• FINANSE I PRAWO FINANSOWE •
• Journal of Finance and Financial Law •

Grudzień/December 2024 • vol. 4(44): 23–48

IMPLEMENTATION OF PARENT COMPANY'S LIABILITY FOR BANKRUPTCY EXPERIENCED BY SUBSIDIARY: CASE IN INDONESIA

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Member since 2021
JM15102

https://doi.org/10.18778/2391-6478.4.44.02

IMPLEMENTATION OF PARENT COMPANY'S LIABILITY FOR BANKRUPTCY EXPERIENCED BY SUBSIDIARY: CASE IN INDONESIA

ABSTRACT

The purpose of the article. The article aims to reveal the existence of vacuum of norms regarding a group company in Indonesia, especially regarding the parent company's responsibility for bankruptcy experienced by its subsidiary.

Methodology. This research is normative juridical research. It uses several approaches to obtain information from various aspects regarding the legal issues being studied, namely the statute approach and case approach.

Results of the research. This legal vacuum causes differences of opinions among judges in assessing the relationship between a parent company and its subsidiary as a basis for implementing the parent company's liability for bankruptcy experienced by its subsidiaries. In this research, there were cases where the judge found that the parent company was not responsible for the losses or bankruptcy experienced by its subsidiary on the basis that these two companies were separate entities. Meanwhile, in a different case, a judge's opinion was that the parent company and its subsidiary were a single economic entity and there was a special relationship between the two companies, so that the parent company was liable for the bankruptcy experienced by its subsidiary. In this regard, we are of the opinion that it is necessary to establish legislation regarding a group

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company, specifically regulating the liability of parent company for bankruptcy experienced by its subsidiary in order to guarantee legal certainty and provide legal protection for all relevant stakeholders.

Keywords: group company, parent company's liability, bankruptcy of subsidiary.

JEL Class: G33, K29.

INTRODUCTION

Global economic developments also influence the development of existing business entities, one of which can be found through the presence of a group company. In this entity the company's operational activities are carried out using a structure involving a parent company and subsidiary (Petrin & Choudhury, 2018). The existence of a group company as a company certainly has an influence on the development of the economic sector in a country. This cannot be separated from the fact that both small and large companies have an influence on the development of the economic sector, one of which is through the role of companies in providing employment opportunities (Edmiston, 2011). In this regard, the role of group company in the economic sector in Indonesia is demonstrated, one of which is that the total income of the top ten group companies in Indonesia reached 9.27% of Indonesia's GDP in 2010 (Sulistiowati, 2013, p. 3). On the other hand, in business terms, the formation of group companies is considered to be able to reduce transaction costs by internalizing transactions through carrying out transactions between companies that are in the same group compared to more expensive market interactions between different companies (not in the same group), so that through the formation of a group company can reduce transaction costs and increase overall economic activity (Dau et al., 2021).

The presence of a group company in Indonesia has existed since the end of the 19th century, which was marked by the emergence of Oei Tiong Ham Concern as the first group company during the Dutch East Indies colonial period which also became the first group company in the Southeast Asia region (Purwanti, 2022). In its development, the existence of a group company in Indonesia continues to experience growth, this can be seen by the increasing number of group companies being formed, for example: Djarum Group, Bakrie Group, and Astra Group. On the other hand, the formation of a group company as a form of business entity has not been followed by legal development efforts. This can be seen from the reality that to date there are no statutory norms that specifically regulate a group company. This condition has led to a vacuum of norms (rechts vacuum) in the regulation of a group company in Indonesia, especially regarding the regulation of the parent company's liability for bankruptcy experienced by the subsidiary which is the focus of this research. Vacuum of norms can occur due to several things, namely, first, the process of drafting statutory regulations takes a relatively long time, so that when the statutory regulations have been ratifed there is a possibility that the circumstances or things to be regulated have undergone changes. Second, a particular situation or thing cannot yet be regulated into a statutory organ, or even though it has been regulated into a statutory one, it is still unclear or incomplete (Nasir, 2017). This also reflects the reality that the law will always lag behind the development of society (Kusbianto, 2019).

The absence of statutory norms that specifically regulate the parent company's liability for bankruptcy experienced by its subsidiary has resulted in the single company approach as regulated in Law Number 40 of 2007 concerning Limited Liability Company (hereinafter referred to as Company Law), to be used to assessing the liability of parent company. Based on that statutory tegulations the parent company basically has limited liability, with the basis of the assessment that the parent company only has the position of shareholder in its subsidiary. This is in line with the opinion of Altieri and Nicodano (2002) which states that the limited liability of a parent company for the obligations or debts of its subsidiary is a common characteristic in various countries. This creates tension with the controlling authority that the parent company has over its subsidiary, where the parent company can exercise "control" or "influence" business decisions made by the subsidiary, thus giving rise to a related problem of the parent company's liability for the bankruptcy experienced by its subsidiary.

Regarding the liability of a parent company for the debts of a subsidiary that declared bankrupt, Murphy (1998) stated that the concept of limited liability is not relevant in the context of a subsidiary whose shares are all owned by the parent company. In this case even though based on the company law in Australia, a parent company can be held liable for subsidiary debts based on the provisions of the Company Law and the "shadow director" approach, but there can be seen the fundamental incompatibility between commercial interests and the legal approach. Furthermore, Long (2020) revealed the fact that the parent company has the power to exercise control over its subsidiary and analyzed that it is very likely that the parent company will use its subsidiary for its own benefit and harm the interests of creditors. She further stated that the parent company could take advantage of the limited liability principle and independent corporate personality as well as a very careful application of piercing the corporate veil doctrine in the UK, so that the parent company could discharge its liability for the debts of its subsidiary which were in a state of insolvency. Then, Zhang (2022) revealed that based on the law in China, absolute limited liability applies to a parent company which are foreign investors, provided that the parent company has fulfilled the requirements as a legal entity. The implementation of piercing the corporate veil is still limited in application to domestic position of parent company and subsidiary. Meanwhile, this article focuses on the implementation of parent company's liability for bankruptcy experienced by its subsidiary by exploring several court decisions in Indonesia, where there are different perspectives of judges regarding the relationship between the parent company and its subsidiary as a basis for decision making.

As we will show in this article, there is inconsistency among judges in assessing the relationship between a parent company and its subsidiary as a basis for determining the parent company's liability for the bankruptcy experienced by the subsidiary. We believe that it is necessary to establish statutory norms to provide legal certainty regarding the parent company's liability for bankruptcy experienced by its subsidiary. To articulate the argument that we develop, this article consists of several parts. First, it begins by discussing the existence of a vacuum of norms, because there are no laws and regulations that specifically regulate a group company in Indonesia, especially in this case regarding the regulation of the parent company's liability for bankruptcy experienced by its subsidiary. Second, after seeing that there is a vacuum of norms regarding the parent company's liability, a search will be carried out on court decisions that are related to the focus of this research to see the basic considerations used by the judge in deciding the case. This description will be accompanied by criticism regarding the absence of statutory regulations that specifically regulate the liability of a parent company for bankruptcy experienced by their subsidiary

1. METHOD

This research is a normative juridical research. The legal materials used in this research are legislation, books, documents and other articles related to the focus of this research. The technique for searching for legal materials is carried out using library research and browsing the internet. After an inventory of legal materials related to this research was carried out, the legal materials were studied and then grouped based on their hierarchy and analyzed using prescriptive analysis techniques to draw conclusions. This research uses several approaches to obtain information from various aspects regarding the legal issues being studied, namely the statute approach which is carried out by reviewing all laws and regulations relating to the legal issue being handled and the case approach which is carried out by reviewing cases related to the legal issue under study (Marzuki, 2015: 136–158).

The aim of this research is to reveal the existence of a vacuum of norms regarding a group company, especially regarding the parent company's responsibility for bankruptcy experienced by its subsidiary. To explain this, we analyze several cases related to this research which show that there are differences in judges' opinions regarding the relationship between a parent company and its subsidiary as a basis for decisions. By revealing this, it is hoped that this research can provide a comprehensive understanding of the relationship between a parent company and their subsidiary and build arguments regarding the importance of establishing laws and regulations as a basis for implementing the parent company's responsibility for bankruptcy experienced by its subsidiary.

2. RESULT AND DISCUSSION

2.1. Vacuum of norms regarding the parent company's liability for the bankruptcy experienced by the subsidiary

As explained above, there is a vacuum of norms in the regulation regarding the liability of a parent company to its subsidiary that declared bankrupt. This condition cannot be separated from the fact that to date, there are no statutory norms that specifically regulate a group company. This vacuum of norms can cause confusion (chaos) in society regarding what rules should be used or applied, so that there is no legal certainty regarding a particular matter (Nasir, 2017). Based on this, it is appropriate that the law in the form of statutory norms must be able to follow the dynamics and legal problems that exist in a society. However, as explained above, the existence of a group company in Indonesia is still not specifically regulated in a statutory norm. The legal vacuum related to the group company can be exploited by the parent company by doing the following:

a) a parent company can use its subsidiary to carry out high-risk business activities, so that when a loss occurs, the loss will be the responsibility of the subsidiary;

b) a parent company can use a loan obtained by one of its subsidiaries from a third party to finance the operations of other subsidiary without the creditor's knowledge;

c) a parent company can transfer part of the assets of its bankrupt subsidiary to another subsidiary, without the knowledge of minority shareholders and creditors of the bankrupt subsidiary. When the bankruptcy assets were settled, ownership of the assets was transferred to another subsidiary. This results in third parties experiencing difficulties in claiming these assets to fulfill their receivable rights (Sulistiowati, 2012).

In this regard, if the activities carried out by the subsidiary run smoothly in accordance with the company's objectives, it will not cause legal problems. Problems arise when the subsidiary experiences financial distress, which results in the subsidiary having difficulty fulfilling its obligations, and then leading to bankruptcy of the subsidiary, which will give rise to problems regarding liability for the losses incurred. In general, the company's responsibility for losses is also influenced by the company's legal status, as follows:

a) liability of a company that is not legal entity;

In companies that are not legal entities, there is no separation between the company's assets and the assets of the company owner. This means that the company owner can be asked to be held responsible for any debts or losses experienced by the company (Bachmid, 2021). For example, in a private company, a person is both the owner and the manager, so the manager is the person who is responsible for all engagements carried out by the company, including responsibility for losses experienced by the company. In this case, the provisions of Article 1131 of the Civil Code apply (Indonesia, 1847b, art. 1131).

Furthermore, in companies that are civil partnerships, general principles apply, where members or partners are not related and not responsible for all partnership debts, and each partner or member cannot bind other partner members, if they are not given the authority to do so (Indonesia, 1847b, art. 1624). Thus, only the member of the partnership who carries out the legal action is responsible to a third party and is personally responsible. However, if the members of the partnership jointly take legal action with a third party, then the third party can sue each of them for the same amount and share (Indonesia, 1847b, art. 1643).

The other forms of companies that are not legal entities are Firm (venootschap onder firm) and CV (Comamanditaire Vennootschap). In a firm, in principle, each partner has the authority to act on behalf of the firm, where members of the firm do not need authority from other members, but these actions bind the partners or other members of the firm to fulfill the obligations that arise from the action to third parties jointly and severally (Indonesia, 1847a, art. 17, §1). That joint liability does not apply if one of the partners is proven to have committed an ultra vires act (Indonesia, 1847a, art. 17, §2).

Meanwhile, in CV there are two types of partners, namely management partners or complementary partners, who act as management and limited partners, also known as non-working partners, whose status is only as providers of capital (Indonesia, 1847a, art. 19, §1). Limited partners are only responsible for the capital they have contributed, while complementary partners are personal liability for the obligations/debts of CV. However, if the limited partners are proven to be involved in the management, they will be held jointly and severally liable (Indonesia, 1847a, art. 21);

b) liability of companies that are legal entities;

In contrast to companies that are not legal entities, these companies are legal subjects, and are viewed like humans as legal subjects who hold rights and obligations. There are several forms of companies that are recognized as legal entity in Indonesia, namely State-Owned Enterprises (BUMN), Limited Liability Company, and Cooperatives. Specifically, regarding limited liability companies which are a form of a company that is a member of the group company studied in this research, the principle of limited liability as regulated in Company Law applies. Based on this principle of limited liability, shareholders are not personally responsible for all agreements made for the company and not responsible for any losses suffered by the company in excess of the shares they own (Indonesia, 2007, art. 3, §1). The limited liability principle does not only apply to shareholders, but also applies to directors and board of commissioners as long as they carry out their obligations and authority in accordance with the applicable provisions as regulated in the Company Law and the company's Articles of Association (Sufiarina et al., 2023).

Based on the company's liability according to its legal entity status as described above, a subsidiary in the form of a limited liability company will bear responsibility for losses that arise, as long as the losses arise as a result of actions carried out by the management on behalf of the subsidiary and for the interests of the subsidiary. However, as explained in the introduction, in a group company there is a possibility of control exercised by the parent company over its subsidiary. The parent company as controlling shareholder can dominate decision making in a subsidiary and maximize personal profits for the parent company, for example, through appointing management to subsidiary that follow the wishes of the parent company (Fujita & Yamada, 2022). In this regard, a subsidiary as a company in carrying out its business activities will of course have relationships with other parties, these relationships can be in the form of sale and purchase agreements, loan or other relationships related to the subsidiary's business activities. In connection with the business activities carried out by the subsidiary, one of the risks that the subsidiary may experience is bankruptcy, where the provisions regarding bankruptcy law in Indonesia are regulated in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter called Bankruptcy Law).

The reason for the enactment of the Bankruptcy Law is because the regulations in the context of settling debts based on Faillissements verordening, Staatsblad 1905:217 juncto Staatsblad 1906:348, most of the material is no longer in accordance with the development and legal needs of society and therefore has been changed by a Substitute Government Regulation Law Number 1 of 1998 concerning Amendments to the Law on Bankruptcy, which was later enacted into Law based on Law Number 4 of 1998, however, these changes have not yet met the development and legal needs of society. There are several factors that require regulations regarding Bankruptcy and Suspension of Debt Payment Obligations as stated in the explanation section of the Bankruptcy Law, including (Indonesia, 2004):

a) to prevent seizure of the debtor's assets, when creditors within the same time frame submit claims for their receivables to the debtor;

b) to prevent creditors holding material security rights from demanding fulfillment of their receivables by selling goods belonging to the debtor without considering the interests of the debtor or other creditor;

c) to prevent fraud, whether committed by the debtor or one of the creditors.

In connection with the existence of regulations related to bankruptcy law in Indonesia, Adnan & Sunarto (2020) revealed that the purpose of bankruptcy is to divide the assets belonging to the debtor to all creditors, which is implemented by the curator taking into account their respective rights. Furthermore, according to Babatunde Onakoya & Olotu (2017) revealed that the main purpose of the regulations in bankruptcy law is to provide protection and convenience for debtors, to be a tool that guarantees the achievement of a fair distribution of debtor assets to all creditors, as well as to prevent fraudulent actions that can undermine the purpose of bankruptcy law. These two opinions show that the main purpose of bankruptcy law is to regulate the mechanism for distributing the assets of a bankrupt debtor to its creditors correctly. The party that can be declared bankrupt based on a commercial court decision is the debtor (Indonesia, 2004, art. 1, point 3), where the debtor can be a human (natuurlijke person) and a legal entity (rechtspersoon). In connection with this, a subsidiary in the form of a limited liability company can be a party that is requested to be declared bankrupt because of its status as a limited liability company which is a legal entity as long as it meets the requirements for declaring bankruptcy as regulated in Article 2 paragraph (1) of the Bankruptcy Law, namely:

a) the debtor has 2 (two) or more creditors; and

b) the debtor does not pay off at least 1 (one) debt that is due and collectible. The debt is not paid either because the debtor is unable to pay or because they do not want to pay (Devi et al., 2022).

The parties that can apply for a bankruptcy declaration as regulated in the Bankruptcy Law include: debtor, creditor, prosecutor, Bank Indonesia, the Capital Market Supervisory Agency, and the Minister of Finance (Indonesia, 2004, art. 2). However, after the enactment of Law of the Republic of Indonesia Number 21 of 2011 concerning the Financial Services Authority as amended by Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector, there has been the following change in authority in submitting applications for bankruptcy.

The Financial Services Authority is the only party that authorized to submit a request for a bankruptcy declaration and/or a request for suspension of debt payment obligations to debtors who are bank, securities company, stock exchange, alternative market operator, clearing and guarantee institution, depository and settlement institution, fund administrators of investor protection, securities funding institution, securities price assessment institution, insurance company, sharia insurance company, reinsurance company, or sharia reinsurance company, pension fund, guarantor institution, financing institution, microfinance institution, electronic system operator that facilitate the collection of public funds through offers securities, providers of information technology-based joint funding services, or other financial institutions registered and supervised by the Financial Services Authority as long as their dissolution and/or bankruptcy are not regulated differently from other statutory (Indonesia, 2023, art. 8B).

Based on the provisions as described above, in general, a subsidiary can be filed for bankruptcy by the subsidiary itself as a debtor or by one of the subsidiary's creditors. When a debtor is declared bankrupt based on a commercial court decision, the bankrupt debtor loses their right to control and manage assets which are included in the bankruptcy assets, starting from the time the bankruptcy decision is pronounced (Indonesia, 2004, art. 24, §1). This is in accordance with the opinion of Kartoningrat & Krisharyanto which states that debtors who have been declared bankrupt lose their right to control and manage their assets which are included in the bankruptcy assets, where the authority to manage and settle these assets is transferred to the curator (Kartoningrat & Krisharyanto, 2023). All processing (clearing up bankruptcy assets) is carried out by the curator from the time the decision on the bankruptcy declaration is pronounced, even if the decision is submitted for cassation or judicial review (Simbolon & Sitorus, 2024). The impact of the decision to declare bankruptcy on the debtor is only limited to the debtor's assets, where the decision does not result in the debtor being placed under guardianship (Hadi Shubhan, 2019). In this case, the debtor only loses the ability to manage and transfer assets which are included in bankruptcy assets, but does not lose the ability to carry out legal actions that concern them. In general, the legal consequences of the decision to declare bankruptcy include:

a) the debtor loses the right (capacity) to control and manage assets which are included in the bankruptcy assets;

b) the decision to declare bankruptcy only causes the debtor to lose the right to control and management related to the bankruptcy assets, but not regarding the personal person of the bankruptcy debtor;

c) control and management of bankruptcy assets is carried out by the curator for the benefit of creditors with supervision from the Supervisory Judge;

d) all claims and lawsuits related to the rights and obligations of the bankruptcy estate are filed by or against the curator;

e) all actions of the debtor that were carried out before the debtor was declared bankrupt based on a commercial court decision can be canceled if it can be proven that the actions were carried out by the debtor to harm their creditors – this is known as actio paulina;

f) the curator can ask the court to cancel the gift made by the debtor, if the curator can prove that at the time the gift was made the debtor knew or should have known that the gift would be detrimental to the interests of the creditor;

g) an agreement entered into by a debtor during bankruptcy only binds the debtor personally or can be requested for cancellation, unless the agreement creates a benefit for the bankruptcy debtor's assets;

h) the execution rights of creditors or third parties to demand fulfillment of their rights which are part of the bankruptcy assets, are suspended for a maximum period of 90 (ninety) days;

i) the right to retain property owned by the bankrupt debtor is not lost;

j) bankruptcy experienced by a husband or wife that is not accompanied by a separation of assets agreement, so it is treated as bankruptcy of a union of assets (Makmur, 2018).

Furthermore, although bankruptcy assets include all of the debtor's assets at the time the bankruptcy declaration decision was pronounced as well as everything obtained during the bankruptcy (Indonesia, 2004, art. 21), based on humanity considerations there are some assets belonging to the debtor that are not included in the bankruptcy assets, including (Indonesia, 2004, art. 22):

a) objects, including animals that are really needed by the debtor in connection with their work, equipment, medical equipment used for health, beds and equipment used by the debtor and their family, and food for 30 days for the debtor and their family who live at that place;

b) everything that the debtor obtains from their own work as remuneration for a position or service, as wages, pensions, waiting money or allowances, to the extent determined by the Supervising Judge; or

c) money that given to the debtor to fulfill an obligation to provide maintenance according to the law.

Specifically for limited compaies that become bankruptcy debtors, the decision to declare bankruptcy results in the directors' power to manage the company being "locked in", even though they continue to hold positions as directors of the company (Sjahdeini, 2009, p. 191). In this regard, a decision to declare bankruptcy against a company does not necessarily result in the company being dissolved, so that a company that has been declared bankrupt based on a commercial court decision can still carry out its business activities (Suryati et al., 2022). In connection with this, there are several benefits that may be obtained by continuing the company's business activities:

a) able to increase the bankruptcy assets through profits obtained from the company's activities;

b) there is a possibility that with the continuation of the company's activities, the company will gradually be able to pay its obligations or debts in full;

c) the possibility of achieving peace between the bankruptcy debtor and its creditors (Karundeng, 2015).

Furthermore, in relation to the management functions of the directors, in the event that the company has been declared bankrupt, the Bankruptcy Law regulates that the company organs, including in this case the directors, can still carry out their functions, but in relation to the expenditure of money included in the bankruptcy assets, this is the authority of the curator (Indonesia, 2004, art. 24, §1). This means that the company's directors can still carry out their functions, except for actions related to spending money as regulated in the Bankruptcy Law. There are several consequences of the decision to declare bankruptcy on the company, including:

a) the power possessed by the directors to manage the company becomes "limited", but the directors in this case still hold their positions as directors of the company;

b) the company's directors become the functus officio (recipient of the company's mandate);

c) all assets of the company which are bankruptcy assets are managed and controlled by the curator for the benefit of the creditors in the context of settling the bankruptcy debtor's assets under the supervision of the Supervisory Judge;

d) all obligations carried out by the directors after the company is declared bankrupt cannot be fulfilled from the bankruptcy assets, unless the agreement benefits the bankruptcy assets (Manikoe et al., 2023).

Based on the consequences of declaring bankruptcy as described above, when a subsidiary is declared bankrupt, all assets it owns will be used to pay off all its debts to creditors, which will be carried out by a curator. When the assets of a subsidiary that has been declared bankrupt exceeds all the debts it has, this will not cause problems, especially for creditors, because they will still receive satisfaction for their receivables. Problems arise when the assets owned by a subsidiary are not sufficient to pay off all its debts to creditors, so that the subsidiary is in a state of insolvency (Hidayat et al., 2023). In this regard, the provisions in the current Bankruptcy Law did not regulate the responsibilities of the parent company if its subsidiary is declared bankrupt.

Furthermore, the insolvency situation experienced by the subsidiary as regulated in the Bankruptcy Law, can be a reason for the dissolution of the subsidiary as regulated in Article 142 paragraph (1) of the Company Law. The provisions in the Company Law stipulate that the dissolution of the company can occur due to:

a) based on the decision of the General Meeting of Shareholders;

b) because the period of existence 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 which has permanent legal force, the Company's bankruptcy assets are insufficient to pay bankruptcy costs;

e) because the bankruptcy assets of the Company which has been declared bankrupt are in a state of insolvency as regulated in Bankruptcy Law; or

f) due to the revocation of the Company's business license, which requires the Company to carry out liquidation in accordance with statutory provisions (Budiono & Talia, 2023; Rasyidi, 2022).

Similarly, the Bankruptcy Law does not regulate the parent company's liability for bankruptcy experienced by its subsidiary, the provisions in Company Law also do not explicitly regulate the parent company's liability for bankruptcy experienced by its subsidiary. However, the provisions in the Company Law regulate the liability of company organs when the company is declared bankrupt, as follows:

a) liability of director;

If the assets of a company that has been declared bankrupt are not sufficient to pay off all debts, then each member of the board of directors must be jointly and severally responsible for paying off the company's debts, provided that the bankruptcy occurred due to an error or negligence committed by the directors (Indonesia, 2007, art. 24, ayat 2).

This provision also applies to members of the board of directors who have committed errors or omissions, who have served for a period of five years before the decision to declare bankruptcy is pronounced (Indonesia, 2007, art. 104, §3). However, a member of the board of directors can be released from this responsibility if they can prove that (Indonesia, 2007, art. 104, §4):

– bankruptcy experienced by the company did not occur due to the illegality or negligence of the director;

– the director managed the company in good faith, prudence and full responsibility for the interests of the company and in accordance with the aims and objectives of the company;

– the management actions carried out by the director do not have a conflict of interest either directly or indirectly; and

– the board of directors has taken action to prevent bankruptcy;

b) liability of the board of commissioners;

If the assets of a company that has been declared bankrupt are not sufficient to pay off all debts, and the bankruptcy occurs due to an error or negligence by the board of commissioners in supervising the management carried out by the board of directors, then each member of the board of commissioners is jointly and severally responsible with the members of the board of directors for the debt (Indonesia, 2007, art. 115, §1). This responsibility also applies to members of the board of commissioners who commit errors or omissions, who have served for a period of five years before the decision to declare bankruptcy is pronounced (Indonesia, 2007, art. 115, §2). Just as members of the board of directors that can be free from liability for bankruptcy experienced by the company, members of the board of commissioners can also be free from this liability if they can prove that (Indonesia, 2007, art. 115, §3):

– bankruptcy experienced by the company did not occur due to the illegality or negligence of the members of the board of commissioners;

– the member of the board of commissioners did the task of supervising the management carried out by the board of directors in good faith and prudence for the interests of the company and in accordance with the aims and objectives of the company;

– do not have a conflict of interest, either directly or indirectly, regarding the management actions carried out by the directors which caused the company to go bankrupt; and

– the member of the board of commissioners has provided advice to the board of directors to prevent bankruptcy;

c) liability of the General Meeting of Shareholders;

The General Meeting of Shareholders is one of the organs of the company which consists of the shareholders of the company. In contrast to the liability that is held by the directors and board of commissioners for bankruptcy experienced by the company as described above, shareholder has limited liability for bankruptcy experienced by the company, this means that shareholders are only responsible for the shares they deposit into the company (Nugraheni, 2020). However, the limited liability of shareholders does not apply if proven:

– the requirements for the company as a legal entity have not been or are not fulfilled;

– the shareholder, either directly or indirectly, in bad faith, uses the company for his personal interests;

– the shareholder is involved in unlawful acts committed by the company;

– the shareholders either directly or indirectly use the assets owned by the company, which results in the company's assets being insufficient to pay off debts (Widijowati & Darmawan, 2020).

Based on the description regarding the regulations contained in the Company Law and the Bankruptcy Law as described above, it can be seen that in these two statutes there are still no regulations related to a group company, especially regarding a regulation related to the liability for bankruptcy experienced by its subsidiary, so that this condition causes a vacuum of norms with the absence of statutory provisions that regulate the liability of parent company for bankruptcy experienced by its subsidiary. This of course creates legal uncertainty in law enforcement regarding the parent company's liability, which can be seen in the second part of this article by exploring several court decisions.

2.2. Cases in Indonesia

The existence of a vacuum of norms related to the regulation of a group company, especially regarding the regulation of the parent company's liability for losses or bankruptcy experienced by subsidiary, this reality has led to differences in the views of the panel of judges in deciding cases regarding the parent company's liability for losses or bankruptcy experienced by subsidiaries. This can be seen in the case below:

2.2.1. AMERICAN EXPRESS BANK LTD, SINGAPORE ET AL V PT. OMETRACO CORPORATION TBK.

This case started when PT. Ometraco Corporation Tbk. (hereinafter referred to as OC) as the parent company becomes the guarantor of its subsidiary, namely PT. Ometraco Multi Artha (hereinafter referred to as OMA) in a loan agreement with the syndicated bank American Express Bank Ltd, Singapore et al. as stated in the Syndicated Credit Agreement (PKS) dated June 26, 1997. Apart from being a guarantor for its subsidiary, OC also carries out loans for the benefit of its subsidiary, namely OMA, based on the Facility Agreement on December 3, 1996. However, until the maturity date, OMA did not pay off its obligations as stated in the PKS, nor did OC as guarantor pays off its obligations (Ramsay, 2022), so that American Express Bank Ltd, Singapore et al. filed a bankruptcy petition against OC on September 8, 1998, which was registered at the Registrar's Office of the Commercial Court at the Central Jakarta District Court under Register Number: 05/PAILIT/1998/PN.Jkt.Pst. (hereinafter referred to as case no. 05). As for the applicant in case no. 05 among others (Pengadilan Niaga Jakarta Pusat, 1998):

1) American Express Bank Ltd., Singapore Branch;
2) Overseas Chinese Banking Corporation Limited;
3) Royal Bank Of Canada;
4) PT. Bank Ekspor Impor Indonesia (Persero);
5) Union De Banques Arabes Et Francaises, Singapore Branch;
6) PT Bank Internasional Indonesia Tbk;
7) PT Fuji Bank International Indonesia;
8) PT. Bank BII Commonwealth;
9) PT. Bank Pembangunan Indonesia (Persero);
10) Bumi Daya Finance Internasional Ltd;
11) The Commercial Bank Of Korea Singapore Branch;
12) Industrial And Commercial Bank Limited; dan
13) PT. Bank Negara Indonesia (Persero) Tbk, Cabang Hong Kong.

Furthermore, the applicant in case no. 05 is called American Express Bank Ltd, Singapore et al. Commercial court in case no. 05 decided that the bankruptcy petition submitted by American Express Bank Ltd, Singapore et al. against OC could not be accepted (Pengadilan Niaga Jakarta Pusat, 1998), where one of the considerations used by judges in case no. 05 is a bankruptcy petition filed against the parent company which should be submitted in one petition for bankruptcy against its subsidiary (Pengadilan Niaga Jakarta Pusat, 1998). There are several considerations used by the panel of judges at the commercial court in case no. 05, among others (Pengadilan Niaga Jakarta Pusat, 1998):

a) American Express Bank Ltd, Singapore et al. as the applicants have apparently also filed a bankruptcy application against OMA which was submitted and registered at the Registrar of the Commercial Court at the Central Jakarta District Court under Register Number: 04/PAILIT/1998/PN.Jkt.Pst . (hereinafter referred to as case no. 04);

b) the legal basis for the bankruptcy petition used in case no. 05 is the same as the legal basis used in case no. 04;

c) between OC and OMA is single economic entity, where OC as the parent company has a large number of shares in OMA, thus greatly determining the continuity of OMA's business or operations;

d) the applicants should only submit one application for declaring bankruptcy, namely against OMA and also against OC, where OC is bound by law as a joint and several liability guarantor (even considered as the only main debtor) so that both OMA and OC can be declared bankrupt in one decision;

e) the application for declaration of bankruptcy against OC uses the same legal basis as the application for declaration of bankruptcy against OMA in two separate applications (case no. 04 against OMA and case no. 05 against OC) will have confusing (ambiguous) juridical consequences.

Furthermore, regarding the decision in case no. 05 was submitted for cassation to the Supreme Court with Register Number: 01 K/N/1998. At the cassation level, the judges decided to continue to reject the application that submitted by American Express Bank Ltd, Singapore et al. However, the main consideration used in the decision at the cassation level was different from the previous decision, namely because the debt which was a requirement for the application for a bankruptcy declaration had not yet expired (Mahkamah Agung, 1998). The considerations used by the judges in this case are as follows (Mahkamah Agung, 1998):

a) OC as the parent company acts as a debtor to American Express Bank Ltd, Singapore et al for the interests of its subsidiary, namely OMA, based on the Facility Agreement dated December 3, 1996, while OMA as a subsidiary acts as a debtor as described in the form of a Syndicated Credit Agreement (PKS) dated June 26, 1997 No. 274;

b) American Express Bank Ltd, Singapore et al as the applicant in this case have mixed up the maturity agreed in the Facility Agreement dated December 3, 1996 with the maturity stipulated in the Syndicated Credit Agreement June 26, 1997;

c) based on the provisions in the Facility Agreement dated 3 December 1996 between OC and American Express Bank Ltd, Singapore et al, the maturity date is 24 months starting from the date of the first loan withdrawal;

d) OC had made the first withdrawal of the loan on December 3, 1996, so the maturity date was December 3, 1998, so that the application for bankruptcy declaration submitted by American Express Bank Ltd, Singapore et al in case no. 05 to the Commercial Court dated September 8, 1998 is premature or too early.

Although the judges at the cassation level in this case rejected the application for a bankruptcy declaration submitted by American Express Bank Ltd, Singapore et al against OC, the panel of judges at the cassation level in their decision were of the opinion that in the current and future development of business activities there are group companies which have several subsidiaries, the number of subsidiaries can even reach tens to hundreds. In these group companies, basically there is no separation of economic activities and objectives (may have no separate economic existence) between the parent company and its subsidiary (Mahkamah Agung, 1998). Even when the parent company and subsidiary have the same management (directors), this can result in no business separation between the two companies (Ramsay, op cit.) However, the panel of judges in their decision at the cassation level canceled the Commercial Court Decision at the Central Jakarta District Court Number: 05/Pailit/1998/PN.Niaga/Jkt.Pst. with consideration based on the facts of the Facility Agreement dated December 3, 1996 and the Syndicated Credit Agreement dated June 26, 1997 as intended, which are related to the legal principle of separation of personality (separate entity) between the parent company and subsidiaries within the group company, then the application for a bankruptcy declaration is submitted in two applications that separate and independent, namely case no. 04 and case no. 05 does not conflict with legal provisions, so the opinions and conclusions in Decision Number 05/Pailit/1998/PN.Niaga/Jkt.Pst. which requires combining settlements in one application for bankruptcy declaration, cannot be maintained and the decision must be cancelled (Mahkamah Agung, 1998).

Based on the opinion of judges in the Supreme Court Decision Number: 01 K/N/1998 as described above, it confirms that legally speaking, between the parent company and its subsidiary, each is an independent legal entity. In connection with this, the civil law recognizes the existence of regulations regarding the family law, which regulates the rights and obligations that parents have towards their children. This is different from a parent company which does not have "parental power over its subsidiary", like the relationship between a father/mother and their child in the family law (Supramono, 2007). This happens because a subsidiary in the form of a limited liability company is a legal entity which, when it has received approval as a legal entity, is considered to be "mature" and has independence.

2.2.2. EMPLOYEES OF PT. INTI FASINDO INTERNATIONAL V PT. GREAT RIVER INTERNATIONAL TBK.

PT. Great River International Tbk. is a company engaged in the manufacturing and distribution of men's, women's and children's clothing (Bloomberg, n.d.), which was founded on July 22, 1976 with the initial name PT. Great River Garment Industries which later changed its name to PT. Great River Industries in 1991, and finally changed its name to PT. Great River International in 1996 (Pengadilan Hubungan Industrial, 2007). PT. Great River International Tbk. has several branches and several subsidiaries, one of which is PT. Inti Fasindo International which has business activities in the form of distribution and trading of clothing and consulting equipment. The shareholders at PT. Inti Fasindo International as of December 31, 2004, as follows (Otoritas Jasa Keuangan, n.d.):

Tabel 1. Shareholders of PT. Inti Fasindo International

Pemegang Saham	Persentase
PT. Great River International Tbk.	99,95%
Wendy Tanudjaja	0,05%

Source: Otoritas Jasa Keuangan.

Furthermore, in carrying out its business activities, PT. Inti Fasindo International has a company organ with a board of commissioners and directors as follows (Otoritas Jasa Keuangan, n.d.):

a) susunan dewan komisaris:
- Chief Commissioner : Doddy Soepardi Harun Al Rasyid
- Commissioner : Wendy Tanudjaja
- Commissioner : Johanes Abdulhay Sinungan
- Commissioner : Philip Juchahana

b) susunan dewan direksi:

- President Dirertor	: Sunjoto Tanudjaja
- Vice of President Dirertor	: Albert Mario Setiawan
- Dirertor	: Djims Kurnia
- Dirertor	: Hasanuddin Rachman

In this case, 557 employees of PT. Inti Fasindo International (as Plaintiffs) filed a lawsuit against PT. Great River International Tbk. which is the parent company of PT. Inti Fasindo International at the Registrar's Office of the Central Jakarta District Court on February 15, 2007 with registration number: 40/G/PHI.PN.JKT.PST. The basis for filing a lawsuit in this case is because the salaries/wages that the Plaintiffs should have received have not been paid. In this case, the judges accepted the exception submitted by PT. Great River International Tbk. (as Defendant), on the grounds that the lawsuit filed by 557 employees clearly stated that they were employees of PT. Inti Fasindo International, but in this lawsuit filed against PT. Great River International Tbk. so that this lawsuit is wrong in determining the Defendant (error in persona). Apart from that, the judges considered that between PT. Inti Fasindo International with PT. Great River International Tbk., is two different legal entities and each is independent, so the panel of judges in this case decided that the lawsuit could not be accepted (Pengadilan Hubungan Industrial, 2007).

In this case it can be seen that the judges saw that even though PT. Inti Fasindo International with PT. Great River International Tbk. has a relationship as a subsidiary and parent company, but legally both are separate legal entities, so that legally 557 employees of PT. Inti Fasindo International have no legal relationship with PT. Great River International Tbk. However, it is interesting to note the relationship between PT. Inti Fasindo International with PT. Great River International Tbk. in their business activities, where both of them have a scope of business activities in the clothing sector. Apart from that, as explained above, the management at PT. Inti Fasindo International that holds the position of the main director is Sunjoto Tanudjaja, where at the same time Sunjoto Tanudjaja is also the President Director of PT. Great River International Tbk (Tempo, n.d.). The existence of interconnected business activities and the similarity of management (directors) between the parent company and the subsidiary company raises the question of whether the concept of separation between the parent company and the subsidiary company as a legal entity in the construction of a group company is something absolute. This question arises because in this case there is the potential that PT. Inti Fasindo International as a subsidiary can be used as a "tool" for PT. Great River International Tbk. as a holding company in carrying out its business activities.

2.2.3. CHUAN SOON HUAT INDUSTRIAL GROUP LTD. CASE

This case started when PT. Cemerlang Selaras Wood Working (hereinafter referred to as CSWW) has been declared bankrupt based on the Commercial Court Decision at the Central Jakarta District Court Number: 37/Pailit/2010/PN.NIAGA.JKT.PST. on June 16, 2010. CSWW is a legal entity in the form of a limited liability company established under Indonesian law based on the Deed of Establishment No. 30 dated June 17, 1989, made before Agus Madjid, S.H., Notary in Jakarta. This deed has received approval from the Minister of Justice of the Republic of Indonesia based on Decree No. C2-10297-HT.01.01.TH.89 dated 3 January 1989, and registered at the Tangerang District Court Office under No.HT.01.02.58/1989/PN.TNG dated 13 November 1989, and published in the State Gazette of the Republic of Indonesia No. 99, dated December 12, 1989, Supplement No. 3501 (Mahkamah Agung, 2010). CSWW is a subsidiary of Chuan Soon Huat Industrial Group Ltd. (hereinafter referred to as CSH), which is a public company with business activities in the form of wholesale trade in logs, sawn wood, plywood and related products.(SGPBusiness, n.d.) CSH is a company domiciled and subject to the laws of Singapore, and is the majority shareholder in CSWW which owns 99% of the shares (Purnama et al., 2023). The composition of shareholders in CSWW is as contained in CSWW's Articles of Association as stated in Deed Number 03 dated May 1, 2009, which was made before Yasmine Achmad Djawas, S.H., Notary in Tangerang Regency, and has received approval from the Minister of Law and Human Rights Number: AHU 23913.AH.01.02 dated June 1, 2009, is as follows (Mahkamah Agung, 2010):

Tabel 2. Shareholders of PT. Cemerlang Selaras Wood Working

1	PT. Chuan Soon Huat Industrial Group Ltd.	3.960	USD 3.960.000,00	Rp. 7.013.160.000,00
2	Rudi Widjaja	40	USD 40.000,00	Rp. 70.084.000,00
Total		4.000	USD 4.000.000,00	Rp. 7.084.000.000,00

Source: Putusan Mahkamah Agung Nomor: 1038 K/Pdt. Sus/2010.

In this case, CSH felt disadvantaged because in the receivables matching meeting held on August 5, 2010 the curator did not recognize the receivables owed by CSH to CSWW amounting to US$ 37.622.051.95 and SGD 4,300,113.30 or if converted into Rupiah, it was IDR 372,879,243,493.00. The reasons used by the curator in denying the recognition of CSH's receivables in the receivables matching meeting are as follows (Mahkamah Agung, 2010):

a) CSWW as a subsidiary of CSH has never sold the products it produces to any party, other than CSH. In this case, the curator views CSH as a holding company that finances the operational activities of its subsidiary, namely CSWW, so that CSWW can produce all the materials, and then all the products produced are then only sold to the parent company. Based on these conditions, the curator sees that legally there is a special relationship between the parent company and the subsidiary, so it views the CSH's receivable as capital participation;

b) apart from that, the curator also considered that if CSH's receivables were recognized, it would cause losses to other creditors, because the amount of claims submitted by CSH exceeded the amount of assets owned by CSWW.

Based on the description above, CSH's receivables were not recognized by the curator at the receivables matching meeting, so CSH then filed an objection in the Commercial Court at the Central Jakarta District Court. In this case, CSH provided a rebuttal, which essentially stated that the claim submitted by CSH arose from a debt-receivable relationship and was not a capital contribution, and stated that CSH and CSWW were separate legal subjects with reference to Supreme Court Decision Number: 01 K/N/1998 dated November 19,1998 between PT. Ometraco Corporation Tbk. against American Express Bank Ltd, Singapore et al. In this case, the Commercial Court at the Central Jakarta District Court in Decision No: 37/Pailit/2010/PN.Niaga.Jkt.Pst dated October 14, 2010 decided to reject the objection request (renvoi procedure) from CSH and determine the list of claims to CSWW Creditors made by the Curator on August 5, 2010 is valid (Mahkamah Agung, 2010). Against the commercial court's decision, CSH then filed an appeal. In the cassation application that submitted by CSH, several things were stated as follows (Mahkamah Agung, 2010):

a) the receivables submitted by CSH ose because of the debt-receivables agreement between CSH and CSWW, which has been acknowledged by CSWW and confirmed and affirmed as correct by the Public Accountant who conducted the Audit of CSWW's Financial Report, namely Kiman Mustika Karta from Johan Malonda Public Accounting Firm Astika and Partners via letter dated June 28, 2010, so that the receivables do not constitute capital payments;

b) CSH as a shareholder of CSWW last paid capital to CSWW in 1994, based on Deed No. 67 dated December 29, 1994 made before Haryati Surachman, successor to Suzana Zakaria, Notary in Jakarta, which had obtained approval from the Minister of Justice of the Republic of Indonesia based on Decree No.C2-283.HT.01.04.TH'96 dated January 9, 1996;

c) based on the provisions in Article 1131 and Article 1132 of the Civil Code, it is stated that all people who have receivables have the right to obtain repayment of these receivables from objects owned by the party who owes them.

In connection with the cassation petition submitted by CSH, the Supreme Court at the Cassation level in its decision rejected CSH's petition, thus strengthening the Decision of the Commercial Court at the Central Jakarta Court Number: 37/Pailit/2010/PN.NIAGA.JKT.PST, on the basis that CSWW as a subsidiary does not carry out sales transactions for its products to any party, except to CSH which is its parent company, so this is a special relationship that causes a breach of limited liability based on the provisions in Article 3 paragraph (2) of the Company Law. So in this case, CSH is not a creditor and the curator's decision to reject the receivables submitted by CSH has legal grounds (Mahkamah Agung, 2010).

Based on the description of the court decision regarding group companies as described above, it can be seen that there are differences in the views of the judges regarding the relationship between the parent company and its subsidiary in the construction of a group company, where of course these differences will affect the burden of liaibility held by the parent company. The differences in views can be seen in the table below:

Tabel 3. Differences in Judges' Considerations Regarding the Relationship Between Parent Company With Its Subsidiary

No.	Case	Judge's Consideration	Verdict
1.	American Express Bank Ltd, Singapore et al v PT. Ometraco Corporation Tbk.	- the subsidiary and parent company are single economic entity and the parent company is in the position of debtor and guarantor, so that the application for declaring bankruptcy against the parent company and subsidiary company should be submitted in one application.	Putusan Pengadilan Niaga Pada Pengadilan Negeri Jakarta Pusat Nomor: 05/Pailit/1998/PN.Niaga/Jkt.Pst,
		- The parent company and subsidiary are separate entities and each company is an independent subject, so that applications for bankruptcy can be submitted separately.	Putusan Mahkamah Agung Nomor: 01 K/N/1998
2.	Employees of PT. Inti Fasindo International v PT. Great River International Tbk.	In law, the parent company and the subsidiary are separate legal entity, so that the employees of the subsidiary have no connection (relationship) with the parent company.	Putusan Pengadilan Hubungan Industrial pada Pengadilan Negeri Jakarta Pusat Nomor: 40/G/PHI.PN.JKT.PST,
3.	Chuan Soon Huat Industrial Group Ltd. Case	Between the parent company and its subsidiaries there is a "special relationship", so that piercing the corporate veil can be applied to the parent company.	Putusan Mahkamah Agung Nomor: 1038 K/Pdt. Sus/2010

Source: processed by the authors.

Based on the description of the differences in the judges' considerations regarding the relationship between the parent company and its subsidiary as outlined in the table above, it can be seen that there are still differences in the judges' considerations regarding the relationship between the parent company and its subsidiary. Even in the case of American Express Bank Ltd, Singapore et al v PT. Ometraco Corporation Tbk, the judges at the first level saw the existence of the parent company and its subsidiary as single economic entity, however at the cassation level the Supreme Court considered that the parent company and subsidiary were separate entities, where this consideration was the same as the judge's consideration in the case of employees of PT. Inti Fasindo International v PT. Great River International Tbk. Furthermore, judges' view that attracted attention was in Chuan Soon Huat Industrial Group Ltd. case where the Supreme Court considered that there was a "special relationship" between the parent company and its subsidiary as a reason for implementing the parent company's liability for bankruptcy experienced by the its subsidiary. However, there is no explanation regarding the "special relationship" in the decision, this cannot be separated from the fact that up to now there are still no statutory that specifically regulate the relationship between the parent company and its subsidiaries in a construction group company.

Apart from that, in the Chuan Soon Huat Industrial Group Ltd. case in this receivables matching meeting, the curator denied the receivables submitted by CSH, because he considered that the receivables submitted were not receivables, but were considered capital participation and the curator also considered that if CSH's receivables were recognized, it would cause losses to other creditors, because the amount of the receivables submitted by CSH exceeds the amount of assets owned by CSWW. This of course raises the question that if the receivables owned by CSH do not exceed the assets owned by CSWW and other creditors still receive repayment for their receivables, whether the receivables submitted by CSH will be accepted by the curator. In this regard, the authors are of the opinion that the reasons used by the curator are not appropriate because even though the assets that owned by CSWW as a debtor are not sufficient to fulfill all the receivables owned by creditors, the fulfillment of debts owned by bankrupt debtors should be carried out proportionally to all creditors based on the pari passu pro rata parte principle, which of course must first rank the creditors based on a series of priority rights they have as regulated in the Bankruptcy Law (Yuhelson & Maryono, 2018).

CONCLUSIONS

The research results show that the existence of a group company as a form of development of business entity in business activity can be an option for business actors, but this development has not yet been followed by legal development in Indonesia. This can be seen from the lack of statutory norms that specifically regulate a group company, where neither Company Law nor Bankruptcy Law explicitly regulates the liaibility of the parent company for bankruptcy experienced by its subsidiary, which is the focus of this article. This vacuum of norms can be exploited by a parent company, one of which is by using its subsidiary to carry out high-risk business activities, and when a loss occurs, the loss becomes the liaibility of the subsidiary.

Furthermore, this vacuum of norms also causes there to be no legal certainty regarding the parent company's liability for bankruptcy experienced by its subsidiary. This is shown by the differences in judges' opinions in assessing the relationship between the parent company and its subsidiary. Based on the case described in the discussion section above, it is shown that there are differences in the opinions of judges, where there are judges who consider that the parent company and its subsidiary are separate entities so that the parent company is not liable for losses or bankruptcy experienced by its subsidiary. Meanwhile, in a different case, a judge's opinion was found which considered that the parent company and its subsidiary were a single economic entity and there was a special relationship between the two companies, so that the parent company was liable for the losses or bankruptcy experienced by its subsidiary.

In connection with this, we are of the opinion that it is necessary to establish legislation regarding a group company, in particular regulating the liability of the parent company for bankruptcy experienced by its subsidiary. This is important to do in order to guarantee legal certainty. With legal certainty regarding this matter, it is hoped that it can prevent misuse of subsidiary by the parent company and can provide guarantees of legal protection for all relevant stakeholders.

DISCLOSURE STATEMENT

The authors report no conflicts of interest.

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Zakończenie recenzji/ End of review: 04.11.2024
Przyjęto/Accepted: 18.11.2024
Opublikowano/Published: 23.12.2024