

Responsibility and Procedure for Dissolution of PT by GMS: A Comparison of Indonesian and Malaysian Law

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Abstract

The purpose of this research is to examine how the legal framework in Indonesia regulates the dissolution of companies, particularly when it has been approved by shareholders in a General Meeting of Shareholders (GMS). This study also aims to conduct a comparison with the company dissolution mechanism in Malaysia. The method used is a literature review, which involves examining laws and regulations as well as analyzing relevant legal concepts. The findings indicate that there are similarities and differences between the legal systems of the two countries. These differences stem from the distinct legal traditions each country follows: Indonesia adopts a civil law system, while Malaysia follows a common law system. Consequently, the approaches and regulatory styles in each country differ.

Keywords: *Dissolution, Limited Liability Company, General Meeting of Shareholders*

Abstrak

Tujuan dari penelitian ini adalah untuk mengetahui bagaimana pengaturan hukum di Indonesia terkait pembubaran perusahaan, khususnya apabila telah memperoleh persetujuan dari para pemegang saham dalam rapat umum pemegang saham (RUPS). Penelitian ini juga bertujuan untuk melakukan perbandingan dengan mekanisme pembubaran perusahaan di Malaysia. Metode yang digunakan adalah studi kepustakaan, yaitu dengan menelaah peraturan perundang-undangan serta menganalisis konsep-konsep hukum yang relevan. Hasil penelitian menunjukkan bahwa terdapat persamaan dan perbedaan antara sistem hukum di kedua negara. Hal ini disebabkan oleh perbedaan sistem hukum yang dianut: Indonesia menganut sistem civil law, sementara Malaysia menganut sistem common law, sehingga pendekatan dan gaya regulasi di masing-masing negara pun berbeda

Kata Kunci: Pembubaran, Perseroan Terbatas, Rapat Umum Pemegang Saham

A. INTRODUCTION

The process of operating a legal entity is the fact that not all individual legal subjects who establish a limited liability company (PT) understand about the problems in running a limited liability company from a legal point of view. This has resulted in

many limited liability companies or generally referred to as companies experiencing a decline in both operations and production, until finally many companies are unable to run until they have to go out of business. The number of companies that close is not only due to internal and external risks, but in addition there are still many company administrators who do not understand the legal consequences attached to or impacting the company (Orinton Purba, 2011: 6). Building a business or business that only pursues profit, but is not accompanied by the ability to run a company based on applicable laws and regulations can certainly have a negative impact. In fact, running a limited liability company is not only about financial management, but every action or decision taken by the company's management will have a legal impact in the future.

Individual legal subjects who are running a business certainly have the hope of obtaining results or profits from the previous business, this also applies in the process of forming a trading business entity, namely a limited liability company (Gunawan Widjaja, 2006: 1). Limited Liability Company (PT) is one of the forms of a trading business whose presence cannot be ignored. A Limited Liability Company is a form of business entity in the form of a legal entity that is the most ideal for doing business and running in the country of Indonesia. Running a business or business by establishing either on a micro, medium or macro scale the most common start-up capital in Indonesia. Therefore, a business entity in the form of a legal entity is the entity most widely used by individual legal subjects to carry out their economic activities.

In the practice of running a business, there are unique activities carried out by the founders of a limited liability company, namely certain people who only want to provide part of their previously separated assets to carry out business activities without the person being involved in the process and management of the company (Gunawan Widjaja, 2006:

6). Limited Liability Company basically consists of 2 (two) words, namely "*company*" and "*limited*". Company refers to the capital of a PT, which consists of shares, while the word limited refers to shareholders, namely "*roles and responsibilities that are only limited to the nominal shares they own*" (Kansil, 1996: 31).

Limited Liability Company (PT) which in Dutch is called *Naamloze Venootschap* (Yan Pramadya Puspa, 2008: 406), where a limited liability company is born from the desire or will of the investors to jointly establish a business entity that has capital consisting of shares, where the owner has as much shares as the shares he owns. Limited Liability Companies have capital consisting of shares that can be traded and changes in company ownership can be made without having to dissolve the company itself

The word "*company*" refers to the capital consisting of sero or shares, while the word "*limited*" refers to the liability of shareholders that does not exceed the nominal value of the shares taken and owned. In principle, a limited liability company as a legal entity has its own rights, obligations and assets, which are separate from the rights, obligations and assets of the founders or shareholders. The assets of a limited liability company are not only in the form of capital or money, but can be realized in other forms, namely property, both in the form of movable and immovable objects. Furthermore, it can also be tangible or intangible objects, as long as the limited liability company meets the requirements as a legal subject of the owner of the property.

Based on Article 1 number 1 of Law Number 40 of 2007 on Limited Liability Companies (hereinafter referred to as "Law No. 40 of 2007) as amended by Law Number 11 of 2020 on Job Creation (hereinafter referred to as "Law No. 11 of 2020), states that:

"Limited Liability Company, hereinafter referred to as the Company, is a legal entity which is a capital alliance, established based on an agreement, conducting

business activities with authorized capital which is entirely divided into shares or an individual Legal Entity that meets the criteria of Micro and Small Enterprises as stipulated in laws and regulations concerning Micro and Small Enterprises".

Based on the explanation of the article above, a limited liability company currently has a broad meaning and is not only limited by a collection of several founders, but individuals can individually establish a limited liability company based on the latest requirements determined through Law Number 11 of 2020 concerning Job Creation and its implementing regulations. A limited liability company as a form of legal entity is formed and established based on a *legal process (created by a legal process)*. Therefore, the mechanism for dissolution or termination of its operations must also go through a legal process in accordance with applicable regulations, as the sentence expressed by Mc Oliver and EA Marshal, namely "*only be destroyed by a legal process*", so that its destruction must also go through a legal process (M. Yahya Harahap, 2001: 543). Furthermore, a limited liability company as a form of a legal entity is a capital alliance, established based on an agreement, conducting business activities with an authorized capital consisting entirely of shares, and must fulfill the requirements specified in the applicable statutory provisions and implementing regulations. This is in accordance with the purpose of establishing a limited liability company, namely, the company becomes a separate part of the person who formed it or runs it, where the company has rights and obligations that are closely related to its activities not to other people who own or run it.

Limited liability companies that are formed and established certainly have objectives that have been determined by statutory provisions, based on Article 12 of Law No. 40 of 2007 as amended by Law No. 11 of 2020, which states that:

"The Company must have purposes and objectives and business activities that do not conflict with the provisions of laws and regulations, public order, and/or decency".

A limited liability company is also referred to as an *"artificial person"*, that is, as a legal subject created by humans, the limited liability company is basically not real. Therefore, in order for a limited liability company to act as a legal subject as a human or person, an organ is needed as a tool for a limited liability company legal entity to carry out legal relations with third parties or other parties (Ridwan Khairandy, 2009: 4). Furthermore, in connection with limited liability company in carrying out its business activities will be represented by an organ called the board of directors, both inside and outside the court.

Specifically, this research will discuss the legal provisions regarding the dissolution of a limited liability company (PT) based on the applicable provisions, which in practice there are still difficulties and obstacles in its application. One form of difficulty encountered is related to the procedures or settlement procedures in the event of a difference of opinion among the shareholders in the process of dissolving a limited liability company that should have been unable to operate based on the period of establishment stipulated in the deed of establishment of the limited liability company. In the situation of disagreement experienced, of course the shareholders do not meet an agreement, generally submitting a request for dissolution of a limited liability company through the district court.

The dissolution process carried out based on the period of establishment of a limited liability company in accordance with the provisions of Article 145 paragraph (1),

paragraph (2) and paragraph (3) of Law No. 40 of 2007 as amended by Law No. 11 of 2020, states that:

"(1) The winding up of a Com pany occurs by operation of law when the period of incorporation of the Com pany specified in the articles of association expires.

(2) By no later than 30 (thirty) days after the end of the period of incorporation of the Com pany, the GMS shall appoint a liquidator.

(3) The Board of Directors m ay not perform any new legal acts on behalf of the Com pany after the period for the incorporation of the Com pany set out in the articles of association has expired".

Meanwhile, the dissolution process carried out based on a decision from the district court is in accordance with the provisions of Article 146 paragraph (1) and paragraph (2) of Law No. 40 of 2007 as amended by Law No. 11 of 2020, which states that:

"(1) The district court may dissolve the Company upon:

- a. request of the prosecutor's office based on the grounds that the Company violates the public interest or the Company commits acts that violate laws and regulations;*
- b. application of an interested party based on the grounds of a legal defect in the deed of establishment;*
- c. application of shareholders, the Board of Directors or the Board of Commissioners based on the reason that the Company is impossible to continue.*

(2) The court order shall also determine the appointment of a liquidator".

Based on the provisions of the articles above, basically the law has given *legal standing* or *legitima persona standi in judicio* to the prosecutor's office to propose

dissolution on the grounds that the limited liability company is proven to have violated the public interest or the limited liability company has committed acts that violate laws and regulations (Ridwan Khairandy, 2009: 550). On the other hand, the provisions of the law do not provide a more concrete explanation of who or which parties are categorized as interested parties in the dissolution of a limited liability company. However, what needs to be understood is that the reason for the request for dissolution of a limited liability company made by an interested party is limited only to the deed of establishment if there are indications of legal defects such as an error in drafting the articles of association of a limited liability company that makes its establishment legally invalid (Gatot Supramono, 2007: 108).

Company organs consisting of shareholders, directors or board of commissioners other than the attorney and interested parties Article 146 paragraph (1) letter c of Law No. 40 of 2007, have the capacity or *legal standing* to submit a request for dissolution of a limited liability company to the district court. Generally, the basic reason for the application that can be submitted by the limited liability company organ to the district court is limited to the reason "the company is impossible to continue".

Business closure or dissolution of a limited liability company in Indonesia is generally caused by several factors. Based on Article 142 of Law No. 40 of 2007, a company that no longer carries out its business activities must be dissolved based on the decision of the founders as outlined in the Deed of Minutes of the General Meeting of Shareholders (GMS) with the agenda of dissolving the company and appointing a liquidator to manage and administer the company's assets (M. Yahya Harahap, 2013: 543).

Limited liability companies in reality no longer carry out their business activities, but are not also dissolved by the organs of the company as stipulated in the provisions of laws and regulations. This is because the process of dissolving a limited liability company in Indonesia is known to be very complicated and time-consuming, making shareholders, directors and commissioners of limited liability companies unwilling to follow the dissolution procedure. In addition, the lack of knowledge and understanding of the importance of the dissolution of a limited liability company as well as the unfamiliarity with the dissolution procedures applicable in Indonesia is also one of the causes of many limited liability companies that are no longer operating but instead are not liquidated. Company organs such as shareholders, directors and commissioners will be more likely to let the limited liability company become fictitious and empty rather than having to dissolve it because there are still other legal consequences that will be caused if liquidation is carried out such as tax payments and the cost of the limited liability company dissolution process itself.

The dissolution of a limited liability company that will be discussed in this study is carried out based on the decision of the shareholders of the General Meeting of Shareholders (GMS). According to Law No. 40/2007 on Limited Liability Companies as amended by Law No. 11/2020 on Job Creation, after the company is dissolved, there is a liquidation process and the recording of the deletion of the status of a legal entity as well as the deletion of the company's name from the company register. However, in reality, the dissolution of the company by the GMS is often not followed by the liquidation process and the deletion of the name or status of the legal entity as required by Law No. 40 of 2007. In fact, the announcement of the liquidation result distribution plan, which should be done before the company's assets are distributed, is also not done.

This generally occurs in small and medium-sized limited liability companies and family companies. The amount of time and cost is the main reason.

The public does not understand the juridical consequences of the dissolution and deletion of the company name. Notaries who make the deed of dissolution of the company often do not comprehensively understand and do not explain the dissolution procedure and its consequences according to the laws and regulations. For shareholders, directors, and commissioners, dissolution by resolution of the GMS is sufficient, especially if the company has never conducted business activities or received capital deposits. There is also a legal opinion that a company that has no assets at the time of dissolution does not need to liquidate (Rudhi Prasetya, 2011: 167). Furthermore, the research aims to discuss the comparison of the dissolution of a limited liability company in accordance with the applicable legal provisions in Indonesia and Malaysia.

B. RESEARCH METHODS

The research method used in this journal is *legal research* to find the truth of coherence, namely whether the rule of law is in accordance with legal norms and whether the norms in the form of orders or prohibitions are in accordance with legal principles, and whether a person's actions are in accordance with legal norms or legal principles (Peter Mahmud Marzuki, 2019). This type of legal research is normative juridical legal research where in answering the problem it is studied based on legislation, jurisprudence, legal theory and the doctrine of scholars. The approach to the problem in writing this journal uses 2 (two) approaches, namely the *statute* approach and *conceptual approach*. The statutory approach is carried out by examining all regulations related to the legal issues raised and understanding the hierarchy and principles in laws and regulations (Sunaryati Hartono, 2006). The *conceptual approach* is an approach that refers to the

views and doctrines that have developed in the field of law (Peter Mahmud Marzuki, 2019).

C. RESULTS AND DISCUSSION

1. The provisions of Indonesian law regulate the dissolution of a Limited Liability Company based on the Resolution of the General Meeting of Shareholders (GMS).

Limited liability company as a form of legal entity, the company must have the purpose and objectives, as well as the activities of the company stated in the articles of association. The company must have such purposes and objectives and in conducting its business is prohibited from contradicting the provisions of legislation, public order, and/or decency as stipulated in Article 2 of Law No. 40 of 2007. In the event that a limited liability company does not fulfill these provisions by clearly and explicitly stating its purpose and objectives as well as its business activities, then the limited liability company can be said to be "*legally defective*" (*legal defect*) which results in its existence becoming "*invalid*" (*invalidate*).

A limited liability company as a legal entity certainly has the meaning of a legal subject, where the company as a legal entity can be charged with rights and obligations like a person or human. Furthermore, the definition of a legal subject is something that can or is capable of performing legal acts or performing civil actions or making an engagement. The subjects of law that are distinguished according to expert opinion are as follows (Hardijan Rusli, 1997: 17):

- a. A private person in Dutch is called *natulijk person* or in English is called *natural person*; and

b. *Legal entity* in Dutch is called *rechtspersoon* or in English is called *legal entity*.

Based on the main element of a legal entity is what is meant by "*separate patrimony*", namely having separate assets from shareholders as owners of the company. Then the characteristic of a legal entity is to have limited liability of shareholders as owners of the company and company management (Erman Rajagukguk, 2011: 191). Some of the above descriptions provide a clear picture of the company as a collection (accumulation) of capital containing the following characteristics (Abdul R. Saliman, 2010: 105):

- a. Legal entities that have characteristics include:
 - 1) Must obtain approval from the Minister of Law and Human Rights, if the company has not been authorized, its status is not yet a legal entity and all its responsibilities and obligations;
 - 2) The company is a form of organization or a regular corporate organ, there is a general meeting of shareholders, directors, and commissioners;
 - 3) Having its own assets, means recognizing the separation of the personal assets of the founders of the company from the assets of the company;
 - 4) It has an independent purpose, which is to make a profit.
- b. Shareholders' liability is limited to the value of the shares they own or subscribe for, except in the case of:
 - 1) The company's requirements as a legal entity have not been met;
 - 2) Shareholders use the company for personal gain;
 - 3) Involved in unlawful acts committed by the company and using the company's assets; and

- 4) Shareholders unlawfully use the Company's assets so that the company cannot pay off its debts.
- c. Based on the following agreement:
 - 1) A Company may be established by 2 (two) or more persons (individuals or legal entities)
 - 2) The agreement of the parties establishing the company; and
 - 3) Obligation to take part at the time of establishment.
- d. The Company conducts business activities prescribed by laws and regulations;
- e. The Company has a capital divided into shares (accumulated shares);
- f. A company may have an unlimited period of incorporation, unless otherwise determined by the company's articles of association.

The Company as a legal entity can certainly act like a legal subject and has a corporate organ whose provisions are regulated based on Article 1 number 2 of Law No. 40 of 2007 as amended by Law No. 11 of 2020 which states that:

"The Company's organs are the General Meeting of Shareholders, the Board of Directors and the Board of Commissioners".

In general, the GMS is an organ of the company that has authority that is not given to the board of directors or the board of commissioners within the limits specified in this law and/or the articles of association. Furthermore, the board of directors is an organ of the company that is authorized and fully responsible for the management of the company for the benefit of the company, in accordance with the aims and objectives of the company and represents the company, both inside and outside the court in accordance with the provisions of the articles of association. Then the last is the board of commissioners, which is a company organ

tasked with conducting general and / or special supervision in accordance with the articles of association and providing advice to the board of directors.

Dissolution of a limited liability company based on can occur due to several reasons as stipulated in Article 142 paragraph (1), which states that:

"(1) Dissolution of the company occurs:

- a. based on the resolution of the GMS:*
- b. because the period of incorporation stipulated in the articles of association has expired;*
- c. based on a court order;*
- d. with the revocation of bankruptcy based on a commercial court decision that has permanent legal force, the Company's bankruptcy assets are not sufficient to pay bankruptcy costs;*
- e. because the bankruptcy estate of the Company that has been declared bankrupt is in a state of insolvency as stipulated in the Law on Bankruptcy and Suspension of Debt Payment Obligations;*
- f. due to the revocation of the Company's business license that requires the Company to conduct liquidation in accordance with the provisions of laws and regulations".*

The first stage of dissolution of a limited liability company begins with a GMS resolution stating that the dissolution of the limited liability company is carried out and processed based on the provisions of the applicable law. Since is dissolved, the company cannot perform legal actions, except for liquidation. Every outgoing letter must include the words "in liquidation" behind the company's name as a form of notification to third parties. Within 30 (thirty) days of the dissolution,

the liquidator is obliged to announce it in a newspaper and state news, and thereafter notify the Minister of Law and Human Rights (hereinafter referred to as the Minister). If not done, the dissolution of the company shall not apply to third parties and the liquidator shall be personally liable for the loss of third parties. Creditors are given 60 (sixty) days from the announcement to submit their bills. If a creditor does not submit a claim, even though there are remaining assets after liquidation, the creditor may submit a claim to the district court within 2 (two) years from the date of announcement.

The second stage is liquidation or *vereffening*. Liquidation is an absorption word from English liquidation which means the determination of the amount of unclear debt, settlement of debt, or the process of converting assets into cash, especially to settle debts. Liquidation means the completion and termination of the company's affairs. The actions taken in the settlement of the company's affairs include (:

1. recording and collection of wealth;
 2. determination of the procedure for the distribution of wealth;
 3. payments to creditors;
 4. payment of the remaining assets of the liquidation proceeds to shareholders;
- and
5. other necessary measures.

After recording the company's assets, both assets and liabilities, the liquidator sells assets that are not cash. After all the assets of the company become cash, the liquidator pays the creditors. If after payment there is still a remainder, the remaining liquidation proceeds are distributed to shareholders proportionally.

Before making payments to creditors and shareholders, the liquidator must announce the distribution plan, including a detailed list of debts and payment plans, in newspapers and state news. After the announcement, there is a 60 (sixty) day grace period for creditors to file objections.

The third stage is the end of the legal entity status. After the liquidation process is complete, the liquidator is obliged to account for his duties to the GMS or the court that appointed him. If the accountability is accepted, the liquidator is released from his/her *responsibility (acquit et de charge)*. Within 30 (thirty) days the liquidator is obliged to announce the liquidation result in a newspaper and notify the Minister. Upon the notification, the Minister records the end of the company's legal entity status and announces it in the state news and removes the company's name from the company register.

2. Malaysian Law provides for the Dissolution of a Limited Liability Company by Resolution of the General Meeting of Shareholders (GMS).

Based on the provisions of law and legislation in Malaysia, which is one of the ASEAN countries, the provisions of the State of Malaysia regulate that a limited liability company can be dissolved other than by court order, the dissolution of a limited liability company can also be carried out voluntarily by the decision of the company's management or GMS. Based on provision 254 *sub-section (1) of Companies Act 1965* regulates the reasons a company can be dissolved voluntarily, if:

- a. The period, if any, fixed for the duration of the company by the memorandum or articles of company expires, or the event, if any, occurs, on the occurrence of which the memorandum or articles provide that the company is to be wound

up and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

- b. If the company completes a special resolution.

Furthermore, Section 254 sub-section (2) of the *Companies Act 1965* provides that a company that is dissolved voluntarily, must:

- a. Within 7 (seven) days after the passing of the resolution for voluntary closure file a printed copy of the resolution with the Registrar; and
- b. Within 10 days after the passing of the resolution give notice of the resolution in a newspaper of general circulation throughout Malaysia.

In the process, the Board of Directors of a company can appoint a liquidator to be a provisional liquidator, in the event that the Board of Directors of the company has provided a statement that has been filed with the *Registrar and Official Receiver*, which contains that:

- a. The Company due to its obligations is unable to continue its business; and
- b. That a meeting of the company and its creditors has been called to a date within one month from the date of declaration.

Section 254 sub-section (6) of the *Companies Act 1965* provides that voluntary winding up of a company shall take effect when:

- a. Where a provisional liquidator has been appointed before the resolution for voluntary winding up is passed, at the time the declaration referred to in paragraph (1) is filed with the Registrar; and
- b. In other cases, upon the passing of a resolution for voluntary closure.

In terms of the appointment of a liquidator in the voluntary winding up of the company, section 261 of the *Companies Act 1965* provides that the company and

the creditor may jointly nominate a person to be the liquidator in terms of managing the winding up of the company and to distribute the assets of the company. If then the company and the creditor propose two different names, then the party proposed by the creditor will become the liquidator. Meanwhile, if the creditor does not propose a name to become the liquidator, the name proposed by the company will become the liquidator. Furthermore, all costs incurred during the process of dissolving the company, including the remuneration of the liquidator, must be paid by not using the company's assets used as settlement of existing claims.

D. CLOSING

As for the description above, it can be concluded that there are some similarities and differences regarding the limited liability company dissolution procedures adopted by Indonesia and Malaysia when viewed from the regulations and provisions of Malaysia and Indonesia. Malaysia has a relatively shorter procedure for dissolving a limited liability company compared to Indonesia which takes years until the company's status as a legal entity ends. Furthermore, regarding the similarities of the dissolution of a limited liability company carried out by Indonesia and Malaysia can be done based on the decision of the company's management or the General Meeting of Shareholders which is carried out voluntarily by considering the company cannot continue its operations

Based on the writing of this journal, it is suggested that business actors are advised to dissolve the company in accordance with the stages in the applicable statutory provisions (Law No. 40 of 2007), because liquidation and elimination of legal entity status are important for liquidators, members of the board of directors, board of commissioners, and shareholders to avoid legal risks. The government should be able to streamline the period of dissolution of the company and improve the means of

notification and announcement of dissolution, liquidation, and termination of the company, among others by using information technology.

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