan, “Penerapan Prinsip Business Judgment Rule Terhadap Direksi Yang Melakukan Kebijakan Yang Merugikan Perusahaan,” *Patik: Jurnal Hukum* 10, no. 1 (2021): 1–14.

- a) The existence of a more persuasive *business judgment rule*, in this case, the court not only applies the business judgment rule but makes its primary application;
- b) If it is seen that there is a vested interest of the board of directors/administrators on issues that are more focused on the motive of an action, the court still applies the principle of business judgment rule.
- c) There is a personal interest of the director/administrator, in this case usually the business judgment rule is not applied.
- d) If a business decision is contrary to certain policies or rules from the government, in this case, the business judgment rule cannot be applied and can even be said to violate the fiduciary duty of the company.

According to Bismar Nasution, the company is like a ship where the director is a skipper. Whether the skipper's journey is good or bad depends on the skipper's ability to drive the ship. Likewise with a company, the good or bad of the company depends largely on the policy that a director of the company will achieve.

Regarding the terms of enactment of the principle of *business judgment rule*, Bismar Nasution agrees with the general opinion that a director cannot be punished for the policies he takes if (1) in good faith, (2) on a solid basis, (3) does not contain a conflict of interest. Bismar Nasution, *Good Corporate Governance Pada Perseroan* (Medan: USU Press, 2009).

Thus, a board of directors, in general, a board of directors in a limited liability company or other business entity cannot be held legally liable whether convicted or sued civilly by anyone including shareholders if the directors carry out the functions of the company according to the purposes of the company and AD/ART with care and full responsibility. The Board of Directors or Directors is an organ of the Company that has full duties, authorities, and responsibilities for the management and running of the Company which it leads for the interests and purposes of the Company. The Board of Directors also represents and acts for and on behalf of the Company in and out of court by applicable laws and regulations in the articles of association of the Company.

2. Limits of Liability of the Company's Board of Directors either on Personal Behalf or on behalf of the Board of Directors representing the Company under the 2007 Tax Law

In carrying out management and representation for and on behalf of the company, the board of directors is required to be able to act prudently, appropriately, and as well as possible in accordance with the authority stipulated in the Articles of Association. For example, if there is a director of a company who commits acts or actions that violate the limits of authority or provisions stipulated in the articles of association, then the directors will be held personally liable by a third party either on behalf of themselves or jointly for all actions made and detrimental to the company. Basically, the company is not responsible for the actions of the board of directors that exceed the limits of authority granted to it by the articles of association. M. Gary Gagarin Akbar, “Perlindungan Hukum ,” n.d., 17.

One of the things related to the authority of the board of directors is the principle of *business judgment rule* where a director cannot be held personally accountable for his actions carried out in his position as a director of the company who has a hand in making decisions for and on behalf of the company in accordance with the authority stated in the articles of association. In terms of his position as a director, if he believes that such actions are good for the company and are carried out in a prudent and good faith and honest manner in taking actions related to the interests of the company, then the director cannot be held accountable. So that basically the business judgment rule is a consideration based on fair and reasonable wisdom. Binoto Nadapdap, *Hukum Perseroan Terbatas* (Jakarta: Permata Aksara, 2013). *The principle of business judgment rule* has also been accommodated in the Limited Liability Company Law number 40 of 1997 in Article 97 paragraph (5) it is stated that a Board of Directors is free from responsibility for company losses if it can prove : The loss was not due to his negligence and fault; Has carried out management in a good manner in accordance with the purposes and objectives of the company; Does not have a conflict of interest, either directly or indirectly, for management actions that result in losses; Have taken measures to prevent such losses from arising or continuing.

According to Bismar Nasution, in general, *the business judgment rule* only applies to business decisions. In Law No. 40 of 2007 concerning Limited Liability Companies, this principle only applies to the management of the company which is a broader aspect compared to business decisions. This means that the board of directors can be relieved of their responsibility not only in terms of the business decisions they take but also in the management aspects of the company as well as the directors can prove the five elements above. Bismar Nasution, "Good Corporate Governance," n.d., 45. Based on the legal doctrine of a Limited Liability Company, the Board of Directors in carrying out their duties has the obligation to carry out management with full responsibility, among others.:

a. *Fiduciary Duty*

Each member of the board of directors "must be trusted" in carrying out the company's management responsibilities. This means that every member of the board of directors is always trustworthy (must always *be bona fide*) and must always be honest (must always be honest). Regarding the meaning of good faith and must be trusted and forever obliged to be honest in assuming responsibility for the implementation of the management of the company, there is a phrase that reads a director is permitted to be very stupid so long as he is honest. This does not mean that it is approved to appoint a stupid board of directors. What the phrase wants is to appoint both capable and honest members of the board of directors, rather than being smart but dishonest and untrustworthy.

b. *Duty of Care*

Directors in running a company based on existing authorities must always be vigilant and act with careful calculations. In the policy he makes, the director must always act with caution and take into account the circumstances, conditions, and large management costs. In managing the company, members of the board of directors must not be "reckless" (caressly) and "negligent" (negligence). If he is reckless and neglects to carry out management, according to law he has violated his duty care obligations or is contrary to "prudential duty". The duty of the due care standard that is generally applied in practice, is the standard of caution that ordinary people are accustomed to in the same position and condition. If this prudential benchmark is ignored by a member of the board of directors in carrying out the management of the company, he is deemed guilty of violating the obligation to carry out the management with full responsibility. There is no apology for someone who occupies the position of a member of the board of directors with a large enough salary and benefits, but is not careful to carry out the management of the company. M. Yahya Harahap, *Hukum Perseroan Terbatas*, n.d.

c. *Duties of Loyalty*

The loyal attitude that the directors must show in the company is one that is based on rational and professional considerations. In this sense, the board of directors must be able to be firm in accordance with the vision and mission as well as the articles of association of the limited liability company. *The point of loyalty* is that the board of directors must always side with the interests of the company he leads. The Board of Directors entrusted by shareholders must act for the benefit of shareholders and stakeholders, act for the interests and purposes of the company, and act by prioritizing the interests of the company above personal interests. M. Yahya Harahap, "Hukum Perseroan Terbatas," n.d., 379–81. In relation to *the duty of loyalty*, the board of directors is also prohibited from doing things such as competing with the company, seizing opportunities within the company, realizing personal profits derived from existing material information, using company assets for its personal interests, and participating in the making of agreements that give rise to conflicts of interest. M. Yahya Harahap.

d. Duties to Act Lawfully

The Board of Directors, which is entrusted by the shareholders, is obliged to lead the company in accordance with applicable laws or regulations. If the board of directors knows that the actions they will do are contrary to applicable laws or regulations, then the management of the company should not do so. The Board of Directors in carrying out the duties of the company must be in accordance with the provisions of the Uupt and the company's articles of association, these duties must be carried out with prudence, good faith, consequences, and consistency. Ridwan Khairandy, *Perseroan Terbatas, Doktrin, Peraturan Perundang-Undangan Dan Yurisprudensi*, 2009.

The Board of Directors has an obligation to carry out the mandate given by the company (*fiduciary duties*). With this mandate, members of the board of directors are required to carry out the best possible management of the company solely for the benefit of the company. Members of the board of directors may not use the company for their personal interests. In addition, members of the board of directors are also required to carry out the management of the company based on the principle of prudence and care (*duty of care*). Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia*. So, Basically, the liability of the board of directors is limited. However, in certain circumstances this limited liability may become personal responsibility or joint liability of fellow members of the board of directors.

In Indonesian it can be interpreted that the doctrine of the Business Judgement Rule is a presumption that in making business decisions that do not contain personal interests or direct personal gain. The Board of Directors of the Company acts on the basis of sufficient information in good faith and with an honest belief that his actions are in the best interests of the Company. This rule protects the Board of Directors and officers of the company from liability for transactions that are not beneficial or detrimental to the company if the transaction is carried out in good faith, prudent and within the scope of the authority of the Board of Directors or the officer concerned.

On the other hand, the doctrine of *Business Judgement Rule* in Indonesian company law can be found in Article 97 paragraph 5 Jo. Article 104 paragraph 4 of Law No. 40 of 2007 concerning Limited Liability Companies which provides an exception to the liability of members of the board of directors personally in the occurrence of losses or insolvency, if he can prove that the loss was not due to his fault or negligence, has carried out management in good faith and prudence for the benefit of and in accordance with the purposes and objectives of the Company, has no conflict of interest either directly or indirectly over management actions that result in losses and has taken actions to prevent the arising or continuation of such losses.

IV. CONCLUSION

The application of the Business Judgement Rule principle to directors who carry out policies that harm companies in Indonesia has not been optimal. The lack of human resources of our law enforcement, especially the prosecutor's office, has the opportunity to drag directors who perform their duties based on the principles of good faith, prudence and responsibility into the criminal and civil realms.

The regulation of the business judgment rule in Indonesia is a doctrine that emerged from the United States and is quite adequate although it still requires improvement in the meaning of the *business judgment rule* as contained in Law No. 40 of 2007 concerning Limited Liability Companies. The Board of Directors in carrying out their duties and authorities has the flexibility and protection in providing business decisions to the company.

References

- “According to Ningrum Natasya Sirait, Fiduciary Duty Is a Very Important to Be Carried out by All Organs of the Company to Increase Company’s Productivity and Prevent All Stakeholders from Legal Liability.” n.d.
- Asep Mulyana. *Business Judgment Rule, Praktik Peradilan Terhadap Penyimpangan Dalam Pengelolaan BUMN/BUMD*. Jakarta: PT Grasindo, 2018.
- Binoto Nadapdap. *Hukum Perseroan Terbatas*. Jakarta: Permata Aksara, 2013.
- Bismar Nasution. “Good Corporate Governance,” n.d., 45.
- . *Good Corporate Governance Pada Perseroan*. Medan: USU Press, 2009.
- Hendra Setiawan Boen. *Bianglala Business Judgment Rule*. Jakarta: PT Tatanusa, 2008.
- M. Gary Gagarin Akbar. “Perlindungan Hukum ,” n.d., 17.
- . “Perlindungan Hukum Terhadap Direksi Yang Telah Menggunakan Business Judgment Rule Dalam Mengelola Perseroan.” Thesis, Universitas Islam Indonesia, 2014.
- M. Yahya Harahap. *Hukum Perseroan Terbatas*, n.d.
- . “Hukum Perseroan Terbatas,” n.d., 379–81.
- Misahardi Wilamarta. *Doktrin-Doktrin Fiduciary Duty Dan Business Judgement Rule Dalam Pengelolaan Perseroan Terbatas, Cet.I, Center for Education and Legal Studies (CELS)*,. Depok, 2007.
- Notarius. “, Business Judgement Rule Sebagai Imunity Bagi Direksi BUMN Di Indonesia.” *Jurnal Hukum Bisnis* 8, no. 2 (2015): 1–19.
- Purwosutjipto. *Pokok Hukum Dagang Indonesia*. Jakarta: Djambatan, 2001.
- Ridwan Khairandy. *Perseroan Terbatas, Doktrin, Peraturan Perundang-Undangan Dan Yurisprudensi*, , 2009.
- . *Pokok-Pokok Hukum Dagang Indonesia*. Yogyakarta, 2014.
- Robin Panjaitan, Martono Anggusti, and Roida Nababan. “Penerapan Prinsip Business Judgment Rule Terhadap Direksi Yang Melakukan Kebijakan Yang Merugikan Perusahaan.” *Patik: Jurnal Hukum* 10, no. 1 (2021): 1–14.
- Soerjono Soekanto, and Sri Mamudji. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Depok: PT RajaGrafindo Persada, , 2019.