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# IDEAL CONSTRUCTION OF DIRECTORS' RESPONSIBILITY REGULATION AS AN ORGAN OF A LIMITED COMPANY BASED ON JUSTICE VALUE

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## ABSTRACT

The responsibility of the directors as a limited liability company organ of justice is related to legal protection of third parties in the event that the directors commit ultra vires actions which can give rise to the rights of the aggrieved party to act or demand compensation, including recovery efforts aiming to restore the rights of the aggrieved party, but this is not strictly regulated if the action This also provides benefits to the company, and settlement if the directors who are burdened with personal responsibility do not have sufficient wealth to restore the rights of the aggrieved party. This study aims to analyze and find the ideal construction of the regulation of the responsibilities of directors as an organ of a limited liability company based on the value of justice. The Constructivism Paradigm, the approach method in research is social legal research. The data used are secondary data and primary data. The results of the study found that the reconstruction of the regulation of the responsibilities of directors as an organ of a limited liability company is based on the value of justice, in this case Article 97 paragraph (3) of Law Number 40 of 2007 concerning Limited Liability Companies, namely that each member of the board of directors is fully personally responsible for the company's losses. if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions referred to in paragraph (2). If the company also benefits in the event that the directors are guilty or negligent in carrying out their duties, then the members of the board of directors and the company are responsible for the loss, and in the event that the directors who are burdened with personal responsibility are unable to be held responsible for example for reasons of not having sufficient wealth, then the company first bailout the losses of third parties and then the directors are obliged to account for it to the company.

**KEYWORDS:** Limited Liability Company Directors, and the Value of Justice

## A. INTRODUCTION

The personal responsibility of the directors is a situation where the directors do not carry out their fiduciary duties[1] in their leadership to the detriment of the company and shareholders, and in this case the size of the shares is no longer the benchmark for the limit of the value of this responsibility, so that the personal assets of the directors can be held accountable for their actions.[2] Company law dictates that the board of directors must manage the company with proper care, just as drivers must drive their cars with care.[3] The existence of directors in a limited liability company is like the soul of the company. There is no way a company without directors. Conversely, there can be no directors without a company. Therefore, the existence of directors for limited liability companies is very important.[4]

With regard to the issue of applying the duty of care in the management of a company, it is necessary to state a generally accepted principle, which is called business judgment risk.[5] If the directors are truly honest and have good faith in carrying out the responsibilities of managing the company, and can prove it, then the directors cannot be held responsible for the mistake. This relates to corporate opportunity in Article 97 paragraph (2) of Law Number 40 of 2007 which states: Management as referred to in paragraph (1) must be carried out by each member of the board of directors in good faith and full responsibility. Article 99 paragraph (1) of Law Number 40 of 2007 states: A member of the board of directors is not authorized to represent the Company if: A case occurs in court with the member of the board of directors concerned; and the member of the board of directors concerned has a conflict of interest with the company.

The directors can be sued personally to the district court if the company suffers losses caused by their mistakes and negligence, for example in the case of a company bankruptcy caused by the mistakes and negligence of the directors. The directors' liability occurs jointly and severally for the loss and bankruptcy of the company if the company's assets are insufficient to cover losses due to the bankruptcy. Corporate opportunity is a doctrine that teaches that a director, commissioner or other company employee or major shareholder is not allowed to take the opportunity to seek personal gain when the actions he takes are actually actions that should be taken by the company in carrying out its business. Thus, if the action is an opportunity for the company to run its business, the directors may not take this opportunity for personal gain.[6]

[1]Bambang S and Eman Suparman Anis Mashdurohatun, Legal Protection for Creditors in Providing Business Credit with Object of Inventory Warranties Based on Justice Values, J.Eng. Applied Scinces, Volume 14 , Issue 12 , 2019. pp. 4176-4182

[2] Gunawan Widjaja, Jaminan Fidusia,RajaGrafindo Persada, Jakarta.2001, p.143. Munir Fuady, Doktrin-Doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia, PT Citra Aditya Bakti, Bandung, 2002. p.33.

[3] Bismar Nasution, *Pertanggungjawaban Direksi*, http://bismar.wordpress.com/2009/12/23.

[4] Rachmadi Usman, *Dimensi Hukum Perusahaan Perseroan Terbatas*, Alumni, Bnadung, 2004, p.131.

[5] *Ibid*, p. 50.

[6] Munir Fuady, *Doktrin-Doktrin Modern Dalam Coporate Law dan Eksistensinya Dalam Hukum Indonesia*, Citra Aditya Bakti, Bandung, 2006, p. 224

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Violation of the corporate opportunity doctrine resulted in the company receiving compensation in proportion to the loss of expected profit if it obtained the business opportunity.[7] Setting the principle of corporate opportunity, a director must be able to show the management and implementation of business activities in good faith and prudence in running the company, but does not provide clarity to what extent the application of the principle of action is justified or said to be good faith and has been prudent. careful in running the company which is held by the board of directors.

Based on Article 92 paragraph (1) of Law Number 40 of 2007, actually the directors have limited authority in carrying out the management of the company must remain guided and may not conflict with the aims and objectives of the company as stated in the company's articles of association. The legal actions of the directors are said to be ultra vires if they exceed the limits of authority stated in the articles of association and laws and regulations.[8]

In managing the company, the board of directors is not only bound by what is expressly stated in the aims and objectives and business activities of the company, but can also support or expedite their duties (secondary), but are still within the limits permitted or the scope of their duties and obligations (intra vires). ) as long as it is in accordance with custom, fairness, and decency (no ultra vires).[9] Fred B. G. Tumbuan distinguishes between intra vires and ultra vires actions. Actions that are explicitly or implicitly included in the capacity to act of a limited liability company (including the aims and objectives of a limited liability company) are intra vires actions. Actions outside the limited liability company's ability to act (not included in the aims and objectives of the limited liability company) are ultra vires actions.[10] According to Fred B. G. Tumbuan, a legal action is outside the aims and objectives of a limited liability company if one or more of the following criteria are met:[11] The legal action in question is expressly prohibited by the articles of association. support the activities mentioned in the articles of association. Taking into account the special circumstances, the legal action in question cannot be interpreted as directed towards the interests of the limited liability company. Based on the description above, the authors are interested in conducting research related to the ideal construction of the Regulation of Directors' Responsibilities as an Organ of a Limited Liability Company Based on the Values of Justice.

## B. RESEARCH METHOD

[7] Suharnoko, *Hukum Perjanjian Teori dan Analisa Kasus*, Kencana, Jakarta, 2009, p.157.
[8] Gunawan Widjaja, *Op, Cit*, p.23.
[9] I. G. Ray Wijaya, *Hukum Perusahaan*, Megapoint Divisi dan Kesaint Blanc, Jakarta, 2000, p.226.
[10] Fred B. G. Tumbuan, *Tanggung Jawab Direksi dan Komisaris serta Kedudukan RUPS Perseroan Terbatas*, Makalah, 2001, p. 19.
[11] Fred B. G. Tumbuan, *Op, Cit*, p. 19.

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The research method used constructivism paradigm, sociological juridical research approach[12], descriptive juridical research type, primary and secondary data types, library data collection methods, observations and interviews[13]. Qualitative data analysis methods.[14]

## C. RESEARCH RESULTS AND DISCUSSION

### C. 1 Accountability System in Corporations

In order to achieve effective and efficient company performance, shareholders, directors, commissioners and other company constituents must understand not only limited liability, but also other components of the company's accountability system in general.

Broadly speaking, the accountability system in the company consists of:

1. Responsibilities of Shareholders

With regard to the description of the responsibilities of the shareholders, it should first be separated between the shareholders and the general meeting of shareholders which is one of the organs of the company.

Shareholders are basically individuals or people and/or legal entities that own shares of a company. Thus, the shareholder is not an organ of the company. In contrast to the general meeting of shareholders, the shareholder does not have authority, but the main obligation is to make a deposit of the share capital they take, and a responsibility.

The responsibilities referred to are as stated in Article 3 of Law Number 40 of 2007. These responsibilities include limited liability and personal responsibility. Limited liability implies, in which the company's shareholders are not personally responsible for the engagement made on behalf of the company and are not responsible for the company's losses exceeding its shares (Article 3 paragraph (1)). Personal responsibility implies that the shareholders of the company are no longer limited in liability in the event that the requirements of the company as a legal entity have not been or are not

[12] Mahyuni, Land Acquisition of Toll Roads for Public Interest in The Kendal District, Jurnal Akta, Volume 6 Issue 1, March 2019, pp. 153-158, Anis Mashdurohatun, Zaenal Arifin, The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia, International Journal of Applied Business and Economic Research, Vol.15 Issue.20. 2017, see too Sukarmi et.al, Impact of Traffic Congestion on Economic Welfare of Semarang City Community, Journal of Xidian University, Volume 16, ISSUE 2, 2022.

[13] Carto Nuryanto, Gunarto, Anis Mashdurohatun, Reconstruction of Criminal Sanction and Rehabilitation Combating on Narcotic's Victims Based on Religious Justice, The 5th International Conference and Call for Paper Faculty of Law 2019, Sultan Agung Islamic University, 2019, pp.91-95. See too Wawan Setiyawan and Anis Mashdurohatun, The Reforming of Money Politics Cases in Election Law as Corupption Crime. Law Development Journal, Volume 3 Issue 3, September 2021, pp.621 – 629.

[14] Yeltriana, Ideal Reconstruction of Protection for Layoff Victim At The Industrial Relations Court Based On Justice, International Journal of Law, Government and Communication, Volume: 4 Issues: 14 [March, 2019]. pp.32-49. Irwansyah, Ahsan Yunus, Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel, Mirra Buana Media, Yogyakarta. 2020.

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met, those concerned with bad faith take advantage of the company for personal gain, those concerned are involved in unlawful acts committed by the company, and the party concerned unlawfully uses the company's assets, which results in the company's assets being insufficient to pay off the company's debts (Article 3 paragraph (2)).

The personal responsibility of shareholders, among others as stated in the provision, is essentially a principle or principle in the sense of excluding the application of the principle of limited liability of shareholders. The principle of personal responsibility breaks through the existence of a principle that has fortified and been a source of pride for shareholders. Because of its nature to break through or reveal an obstacle, the performance of the principle of personal responsibility is also called piercing the corporate veil principle.

Based on the piercing the corporate veil principle, the limited liability of shareholders can be erased if it is proven that there has been a mixing of the shareholder's personal assets and the company's assets, so that it is as if the company was established solely as a tool used by the shareholder to fulfill his personal goals.[15] By piercing the corporate veil principle, shareholders can no longer hide behind the curtain of a limited liability system.

2. Responsibilities of Commissioners

Law Number 40 of 2007 basically determines the responsibilities of commissioners in a limited way and the provisions can be found in Articles 114 and 115.

From the two articles, it can be seen that the scope of the commissioner's responsibilities includes two things, first, the commissioner is responsible for supervising the company regarding management policies, the course of management in general, both regarding the company and the company's business, and giving advice to the directors (Article 114 paragraph (1) referring to Article 108 paragraph (1)), and secondly, in the event of bankruptcy due to the errors or negligence of the board of commissioners in supervising the management carried out by the directors and the company's assets are not sufficient to pay all of the company's obligations due to the bankruptcy, each members of the board of commissioners are jointly and severally responsible with members of the board of directors for outstanding obligations (Article 115).

In the case of the commissioner carrying out the second responsibility, it means that the commissioner is subject to the assembly system, meaning that one cannot act independently of one another in terms of representing a group. Instead, they must always act together.[16] The assembly system is in

[15] Jamin Ginting, *Hukum Perseroan Terbatas*, Citra Aditya Bakti, Bandung, 2007. p.19.
[16] Munir Fuady, *Hukum Bisnis Dalam Teori dan Praktek*. EDISI, Cet.3, PT. Alumni, Bandung.2002, p. 74.

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accordance with Article 108 paragraphs (3) and (4) which principally determines that the Board of Commissioners consists of 1 (one) member or more. The Board of Commissioners which consists of more than 1 (one) member is an assembly and each member of the Board of Commissioners cannot act individually, but based on the decision of the Board of Commissioners.

Law Number 40 of 2007 stipulates that the organ of commissioners is a board or board, and if there are more than one members, the board is an assembly. Because the performance characteristics of an assembly rely on the togetherness of each member, the board of commissioners as an assembly must act and be responsible together. In Law Number 40 of 2007 with joint responsibility.

3. Responsibilities of the Board of Directors

Arrangements for directors' responsibilities can be found in Article 97 paragraph (1) paragraph (3), and paragraph (4). These provisions stipulate that the board of directors is responsible for managing the company for the benefit of the company and according to the aims and objectives of the company (Article 97 paragraph (1) which refers to Article 92 paragraph (1).

Each member of the board of directors is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out his duties (Article 97 paragraph (3)). In the event that the board of directors consists of 2 (two) members of the board of directors or more, the responsibilities referred to in paragraph (3) shall apply joint responsibility for each member of the board of directors (Article 97 paragraph (4)).

Unlike the board of commissioners which can form an assembly, the existence of directors according to Law Number 40 of 2007 is not designed as an assembly, but personnel or members can consist of more than 1 (one) person, therefore from the aspect of accountability, on the one hand the directors adhere to a system of representative individuals, and on the other hand subject to the collegial system.

Representative individual systems introduce a kind of authority by which a person can act alone to represent a group.[17] Article 98 paragraph (2) stipulates, in the event that the members of the board of directors consist of more than 1 (one) person, each member of the board of directors is authorized to represent the company, unless otherwise specified in the articles of association.

The board of commissioners carries out their duties according to the characteristics of the assembly, while the directors carry out their duties based on a collegial model.[18] In essence, the collegial system can also be applied to directors who carry out legal actions on behalf of a company that has not yet

[17] *Ibid.*

[18] *Ibid.* p. 76.

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obtained legal entity status. This can only be done by all members of the board of directors together with all founders and all members of the company's board of commissioners and they are all jointly and severally responsible for their actions. the law (Article 14 paragraph (1)).

Shareholders whose responsibilities may also include, among other things, legal actions taken for and on behalf of the Company by members of the Board of Directors before their appointment is cancelled (Article 95 paragraph 3), can basically be asked to provide personal accountability as long as it can be proven that the ultra vires act was carried out for meet the personal goals of shareholders. The same goes for the board of commissioners and directors.

Among the company's stakeholders, it is the directors who are the most relevant targets to be held accountable in the event that a third party suffers a loss as a result of its agreement with an ultra vires company. This is based on considerations by law, the directors have been designated as representatives of the company both inside and outside the court. Thus, it is the directors who deal directly with third parties.

In principle, bearing in mind that third parties who have good intentions and are not aware of the existence of ultra vires elements must receive legal protection, logically there must be a party who can be held accountable, in the sense that there must be solutions or efforts both aimed at prevention and those that remedial or recovering (remedy).

### C. 2 The Ideal Construction of the Legal Responsibilities of the Board of Directors as an Organ of a Limited Liability Company Based on the Value of Justice

The ultra vires doctrine originates from the common law system which was originally developed in England. However, gradually the doctrine was finally accepted and implemented in various countries such as France and other European countries, the United States, Australia, and others. What about Indonesia, which has recently updated its legal system with Law No. 1 of 1995 and Law No. 40 of 2007 respectively.

In order to find out whether the ultra vires doctrine applies or is applied in Indonesia, it must first be known whether Law Number 40 of 2007 regulates in the sense of accepting doctrine. Based on an investigation into Law Number 40 of 2007 which is a positive company law in Indonesia, it turns out that there is no single provision that explicitly regulates ultra vires, especially in terms of concept or terminology. However, this does not imply that Indonesia does not accept the ultra vires doctrine, solely because there are no rules or norms in the legal system that define it explicitly.

A legal system basically does not only consist of components of rules or legal norms in the form of

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explicit articles. In this regard, the company's legal system also consists of agreements in the articles of association and relevant legal opinions.

Munir Fuady stated that in principle, the ultra vires doctrine applies in Indonesia with the following considerations:[19]

a. Whereas the ultra vires principle is a universally applicable doctrine, even in the Netherlands, which is the country where Indonesian law originates, this ultra vires doctrine is enforced.
b. The limited liability company law implies the enactment of the ultra vires doctrine, which, among other things, places the aims and objectives of the company in an important position. The logical consequence is that violation of these aims and objectives can become a serious problem.

Even though it is still based on Law Number 1 of 1995 which has been replaced by Law Number 40 of 2007, this opinion is relevant and acceptable. This is because the two laws view the aims and objectives of the company as an important aspect as a determinant of the type and number of company activities that must be determined in law and set forth in the articles of association.

Implicitly, Law Number 40 of 2007 recognizes and accepts the ultra vires doctrine, reflected in the existence of provisions relating to the aims and objectives and business activities of the company. In Law Number 40 of 2007 there are about 3 (three) groups of provisions governing or relating to the aims and objectives and business activities of companies as follows:

1. Article 2 regarding the obligation to have aims and objectives as well as business activities;
2. Article 15 paragraph (1) requires expressly stating the aims and objectives and business activities of the company in the articles of association,
3. Articles 9, 10, 11, 19 to 28 reflect the strict procedures that must be followed when changing the aims and objectives and business activities of the company.

In addition to several ultra vires notions which imply a link between the actions taken by the company through the directors and the articles of association (memorandum of association), there is a view, when a company is incorporated, it requires a constitution (memorandum of association) which basically records the purpose for which the company is established, and regulate the distribution of authority within the company and the issue of internal procedures.[20]

The function of the articles of association as a forum that accommodates the fundamental provisions of the company such as name, place of domicile, term of existence and the intent and purpose of the founders, in this connection the articles of association function as general guidelines for measuring

[19] Munir Fuady, *Hukum Bisnis Dalam Teori dan Praktek.Op.Cit.*.2002.p. 147.
[20] Alan Dignan, *Op, Cit,* p.165.

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whether or not ultra vires acts have occurred. The existence of provisions regarding the aims and objectives and business activities of the company has proven that Law Number 40 of 2007 accepts the ultra vires doctrine, and there is a legal basis for applying it in relevant cases.

The purpose of the company is stated in the articles of association, especially to protect investors or shareholders.[21] In connection with ultra vires actions that have an adverse impact on third parties who enter into agreements with the company, there should be legal protection for third parties. Even though third party agreements with the company are ultra vires in nature and are null and void and cannot be ratified, this is not a basis for ignoring the legal protection of third parties who have also contributed no small amount to the continuity of the company's business. In this connection there are several grounds that can be used as reasons for providing protection to third parties. These bases are:

1. The Principle of Good Faith

In order for the agreements made by the company with any party to be carried out properly and sustainably, conditions of mutual trust are needed. To foster this condition, both parties must show good faith which is an act without deception, without deception, without trickery, subterfuge, without disturbing the other party, not only by looking at their own interests, also by looking at the interests of others. The agreement is based on good faith based on honesty and balance in taking into account the interests of both parties.

The principle of good faith also contains an element of justice, namely remedial justice, intended to restore equality by imposing a penalty on the party concerned. This justice is also a midpoint between the poles of gain and loss. This conception then becomes the notion of justice as a remedy for mistakes by providing compensation to victims of mistakes or punishment to the perpetrators.[22] The principle of good faith is very relevant to the protection of third parties who enter into agreements with ultra vires companies. In this connection, third parties can be seen as victims who must be given legal protection.

The existence of this principle is increasingly relevant to Article 1338 of the Criminal Code, the last sentence stipulates, agreements must be carried out in good faith, and Article 1341 second paragraph, that the rights are obtained in good faith by third parties over goods that are the subject of the act which is null and void is protected. So, this principle can indeed protect third parties.

[21] Law Number 40 Of 2007 Concerning Limited Liability Companies

[22] The Liang Gie, *Teori-Teori Keadilan*, Penerbit Super, Yogyakarta, 1989, p.23.

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2. Principle of Pacta Sun Servanda

The principle of pacta sun servanda implies that the agreement must be obeyed by the party making the agreement. This requirement is reinforced by Article 1338 of the Indonesian Criminal Code, that as long as the agreement is not contrary to the law, decency and public order are reflected, the agreement applies like a law or is binding on the parties so that therefore it must be obeyed.

The principles and provisions associated with Article 1338 and the regulations in Book III of the Indonesian Criminal Code are only complementary laws (aanvullend recht), not hard or coercive laws.[23] Thus and added the obligation to carry out based on good faith, even if an agreement is declared not in accordance with the law and ultra vires, it does not necessarily ignore the principle of pacta sun servanda. The implementation of this principle must be linked to the principle of good faith, so that third parties still receive legal protection, at least in terms of basic rights, such as the provision of compensation for capital and costs incurred.

3. Modern Ultra Vires Doctrine

One of the developments of the ultra vires doctrine is the protection of third parties (parties outside the company) who transact with the company, even actions classified as ultra vires are still considered valid for the interests of the counterparty to the transaction (third parties) as long as they meet the following requirements:[24]

a. The third party is in good faith;
b. Third parties are not aware of the existence of these ultra vires elements.

This development contrasts with the substance of the traditional ultra vires doctrine, where ultra vires actions result in null and void. Based on progressive developments, legal protection for third parties has become stronger.

The term legal protection or *rechtsbescherming* (Dutch) or legal protection (English) for the purposes of this description is used as a concept to describe things that can and should be given by law so that losses do not arise on one side, as well as things that can and must be done to compensate for the losses incurred.

These limits refer to the types of legal protection, namely: preventive legal protection and repressive legal protection. Examined from the aspect of objectives, preventive legal protection aims to prevent

[23] Jamal Wibowo, Anis Mashdurohatun, Hukum Kontrak, Ekonomi Syariah dan Etika Bisnis, Undip Press, Semarang,2017. p.38. see too Anis Mashdurohatun, Hukum Perlindungan Konsumen (Kajian Teori dan Praktik), SA Press, semarang, 2019,p.68.

[24] Munir Fuady, *Hukum Bisnis Dalam Teori dan Praktik*, *Op, Cit*, p. 127

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adverse legal consequences and repressive legal protection aims to overcome or provide legal means to carry out countermeasures against legal consequences arising from an event or legal relationship.

In terms of ultra vires, preventive legal protection in the sense of efforts to avoid or prevent agreements that are ultra vires from materializing and third parties not falling into making such agreements (enter into contracts) and suffer losses essentially consists of:

1. Improving the consistency of the board of directors with respect to the articles of association

The articles of association play an important role for the company, which is a constitution in which the provisions regarding the establishment and several aspects of the company's operations are set forth. Article 15 paragraph (1) of Law Number 40 of 2007 determines that the articles of association contain at least:

a. Name and place of domicile of the company;
b. The aims and objectives and business activities of the company;
c. The period of establishment of the company;
d. The amount of authorized capital, issued capital and paid-up capital;
e. The number of shares, the classification of shares, if any, including the number of shares for each classification, the rights attached to each share, and the nominal value of each share;
f. Name of position and number of members of the board of directors and board of commissioners;
g. Determination of the place and procedures for holding a general meeting of shareholders;
h. Procedures for appointment, replacement, dismissal of members of the board of directors and commissioners.
i. Procedures for the use of profits and distribution of dividends.

As the constitutional[25] basis of the company, the articles of association are the basic norms and become guidelines in the company, it is appropriate that the actions of the directors representing the company must comply with and be in accordance with the articles of association.

The company's ultra vires action through the board of directors due to the discrepancy between the action and the articles of association. The Board of Directors must be consistent with the provisions in the articles of association, especially regarding the aims and objectives and business activities of the company. In addition to protecting shareholders, it also protects the general public both those who are positioned as creditors and other constituents for the company such as suppliers and customers.

The Board of Directors may not be coaxed and compelled to take actions or transactions such as giving

[25] Anis Mashdurohatun, Adhi Budi Susilo, Bambang Tri Bawono, Copyright Protection towards the Society 5.0, Journal of Southwest Jiaotong University, Volume 56, Issue 2, 2021.pp.394-403.

donations or other gifts, being a guarantor or providing guarantees for the debts of other companies, whether in the same group (company group) or not affiliated at all, even though the company does not have the capacity to bind itself to an agreement. like that because it is not stated in the provisions regarding the aims and objectives and business activities of the company.

In the common law system of corporate law, agreements or transactions as they are called gratuitous transactions are actions or transactions that are baseless. The company does not have the competence to enter into legal relations in such agreements and all transactions are not based on ultra vires (the company did not have the capacity to enter into wholly gratuitous transactions which were thus ultra vires).[26] In addition, to measure whether a company has made free transactions or not, there are several relevant tests in the form of questions:[27]

a. Are transactions made incidental?
b. Can the transaction be trusted (bona fide)?
c. Are transactions profitable and can advance the welfare of the company.

The test is subjective because it can encourage directors to speculate and make their own interpretation of the articles of association, so that their accuracy in determining whether a transaction is a free transaction or vice versa can raise doubts.

A speculation is an act of chance and if done excessively can result in losses for other parties. The company, including its articles of association, is actually an accumulation of agreements. Making clear interpretations of agreements (statutes of association) is not permitted by the Criminal Code. Prevention of ultra vires acts and third party losses is still more effective when using directly the provisions in the articles of association as a measure that is matched with the real behavior of the directors. In the context of preventive legal protection for third parties, the Board of Directors is required to be consistent or adhere to the principles of the articles of association.

2. Increasing client awareness

Client awareness is basically one of the attitudes recommended by Robert A. Feldman and Raymond T. Nimmer regarding effective contract design.[28]

The term client is generally used to refer to, among other things, people defended by lawyers and people served by a notary. Grammatically means customer or customer. Third parties, both creditors

[26] Alan Dignan, Hicks & Goo's Cases and Materials on Company Law 7th Edition, Oxford University Press; 7th edition (June 4, 2011). p. 184.
[27] *Ibid.*
[28] Robert A. Feldman dan Raymond T. Nimmer, *Drafting Efective Contract, A Practitioner's Guide,* Aspen Law & Business, New York, 2002, p. 13.

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and suppliers and customers related to the company, can be called the company's clients. While awareness means aware or knowing. Thus, client awareness implies that a third party in establishing a contractual relationship with the company must be aware of and know the condition of the company, whether the company has the competence to make the agreement in question with a third party.

To support the implementation of client awareness, third parties have the right to obtain information regarding the competence of the company according to the articles of association and the directors are required to provide this information. In Indonesia this is relevant in connection with the obligation to announce the company's articles of association in the state gazette and additional state news with the aim of making the public aware of it.

Client awareness emphasizes the need for third party awareness and obligations to know the company's competence, basically aimed at preventing ultra vires actions and losses to third parties, because if a third party knows or is aware of it, of course the third party can make a decision not to continue the agreement with an ultra vires company.

Repressive legal protection in the sense of efforts to overcome or resolve the consequences of ultra vires actions against third parties who suffer losses is to restore or restore the third party's condition to its original state. The legal system must open up opportunities for third parties to recover their condition either through litigation or dispute resolution through courts or non-litigation such as arbitration and alternative forms of dispute resolution. Meanwhile, if it is proven to be ultra vires, it is obliged to provide a remedy in the form of compensation.

The legal consequences of third party agreements with ultra vires companies as stated in the previous description include consequences such as the agreement being declared invalid, the agreement null and void, and the company being irresponsible. In such conditions, the directors are burdened and carry out personal responsibility to a third party as a contracting party who is harmed. Based on the ultra vires doctrine, teaching how to overcome the consequences of ultra vires actions, put forward in the event of an ultra vires act committed by the board of directors, the general meeting of shareholders also has the competence to summon and hold the directors accountable for the actions taken. The assignment of responsibility to the directors ultimately raises the issue of whether the directors always have to be personally responsible for any ultra vires actions. Regarding this problem, there is a view that ultra vires does not always result in the imposition of personal responsibility on the directors who commit ultra vires. Indeed, in general, ultra vires actions lead to the emergence of personal responsibility of the directors, among others, based on the doctrine of piercing the corporate veil.[29] Views based on a general understanding of justice, especially related to statements of directors that

[29] Munir Fuady, *Hukum Bisnis Dalam Teori dan Praktik, Op, Cit,*p.118.

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are not always personally responsible for ultra vires actions, are acceptable, but the background to statements of personal responsibility of directors based on the doctrine of piercing the corporate veil still needs to be explained.

The understanding of the doctrine of piercing the corporate veil or lifting the corporate veil essentially emphasizes personal responsibility based on positive law in this case Article 3 paragraph (2) of Law Number 40 of 2007, actually shows that the obligation to be personally responsible is only borne by shareholders. What are the considerations so that the personal responsibility of the directors is also seen based on the doctrine of piercing the corporate veil.

The basis for this view is that piercing the corporate veil is a judicial process in which the court waives immunity (immunity) from corporate organs from their responsibilities related to the company's business activities. Limited liability (limited liability) of shareholders is ignored and personal responsibility (personal liability) is emphasized on both shareholders and commissioners and directors.[30]

This understanding is the basis for placing personal responsibility on the board of directors for ultra vires actions. However, up to this stage, imposing personal responsibility for ultra vires to directors who are organs of the company, working based on the principles of duty of care, fiduciary duty, duty of loyalty and business judgment rule is still seen as unfair, and too cornering directors who basically is the representative of the company inside and outside the court.

Imposing personal responsibility to the directors is actually the ultimate effort, a step that can not be applied casually. A search of the legal literature shows that there are several recovery steps that can be taken before imposing personal responsibility. The steps referred to are called injunction and tracing as described as follows:[31]

1. Injunction - if the money lent to the company has not been spent the lender can get the injunction to prevent the company from parting with it.
2. Tracing - the lender can recover his money so long as it is found in the hands of the company in its original form.

Broadly speaking, by making an injunction, a third party can seek a stipulation to prevent the company from spending loans from third parties. Meanwhile, through tracing, lenders can withdraw loans as long as they can be found in intact condition.

[30] Henry Campbell Black, *Op*, *Cit*, p.1033.
[31] http://www.csstudentonlineclub.com.

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In order to overcome the consequences of ultra vires actions, both injunction and tracing are only relevant to be applied for ultra vires actions related to third parties who are domiciled as creditors or lenders to the company. Injunction and tracing also cannot prevent directors from having to carry out personal responsibilities.

Thus, in terms of liability for third party losses due to ultra vires actions, the imposition of personal responsibility on the directors is unavoidable. The problem is whether the board of directors who are the management of the company have the ability to be responsible while their actions which are ultimately declared ultra vires are carried out for the benefit of the company. In such conditions, what steps should be taken so that a third party's loss can obtain a remedy or recovery.

Third parties as aggrieved parties basically have no interest in who should be responsible for the losses they experience, whether it is the company or the directors. The third party only understands that the intended agreement is a legal relationship with the company and the directors are the representatives of the company. There is no relevance of bringing third parties into the matter of who is responsible. Third parties only need that the losses they experience can be recovered immediately.

Recovery or remedy for third party losses due to agreements with the company is declared ultra vires, while directors who are burdened with personal responsibility cannot be held responsible, for example for reasons of not having sufficient wealth, in this case there is a view that recovery can be carried out by means of mechanisms or procedures. among others as contained in subrogation institutions.

As an initial description, subrogation or subrogatie or subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.[32] Specifically with regard to money borrowed by the company, another view suggests that if the money borrowed has been used to pay legal debts from the company, the lender can claim subrogation rights and as a result, the lender stands on the shoes of creditors (he will stand in the shoes of creditors). the creditor) and may demand information on the subsequent use of the money, but this subrogation does not accord it the same priority as the original creditor.[33]

In legal relations concerning debts that are subject to the civil law system in Indonesia, there is also a subrogatie as Article 1400 of the Indonesian Criminal Code stipulates that subrogation or replacement of the rights of the debtor by a third party, paying the debtor, occurs either by agreement or by law. As a whole, both from the viewpoint and the provisions, subrogation is a replacement for the position

[32] Henry Campbell Black, *Op*, *Cit*, p. 1279.
[33] http://www.csstudentonlineclub.com.

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of a creditor by a third party who has paid or paid off the debtor's debt. Third parties obtain subrogation because they have paid the debts of the debtor.

The formulation of Article 1400 of the Criminal Code basically contains two elements, namely replacement of creditor rights by a third party, and payment by a third party. With regard to the first element, the creditor's rights here are the rights owned by the creditor against the debtor, while a third party is a party who is neither a creditor nor a (main) debtor.[34] With regard to the second element, a third party obtains rights based on subrogation if and only in the event that the debt is repaid.[35]

With regard to subrogation in general, the issue arises as to whether the mechanism available in the subrogation institution is relevant to be applied in the process of recovering the rights of third parties who enter into agreements with companies that are ultra vires. The issue becomes even more confusing with regard to the mention of the term third party. In relation to subrogation, the term is appropriate to refer to those who replace creditors, but when applied in ultra vires, the term will result in confusion because in relation to ultra vires agreements, subjects such as company creditors, lenders to the company, suppliers and customers actually have be a third party and creditor first. So if they are given another position as a third party, the issue is whose rights they replace.

Considerations in the Decision of the Surabaya High Court dated March 22, 1951 which stated, in every payment by a third party there is unacceptable subrogation, which according to J. Satrio, is not true and even in principle payments by third parties do not give rise to subrogation, in fact it does not even cause new bills, for example someone who pays because he thinks he has a debt and thinks he is a debtor. In addition, a third party may pay out of necessity, because he happens to be the debtor of the debtor.[36]

This view is understandable because there are indeed factors that require subrogation to be performed or undertaken. These factors are in accordance with Articles 1401 and 1402 of the Indonesian Criminal Code which basically determine that subrogation occurs with the consent and by law. As long as payments by third parties are made not in the context of Articles 1401 and 1402, it can be stated that payments made do not cause what is called subrogation.

In general, the ideas and mechanisms reflected in mutatis mutandis subrogation or changes and adjustments as necessary can be applied in the context of recovering third party losses because the agreement with the company is declared ultra vires. However, for this purpose, there is still one more

[34] J. Satrio, *Cessie, Subrogattie, Novatie, Kompensatie, & Percampuran Hutang,* Alumni, Bandung, 1999,p. 50.
[35] *Ibid*, p. 58.
[36] *Ibid*, p. 51.

mechanism that needs to be examined and its characteristics and relevance compared.

The mechanism referred to is substitution, which in general implies serving another person as a substitute (serving in lieu of another).[37] In the substitution mechanism, there is a triangular relationship between the substitute, who is being replaced, and a third party.

Substitution or replacement is a widely accepted principle that with this principle a person or a new debtor (new debtor) can receive debt from another person (the original debtor or debtor), and in this way the new debtor then replaces the position of the debtor.[38]

Efforts to reimburse do not appear by themselves, but are based on the approval of the creditor's replacement. In an effort to recover third party losses due to an agreement with the company being declared ultra vires, the said replacement approval must be given by a third party. Based on the substitution effort, there is a transfer of obligations from the original debtor to the new debtor, then the transfer of obligations occurs from the directors who were previously burdened with personal responsibility to the company.

When compared, a significant difference appears, and, the process of subrogation basically produces a new creditor called a third party, while the substitution mechanism creates a new debtor who is obliged to act as a substitute (in lieu of) carrying out the obligations of the original debtor.

From the difference in these characteristics, it appears that the replacement mechanism is more relevant. This is based on the premise that what is needed by the directors is a substitute who can carry out his obligations to third parties, not creditors who will demand compensation from the directors.

Examined from the perspective of the implementation of fiduciary duty, duty of care, duty of loyalty which in general shows the directors in a complete state with all obligations, competencies and responsibilities that are actually identical to the company itself, it is quite fair if the directors who have shown loyalty and integrity receive substitution when he is obliged to account for actions taken also for the sake of the company.

Thus, the provisions of Article 97 paragraph (3) of Law Number 40 of 2007 are reconstructed to become: Each member of the board of directors is personally fully responsible for the company's losses if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions referred to in paragraph (2). However, if the company also gains in the event that the

[37] Henry Campbell Black, *Op, Cit*, p.1282.
[38] Eric Clive Ole Lando, *Principles Of European Contract Law*, http://books, google.co.id

directors are guilty or negligent in carrying out their duties, then the members of the board of directors and the company are responsible for the loss, and in the event that the directors who are burdened with personal responsibility are unable to be held responsible, for example for reasons of not having sufficient wealth, then The company first bails out the losses of third parties and then the directors are obliged to account for them to the company.

## D. CONCLUSION

In the aspect of accountability, on the one hand the directors adhere to a representative individual system, and on the other hand they are subject to the collegial system. Settlement due to company actions that exceed authority, is that each member of the board of directors is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out his duties, but is not strictly regulated if the action also benefits the company, and settlement if the directors who are burdened with responsibility personal liability does not have sufficient wealth to restore the rights of the aggrieved party. Ideal construction of the regulation of the responsibilities of directors as an organ of a limited liability company based on the value of justice, in this case Article 97 paragraph (3) of Law Number 40 of 2007 concerning Limited Liability Companies, i.e. Each member of the board of directors is fully personally responsible for the company's losses if the person concerned guilty or negligent in carrying out their duties in accordance with the provisions referred to in paragraph (2). However, if the company also gains in the event that the directors are guilty or negligent in carrying out their duties, then the members of the board of directors and the company are responsible for the loss, and in the event that the directors who are burdened with personal responsibility are unable to be held responsible, for example for reasons of not having sufficient wealth, then The company first bails out the losses of third parties and then the directors are obliged to account for them to the company.

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