

Examining the Business Judgement Rule in the SOE Bank Haircut

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ABSTRACT

Restructured non-performing loans by partially or fully cutting off the customer's credit were also known as a haircut. The haircut method commonly used for dealing with the customer's debt considering their financial status and ability to repay. However, the execution of a haircut policy is always faced with difficulties, mainly if the procedure is applied to state-owned banks (SOE) in Indonesia. This was due to the interpretation of the concept of Indonesian BUMN's (state-owned enterprises) wealth which states that all wealth owned by BUMN is part of the state's wealth. A different practice applied in Malaysia which carries out privatization by separating Government Linked Companies (GLC) assets from state assets. As a result, this research examined the dimension of directors' accountability to the state's wealth concerning debt write-offs or a haircut in Indonesia and Malaysia using the Business Judgment Rule doctrine. This study used a normative juridical analysis methodology with a statutory approach in Indonesia and Malaysia. The results of this study indicate that the haircut policy is detrimental to state-owned banks, based on these findings, with certain conditions that apply, the directors can be released from the responsibility for using the Business Judgment Rule doctrine.

Keywords: BUMN, State Owned Enterprises, Government Linked Companies, Haircut, Non-Performing Loan, Business Judgment Rule

INTISARI

Restrukturisasi kredit macet dengan memotong sebagian atau keseluruhan kredit nasabah yang memiliki hambatan dalam membayarnya kembali kerap kali disebut sebagai *haircut*. Upaya *haircut* umum digunakan sebagai jalan keluar untuk menangani beban utang milik nasabah dengan memperhatikan kondisi finansial serta kemampuan untuk melunasi kembali. Meskipun demikian, kebijakan *haircut* kerap kali memiliki hambatan dalam pelaksanaannya khususnya bagi bank-bank milik negara di Indonesia. Hal ini dilatarbelakangi dengan konsep kekayaan BUMN dalam arti luas yang mengkategorikan semua aset yang dimiliki oleh BUMN tergolong sebagai kekayaan negara. Berbanding terbalik dengan di Malaysia yang menganut privatisasi dengan memisahkan kekayaan GLC dengan kekayaan negara. Oleh sebab itu penelitian ini menganalisis perbandingan sejauh mana tanggung jawab direksi terhadap kekayaan negara sehubungan dengan penghapusan tagihan piutang atau *haircut* di Indonesia dan Malaysia berdasarkan prinsip *Business Judgment Rule*. Penelitian ini menggunakan metode analisis yuridis normatif dengan pendekatan peraturan perundang-undangan di Indonesia dan di Malaysia. Hasil penelitian ini menunjukkan bahwa dalam hal *haircut* membawa kerugian bagi bank milik pemerintah, maka direksi dapat bebas dari tanggung jawab menggunakan doktrin *Business Judgment Rule* dengan ketentuan-ketentuan tertentu.

Kata kunci: BUMN, Government Linked Companies Haircut, Kredit Macet, Business Judgment Rule

INTRODUCTION

Banking viewed and defined Haircut as the process of cutting part or all of the non-performing loans on a customer's debt by the bank.¹ The Haircut can be done by reducing loan interest arrears, or loan principal arrears, or by imposing other conditions based on an agreement between the bank (the creditor) and the customer (the debtor).² There are numerous state practices for Haircuts and such practices have been incorporated into domestic laws. Haircuts might be seem profitable for debtors, but in fact, the are disadvantages that must be faced by a state-owned banks (hereinafter "**SOE**") if they decided to performed it, especially for Indonesian SOE Banks or Badan Usaha Milik Negara (hereinafter "**BUMN**"). This principle somewhat contradicts the economic view on privatization, which suggests that BUMNs (State-Owned Enterprises) should be independent legal entities, thus requiring all company assets to be separate from state assets.³ In many other countries, the principle of 'privatization' prevails.⁴ It can be seen in Malaysia in the case of the National Automobile Company (PROTON), which is the largest Government Linked Company (hereinafter referred to as "GLC"). Although its owned by the state, they are perceived as independent business entities, with all assets and wealth being separated from the state.

In Indonesia, BUMN banks such as Bank Mandiri, Bank BNI, Bank BTN, and others adhere to the provisions outlined in Law Number 40 of 2007 concerning Limited Liability Company (hereinafter "**Limited Liability Company Act 40/2007**"). This legislation serves as the foundational legal framework for all corporate entities registered under Indonesian law. Additionally, these banks also operated under specific regulation as outlined in Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter "**BUMN Act 19/2003**"). These regulations are implemented through two distinct approaches.

Firstly, in accordance with the Liability Company Act 40/2007 and the SOE Act 19/2003, BUMN banks must be classified as independent and professional public companies, thereby ensuring they remain free from political interference in their operations.⁵ Secondly, BUMN banks must comply with Law Number 17 of 2003 concerning State Finances (hereinafter "**State Finances Act 17/2003**"). This Act is further regulated by Law Number 4 of 2004 concerning the State Treasury (hereinafter "**State Treasury Act 1/2004**"). Article 1, paragraph (22) of the State Treasury Law 1/2004 defines state or regional losses as a real shortage of funds, whether resulting from intentional actions or negligence. Such a shortage, caused by unlawful activities, may include, but is not limited, to securities or goods. Consequently, if BUMN banks incur

¹ Wibowo JS, 'Analisis Terhadap Pemisahan Kekayaan Bank Bumn Atas Kekayaan Negara Sehubungan Dengan Penghapus Tagihan Piutang (Haircut) Berdasarkan Business Judgement Rule Ditinjau Dari Peraturan Perundang-Undangan Yang Terkait' (2015) Universitas Padjajaran 2

² Hariyani I and Toruan RL, *Restrukturisasi Dan Penghapusan Kredit Macet* (Elex Media Komputindo 2013)

³ OECD, *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices* (The Organization for Economic Cooperation and Development 2021) 11

⁴ OECD, *Op. Cit.*, 78

⁵ Yoyo Arifardhani, 'Kemandirian Badan Usaha Milik Negara: Persinggungan Antara Hukum Privat Dan Hukum Publik' (2019) 1 Otentik's: Jurnal Hukum Kenotariatan 55

losses due to the write-off of bad loans, it is considered a loss to the state, and thus the directors must bear criminal responsibility, as stipulated in the general explanation section of State Finance Law 17/2003. The government lays down universal principles in this regard, stating: *"anyone authorized to receive, store, and disburse money, securities, or goods belonging to the state is personally liable for any shortages that occur in their management."* However, the Government did not amend Law Number 49 of 1960 concerning the Committee for State Receivable Affairs when it issued Government Regulation Number 33 of 2006 concerning the Write-Off of State and Regional Receivables (hereinafter referred to as "**PP 33/2006**"), which specified that credits from BUMN banks were not considered state-owned receivables. Hence, it appears that there is an overlap in the provisions of the two aforementioned regulations.⁶

The implementation of the haircut policy may lead to the loss of certain assets belonging to the bank, causing disagreement among numerous stakeholders in the management of BUMN Banks and resulting in losses to the state, for which the directors may be held liable.⁷ However, this situation can be justified within the framework of the Business Judgment Rule, which protects directors from legal action unless it can be adequately proven that they have violated their assigned duties or if the decision-making process has breached the principles of independence and avoidance of personal interests.⁸

Malaysia has incorporated the Business Judgment Rule doctrine into its national law through the Malaysian Companies Act 2016. A publication officially released by Praxis, known as the chronicle of the Malaysian Bar (hereinafter "**Majlis Peguam**"), which features articles addressing topics of interest to the legal community, has long highlighted the use of the Business Judgment Rule for defending Directors of Government-Linked Companies (GLCs) in the country.⁹ In contrast, the implementation of this doctrine has only recently begun to take shape in Indonesian legal practices, stemming from the case involving the former Chief Executive Officer of PT Pertamina (Persero), Ms. Karen Agustian, dating back to 2009.¹⁰

Exploring comparative legal frameworks can offer invaluable insights for nations seeking to refine their own regulatory systems. In the context of Indonesia, examining Malaysia's laws and regulations presents an opportunity to identify effective strategies and best practices that could be adapted to enhance Indonesia's legal landscape. This inquiry prompts the formulation of two key research questions as follows:

1. How do Indonesia and Malaysia regulate the imposition of the State-Owned Enterprise (SOE) Bank Haircut?

⁶ Yani I, 'Bank Bumn Ragu Lakukan Haircut Utang' (*Kontan.co.id*, 16 February 2010) <<https://keuangan.kontan.co.id/news/bank-bumn-ragu-lakukan-haircut-utang>> accessed 20 June 2023

⁷ Wibowo JS, *Loc. Cit*

⁸ *ibid.*

⁹ Praxis, *The Business Judgment Rule under the Companies Act 2016* (Praxis by Majlis Peguam 2019)

¹⁰ Prasetyo A, 'Business Judgment Rule, Alasan Di Balik Lepasnya Eks Dirut Pertamina Di Tingkat Kasasi' (*hukumonline.com*, 2020)

<<https://www.hukumonline.com/berita/a/ibusiness-judgment-rule-i--alasan-di-balik-lepasnya-eks-dirut-pertamina-di-tingkat-kasasi-lt5e69546a7fe7c/>> accessed 20 June 2023

2. How does the Business Judgment Rule in both Indonesia and Malaysia influence the liability of the Board of Directors regarding the State-Owned Enterprise (SOE) Bank Haircut?

METHODS

This research methodology used the normative judicial with the statute approach in providing acknowledgement regarding the dimension of directors' accountability to the state's wealth in relation to debt write-offs or a haircut in Indonesia and Malaysia using the Business Judgement Rule doctrine. The primary sources consisted of numerous laws and regulations such as Limited Liability Company Act, the State Treasury Act, PERPPU on Committee for State Receivable Affairs, PBI 14/15/PBI/2012, and POJK 16/POJK.03/2014, FSA 2013, the Companies Act 2006, and the Guidelines on the Disposal/Purchase of Non-Performing Loans 2005. The secondary sources include journals, papers, research, and literature on the topic of this study.

RESULTS AND DISCUSSION

1. Haircut for the Non-Performing Loan: An Overview

1.1. Banking Perspective

In the banking industry, there are 3 (three) common credit or NPLs rescue actions that are typically used such as restructuring; reconditioning; and rescheduling.¹¹ The objective of NPL restructuring is to aid debtors in overcoming financial challenges and limitations, with the aim of facilitating prompt debt relief.¹² This is particularly relevant when the available collateral is insufficient to cover the full outstanding debt, including accrued high annual interest.¹³

Private banks and state-owned enterprise (SOE) banks typically employ various approaches to restructuring non-performing loans (NPLs). SOE banks are bound by more sophisticated regulations, given that their shareholders are the state. Additionally, SOE banks are obligated to generate profits and mitigate losses, which can have adverse effects on the country's economy.¹⁴ As mentioned in the preceding section, one method of NPL restructuring involves partially or completely reducing the debtor's liabilities, commonly referred to as haircuts.¹⁵ The haircut can be implemented by reducing loan interest arrears, credit principal arrears, or imposing additional terms based on the agreement between the bank and the debtor.¹⁶ While this financial measure is primarily utilized for Micro, Small,

¹¹ Mahayoni PM and Mayasari IDAD, 'Penyelamatan Kredit Bermasalah Sebagai Upaya Bank Menurunkan Non Performing Loan (Npl) PT Bpr Dinar Jagad' (2021) 9 Jurnal Kertha Semaya 375

¹² Ashar J, 'What Are The Solutions For Non Performing Loans (NPLs)?' (*The CFO*, 3 January 2020) <<https://the-cfo.io/2019/11/07/what-are-the-solutions-for-non-performing-loans-npls/>> accessed 20 June 2023

¹³ *ibid.*

¹⁴ Morozova A and others, *Regulating, Supervising, and Handling Distress in Public Banks* (International Monetary Fund 2022) V

¹⁵ Wibowo JS, *Loc. Cit*

¹⁶ Hariyani I and Toruan RL, *Loc. Cit*

and Medium Enterprises (hereinafter referred to as "MSME"), it can also be applied to individual debtors or corporate entities.¹⁷

There are additional terminologies involved in the process of NPL (Non-Performing Loans) restructuring beyond haircuts, including 'write-off' ('hapus buku' in Bahasa Indonesia) and 'waive-off' ('hapus tagih' in Bahasa Indonesia). The distinctions among these three terms are outlined in the table below:

Table 1. General differences between Haircut, Write Off, and Waive-off

No.	Name	Definition	Key Differences	
			Debtor	Creditor
1.	Haircut ¹⁸	The act of reducing or cutting a portion of the credit value recognised by a financial institution. In this scenario, both the financial institution and the consumer mutually consent to diminish the amount of credit that the customer is obligated to repay. Haircuts may encompass the reduction of a portion of the loan's principal amount, lowering interest rates, or devising alternative arrangements to facilitate consumers in settling their financial obligations.	The haircut does not completely absolve the client of their responsibilities, but it does assist in mitigating the financial burden the customer must bear.	Banks have recorded a loss in their financial statements because the debtor does not have to repay the full amount of the money they borrowed

¹⁷ DJKN, 'Haircut Dongkrak Kinerja Bank BUMN Dan Sektor Riil' (*Direktorat Jendral Kekayaan Negara*, 2012) <https://www.djkn.kemenkeu.go.id/berita_media/baca/2617/Haircut-Dongkrak-Kinerja-Bank-BUMN-dan-Sektor-Riil.html> accessed 20 June 2023

¹⁸ HeroFincorp, 'Difference between Loan Write-off and Loan Waive-Off' (*HeroFincorp*, 2023) <<https://www.herofincorp.com/blog/loan-write-off-and-loan-waive-off#:~:text=Difference%20between%20Write%20Off%20and%20Waive%20Off,-Parameters&text=Write%20Doff%20has%20no%20direct,loan%20that%20was%20waived%20off.>> accessed 20 June 2023

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2. **Write-off** (*hapus buku*)¹⁹ The process of recording losses by a financial institution in its financial statements is a critical aspect of accounting. In instances of bad credit, financial institutions may document the loss by either reducing or eliminating the value associated with such credit from their assets.
- It does not imply that the customer's obligation to repay bad loans is entirely waived. The customer remains accountable for settling this obligation, notwithstanding the financial institution's acknowledgment of a loss in its financial statements. Conversely, the borrower may encounter various legal ramifications due to the bank's recognition of a loss in its financial statements.
- The write-off results in a loss for the lender, as the debt declared uncollectible is removed from their books and is no longer considered an asset.
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3. **Waive-of** (*hapus tagih*)²⁰ The act of eliminating or completely waiving customer payment obligations related to bad loans is commonly referred to as a "write-off." In this process, the financial institution officially absolves or removes the payment obligation from the customer, relieving them of the responsibility to repay the debt. However, write-offs are typically infrequent and are subject to specific criteria
- The loan waiver provides relief to the borrower by alleviating their obligation to repay the portion of the loan that has been waived.
- The loan waiver offers relief to borrowers by absolving them of the obligation to repay the portion of the loan that has been waived.
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¹⁹ *ibid.*

²⁰ *ibid.*

established by financial institutions or relevant laws and regulations.

1.2. Indonesian Law

Financial institutions are subject to supervision by the central bank, Bank Indonesia (hereinafter referred to as "**BI**"), and the Financial Services Authority, known as the Otoritas Jasa Keuangan (hereinafter referred to as "**OJK**"). The most recent statutory legislation governing financial institutions is Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector (hereinafter referred to as the "**Development and Strengthening of the Financial Sector Act 4/2023**"), which amends certain provisions of Law Number 7 of 1992 concerning Banking (hereinafter referred to as the "**Banking Act 7/1992**"). Pursuant to the Banking Act 7/1992, a bank is a corporate entity that mobilizes funds from the public in the form of deposits and channels them back to the public in the form of credit and/or other financial instruments with the aim of improving the living standards of the common people.²¹ To mitigate potential non-performing loans (NPLs), a bank must adhere to several lending principles commonly employed in Indonesia, such as:²²

1. The Fiduciary Principles
2. The Precautionary principle
3. The Confidentiality Principle, and
4. Understand Your Customer Principles.

Not all things happened as smoothly as planned. The debtor often encountered difficulties in making payments, putting the credit at risk. Most issues in loans could lead to an increase in non-performing loans (NPLs), which, in turn, can result in losses for the bank.²³ Banks are striving to restructure NPLs in such situations, a process that may involve a haircut. If the preceding section provides a broad explanation of the distinctions between a haircut, write-off, and wave-off, analyzed from the perspective of Indonesian law, national law consolidates the definitions of these terms into a single term 'haircut'. According to the Supreme Court's decision Number 1/PUU-XVI/2018, a haircut is the process of either partially or entirely erasing a debtor's debt, following the conditions stipulated in the Article 69 paragraph (1) and the Explanation of Bank Indonesia Regulation Number 7/2/PBI/2005 (hereinafter "**PBI 7/2/PBI/2005**"), Article 66 paragraph (1) Bank Indonesia Regulation Number 14/15/PBI/2012 (hereinafter "**PBI 14/12/PBI/2005**"), Article 69 paragraph (1) and

²¹ Article 1 (2) of Law Number 7 of 1992 concerning Banking

²² Darmaangga IDGCD, Darmakusuma AAGA and Rudy DG, 'Penerapan Prinsip Kehati-Hatian Sebagai Analisis Dalam Pemberian Kredit Pada Pt. Bpr Gianyar Partasedana' (2013) 1 Kertha Semaya : Journal Ilmu Hukum 4

²³ Khan MA, Siddique A and Sarwar Z, 'Determinants Of Non-Performing Loans In The Banking Sector In Developing State' (2020) 5 Asian Journal of Accounting Research 135

Explanation of Financial Services Authority Regulation Number 16/POJK.03/2014 (hereinafter "POJK 16/POJK.03/2014") which are further explained in the table below:²⁴

Table 2. Haircut Regulations in Indonesia

No.	Regulations	Provisions
1.	PBI 7/2/PBI/2005	<p>Article 69 (1)</p> <p><i>"Banks are required to have written policies and procedures regarding write-off and waive-off"</i></p> <p>Art 69 (1) - Explanations</p> <p><i>"Write-off is an administrative action undertaken by the bank to expunge Non-performing Loans from the balance sheet, aligning with the debtor's liabilities, while preserving the bank's entitlement to collect from the debtor. Debt waiver, conversely, denotes the bank's initiative to absolve the debtor of insurmountable obligations."</i></p> <p><i>"The policies and procedures governing write-off and debt waiver encompass criteria, prerequisites, thresholds, authorizations, duties, and protocols pertaining to both processes."</i></p>
2.	PBI 14/12/PBI/2005	<p>Article 66</p> <p><i>"Banks are obliged to report to Bank Indonesia all Credit Restructuring that has been conducted no later than 10 (ten) working days after the end of the respective reporting month using the Credit Restructuring reporting form."</i></p>
3.	POJK 16/POJK.03/2014	<p>Article 69 (1)</p> <p><i>"Banks are required to have written policies and procedures regarding write-off and waive-off"</i></p> <p>Article 69 (1) - Explanation</p> <p><i>"The policies and procedures for write-off and waive-off include criteria, requirements, limits, authorities, responsibilities, and procedures for write-off and debt waiver."</i></p> <p><i>The term "hapus buku"²⁵ refers to the administrative action</i></p>

²⁴ Supreme Court Decision Number 1/PUU-XVI/2018

<https://www.mkri.id/public/content/persidangan/putusan/1_PUU-XVI_2018.pdf> accessed 20 June 2023

²⁵ Write-off

taken by the bank to remove non-performing financing from the balance sheet while preserving the bank's right to collect the debt from the customer.

The term "Hapus Tagih"²⁶ refers to the bank's action of permanently erasing the customer's unsettled obligation (the right to collect the debt is waived)."

The regulations pertaining to haircut procedures appear to be fragmented, as illustrated in the table above, with none offering comprehensive guidance. This section merely mandates banks to establish written rules and procedures for haircuts, leaving the implementation to the discretion of each institution, whether private or state-owned. The legislation outlines general requirements without delving into specifics. Referencing Article 70 of the POJK 16/POJK.03/2014, it delineates minimum criteria, stipulating that waiver or write-off actions are permissible solely for Earning Assets supported by a 100% CKPN²⁷ calculation, and whose quality has been deemed to be poor.²⁸ The write-off also cannot be done on some of the Earning Assets (partial write-off).²⁹

On the other hand, write-off of some Earning Assets can only be carried out in the context of Financing Restructuring or in the framework of Financing settlement.³⁰ Furthermore, haircuts (write-off and waive-off) can only be conducted after the Bank has made various efforts to recover the given Productive Assets.³¹ The Bank is obligated to document the efforts and the basis for implementing the write-off or debt waiver.³² The Bank is obligated to maintain data and information regarding the Productive Assets in the form of Financing that has been written off or waived.³³ These requirements also stipulated in the PBI 7/2/PBI/2005 Article 70 and 71 which sound exactly the same, but it was already repealed in 2012 and replaced by Bank Indonesia Regulation Number 14/ 15 /PBI/2012. Thus the provisions which were previously regulated in Article 70 and 71, have now changed to Article 66 and 67.

Haircuts conducted by BUMN banks must, naturally, adhere to governmental regulations regarding substance, thus often hindering the performance of state-owned banks. State intervention manifests not solely in the haircut process but also in its execution and subsequent impact. This pertains to the losses incurred by BUMN banks due to haircut

²⁶ Waive-off

²⁷ Cadangan Kerugian Penurunan Nilai (hereinafter referred to as "Allowance for Impairment Losses") is a provision made if the carrying value of a financial asset after impairment is less than the initial carrying value.

²⁸ Article 70 (1) Financial Services Authority Regulation Number 16/POJK.03/2014

²⁹ *ibid*, paragraph (2)

³⁰ *ibid*, paragraph (4)

³¹ *ibid*, Article 71 (1)

³² *ibid*, paragraph (2)

³³ *ibid*, paragraph (3)

implementations for delinquent credit customers, a topic that will be further elaborated *infra*.

1.3. Malaysian Law

Malaysia has integrated common law into its legal system as a legacy of British colonialism. Alongside national law, Malaysia incorporates Syariah law. The primary statute governing the conventional finance industry is the Financial Services Act 2013 (referred to hereinafter as "**FSA 2013**"), which supplanted the Banking and Financial Services Act of 1989, the Insurance Act of 1996, the Payment Systems Act of 2003, and the Exchange Control Act of 1953, all of which were repealed. Additionally, there is the Islamic Financial Services Act 2013 (referred to hereinafter as "**IFSA 2013**"), which replaced statutes such as the Islamic Banking Act 1983 and the Takaful Act 1984 as the counterpart to the FSA for the Islamic financial sector.

Malaysia operates under a dual banking system³⁴ wherein the conventional banking system operates alongside an Islamic banking system.³⁵ Within this framework, Islamic banks and International Islamic banks function alongside conventional banking institutions, providing a diverse array of Islamic financial products in various currencies to both residents and non-residents alike.³⁶

The regulatory authorities overseeing banking in Malaysia comprise the central bank Bank Negara Malaysia (hereinafter "**BNM**"), the Finance Minister, and the Securities Commission of Malaysia (hereinafter "**SC**").³⁷ BNM is vested with the authority to regulate banking institutions under the FSA, IFSA, and the Central Bank of Malaysia Act 2009.³⁸ The Finance Minister also holds a significant role in the regulation of both conventional and Islamic banks, serving as the authorizing authority for banking license applications and possessing the authority to impose conditions on such licenses.³⁹ On the other hand, the SC, established as a statutory body under the Securities Commission Act 1993, serves as the primary regulatory authority overseeing capital market activities in Malaysia.⁴⁰

Non-performing loans (NPLs) will also pose challenges for Malaysian commercial banks, as they significantly affect the bank's performance.⁴¹ A high volume of NPL cases indicates that numerous debtors are unable to repay their loans, thereby diminishing the bank's cost

³⁴ Luk A bin O, Foong K and Heung E, 'Banking Regulation in Malaysia: Overview' (*Practical Law*, 2023) <<https://uk.practicallaw.thomsonreuters.com/w-008-0538?transitionType=Default&contextData=%28sc.Default%29&firstPage=true>> accessed 21 June 2023

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Noreni Mohamad Zain E, Liza Ghazali P and Mohd Nazri Wan Daud W, 'Determinants of Non-Performing Loans: Evidence from Conventional Banks in Malaysia' (2020) 8 *Humanities & Social Sciences Reviews* 423

efficiency.⁴² Consequently, Malaysian commercial banks must allocate a portion of their profits towards loan loss provisions to safeguard against various scenarios and ensure financial stability. This proactive measure reduces the bank's volatility and mitigates the risk of underperformance, thereby upholding its reputation.⁴³

In Malaysia, there is no differentiation in the requirements for performing NPL restructuring or implementing a haircut between private banks and GLC banks. Banks are obligated to adhere to the Guidelines on the Disposal/Purchase of Non-Performing Loans 2005 and the Guidelines on the Disposal/Purchase of Non-Performing Financing by Islamic Banks 2007, officially issued by BNM, to elucidate the necessary procedures when opting for a haircut. According to Section 7.3 of the Guidelines on the Disposal/Purchase of Non-Performing Loans 2005, accounts or portions of accounts classified as bad or deemed uncollectible and worthless must be written off.

The subsequent procedures will adhere to the policy stipulations of each bank. It is incumbent upon management to implement prudent and systematic loan monitoring practices to safeguard the institution's financial integrity. This entails preventing any distortion of the institution's health by prematurely writing off loan accounts that remain payable, thereby concealing the actual extent of non-performing loans.⁴⁴ Prior to any loan write-off, banks must seek approval from the Board of Directors. This approval process is crucial for ensuring diligent oversight and accountability.⁴⁵ Additionally, partial write-offs are permissible under specific circumstances as follows:⁴⁶

1. The collateral value falls short of the total amount due, encompassing principal, accrued interest, and additional costs, with no prospect of supplementation.
2. The disparity between the collateral value and the outstanding balance, encompassing principal, interest, and additional charges, renders it uncollectible and worthless.
3. The banking institution is approaching the conclusion of the collateral realization process.
4. The amount is adjusted down to the collateral value, meaning the difference between the collateral value and the outstanding balance is written off.

⁴² Segal T, 'Nonperforming Loan (NPL) Definitions, Types, Causes, Consequences' (*Investopedia*, 12 May 2023) <<https://www.investopedia.com/terms/n/nonperformingloan.asp>> accessed 20 June 2023

⁴³ Noreni Mohamad Zain E et.al., *Loc. Cit*

⁴⁴ Section 7.3 of the Guidelines on the Disposal/Purchase of Non-Performing Loans by Banking Institutions issued by Bank Negara Malaysia on 28 December 2005

⁴⁵ *ibid.*, Section 7.4

⁴⁶ *ibid.*, Section 7.5

2. Wealth Separation Concept of State Owned Enterprises Banks

The state as a shareholder in state-owned banks is expected to adhere to civil law principles governing legal entities, particularly those pertaining to limited liability companies.⁴⁷ While the government may offer subsidies, fiscal transfers, targeted investments, and other industrial policy measures, it should not impede companies from engaging in high-risk businesses.⁴⁸ Therefore, this study aims to assess the degree of state intervention evident in the classification of state bank assets, considering both Indonesian and Malaysian legal frameworks.

2.1. Indonesian Law

The concept of privatizing State-Owned Enterprises (SOEs) is also utilized in Indonesia. As stipulated in Article 1, paragraph (12) of the BUMN Act, privatization involves the sale of a company's shares, either partially or wholly, to other parties, with the aim of enhancing the company's performance and value, increasing benefits for the state and society, and broadening societal ownership. However, unfortunately, the concept of privatization is often not accompanied by an understanding that the assets of SOEs become distinct from those of the state.

Based on the jurisprudence of the Constitutional Court, particularly cases numbered 48 and 62/PUU-XI/2013, it is elucidated that BUMN is considered an "*perpanjangan tangan negara*" which translated as "*extension of the state.*" This implies that the state, through its government, retains all rights and the potential for significant state intervention. In addition to being governed by the BUMN Act, as previously outlined, BUMN banks are also obligated to adhere to the State Finances Act 17/2003, despite certain provisions overlapping with each other.

According to Article 1 paragraph (6) and (7) of the State Finances Act 17/2003, it expressly provides an understanding/limitation of state and regional receivables, as well as rights held by the central government or regional government that can be quantified monetarily due to agreements or legal consequences under applicable laws and regulations. This provision serves as the foundation for the procedures for writing off state/regional receivables outlined in Government Regulation Number 14 of 2005 Procedures for Writing off State/Regional Claims, as amended by PP 33/2006.

Article 4 of the BUMN Act explicitly provides that state assets used as state equity participation in BUMN are considered 'separate' state assets. Furthermore, it is emphasized in the explanation of Article 4 of the Law on BUMN that 'separated' means the separation of state assets from the *Anggaran Pendapatan Belanja Negara* (state revenue budget, hereinafter "**APBN**") to be used as state capital participation in BUMN for further development and management that is no longer based on the APBN system but Good Corporate Governance (hereinafter "**GCG**").

⁴⁷ Kikeri S, 'Privatization of State-Owned Enterprises: A Summary of Experience' (2022) The Governance Brief by Asian Development Bank 3

⁴⁸ *ibid.*

Regulatory dualism in state-owned enterprise (BUMN) banks elicits two contrasting perspectives with divergent legal implications. First, given that BUMN banks are governed by the Limited Liability Company Act, the Banking Act, and the BUMN Act, they are regarded as commercial entities.⁴⁹ This suggests that losses incurred by BUMN banks are deemed customary as long as their management adheres to good corporate governance (GCG) and other banking principles. Consequently, BUMN banks can generate profits while simultaneously facing the possibility of losses, constituting an inherent business risk. Secondly, state wealth segregated in BUMN Banks remains part of state assets. Therefore, managing BUMN losses is approached similarly to managing state assets that have not been separated. This principle is exemplified by the involvement of the Panitia Urusan Piutang Negara (Committee for State Receivables, hereinafter referred to as "PUPN") in the haircut process. As stipulated in Article 4 of Government Regulation in Lieu of Law Number 49 of 1960, also known as the Committee for State Receivable Affairs (Peraturan Pemerintah Pengganti Undang-Undang, hereinafter "PERPPU 49/1960"), one of PUPN's tasks is to supervise the accounts receivable/credits issued by the State/State Agencies, ensuring their proper utilization according to the specified terms, and requesting relevant information from Banks if deviations are observed. In contrast, the government issued PP 33/2006, which delineates that the credit of state-owned banks is not considered part of state-owned receivables and that credit write-off falls under the authority of the bank manager.

According to the two content materials in these two regulations, there appears to be contradicted in the different perceptions of bank credit as part of state wealth or not. As expected, upon issuing PP 33/2006, the government revoked the provisions of the PUPN Law, thereby removing PUPN's authority to oversee the process and hold the directors to be liable for losses resulting from haircut implementation. Consequently, the legal framework governing haircut implementation by state-owned banks remains inconsistent.

2.2. Malaysian Law

Banking corporation refers to a licensed bank, licensed investment bank, licensed Islamic bank and licensed international Islamic bank.⁵⁰ GLC banking companies in Malaysia follow the privatization concept, with the understanding that GLC assets will be separated from state assets. Privatization means selling shares to the public and resulting in a reduction in the percentage of government ownership.⁵¹ GLC assets in Malaysia are not swiftly classified as a part of state wealth even though the government owns a large portion of shares in GLC.⁵² They are seen as a legal entity by the government, hence the assets of the GLCs are seen as the assets of the companies, rather than the assets of the state.⁵³ However, the Malaysian government does have

⁴⁹ Kusumawati A, Nachrawi G and Huda M, 'Legal Status of Business Entities on the Merger of Subsidiaries of BUMN into BUMN' (2022) 11 Legal Brief 1022

⁵⁰ Companies Act 2016 Section 2 (1)

⁵¹ KS J, 'Privatisation of State-Owned Enterprises: How It Began and Spread' (*Malaysiakini*, 18 July 2018) <<https://www.malaysiakini.com/news/433994>> accessed 24 June 2023

⁵² *ibid.*

⁵³

an essential role to play in governing and supervising GLCs through regulatory and supervisory authorities such as Bank Negara Malaysia (the central bank) and Suruhanjaya Syarikat Malaysia (the Malaysian Companies Commission). The government also has regulations and directives in place to guarantee that GLCs serve national interests and benefit society.⁵⁴

Malaysian GLCs Banks are governed by the FSA 2013 and the IFSA 2013, which control the country's financial sector and Islamic financial institutions as explained in section 1.3 above. However, there's no specific statute that specifically classifies the wealth of GLCs as state property. Hence the consequence is that GLC banks can easily take haircuts in accordance with each bank's procedural regulations as long as they do not break the law because it is not regarded as a loss to the state that the government must supervise.⁵⁵

Malaysian GLCs are governed by the Financial Services Act 2013 (FSA 2013) and the Islamic Financial Services Act 2013 (IFSA 2013), which control the country's financial sector and Islamic financial institutions.⁵⁶ However, no specific statute specifically classifies the wealth of GLCs as state property.⁵⁷ Thus the consequence is that GLC banks can easily take haircuts in accordance with each bank's procedural regulations as long as they do not break the law because it is not regarded as a loss to the state that the government must supervise.

3. The Business Judgement Rule and its influence on Directors' Liability in the SOE Bank Haircut

3.1. Definitions

Personal responsibility might occur if the Board of Directors' decisions are not accompanied by careful consideration and without regard for the good faith that should be carried out, causing the company to suffer losses.⁵⁸ The Business Judgement Rule is a legal principle that protects the board of directors of a SOE against frivolous litigation charges regarding its business practices.⁵⁹ Boards are presumed to act in 'good faith', in accordance with the fiduciary standards of loyalty, prudence, and care that directors owe to stakeholders.⁶⁰ Unless there is evidence demonstrating flagrant violation of conduct rules by the board, courts typically refrain from reviewing or disputing the board's actions.⁶¹

⁵⁴ BNM, 'Legislation & Guidelines' (*Bank Negara Malaysia*) <<https://www.bnm.gov.my/legislation-guidelines>> accessed 24 June 2023

⁵⁵ KS J, *Loc. Cit*

⁵⁶ BNM, *Loc, Cit*

⁵⁷ *ibid.*

⁵⁸ Barone A, 'What Is a Fiduciary Duty? Examples and Types Explained' (*Investopedia*, 24 May 2023) <<https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp>> accessed 24 June 2023

⁵⁹ Hayes A, 'What Is the Business Judgment Rule? With Exemptions & Example' (*Investopedia*, 11 November 2022) <<https://www.investopedia.com/terms/b/businessjudgmentrule.asp>> accessed 24 June 2023

⁶⁰ *ibid.*

⁶¹ *ibid.*

Fiduciary obligations include the ‘duty of care’ and the ‘duty of loyalty’. The duty of care entails acting in good faith, while the duty of loyalty necessitates directors prioritizing the corporation's interests over their own or those of others.⁶² However, the Business Judgement rule does not apply when the board of directors does things as follows:

1. Committed fraud
2. Corporate waste
3. Self-dealing
4. Decisions influenced by a conflict of interest
5. Acted in poor faith or with a malicious intent
6. Infringed on their duty of care by engaging in a severely negligent process that included failing to evaluate all material facts reasonably available.

3.2. Indonesian Law

The Limited Liability Company Act 40/2007 emphasize the directors or board of directors (hereinafter “**BoD**”) to be responsible for the management of the company⁶³ and shall undertake its duty to manage the company for the interest of the company in the pursuit of its purposes and objectives.⁶⁴ The BoD must carry out its responsibilities in good faith and with full responsibility.⁶⁵ If they perform their duties in violation of these rules and the company suffers a loss as a result of its fault or negligence, the BoD will be totally and personally liable for the loss.⁶⁶ This rule also applies to the BoD consisting of 2 members or more, hence the responsibility shall jointly and severally apply to each member of the BoD.⁶⁷

Building upon section 2.1 of this research, which categorizes BUMN (State-Owned Enterprises) as constituent components of state wealth, a haircut determined by the state's financial framework may be deemed a detriment to the state, thus constituting a criminal act of corruption. Especially if the haircuts are done on a massive scale and force state-owned banks to experience enormous losses to the point where they are claimed to be nearly bankrupt.⁶⁸ If this happens then the directors hold liability and must fully take responsibility as stipulated in the Article 92 paragraph (2) of the Limited Liability Company Act 40/2007. In certain circumstances, BUMN haircuts are viewed as policies involving political aspects and conflict of interests, making the PUPN liable to investigate the reason behind a haircut.⁶⁹

⁶² *ibid.*

⁶³ Limited Liability Act, Article 97 paragraph (1)

⁶⁴ *ibid.*, Article 92 paragraph (1)

⁶⁵ *ibid.*, paragraph (2)

⁶⁶ *ibid.*, paragraph (3)

⁶⁷ *ibid.*, paragraph (4)

⁶⁸ Yani I, *Loc. Cit*

⁶⁹ Article 4 PERPPU 49/1960

The Business Judgement Rule is also referred to as the director immunity doctrine. To protect the BoD from the liability that is purely a consequence of a business risk, Limited Liability Act 40/2007 adapts the Business Judgement Rule doctrine through article 97 paragraph (5). Hence The BoD of BUMN Banks can expect to be free of all accusations of corruption that have resulted in losses to the bank if:

1. Such loss is not the result of its fault or negligence;
2. BoD had managed the company in good faith and in the best interests of the company in the pursuit of its purposes and objectives;
3. There is no conflict of interest, either directly or indirectly over the management that resulted in the loss; and
4. It has taken precautionary measures to avoid the loss.

If the company's losses, which could potentially lead to bankruptcy, are significantly impacted by such a haircut then the Board of Directors (BoD) can still be defended by invoking Article 104, paragraph (4) of the Limited Liability Company Act 40/2007, which stipulates that the BoD shall not be held liable if bankruptcy does not result from their fault or negligence, has conducted the management of the Company with good faith, prudent, and fully responsible in the pursuit of its purposes and objectives; proves that there is no conflict of interest, either directly or indirectly over the management of the Company; and had taken a precaution measure to avoid the bankruptcy.

Unfortunately, Indonesian law didn't explain further the scope and condition of such negligence. This ambiguity occasionally allows shareholders to exploit the situation, holding directors accountable for their dissatisfaction with decisions, such as approving a haircut.⁷⁰

In terms of principle, haircuts can be carried out on the basis of good faith in fiduciary duty and duty of care. The implementation is encountering obstacles primarily because the directors fear being perceived as conducting themselves in bad faith. Moreover, the involvement of PUPN further complicates the process. It's crucial to note that BUMN losses shouldn't be conflated with losses from state assets, particularly considering that not all BUMN wealth originates from the state budget.

In contrast to private banks which operate more dynamically and flexibly, even though they can also be held liable for carelessness and bad faith that result in company losses, it is easier for private banks to implement haircut policies in its practices.⁷¹ The execution is likewise simple because it is solely directed by internal norms and minimal requirements established by BI and OJK, as discussed in the section 1.2 above. Comparisons between

⁷⁰ Budidjaja T and Rahmiani F, 'Corporate Governance and Directors' Duties in Indonesia: Overview' (*Thomson Reuters Practical Law*, 2022) <[https://uk.practicallaw.thomsonreuters.com/8-506-7779?contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/8-506-7779?contextData=(sc.Default))> accessed 25 June 2023

⁷¹ Wibowo JS, *Op. Cit.*, 9

private banks and BUMN banks in performing haircuts are further explained in the following table:

Table 3. Differences between private banks and BUMN banks in performing haircuts⁷²

No.	BUMN BANKS	PRIVATE BANKS
1.	BUMN wealth is part of the state's wealth, although not all BUMN wealth is derived from the state budget.	Bank's assets are not part of the state's wealth.
2.	To avoid being perceived as detrimental to the state, the Board of Directors implemented random budget cuts, and the presence of Public Utility Payment Negotiations (PUPN) complicated the execution of these cuts.	The Board of Directors is more lenient when it comes to deciding on a haircut.
3.	The high NPL level represents a poor corporate governance even though it's a business risk	NPLs purely classified as a business risk

Haircuts performed by BUMN banks cannot be done if there are anomalies or if they solely benefit a few parties in order to BoD avoid being liable for the loss.⁷³ The execution of a haircut must be founded on the principles of the business judgment rule, which considers business judgements as being made with good faith, duty of care and the duty of loyalty.⁷⁴ BUMN banks should be given the same flexibility as private banks in conducting business, including the settlement of NPLs, so that BUMN banks management can freely develop credit marketing strategies and sound credit distribution in order to build the country's economy.⁷⁵

3.2. Malaysian Law

Malaysia adopts the Business Judgement Rule doctrine in the Companies Act 1965 and its amendments in 2016. The fundamental principles therein mirror those outlined in Indonesia's Limited Liability Act. In Malaysia, it is stipulated that a director of a company is duty-bound by law to act with reasonable care, skill, and diligence.⁷⁶ Business Judgement may be interpreted as any decision on whether or not to take action in respect of a matter relevant to the company's business.⁷⁷

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⁷³ Limited Liability Act, Article 104 Paragraph (4)

⁷⁴ Hayes A, *Loc. Cit*

⁷⁵ *Supra* 73

⁷⁶ Section 214 of the Companies Act 2016, previously regulated in the Section 132(1B) of the Companies Act 1965

⁷⁷ *ibid.* Section 214 (2) of the Companies Act 2016

The Business Judgment Rule outlines the criteria under which a director is considered to have fulfilled this duty. The conditions dictate that a director must:⁷⁸ make the business judgment for a proper purpose and in good faith, not possess a material personal interest in the subject matter of the business judgment, be sufficiently informed about the subject matter of the business judgment to the extent that the director reasonably believes to be appropriate under the circumstances, and reasonably believe that the business judgment is in the best interest of the company.

To complete the implementation of the doctrine of business judgment, the act clarifies the obligations of the directors to be released from responsibility by using the Business Judgment Rule as follows:⁷⁹

“Director of a company shall exercise reasonable care, skill and diligence with-
(a) the knowledge, skill and experience which may reasonably be expected of a director
having the same responsibilities; and
(b) any additional knowledge, skill and experience which the director in fact has.”

In order for the doctrine to apply, a 'business judgment' must first be made, which is defined as any decision on whether or not to act on a topic linked to the company's business.⁸⁰ The court will *prima facie* presume that the directors acted in good faith, invoking the presumption of innocence.⁸¹ Therefore, those who allege that directors have abused their authority must substantiate their claims with evidence. It runs counter to customary justice norms to assume that directors have acted wrongly without such proof. This presumption, however, can be rebutted. For instance, it might be demonstrated that no rational individual, given the facts and circumstances and possessing intelligence, would have acted in the same manner as the directors.⁸² The presumption is also frequently displaced when directors' self-interests are implicated, there is an absence or lack of independent judgment, or it is evident that the interests of other people were prioritized over the interests of the company.⁸³

In a condition when the GLC banks need to perform haircuts, directors are not permitted to act solely on the instructions of another person, including the majority shareholder.⁸⁴ Directors cannot claim to have acted in good faith in the best interests of the company if they fail to investigate and comprehend the circumstances around a decision.⁸⁵ Directors must bring their own thoughts to bear on the issue after listening to and passing on what

⁷⁸ Supra 76

⁷⁹ *ibid.* Section 213 (2) of the Companies Act 2016

⁸⁰ Praxis, *Op. Cit.*, 45

⁸¹ *ibid*; see also Mohan a/l Paramsivam v Sepang Omnibus Co Sdn Bhd [1989] 1 MLJ 247, and Re Coalport China Co [1895] 2 Ch 404.

⁸² Praxis, *Op. Cit.*, 46 ; see also Loh Siew Cheang, Corporate Powers, 2nd ed., Lexis Nexis Butterworth, p. 247

⁸³ Supra 76

⁸⁴ Kheong KC, 'Bank Negara Malaysia Revises Policy Document On Securities Borrowing And Lending Of Rentas Securities' (*Lexology*, 27 December 2022) <<https://www.lexology.com/library/detail.aspx?g=39667ab6-350a-427a-b77a-f91205440c0d>> accessed 25 June 2023

⁸⁵ Supra 79

their colleagues, management members, or other consultants had to say.⁸⁶ It implies that they cannot behave rashly or delegate decision-making authority to others.

The Business Judgement Rule doctrine applies when there's no conflict of interest involving the GLCs directors when issuing the haircut, since it may manifest as physical or intangible benefits to the directors in question, or they may have the effect of consolidating management power in the hands of the incumbent directors or their group.⁸⁷ Personal interest, on the other hand, is not necessarily fatal when advancing the company's aims also enhances the directors' own interests.⁸⁸

CONCLUSION

In Indonesia, Haircut can be executed in two ways which is "*hapus buku*" and "*hapus tagih*." In contrast to Indonesia, where the execution is overseen by the Committee for State Receivable Affairs, Malaysia more clearly categorizes GLC wealth as the company's own asset. This distinction facilitates the process of haircuts for GLC banks. Both Indonesia and Malaysia can use the Business Judgement Rule doctrine to protect the directors against haircut decisions that are troubling to the bank. Nonetheless, the Malaysian Bar's manual more explicitly explains the conditions and obligations of directors through the Companies Act 2019. However, the Malaysian Bar's manual provides more explicit elucidation of the conditions and obligations of directors under the Companies Act 2019. Indonesia, on the other hand, solely adheres to the provisions outlined in the Limited Liability Company Act 40/2007, which are notably broad. Additionally, as a common law jurisdiction, Malaysia employs landmark cases to establish precedents. Directors in government-linked companies' banks in Malaysia are considered innocent until proven guilty, whereas in Indonesia, directors are presumed guilty and liable until they demonstrate compliance with Article 97 of the Limited Liability Company Act 40/2007.

Based on what has been elaborated in the section 1 until 3 above, the table below contains the results of a comparison of the business judgment rules in haircuts performed by SOE banks in Indonesia and Malaysia:

⁸⁶ Praxis, *Op. Cit*, 46

⁸⁷ Companies Act 2016, *Op. Cit*, Section 214 (b)

⁸⁸ Praxis, *Op. Cit*, 47

Table 4. Haircuts and the Business Judgement Rules on the SOE banks from the perspective of Indonesian and Malaysian Law

No.	INDONESIA's BUMN BANKS	MALAYSIA's GLC BANKS
1.	The rules scattered and overlap each other	The rules are clearly stated in the FSA and IFSA, and a guidebook released by BNM
2.	Need approval from BoD and Commissioner	Only need approval from Directors since Malaysia adopts single board
3.	BUMN is part of the extension of the state, hence BUMN assets is part of the state's wealth, although not all BUMN wealth is derived from the state	GLCs wealth are not part of State's wealth
4.	PUPN undertake the process and supervised BUMN banks when doing haircuts	Government didn't intervene to the process of haircuts performed by BUMN banks
5.	BoD is responsible for the management of the company and shall undertake its duty to manage the company for the interest of the company in the pursuit of its purposes and objectives.	Director of a company has the duty under the law to act with reasonable care, skill and diligence.
6.	BoD must perform the duty in good faith in good faith and duty of care	BoD must perform the duty in good faith
7.	No loss shall caused by negligence and BoD had to stay away from conflict of interest	Directors does not have a material personal interest in the subject matter of the business judgment;
8.	For fear of being perceived as being damaging to the state, the Board of Directors performed random haircuts, and the presence of PUPN made haircuts difficult to carry out.	The Board of Directors is more lenient when it comes to deciding on a haircut since there's no intervene by politics and government
9.	No such as presumption of innocent, the BoD shall proved that they're in compliance with the law especially article 97 of the Limited Liability Act 40/2007	The court will prima facie presume that the directors acted in good faith (presumption of innocence)
10.	Any conflict of interest, either directly or indirectly over the management of the company are not allowed	Personal interest is not necessarily fatal when advancing the company's aims also enhances the directors' own interests

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