

NEW INDONESIAN LIMITED LIABILITY COMPANY LAW: LIABILITIES OF SHAREHOLDERS AND BOARD OF DIRECTORS*

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The Indonesian Parliament is tabling a new Draft Law to replace Law No. 1 of 1995 regarding Limited Liability Companies. Prior to the year 1995, the regulation on Limited Liability Companies was set forth in the Indonesian Commercial Code (KUHD), originating from The Netherlands and had been in effect in Indonesia since 1848.¹

The subsequent paragraphs will describe the liabilities of Shareholders and Directors pursuant to the new Limited Liability Company Draft Law that has been agreed upon in the Parliamentary session. Past court decisions will also supplement the following description since they are still relevant because the content of the provisions has remained unchanged since the coming into effect of the Indonesian Commercial Code (KUHD) subsequently replaced by Law No. 1 of 1995. Several provisions regarding the liabilities of Shareholders and Commissioners under the new Law are also similar to the provisions of Law No. 1 of 1995.

Although Indonesia is classified as a “*Civil Law*” country which does not adopt the “*Stare Decisis Doctrine*” like the “*Common Law*”, namely judges are obligated to follow previous decisions in cases of the same facts; as it will be explained in the following description, it is clear that consistency in judge decisions in Indonesia is still necessary to create legal certainty.

Court decisions, particularly decisions of the Supreme Court, are necessary to explain the purpose of the Law and consistency in the application of corporate law in Indonesia. The Supreme Court by virtue of its decisions may function as an institution that creates unification, carries our reform and oversees the Courts below it.²

Liabilities of Shareholders

Article 3 Paragraph (1) of the New Limited Liability Company Draft Law provides that Shareholders of a Company shall not be personally liable for commitment made on behalf of the Company and shall not be liable for the losses of the Company in excess of

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¹ R. Soepomo, Sistem Hukum di Indonesia sebelum Perang Dunia Ke-II, (The Indonesia’s Legal System Prior to World War II) (Jakarta: Pradnja Paramita, 1972), h. 10.

² Erman Rajagukguk, “Mahkamah Agung : Unifikasi, Reformasi, dan Pengawasan” (Supreme Court: Unification, Reformation, and Supervision), **Fokus**, March 18, 1983.

the shares owned. Paragraph (2), the provisions as intended in Paragraph (1) shall not be applicable in the following events:

- a. The requirements of the Company as a legal entity have not yet been or are not fulfilled;
- b. The relevant Shareholder either directly or indirectly utilizes the Company in bad faith for personal interest;
- c. The relevant Shareholder is involved in a tort committed by the Company; or
- d. The relevant Shareholder either directly or indirectly unlawfully uses the assets of the Company resulting in the inadequacy of the Company's assets to pay off its debts.

Article 3 Paragraph (2a) of this new Law providing that Shareholders are personally liable if the requirements of the Company as a legal entity have not yet been or are not fulfilled; shall be the same as Article 3 Paragraph (2a) of Law No. 1 of 1995. The relevant provisions are also similar to Article 39 of the Indonesian Commercial Code (KUHD).

Article 38 of the Indonesian Commercial Code (KUHD) provides that shareholders are obligated to register Company deeds entirely together with the approvals obtained in the public registry made available for such purpose at the Registrar's Office of District Court the jurisdiction of which covers the domicile of the Company, while they are obligated to announce the same in the Official Gazette. All of the foregoing are also applicable to all amendments to the establishment requirements or in the event that the duration of the company is extended.

Furthermore, Article 39 of the Indonesian Commercial Code (KUHD) provides that so long as the registration and announcement have not been conducted yet, all the management thereof shall be individual persons and each of them shall be entirely liable for their actions towards third parties.

The Indonesian Commercial Code (KUHD) does not stipulate the liabilities of Shareholders if the Establishment Deed has not been registered yet with the Department of Justice. However, the Semarang District Court in **Raden Roosman v. City Bus Company N.V. Sendiko, No. 224/1950/Perdata (1951)** passed judgment, since the "share partnership" in this case had not been approved by the Minister of Justice yet as a legal entity, the approval of which constitutes an absolute prerequisite for the establishment of a Share Partnership (NV), therefore, parties sued should have been all the shareholders who have signed the agreement.

This dispute was attributed to Raden Roosman, the Plaintiff, who had been appointed as the President Director of City Bus Company N.V. Sendiko and obtained entitlement to honorarium every month as of March 1950. However, the Plaintiff had resigned since October 1, 1950. The reasons of his resignation were that he wanted to be active in other fields and his honoraria had not been paid since July 1950. He sued N.V. Sendiko, represented by Liem Khian An who was in charge of the finance of N.V. Sendiko.

The Court in its consideration stated that whether N.V. Sendiko is actually a legal entity or not, therefore, it is very important to decide whether the suit filed by the Plaintiff can be accepted by the Court or not. It is a fact that N.V. Sendiko had not been approved yet by the Minister of Justice as a legal entity, consequently, the Court was of the opinion

that the Company was merely an agreement among the shareholders. Based on Article 39 of the Indonesian Commercial Code (KUHD), the management of the partnership approved shall each be liable in its entirety for all the consequences of all actions taken by each of them towards other persons.

The Court was of the opinion that it was due to the fact that the suit of the Plaintiff against the Defendant in the form of share partnership N.V. Sendiko was inaccurate pursuant to the law. The parties sued should have been all the shareholders who had signed the agreement drawn up before Notary Gusti Djohan. The Court in its decision provided that the suit was unacceptable.³

Article 7 Paragraph (1) of the new Limited Liability Company Law provides that a Company shall be established by 2 (two) or more persons set forth in a Notary Deed drawn up in the Indonesian language. Article 7 Paragraph (4) provides that, after a Company obtains its legal entity status and the number of Shareholders becomes less than 2 (two) persons, within 6 (six) months as from such condition, the relevant shareholder must assign a part of his/her shares to other persons or the Company shall issue new shares for other persons.

Furthermore, Article (5) provides that if the relevant period has elapsed and the number of shareholders is still less than 2 (two) persons, the shareholder shall be personally liable for all commitments or losses of the Company and at the request of the parties concerned, the District Court may dissolve such company. The Article is similar to Article 7 Paragraph (4) of Law No. 1 of 1995.

The Indonesian Commercial Code (KUHD) does not contain any provisions stipulating that a shareholder shall become personally liable if he/she is the sole shareholder. However, the Indonesian Supreme Court in 1973, so prior to the establishment of Law No. 1 of 1995, was of the same opinion as the Jakarta High Court, a Limited Liability Company having 1 (one) shareholder, the personal assets of the relevant shareholder can be confiscated for the payment of the debts of the company.

This is evident in the case of **O. Sibarani v. PT. Perusahaan Pelayaran Samudera “Gesuri Lloyd”, No. 21/Sip/1973 (1973)**. This dispute was attributed to PT. Gesuri Lloyd, as the plaintiff in its case versus PT. Toko Tujuh Belas/Bank Pertiwi, requested the Jakarta Special District Court to execute the seizure of a house located at Jl. Sam Ratulangi No. 24 Jakarta. The seizure was executed on December 29, 1970. The applicant, O. Sibarani, requested that the seizure be revoked since the house did not belong to PT. Toko Tujuh Belas, rather it was his personal property.

According to the Plaintiff that PT. Toko Tujuh Belas managed by the Respondent, O. Sibarani and he also concurrently served as the founder, had had debts since he had received 5000 boxes of milk from the Plaintiff. The debts of the Respondent, O. Sibarani, had been confirmed by virtue of the Decision of the Jakarta Special District Court No. 91/686 corroborated by the decision of the Jakarta High Court No. 183/1969 PT.Perdata. The decision has a binding legal force because the Respondent has not filed an appeal to the Supreme Court.

³ Raden Roosman v. Perusahaan Otobis N.V. Sendiko, No. 224/1950/Perdata (1951).

The Central Jakarta District Court in its consideration stated among other things that PT. Tujuh Belas that had had a legal entity status, was liable for the debts of the PT, not the management, in this regard O. Sibarani. Based on such ground, the Central Jakarta District Court decided to revoke the execution of the seizure.⁴ At the appeal level, the Jakarta High Court and the District Court were of a different opinion.

The High Court was of the opinion that PT. Tujuh Belas was a Limited Liability Company practically owned by one person because O. Sibarani was the sole shareholder. In view of the debts of the company amounting to \$32,841.27 not guaranteed by other assets of the company, the High Court was of the opinion that the confiscation of a house located at Jalan Sam Ratulangi No. 24 could be affirmed. The High Court decided to rescind the decision of the District Court.⁵

At the level of appeal to the Supreme Court, the Supreme Court justified the consideration of the High Court that PT. Tujuh Belas in its practice and not pursuant to the law was a company owned by one person namely O. Sibarani by the name of P.T., and therefore, the confiscation of the house owned by the Plaintiff could be justified.⁶

The Decision of the Supreme Court constitutes a law created by judges, since the Indonesian Commercial Code (KUHD) applicable at the time the decision was made did not contain provisions as decided upon the Supreme Court. This substance had just been included in Article 7 Paragraph (4) of Law No. 1 of 1995 and then was included again in Article 7 Paragraph (5) of the new Limited Liability Company Law.

Liabilities of the Board of Directors Before the Company Has Legal Entity Status

Article 7 Paragraph (4) of the new Limited Liability Company Law provides that a Company obtains a legal entity status after its Establishment Deed is approved by the Minister. Article 14 Paragraph (1) of this new Law provides that a legal action on behalf of a Company which has not obtained legal entity status yet can only be taken by members of the Board of Directors together with all founders, other members of the Board of Directors and members of the Board of Commissioners of the Company, the relevant legal action shall become a joint liability of all founders, members of the Board of Directors and members of the Board of Commissioners.

Subsequently, Article 30 provides that the Minister shall announce the following in the Supplement to the Official Gazette of the Republic of Indonesia:

- a. Company's Establishment Deed together with the Ministerial Decree as intended in Article 7 Paragraph (4);
- b. Deed of amendment to the articles of association of the Company together with the Ministerial Decree as intended in Article 21 Paragraph (1).

⁴ O. Sibarani v. PT. Perusahaan Pelayaran Samudera "Gesuri Lloyd", No. 28/1971 G (1971).

⁵ O. Sibarani v. PT. Perusahaan Pelayaran Samudera "Gesuri Lloyd", No. 293/Pdt/1971/PT.DKI (1972).

⁶ O. Sibarani v. PT. Perusahaan Pelayaran Samudera "Gesuri Lloyd", No. 21/Sip/1973 (1973).

This new Limited Liability Company Law does not stipulate the liabilities of the Board of Directors prior to registration and announcement. The provisions mentioned above are different from Article 23 of Law No. 1 of 1995, where it is stipulated that so long as registration and announcement have not been conducted yet as intended in Articles 21 and 22 of Law No. 1 of 1995, the Board of Directors shall be jointly liable for all legal actions taken.

The provisions of Law No. 1 of 1995 are similar to Article 39 of the Indonesian Commercial Code (KUHD), namely so long as the registration and announcement have not been conducted yet, the entire management shall be individual persons and each of them shall be entirely liable for their actions towards third parties.

It is interesting to observe the following two Court decisions made at the time that the provisions regarding Limited Liability Companies in the Indonesian Commercial Code (KUHD) were still in effect.

First, in **Rama v. H. Abas Ubadi and Tedjakusuma, No. 1139 K/Sip/1973 (1976)**, the Supreme Court affirmed the decisions of the District Court and the High Court that the failure to comply with Article 38 of the Indonesian Commercial Code (KUHD), namely the obligation of shareholders to register the establishment deed together with the approval thereof in the public registry and the obligation to announce the same in the Official Gazette, cause the shareholders to be personally liable.

The Bandung District Court conducted a security seizure towards a Chevrolet Impala sedan on May 29, 1971 owned by PT. Puja. The Respondent said that the car did not belong to him, consequently, such seizure was invalid, since the object could not be accounted for the debts and receivables of the Director or other shareholders. The Director concerned was the son of the Respondent named Rama.

The Bandung District Court wanted to first consider whether PT. Puja had had Legal Entity status or not, since the Legal Entity status entitled PT. Puja to resort to the Court.

PT. Dagang dan Motor "Sumber Motor NV" was previously established on October 24, 1952. This company was changed to "NV. Perseroan Dagang Sumber General Trading Corporation" on February 9, 1957. This company was changed again to "PT. Pudja & Industrial Corporation" on October 9, 1961.

Although NV. Sumber Motor was approved by the Minister of Justice on October 22, 1953, then was registered with the Bandung District Court on March 23, 1954, however, evidently it had not been announced yet in the Official Gazette. The aforementioned changes had never been registered with the Bandung District Court and had not been announced in the Official Gazette.

The District Court in its consideration stated that Article 38 of the Indonesian Commercial Code (KUHD) provides that "All of the foregoing shall also be applicable to the changes in the requirements and extension of the company". PT. Puja, according to the District Court could not meet the conditions as required by Article 38 of the Indonesian Commercial Code (KUHD), consequently, it did not have legal entity status, because if it

had never been announced, it would have been considered as a Firm. Therefore, according to the District Court, PT. Puja could not bring the case to the Court.⁷

The Bandung High Court cancelled the decision of the District Court because the car had been auctioned.⁸ The Supreme Court affirmed the decision of the High Court.⁹

In another case, namely **Tjhin Min You and Thio Guan Hoe v. Hamlan HS, No. 297 K/Sip/1974 (1976)**, the Plaintiff, Hamlan HS, went to court with the father of Defendant I, in Banjarmasin, and requested the imposition of security seizure on the house of the father of Defendant I at Jl. Mangga Besar 124 Jakarta. When the house was about to be auctioned, Tjew Su Tjhin presented the certificate. The house was a house bought by the father of Defendant I, Thio Sin Min, but the ownership had been transferred in the name of Defendant I, so as to get rid of the legal claim of PT. Pancamitra which had claim on Firma Thio Sin Min. The sale of the house had really harmed the creditor, in this case PT. Pancamitra.

Based on the aforementioned matters, the Plaintiff, Hamlan HS, as the President Director of PT. Pancamitra requested the Court to declare the sale and purchase of the house located at Jl. Mangga Besar 124 null and void.

Before passing its judgement, the Court had taken into account whether it was Hamlan HS or PT. Pancamitra who served as the Plaintiff? Then, was PT. Pancamitra really a Limited Liability Company (P.T.) pursuant to Indonesian law?

Evidently, PT. Pancamitra was approved by the Minister of Justice on July 18, 1981. The District Court cancelled the sale and purchase agreement of the house located at Jl. Mangga Besar 124.¹⁰

At the appeal level, Defendant II stated in his exception that it was clear from the claim dated April 30, 1970 that the indicated “Hamlan HS” did not act as the Director, for and on behalf of Pancamitra legal entity, and neither was he indicated in PT. Pancamitra in this case represented by its Director, Hamlan HS. According to the law, the *natuurlijk persoon* Hamlan HS must be expressly differentiated from PT. Pancamitra legal entity.

Defendant II also stated that PT. Pancamitra had not yet constituted a legal entity as limited liability company (P.T.), therefore, PT. Pancamitra had just been approved by the Department of Justice with regard to the draft, but it had not yet been announced in the Official Gazette of the Republic of Indonesia and had not yet been registered with the District Court at the place of its domicile. The announcement in the Official Gazette and registration with the District Court constitute *conditio sine qua non* for a company in order for it to be able to act and call itself as a Legal Entity.

The High Court was not able to accept the exception of Defendant II, among other things, because based on the approval of the Minister of Justice of PT. Pancamitra, the company had constituted a Legal Entity; while the non registration and announcement only

⁷ Rama v. H. Abas Ubadi dan Tedjakusuma, No. 433/71/C/Bdg/Bantahan (1972).

⁸ Rama v. H. Abas Ubadi dan Tedjakusuma, No. 171/1972/Perd/PTB (1973).

⁹ Rama v. H. Abas Ubadi dan Tedjakusuma, No. 1139 K/Sip/1973 (1976).

¹⁰ Tjhin Min You dan Thio Guan Hoe v. Hamlan HS, No. 429/1970 G. (1970).

resulted in the accountability of the management to third parties (Article 39 of the Indonesian Commercial Code).¹¹

At the appeal level to the Supreme Court, the Supreme Court stated that Hamlan HS acted as the Director of Pancamitra, as was the opinion of the High Court. The Supreme Court was also of the opinion that if it were correct that PT. Pancamitra had not been announced yet in the Official Gazette, that would not mean that P.T. had not yet been a legal entity, rather it was only an accountability to third parties as provided for in Article 39 of the Indonesian Commercial Code (KUHD). This does not have the legal consequence of the P.T. not having “*persona standi in judicio*”.¹²

The following decision of the District Court provided that all shareholders, commissioners and management are jointly and personally liable since the loan was extended to a Limited Liability Company that had not yet obtained its legal entity status and had not yet been announced in the Supplement to the Official Gazette.

In **PT. Evergreen Printing Glass v. Willem Sihartoe Hoetahoeroek and BNI 1946 of Jakarta Kota Branch, No. 220/1976 G (1977)**, the dispute was attributed to Plaintiff PT. Evergreen Printing Glass which sued its own President Director, Willem Sihartoe Hoetahoeroek.

An agreement was reached on December 29, 1975 to open a loan between Defendant I and Defendant II in the amount of Rp.62,500,000.- and as a guaranty of such loan, Defendant I had handed over his personal assets to Defendant II, namely a land area of 1,643 m² together with a house thereon.

The Plaintiff among other things stated that:

1. Whereas pursuant to Article 39 of the Indonesian Commercial Code (KUHD), before the Establishment Deed and Articles of Association of a Limited Liability Company (P.T.) are announced in the Official Gazette, the management shall be individually liable for their actions towards third parties. Since PT. Evergreen Printing Glass had not been approved yet by the Minister of Justice and certainly had not yet been announced in the Supplement to the Official Gazette, Defendant I shall be personally liable for the repayment of the loan to Defendant II.
2. Defendant I acted in bad faith, and the tort of Defendant I became more evident because Defendant I changed the loan guaranty from his personal assets to land, building and machinery of the Plaintiff, without the approval of other members of the Board of Directors and Board of Commissioners.

The Plaintiff among other things based on the aforementioned reasons requested the West – South Jakarta District Court to among other things declare the actions of Defendant I as a tort. Furthermore, to declare the loan opening agreement to be for and on behalf of Defendant I personally, and not binding on the Plaintiff.

¹¹ Tjhin Min You dan Thio Guan Hoe v. Hamlan HS, No. 119/1973 Perdata (1973).

¹² Tjhin Min You dan Thio Guan Hoe v. Hamlan HS, No. 297 K/Sip/1974 (1976).

Defendant I in its exception, namely rebuttal not regarding the principal case, responded stating among other things that the Establishment Deed of PT. Evergreen Printing Glass and the amendments thereof had not been approved yet by the Minister of Justice and had not been registered yet with the public registry at the Registrar's Office of the District Court, therefore, it had not yet constituted a legal entity that could be represented by a Director. Consequently, the action of the Director had to be first approved by all shareholders.

In the principal case, Defendant I responded to the lawsuit of the Plaintiff by stating among other things that BNI 46 of Jakarta Kota Branch (Defendant II) in its letter to PT. Evergreen Printing Glass (the Plaintiff) dated December 26, 1975, stated that the loan could be extended provided that among other things Rp.15,000,000.- shall be for the expansion of the factory land. The collateral would be in the form of fixed assets owned by the company and assets of the shareholders/management up to an adequate amount. Following the settlement of the administration of ownership documents owned by PT. Evergreen Printing Glass with regard to the expansion of the factory land, the collateral personally owned by Defendant I pursuant to the agreement with Defendant II could be replaced by the company's assets. Land ownership documents of the company fulfilled the bank loan collateral requirements.

Eventually, Defendant I requested the Court to among other things declare that the Plaintiff owes Defendant II in accordance with the Loan Opening Agreement dated December 30, 1975 and sentence the Plaintiff to pay the amount of Rp.69,524,203.- together with interest and other fines to Defendant II.

The West – South Jakarta District Court in its consideration stated that it was evidently correct that the establishment deed containing the articles of association of PT. Evergreen Printing Glass had not been approved yet by the Minister of Justice, hence, it had not been announced in the Official Gazette either. Since the aforementioned matters had not been conducted yet, while previously the said Limited Liability Company had been in operation and acted externally, among other things, establishing legal relationship with Defendant II, consequently, the Court considered that the legal status of PT. Evergreen Printing Glass was still that of a firm. Accordingly, the shareholders and the management were fully liable jointly and severally for every agreement entered into on behalf of the company.

As a consequence of joint and several accountability, if one of the shareholders takes a legal action externally, including filing a suit to the Court, he/she does not need to be specifically authorized by other shareholders/management, since such other shareholders/management shall automatically be bound by all actions taken by one of the company's shareholders.

The Court was of the opinion that since the status of the Plaintiff had not yet constituted a Limited Liability Company, the management were liable for the loan, consequently, the assets of the management should have been used as loan collateral, the release of the Plaintiff's assets collateral was rejected.¹³

¹³ PT. Evergreen Printing Glass v. Willem Sihartoe Hoetahoeroek dan BNI 1946 Cabang Jakarta Kota, No. 220/1976 G (1977).

The decision of the High Court and/or decision of the Supreme Court with regard to this case are still pending.

Other interesting case regarding the liabilities of Board of Directors, Commissioners and Shareholders prior to the approval of Establishment Deed and Articles of Association of a Limited Liability Company by the Minister of Justice and the non announcement in the Official Gazette can be seen in the case of **PT. Bank Niaga v. Guardi Sunardi, Ny. Tan Seng Gwek, A. Hadrawi and Ferdy Hardi Wijaya, No. 520 K/Pdt/1996 (1997)**. This dispute was attributed to the application for loan granted by the Plaintiff for Original Defendants I, II, III and IV dated September 7, 1989. The Defendants signed a debenture worth Rp.140,000,000.- and had to be paid on September 7, 1992. It turned out that the Defendants were not able to pay it off.

In his lawsuit, the Plaintiff requested that the Court declare Defendants I, II, III and IV both jointly and severally owe the Plaintiff from the acceptance of special transaction loan facility worth Rp.142,421,968.- and declare Defendants I, II, III and IV to be in default. Furthermore, sentencing Defendants I, II, III and IV both jointly and severally to pay in cash and on a lump sum basis Rp.142,421,968.- together with the loan interest of 13.5% per annum of the outstanding loan.

Defendants III and IV in their responses stated that the actual indebted party was PT. Dharma Winarco which was approved by the Minister of Justice on April 11, 1989. The Defendants were of the opinion that the party that had to be sued legally was PT. Dharma Winarco and not the natural persons of Defendants III and IV both as shareholders and Directors and or Commissioners of PT. Dharma Winarco. PT. Dharma Winarco as the legal subject having rights and obligations separate from the management and shareholders had to be treated as Defendants. And it was they that had to be charged with the obligation to pay the debts to the Plaintiff since PT. Dharma Winarco had its own assets and could not be charged to the natural persons of Defendants III and IV. Therefore, the assets of Defendants III and IV could not be confiscated.

The Ujung Pandang District Court in its decision stated that it granted the lawsuit of the Plaintiff in its entirety on February 5, 1994. It sentenced Defendants I, II, III and IV both jointly and severally to pay off their debts to the Plaintiff in cash and on a lump sum basis in the amount of Rp.142,421,968.- plus loan interest of 13.5% per annum.¹⁴

At appeal level, the Ujung Pandang High Court cancelled the Decision of the Ujung Pandang District Court on October 19, 1994.¹⁵

At the level of appeal to the Supreme Court, the Supreme Court stated among other things that the High Court had been erroneous in applying the law with regard to the management accountability principles of a Company. When Defendants I, II, III and IV on behalf of PT. Dharma Winarco, borrowed some money and received loan facility from the Plaintiff and then signed a debenture by using guaranty No. 46 on September 7, 1989, the status of PT. Dharma Winarco had not been approved by the Minister of Justice yet as a

¹⁴ PT. Bank Niaga v. Guardi Sunardi, Ny. Tan Seng Gwek, A. Hadrawi dan Ferdy Hardi Wijaya, No. 31/PTS.PDT.G/1993/PN.UJ.PDG (1994).

¹⁵ PT. Bank Niaga v. Guardi Sunardi, Ny. Tan Seng Gwek, A. Hadrawi dan Ferdy Hardi Wijaya, No. 125/PDT/1994/PT.UJ.PDG (1994).

legal entity. The legal status and liabilities of PT. Dharma Winarco at that time was clearly in the form of Firm, therefore, the parties that had to be liable for paying off the debts on behalf of PT. Dharma Winarco incurred by the management were Defendants I, II, III and IV jointly. Then it turned out that PT. Dharma Winarco was approved by the Minister of Justice to obtain its status as a Legal Entity, consequently, joint liabilities of Defendants I, II, III and IV for the recovery of such loan facility should not be based on the law, since joint liabilities had been set forth in an agreement before by the Plaintiff and Defendants I, II, III and IV. If indeed, there has been a change in the liabilities of PT. Dharma Winarco which was previously in the form of Firm, to become limited liabilities, consequently, such change shall not be binding on the Plaintiff and shall not expunge the joint liabilities of Defendants I, II, III and IV for settling the debts to the Plaintiff.

According to the Supreme Court that although PT. Dharma Winarco had been approved by the Minister of Justice as a legal entity, but the loan facility agreement and debenture signed by the Defendants by using guaranty dated September 7, 1989 shall still be binding on both parties as a Law (Article 1338 of BW) and the Defendants shall be liable for the settlement thereof.

The Supreme Court cancelled the previous decision of the Ujung Pandang District Court and decided among other things to sentence Defendants I, II, III and IV both severally and jointly to pay their debts to the Plaintiff in cash and on a lump sum basis in the amount of Rp.142,421,968.- plus the loan interest of 13.5% per annum.¹⁶

Unfortunately, whether the shareholders held a General Meeting of Shareholders (GMS) deciding upon all actions prior to the approval of the company as a legal entity was not disclosed; upon the availability of the decree of the Minister of Justice, it became the liability of the company. If the GMS had been held with regard to the aforementioned matter, we could have estimated that the said debenture would no longer be applicable.

Liabilities of the Board of Directors After the Company Has a Legal Entity Status

Article 7 Paragraph (3) of the new Limited Liability Company Law provides that a Company shall obtain a legal entity status on the date of issuance of Ministerial Decree regarding the Approval of Company Legal Entity.

Furthermore, Article 14 Paragraph (1) provides that legal actions on behalf of a Company that has not yet had a Legal Entity status can only be taken by members of the Board of Directors together with the founders, other members of the Board of Directors and members of the Board of Commissioners of the Company, and such legal actions shall become joint liabilities of all founders, members of the Board of Directors and members of the Board of Commissioners.

Paragraph (2) Article 14 furthermore provides that if the legal actions as intended in Paragraph (1) above are taken by a founder on behalf of the Company which has not yet

¹⁶ PT. Bank Niaga v. Guardi Sunardi, Ny. Tan Seng Gwek, A. Hadrawi dan Ferdy Hardi Wijaya, No. 520 K/Pdt/1996 (1997).

obtained a legal entity status, such legal actions shall become the liability of the relevant founder and it shall be binding on the company.

Article 30 Paragraph (1) of the new Limited Liability Company Law provides that the Minister shall announce in the Supplement to the Official Gazette of the Republic of Indonesia. The announcement made by the Minister must be conducted within 14 days following the issuance of the Ministerial Decree.

This new Law apparently provides that after a Limited Liability Company has been approved as a legal entity, the Shareholders, Commissioners and Board of Directors shall not have any personal liabilities. None of the articles provides the liabilities of the Shareholders, Commissioners and Board of Directors in the period after the Establishment Deed and Articles of Association have been approved as a legal entity until such company is registered and announced in the Supplement to the Official Gazette of the Republic of Indonesia.

Article 23 of the previous Law No. 1 of 1995 provides that so long as the registration and announcement have not been made yet, the Board of Directors shall be liable jointly for all legal actions taken. The provisions of Article 23 of Law No. 1 of 1995 are similar to those of Article 39 of the Indonesian Commercial Code (KUHD).

The following decisions of the Supreme Court when the Indonesian Commercial Code (KUHD) was still in effect can describe the liabilities of Board of Directors after a company obtains its legal entity status.

In the case of **Herman Rachmat v. Ny. Maryam Abas, No. 268 K/Sip/1980 (1982)**, the Supreme Court was of the opinion that Defendant Mrs. Maryam Abas had not served as the Directress of PT. Cikembang any longer since December 20, 1977. Because PT. Cikembang was approved by the Minister of Justice on January 13, 1976, consequently, such Limited Liability Company had constituted and had been in the form of a legal entity. Therefore, the Plaintiff could not file a lawsuit against the natural person of the defendant, who had no relationship and was not related at all to PT. Cikembang.

This case was attributed to PT. Cikembang during the management of its Directress, Mrs. Maryam Abas, who ordered building materials for her project worth Rp.23,869,655.-. The debt had not been paid off yet up to the filing of lawsuit by the Plaintiff.

The District Court was of the opinion that the party that had to be sued was PT. Cikembang, represented by its present Director, not its Director who had quitted, namely Mrs. Maryam Abas.¹⁷

At appeal level, the High Court in its consideration stated as follows:

“..., however, if the legal obligation is the liability of PT. Cikembang as “rechts person”, the party to be sued in the lawsuit is the present management, since the liability of a legal entity is inherent in the legal entity itself.”¹⁸

At the cassation level, the Supreme Court justified the decision of the Appellate Court, and rejected the appeal request of the Plaintiff, the aforementioned Herman Rachmat.¹⁹

¹⁷ Herman Rachmat v. Ny. Maryam Abas, No. 188/1978/C/Bdg (1979).

¹⁸ Herman Rachmat v. Ny. Maryam Abas, No. 244/1979/Perd.PTB (1979).

Another interesting decision of the Supreme Court was in the case of **Mrs. Sardjiman PS v. Subardi and PT. Sapta Manggala Tunggal, No. 597 K/Sip/1983 (1984)**, in which the Supreme Court rejected the lawsuit of the Plaintiff against the Defendant I, because in this case he acts for and on behalf of P.T. accordingly it is only the P.T which can be accounted for. In respect of the P.T.'s loan, a "*conservatoir beslag*" cannot be conducted on its directors' personal assets.

The Plaintiff Mrs. Sardjiman PS, has been selling building materials to the Defendant I. On February 1979, the Defendant I had purchased building materials in the form of cement, iron rods, et cetera in the amount of Rp.1,625,625,-. The loan concerned had not been paid so that it was detrimental to the Plaintiff as a retailer. Defendant I Subardi, in his responses, stated that the Defendant should be Defendant II PT. Sapta Manggala Tunggal, because as Defendant I and the President Director of PT. Sapta Manggala Tunggal, he is not liable for the aforementioned Company's loan, therefore a "*conservatoir beslaag*" on his private home cannot be conducted.

The Jogjakarta District Court stated in its consideration, among other things, that because the Defendant I had signed the building material orders concerned in his capacity as the Deputy Director, accordingly he could not waive the loan made by PT. Sapta Manggala Tunggal.

In its decision, the Jogjakarta District Court, stated that the security seizure on the land and house owned by the Defendant I was valid and valuable and sentenced Defendant I and Defendant II PT. Sapta Manggala Tunggal to jointly and severally to pay Rp.1,625,625,- to the Plaintiff.²⁰

At the appellate level, the High Court in its legal considerations, , stated among others thing: "The District Court's ground that Mr. Subardi, the Defendant I has signed the purchase orders to the Plaintiff on behalf of PT. Sapta Manggala Tunggal, therefore Defendant I cannot waive his liabilities concerning his actions", is inappropriate, because if someone signs a letter on behalf of another person, he cannot be personally liable for the substance of such letter.

PT. Sapta Manggala Tunggal had been legalized by the Minister of Justice, announced and registered in accordance with Article 38 of the Indonesian Commercial Code (KUHD), and therefore the liabilities to the Limited Liability Company's creditors is limited to such Limited Liability Company as a legal entity, therefore it has its own assets as well as rights and obligations separate from the assets of the respective shareholders. Defendant I is the Director of the company and in all purchase orders he always used the letterhead of "PT. Sapta Manggala Tunggal" and according to the witnesses the orders were for the company.

The High Court was of the opinion that it was legally evident, that Defendant I ordered and received the ordered materials for and on behalf of PT. Sapta Manggala Tunggal. The High Court decided to cancel the Jogya District Court's decision. The High

¹⁹ Herman Rachmat v. Ny. Maryam Abas, No. 268 K/Sip/1980 (1982).

²⁰ Ny. Sardjiman PS v. Subardi and PT. Sapta Manggala Tunggal, No. 88/1979/Pdt/G/PN.Yk (1980).

Court stipulated that the trading was only between the Plaintiff and Defendant II, PT. Sapta Manggala Tunggal.²¹

At the cassation level, the Supreme Court corroborated the decision of the aforementioned District Court and stated that the security seizure by the Jogjakarta District Court was invalid and valueless.²²

The following case was also decided at the time the Indonesian Commercial Code was still applicable, namely the case of **PT. (Persero) Asuransi Kerugian Jasa Raharja v. Setiarko and KRT. Rubyanto Argonadi Hamidjojo, No. 419/K/Pdt/1988 (1993)**. In this case, the Supreme Court was also of the opinion that a director cannot be subject to a personal lawsuit, meanwhile the related P.T. which should be subject to a lawsuit because the P.T. constitutes an individual legal entity.

The following case started by the Defendant as a “Surety Company” which entered into an agreement with Defendant I, jointly provided a guarantee to a third party project owner. If the insured (contractor), the Defendant I failed to exercise its obligation to the project owner, therefore the contractor would have to pay compensation.

If the contractor, the Defendant I, was unable to pay, therefore the “Surety Company” would pay the incurred losses, up to a maximum security amount to the project owner.

Furthermore, Defendant I together with the indemnifier, Defendant II, repaid all costs spent by the Defendant I plus an interest of 8% per year. The abovementioned matters were indicated in an agreement dated January 14, 1982.

Due to the default of Defendant I, as a contractor in the implementation of infrastructure construction project of the Financial Training and Education Center (BPLK) and STAN Campus, the Plaintiff as a Surety Company had paid the project owner the amount of Rp.137,486,055.78,-. Evidently, the Defendant I failed to repay the aforementioned amount to the Plaintiff, so that it created this case, in which Defendant I Setiarko, and Defendant II K.R.T. Rubyanto Argonadi Hamidjojo, respectively in their capacities and as the Directors of the company become the Defendants.

The South Jakarta District Court was of the opinion, that since PT. Graha Gapura was not sued in which the Defendant I Setiarko also served as Director, hence the lawsuit became ambiguous. According to the District Court, Defendant I who had been dismissed as Director was no longer liable for PT. Graha Gapura, because he had signed the aforementioned contract for PT. Graha Gapura’s interest.

The District Court stated that the lawsuit against the Defendant I was unacceptable. Furthermore, in respect of the lawsuit against Defendant II KRT. Rubyanto Argonadi Hamidjojo in his capacity as the President Director of PT. Rencong Aceh Semen, who up to the arising of the case concerned, still held his position, hence as the element liable for the P.T. under his leadership, a lawsuit against him was appropriate and acceptable.

The South Jakarta District Court then decided, that the aforementioned losses of Rp.137,468,055.78,- had to be borne by PT. Graha Gapura and PT. Rencong Aceh Semen jointly and severally. The District Court sentenced Defendant II as the President Director

²¹ Mrs. Sardjiman PS v. Subardi and PT. Sapta Manggala Tunggal, No. 27/1982/Pdt/PT.Yk (1982).

²² Mrs. Sardjiman PS v. Subardi and PT. Sapta Manggala Tunggal, No. 597 K/Sip/1983 (1984).

and represented PT. Rencong Aceh Semen to pay the Plaintiff his portion and the loan, namely a part of the loan to the Plaintiff.²³

At the appellate level, the High Court corroborated the District Court's decision concerned, and stated the lawsuit against the Defendant I was unacceptable and sentenced the Defendant II as the President Director and representing PT. Rencong Aceh Semen to pay a half of the aforementioned loan to the Plaintiff.²⁴

At the cassation level, the Supreme Court was of the opinion that the Limited Liability Company (PT) was a legal entity and constituted a legal subject, and in this case PT. Graha Gapura and PT. Rencong Aceh Semen undertake a legal action in the form of general agreement regarding compensation with PT. (Persero) Asuransi Kerugian Jasa Raharja (the Plaintiff), therefore the lawsuit should have been filed against PT. Graha Gapura and PT. Rencong Aceh Semen, rather than against its Directors.

According to the Supreme Court, the South Jakarta District Courts the Jakarta High Court had made a mistake in its abovementioned considerations concerning the lawsuit against Defendant I and Defendant II by assigning it to the persons as individuals and as the Directors of PT. Rencong Aceh Semen. Moreover, the acceptance or rejection of such lawsuit depended on whether or not the aforementioned defendants still assumed their position as Directors of the Limited Liability Company concerned. Therefore, the Jakarta District Court's decision concerning the lawsuit against the Defendant II had to be cancelled.

Furthermore, the Supreme Court granted the appeal request filed by the appeal petitioners Setiarko on his own behalf and in his capacity as the Director of PT. Graha Gapura and KRT. Rubyanto Argonadi Hamidjojo on his own behalf and for himself and in his capacity as the President Director of PT. Rencong Aceh Semen. The Supreme Court cancelled the decision of the Jakarta District Court dated August 27, 1987, No. 350/Pdt/1987/PT.DKI and the decision of the South Jakarta District Court dated November 20, 1986, No. 047/Pdt/G/1986/PN/Jkt.Sel.

The Supreme Court stated that the lawsuit against Defendant I and Defendant II was unacceptable.²⁵

Personal Liabilities of the Directors of the Limited Liability Company

Article 92 paragraph (1) of the new Law on the Limited Liability Company, reads that the Board of Directors shall be liable for the management of the Company for the interest of the Company and in accordance with the objectives and purposes of the Company.

²³ PT. (Persero) Asuransi Kerugian Jasa Raharja v. Setiarko and KRT. Rubyanto Argonadi Hamidjojo, No. 047/Pdt/G/1986/PN.Jkt.Sel (1986).

²⁴ PT. (Persero) Asuransi Kerugian Jasa Raharja v. Setiarko and KRT. Rubyanto Argonadi Hamidjojo, No. 350/Pdt/1987/PT.DKI (1987)

²⁵ PT. (Persero) Asuransi Kerugian Jasa Raharja v. Setiarko and KRT. Rubyanto Argonadi Hamidjojo, No. 419/K/Pdt/1988 (1993).

Article 97 paragraph (1) states that the Board of Directors shall be liable for the management of the Company as intended in the aforementioned Article 92 paragraph (1). Paragraph (2) of this article reads that the management as intended in article 97 paragraph (1), shall be performed by each member of the Board of Directors in good faith and with full liability.

Furthermore, paragraph (3) states, each member of the Board of Directors shall be personally liable for the losses of the Company, if the relevant person has made a mistake and committed negligence in performing his or her duties as provided for in paragraph (2). If members of the Board of Directors consist of 2 (two) or more persons, each member of the Board of Directors shall be jointly and severally liable for (paragraph 4).

Article 97 paragraph (5) states that a member of the Board of Directors shall not be liable for the Company's losses, if he can prove the following:

- a. that the aforementioned losses did not occur due to his or her mistake or negligence;
- b. that he or she has performed the management in good faith and based on the prudential principle for the interests and in accordance with the objectives and purposes of the company;
- c. that he or she does not have a conflict of interest either directly and indirectly regarding the management affairs causing losses; and
- d. that he or she has taken actions in order to prevent the arising or continuance of the aforementioned losses.

Article 97 paragraph (3) states that a member of the Board of Directors shall be personally liable for the losses of the company, if the relevant person makes a mistake or commits negligence in performing his or her duties, he or she did not manage the company in good faith and with full liability (paragraph 2).

Article 97 paragraph (2) reads same as Article 85 paragraph (1) of Law No. 1 of 1995 concerning the Limited Liability Company. Then, Article 95 paragraph (3) of new Law on the Limited Liability Company reads same as Article 85 paragraph (2) of old Law No.1 of 1995.

In retrospect, Article 45 of the Indonesian Commercial Code (KUHD) stipulates that the liabilities of the management shall be no more than performing the duties assigned to them to the best of their ability. Due to any contract between them and the company, they are not bound to a third party.

If they violate a provision in the Deed, or the amendment of the deed made in the future regarding the requirements of establishment, hence losses are suffered by the third party, they are liable for the entire losses respectively.

An interesting decision of the Supreme Court in this respect is regarding the liability of the Director of a bank who withdrew a bad cheque on behalf of the bank concerned in bad faith. The Supreme Court was of the opinion that since the Director concerned was one of the persons determined by the Defendant, the Bank concerned, in order to withdraw the Banker's Cheque on behalf of the Bank, hence any consequences whatsoever due to the Director's action concerned became the full liability of the Bank (the Defendant), moreover because it was evident that the cheque in this case had been withdrawn without duress and

deceit. The personal liability of the Director concerned constitutes an internal procedure of the bank.

In the case of **Pe A Tjong v. PT. Bank Persatuan Dagang Indonesia, No. 367 K/Sip/1972**, the Plaintiff had a cheque issued by Bank Negara Unit I given by Bank Persatuan Dagang Indonesia Medan Branch to the Plaintiff on April 21, 1967 in the amount of Rp.2,000,000,-. The Bank Negara Unit I on April 25, 1967 due to shortcomings balance of the Defendant in the Bank Negara Unit I Medan.

The Medan District Court in its considerations stated, that the Defendant did not deny that Mak Kim Goan was one of the persons determined by the Defendant to sign the Defendant's check namely, in the form of "banker's cheque". That evidently the aforementioned cheques were misused by Mak Kim Goan as the Director, such misuse could not be changed to an outsider. Therefore, the District Court granted the lawsuit of the Plaintiff, sentenced the Defendant PT. Bank Persatuan Dagang Indonesia to compensate the Plaintiff Rp.2,000,000,- plus 6% interest as from April 25, 1967.²⁶

At the appellate level, the District Court was of the opinion, that the lawsuit of the Plaintiff was inappropriate due to the following reasons.

Mak Kim Goan, as the Director, after having been notified by the first witness that it was not possible for the Bank to issue the Banker's Cheque, evidently ignored the matter concerned. At the same time, it was a provision which had to be complied with by the Director. Hence, Mak Kim Goan did not ask for the cheque concerned to be recorded.

According to the High Court, Mak Kim Goan had used the Defendant (PT. Bank Persatuan Dagang Indonesia) for his personal interests. Such action expressly violated the regulations which had to be obeyed, therefore he had acted in bad faith.

The liability for the aforementioned situation cannot be changed to PT. Bank Persatuan Dagang Indonesia (the Plaintiff), but it was the liability of Mak Kim Goan personally.

Based on the abovementioned reasons, the Medan High court cancelled the decision of the Medan District Court.²⁷

At the cassation level, the Supreme Court was of the opinion, among other things, that the Defendant had acknowledged that Mak Kim Goan acted to issue and withdraw the Banker's Cheque, so that the Plaintiff was entitled to collect the amount stated in the cheque concerned. The withdrawal of the cheque concerned was in accordance with the Defendant's Articles of Association and met the requirements of the Indonesian Commercial Code, while the Plaintiff did not know that the cheque concerned was counterfeit.

The objections of the Plaintiff as described above can be justified, since the Defendant admitted that Mak Kim Goan was one of the persons determined by the Defendant to withdraw Banker's Cheques. Therefore, the internal procedure was the liability of the Defendant individually, moreover the Banker's Cheque in this case was withdrawn without duress and deceit.

²⁶ Pe A tjong v. PT. Bank Persatuan Dagang Indonesia, No. 268/1968 (1968).

²⁷ Pe A tjong v. PT. Bank Persatuan Dagang Indonesia, No.361/1969 (1971).

Based on the aforementioned considerations, the Supreme Court cancelled the decision of the Medan High Court and corroborated the decision of the Medan District Court. Besides, the Supreme Court revised the decision of the Medan District Court, by stipulating the interest of 6% per year, instead of 6% per month as stipulated by the Medan District Court.²⁸

The case of **PT. Evergreen Printing Glass v. Willem Siharto Hoetahoeroek and BNI 46 Jakarta Kota Branch, No. 220/1976 G (1977)**, relates also to whether or not a Director was personally liable, because when borrowing money he was supposed not to obtain an approval from one of the Commissioners.

In this case the Plaintiff argued among other things, that Defendant I violated Article 10 paragraph (1) of the Company's Articles of Association, in which for borrowing money on behalf of the company and binding the company as the guarantor/insurer, the President Director must obtain approval from at least one member of the Board of Directors and two Commissioners. The Plaintiff declared that one of the Commissioners, namely Mrs. Soerta Hasiholan Hoetahoeroek Rajagukguk, passed away two days before the legalization of the approval letter by the Notary on December 29, 1975, therefore the Power of Attorney concerned was invalid. Therefore, the Defendant I had committed tort.

In his rebuttal, Defendant I declared that he had obtained approval from all shareholders to sign the Loan Agreement for and on behalf of the company. In addition to that, the approval letter of Mrs. Soerta Hasiholan Hoetahoeroek Rajagukguk had been given two days before her demise, which was undated at that time. This letter was legalized with a Notarial Deed on December 29, 1975, 2 days after the person concerned passed away. The signature on the legalized letter is not counterfeit or counterfeited. Therefore, Defendant I did not act in bad faith and did not commit a tort.

Therefore, the signing of the Loan Agreement concerned by Defendant I, had obtained approval from a member of the Board of Directors and two Commissioners, therefore Defendant I acted for and on behalf of PT Evergreen Printing Glass (the Plaintiff), accordingly it was the Plaintiff who was liable for repaying the aforementioned loan.

The District Court was of the opinion that the Plaintiff did not deny the originality of Mrs. Soerta Rajagukguk's signature, a commissioner who had passed away, and the Plaintiff did not deny the approval of the Commissioner concerned prior to her demise in order to obtain the aforementioned credit. Therefore, in the substantive respect the aforementioned approval to obtain credit was not contradictory to Article 10 paragraph (1) of the Company's Articles of Association.

In this case, as previously explained (pages 7 and 8), the Court was of the opinion, considering that the status of the Plaintiff PT. Evergreen Printing Glass had not been that of a legal entity, therefore all of the management liable for the credit concerned.²⁹

Article 90 paragraph (1) of the new Law on Limited Liability Company, stipulates that the Board of Directors shall perform the management of the Company for the interest

²⁸ Pe A tjong v. PT. Bank Persatuan Dagang Indonesia, No. 367 K/Sip/1972 (1973).

²⁹ PT. Evergreen Printing Glass v. Willem Sihartoe Hoetahoeroek dan BNI 1946 Cabang Jakarta Kota, No. 220/1976 G (1977).

of the Company and in accordance with the objectives and purposes of the Company. Paragraph (2) of this article furthermore determines that, the Board of Directors shall be authorized to perform management as intended in paragraph (1) in accordance with the policy deemed appropriate, limited to the provisions of this Law on Limited Liability Company and/or Articles of Association.

Furthermore Article 95 paragraph (1) states that the Board of Directors shall be liable for the management of the Company as intended in Article 90 paragraph (1). Paragraph (2) states that management as intended in paragraph (1), shall be performed by each member of the Board of Directors in good faith and with full liability. Furthermore, paragraph (3) stipulates, that each member of the Board of Directors shall be personally liable for the losses of the Company, if the related person has done wrong or is negligent in performing his or her duties in accordance with the provisions of paragraph (2).

The provisions of the Law on the Limited Liability Company as described above are principally similar to Article 85 of Law No. 1 of 1995. Article 85 paragraph (1) reads as follows: "Each member of the Board of Directors shall be obligated to perform his or her duties in good faith and with full liability for the interests and business of the company". Paragraph (2) of this article reads that each member of the Board of Directors shall be individually fully liable if he or she has done wrong or is negligent in performing his or her duties in accordance with the provisions of paragraph (1).

The new Law on Limited Liability Company states clearly the liabilities of the Board of Directors concerning their action for which they do not obtain approval from the Board of Commissioners while in fact such approval is obligated under the Company's Articles of Association.

"Ultra Vires"

The Supreme Court in 1996 once decided that loan made by the Board of Directors without the approval of the Board of Commissioners as stipulated in the Articles of Association, shall become the individual liability of the Board of Directors concerned.

In the case of **PT. Usaha Sandang v. PT. Dhaseng Ltd, PT. Interland Ltd, and Mediarito Prawiro, No. 3264 K/Pdt/1992 (1996)**, the dispute was started by Defendant III Mediarito Prawiro acknowledging to have borrowed money from PT. Dhaseng Ltd (Defendant I) and PT. Interland Ltd (Defendant II) in the amount of Rp.342,480,158.72,-.

Defendants I and II were a P.T. which had been approved by the Department of Justice, but had not been registered at the local District Court, nor had they been announced in the Supplement to the Official Gazette, so that based on Article 39 of the Indonesian Commercial Code (KUHD), Defendant III as the President Director was personally and fully liable to third parties for his actions.

Based on the "Textile Payment Agreement" and agreement dated October 22, 1985, the Defendant III on his own behalf as well as in his capacity as the President Director of Defendant I (PT. Dhaseng Ltd) and Defendant II (PT. Interland Indonesia Ltd) had entered into an agreement with the Plaintiff.

Based on the agreement concerned, the Plaintiff had requested payment many times from the Defendants, but the Defendants had put it off until later by stating that the

insurance claims had not been received. In fact, PT. Asuransi Dharma Bangsa had paid the insurance claims concerned to the Defendants. Therefore, the Plaintiff, requested the District Court to decide to punish the Defendants, among other things to jointly and severally pay Rp.342,480,158.72,- with an interest of 3% per month as from the date of October 22, 1986 up to the full settlement of the loan.

The Defendants filed for exception that the Bandung District Court was not authorized to pass a decision of this case, because all Defendants were domiciled in Jakarta. Furthermore, according to the Defendants, the agreement was invalid due to the lack of date, and it had been signed under a tense situation because the Defendants suffered from a fire. Finally, there was no legal ground for agreement declaring a loan in the amount of Rp.342,480,158.72,- due to the lack of evidence on the textile purchase.

The District Court in its decision refused the entire lawsuit of the Plaintiff. The District Court based on its decision concerned on the following arguments:

1. Based on documentary evidence, it was evident that Defendant III, acting in “his own capacity” and as “the President Director” of PT. Dhaseng and PT. Interland, had borrowed money from the Plaintiff in the amount of Rp.342,480,158.72,- originating from the purchase of goods from the Plaintiff and promised to settle the loan concerned, after receiving fire insurance claims from “Dharma Bangsa Insurance”.
2. According to the Articles of Association of PT. Dhaseng and PT. Interland, article 11 (2) it was stipulated that each member of the Board of the Directors had to obtain a written approval from the Commissioners for undertaking the following actions: 1. To borrow money. 2. To obtain; to aggravate or to segregate the ”fixed assets” of the Company. 3. to bind the company as a Guarantor.
3. In entering into the “Indebtedness Acknowledgment Agreement” of Rp.342,480,158.72,- the President Director, Defendant III, Mediarto Prawiro had aggravated Defendants I and II, without the approval of the Commissioners. Therefore, the act of Defendant III, Mediarto Prawiro, constituted an individual act and also became his individual liability, rather than the liability of PT. Dhaseng and PT. Interland.
4. If the Plaintiff felt inconvenienced, then he would have had to file a lawsuit against Mediarto Prawiro personally, separately and individually without relating him to PT. Dhaseng and PT. Interland.³⁰

At the appellate level, the Bandung High Court was of the opinion that:

1. The Acknowledgement of Indebtedness Payment Agreement on textile materials could not be classified as binding on the company as a Guarantor (Article 11(2) of Articles of Association of PT. Dhaseng).

³⁰ PT. Usaha Sandang v. PT. Dhaseng Ltd, PT. Interland Ltd, dan Mediarto Prawiro, No. 269/Pdt.G/1990/PN.Bdg (1991).

2. The acknowledgement of Indebtedness Payment Agreement on textile materials becoming the loan of both Legal Entities concerned, constituted purchase of textile materials which is included in the “field of business” of both Companies concerned, therefore Defendant III, Mediarto Prawiro as the Director was still authorized and it was valid for him to enter into “the acknowledgement of Indebtedness Payment Agreement on textile materials”, without the approval of the Commissioners

Based on the abovementioned matters, the High Court cancelled the decision of the District Court.³¹

At the cassation level, the Supreme Court declared that the High Court was erroneous in implementing the law. The Supreme Court was of the opinion, among others thing, that:

1. The act of Defendant III Mediarto Prawiro, (the President Director) for and on behalf of the Legal Entity (Defendant I, PT. Dhaseng and Defendant II PT. Interland) by using ”causa” as loan for procuring textile materials from the Plaintiff, had the similar meaning and form as well as objectives to the “description” stated in Article 11 (2) of the Articles of Association of both Legal Entities concerned.
2. Therefore, there had to be an approval from the Commissioners for the action of Defendant III (Mediarto Prawiro) the President Director concerned, in order for it to be valid and having the legal force.
3. The objective of limiting the Directors’ authorities of a Company is called The Ultra Vires Rule namely, regulations stipulating that the Board of Directors may not act exceeding the limitation provided for in the Laws and Articles of Association of the Company.
4. In this case, the action of Defendant III President Director, entering into an Acknowledgement of Indebtedness Payment Agreement with the Plaintiff for and on behalf of Defendants I and II (Legal Entities), without the approval of the Commissioners, in accordance with the Articles of Association of the Company Article 11 (2), constituted an act of Ultra Vires. The act concerned was outside the authorities of the President Director. The act concerned was invalid and had no legal force – it did not bind the Legal Entities (Defendants I and II), in accordance with the limited liability inherent in the Legal Entities.
5. Based on the aforementioned ground, hence the lawsuit against the loan made by Defendant III (the President Director) for and on behalf of the Legal Entities (Defendants I and II), the Legal Entities concerned could not be sued for settlement, and accordingly the lawsuit of the plaintiff against Defendants I and II had to be rejected.

³¹ PT. Usaha Sandang v. PT. Dhaseng Ltd, PT. Interland Ltd, dan Mediarto Prawiro, No. 453/Pdt/1991/PT.Bdg (1992)

6. The loan to the Plaintiff (PT. Usaha Sandang) made by the President Director (Defendant III) for and on behalf of PT. Dhaseng Ltd and PT. Interland Ltd, without the approval of the Commissioners concerned, became the personal liability of Defendant III (Mediaro Prawiro) to pay the loan concerned to the Plaintiffs.

Finally, the Supreme Court cancelled the decision of the High Court and declared Defendant III to be personally liable for his action namely, to pay the loan in the amount of Rp.342,480,158.72,- and a monthly interest of 2%.³²

Another interesting decision of the Supreme Court referring to the action of the Board of Directors without the approval of the Commissioners, can be viewed in the case between **PT. Greatstar Perdana Indonesia v. PT. Indosurya Mega Finance, No. 030 K/N/2000 (2000)**. This case started by the decision of bankruptcy of the Jakarta Commercial Court No. 51/PAILIT/2000/PN.NIAGA.JKT.PST, in which PT. Indosurya Mega Finance requested the Court to declare PT. Greatstar Perdana Indonesia bankrupt, because it had been unable to make payment on the Promissory Note in the amount of Rp.2,000,000,000,- which had been due to the Petitioner.

At the Commercial Court, Budi Handoko as the Director of PT. Greatstar Perdana Indonesia declared that he had signed the Promissory Note concerned in good faith to help, due to the persuasion of Mr. Henry the Director of PT. Indosurya Mega Finance. The Respondent had a strong reason to suspect that the aforementioned Promissory Note were going to be used by the Petitioner to replace the counterfeit promissory notes in the name of PT. Greatstar Perdana Indonesia and PT. Bintang Raya Lokal Lestari. The Respondent had reported the Action of issuing the counterfeit promissory notes concerned to the authorities. According to the Petitioner, based on the Articles of Association of his company, the promissory notes had to be made upon the approval of the Board of Commissioners, meanwhile the Promissory Note dated February 6, 1998 was issued without the approval and knowledge of the Board of Commissioners of the company. Therefore, the Respondent requested the Commercial Court to cancel the request for bankruptcy concerned.

The Commercial Court in its legal considerations declared that the Promissory Note dated February 6, 1998 had met the formal requirements. The Respondent's arguments were not supported by evidence, and a Director had to be able to consider the legal consequences of signing a document. Although Article 12 paragraphs (2) and (4) of the Articles of Association of the Respondent's company stipulates that the Board of Directors must obtain written approval from the Commissioners to authorize the action of the company's Board of Directors, the provisions is only applicable internally and is not binding and is not applicable to third parties externally.

According to the Commercial Court, the company had to be liable to the third party concerned, although there was action exceeding the authority limitations of the Board of Directors.

³² PT. Usaha Sandang v. PT. Dhaseng Ltd, PT. Interland Ltd, and Mediaro Prawiro, No. 3264 K/Pdt/1992 (1996). See also Ali Boediarto, "The Ultra Vires Rule Binds the Corporate's Directors", *Varia Peradilan* : 160-10.

The Jakarta Commercial Court then granted the request for bankruptcy filed by PT. Indosurya Mega Finance and declared the Respondent PT. Greatstar Perdana Indonesia bankrupt.³³

At the appellate level, the Supreme Court in viewing the legal consequences of the abovementioned Promissory Note, was guided by the Articles of Association of PT. Greatstar Perdana Indonesia. The Articles of Association provided that in issuing Promissory Notes a member of the Board of Directors had to obtain the approval of one of the Commissioners. Therefore, the Promissory Note dated February 6, 1998 signed by Budi Handoko, the Director of PT. Greatstar Perdana Indonesia, was without the written approval of one of Commissioners hence the Promissory Note concerned did not bind the Respondent (PT. Greatstar Perdana Indonesia), but was only binding on Budi Handoko as an individual. Therefore, the request for bankruptcy filed by the Petitioner against the Respondent had to be rejected.

Based on the considerations mentioned above, without considering other objections filed by the appeal Petitioner, the Supreme Court was of the opinion that there was an adequate ground to grant the cassation appeal of the petitioner PT. Greatstar Perdana Indonesia, namely to cancel the decision of the Central Jakarta Commercial Court dated August 16, 2000.³⁴

“Piercing The Corporate Veil”

Another interesting decision of the Supreme Court was issued in 1996, when Law No. 1 Year 1995 concerning Limited Liability Company had just come into effect. The decision was related to a Board of Directors acting in bad faith.

Article 85 paragraph (1) of Law No. 1 Year 1995 concerning Limited Liability Company provides that the Board of Directors must run the company in good faith and with full liability for the sake of the company. Each member of the Board of Directors shall personally bear full liability if he/she makes any mistake or fails to perform his/her duties (paragraph 2). These provisions are similar to those set forth in Article 95 paragraph (2) of the new Company Law.

In the case of **PT. Bank Perkembangan Asia v. PT. Djaja Tunggal cs, No. 1916 K/Pdt/1991 (1996)**, the Supreme Court reversed the decision of the High Court. According to the Supreme Court, the management may be held liable for the Limited Liability Company (PT), if the legal actions that they undertake for and on behalf of the Limited Liability Company include a conspiracy committed in bad faith which inflicts losses on other parties.

In this case, Defendants II, III, IV and V as members of the Board of Directors and Commissioners of PT. Bank Perkembangan Asia and concurrently members of the Board of Directors and Commissioners of PT. Djaja Tunggal (Defendant I), extended a loan to Defendant I without any credit analysis. They also knew that the collateral for the loan was

³³ PT. Greatstar Perdana Indonesia v. PT. Indosurya Mega Finance, No. 51/PAILIT/2000/PN. NIAGA.JKT.PST (2000).

³⁴ PT. Greatstar Perdana Indonesia v. PT. Indosurya Mega Finance, No. 030 K/N/2000 (2000).

land with the Title to Build (HGB) which had expired on September 24, 1980, so that it had become State Land.

The dispute was triggered by the extension of a loan by PT. Bank Perkembangan Asia to PT. Djaja Tunggal, which had been renewed several times in the amount of Rp. 5,502,293,038.84,-. The loan was secured using two plots of land under Title to Build (HGB) No. 39 and No. 40 along with a factory building thereon in the name of PT. Djaja Tunggal.

On the maturity date of the loan, PT. Djaja Tunggal was unable to repay it. This company closed its operational activities after suffering losses of 75%, so that the company declared itself insolvent and it was unable to pay its debts to the Plaintiff. It was discovered that the members of the Board of Directors and Commissioners of the Bank extending the loan were the same persons as the members of the Board of Directors and Commissioners of PT. Djaja Tunggal. It was also discovered that the collateralized land under Title to Build (HGB) No. 39 and 40 had expired, so that the land had become State Land.

As a consequence of the fiasco at PT. Bank Perkembangan Asia, Bank Indonesia decided to replace the members of the Bank's management, and the Bank filed a lawsuit against the former members of its Board of Directors and Commissioners as well as against PT. Djaja Tunggal.

In their response, the Defendants stated, among other things, that the debt was the debt of PT. Djaja Tunggal and therefore it was the liability of PT. Djaja Tunggal, to the extent of the company's assets. Therefore, Defendants II to V could not personally be held liable for the debt of PT. Djaja Tunggal (Defendant I).

In its decision, the Bogor District Court stated, among other things, as follows:

1. Defendant I, PT. Djaja Tunggal, had a debt to the Plaintiff in the amount of Rp. 5.502.293.038,83,-.
2. Defendant I, PT. Djaja Tunggal, had defaulted on its loan from the Plaintiff.
3. Defendants II-III-IV-V-VI and VII committed an unlawful act by the management.
4. Punishing Defendant I, PT. Djaja Tunggal, to repay its debt as well the interest thereon in the total amount of Rp. 5.502.293.038,83,-.
5. Punishing Defendants II-III-IV-V-VI-VII to pay an indemnity of Rp. 100,000,000.- in cash to the Plaintiff.³⁵

At the appellate level, the Bandung High Court reaffirmed the decision of the Bogor District Court.³⁶

At the cassation level, the Supreme Court stated that it was a fact that the members of the management of Defendant I were concurrently serving as members of the management the Plaintiff before the Plaintiff as PT. Bank Perkembangan Asia was taken over by Bank Indonesia due to a clearing mismatch. Therefore, at the time the loan was extended, Defendant I and Plaintiff I were similar to Defendants II to V. Accordingly, at the time the loan agreement was signed and realized, the Board of Directors and Board of

³⁵ PT. Bank Perkembangan Asia v. PT. Djaja Tunggal cs, No. 136/Pdt.G/1987/PN.Bgr (1988).

³⁶ PT. Bank Perkembangan Asia v. PT. Djaja Tunggal cs, No. 431/Pdt/1989/PT.Bdg (1990).

Commissioners of the Plaintiff and the Defendant as legal entities (PT) were similar to those defendants.

Based on the aforementioned fact which was related to the way the loan was extended by the Plaintiff, actually controlled by Defendants II – V, to a company also under their control (Defendant I : PT. Djaja Tunggal), it can be assumed that there was a conspiracy and bad faith among Defendants I, II, III, IV and V. With regard to this case, a legal theory has been developed, which is known as “**piercing the corporate veil**”, namely the management of a Limited Liability Company may be held liable, if the legal actions which they undertake for and on behalf of a Limited Liability Company include conspiracy committed in bad faith leading to losses to other parties. In this case, Defendants II, III, IV and V as members of the management of PT. Perkembangan Asia (Plaintiff) and at the same time as members of the management of Defendant I (PT. Djaja Tunggal) acting in bad faith extended a loan to the Defendant without any credit analysis and they knew that the collateral in the form of Title to Build (HGB) No. 39 and 40 had expired on September 24, 1980. Therefore, the losses suffered by the Plaintiff should not only be charged to Defendant I, but also to Defendants II, III, IV and V in a joint and several manner.

The Supreme Court reversed the decision of the Bandung High Court dated February 12, 1990. The Supreme Court decided, among others, that Defendants I, II, III, IV and V owed money to the Plaintiff in the amount of Rp. 5.502.293.038,83,-. Punishing Defendants I, II, III, IV and V to repay the debt in a joint and several manner.³⁷

“Derivative Action”

Another Decision of the Supreme Court which is also quite interesting is about the right of minority shareholders to sue the Board of Directors in the name of the company.

Article 97 paragraph (6) of the new Limited Liability Law provides that Shareholders representing at least 10% of the total number of voting shares may file a lawsuit to the District Court in the name of the Company against members of the Board of Directors, who due of their mistake or default inflict losses on the Company.

If we relate this to the provision of Article 95 paragraph (3), we find that each member of the Board of Directors personally bears full liability for the Company’s losses, if he/she makes mistakes or fails to perform his/her duties.

The aforementioned provisions are similar to those of Article 85 of Law No. 1 Year 1995.

The previously applicable Indonesian Commercial Code (KUHD) does not provide for such “derivative action”, which originates from the company law of a Common Law system.

In the case of **PT. Dwi Satrya Utama v. Raymond Richard Sparks dan Inderadi Kosim, No. 59/Pdt.G/2002/PN. Jak-Sel (2002)**, the South Jakarta District Court examined the lawsuit of PT. Dwi Satrya Utama, the holder of 45% shares in PT. ICI Paints Indonesia, against 2 (two) Directors of PT. ICI Paints Indonesia.

³⁷ PT. Bank Perkembangan Asia v. PT. Djaja Tunggal cs, No. 1916 K/Pdt/1991 (1996),

The Plaintiff argued that the Defendants had inflicted losses on the Company for the following reasons, among other things:

1. Defendant I and Defendant II, either jointly or individually, arbitrarily caused the appointment of Legal Consultants Freshfields and Makarim & Taira by ICI Omicron BV for the interest of PPG Industries, Inc which was intending to purchase a Factory in Cimanggis without the consent of two Directors representing PT. Dwi Satrya Utama. (based on the Master Sale and Purchase Agreement).
2. Following the completion of the duties of those Legal Consultants, Defendant I and Defendant II approved the payment of legal fee to those Legal Consultants respectively in the amount of S\$ 16,970.13 (sixteen thousand nine hundred and seventy Singaporean dollars and thirteen cents) to Freshfields and US\$ 106,850.12 (one hundred and six thousand eight hundred and fifty US dollars and twelve cents) to Makarim & Taira, while the services of those Legal Consultants were for the interest of another party rather than the interest of PT. ICI Paints Indonesia.
3. Defendant I and Defendant II arbitrarily determined an excessive remuneration for the General Manager without the approval of all members of the Board of Directors of PT. ICI Paints Indonesia violating the provisions of Article 2 paragraph (3) of the Shareholders Agreement which reads as follows: The day to day management of the company shall be entrusted to a General Manager. The General Manager shall be appointed based on the approval of all the Directors of the Company but no Director shall unreasonably withhold such approval.
4. Defendant I and Defendant II, both jointly and individually, failed to take a corporate management action, namely prohibiting the General Manager to transfer money in the amount of US\$4,500,000.- (four million five hundred thousand US dollars) from a Bank Indonesia to a Bank overseas. Whereas at that time Indonesia was facing an acute economic crisis and all Indonesian citizens and legal entities were urged not to make any fund transfers to foreign countries.
5. Therefore, Defendant I and Defendant II made mistakes or failed in performing their duties for the interest of PT. ICI Paints Indonesia, hence the losses suffered by PT. ICI Paints Indonesia should be the personal liability of Defendant I and Defendant II (Article 85 paragraph (2) of Law No. 1 Year 1995 concerning Limited Liability Company).
6. Based on the aforementioned facts, it was proven that Defendant I and Defendant II had not only violated the provisions of Article 2 paragraph (3) of the Shareholders' Agreement, but also the provision set forth in Article 85 paragraph (2) of Law No. 1 Year 1995 concerning Limited Liability Company which reads as follows: Each member of the Board of Directors must in good faith and with full liability perform the duties for the interest and business of the Company, and accordingly, Defendant I and Defendant II had committed an unlawful act (*onrechtmatige daad*) inflicting losses on PT. ICI Paints Indonesia as provided for in Article 1365 of the Indonesian Civil Code.
7. The losses suffered by PT. ICI Paints Indonesia as a consequence of the unlawful act committed by Defendant I and Defendant II totaled S\$16,970.13 (sixteen thousand nine hundred and seventy Singaporean dollars and thirteen cents) and US\$106,850.12 (one hundred and six thousand eight hundred and fifty US dollars and twelve cents).

8. The losses suffered by PT. ICI Paints Indonesia in the amount of S\$16,970.13 (sixteen thousand nine hundred and seventy Singaporean dollars and thirteen cents) and US\$106,850.12 (one hundred and six thousand eight hundred and fifty US dollars and twelve cents) were incurred at the time of the payments to the Legal Consultants reducing the cash flow capacity of PT. ICI Paints Indonesia and actually causing the loss of opportunity to gain interest.

In the rebuttal and in the response to the main issue of the case, the Defendants refused all arguments of the Plaintiff as mentioned above. The Defendants requested the Court to pass a decision requiring the Plaintiff to place a public apology in Kompas and The Jakarta Post dailies for three consecutive days considering that its legal action had defiled the defendants' reputation.

After hearing the testimonies of the witnesses and examining the evidence, the South Jakarta District Court stated in its legal considerations that it was not proven that the appointment of Legal Consultants Freshfields and Makarim & Taira by PT. ICI Paints had inflicted losses was an unlawful act. It was not proven either in the Plaintiff's lawsuit that the Defendants had inflicted losses on PT. ICI Paints Indonesia for not prohibiting the transfer of money of US\$4,500,000.- to Deutsche Bank Singapore.

Therefore, the South Jakarta District Court decided to reject the Plaintiff's lawsuit in its entirety. It also declared that the Plaintiff had committed an unlawful act and punished the Plaintiff to place a public apology to the Defendants in Kompas and The Jakarta Post dailies for three consecutive days, the text of which had to be previously approved by the Defendants.³⁸

Unfortunately, no decision has been passed to date by the High Court and/or the Supreme Court on this dispute.

Conclusions

The Indonesian Limited Liability Company Law has been amended twice. First, the applicable law used to be the Indonesian Commercial Code (KUHD) which contained provisions on Limited Liability Company (1848-1995). The second one was Law No. 1 Year 1995 concerning Limited Liability Company which replaced the first one (1995-2007), and finally the new Law on Limited Liability Company has come into effect in 2007.

There are no significant changes with regard to the liabilities of Shareholders and members of the Board of Directors, either before the company obtains the status as a legal entity or afterwards. Shareholders' liability is limited to the amount of their shares and the Board of Directors are liable because of their positions. Both can be personally liable if they act in bad faith, violate the Law on Limited Liability Company and/or the Company's Articles of Association. This is reflected in the court decisions as described above, despite the different interpretations in those court decisions.

³⁸ PT. Dwi Satrya Utama v. Raymond Richard Sparks dan Inderadi Kosim, No. 59/Pdt.G/2002/PN. Jak-Sel (2002).

While law is the “law in the book”, court decisions can be regarded as “law in action”. A Law on Limited Liability Company which can create predictability, stability, and fairness is an absolute requirement for the functioning of such Law in promoting economic development.
