

THE TWO-TIER BOARD
AND
CORPORATE GOVERNANCE *
(Pointers For Discussion)

By: Fred B.G. Tumbuan **

1. The legal principles on which Indonesian company law as found in Law No. 1 of the Year 1995 concerning the limited liability company (the “UUPT”) is based are identical or similar to those relating to Dutch company law.

The reason for such similarity can be traced to the predecessor of both the Dutch as well as Indonesian company law to wit the Indonesian Commercial Code Article 36 thru Article 56, which is a replica of the 1838 Dutch Commercial Code and which was promulgated in the then Netherlands Indies in the Year 1848.

2. However, unlike Dutch company law, Indonesian company law provides

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** Fred B.G. Tumbuan is the Senior Managing Partner of the law firm TUMBUAN PANE in Jakarta, who specialises in corporate and business law.

mandatorily that every Indonesian limited liability company known as Perseroan Terbatas or abbreviated PT must have a **Direksi** (Board of Directors/Board of Management) and a **Dewan Komisaris** (Board of Commissioners/Supervisory Board).¹ Under the old Company law as laid down in Article 44 para 1 of the Indonesian Commercial Code the Board of Commissioners was an optional organ of the Indonesian company.

Specifically with respect to public listed companies (PT Tbk) Indonesian company law provides that such companies must have at least 2 (two) Directors² and at least 2 (two) Commissioners.³

The reason why Indonesian company law has made it mandatory for every Indonesian company to have a two-tier Board is that the two-tier Board, which makes a clear separation between on the one hand the Board of Directors charged with the management of the company and on the other hand, the Board of Commissioners charged with the supervision of the way the Board of Directors is managing the company in the interest of the company, is that such two-tier Board enhances the checks and balances required for good corporate governance highlighted in Ms. Gerdina ter Huurne's paper on the Role of the Board in Corporate Governance. In fact, although under the old company law laid down in the Indonesian Commercial Code the Board of Commissioners is an optional organ of the company, however, it was clear from the provisions in Articles 43, 52

¹ Article 8(1)b. jis. Article 12 f. and Article 94(1) UUPT.

² Article 79(2) UUPT.

³ Article 94(2) UUPT.

and 54 Indonesian Commercial Code that the legislator assumed that the incorporators of a company would elect to institute a Board of Commissioners.

3. As is the case in Dutch company law, the UUPT provides that the duty of the Board of Commissioners is to supervise the policy of the Board of Directors in managing the company and to advise the Board of Directors.⁴

To facilitate the proper discharge of its supervisory duties, the Board of Commissioners is vested with specific powers. It has the right to obtain from the Board of Directors, and the latter is obliged to provide, any information which the Board of Commissioners deems necessary to be able to properly supervise the way the Board of Directors is conducting the affairs of the company. Most if not all articles of association of Indonesian companies contain a specific provision to that effect which reads as follows:

"the members of the Board of Commissioners, jointly as well as singly, have the authority to enter into buildings, offices and premises used by the company and have the right to inspect the records and documents and the assets of the company in the execution of their duties".

With respect to such inspection right, it is also commonly stipulated in the articles of association that the Board of Commissioners has the right to retain the services of outside experts to carry out, in its behalf and at the expense of the company, such inspection and examination. In addition, the articles of association of the company in question invariably provide that the Board of Commissioners has the power at any time to **suspend from**

⁴ Article 97 UUPT.

office any member of the Board of Directors whenever such member has committed acts which are in violation of the articles of association or are harmful to the welfare of the company or such member has failed to properly perform his duties towards the company. In fact such right of the Board of Commissioners to suspend members of the Board of Directors is explicitly provided in the UUPT.⁵ It ought, however, to be observed that such power of suspension is vested in the Board of Commissioners acting as board and not in the individual member of the Board of Commissioners.⁶ Further, another instance wherein such supervisory duties of the Board of Commissioners find their expression is the common practice to provide in the articles of association of the company certain restrictions to the effect that specific acts of the Board of Directors will require the prior approval of the Board of Commissioners.⁷ Such acts are usually of such a nature that, if imprudently contracted by the Board of Directors on behalf of the company, could well adversely affect the company as a commercial enterprise.

4. It may be of interest to know that the draft revision of the UUPT in the section which deals with the Board of Commissioners has provided that it may be stipulated in the company's articles of association that there shall be one or more Independent Commissioners and 1 (one) so-called "**Delegated Commissioner**" or Komisaris Utusan (gedelegeerde commissaris).

⁵ Article 92(1) UUPT.

⁶ Article 94(3) UUPT stipulates that in the event there are more than 1 (one) member of the Board of Commissioners, they shall form a council.

⁷ Article 100(1) UUPT.

The provision in question further provides that the Independent Commissioner(s) must be appointed by the General Meeting of Shareholders from amongst persons who are not affiliated with the majority shareholder, any member of the Board of Directors and the other members of the Board of Commissioners.

As regards the Delegated Commissioner, he has to be designated by the meeting of the Board of Commissioners from amongst the incumbent members of the Board Commissioners. His duties must be set out in the company's articles of association and they may not be contrary to the duties and powers of the Board of Commissioners (i.e. supervisory and advisory) and they may not prejudice the management duties and powers of the Board of Directors. It would be contrary to the principles of Indonesian company law if the Delegated Commissioner would function as a "shadow Director".

An example of the duties of such Delegated Commissioner could be the duty of daily supervision and daily contact with the Board of Directors. This would enhance hands-on supervision by the Board of Commissioners of the way the Board of Directors is managing the company.

5. Specifically as regards public listed companies, to enhance transparency and good corporate governance in public listed companies BAPEPAM has issued Rule No. IX.I.5: Tentang Pembentukan Dan Pedoman Pelaksanaan Kerja Komite Audit (Setting up and Operating Guidelines of the Audit Committee), Lampiran Keputusan Ketua BAPEPAM No. Kep-29/PM/2004 dated 24 September 2004. It is expressly provided therein that the Audit Committee which shall be set up by the Board of

Commissioners is to assist the Board of Commissioners in discharging its duties and responsibility. Such Committee must be headed by the Independent Commissioner who must fulfil certain requirements laid down in detail in said BAPEPAM Rule.

The Audit Committee shall consist of at least 1 (one) Independent Commissioner and at least 2 (two) other members from outside the public listed company. The said BAPEPAM Rule further lists a number of specific requirements which must be fulfilled by the members of the Audit Committee.

In carrying out its duties the Audit Committee is entitled to have access to the company's records, assets, capital, manpower and other matters related to its function as the Audit Committee, including close cooperation with the company's internal audit.

The Audit Committee shall report to the Board of Commissioners about each specific task given to it and shall once a year give an annual report of the way it has discharged its duties.

6. With regard to the internal and external liability of the Board of Commissioners the following should be noted. As the Board of Commissioners is charged with the duty to supervise the way the Board of Directors is managing the company, it has to render an account of such supervisory duty to the organ which has appointed it, to wit the General Meeting of Shareholders. Such rendering of account takes place at the annual General Meeting of Shareholders at which the annual reports, signed by all the members of Board of Directors and the Board of

Commissioners⁸, together with the annual accounts are submitted for the approval and ratification of the General Meeting of Shareholders.⁹

In the event that the annual accounts that are made available turn out to be incorrect and/or misleading, the members of the Board of Directors and the Board of Commissioners will be jointly and severally liable to any party who is harmed thereby.¹⁰ To the extent, therefore, that the Board of Commissioners fails to properly discharge its supervisory responsibility and thereby causing harm to the company, it will be liable for the damage suffered by the company (internal liability). Such liability could also arise in instances where the Board of Commissioners assumes temporarily the management of the company pursuant to the provisions in the articles of association. In such case the liability in question is not different from the liability of the Board of Directors, as in such instance, albeit temporarily, the Board of Commissioners has the same powers and duties as the Board of Directors in respect of the management of the company.¹¹ It is therefore not surprising that as regards the personal liability of the Board of Commissioners with respect to the company, the UUPT has, as is the case with the Board of Directors, conferred on one or more shareholders together representing at least 1/10 (one-tenth) of the total number of the issued shares with valid voting rights the authority to file, on behalf of the company and at the company's expense, an action with the District Court against the member of the Board of Commissioners who through his fault

⁸ Article 57(1) UUPT.

⁹ Article 60(1) UUPT.

¹⁰ Article 60(3) UUPT.

¹¹ Article 100(3) UUPT.

or negligence has caused the company to suffer a loss.¹² This is the so-called derivative action by the minority shareholder.

As regards the external liability of the Board of Commissioners vis-a-vis third parties, pursuant to the provisions in Articles 1365 and 1366 of the Indonesian Civil Code which deal with acts in tort, members of the Board of Commissioners could become personally liable towards third parties. It goes without saying that members of the Board of Commissioners who are able to prove that the damage suffered by the third party is not imputable to their negligence in properly carrying out their supervisory duties can not be personally held liable therefor.¹³

It should further be noted that the supervisory duty of the Board of Commissioners does never exonerate the Board of Directors of its own responsibility. It would, therefore, be rare indeed that a situation would arise where members of the Board of Commissioners are held liable whilst the Board of Directors is not liable. The contrary will more often be the case, as the mere fact that the Board of Directors is negligent or at fault does not necessarily imply that the Board of Commissioners has failed in its supervision.

Thus some pointers for discussion.

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¹² Article 98(2) UUPt.

¹³ Article 60(4) UUPt.