

## CHARGING DIRECTOR OF COMPANY WITH PERSONAL BANKRUPTCY FOR COMPANY MISMANAGEMENT

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### **Abstract**

This study aims to examine the theories, regulations, and practices at the commercial court in Indonesia regarding the possibility of charging director of limited liability companies (LLC, Perseroan Terbatas (PT)) with personal bankruptcy as a form of personal liability due to mismanagement causing the company to go bankrupt. This is an interesting issue to study because, in general, the rights and obligations of the company, and specifically LLC in this article, are separated from the rights and obligations of the directors. Therefore, the company's liability cannot be requested upon its directors' personal liability. Nonetheless, this general principle is revocable if the director makes an error which causes the company to go bankrupt. This study uses the normative (doctrinal) legal research method with statute approach, conceptual approach, and cases approach. The study results revealed that directors could be asked for personal liability if they create problems which lead to a company going bankrupt. The director's liability comes in the form of the obligation to file bankruptcy for the director him/herself. In this study, several cases were found that punished the director with the director's personal bankruptcy, like in the case of personal bankruptcy of director PT QSAR and in the case personal bankruptcy of director of PT CHK.

*Penelitian ini bertujuan untuk mengkaji teori, aturan, dan praktik di pengadilan niaga di Indonesia mengenai kemungkinan dipailitkannya pribadi direktur limited liability company (LLC) sebagai bentuk pertanggungjawaban pribadi karena direktur LLC tersebut telah melakukan perbuatan yang salah yang menyebabkan perusahaan pailit. Hal ini menarik untuk diteliti karena secara umum pada prinsipnya hak dan kewajiban perusahaan, dalam tulisan ini khusus yang berbentuk LLC, terpisah dengan hak dan kewajiban dari direktur perusahaan,*

*sehingga kewajiban perusahaan tidak dapat dimintakan pertanggungjawabannya kepada direktur secara pribadi. Namun demikian prinsip umum ini dapat dikesampingkan jika direktur melakukan kesalahan sehingga menyebabkan perusahaan pailit. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan statute approach, conceptual approach, dan cases approach. Hasil penelitian ditemukan bahwa direktur dapat saja dimintai pertanggungjawaban secara pribadi karena melakukan kesalahan sehingga menyebabkan perusahaan pailit. Adapun bentuk pertanggungjawaban direktur tersebut adalah dimohonkannya pailit terhadap direktur tersebut. Dalam penelitian ini ditemukan juga, beberapa kasus yang menghukum direktur dengan kepailitan pribadi direktur, seperti dalam kasus kepailitan pribadi direktur PT QSAR dan dalam kasus kepailitan pribadi direktur PT CHK.*

**Keywords:** Director, Personal liability, Bankrupt, Company, Mismanagement

## Introduction

In Indonesian Company Law, it is determined that the company organs, in this paper's case limited liability companies/LLC, consist of General Meeting of Shareholders (GMS), commissioners, and board of directors. These three organs have different duties, authorities, and liabilities from each other. The three LLC organs have separate rights and obligations from those of the company, meaning that the director cannot be held accountable for the company's liabilities or vice versa.

The director is one of the LLC organs whose duties are to be fully responsible for managing the company, fulfilling its purpose, and representing it both inside and outside the court in accordance with the provisions in the articles of association of the company. The board of directors has a very central function and role in the LLC paradigm, since it performs the function of the management and serves as the representative of the company.<sup>1</sup> In other words, the directors are the personification of the LLC, where the LLC is an independent legal entity.

In terms of the importance, function and position of the director in a LLC, Nindyo Pramono cited the theory of organism from Otto von

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<sup>1</sup> Simon Witney, "Corporate opportunities law and the non-executive director", *Journal of Corporate Law Studies*, vol. 16, no. 1 (2016), p. 145.

Gierke and the theory of representatives from Paul Scolten and Bregstein.<sup>2</sup> According to the theory of organism from Otto von Gierke, directors are organs or the equipment of a legal entity. Just as human beings have organs such as feet, hands, and senses, whose every movement is determined or commanded by the human brain, any movement or activity of the directors of a legal entity is desired or governed by the legal entity itself. Hence, the directors are the personification of the legal entity itself.

In the literature, this task is referred to as the representation task.<sup>3</sup> Simply put, the representation task is the task of the director to represent the company, both inside and outside of the court. The task of representing the company outside of the court includes representing the company in terms of making a deal or business transaction with a third party, signing a contract, meeting a country official, etc.<sup>4</sup>

Based on the normative provisions in Indonesian company law and the Gierke-Scholten-Bregstein theory, the function of the director is to conduct management and representation. The management duty will be interrelated with the internal tasks of the LLC and its interests in order to achieve its purpose and objectives. Meanwhile, the representative duty is related to the task of the director in representing the company in interacting with third parties and representing it outside and inside of the court. It is important to understand the aforementioned duties and authority of the director before analysing its liability.

Rudhi Prasetya stated that, when talking about accountability, the external relations and aspects of internal relations can become evident.<sup>5</sup> External responsibility is the accountability resulting from the impact of relations with the outside parties. Conversely, the internal accountability is the impact of the manager's relationship as a company organ with other organs, namely the commissioners and/or general meeting of shareholders.<sup>6</sup>

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<sup>2</sup> Nindyo Pramono, *Sertifikasi Sabam PT Go Publik dan Hukum Pasar Modal di Indonesia* (Bandung: Citra Aditya Bhakti, 2001), p. 94.

<sup>3</sup> Munir Fuady, *Perseroan Terbatas Paradigma Baru* (Bandung: Citra Aditya Bhakti, 2003), p. 59.

<sup>4</sup> Munir Fuady, *Perseroan Terbatas...*, p. 60.

<sup>5</sup> Munir Fuady, *Perseroan Terbatas...*, p. 7.

<sup>6</sup> Rudhi Prasetya, *Kedudukan Mandiri Perseroan Terbatas Disertai Dengan Ulasan Menurut UU Nomor 1 Tahun 1995 tentang Perseroan Terbatas* (Bandung: Citra Aditya Bakti, 2001), p. 205.

The director, as an important organ of the LLC, is the personification of the LLC, which is a legal entity, in carrying out legal actions. However, the director's legal action is for and on behalf of the LLC as a legal entity which is separate from the director as an individual. The rights and obligations of the LLC are separated from the director's personal rights and obligations. Likewise, the assets owned by the LLC are separated from the director's personal assets.

However, even though the LLC and the director are separate entities, the director may be held personally accountable if the director commits a faulty action which results in the company's becoming bankrupt. Theoretically, this is possible. However, these individuals may set up their own businesses. If the issue escalates to the court, the individual will face prosecution for their actions, not as the company he/she represents, but as a person for their act and as the company's shield as it is lifted in this case.<sup>7</sup> This is also the case with Indonesian limited liability companies, such as Law No. 1 of 1998 and Law No. 40 of 2007 concerning Limited Liability Company, hereafter referred to as the Company Law, that allow the director to be held personally accountable.

In the practice of Indonesian courts, this issue also occurs where the directors participate in bankruptcy as they are partly responsible for mismanagement, causing the company to go bankrupt. In this study, purposive sampling was conducted in two cases, namely the bankruptcy cases of the director of PT Cita Hidayat Komunikaputra and the director of PT Qurnia Subur Alam Raya.

Based on this background, the legal issues to examine in this study include whether the LLC directors can be held personally liable by putting them in bankruptcy because they have committed mismanagement causing the LLC fall into bankruptcy, and how the laws and practices in Indonesian court related to the bankruptcy law and the Indonesian laws on limited liability company address the possibility of the directors being charged for personal bankruptcy due to mismanagement.

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<sup>7</sup> Tareq Na'el Al-Tawil, "Piercing the corporate veil: when LLCs and corporations may be at risk", *International Journal of Law and Management*, vol. 61, no. 2 (2019), p. 328.

## **Theories about the Tasks and Responsibilities of the LLC Director**

According to Indonesian Corporate Law, the director of a limited liability company has a very strategic position in the organization. Despite being appointed by shareholders at a general meeting of shareholders (GMS), the director is not a sub-ordination of the GMS and the director is entitled to exercise an extensive management authority. The director obtains the authority from the GMS that provides the power mandate to run the company. The director must also account for its duties and authorities to the GMS. These regimes have reflected the dominant corporate governance jurisprudence of the nineteenth and twentieth centuries – the ownership and nexus of contracts theories of the firm.<sup>8</sup>

The theories about the board of management's liability of the limited liability company/LLC is distinguished at least into four theories, namely:

1. theory of liability based on the principle of fiduciary duties and duty to skill and care;
2. theory of liability based on the indoor management rule;
3. theory of liability based on the principle of ultra vires; and
4. theory of liability based on the principle of piercing the corporate veil.

The tasks which make up the board of management's fiduciary duties, in this case, include those published by the operation of law from a fiduciary relationship between the director and the company it leads. Therefore, a member of the director must show a high degree of care and skill, good faith, loyalty and honesty towards the company.<sup>9</sup> Because of its fiduciary position, the liability of the director sits at a high degree. Not only is a board member responsible for dishonesty, but he/she is also legally responsible for any mismanagement, negligence, or failure to do something important for the company.<sup>10</sup> In addition, to find out whether a member of the director has performed his/her duty properly

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<sup>8</sup> Peter Waring, "Rethinking directors' duties in changing global markets", *Corporate Governance: The international journal of business in society*, vol. 8, no. 2 (2008), p. 153.

<sup>9</sup> Munir Fuady, *Perseroan Terbatas...*, p. 81.

<sup>10</sup> Munir Fuady, *Perseroan Terbatas...*, p. 82.

with care and skill, the commonly-accepted juridical standard is that the director must show certain care and skill degrees as reasonably expected from a person who has knowledge and experience. The fiduciary duty of the directors requires that they provide accurate information to the shareholders.<sup>11</sup>

Meanwhile, the theory of indoor management rule is a contemporary doctrine, teaching that if the party carrying out the company's duties is consistent with the articles of association of the LLC, the company becomes engaged to a third party for all actions it takes. This situation means there is a chance that the company will not fulfil its internal requirements, or it will be assumed that the external party which does business with the company knows and has studied the publicly-announced company documents, such as the articles of association.<sup>12</sup> The philosophy behind this doctrine is that the external parties who have good intentions should not be burdened with the responsibility regarding the internal validity of the parties representing the company. On the contrary, the company's director is the one that should be responsible for the validity of these actions.

The liability of the board of management, based on this inward management doctrine, is limited to the following points:

1. the party carrying out the company's activities is actually authorised to perform a certain act;
2. the parties have not adhered to falsified documents;
3. the third party conducting activities with the company has good intention;
4. the third party conducting activities with the company has conducted a proper investigation of the transaction.<sup>13</sup>

Simply put, the principle of ultra vires (exceeding the company's authority) is a principle that regulates legal consequences if there is an action of a member of the director for and on behalf of the company which actually exceeds what is stipulated in the articles of association. An action is considered ultra vires if it is performed without the

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<sup>11</sup> Phillip S. Scherrer, "Directors' responsibilities and participation in the strategic decision making process", *Corporate Governance: the international journal of business in society*, vol. 3, no. 1 (2003), p. 86.

<sup>12</sup> Phillip S. Scherrer, "Directors' responsibilities...", p. 90.

<sup>13</sup> Phillip S. Scherrer, "Directors' responsibilities...", p. 91

authority. For a company, an action is *ultra vires* if it is carried out beyond, or exceeds the authority of, the director or the company itself, which is stated in the company's articles of association and regulations.

The *ultra vires* doctrine affects the engagement between the company and the third party, if any transactions carried out are classified as such. According to Chatamarrasjid Ais, an *ultra vires* transaction is invalid and cannot be authorised later even by a general meeting of shareholders (GMS).<sup>14</sup> Therefore, any action of the member of the director which is classified as *ultra vires* becomes his/her personal liability.

Fred BG Tumbuan revealed the boundaries within which the board of management's acts are classified as *ultra vires*, if it meets one or more of the following criteria:<sup>15</sup>

1. any legal action clearly prohibited by the articles of association;
2. taking special circumstances into account, any legal actions which cannot be considered to support the activities referred to in the articles of association;
3. taking special circumstances into account, any legal action which cannot be interpreted as being dedicated to the interests of the limited liability company.

The laws pertaining to the director and commissioners of the company in relation to the principles of corporate veil piercing are stated in Paragraph 60 Article 3 and Article 4, as well as Paragraph 85, and Paragraph 90 of the Indonesia Company Law. The provision of Paragraph 60 Article 3 of the Indonesia Company Law states that, in cases where the annual calculation of the prepared document is false and/or misleading, the members of the director and commissioners are jointly responsible for the injured party. Meanwhile, Paragraph 60 Article 4 of the Indonesia Company Law states that the members of the director and commissioners are released from the liability as referred to in Article (3) if it is proven that the situation is not due to mismanagement.

The provision of Paragraph 80 of the Indonesia Company Law explains more about the liability of limited liability companies, especially

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<sup>14</sup> Chatamarrasjid Ais, *Penerobosan Cadar Perseroan dan Soal-Soal Aktual Hukum Perusahaan* (Bandung: Citra Aditya Bhakti, 2004), p. 41.

<sup>15</sup> Tumbuan, Fred BG, "Perseroan Terbatas dan Organ-organnya", *Makalah Disampaikan pada Kursus IV*, (Surabaya, 1998), p. 4.

sanctions if the director makes an error or is negligent. In Paragraph 80 Article 1 of the Indonesia Company Law, it is stated that the members of the director are obliged, in good faith and with full liability, to perform their tasks for the interests and business of the company. Meanwhile, Paragraph 80 Article 2 of the Indonesia Company Law states that each member of the director is personally responsible if he/she is guilty or negligent in carrying out his/her duty in accordance with the provisions referred to in Article 1. Paragraph 80 Article 3 of the Indonesia Company Law states that, on behalf of the company, a shareholder representing at least 1/10 (one tenth) of the total shares and holding valid voting rights can file a claim to the District Court against the members of the director in relation to their error or negligence which has led to losses for the company.

Rudhi Prasetya further explained the board of management's prudence principle in avoiding fault and negligence by employing the principle of *good corporate government*.<sup>16</sup> In conjunction with the principle of piercing corporate veil, the liability of the director can be reduced and even waived if it fulfils certain conditions, including: the board of management's actions are in order to carry out the GMS decision, it is accepted by the GMS upon being adopted, and it is beneficial to the company without violating the prevailing laws. If such conditions are met, the director is released and discharged (*et quit et de charge*) by the GMS, by following the opinions of external professionals, such as legal opinions from lawyers, financial reports from accountants, or written opinions from appraisers.<sup>17</sup>

### **Director's Responsibilities for Making Errors and Causing Bankruptcy for the Company**

The aforementioned principle of accountability of the director is the general principle of the board of management's liability. This means that it is the liability of the director to run the company in general and this principle is not yet related to the bankruptcy of a company controlled by the board of management. A further problem is the notion of when an action of the director constitutes its liability, both as

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<sup>16</sup> Rudhi Prasetya, *Kedudukan Mandiri Perseroan...*, p. 197.

<sup>17</sup> Munir Fuady, *Perseroan Terbatas...*, p. 82.



the member of the director and as personal liability, and causes a company to go broke and finally bankrupt.

In the case when a company goes bankrupt, the members of the board of director are not immediately held personally liable for such a condition. Nonetheless, this does not necessarily mean that the board of director is free from liability for the company's bankruptcy. This is where a comprehensive assessment is required on which part constitutes the company's liability and which is the personal liability of the director.

In principle, the liability of the director whose company experiences bankruptcy is equal to the liability of the director whose company does not experience bankruptcy. There are a number of conditions which constitute further arrangements of the director related to the company's bankruptcy. In principle, the director is not personally liable for any action taken for and on behalf of the company, based on the authority they have. This is because the actions of the director are seen as the company's actions, which is an independent subject of law. Therefore, the company is the one responsible for any actions it takes, which, and in this case the company is represented by the director. However, on some points, the director can also be held personally liable for a company's bankruptcy.

The normative provisions regarding the liability of the director in the event of a company's bankruptcy are stipulated in Paragraph 2 Article 90 of the Indonesia Company Law, which states that in the event of bankruptcy due to fault or negligence of the director and when the company assets are insufficient to cover the losses due to bankruptcy, each member of the director is jointly responsible for the loss. Furthermore, Paragraph 90 Article 3 states that the members of the director who can prove that the bankruptcy is not due to fault or negligence are not jointly responsible for the losses.

Jerry Hoff stated that the provisions of Paragraph 90 Article 2 of the Indonesia Company Law are a more explicit provision regarding the director's liability in the event of a company's bankruptcy.<sup>18</sup>

The applicable rules for the liability of managing directors in bankruptcy are more severe. According to Article 90 CL every member of the management board is jointly and severally liable for the losses resulting from the insolvency, in the case where (i) the

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<sup>18</sup> Jerry Hoff, *Indonesian Bankruptcy Law* (Jakarta:Tatanusa, 1999), p. 154-155.

insolvency occurs because of the fault or negligence of the management board and (ii) the assets of the company are not sufficient to cover the losses resulting from the insolvency. Since this provision in the Indonesian Company Law does not refer to the persons it seeks to protect, arguably this means that it is wide enough to allow not only shareholders but also creditors, potential investors and employees to claim against the managing directors. The claim will be for the full amount of the shortfall in the bankruptcy.

However, it is not easy to prove that the director has committed an error and/or negligence causing a company to experience insolvency which leads to bankruptcy. Such a phenomenon has always happened; for instance, there is the very famous case of *Salomon v Salomon Co. Ltd.* in London.

With regard to this arrangement, there is actually an interconnection between the liability of a company's director experiencing bankruptcy and the liability of that which does not. Thus, various aforementioned theories of director liability can also be utilized to measure the liability of the director when the company experiences bankruptcy. Meanwhile, Paragraph 3 Article 90 of the Indonesia Company Law is a juridical implication of the collegial nature of the board of management, where all members of the director are jointly and severely responsible. Hence, the members of the director who intend to release themselves from the joint liability are obliged to prove their stance.

Fred Tumbuan noted the provisions of Paragraph 2 Article 90 and Article 3 in accordance with the provisions intended in Paragraph 1 Article 85 of the Indonesia Company Law stating that the duty, authority, and liability of the director of a LLC are for the interests and efforts of the company which are entrusted and weighed down to each of the members of the director without any exception.<sup>19</sup> Thus, both negligence and error on the part of one or more members of the director may affect the entire board of management, with each member of the director having to bear the consequences. This collegial liability (*collegiale aansprakelijkheid*) is discussed in Paragraph 2 Article 90 of the Indonesia Company Law. Furthermore, the party who is obliged to

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<sup>19</sup> Fred BG. Tumbuan, "Perseroan Terbatas...", p. 295-296.

prove that bankruptcy has occurred due to the fault or negligence of the company's director is the party that files the accusation. If the party succeeds in proving this, according to the provision referred to in Paragraph 2 Article 90 of the Indonesia Company Law, every member of the director shall be jointly and severely liable for the loss due to bankruptcy that cannot be covered by the company property. An exception is valid when the members of the director who believe that they are not at fault and have not been negligent can prove their argument. In accordance with the provision referred to in Paragraph 90 Article 3 of the Indonesia Company Law, the burden of proof is on the members of the board of director.

Supporting the opinion of Fred Tumbuan, Sutan Remy Sjahdaeny mentioned that, given the enactment of the provision in Paragraph 90 Article 2 of the Indonesia Company Law, it can be identified that the Indonesian Law on LLC not only acknowledges but also confirms that a company's director must be personally liable, meaning that they have to let their individual assets go to cover the company's debt shortage if the bankruptcy is proven to be due to fault or negligence. Such a measure is taken if the proceeds of selling the company's assets are insufficient to cover all company debts and costs.<sup>20</sup>

Further issues on the provision of Paragraph 2 Article 90 of the Indonesia Company Law lie in the definition of the fault or negligence which causes the director to be personally liable. Regarding this matter, I cite the opinion of Sutan Remy Sjahdeiny, who stated that what is meant by fault in Paragraph 2 Article 90 of the Indonesia Company Law is an action intentionally carried out, while negligence is mentioned differently. In law, there are three degrees of negligence (*culpa*), namely *lata culpa* or gross negligence, *levis culpa* or common negligence, and *levissima culpa* or slight negligence. In conjunction with the degrees of negligence, a question arises regarding the degree which is intended in Paragraph 2 Article 90 of the Indonesia Company Law. Shall the director be jointly responsible only if they commit gross negligence (*lata culpa*) or should they remain responsible even though the negligence is mild (*levissima culpa*)? Sutan Remi concurred with the attitude of the courts in the United States, stating that the members of the company's

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<sup>20</sup> Sutan Remy Sjahdeiny, *Hukum Kepailitan: Memahami Faillissementsverordening Juncto Undang-Undang Nomor 4 Tahun 1998* (Jakarta: Grafiti, 2002), p. 439.

director are only responsible if the negligence they do in carrying out their duties is categorized as gross negligence.<sup>21</sup>

The collegiality aspect can create injustice for the members of the board of director who do not commit certain actions yet are charged with the same liability. To bridge this issue of injustice, Rudhi Prasetya opined that it is very appropriate to state that it is truly important that the provisions of the articles of association governing the director meeting are actually implemented.<sup>22</sup> Therefore, in making decisions, the director actually negotiates among the members, where one of/some of them are collegially responsible.

Jerry Hoff exemplified the case of the director who spoke up against the decision of the director meeting to receive exemption from personal fault. Hoff further explained as follows:<sup>23</sup>

The case of a director who voted against the resolution at the relevant board meeting may be an example of individual exoneration. In such a case, it is advisable for the director to have his vote recorded in the minutes. A director may also avoid liability in the event that he was temporarily absent at the time the resolution concerned was prepared and adopted, and had been implemented upon his return.

Regarding the liability of the director whose company goes bankrupt, Munir Fuady suggested that if a company is bankrupt, the director cannot suddenly (not by law) be personally liable. To be personally liable upon their company's bankruptcy, the members of the director must meet the following requirements:<sup>24</sup>

1. the presence of fault (intentional) or negligence (with simple evidence);
2. to pay the debt and bankruptcy costs, the money must be first taken from the company's assets. If the company's assets are not sufficient, then personal assets of the director can be taken;

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<sup>21</sup> Sutan Remy Sjahdeiny, *Hukum Kepailitan: Memahami...*, p. 440-441.

<sup>22</sup> Rudhi Prasetya, "Aspek Hukum Penerapan Good Corporate Governance", *Article, delivered in a Good Corporate Governance Workshop* (Jakarta, 2000), p. 3.

<sup>23</sup> Jerry Hoff, *Indonesian Bankruptcy...*, p. 156.

<sup>24</sup> Munir Fuady, *Doktrin-Doktrin Modern Dalam Corporate Law dan Eksistensinya Dalam Hukum Indonesia* (Bandung: Citra Aditya Bhakti, 2002), p. 26.

3. reversal burden of proof (*omkering van bewijslast*) is applied to the members of the board of directors, whereby the company must prove that the bankruptcy is not due to fault (intentional) or negligence.

The next problem pertains to the liability of the director related to Paragraph 2 Article 90 of the Indonesia Company Law on the request mechanism over the liability of the director due to fault or negligence causing the LLC to go bankrupt. Is the liability equally applicable to the director (*mutatis mutandis*), where the curator immediately asks for personal liability to the director, or is it necessary to file a lawsuit to the court? Should the request for personal liability of the director go through a regular lawsuit or a bankruptcy petition against the director? None of these problems are governed in either the Indonesia Bankruptcy Law or the Indonesia Company Law. These problems could form the basis of an interesting study.

Meanwhile, in the Indonesia Bankruptcy Law itself, there are no provisions governing the liability of the director in the case of LLC bankruptcy. The absence of such regulations in this field is very unfortunate, given the huge number of LLC bankruptcy cases. In addition, it is also noteworthy to consider many normative provisions relating to this issue, such as being able to be nominated to work in a public office, which requires the declaration of not being bankrupt. Such a phenomenon also takes place in the private sector, where one must not be declared bankrupt to become a member of the director in a LLC.

In the aforementioned case, it is clear that the director's actions had violated the provisions of Paragraph 1 Article 85 of the Indonesia Company Law, which states that any member of the director shall be in good faith and take full liability in performing the tasks for the company's benefit and effort. Since it had violated Paragraph 1 Article 85 of the Indonesia Company Law, the director met the qualification of Paragraph 2 Article 85 of the Indonesia Company Law, which declares that each member of the director has full personal liability if he/she is guilty or negligent in carrying out his/her duties based on the provisions referred to in Article 1. Therefore, the disadvantaged third party can use the provision regarding illegal acts as stipulated in Paragraph 1365 of the Indonesia Civil Code, as well as the provisions of the Company Law itself to press charges.

In addition to civil liability, the director may be subject to criminal liability in the LLC's bankruptcy. These criminal provisions are related to the actions of the company's organs after the limited liability

company is declared bankrupt and are also related to the process of the bankruptcy of a company. The provisions of criminal liability to the director, among others, are stipulated in Paragraph 398 and Paragraph 399 of the Indonesian Criminal Code.

## **Court Cases on Charging Directors with Personal Bankruptcy due to Company Mismanagement**

### ***Bankruptcy Director Case of PT QSAR***

This case began when PT QSAR offered an investment package to the public. PT QSAR was engaged in agrobusiness, and worked by attracting funds from the public as investors through collaborative proposals in the field of agrobusiness. Initially, the investors received benefits as agreed. Later on, however, PT QSAR started to cease paying the benefits as promised. Even the capital from investors was not reimbursable.

Because PT QSAR had violated the agreement, the people who became investors reported Ramly Arabi, the CEO of PT QSAR at the time, to the police under the accusation of fraud and embezzlement of the investors' money. The criminal court, namely the Cibadak District Court, then reinforced the Bandung High Court Decision No. 247/Pid/2003 /PT.Bdg and Supreme Court verdict No. 308 K/Pid/2004; Ramly Arabi was accused of violating Paragraph 378 and Paragraph 372 of the Indonesia Criminal Code and was sentenced to eight years' imprisonment and a fine of 10 billion rupiahs; he was also ordered to distribute the company's assets to the investors.

In order to follow up the criminal verdict against the CEO of PT QSAR, Cibadak District Attorney then filed a bankruptcy against PT QSAR and its CEO Ramly Arabi. The reason behind the Cibadak District Attorney filing for bankruptcy was to liquidate the company's assets and the director's personal assets to repay the investors. The bankruptcy filing of PT QSAR and its CEO by the Cibadak District Attorney was conducted at the Commercial Court of Central Jakarta District Court.

The Commercial Court of Central Jakarta District Court decided to declare bankruptcy against PT QSAR and its CEO (RA) through its Decision No. 23/Pdt.Sus/Pailit/2013/PN.Niaga.Jkt.Pst. The judges felt that the bankruptcy application for PT QSAR and its CEO had fulfilled the requirements for bankruptcy application, namely unpaid

debt that is due and has at least two creditors. In the a quo case, PT QSAR had fulfilled the requirements of having debts that were not paid in full and were due because PT QSAR did not pay profits for and capital from its investors. This was also reinforced in the criminal decision against RA as the CEO of PT QSAR. Meanwhile, the requirement of having at least two creditors was also fulfilled because PT QSAR had thousands of creditors as its investors whose profit was not paid and whose initial capital was not repaid.

### ***Bankruptcy Director Case of PT CHK***

The bankruptcy case application against DH as the Director of PT CHK initiated from PT CHK not being capable of paying debts to its creditors, which included the bankruptcy applicants, namely the Pension Fund of Bandung Islamic University and Heru Mujianto. PT CHK, the Pension Fund of Bandung Islamic University, and Heru Mujianto made an investment partnership, whereby the Pension Fund of Bandung Islamic University and Heru Mujianto handed over money amounting to 3.5 billion rupiahs and 600 million rupiahs respectively to PT CHK. In return, PT CHK was to provide profit (interest) of 4-10% per month.

In the implementation of the partnership, it turned out that PT CHK had made an error by not giving the promised profits and not returning the principal capital. As a result of not paying its obligations to its investors, PT CHK was declared bankrupt by the Commercial Court of Central Jakarta District Court in its Decision No.20/Pailit/2005/PN.Niaga.JKT.PST.

After PT CHK was declared bankrupt by the court, a curator managed the bankruptcy estates. The bankruptcy assets from PT CHK were insufficient to pay its debts to its creditors. Therefore, the Pension Fund of Bandung Islamic University and Heru Mujianto, as investors who had not had their debt paid, filed for bankruptcy against HD as the director of PT CHK.

Before facing the bankruptcy claim, the director of PT CHK was sentenced to one year in prison after being charged with criminal fraud and embezzlement of the investors' money, based on the decision of Bandung District Court, Decision No. 196/Pid.B/2005/PN.Bdg. (already had permanent legal force/*inkracht van gewijsde*). In addition

to this, he was also being tried in another criminal case, Case No.950/Pid.B/2006/PN.Bdg.

The legal reason for filing bankruptcy against the director of PT CHK was because the director had committed an illegal act, namely putting the money obtained from the investors into his private bank accounts and using it for personal purposes. This action against the law had also been proven in the court where the director was sentenced to prison for one year.

Upon the bankruptcy petition, the Commercial Court of Central Jakarta District Court decided to declare bankruptcy against HD as the director of PT CHK, Decision No. 47/PAILIT/2006/PN.NIAGA.JKT.PST. The judges felt that HD was personally responsible for the insufficient bankruptcy estates of PT CHK because he, as the director of PT CHK, had committed an act against the law, causing PT CHK go bankrupt. In addition, HD also fulfilled bankruptcy requirements, namely the existence of unpaid debt that was due and collectible, and had at least two creditors, both of which could be proven through simple evidence.

With regards the bankruptcy decision, HD filed an appeal to the Supreme Court. In the cassation level trial, the Panel of Cassation Judges, through its Decision No. 06 K/N/2007, had decided to strengthen the decision of the Commercial Court of Jakarta District Court by declaring that the cassation was unacceptable. The Panel of Cassation Judges of the Supreme Court felt that the verdict of the Commercial Court at the Central Jakarta District Court was already correct.

The decision of the Commercial Court of Central Jakarta District Court, corroborated by the Supreme Court decision, was appropriate for the bankruptcy against HD as the director of PT CHK based on company mismanagement, which caused the company go bankrupt. In the Indonesian Bankruptcy Law, also contained in Law No. 1 of 1995 on Limited Liability Company in Paragraph 90 Article 2, as well as Paragraph 104 Article 2 of No. 40 of 2007 Law on Limited Liability Company, it is specified that “bankruptcy occurs because of the director’s fault or negligence and when the company’s assets is insufficient to cover the losses due to bankruptcy, each member of the board of directors is jointly responsible for the loss.” The form of



liability of the director is to pay off the company's debt with the members' personal assets.

## Conclusion

In principle, LLC bankruptcy will not have an impact on a director's personal liability. This is because the company and the director are two stand-alone legal entities that are separated from one another. The rights, obligations and assets of the company are separated from the rights, obligations and assets of the director. Hence, company debts, which are the obligations of the company, are not automatically borne by and liable to the director to pay. Rather, they are paid using the company's assets, including when the company is in bankruptcy.

Nonetheless, in Indonesian Corporate Law and Indonesian Bankruptcy Law, the director can be asked for personal liability if it is proven that the company's bankruptcy is due to the director's mismanagement. If the director has made an error that causes a company to go bankrupt, the director becomes subject to personal liability and shall participate in paying off the company's outstanding debts due to insufficient company assets. Furthermore, the director can also be asked for personal liability if he/she makes an error or is negligent in carrying out his/her duties in managing the company. Thus, with the latter-mentioned personal liability of the director, there is no need to wait for a company to go bankrupt, or to wait for the company's assets to be insufficient to pay the debts. Rather, the director can be held liable in advance and an application can even be filed for him/her to be declared bankrupt together with the company.

In this study, several cases were found that punished the director with the director's personal bankruptcy as in the director bankruptcy case of PT QSAR and in the director bankruptcy case of PT CHK.

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