

BOARD RESIGNATION IMPACT ON LIMITED LIABILITY COMPANY GOING CONCERN: ABSENCE OF PROVISIONS

Daniel Suhardiman, Nindyo Pramono

Universitas Pelita Harapan

Universitas Gadjah Mada

Kuning44an@yahoo.com, nindyopramono@gmail.com

Abstract

In Indonesia, matters concerning limited liability companies is mainly governed by Law Number 40 of 2007 on Limited Liability Company (Companies Law). The Companies Law regulates all aspects from the formation of company until the dissolution of company along with the legal consequences. In forming a limited liability company, a company must be formed by 2 (two) or more people. This mandatory provision creates the practice of a limited liability company with 50-50 shareholder composition, especially for private company. Structurally, a limited liability company consists of General Meeting of Shareholders (GMS), the Board of Directors (BOD), and the Board of Commissioners (BOC). Both members of BOD and BOC serve the company with limited terms of office and shall be re-appointed by the GMS. In practice, there is a condition where the GMS fails to re-appoint or replace the BOD and BOC even when all the members of BOD and BOC's terms of office have been ended. During this period, those members of BOD and BOC can no longer act on behalf the limited liability company. The possibility of such company facing such situation is quite high, especially if the company's shareholder composition is 50-50. This research aims to discuss and analyse the BOD and BOC whose terms of office have ended without re-appointment or replacement by the GMS. The result shows that since the Companies Law has yet to regulate provision to overcome the described issue, this condition may endanger the operation and the existence of limited liability company. Consequently, the existing Company Law has to be amended to address the aforementioned issue.

Keywords: *Limited Liability Company, Demission State, Legal Vacuum.*

1. INTRODUCTION

Basically, law holds an important role in maintaining and sustaining a country's economy.¹ In economic perspective, law is a regulatory instrument that helps individual to fulfill their economic needs.² Company Law does not only encourage the company's growth, it also contributes to the growth of a country's economy. The most common company's form used in almost every country is limited liability company (hereinafter referred to as "Company"). According to Article 1 point 1 Law Number 40 of 2007 on Limited Liability Company (hereinafter referred to as "Companies Law") jo. Law Number 11 of 2020 on Job Creation (hereinafter referred to as "Job Creation Act"), Company is defined as:

"Limited Liability Company, hereinafter referred to as the Company, means a legal entity constitutes a capital alliance, established based on an agreement, in order to conduct business activities with the Company's Authorized Capital divided into shares and individual legal entity that meets criteria for Micro and Small Business that is stipulated in Law which governs Micro and Small Business."

¹ Say H. Goo, "An Economic Efficiency Approach to Reforming Corporate Governance: The Case of Multiple Stakeholder Boards", *Asian Journal of Law and Society* 4, (2017): pp. 387.

² Nindyo Pramono, *Bunga Rampai Hukum Bisnis Aktual*, Bandung: PT Citra Aditya Bakti, 2006, pp. 5.

Before the enactment of Job Creation Act, the main requirement to form a Company as a legal entity is stipulated in Article 1 point 1 Companies Law. In relation to this, if the Company's founder fails to meet one of the requirements, the Company validity would be questioned and it would not be considered as a legal entity. Those requirements are:³ 1) legal entity; 2) capital partnership; 3) formed by an agreement; 4) doing business activities; 5) authorized capital; and 6) meet the requirements stipulated by the law. The requirements would cover as follows:

1) Legal Entity

A limited liability company is basically a legal entity. Therefore, a Company is an entity that is eligible to hold right and obligation as if it is an individual. Companies Law states that a Company is a legal entity. The status of legal entity is obtained through the legitimation of law.⁴

2) Capital Partnership

As a legal entity, Company has authorized capital, an amount of capital recorded in the article of association.⁵ In relation to that, a Company is a set of capitals or association of capital. Hence, if the Company needs additional fund, it is possible to collect the fund by offering and selling the shares.

3) Formed by an Agreement

A Company is formed by an agreement. Therefore, a minimum of 2 (two) persons as the founders is required in forming a Company. The parties shall agree to establish a Company which is later proved by a written agreement in form of article of association. The article of association shall be made in deed of establishment before a Notary. The establishment of a Company shall meet the provisions stipulated in Book III of Indonesian Civil Act, especially in Chapter 2, Section 1 concerning contract in general,⁶ Section 2 concerning the conditions that are verified for the validity of agreements,⁷ and Section 3 concerning the effects of agreement.⁸

4) Doing Business Activities

Companies Law defines that a Company shall have purpose, aim, and business activity.⁹ Business activity is the activity of the Company in order to achieve its

³ Nindyo Pramono, *Hukum Bisnis*, Universitas Terbuka, Tangerang Selatan, pp. 3.17-3.18.

⁴ Sulistiowati, "Limited Liability dalam Limited Liability pada Konstruksi Perusahaan Kelompok Piramida", *Jurnal Mimbar Hukum* 23, No. 2 (2011): 249-262.

⁵ Yahya Harahap, *Hukum Perseroan Terbatas*, Jakarta: Sinar Grafika, 2009, pp. 34.

⁶ Articles 1313-1319 Indonesian Civil Act.

⁷ *Ibid*, Articles 1320-1337.

⁸ *Ibid*, Articles 1338-1341.

⁹ Article 2 Indonesian Companies Law.

purpose and aim.¹⁰ Every Company run its business activity, an economic activity which aims for gaining profit.¹¹

5) Authorized Capital

Company as a partnership of capital shall have authorized capital that is divided into shares.¹² Authorized capital is the Company's asset as a legal entity and it is separated from the founder's private assets, Company's organ and the shareholders.

6) Meet the Requirements stipulated by the Law

Every Company shall meet the requirements stipulated in Companies Law and its implementing regulations. A Company is established as a legal entity (*rechtspersoon*) through legal procedures set by the Companies Law.

After a period of time, the definition of Company in Article 1 point 1 Companies Law has been amended by the Job Creation Act. The Job Creation Act has brought several changes in company law, especially concerning limited liability company. The act stipulates and acknowledges the existence of One-Person Company along with the new legal entity elements. The One-Person Company that is acknowledged as a legal entity by the act is a Company that meets the criteria for Micro and Small Business ("UMK") which further stipulated in Government Regulation No. 8 of 2021 on Authorized Capital of the Company and Registration of Establishment, Amendment and Disbanding of Companies that Meet Criteria for Micro and Small Businesses ("Government Regulation No. 8 of 2021"). Job Creation Act does not regulate provisions concerning criteria for Micro and Small Business in detail. However, the criteria for Micro and Small Business are stipulated in Government Regulation No. 7 of 2021.¹³

As the definition of a Company in Indonesian Companies Law along with its amendment, a company in the form of a limited liability company is widely used by business actors. It is mainly due to its legal entity characteristic where there is a clear separation between the assets of the Company and the individuals who play the role as the Company's management board. With the separation of assets, in general, the management board of the Company has limited liability, which is limited to the shares they own in the Company.

Based on such Companies Law, a Company consists of 3 (three) organs, namely the General Meeting of Shareholders (GMS), the Board of Directors, and the Board of Commissioners. Provisions in the law states that the GMS, as one of the organs of the Company owns the authority that is not entitled to the Board of Directors and the Board of

¹⁰ *Ibid*, Explanation of Article 18.

¹¹ Nindyo Pramono, *Hukum Bisnis, op.cit.*, pp. 3.18. Lihat juga Sanjeet Singh, *et.al*, "The Goal of Business-A Review Paper", *Global Journal of Management and Business* 15, (2015): pp. 9-12.

¹² Tatyana A. Skvortsova, *et.al*, "The Formation of Authorized Capital in Economic Organizations", *European Research Studies Journal* 20, (2017): pp. 369- 378.

¹³ Government Regulation Number 7 of 2021.

Commissioners.¹⁴ Through the GMS, the shareholders of the Company exercise control¹⁵ over the management carried out by the Board of Directors as well as the assets and management policies carried out by the management of the Company.¹⁶ One of the authority of the GMS is to appoint members of the Board of Directors and the Board of Commissioners.¹⁷

Structurally, the Board of Directors is the organ that execute the management function of the Company, meanwhile the Board of Commissioners is the organ that carries out the supervisory function of the Company. It can be said that these two organs are the main organs of the Company, regardless both organs are appointed and dismissed by the GMS. Therefore, neither the position of the Board of Directors nor the Board of Commissioners should be in vacant since it may seriously affect the performance and Company's going concern.

In practice, both the positions of the Board of Directors and the Board of Commissioners have the potential to experience vacancies. Article 94 paragraph (3) and Article 111 paragraph (3) of Indonesian Companies Law requires "a term of office within a certain period of time" for the Board of Directors and the Board of Commissioners in carrying out their duties. In addition, the law also requires the re-appointment of the Board of Directors and the Board of Commissioners whose terms of office have ended through the GMS. In running the Company, there are many unprecedented variables that might prevent a Company from re-appointing members of the Board of Directors and Board of Commissioners whose term of office have come to an end. Thus, the two organs may be in vacant, such condition can also be called a demission state. This state of demission condition has the potential to threaten business activities and even the Company's going concern.

2. RESEARCH METHOD

This research is a normative legal research which is supported by interview. The characteristic of research is descriptive. on the basis of descriptive analysis and statutory approach. As a normative research, the data used is secondary data obtained through a literature study which further analyzed using qualitative methods.

3. ANALYSIS AND DISSCUSSION

3.1. Demission State of Board of Directors and Board of Commissioners in Limited Liability Company

The issue of demission state of Board of Directors and Board of Commissioners arises when the Company fails to convene the GMS in order to re-appoint or replace both members of the boards. The failure of convening GMS regarding the appointment of the Board of Directors and Board of Commissioners is very likely to occur in practice.

¹⁴ *Ibid*, Article 1 number 4 and Article 75 paragraph (1).

¹⁵ K. J. Martijn Cremers and Simone M. Sepe, "The Shareholder Value of Empowered Boards", *Stanford Law Review* 68, (2016): pp. 69.

¹⁶ Yahya Harahap, *op.cit*, pp. 306.

¹⁷ Article 94 paragraph (1) and Article 111 paragraph (1) Indonesian Companies Law.

If the Company fails to re-appoint the Board of Directors, the Board of Directors will automatically have no authority. The problem is, it is an unprecedented issue that there is no single provision in Indonesian Companies Law which regulates a situation in the event that the GMS is deadlocked in making decisions. Normatively, there are no provisions available to solve the issues. In addition, the provisions regarding the term of office of the Board of Directors are not comprehensively regulated. Therefore, the existing conditions in practice are remained unsolved and it leads to a legal vacuum.

The provisions in Indonesian Companies Law and its implementing regulations have not been able to answer and resolve the issues of the Board of Directors and the Board of Commissioners demission state. However, before discussing the demission state of the Board of Directors and the Board of Commissioners, it is naturally essential to first understand the duties and functions of the Board of Directors and the Board of Commissioners and the main points of their arrangement in Indonesian Companies Law.

3.1.1. Provisions regarding Board of Directors and Board of Commissioners in Limited Liability Company

The Board of Directors is an organ of a limited liability company that is authorized and fully responsible for managing the company for the benefit of the company, in accordance with the aims and objectives of the company and representing the company, both inside and outside the court in accordance with the provisions of the articles of association.¹⁸ Director or President Director is a position, and is not identical with the Board of Directors as an organ of the Company. The duties and authorities of the Board of Directors according to Indonesian Companies Law has a dual function, namely carrying out management duties and carrying out the duties of representing the Company.

The management duties of the Board of Directors include legal actions that are explicitly included in the aims and objectives as well as the business activities of the Company regulated in its articles of association as well as legal actions which according to custom, fairness, and propriety can support the Company's business activities, such as the appointment and dismissal of employees, or buy land for business purposes. Meanwhile, the duties of representatives include the authority to represent the Companies both inside and outside the court, unless otherwise stipulated in Companies Law and/or its articles of association.

The Board of Directors and the Company have a special relationship. The Company as a legal entity in carrying out legal actions will always the management board. Without the management board, legal entities will never be able to carry out their functions. The relation between the Limited Liability Company and the Board of Directors as management creates a fiduciary

¹⁸ *Ibid*, Article 1 paragraph (5).

relationship (fiduciary duties). The management board will always be the trusted party to act and carry out their authority solely for the purposes of the Company.¹⁹

Further, members of the Board of Directors have other obligations in addition to obligations based on fiduciary relationships or fiduciary duties. The other obligations include the duty of care, duties of loyalty, duties of skill, and duties to act lawfully. Among others, the obligations of the Board of Directors are as follows:

1) *Duty of Care*

The Board of Directors is fully responsible for the management of the Company. Every policy related to the management of the company, the Board of Directors must always act carefully and consider all conditions related to the policy to be taken in order to avoid negligence.²⁰ The Board of Directors is required to be legally responsible in the duty of care. Therefore, the Board of Directors is required to act with prudence in making all policies.²¹

2) *Duties of Loyalty*

The Board of Directors shall demonstrate a loyal attitude based on rational considerations. This means that the Board of Directors must be able to act decisively based on the Company's objectives as stipulated in the articles of association. Loyalty as referred is that the Board of Directors shall act solely for the benefit of the company only.²² The trust to take control of the management of the Company is given to the Board of Directors by the shareholders and stakeholders. Therefore, the actions taken by the Board of Directors must be in accordance with the interests and objectives of the Company. In this respect, personal interests shall be set aside.²³

3) *Duties of Skill*

The Board of Directors must have the expertise and knowledge to support their duties in managing the Company. Expertise and knowledge in managing a Company is a requirement that every member of Board of Directors of a Company should possess. For this reason, it is necessary to carry out a fit & proper test to determine candidates for the Board of Directors

¹⁹ Ridwan Khairandy, *Hukum Perseroan Terbatas*, Yogyakarta: FH UII Press, 2014, pp. 206-205.

²⁰ Nicholas J. McBride, "Duties of Care: Do They Really Exist?", *Oxford Journal of Legal Studies* 24, No. 3 (2004): pp. 417-441.

²¹ Christian Witting, "Duty of Care: An Analytical Approach", *Oxford Journal of Legal Studies* 25, No. 1 (2005): pp. 33-63.

²² Gabriel Rauterberg and Eric Talley, "Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers", *Columbia Law Review* 117, No. 5 (2017): pp. 1085.

²³ John Lowry, "The Duty of Loyalty of Company Directors: Bridging the Accountability Gap through Efficient Disclosure", *Cambridge Law Journal* 68, No. 3 (2009): pp. 6007-622.

who are competent in running the Company. Candidates who have good knowledge and abilities to manage the Company shall get additional value.²⁴

4) *Duties to Act Lawfully*

The authority to carry out the management of the company given to the Board of Directors is an attributive authority or authority granted by law. In this regard, the Board of Directors is obliged to lead the Company in accordance with the applicable laws or regulations. This is also related to every action or policy made by the Board of Directors. If it is known that the action or policy is contrary to the provisions of the existing laws and regulations, then it should not be done.²⁵

In contrast, the Board of Commissioners is the Company's organ in charge of conducting general and/or specific supervision in accordance with the articles of association and providing advice to the Board of Directors.²⁶ Each Company must have at least 1 (one) Commissioner.²⁷ If there is more than one person, it is called the Board of Commissioners.²⁸ Especially for companies whose business activities are related to collecting and/or managing public funds, or issuing acknowledgement of indebtedness to the public or public companies, a limited liability company must have at least 2 (two) members of the Board of Commissioners.²⁹ The Board of Commissioners in the composition of the Company's organs has the main task of overseeing the policies of the Board of Directors and providing advice to the Board of Directors. The Board of Commissioners has the authority which includes:

- a. provide approval or assistance to the Board of Directors to carry out certain legal actions regulated in the articles of association;
- b. examine the Company's books, balance sheet, and profit and loss account;
- c. temporarily dismiss the guilty Board of Directors while waiting for the GMS; and
- d. perform the work of the Board of Directors during the absence of the Board of Directors.

The main function of the Board of Commissioners in a Company is to supervise and provide advice to the Board of Directors. The function of supervision and providing advice is carried out so that the Company in carrying

²⁴ Sujata Balan, *et.al*, "Directors' Duties of Care, Skill and Diligence: An Analysis of Some Developments in Malaysia", *Journal of Malaysian and Comparative Law* 41, No. 2 (2014): pp. 53-76.

²⁵ Misahardi Wilamarta, *Hak Pemegang Saham Minoritas dalam Rangka Corporate Governance*, Jakarta: Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, 2002, pp. 145.

²⁶ Article 1 paragraph (6) Indonesian Companies Law.

²⁷ *Ibid*, Article 108 paragraph (3).

²⁸ Rudhi Prasetya, *Perseroan Terbatas Teori dan Praktik*, Jakarta: Sinar grafika, 2011, pp. 32.

²⁹ *Ibid*, Article 108 paragraph (5).

out business activities does not commit unlawful acts that are detrimental to the Company and its shareholders. The supervisory and advisory functions could be further explained as follows:³⁰

1) Supervisory Function

a. Financial Audit

The Board of Commissioners has the function of supervising the financial sector. As a crucial position in every company, the Board of Commissioners shall monitor the cash flow and financial condition of the Company.

b. Organization Audit

Supervision in the field of organization includes supervision of the organizational structure, line relationships from the leadership, the shape and size of the structure of an organization.

c. Personnel Audit

Personnel supervision is needed in determining the criteria to get individuals who meet the qualifications based on the Company's needs. General principles such as fiduciary duties, duties of skill, duties of care, and duties to act lawfully can be used by the Board of Commissioners in supervising personnel.

2) Advisory Function

a. In Making the Program Agenda

The Board of Commissioners functions to provide advice to the Board of Directors both in the process of making a meeting agendas and in work programs. This is intended to realize the implementation of good corporate management through the creation of a program agenda by the Board of Directors.

b. In Implementing the Program Agenda

The advice or input given by the Board of Commissioners, apart from the stage of making the program agenda, also includes the process of implementing the program agenda as the implementation of good corporate management.

Based on Indonesian Companies Law, the Board of Commissioners in carrying out their duties as an organ of a Company is subject to several principles. The principles held by the Board of Commissioners are as follows:³¹

1) Board of Commissioners is a Supervisory Board

Indonesian Companies Act explicitly states in general provisions that the Board of Commissioners is the organ that carries out the supervisory

³⁰ Ridwan Khairandy, *op.cit.*, pp. 242-243.

³¹ Munir Fuady, *Perlindungan Hukum Pemegang Saham Minoritas*, Bandung: Citra Aditya Bakti, 2005, pp. 76.

function. The supervision carried out is not limited to the Board of Directors but the supervision of the Company in general.

2) Board of Commissioners is an independent board

The Board of Commissioners is as independent as the other Company organs. The Board of Commissioners is not subject to any authority and carries out its duties for the benefit of the Company.

3) Board of Commissioners does not possess the management authority

The Board of Commissioners is the decision maker in carrying out the business activities of the Company, but it does not possess the authority to carry out the management of the company. The management authority of the company is fully owned by the Board of Directors.

4) Board of Commissioners is not allowed to give binding instruction to the Board of Directors

The main function of the Board of Commissioners is to supervise the Board of Directors in carrying out their duties. However, the Board of Commissioners is not allowed to give direct instructions and intervene the management board. It is due to the position of the Board of Commissioners which is the supervisory body in a company. Therefore, the Board of Commissioners in carrying out supervision may only grant the approval to certain policies taken by the Board of Directors, temporarily dismissing the Board of Directors, providing advice to the Board of Directors either requested or for the purpose of supervision.

5) The GMS is not allowed to order the Board of Commissioners

The GMS is the organ of the Limited Liability Company that has the highest power. However, the GMS is not allowed to order the Board of Commissioners due to the independent position of the Board of Commissioners.

Based on the descriptions of the roles and functions of the Board of Directors and the Board of Commissioners above, it is clear that the two organs of the Company play a vital role for the Company's going concern. Therefore, the absence of these two organs in a Company would be the same as a humans that are unable to carry out their daily activities.

3.1.2. Provisions regarding Terms of Office of Board of Directors and Board of Commissioners in Indonesian Companies Act

All members of the Board of Directors have a term of office during the management of the Company. The term of office of the Board of Directors is not specifically regulated by Indonesian Companies Law. Therefore, its implementation in practice may vary. The provisions of Article 94 paragraph (3) of Indonesian Companies Law only state that members of the Board of Directors are appointed for a certain period of time and can be re-appointed. Further, in the explanation of the article it is stated that:

- a. The requirements for the appointment of members of the Board of Directors for a certain period of time are intended so that members of the Board of Directors whose term of office has expired may not automatically maintain their original positions;
- b. To maintain the position, it must be done through re-appointment based on the GMS resolution.

The provisions of Article 94 paragraph (3) Indonesian Companies Law and its explanations do not comprehensively regulate the term of office of members of the Board of Directors. The explanation that are expressly determined are as follows:

- a. The requirements for the appointment of members of the Board of Directors must be limited to a certain period of time, for example, 3 (three) or 5 (five) years. The length of the period is not limited to a certain number as long as it has to fulfill a certain period of time; and
- b. If the term of office of a member of the Board of Directors has expired, then the member of the Board of Directors shall not automatically continue as if his original position for the next period or there must be re-appointment for the next term of office by the GMS resolution.

Members of the Board of Directors whose term of office has ended, since the expiration of that period, the former member of the Board of Directors is no longer entitled to act for and on behalf of the company. In order to maintain his authority to act for and on behalf of the company, it is necessary to re-appointment through the GMS.

The provisions regarding the term of office of the Board of Commissioners is similar to that of the Board of Directors. In fact, Indonesian Companies Law requires members of the Board of Commissioners to have a term of office for a certain period of time. This means that the law prohibits the appointment of members of the Board of Commissioners for an indefinite term of office as required by the provisions regarding the term of office of members of the Board of Directors.

As previously mentioned, the provisions regarding the term of office of the Board of Commissioners in Article 111 paragraph (3) of the Companies Law is similar with the provisions regarding the term of office of the Board of Directors as stipulated in Article 94 paragraph (3) where the term of office must be determined within a certain period of time. The end of the term of office of the members of the Board of Directors which has been determined automatically by law ends their term of office. The term of office of members of the Board of

Commissioners that has ended shall not automatically be continued as well. Therefore, it is necessary to re-appoint the board through the GMS.

3.1.3. Demission status of Board of Directors and Board of Commissioners

In terms of substance, the Companies Law only stipulates that members of the Board of Directors have a certain term of office without specifically determine the length of the term of office. In the event that the term of office has ended, the members of the Board of Directors shall not automatically act for and on behalf of the Company, unless by re-appointment through the GMS resolution.³² Issues that arise and may inflict fatal consequences for the Company's going concern are in the event that all members of the Board of Directors and members of the Board of Commissioners term have come to an end, no re-appointment or replacement of the management of the Company has been carried out timely.

Based on the provisions of Article 94 paragraph (1) and Article 111 paragraph (1) of Companies Law the authority to appoint members of the Board of Directors and the Board of Commissioners rests with the GMS. This authority is not entitled to other organs of the Company or other parties. The said authority was first owned by the founder of a Company. However, the authority is then transferred to the GMS. This provision is imperative and cannot be deviated or regulated differently in the articles of association of the Company.³³ In the event that the term of office of the Board of Directors and the Board of Commissioners has ended, they must be re-appointed through the GMS and the Company shall made the minutes of the GMS.³⁴

The Companies Law only stipulates that the establishment of a Company is carried out by 2 (two) or more persons without further stipulating regarding share ownership. The ownership of shares in a Company is possible for various variations because the choice to determine the composition is left entirely to the founders of the Company. In general, variations in share ownership can be in the form of majority share ownership and 50-50 share ownership. Furthermore, balanced share ownership is divided into 2 (two), namely:

- 1) 50-50 share ownership where there are only 2 (two) shareholders and each shareholder owns 50% (fifty percent) of the shares; and
- 2) 50-50 share ownership where the structure and composition of each shareholder does not own majority share or share ownership is less than 50% (fifty percent) of the shares.

At first, 50-50 share ownership in a company is initiated for a noble purpose. This kind of share ownership composition is originated from the value of eastern collectivity culture. The culture's teaching is to have a fair amount where the

³² Explanation of Article 94 paragraph (3) Indonesian Companies Act.

³³ Yahya Harahap, *op.cit*, pp. 359.

³⁴ *Ibid*, Article 90.

shareholders shall not take a larger portion of each other so that there is no majority share ownership.

In practice, the implementation of the Annual GMS and Extraordinary GMS may experience obstacles in a 50-50 shareholder Company. In fact, normatively, the implementation of the GMS, especially the annual GMS is an obligation. In this regard, disharmony in the relationship between shareholders in a Company may practically have an impact on the Company's management. This impact has the potential to obstruct the convening of the GMS. Meanwhile, the authority to appoint, replace, and dismiss members of the Board of Directors and Board of Commissioners are legally hold by the GMS.

The authority of the GMS as confirmed in Article 1 point 3 Companies Law is an authority that is not entitled to the Board of Directors and the Board of Commissioners. The relationship between shareholders who are in disharmony in a Company, especially a 50-50 shareholder Company may result in a deadlock in the process of re-appointment or replacement of members of the Board of Directors and the Board of Commissioners, even at the edge of the term of office of the members of the Board of Directors and the Board of Commissioners. In such condition, the GMS can never be held since the end of the term of office of the members of the Board of Directors and the Board of Commissioners means both boards lose all of their authority, including calling for the GMS.

The replacement of the Board of Directors and the Board of Commissioners of a Company is an essential matter for the Company's going concern due to limited term of office for both boards. The two organs of the company cannot maintain their term of office automatically since the appointment of the Board of Directors and the Board of Commissioners through the GMS mechanism is an imperative provision. With a prolonged dispute between shareholders, the replacement of management will always be deadlocked. The failure of the GMS to reach a decision to re-appoint or change the management is very likely to occur in the practice of running a Company, not to mention 50-50 shareholder Company. The worst condition of the failure of the GMS to re-appoint or replace the management is the paralysis of the business activities of the Company. This situation can be referred to as demission state. Consequently, the Company cannot carry out its activities due to the absence of the company's management and supervisory organs.

3.2. Legal Vacuum due to Demission State of Board of Directors and Board of Commissioners

The absence of norms in the context of positive law can be interpreted as absence of statutory regulations or more accurately said to be a legal vacuum (*rechtvacuum*).³⁵ Legal vacuum may occur when the existing issues have not been regulated in laws and

³⁵ Gamal Abdul Nasir, "Kekosongan Hukum & Percepatan Perkembangan Masyarakat", *Jurnal Hukum Replik* 5, No. 2 (2017): 173.

regulations, or even when the issues have been regulated in a statutory regulation, the provisions are unclear or even incomplete.

Indonesian Companies Act stipulates provisions regarding the term of office of the Board of Directors and the Board of Commissioners and its limitation to a certain period of time.³⁶ The interpretation of a certain period of time is defined in the explanation of Article 94 paragraph (3) of the law referring an example of 3 (three) years or 5 (five) years. This provision is intended so that the Board of Directors and the Board of Commissioners whose terms of office have ended do not automatically continue their original positions, but shall be re-appointed through the resolution of the GMS. Article 94 paragraph (3) only stipulates that the Board of Directors has a certain term of office and when the term of office has ended, the Board of Directors no longer has the authority to act for and on behalf of the company unless re-appointed through the GMS. Article 94 paragraph (3) explanation does not further stipulate what can be done in the event that the term of office of the Board of Directors has ended and there has been no re-appointment or replacement of the Board of Directors due to the failure of holding the GMS or the GMS is unable to make a resolution.

The re-appointment of the Board of Directors through the GMS is mandatory. However, failure to vote in relation to the appointment of the Board of Directors is very likely to occur in practice. The issue remains unsolved since there is no single provision in the Companies Law which regulates the condition of the Board of Directors' demission in the event that the GMS is deadlocked in making decisions. This problem does not only obstruct the business activities of the Company, it may paralyze all the activities of the Company. In short, it might bring harm to the Company since the Board of Directors and the Board of Commissioners are two main organs that affect the Company's going concern. The provisions regarding the term of office of the Board of Directors in Article 94 paragraph (3) are not comprehensively regulated and leave the existing issues in practice remain unsolved and create unintended legal vacuum.

3.2.1. Indonesian Companies Law Has Yet to Regulate the Demission State of Board of Directors and Board of Commissioners

The term "demission" has yet to be recognized in Indonesian Companies Law and other regulations. In the law, the used term is "ex" which refers to "ex-Board of Directors".³⁷ It is used in the explanation of Article 94 paragraph (3) of Indonesian Companies Act which regulates the term of office of members of the Board of Directors, which is appointed for a certain period of time and can be re-appointed.

Based on the definition as defined in the KBBI, the word "former" which means "used", and the word "former" which one of the meanings is to have served,

³⁶ *Ibid*, Article 94 paragraph (3) and Article 111 paragraph (3).

³⁷ KBBI Daring, "Mantan", accessed through <https://kbbi.kemdikbud.go.id/entri/mantan> on 7 June 2021. Based on the Indonesian Dictionary (KBBI),³⁷ the definition of the word "ex" is "former"³⁷ (officer, position, etc.)", with an example of its use in the sentence "he -- the governor who is now active in social organizations". "Former" has meaning in an adjective or adjective class so that the former can change the noun or pronoun, usually by explaining it or making it more specific.

then actually the word "former" is not suitable to describe the condition. According to the Companies Act, the Board of Directors and the Board of Commissioners may be re-appointed. The status of "former" is more accurately assigned to someone who is no longer hold the office due to replacement with the new management board. Thus, the word "former" which refers to "former Board of Directors" is more suitable to be used in condition where the Board of Directors and Board of Commissioners are dismissed and replaced by the GMS. In contrary, in the event that the term of office of the Board of Directors and the Board of Commissioners expires³⁸ but a GMS has not been held to re-appoint or replace the boards, it would be more appropriate to use the term "demission state".³⁹

Based on the meaning of the word "demission" defined in KBBI, the Board of Directors and the Board of Commissioners in a Company still are forced by the condition to carry out their duties even if their term of office has expired. Due to failure of the GMS to re-appoint or replace the expired boards with the new management board, therefore, the Company's organs position become vacant. Hence, the use of the word "demission" is more appropriate than "former". In practice, most Directors still maintain their position to carry out their duties even if their term of office has lapsed for a greater good and solely for the interest of the Company. The greater good in this regard is for the Company's going concern. In addition, such measure shall be taken for the interests of the workers, investors, debtors, creditors, suppliers, distributors, colleagues, and business partners. The Board of Directors shall continue to carry out their duties and functions as management board based on fiduciary duty, as long as the actions comply with the business judgment rule.

Directors who continue to carry out their management duty solely based on fiduciary duty are very vulnerable to confront with legal problem. In this regard, there is no legal protection that guarantees legal certainty for the Board of Directors in their status in demission state. As a result, the Board of Directors' authority may be questioned because their term of office to represent the company has no longer legitimate. In fact, the Board of Directors whose term of office has expired solely continues to carry out their duties due to fiduciary duty. At this point, the statutory provisions clash with the corporate governance's principles, especially fiduciary duty and business judgment rule. The certain thing is that the Board of Directors still has to pay the salaries of the workers, dealing with financial institutions and taxation in order to maintain the Company's existence. It is undeniable that the protection of the Board of Directors based on fiduciary duty and business judgment rule is clearly insufficient. Therefore, it is necessary to provide a legal protection in statutory provisions for the Board of Directors in maintaining the company while in a demission state.

³⁸Article 94 paragraph (3) and Article 111 paragraph (3) Indonesian Companies Act.

³⁹KBBI Daring, "Demisioner", accessed through <https://kbbi.kemdikbud.go.id/entri/demisioner>, on 7 June 2021. According to the KBBI, the meaning of the word "demission" is: "n a state without power (for example a cabinet and so on that have returned the mandate to the head of state, but are still carrying out daily tasks while waiting for a new cabinet to be sworn in)".

The lack of comprehensive regulation regarding the term of office of the Board of Directors creates a legal vacuum (*rechtvacuum*) and the Companies Law has not provided an answer for the solution. In fact, during the formulation of the Law, the provisions regarding the term of office of the Board of Directors were discussed. The expert team gave an idea that could anticipate the demission state problems. Initially, the explanation of the article regarding the term of office of the Board of Directors stated that Directors whose term of office has ended may not act for and on behalf of the company “in taking new legal actions”.⁴⁰ It means that actions such as paying workers' salaries and paying obligations in the banking and tax sectors are still within the authority of Directors whose term of office has lapsed.⁴¹

However, specific discussions regarding the terms of office of the Board of Directors and the Board of Commissioners are still not one of the main focuses of legislators. It is clearly seen in the regulation regarding terms of office which only consist of 1 (one) paragraph, namely Article 94 paragraph (3). The potential for disputes between shareholders that result in the failure of the GMS to re-appoint or replace the Directors and Board of Commissioners whose terms of office have expired is far from being anticipated. Although the basic principles of establishing and managing a Company have been stipulated, a set of provisions that can prevent the issue of Board of Directors and the Board of Commissioners terms of office need to be comprehensively determined. If such provisions are not stipulated, it will create legal uncertainty that has the potential to disrupt the management of a Company.

3.2.2. The Impact of Legal Vacuum due to the Absence of Regulation regarding Demission State of Board of Directors and Board of Commissioners

The absence of the members of the Board of Directors and the Board of Commissioners will inflict a fatal damage on the internal company. It is simply due to the vacancy of the organ that holds the management and supervision functions of the company can directly paralyze the company's business activities. The paralysis of the company's activities may lead to several internal problem. Among others, the companies may experience difficulties in carrying out their obligations to the employees. In this regard, the company's obligations in fulfilling the rights of the workers include paying their salaries/wages. If it is not fulfilled, it may leave an impact on decreasing of the company's productivity.⁴² In short, the paralysis of the company's activities due to vacancies in the organs that carry out the management and supervisory functions will have an impact on internal company that will affect the company's productivity. The worst condition that

⁴⁰ Obtained from interview with Ratnawati Prasodjo, Member of Drafting Team of Law No. 1 of 1995 dan Law No. 40 of 2007, on 3 October 2021.

⁴¹ *Ibid.*

⁴² Hesty Diyah Lestari, “Director’s Duty to Employees: Co-Relation Between Corporate and Labour Laws”, *Jurnal Mimbar Hukum*, Edisi Khusus, (2011): pp. 60.

might occur is that the company stops operating completely. If such condition happens, the impact will be very serious and may even disrupt the stability of the national economy.

In relation to the paralysis of the company's activities, the issues that arise can reach out to external aspects of the Company. External problems might have a wider impact since third parties are involved. The main external aspects involve the Company's reputation which will get a negative stigma from business actors and even the business world which consist of partners, colleagues, suppliers, and consumers. The Company is also unable to carry out its obligations to its creditors. Moreover, it can also have an impact to the country's tax earning. The Companies whose activities are paralyzed or unable to carry out functional business activities would not be able to pay its tax.

It should be noted that the issues are not only in the field of taxation. In carrying out its business activities, Companies also deal with credit facilities obtained through financial institutions which are Bank in general. If the Company's business activities become paralyzed, then the company would likely to experience financial distress and it leads to decreasing of the ability to pay the credit facilities. Non-payment loan is one of the reasons for company to go face bankruptcy.⁴³ Therefore, problems with external third parties can be fatal and threaten the continuity of the company's business.

The purpose of every statutory regulation including the Limited Liability Company Law is to uphold legal certainty. In making laws and regulations which generally binding, efforts must be made so that the provisions contained within the laws and regulations are clear, firm, and do not contain multiple interpretations or provide opportunities for other interpretations.⁴⁴ The absence of norms (*rechtsvacuum*) in Indonesian Companies Law, especially Article 94 paragraph (3) has clearly resulted in legal uncertainty when dealing with the issues of the Board of Directors and the Board of Commissioners demission state. Therefore, it is necessary to amend the term of office of the Board of Directors and the Board of Commissioners that is able to guarantee legal certainty and prevent the occurrence of a situation where the Board of Directors and the Board of Commissioners are in a demission statue. In addition, arrangements are also needed to protect the management board in carrying out the management of a Company in the event of both Board of Directors and Board of Commissioners in state of demission.

4. CONCLUSION

Indonesian Companies Law has regulated all matters relating to Limited Liability Companies, starting from the establishment of the company, management of the company,

⁴³ Hadi Shubhan, *Hukum Kepailitan Prinsip, Norma, dan Praktik di Peradilan*, Jakarta: Kencana 2008, pp. 88.

⁴⁴ Rochmat Soemitro, *Asas dan Dasar Perpajakan*, Bandung: Refika Aditama, pp. 21.

the dissolution and its all legal consequences. Companies have organs that carry out management and supervisory functions, namely the Board of Directors and the Board of Commissioners. Indonesian Companies Law also stipulates that the two organs are appointed for a certain period of time and may be re-appointed through a GMS resolution. Furthermore, Indonesian Companies Act stipulates that if the term of office of the Board of Directors and the Board of Commissioners has ended, the Board of Directors and the Board of Commissioners are not entitled to act for and on behalf of the Company. In such condition, all actions taken will become personal responsibility.

Based on normative juridical studies, it is found that there is a legal vacuum that brings jeopardize to the management of the Company. The legal vacuum concerns the issue when the Board of Directors and the Board of Commissioners are in demission state, namely when the terms of office of the boards have ended, but the two organs of the company have not been re-appointed or replaced by new management. The demission state of all members of the Board of Directors and Board of Commissioners may occur mainly due to the failure of convening a GMS. The failure may be caused due to the negligence of the shareholders or the disharmony between the shareholders which results in deadlock in every decision-making process. Technically, the problem might be more complicated if there is a 50-50 shareholder ownership in the Company. Further, it becomes even more difficult due to the absence of provision that regulates the demission state of the management board and supervisory board in Indonesian Companies Law. As a result, there will be a vacant in the management of the company and its activities would even be obstructed. This condition has to be addressed by amending the prevailing Companies Law. By this, it could provide legal certainty and then give no harm to the Company's going concern.

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