

## Qualification of Ultra Vires Act by Board of Directors Company in Indonesian Law and Court

Andika Pribadi Waruwu<sup>1</sup>, Bismar Nasution<sup>2</sup>, Sunarmi<sup>3</sup>, Mahmud Siregar<sup>4</sup>.

<sup>1</sup> Student, Master of Law, Faculty of Law, University of North Sumatra, Indonesia.  
E-mail: apribadi69@yahoo.com (CA)

<sup>2,3,4</sup> Lecturer, Master of Law, Faculty of Law, University of North Sumatra, Indonesia

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**Abstract:** Ultra vires actions are actions without authority / outside the authority in the representation contract given by a legal entity to a person. But in fact, cases and arrangements regarding Ultra Vires have not fully accommodated what parameters actually become a benchmark for an action referred to as ultra vires action. Is it only if one of the company's organs takes action outside of its authority that harms the company, but what if one of the company's organs takes action outside of its authority but does not harm the company. Court decisions that are also different in deciding cases about ultra vires actions are also an issue that continues to be disputed today. Therefore, this paper is intended to find out and analyze the regulation of Ultra Vires actions in Indonesian legislation, the size of the board of directors' actions can be qualified as ultra vires actions, as well as the opinion of the Court by the Supreme Court judges in the case of ultra vires lawsuits. This research includes normative legal research and is descriptive in nature, using primary, secondary and tertiary legal materials collected by the library research method. Furthermore, legal material data is analyzed using qualitative data analysis methods. The results of the study found that the application of the ultra vires doctrine in Indonesia is more likely to be associated with a criminal act committed by the board of directors or management, which is made beyond or outside the authority stipulated in the company's Articles of Association. This is what should be a special concern for lawmakers in terms of formulating things that can be a benchmark for actions referred to as ultra vires, so that legal certainty can be achieved.

**Keyword:** Qualification, Limited Liability Company, Ultra Vires.

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### 1. Introduction

As a forum for conducting business activities, a Limited Liability Company (PT) is supported by organizational tools that control it. A definite legal framework is needed so that this business unit can work productively and efficiently so that legal confusion can be overcome, and there is clear legal direction for limited liability companies in carrying out their activities. The development of legal instruments to create and protect human rights as members of society continues to evolve.

It is clear that the existence of PT requires rules and norms that can be used as a guide for business actors. With the enactment of Law No. 40 of 2007 concerning Limited Liability Companies (UUPT), the obligation of existing PTs to adjust their articles of

association in accordance with the UUPT. Many things must be considered in the implementation of PTs, such as: minimum authorized capital, duties and authorities of directors and commissioners, corporate social and environmental responsibility, up to liquidation, dissolution and the end of the status of a limited liability company. So, what about the doctrine of ultra vires?

According to the author, ultra vires itself is defined as "an action taken without the authority to act as a subject". In Latin, ultra vires means "outside" or "exceeding" the power (outside the power), namely the power given by law to a legal entity, in this case the legal entity of the Company which is represented by the Board of Directors. Another term that is often used to define ultra vires is "exceeding authority". ultra vires is applied in a broad sense, namely not only activities prohibited by the Articles of Association, but also including actions that are not prohibited, but exceed the authority granted. The doctrine of ultra vires is based on agency theory. The construction of the legal relationship occurs between the principal on one side and the agent on the other. In this case, the Company's organ is the agent and the Company is the principal. The agent must act within the limits of authority (*intra vires*). If he acts outside the limits of his authority, the Company's organ commits an ultra vires action.

The Board of Directors in practice is the organ that most often commits ultra vires actions compared to other organs of the Company, this is because the board of directors is the organ of the Company that has the most important function over the running of the Company. If the board of directors takes actions that deviate from the prevailing laws and regulations, contrary to the aims and objectives of the company as contained in the articles of association or contrary to the provisions that have been decided by the GMS as the highest decision-making power of a company, the board of directors has exceeded the limits of authority granted by the laws and regulations (Khairandy & Latif, 2009).

The Company Law, Articles of Association, and GMS regulate that if it causes losses to the company, the directors can be held personally liable based on applicable legal provisions, in replacing the losses suffered by the company due to the ultra vires actions of the directors. Shareholders can file a lawsuit for compensation against the board of directors based on the doctrine of ultra vires because the actions of the board of directors exceeded the limits of their authority (Nindyo Pramon, 2012).

One of the cases regarding ultra vires acts committed by directors is found in the Supreme Court Decision No. 55 K/Pdt/2009. This case began when Anhar Wahab as the President Director of PT Lamere Tirta Mutiara entered into a credit agreement with PT NTB Regional Development Bank, Bima Branch in the amount of Rp. 3,000,000,000, - (three billion rupiah) with the collateral of PT Lamere's assets on July 3, 2003, through an authentic notarial deed of credit agreement no.11 and no.12 dated July 4, 2003. After some time, there was a congestion in terms of payments by Anhar Wahab as President Director of PT Lamere Tirta Mutiara to the NTB Regional Development Bank, Bima branch as the creditor. As a result of the payment jam, the NTB Regional Development Bank Bima Branch submitted a Debt Submission Letter to the State Receivables and Auction Service Office (KP2LN) Mataram, which then confiscated all collateral belonging to PT. Abdul Muis as one of the members of the

board of directors. PT Lamere filed a lawsuit to the Bima District Court on the basis that the credit agreement made by Anhar Wahab as President Director of PT Lamere Tirta Mutiara with the NTB Regional Development Bank Bima Branch was unlawful because it was made without the consent of Abdul Wahab as one of the directors and shareholders of PT Lamere, and the credit agreement was made by Anhar Wahab not for the benefit of PT Lamere but for the personal interests of Anhar Wahab as President Director of PT Lamere, causing losses to PT Lamere because PT Lamere's assets were executed and will be auctioned by the NTB Regional Development Bank Bima Branch as a creditor.

The District Court of Raba Bima in its decision No.11/Pdt.G/2006/PN.RBI, dated November 29, 2006 stated that the credit agreement made by Anhar Wahab as President Director of PT Lamere Tirta Mutiara with NTB Regional Development Bank was not against the law, because it was proven that Anhar Wahab as President Director of PT Lamere made a credit agreement with notarial deeds No.11 and No.12, dated July 4, 2002, in accordance with the authority he had in the Articles of Association of PT and with the approval of the GMS. Therefore, the agreement remains valid and not null and void. The decision of the district court was upheld by the Mataram High Court through decision No.38/PDT/2007/PT.MTR. At the cassation level the Supreme Court in Decision No. 55.K/Pdt/2009 also upheld the decision of the Mataram High Court No.38/PDT/2007/PT.MTR, stating that the District Court of First Instance and the Mataram High Court did not misapply the law because their decisions were not contrary to the law.

Departing from the case, then how is the ultra vires regulation and what is its role if the court states that Anhar Wahab as Director is in accordance with his authority in the Articles of Association of PT and with the approval of the GMS in carrying out his legal actions in the company. What is the basis for PT Lamere to file a lawsuit to the Bima District Court stating that Anhar Wahab acted outside the limits of his authority? Therefore, the importance of this research is to find out the extent to which the laws and regulations in Indonesia regulate Ultra Vires actions and also to find out the indicators of a problem in a PT can be qualified as an Ultra Vires action. In PT itself does not have a field that can determine and also supervise and decide that an act can be categorized as an Ultra Vires action, where every action must always end up in court instead of being discussed at the internal level of the company itself.

## **2. Research Methods**

The type of research used to answer the problems in this research is normative research and is descriptive analysis. Data collection in a study is very important in research, because through this data collection, data will be obtained which can then be used for analysis as expected in relation to this, so in this study using primary, secondary and tertiary legal material collection. Researchers use data collection tools in the form of literature studies. After the legal material is inventoried and collected and to solidify the author's argumentation in this study, legal material is analyzed using qualitative analysis methods.

### 3. Result and Discussion

Ultra vires comes from Latin which in English is translated as "beyond the power" or in Indonesian as beyond the authority. The academic understanding, for example, is written by Timothy Endicott (2003), "ultra vires means beyond (the agency's) legal powers". Frank Mack (1929) defines it as "The term ultra vires in its proper sense, denotes some act or transaction on the part of a corporation which although not unlawful or contrary to public policy if done or executed by an individual, is yet beyond the legitimate powers of the corporation as they are defined by the statute under which it is formed, or which are applicable, or by its charter or incorporation papers".

Ultra Vires in legal literature is often referred to as extra vires, because extra vires also has the same meaning as Ultra Vires, which is beyond the power. The doctrine of ultra vires is applied to companies as well as community organizations, social and religious organizations with legal entities that have a very broad role in people's lives.

Black's Law Dictionary defines ultra vires as "An act performed without any authority to act on the subject. Acts beyond the scope of the powers of a corporation, as defined by its charter or the laws of the state of incorporation. An act is ultra vires when the corporation is without authority to perform it under any circumstance or for any purpose." Meanwhile, the definition of extra vires in Black's Law Dictionary only mentions beyond the power, which refers to the same meaning as ultra vires (Black, 1990).

The discussion of the doctrine of ultra vires cannot be separated from the doctrine of intra vires, which has the opposite meaning to ultra vires. The definition of intra vires according to Black's Law Dictionary is "An act is said to be intra vires (within the power) of a person or corporation when it is within the scope of his or her powers of authority. It is the opposite of the ultra vires." Based on this, the scope of intra vires is where everything is mandated in the Articles of Association which contains the purpose and objectives and business activities of the company as well as matters that guide the directors of the company in carrying out the company's activities.

In Indonesia, the essence of the authority of the board of directors to represent the Company is unlimited and unconditional, unless otherwise specified in Law No.40 of 2007 on Limited Liability Companies (UUPT), the articles of association or a resolution of the General Meeting of Shareholders ("GMS"). In the event that the board of directors consists 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 (Saliman, 2005). The purpose of this exception is so that the articles of association can determine that the Company can be represented by certain members of the board of directors as stipulated in Article 98 and Article 99 of the Company Law.

The provisions of Article 99 of the Company Law stipulate that the authority of the board of directors in representing the Company does not mean that there are no restrictions. However, in certain cases, the board of directors is not authorized to represent the Company if there is a case in court between the Company and the member of the board of directors concerned; or the member of the board of directors

concerned has a conflict of interest with the Company (Frans Satriyo Wicaksono, 2009). If such conditions occur, the Company may be represented by other members of the board of directors who do not have a conflict of interest with the Company, the board of commissioners in the event that all members of the board of directors have a conflict of interest with the Company; or other parties appointed by the GMS in the event that all members of the board of directors or board of commissioners have a conflict of interest with the Company (Budiarto, 2001).

As is known that the board of directors in carrying out its duties must refer to the provisions of the prevailing laws and regulations, the company's Articles of Association and the GM (Supramono, 2004). From this statement, it can be said that the actions of the board of directors in managing the company's operations that are not based on the applicable laws and regulations, the company's articles of association and the GMS are actions that are beyond the authority of the board of directors, this arrangement in the UUPT is known as a manifestation of the existence of the Ultra Vires doctrine (Tjager, 2003).

The norm in Article 15 paragraph 1 (b) which emphasizes that the Articles of Association of the Company must include the purpose and objectives and business activities of the Company, shows that the doctrine of ultra vires is strictly applied in national positive law, especially to legal entities in the form of PT. The strict regulation of the application of the doctrine of ultra vires is further emphasized in Article 19 and Article 21 of the Company Law which stipulate that amendments to the Articles of Association must be stipulated by the GMS and approved by the Minister in the event that the amendments to the Articles of Association, among others, concern the purpose and objectives and business activities of the company. The application of the doctrine of ultra vires in corporate law in Indonesia is carried out strictly, namely in order to build a healthy corporate structure to ensure the implementation of a conducive business climate. The application of the doctrine of ultra vires in Indonesia is more likely to be associated with a criminal act committed by the board of directors or management, which is made beyond or outside the authority stipulated in the Articles of Association of the company. That acts within the scope of intra vires committed by the management alone can be held criminally liable to the corporation concerned, as well as to the management who committed the act. Meanwhile, ultra vires actions can only be held accountable to the personal management and cannot be held accountable to the corporation. Likewise, the Articles of Association that regulate and stipulate the goals and objectives of the company must contain the broadest scope of business fields that predictively are fields that are interrelated between each other, so that in the event that the company expands its business, there is no need to make changes to the Articles of Association, at least to the means and objectives of the company's establishment, so that the lawsuit on the basis of the application of the doctrine of ultra vires can be narrowed. This needs to be considered in the establishment of the company to prevent the company from being sued on the basis of the doctrine of ultra vires.

There is no explicit regulation on the existence of Ultra Vires in the laws and regulations. However, Ultra Vires actions of PT directors can be interpreted a

Contrario based on the provisions of article 92 paragraph (1) and paragraph (2) UUPT. Ultra Vires is applied in a broad sense, namely not only activities prohibited by the Articles of Association of a PT, but also includes actions that are not prohibited, but exceed the authority given. If the Board of Directors acts outside the limits of its authority, the company organ is categorized as committing Ultra Vires (Yusanti et al., 2022).

In the UK, the aims and objectives of the company must be stated in the memorandum of association (deed of association) of a company. To this day, this obligation still applies. The question of sanctions for "ultra vires" actions was answered in 1875 in the *Ashbury Railway Carriage & Iron Company v Riche* case. In that case, the judge stated that actions taken outside the aims and objectives of the company stated in the memorandum of association were void because they were outside the authority of the legal entity concerned (Ali, 2009). The justification for the doctrine is to provide protection to shareholders and creditors of the company. Prior to 1970, no distinction was made between actions that were "ultra vires" and actions that were contrary to the interests of the company. However, since 1970, in the decision of several cases, actions that are included in the aims and objectives of the company but contrary to the interests of the company are no longer qualified as "ultra vires" actions but are stated as a matter of authority of the board of directors, namely a violation of the directors' fiduciary duties. Whereas in Australia, the Corporations Act 2001 does not require a description of the company's objectives in the memorandum of association. For companies whose memorandum of association outlines the objectives of the company, based on Section 125 of the Corporations Act 2001, the doctrine of "ultra vires" has been removed. If an action is taken that is outside the objectives of the Company, then it is considered a breach of the company's director's breach of duty. Furthermore, in Singapore, Section 25 paragraph 1 has also abolished the doctrine of ultra vires, but only to the extent that an act has been done. For acts that have not yet been done, shareholders (members) or creditors (debenture holders) secured by a floating charge have the right to ask the court to prohibit ultra vires acts. In the event that the action is contrary to the interests of the company, the action is qualified as an action that violates the director's fiduciary duty (Hadi, 2011).

Ultra vires actions are different from acts of exceeding the authority of the need to regulate things that reach the level of ultra vires is basically to support the principles of Good Corporate Governance (GCG), Dwi Kartini (2009) said "Where GCG principles can be realized in concrete forms, among others, by separating responsibilities and authorities accompanied by a mechanism of cooperation between company organs and establishing a clear vision, mission, goals and strategies so that company performance and the contribution of each individual can be assessed objectively." It becomes a problem if the authority possessed by the company's organs in terms of management is not understood to be different from the actions of the board of directors that deviate from the aims and objectives of the PT formulated in the articles of association. The possibility that the actions of the board of directors actually do not exceed the aims and objectives or activities of the PT, but the legal action is carried out by the board of directors by exceeding the limits of the authority of the board of



directors in representing the PT, causing the action to be doubtful of its validity. In carrying out its business activities, a PT is certainly continually developing, following the needs of the community and the legal entity itself. Many legal relevances result from the aims and objectives set out in the articles of association. Not avoided of course with regard to the contracts made by the PT, with regard to its relationship with other parties (Budiono, 2007).

Ultra vires committed by the Board of Directors is related to the authority of the Board of Directors in managing the corporation (Fuady, 2002). The authority of the Board of Directors in managing the corporation includes everything that the Board of Directors can do without the need for shareholder approval, but must refer to the articles of association and provisions of corporate law. The scope of authority or authority (authority) and also limitations (limitation) of the Board of Directors is regulated in the articles of association of a corporation. Legal actions of the Board of Directors that do not refer to the articles of association and the provisions of corporate law are ultra vires (Harris et al., 2010). The term act of ultra vires is applied not only if the company takes actions that it actually does not have the authority, but also to actions that it has the authority, but is carried out irregularly.

Based on the framework of the meaning and consequences of violating Ultra Vires, the root of ultra vires regulation, in fact, is in the company's articles of association. The articles of association are the basis of the company's framework for all existing organs (GMS, Commissioners and Directors) in carrying out daily activities and one of them is the provision of goals and objectives. The purpose and objectives have a dual role, namely as an acknowledgment of the existence of the company and secondly as a basis for limiting the ability of the directors to act. This means that directors who perform acts that are not included in the aims and objectives of the company are ultra vires and become the personal responsibility of the directors and do not bind the company. For this reason, the directors must know two things.

First, whether the action according to the legislation (for example, the Company Law) and the articles of association is an action that is outside the aims and objectives of the company. Second, whether the action of the company's board of directors is beyond the authority given to it based on the applicable provisions, including the company's articles of association. Both of the above can be used as a reference by the board of directors in measuring whether Ultra Vires has occurred or not, but the board of directors must also pay attention to the criteria for actions outside the intent and purpose.

There are three criteria to determine whether the actions of the board of directors are included outside the aims and objectives or not, namely if one or more of the following criteria are met: first, the legal actions of the directors concerned are expressly prohibited by the articles of association of the company. Secondly, by taking into account the special circumstances, the legal action of the board of directors concerned cannot be said to support the activities mentioned in the company's articles of association. Third, taking into account the special circumstances, the actions of the directors cannot be interpreted as supporting the interests of the company. Thus, the corridor that can be used by the board of directors in preventing

Ultra Vires violations and fulfilling the Intra Vires criteria, in fact, is to always hold and act on behalf of and for the interests of the company within the limits permitted generally by statutory regulations and specifically in the aims and objectives of the company's articles of association. Conditions that are still within the framework of the company's goals and objectives become intra vires (still within their capacity), so that the actions of the board of directors become valid and binding on the company. This implies that the Board of Directors has the limitation to act for and on behalf of the company. However, the extent to which the actions of the board of directors can be said to have deviated from the aims and objectives of the company (so that Ultra Vires has occurred) can be seen from the customs or conventions that occur in business practice as a basis for measurement.

Considering the case of Anhar Wahab as described earlier, by paying attention to the facts of the existing decision, the author can conclude that there was a congestion in terms of payment by Anhar Wahab as President Director of PT Lamere Tirta Mutiara to the Development Bank. The basis of the lawsuit to the Bima District Court on the basis that the credit agreement made by Anhar Wahab as President Director of PT Lamere Tirta Mutiara with the NTB Regional Development Bank, Bima Branch is an unlawful act because it was carried out without the consent of Abdul Wahab as one of the directors and shareholders of PT Lamere, and the credit agreement was made by Anhar Wahab not for the benefit of PT Lamere but for the personal benefit of Anhar Wahab as President Director of PT Lamere, thus causing losses to PT Lamere because PT Lamere's assets were executed and will be auctioned by the NTB Regional Development Bank, Bima Branch as the creditor. According to the author, Anhar Wahab as the president director of PT Lamere should have committed an ultra vires action where he made a credit agreement with a notaries deed that was proven to be intended for personal gain without the approval of the GMS. This has caused the company to suffer losses so that the assets of PT Lamere are confiscated and will be auctioned by the NTB regional development bank, Bima branch as the creditor.

The case of ultra vires is also found in the Supreme Court Cassation Decision No. 30/K/N/2000. In short, in the cassation effort new evidence was found which stated that the violations committed by the President Director of PT. Wijaya Wisesa, Br. Herry Wijaya were not only related to the ultra vires doctrine. In the judge's decision above, it illustrates that the violation committed by the President Director of PT Wijaya Wisesa has injured the company's bylaws, which should not be done because it is as if the person concerned is running away from responsibility. In addition to ultra vires, Br. Herry Wijaya violated the fiduciary duty, especially the duty of fair dealing, namely because Br. Herry Wijaya on the evidence of PT Aditya Toa Development is the President Director as well as the Majority Shareholder of PT Wijaya Wasesa. This is what then creates a conflict of interest. Although in this case Br. Herry Wijaya borrowed money in the amount of US \$ 1,250,000 (one million two hundred and fifty thousand US Dollars) to PT Aditya Toa Development carried out on the basis of legal rights, because Br. Herry Wijaya acted as the Board of Directors of PT Wijaya Wasesa, but the action was not fair, because the action resulted in a conflict of interest. Therefore, it is a common recognition of the concept that the Company is an independent entity and separate from its shareholders. Thus, based on this concept,



Shareholders and Directors as administrators are generally protected from personal liability for the Company's debts, but their personal liability for the Company's legal acts is possible if the Law determines otherwise or because of a contractual obligation. Liability for the legal acts of the Company that are based on or specified in the Law, the Shareholders or Directors are also personally liable. As for personal liability due to contractual obligation, it can occur if the shareholders or the Board of Directors sign or declare themselves as personal guarantor for the contractual relationship entered into by the Company with a third party.

According to the author, what was done by Br. Herry Wijaya as President Director as well as Majority Shareholder of PT Wijaya Wisesa which then caused a conflict of interest with PT Aditya Toa Development due to matured debt of US \$ 1,250,000 (one million two hundred and fifty thousand United States Dollars), and on the basis of the Judge's consideration with new evidence and considering the previous Commercial Court Decision, it can be ascertained that PT Wijaya Wisesa is an alter ego of Br. Herry Wijaya to fulfill his personal interests, not the interests of the Company.

#### **4. Conclusion**

Based on the discussion above, it can be concluded that the application of the doctrine of ultra vires in corporate law, in Indonesia, is carried out strictly, namely in order to build a healthy corporate structure to ensure the implementation of a conducive business climate. The application of the doctrine of ultra vires in Indonesia is more likely to be associated with a criminal act committed by the board of directors or management, which is made beyond or outside the authority stipulated in the Articles of Association of the company. Acts within the scope of intra vires committed by the management alone can be held criminally liable to the corporation concerned, as well as to the management who committed the act. Meanwhile, ultra vires actions can only be held accountable to the personal management and cannot be held accountable to the corporation as regulated in Law Number 40 of 2007 concerning Limited Liability Companies or UUPT. Departing from the description of cases regarding ultra vires, the regulation of Ultra Vires actions has not fully qualified what exactly the benchmark for an action is called an Ultra vires action. Is it only if one of the company's organs takes action outside of its authority that harms the company, but what if one of the company's organs takes action outside of its authority but does not harm the company. Different court opinions interpreting the category of an act as an Ultra Vires act is a challenge for the Supreme Court in formulating guidelines for judges in deciding Ultra Vires cases. This is what should be a special concern for lawmakers in terms of formulating what is the benchmark for an act referred to as an Ultra Vires act so that it can create legal certainty. Therefore, it is necessary to have guidelines in determining what actions are included in the qualification of Ultra Vires actions. There needs to be a qualification so that the company can immediately take action if one of the company's organs (GMS, Board of Directors, Board of Commissioners) acts beyond the limits of its authority.

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