

Transfer Of Company Assets By Directors Without The Approval By The GMS: A Comparison With Malaysia

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Abstract: PT, in carrying out its daily business activities, is represented by appointed people, namely people who occupy the position of directors and company officials, the Board of Directors has broad authority to ensure that the company will run adequately and properly as the intent and purpose stated in the deed. One of the authorities of the board of directors is to transfer the assets of PT, but in UUPT, this authority is limited by the approval of the GMS. The type of research used is normative legal research, which centres on evaluating how well the rules or norms are applied in relevant favourable legislation. To gain insight into various aspects of the legal issues studied in this research using a statute approach and comparative approach with Malaysia. The results in this study are First, although the board of directors has the authority to transfer the assets of the PT, it is limited as in article 102 paragraph (1) letter an of the Company Law where transferring the help of the PT more than 51% of the net assets of the PT during the year must be approved by the GMS. Second, if the directors transfer assets exceeding the limitations of article 102 paragraph (1) letter a of the Company Law, it will become the personal responsibility of the directors or not the responsibility of the PT. Third, when compared to Malaysia, the authority of the directors in the transfer of assets in Indonesia is greater than in Malaysia, where the directors in the Companies Act 2016 must obtain GMS approval if the transfer of assets is more than 25% of total assets.

Keywords: Directors; transferring the assets of PT;

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INTRODUCTION

A limited Company in Indonesia called Limited Liability Company (PT) was initially known as Naamloze Vennootschap (NV)¹, which was regulated in The Trade

Law (KUHD). The form of business currently most widely used in business activities is a Limited Company (PT), which continues to grow in line with economic developments in Indonesia. The development of PT is also inseparable from regulations issued by the government to provide convenience and responsibility for PT as a Legal Entity. Birth

¹ Handri Raharjo, *Corporate Law* (Yogyakarta: Pustaka Yustisia, 2009), 69.

of a Limited Liability Company as a legal entity (rechtspersoon, legal entity) because it was created or realised by a process under the provisions of the laws and regulations².

Limited Company, starting now referred to as the Company, is a legal entity that is a capital partnership, established based on an agreement, conducting business activities with authorised capital which is divided into shares and fulfils the requirements stipulated in this Law and its implementing regulations.³ Limited Company consists of two words, Company and limited. The Company refers to PT capital which consists of shares or shares. The word limited refers to the responsibilities of shareholders whose scope is limited to the nominal value of all the shares they own. PT is one form of business economic activity that gets the most attention⁴. PT is now the most preferred form of business economic activity. Limited liability companies also make it easy for owners or shareholders to transfer their Company (to everyone) by selling all of their shares.⁵

In carrying out its daily business activities, the Company is represented by appointed persons, namely persons holding the positions of directors and company officials. In Indonesia, a legal entity in the form of a limited liability company has 3 (three) main

organs, namely the General Meeting of Shareholders, the Board of Commissioners, and the Board of Directors. The Company is bound by all legal actions the directors and other company officials take, which does not necessarily make them free from legal responsibility that may be related to their actions. According to Article 1 paragraph (5) of the Limited Liability Company Law, the Board of Directors is an authorised company organ entirely responsible for managing the Company for the benefit of the Company, under the purposes and objectives of the Company. It represents the Company, both inside and outside the court, under the provisions of articles of Association. In carrying out their duties, the Board of Commissioners, Directors, and other company officials are required to carry out the principle of duty of care, which is responsible for the 'Company itself, shareholders, employees, creditors, supervisory bodies, and /or the government, clients, and customers, including competitors and colleagues at the board of directors level and/or other company officials.

The Board of Directors has broad authority to ensure that the Company will run properly and correctly as the intent and purpose stated in the deed. The Board of Directors is the main motor in the Company, where the directors must carry out administrative and managerial functions.⁷ Thus, the board of directors' authority is almost unlimited as long as it does not violate the Law and is carried out in good faith. This happens because the authority given by the Company to the board

² Verina Yuwono Setianto, "Personal Liability of the Board of Directors in a Bankrupt Limited Liability Company," *Pulpit of Yustitia* 1, No. 2 (2017): 203.

³ Republic of Indonesia *Law Number 40 of 2007 concerning Limited Liability Companies*, n.d., Article 1 Number 1.

⁴ Ridwan Khairandy, *Limited Liability Company Doctrine, Laws and Regulations and Jurisprudence* (Yogyakarta: Kreasi Total Media, 2020), 1.

⁵ Binoto Nadapdap, *Limited liability company law (based on Law No. 40 of 2007)*, 7 ed. (Jakarta: Jala Permata Aksara, 2020), 4–5.

⁶ Committee on Non Profit Corporations, *Guidebook for Directors of Non Profit Corporation*, Second. (New York: American Bar Association, 2002), 19.

⁷ Herlien Budiono, *The Doctrine of Ultra Vires In Theory and Practice* (Jakarta: Notary Bulletin, 2000), 2000.

of directors is inherent, as specified in Article 1 number 5 of the Company Law.

The existence of directors in the company is akin to the life of the Company. Without directors, a company will also not be able to run. Conversely, there can be no directors without a company. Therefore, the existence of directors for a company is significant, and managing a company takes work. For the Company to be handled according to the intent and purpose of establishing the Company, then becoming a board of directors needs requirements and expertise. Authority delegation from the C company to the board of directors to manage the Company is commonly referred to as a fiduciary duty⁸.

Despite the magnitude of the board of directors' authority, there are still restrictions in exercising its authority in certain legal acts. This is based on Article 102 of the Company Law. Apart from those regulated in the Company Law, this limitation can also be held in the Association Articles of PT. In conducting a company, the possibility of setbacks and lack of capital is possible, thus the directors need to sell the company's assets. ⁹Regarding the transfer of PT assets, according to the provisions of Article 102 paragraph (1) letter a of the Company Law that "in transferring the company's assets of more than 50% (fifty percent) of the company's net assets in 1 (one) or more transactions, whether related to each other or not, it is mandatory to obtain approval

from the General Meeting of Shareholders". As for the Company's wealth or assets, all goods are movable and immovable, tangible and intangible, as specified in Article 503 and Article 504 of the Civil Code. Thus, in an asset purchase transaction by PT¹⁰, if it exceeds the provisions stipulated by the Company Law, there has been a transfer of wealth in which part of the PT's assets has been transferred to purchase assets. Hence the purchase of these assets also requires approval from the GMS.

There are several previous researches that examine this topic, such as the Responsibility of Directors for Transferring Company Assets Without Going Through the GMS by Gede Dwi Ambara and I Wayan Novy Purwanto, where this research focuses on the responsibility of directors who transfer company assets without the approval of the GMS to third parties who receive or conduct asset transactions with the directors. Then the research entitled Legal Protection of Shareholders in the Sale of Company Assets Based on Article 102 Paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies by Musriansyah and Sihabudin, this research focuses on legal protection of shareholders based on the theory of legal protection against acts of transfer of assets by directors.

From the explanation that follows, a problem will arise when the board of directors transfers the assets of PT, which in quantity should be based on the provisions of the Company Law must be approved by the GMS, but the board of directors performs this action without seeking approval from the GMS. Legal actions carried out by directors who transfer assets without the approval of the GMS will increasingly intersect with the

⁸ Daniel Attenborough, 'Misreading the Directors' Fiduciary Duty of Good Faith', *Journal of Corporate Law Studies* 20, no. 1 (January 2, 2020): 75, <https://www.tandfonline.com/doi/full/10.1080/14735970.2019.1631516>.

⁹ Purbo Adjar Waskito, 'Tanggung Jawab Hukum Direksi Terhadap Kerugian Perusahaan Dalam Pengurusan Perseroan Terbatas', *Jurnal Cita Hukum Indonesia* 1, no. 1 (2022): 43.

¹⁰ M. Yahya Harahap, *Limited Liability Company Law* (Jakarta: Sinar Grafika, 2018), 400.

protection of shareholders, especially when there are losses from the transfer of assets.

This paper will discuss in more depth related to this problem by raising the title "Transfer Of Company Assets By Directors Without The Approval By The GMS: A Comparison With Malaysia". with the issues raised, namely what are the limits of the authority of the board of directors in the transfer of PT assets and what are the legal consequences of the transfer of PT assets carried out by the directors without obtaining GMS approval, then a comparison will also be made with Malaysia regarding the limits of the authority of the board of directors in the transfer of PT assets.

METHOD

The method of research used is normative legal research, which is research that focuses on evaluating how well the rules or norms applied in the relevant positive laws and regulations. To gain insight into various aspects of the legal issues studied in this research relating to the limitation of the authority of directors in transferring PT assets without the approval of the GMS using a statute approach, conceptual approach and comparative approach.¹¹

ANALYSIS AND DISCUSSION

Limitations on the Authority of the Board of Directors in the Transfer of Perseroan Assets

The company's organs consist of the General Meeting of Shareholders (GMS), the Board of Commissioners (if there is more than one Commissioner) and the Board of Directors (if there is more than one Director), where the General Meeting of Shareholders (GMS) is

the holder of the highest power or position in the company, the Board of Commissioners is a representative of the General Meeting of Shareholders (GMS) which supervises the company's operations carried out by the Board of Directors¹².

The Board of Directors is an organ of the Company that is authorised and entirely responsible for the management of the Company for the benefit of the Company, under the purposes and objectives of the Company¹³. It represents the Company, both inside and outside the court, according to the provisions of the articles of association.¹⁴ In short, the Board of Directors is the organ that represents the interests of the Company¹⁵ as an independent legal subject. The Company is the reason for the existence (*raison d'être*) of the Board of Directors because if there is no Company, there is no Board of Directors. That is also why the Board of Directors should serve the interests of the Company, the Board of Directors is not the representative of shareholders, but the Board of Directors is the representative of the Company as *persona standi in judicio* (independent legal subject).

Based on Article 92 paragraph (1), jo. Article

¹²Ryamirzad and Galang Fauzan Prawinda, 'Karakteristik Persetujuan Dewan Komisaris Terhadap Kewenangan Direksi Menjaminkan Aset Perusahaan', *Perspektif* 25, no. 2 (2020): 87.

¹³I Made Pria Dharsana et al., 'Responsibility Of The Board Of Directors On Implementation Of Company When Conflict With Commissioners', *Journal Equity Law And Governance* 1, no. 2 (2021): 91.

¹⁴Republic of Indonesia *Law Number 40 of 2007 concerning Limited Liability Companies*, Article 1 number 5.

¹⁵Eko Priyono, Agus Surono, and Sadino Sadino, 'Doktrin Business Judgment Rule Dalam Memberikan Perlindungan Hukum Kepada Direksi Bumn (Studi Kasus Pt. Pln)', *Jurnal Magister Ilmu Hukum* 7, no. 2 (2022): 34.

¹¹Peter Mahmud Marzuki, *Legal Research* (Jakarta: Prenadamedia Group, 2009), 83.

97 paragraph (1), Article 102 paragraph (1), and Article 98 paragraph (1) of the Company Law, the management of the Company is entrusted to the Board of Directors. The concept of management is not intended that the Board of Directors is only the executor of policies and plans made by the GMS or the Board of Commissioners, but rather the term management is interpreted as the Board of Directors is assigned and therefore authorised to manage the Company:¹⁶

- a) Managing and organise the business activities of the Company;
- b) Managing the Company's assets; and
- c) Representing the Company in and out of court.

In fact, what is stated in letters a and b above cannot be separated from the Company because the management of the Company's assets must support implementing the Company's business activities¹⁷. Thus, the Board of Directors only has 2 (two) duties, namely, the management and representation of the Company. In connection with these two duties, the direction of the Company is essentially the duty of all members of the Board of Directors without exception (collegiate *bestuurs-veranwoordelijkheid*) as stated in the Company Law Explanation of Article 98 paragraph (2) and Article 104 paragraph (2). The duty and authority to carry out the management of the Company are the duty and authority of each member

of the Board of Directors confirmed in joint and several personal liabilities as stipulated in Article 97 paragraph (4) of the Company Law with exceptions as stipulated in Article 97 paragraph (5) of the Company Law¹⁸.

Certain actions or agendas in the company are required by law to be approved by the GMS. For example, related to capital increase (both authorised capital and issued and paid-up capital), appointment of new management or extension of the term of office of the company's management, amending the articles of association, as well as to transfer the company's assets or make debt collateral for the company's assets which constitute more than fifty per cent of the company's net assets.¹⁹

The Articles of Association may contain certain restrictions binding on the Board of Directors. It is common for the Articles of Association to provide that the Board of Directors may only perform certain legal acts of the Company after obtaining the approval of the GMS or the Board of Commissioners. However, it should be noted that such restrictions must not be such as to negate the independence of the Board of Directors to carry out management and represent the Company reasonably in the Company's own interest. In summary, the authority of the Board of Directors is limited by (1) laws and regulations, (2) the purposes and objectives of the Company, and (3) restrictions in the

¹⁶Chatamarrasjid Ais, *Breaking the Corporate Veil and Actual Problems of Corporate Law*, 1 ed. (Bandung: Citra Aditya Bakti, 2004), 73.

¹⁷Lu Sudirman, 'Application Of Acquit Et De Charge In Removal Of Liability Of The Board Of Directors Of A Limited Company', *Widya Yuridika* 6, no. 1 (December 2, 2022): 142, <http://publishing-widyagama.ac.id/ejournal-v2/index.php/yuridika/article/view/4000>. providing convenience for the owner (shareholder

¹⁸I Wayan Novy Purwanto, "Accountability of the Board of Directors for the Transfer of Company Assets Without a GMS" (2020): 9.

¹⁹Sriwati, 'Pengalihan Kekayaan Perseroan Yang Lebih Dari Lima Puluhan Persen Jumlah Kekayaan Bersih Perseroan Melalui Rapat Umum Pemegang Saham Luar Biasa Yang Tidak Mencapai Kuorum Menurut Undang-Undang Perseroan Terbatas', *Jurnal Education And Development* 4, no. 8 (2020): 72.

Articles of Association. Concerning the restrictions that bind the Board of Directors, the Company Law expressly stipulates that such restrictions do not have an external effect (*externe werking*), namely that legal actions taken by the Board of Directors without the approval of the GMS or the Board of Commissioners remain binding on the Company as long as the other party to the legal action is in good faith²⁰. This means that the other party in question is protected by the *presumption of good faith*, a principle in Indonesian civil law.²¹

In terms of joint and several personal liabilities, this stems from two facts, namely that (1) the Company is an independent legal subject and (2) the Company as a legal creation is an artificial person which requires a Board of Directors assigned to carry out the management and representation of the Company. Several articles of the Company Law that regulate such responsibilities are described below.

Article 92 paragraph (1) and Article 98 paragraph (1) of the Company Law stipulate that the Board of Directors is the management and representative of the Company. This duty creates an obligation on each member of the Board of Directors to always safeguard and defend the Company's interests as referred to in Article 97 paragraph (2) of the Company Law. Errors or omissions in carrying out this duty result in each member of the Board of Directors being jointly and severally liable, as referred to in Article 97 paragraphs (3) and (4) of the Company Law. As long as the members

of the Board of Directors carry out their obligations within the limits of their authority, the members of the Board of Directors cannot be held liable for the Company's losses, as referred to in Article 97 paragraph (5).

Suppose the Board of Directors violates the provisions of the Company Law or the Articles of Association that require the Board of Directors to obtain prior approval from the GMS or the Board of Commissioners. In that case, a distinction must be made between the internal consequences (*interne werking*) and the external consequences (*externe werking*) of the board of directors' legal actions. Concerning external consequences, the Company Law recognizes that third parties in good faith must be protected. This is emphasized in Article 102 paragraph (4) regarding the approval of the GMS and Article 117 paragraph (2) regarding the approval of the Board of Commissioners. Although the Board of Directors has carried out legal actions without the approval of the GMS or the Board of Commissioners as required by the Articles of Association, the legal actions are still binding on the Company as long as the other party in the legal action is in good faith. Thus, the legal action performed by the Board of Directors does not have an external effect (*externe werking*) because it is void or can be canceled.

This is different from the internal consequences of legal actions carried out by the Board of Directors in violation of the provisions of Article 102 paragraph (1) and Article 117 paragraph (1) of the Company Law, which requires the Board of Directors to obtain prior approval from the GMS or the Board of Commissioners. In such an event, each member of the Board of Directors is jointly and severally liable for the losses

²⁰Ibid., no. Article 102 paragraph (4) and Article 117 paragraph (2).

²¹Subekti and R. Tjitrosudibio, *Civil Code (Bulgerlijk Wetboek)*, 38 ed. (Jakarta: Pradnya Paramita, 2020), Art. 533, 1865, 1916, 1965.

suffered by the Company as a result of such legal action. This is according to the UUPT Article 97 paragraphs (3) and (4). Therefore, both shareholders represent at least 1/10 (one-tenth) of the total number of shares with voting rights. Moreover, the Board of Commissioners has the right to file a lawsuit on behalf of the Company concerning the losses suffered by the Company, as stated in Article 97, paragraph (6) and paragraph (7) of the Company Law.

The purpose of establishing the responsibility of each member of the Board of Directors jointly and severally for the consequences of the Company's bankruptcy that occurs due to the fault or negligence of the Board of Directors as stated in Article 104 paragraph (2) and paragraph (3) of the Company Law is a logical and natural consequence of the task of managing the Company which is entrusted by law to the Board of Directors, giving birth to the fiduciary responsibility of the Board of Directors. Therefore, it is not wrong to say that between the Company and the Board of Directors, there is a fiduciary relationship that gives birth to a fiduciary duty for the Board of Directors, namely the duty of loyalty and good faith and the duty of care, skill, and diligence.

As emphasized in UUPT Article 97 paragraph (2) and paragraph (3), the Board of Directors can only be held liable for the Company's losses if the losses are caused by the fault or negligence of the Board of Directors for not carrying out their duties in good faith and with full responsibility. Therefore, it is unreasonable and unfair to expect, let alone require, the Board of Directors to guarantee that the Company whose management is assigned to the Board of Directors must be

profitable.

The Company Law confirms that the Board of Directors is authorized to manage the Company under limits set by the Company Law and the Articles of Association. This authority is similar to the duty to retain discretion, which is part of the duty of loyalty and good faith that the Company's Board of Directors must implement in Australia and the UK. As a measure to determine whether members of the Board of Directors have conducted management in good faith and with full responsibility, Article 97 paragraph (5) of the Company Law stipulates 4 (four) cumulative criteria as follows:

- a. the Company's loss is not due to the fault or negligence of the member of the Board of Directors concerned;
- b. the member of the Board of Directors concerned in good faith and prudence has carried out management in the interests of and under the purposes and objectives of the Company
- c. the member of the Board of Directors concerned has no conflict of interest either directly or indirectly over the management action that has resulted in the loss; and
- d. the member of the Board of directors has taken measures to prevent the incidence or continuation of the loss.

Given the measure mentioned above as referred to in Article 97 paragraph (5) of the Company Law, it is clear that in assessing the responsibility of members of the Board of Directors for the management of the Company, the so-called business judgment rule applies. Furthermore, based on the provisions in Articles 1365 and 1366 of the Civil Code, the Board of Directors (meaning all members of the Board of Directors) can be

personally liable for losses suffered by third parties due to unlawful acts committed by the Company. Specifically, regarding the meaning and scope of unlawful acts, it should be noted that unlawful acts are acts and omissions (not doing what should be done) that: violate the rights of others; or

- a) conflicts with the obligations of the perpetrator; or contrary to good morals; or
- b) contrary to the care reasonably exercised for the safety of others or their property.

Therefore, if the Board of Directors enters into an agreement on behalf of the Company, it is known that the Company will not be able to fulfill its obligations regarding the agreement made, the actions of the Board of Directors are unlawful acts that can be accounted for to the Board of Directors. This responsibility can also fall on the Board of Commissioners if they serve as the Board of Directors because the Board of Directors is vacant and in that position carries out legal actions on behalf of the Company that harm third parties, as referred to in Article 118 of the UUPT, and even shareholders involved in unlawful acts committed by the Company, as referred to in Article 3 paragraph (2) letter c. UUPT.

Acts that are explicitly or implicitly covered by the Company's acting skills (i.e. included in the Company's purposes and objectives) are *ultra-vires* acts. Acts that are beyond the Company's acting skills (i.e. not covered by the Company's aims and objectives) are *ultra vires* acts²². The definition of *ultra vires* means that certain actions that if done by humans are valid, turn out to be outside the Company's

acting skills because they are outside the scope of their purposes and objectives as stated in the Articles of Association.

Authority of the board of directors in the transfer of the Company's assets

Legal action to release the company's assets, according to the UUPT, especially in Article 102 paragraph (1) letter a, it is explained that in transferring the company's assets of more than 50% (fifty percent) of the company's net worth in 1 (one) or more transactions, whether related to each other or not, it is mandatory to obtain approval from the company's General Meeting of Shareholders (GMS).

In addition, the limitations on the authority of the board of directors affirmed in the Uupt include the following: ²³

1. Article 2: the company's activities must be in accordance with its purposes and objectives and not contrary to laws and regulations, public order and decency;
2. Article 97 paragraph (1): the board of directors carries out the management of the company for the benefit of the company and in accordance with the purposes and objectives of the company;
3. Article 97 paragraph (2): the management as referred to in paragraph (1) must be carried out by each member of the board of directors in good faith and full of responsibility;
4. Article 99 paragraph (1): members of the board of directors are not authorized to represent the company if:
 - a) There was a case in court between the company and the members;
 - b) The member of the board of directors

²²Ali Khaled Qtaishat, 'The Doctrine of Ultra Vires: Commendable or Condemnable!', *Asian Social Science* 16, no. 5 (2020): 149.

²³Zarman Hadi, *Characteristics of Personal Responsibility of Shareholders, Commissioners, and Directors in a Limited Liability Company* (Malang: UB Press, 2011), 88.

concerned has a conflict of interest with the company.

5. There are certain legal acts that must obtain prior approval from the board of commissioners and / or GMS as stipulated in the articles of association.

In addition, the articles of association have meaning for the company. These articles of association shall contain the purposes and objectives of the company. The purpose and objectives of this company can be a limitation of the scope of the acting authority of the company concerned. Laws and regulations limit the authority to act as a limited liability company, articles of association and the purposes and objectives of the company. A legal action is outside the purpose and objectives of the company when it meets one of the criteria: ²⁴

- a) The legal acts concerned are expressly prohibited by the articles of association;
- b) Taking into account special circumstances, the legal act concerned cannot be said to support the activities referred to in the articles of association;
- c) Taking into account special circumstances, the legal act concerned cannot be interpreted as supporting the interests of a limited liability company.

In general, an act is said to be *ultra vires* if it is done without or exceeding the *authority* to do the deed. For the company, such acts are *ultra vires* if they are carried out outside or beyond the authority of the board of directors as stated in the articles of association and laws and regulations. To what extent the deed can be said to deviate from the purpose and objectives of the company, and therefore can be categorized as *ultra vires* acts, can

be seen from the habits or prevalence that occur in the practice of the business world. Actually, the board of directors is only entitled and authorized to act on behalf of and for the benefit of the company within the limits permitted by the applicable laws and regulations and its articles of association. ²⁵

Any action committed by the board of directors beyond the authority granted is considered *an ultra vires* act. The legal conduct of the board of directors is said to be *ultra vires* if it exceeds the limits of the authority stated in the articles of association and laws and regulations. The Board of Directors in carrying out the management of the company, is not only bound by what is expressly stated in the purposes and objectives and business activities of the company but can also support or facilitate its duties (secondary), but is still within limits allowed or still within the scope of its duties and obligations (*ultra vires*) ²⁶ as long as it is in accordance with custom, reasonableness, and propriety (no *ultra vires*).²⁷

The Board of Directors is basically only entitled and authorized to act on behalf of and for the benefit of the company within the limits permitted by the laws and regulations and articles of association of the company. Any action taken by the board of directors beyond the authority granted is not binding on the company, meaning that the board of directors has limitations in acting on behalf of and for the benefit of the company. Article 101 paragraph (1) specifies that members of the Board of Directors are required to report to the PT regarding the shares they own

²⁴Fred B.G. Tumbuan, *Limited Liability Company and Its Organs (A Sketch)* (Surabaya, 1988), 4.

²⁵ Ibid.

²⁶Khairandy, *Limited Liability Company Doctrine, Laws and Regulations andnYurisprudence*, 229.

²⁷Ibid.

and/or exit and other PT to be subsequently recorded in a special register, members of the board of directors who do not carry out these obligations and cause losses to the PT, then he will be personally responsible for the loss of PT.²⁸

Then another obligation of the board of directors and related to this research is the obligation of the board of directors who are required to seek the approval of the GMS to transfer the company's assets either making a guarantee of the company's wealth debt which amounts to more than 50% (fifty percent) in one or more transactions, then the issue of transferring the company's assets will greatly affect the survival of the company which must be known and decided directly by the GMS, because the authority is very strategic and has the potential to contain risks for the continuity of the interests and objectives of the Company, which in fact is also the interests of shareholders. Then shareholders must know firsthand the policy and decide for themselves.²⁹

The Board of Directors is basically only entitled and authorized to act on behalf of and for the benefit of the company within the limits permitted by the laws and regulations and articles of association of the company. Any action taken by the board of directors beyond the authority granted is not binding on the company, meaning that the board of directors has limitations in acting on behalf of and for the benefit of the company.

It is stated in Article 92 paragraph (2) which expressly limits the authority of the board of directors to carry out the management of the company, that is, it must be in accordance with the policies deemed appropriate and

within the limits specified in the laws and articles of association, then if the board of directors exceeds the limits and conditions specified in the law and articles of association, it can be said that the actions of the members of the board of directors are categorized as *ultra vires* deeds. In addition, the decision of the GMS can also limit and determine the requirements regarding the authority of the board of directors, provided that the decision must not conflict with the laws and articles of association of the company.

LIABILITY OF THE BOARD OF DIRECTORS FOR THE TRANSFER OF COMPANY ASSETS WITHOUT THE APPROVAL OF THE GMS

The Board of Directors is basically only entitled and authorized to act on behalf of and for the company's benefit within the limits permitted by the laws and regulations, and articles of association of the company. Any action taken by the board of directors beyond the authority granted is not binding on the company, meaning that the board of directors has limitations in acting on behalf of and for the company's benefit.

Furthermore, there is the doctrine of *ultra vires* intended to protect investors or shareholders, that is, to prevent the directors from committing *ultra vires* acts or later obtaining compensation from the company. This is referred to as an external aspect of *ultra vires* is the issue of whether the *ultra vires* contract is binding on third parties and the company concerned. Basically, an *ultra vires* contract is unlawful, null and void and cannot be ratified later by an AGM. Thus, the company can refuse to carry out obligations under the contract, because it is not binding on the company, so this obligation is the

²⁸Ibid.

²⁹Ibid., 230.

personal responsibility of the board of directors. The ultra vires arrangement means that certain legal acts if carried out by humans are valid, they are not valid if they are related to the purposes and objectives of the limited liability company stipulated in the articles of association of the limited liability company.

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In the legal system in Indonesia, especially in the corporate legal order, the UUPT, which is the basic rule regarding PT, does not provide an unequivocal answer whether to apply the ultra vires doctrine even though it actually still hints at the enactment of the ultra vires doctrine. The Uupt does not expressly regulate this doctrine, but rather entrusts its regulation in the company's articles of association which are of course supervised by the government department that oversees it. As long as the board of directors acts in good faith and the action is solely for the company's benefit, but it turns out that the company still suffers losses, it does not necessarily mean that the loss becomes the burden of the directors' personal responsibility.³²

In corporate law, it is known as a doctrine that teaches that the directors of a company are not responsible for losses arising from an act of making a decision, if the action is based on good faith and caution.³³ The Board of Directors receives legal protection

without the need to obtain justification from shareholders or courts for its decisions in managing the company.

The case in which the author believes that the liability of directors who transfer assets without the approval of the GMS should be applied to the ultra vires doctrine is the case of PT B which has four shareholders consisting of C, D, E, and F with a composition of C by 42%, D by 4%, E by 3%, and F by 51%. One day, it turned out that C passed away so that C's share ownership in PT B was inherited by his heirs.

Immediately after C's death, PT B was in a situation where it was urgent to sell the company's assets to PT Z. The asset is the only asset of PT B, so the amount must be more than 50% of the company's net assets. It is said to be urgent because previously PT B has made a binding agreement for sale and purchase with PT Z that PT B is obliged to sell the assets to PT Z within a certain period of time. If PT B does not immediately fulfil this obligation, it is not impossible that PT Z will sue PT B for default. PT B planned to immediately hold a GMS by summoning all shareholders, including the heirs of C. The problem is, when contacted, the heirs of C have said they are not willing to fulfil the summons of the GMS.

COMPARISON OF DIRECTORS AUTHORITY OVER ASSET TRANSFER WITH MALAYSIA

Malaysia inherited a good foundation of company and other commercial laws from the UK before and at the time of independence in 1957. Even with minimal revisions in its company law in the five decades after independence, its formal laws still provide good shareholder protection. Legal reforms in 2007 and 2016 further enhanced this.

³⁰Ibid., 231.

³¹Ice *Breaking the Corporate Veil and Actual Problems of Corporate Law*, 43.

³²Hadi, *Characteristics of Personal Responsibility of Shareholders, Commissioners, and Directors in a Limited Liability Company*, 121.

³³Kamaliah Salleh Et al., 'The Duties and Conflicts of Nominee Directors: The Legal Position in Malaysia', *Psychology and Education Journal* 58, no. 2 (2021): 1577.

Despite being a colonial construct, legal transplants continued after independence. However, reformers benefited from learning from other countries with similar legal legacies, and this ultimately resulted in the revised Companies Act in 2016. The new law streamlines and strengthens legal control over directors, including allowing shareholders to make binding recommendations to the board, expanding the scope of persons deemed to be directors, codifying the duties of appointed directors, tightening the rules relating to related party transactions, and introducing shareholder derivative actions³⁴.

Most businesses in Malaysia can be put into one of two groups: 1) limited and unlimited liability companies; and 2) public and private companies. Section 10(1) of CA 2016 stipulates that a company can be set up into three types which are (a) a company limited by shares, (b) a company limited by guarantee, or (c) an unlimited company. In a company limited by shares, the liability of the members is limited to the amount not payable on their shares. In a company limited by guarantee, members' liability is limited to the amount they agree to contribute if the company is dissolved. In an unlimited company, members' liability is unlimited.³⁵

The organs of the company in Malaysia only have 2, which are the General Meeting of Shareholders and the Board of Directors. The General Meeting in the Kingdom of

Malaysia itself is called the Annual General Meeting (AGM), this AGM must be held by every company in Malaysia every year.

As stipulated under section 340(1) of the Companies Act 2016,... "every public company either publicly listed or non-listed shall hold an Annual General Meeting in every calendar year in addition to any other meetings held during that period in order to discuss on the (a) audited financial statements and the reports for the financial year period, (b) election of the retiring directors, (c) to fix the appointment of the directors and directors fee and remuneration and (d) to transact any resolution or other business in accordance with the Act or the Constitution"

Practically, the AGM minutes serve two purposes: (a) to the management, as a platform for the directors to have a meaningful discussion for strategic and company performance and ³⁶(b) to the shareholders, AGM minutes provide an

³⁴Mohammad Rizal Salim, 'The Failure of Corporate Law : 1MDB and State-Owned Corporations in Malaysia The Failure of Corporate Law : 1MDB and State-Owned Corporations in Malaysia', *Thomson Reuters, trading as Sweet & Maxwell*, no. 9 (2022): 8.

³⁵R. Murjiyanto et al., 'A Legal Paradigm Regarding the Establishment of Limited Liability Company in Indonesia and Malaysia', *Resmilitaris* 12, no. 3 (2022): 2200–2201.

³⁶Fung, 2014; López-Arceiz, Torres, & Bellostas, 2019 in Mohd Shazwan Mohd Ariffin, Wan Nordin Wan Hussin, and Siti Seri Delima Abdul Malak, 'The Quality of Annual General Meeting Minutes of Listed Companies in Malaysia', *Global Business Management Review (GBMR)* 1, no. Number 1 (2020): 2. Shareholders can have an overview of the company's performance. The paper examines the in-depth context of the AGM minutes of listed companies in Malaysia. Using the content analysis, a self-constructed checklist was developed to measure the quality of AGM minutes of listed companies in Malaysia. A sample of 115 AGM minutes from various sectors listed in Bursa Malaysia for the financial year ended December 31, 2016, was reported. The results indicate that the quality of AGM minutes disclosed by listed companies is relatively low consistent with the prior literature that sought for more exploration on the AGM. Using SPSS version 24, a descriptive analysis was presented in this paper. The low level of AGM minutes' disclosure among Malaysian listed companies suggests that these companies merely disclose within the mandatory requirements. The initiative by the Minority Shareholder Watch Group (MSWG

alternative solution for absentee shareholders to keep track of the AGM even though they did not physically attend the meeting. Besides that, AGM for shareholders to exercise their power and right.

Furthermore, there is the Director of the company who is considered the main actor of the company, who is a natural legal person who can perform corporate legal actions against others, whereas, without the director, the company cannot achieve its desired goals. The directors are generally responsible for the management of the company and they may exercise all corporate powers. However, the extent of their powers may be limited by the Companies Act 2016 and the articles of association, especially with regard to the transfer of company assets.

Based on 223(1) CA 2016 the transfer of assets of the Company must be approved by the AGM which mentions:

223. (1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for (a) the acquisition of an undertaking or property of a substantial value; or (b) the disposal of a substantial portion of the company's undertaking or property unless— (i) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or (ii) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

Referring back to the statutory provisions of section 223(1) of the Companies Act 2016, one would realise the very specific express wording of “business or property” only. Does this cover all types of company assets? With reference to section 223(2) of the Companies Act 2016, it is clear that the

term “undertaking or property” includes all or substantially all of the rights, including development rights, benefits or control in the undertaking or property.

Subsection 223(2) of the Companies Act 2016 further adds that this obligation also applies to shares of the company and its subsidiaries listed on a stock exchange. It is further noted that when dealing with such shares, the term ‘substantial value’ or ‘substantial portion’ means the same value specified in the listing requirements of the stock exchange where shareholders' approval at a general meeting is required.

Subsection 223(2) of the Companies Act 2016 even refers to matters where directors of an unlisted subsidiary with a listed holding company are involved in substantial asset transactions and dealings. In such scenarios, it is found that the unlisted subsidiary directors can go ahead with substantial asset transactions or arrangements as well. However, additional steps have to be taken by the parent company director to obtain the approval of the shareholders of the parent company in general meeting in addition to obtaining the approval of the general meeting by the unlisted subsidiary director.

This definition of substantial value is set out in article 223(3) which in brief is as follows:³⁷:

1. The value exceeds 25% of total assets of the company; or
2. The value exceeds 25% of the net profit after deducting all charges except taxation and excluding extraordinary

³⁷Cheng & Co, ‘Director’s Obligations Under Companies Act 2016’, <https://Chengco.Com>, last modified February 26, 2018, accessed December 14, 2022, <https://chengco.com.my/wp/2018/02/26/directors-obligations-companies-act-2016/>.

items; or

3. The value exceeds 25% of the issued share capital of the company; whichever is the highest

From the explanation above, we could understand the difference between the limitation of directors in transferring the Company's assets in Indonesia and Malaysia, as according to the Company Law, especially in Article 102 paragraph (1) letter a, it is explained that the directors must obtain approval from the GMS. If the directors transfer assets in an amount exceeding the limit, the directors will transfer more than 50% of the company's assets personally liable.

If 50% (fifty per cent) of the company's net assets in 1 (one) or more transactions, whether related to each other or not, must obtain approval from the company's General Meeting of Shareholders (GMS) while in Section 223 (3) Companies Act Malaysia 2016 states that firstly, the value of the acquisition or disposal of the property exceeds 25% of the company's total assets; secondly, net profit before tax and extraordinary matters attributed to it amounts to more than 25% of the company's total net profit; or thirdly, the value of the acquisition or disposal of the property exceeds 25% of the company's issued share capital;. So it can be concluded that the limitation of the board of directors' authority in transferring the company's assets in Indonesia is somewhat looser or its authority in transferring assets is greater than in Malaysia.

CONCLUSION

Basically, although the board of directors has the authority to transfer the assets of the PT as the authority of the board of directors in the Company Law, but based on 102 para-

graph (1) letter a of the Company Law provides a limitation to the board of directors to transfer assets, where if transferring assets of more than 51% of the total assets of the PT must obtain approval from the GMS. If the board of directors makes a transfer of assets in an amount that exceeds this limit, the directors will be personally liable.

Compared to Malaysia, the authority of the board of directors in Indonesia can be said to have greater authority in terms of transferring assets with a limit below 51%, while in Malaysia the board of directors only has the authority to transfer assets without having to obtain AGM approval below 25%.

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