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PROCEDURE AND LEGAL CONSEQUENCE DUE TO THE CONVERSION OF COMMANDITAIRE VENOTSCHAP TO LIMITED LIABILITY COMPANY

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Abstract

The company takes an important part of the social life of the community. In order to carry out its business activities, the parties granted the freedom to conduct business individually or through a business entity. One form of business entity that is still alive which is oftenly used is through a *Commanditaire Vennotschap* (CV). As the time goes by, the existence of the CV is deemed no longer able to meet the demands arising from the development. This triggered the desire of the parties to change the form of business from CV into a legal entity. Limited Liability Company or in Indonesia called as "Perseroan Terbatas (PT)" becomes the main choice by the entrepreneurs. The conversion of a CV into a PT is a step that can be taken by the entrepreneurs. The conversion of the CV into a PT is possible to be carried out without having to terminate the CV in advance as the termination of the CV will have impacts on the agreement it has made to be settled on that time, whereas on the other hand the agreements that have been made have not yet expired or done.

Keywords

conversion, commanditaire vennotschap, legal consequences, limited liability company, procedures

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Introduction

The role of law is essential in improving the national development. One of the main aspects of national development is the economic development of a country. Legal reforms take a fundamental role in actualizing economic development in the country. The existence of business activities within a country will also affect the national development which is to improve the welfare of the society. One of the main pillars in the framework of national economic development is through business processes undertaken by the society as its parties. Although the parties often do not realize it, they basically takes legal steps with all its consequences when the parties entering the business activities (Agus Yudha Hernoko, 2010). Basically any business activity must be framed by the legal contract (Moch. Isnaeni, 2013). Recognizing that every business step is a legal step, it is appropriate that a legal measure be offset by the availability of adequate regulations.

The company takes an important part of the social life of the community. The community as a consumer becomes the target for the company to distribute the products or services it produces. On the other hand, the community can also hold a position as the main supplier of the company's needs. Thus society and the company are on two sides that need each other (Tuti Rastuti, 2015). In order to carry out its business activities, the parties generally granted the freedom to conduct business activities individually or through a business entity. There are at least three forms of companies that can be chosen by the public i.e. sole proprietorship, limited liability company, and partnership companies (Yetti Komalasari Dewi, 2016). In Indonesia, business entity is divided into two categories, business entity as a legal entity and business entity which is not as a legal entity.

One form of business entity that is still alive and growing, which is often used by entrepreneurs in order to run their business activities is through a Commanditaire Vennotschap (hereinafter abbreviated as CV). This form of business entity is oftenly used not only because of its easy establishment procedure, but the cost incurred in order to establish the CV is also not as big as a legal entity. As the time goes by, it turns out that the existence of the CV is deemed no longer able to meet the demands arising from the economic development. This triggered the desire of the parties to change the form of business entity from CV into a legal entity. As one of the legal entities, Limited Liability Company or in Indonesia called as “Perseroan Terbatas” (hereinafter

abbreviated as PT) becomes the main choice by the entrepreneurs considering the various advantages they have, such as the ability to develop themselves as well as the ability to enhance the capital (Agus Budiarto, 2009).

The conversion of a CV into a PT is a step that can be taken by the entrepreneurs. It is also possible that a conversion of the CV into a PT occurs as a result of the regulations that requires a certain business field to be run in the form of a PT. In practice, it turns out that the demands raised in society are not balanced by the availability of adequate regulations. This is because the legal arrangement of CV has never changed, but on the other hand the demands of the activities of CV have developed massively. This problem causing weakness for the entrepreneurs, economically and juridically.

The main objective of the conversion of a CV to a PT is to ensure that any agreements made by an ongoing CV may be transferred to a PT. The conversion of the CV into a PT results in the status of the CV to be automatically terminated by law and changing to a PT. Although in practice the changing form of the CV into PT has come to be known, but it turns out that this legal process is not accompanied by the availability of legal regulations governing it. This resulted that the procedure of the conversion of the CV into PT is not in line one another thus causing legal uncertainty. Based on what mentioned above, it will be further analyzed the procedures and legal consequences of the Conversion of CV into PT.

Research Method

The type of research used in this paper is normative research, specifically a doctrinal research. This study uses two types of legal materials, specifically primary law and secondary law to find solutions to legal issues appeared. This research is conducted by listing the applicable regulation related to the CV and PT, both in the aspect of the conversion arrangement, and in the aspect of legal consequences. As a normative study, the focus of this research is on theoretical matters concerning legal principles, legal concepts, statutory regulations, legal opinion, legal doctrines and related legal systems. In this paper, there are two types of approaches used, the conceptual approach and the statute approach.

Discussion

Procedure of the Conversion of Commanditaire Vennotschap (CV) into Limited Liability Company (PT)

In order to develop the business on a wider scale or to fulfill the obligations set by the government, one of the business development strategies that is possible to be taken is through the conversion of CV into PT. The main objective of the conversion is to ensure that any contracts made by an ongoing CV be able to be transferred to a PT. There are several procedures that need to be considered for the established CV must have committed legal actions with the other parties. The conversion is possible to be carried out without having to terminate the CV in advance as the termination of the CV will have impacts on the agreement it has made to be settled on that time, whereas on the other hand the agreements that have been made have not yet expired or done. This conversion will change the status of the company that previously was a non-legal entity into a legal entity, therefore there are matters that need to be considered and adjusted in order to obtain the status of a legal entity. There are several steps that must be fulfilled so that the agreement between the CV and the third party constantly continue. In relation thereto, the process of conversion of the CV into a PT is further divided into 3 (three) stages.

The first stage is the Calculation and Assessment of Assets of the CV. This stage aims to determine the amount of assets of the CV that are separated from the wealth of its members, whose will be converted into issued shares of the PT which will be established. In this case, an assessment of the assets of the CV should be conducted first. The Assessment of CV's assets as intended, shall be done by calculating the assets, including the accounts and debts of the CV, as well as the distribution of the balance to the members, which shall then be set forth in the balance sheet and financial statements of the CV. The assessment should be undertaken by experts that are unaffiliated with the CV. In this case, the unaffiliated expert refers to a Public Appraiser. Based on the Regulation of the Minister of Finance Number 125/PMK.01/2008 concerning Public Appraisal Services, a Public Appraiser is an Appraiser who has obtained license from the Minister to provide valuation services to provide estimation and opinion on the economic value of an assessment object in accordance with the Indonesian Assessment Standards. In connection with the conversion of the CV into a PT, the calculation of the amount of income (*inbreng*) derived from the assets of the CV which is not in the form

of cash, especially in the form of land and/or building must be assessed in advance in order to be converted into par value of the shares.

In order to determine the balance sheet as well as the financial statements of the CV, this conversion should involve the role of the Public Accountant. The involvement of a Public Accountant in performing calculations/audits on the financial condition of the CV refers to the provisions of the Law of the Republic of Indonesia Number 5 Year 2011 on the Public Accountant. Based on that regulation, it can be seen that the Public Accountant has a role in giving opinion on the quality and credibility of financial information of an entity. Thus, the responsibility of a Public Accountant rests on an opinion or statement of opinion on the report or financial information of an entity.

The consideration for the assessment and calculation of the assets and liabilities of the CV by unaffiliated parties is to obtain objective results on the amount of assets of the CV which will be subdivided to its members to be converted into issued capital within the PT to be established (Adib Pangaribuan, 2010).

The second stage that needs to be implemented in this conversion is Announcement of Conversion Plan of CV into PT, Including Plans of Inclusion of Assets of CV into Issued Capital in PT. In relation to the conversion, the members of the CV shall be obliged to notify the plan to the parties related to the CV, whether to the creditors and to the debtors of the CV. In addition, the following conversion plans and financial statements of the CV should be announced in a media that are accessible to the public. This announcement to the third party also relates to the conversion process of the assets of the CV to the PT into the issued capital of the PT in the form of shares. The deposit of capital in the form of immovable goods (*onroerende goederen/zaken)* must be announced in 2 (two) daily newspapers to be known by the public. Announcement regarding the deposit shall be made through Indonesian language daily newspapers with national circulation. The announcement contains the amount of capital in the form of immovable property and the other details (I. G. Rai Widjaya, 2007).

This announcement is needed in order to meet the principle of publicity, so that this information can be known by the public and to give an opportunity to the interested parties to object to the transfer of such item as a share capital deposit, for example, it is known that it does not belong to the depositor but to a third party. (Sujud Margono, 2008).

After the stages as described above are implemented, the next step that must be done is the Adjustment of Articles of Association of CV into the Deed of Establishment of PT. The deed of establishment of PT is an essential element that must be fulfilled in the establishment of the PT. It is necessary to affirm that the establishment of a PT is to continue the business activities of a conversed CV. In relation to the establishment of the PT, the result of the conversion, Article 7 paragraph (1) of Law Number 40 of 2007 regarding Limited Liability Company (hereinafter referred to as UUPT) stated that "The Company is established by 2 (two) or more persons by notarial deed in Indonesian language". This provision is considered as an imperative provision (*dwingendrecht*) and can not be disregarded by the parties even though on the basis of agreement. M. Yahya Harahap stated that the company's establishment must be made in writing (*scriftelijk*) in the form of deed, specifically in the form of notarial deed (*Notariele Akte*). The requirement of notarial deed not only serves as a *probationis causa*, which means notarial deed not only serves as a proof of the establishment of PT, but also serves as a *solemnitatis causa*, that if it is not made in the form of notarial deed, such stance is not eligible so that it can not be granted by the government (M. Yahya Harahap, 2016).

In order to establish PT as a result of the conversion of the CV, the parties can not directly apply for the approval of the establishment of a PT, but must submit a reservation and check the name of the company in advance. This is also regulated in government regulation number 43 of 2011 on Procedures of Application and Use of Limited Company Name (hereinafter referred to PP Number 43/2011). The filing of the company's name is made by a notary on behalf of the founder in the capacity as the applicant through the Information Technology Administration System of Electronic Legal Administration. This process is intended to provide protection and legal certainty to the founders of PT that have used the name of the company in good faith, as well as to other parties who have previously used the name of the company.

If the submission of the name of the PT has obtained the approval from the Minister, the next stage is the issuance of the Deed of incorporation of the PT. The issuance of Deed of Establishment of PT shall be executed within 60 (sixty) days after the approval from the Minister. As previously stated that the deed of establishment of PT must be written in the form of notarial deed since the deed of establishment is positioned as *probationis causa* and also *solemnitatis causa*. In relation with the establishment of a PT as a conversion form from CV, the things that need to be set forth in the Deed of establishment of PT are as follows:

a. Referring to various forms of agreements and legal acts that have been committed and related to the ownership of shares, in accordance with the provisions of Article 12 of UUPT as follows:

   (i). If made by a underwritten deed, it is mentioned and attached to the minutes of the deed;

   (ii). If made by an authentic deed, it shall mention the date, day, time and made before the Notary which makes the deed.

b. Approval of the allies/founders to transfer all rights and obligations of the CV to the PT. This takes a very fundamental provision in the establishment of PT as a result of the conversion of the CV. With this approval the liability of the allies in relation to the maintenance of the Legal Command will legally turn to the incorporated PT. In this matter, it includes the agreements that have been made with third parties. In relation with this process, the author considers this matter to be described it in the **recitals** section on the Deed of establishment of PT.

c. The declaration that the incorporated PT is a continuation of the Business of the CV shall also describe the CV, include the number and date of the deed of establishment, as well as the amendments thereof, as well as the date of registration of establishment and amendment to the Registrar of the local District Court. Related to the statement, the author considers that information about the objectives of the establishment of a PT as a continuation of the business of the CV to be set forth in **Article 3** of the Deed of Establishment of PT in relation with the purpose and objectives and business activities of the company.

d. Another thing to be noted is the provisions of the capital of a PT. The regulation on capital is considered necessary considering that the Articles of Association of the CV generally do not contain the provisions concerning the Authorized Capital or the Issued/Paid-in Capital. In relation to the arrangement concerning the issued and paid up capital of PT as a conversion from the CV, the financial condition as outlined in the Final Balance of the CV shall be set forth in the Deed of Establishment of PT as Issued and Paid-in Capital. Therefore, the authors considered that the financial statements containing the balance sheet of CV which has been audited by Public Accountant is set forth in **Article 4** of the Company's Articles of Association concerning Capital.

To obtain a Ministerial Decree on the legalization of a legal entity of the PT, the Applicant must submit an electronic application to the Minister. As to the application as intended, it must be submitted within 60 (sixty) days from the date of the establishment deed has been signed. Furthermore it is also determined that the proposed establishment format shall be accompanied by an electronic statement from the applicant concerning the documents for the establishment of the Company has been completed, while the physical supporting documents as intended, shall be kept by the notary as the applicant. The term of supporting documents as described is based on Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 4 of 2014 *jo*. Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 1 of 2016 (hereinafter referred to as Permenkumham RI Number 4 of 2014 jo. Permenkumham RI Number 1 of 2016) includes:

a. Minutes of the deed of establishment of the Company;

b. Photocopy of deposit slip or photocopy of bank statement on behalf of the Company or joint account on behalf of the founders or original statement has deposited the capital of the Company signed by all members of the Board of Directors together with all founders and all members of the Board of Commissioners of the Company, if the deposit of capital in the form of money ;

c. Original certificate of assessment from an unaffiliated expert or proof of purchase of goods if the deposit of capital in a form other than money accompanied by proof of announcement in the newspaper if the deposit in the form of immovable objects;

d. Photocopy of balance sheet of incorporated Company or balance sheet of non-legal entity incorporated as capital deposit.

e. Letter of declaration of the ability of the Founders to obtain the tax ID Number and the report of receipt of annual tax notice; and

f. Photocopy of certificate of complete address of the Company from the authorized institution or original statement concerning the complete address of the Company signed by all members of the Board of Directors together with all Founders and all members of the Board of Commissioners of the Company.

Article 9 Paragraph (3) of UUPT has been stated that the procedure to obtain a Ministerial Decree on legalization of a legal entity of the company, where in the case that the founders of the company do not submit the application for legalization of a

legal entity of the company, the founders of the company may only authorize the notary. In its implementation, based on the provisions of Article 2 paragraph (1) Permenkumham RI Number 4 of 2014 jo. Permenkumham RI Number 1 of 2016, Submission of application for legalization of a legal entity of the company shall be conducted by a notary as the power of the founder acting in the capacity of the applicant. This provision is a mandatory law (*dwingenrecht*), therefore, the founder shall appoint a notary as a power to act on the application (M. Yahya Harahap, 2016). *Ratio Legis* of this arrangement is based on the consideration that not all the founders of the PT understand the administrative system and the process of filing legal entity approval so that the submission is done by the party considered to master the process which in this case is notary.

The Existence of the First General Meeting of Shareholders After the Limited Liability Company Obtains the Minister's Approval

In relation with the principle of law, basically the founders and the Board of Directors stands in the fiduciary position against the company as long as the company has not obtained the status as a legal entity. They are therefore personally liable for all legal acts committed by and to the third parties. It is also implied in the provision of Article 3 Paragraph (2) Sub-Paragraph a of the UUPT that "Shareholders of the Company are personally responsible for the commitments made on behalf of the Company and are liable for losses of the Company in excess of the shares owned if the requirements of the company as legal entity have not been met or not met". Thereby it may be interpreted that a legal act done before the company is legal as a legal entity shall be the sole responsibility of the party committing the act.

In the event that the founders of the PT intend to include any legal act which occurs when the business entity is still in the form of a CV into an incorporated PT, then the first General Meeting of the Shareholders of the PT (hereinafeter abbreviated as GMS) since obtaining the status as a legal entity shall expressly accept or take over all rights and the obligations of the CV. Based on the provisions of Article 13 Paragraph (1) of the UUPT, principally legal action by the founder/allies for the interest of the Company that has not been established, binds to the PT after PT lawfully obtains the legal entity status. However, this transition can not be carried out directly by law (*van rechtswege, ipso jure*) (M. Yahya Harahap, 2016). Under the provisions of Article 13 paragraph (1) of UUPT, The legal act of the founders which in this case was formerly the allies of the CV, on behalf of the company will bind the company after becoming a

legal entity when the first GMS expressly accept, take over and affirm in writing the act of the founders.

It should also be affirmed that the Company's attachment to the legal act of the CV, through the GMS already authorized to become a legal entity shall itself be a party to the said agreement (Agus Budiarto, 2009). In the event that the first GMS does not expressly accept and assume all rights and obligations as mentioned above, the prospective founder committing the act of law shall be personally liable for any consequences arising (Agus Budiarto, 2009). The GMS as intended, shall be executed no later than 60 (sixty) days after the Company has obtained legal status as a legal entity. The first GMS to approve the legal actions of the founders of a PT shall be attended by all shareholders with voting rights and such decisions shall be unanimously approved. It is solely to bind the Company thereby resulting in the transfer of rights and obligations of all legal acts committed by the CV to the Company. In the event that it is not fulfilled by the provisions of this first GMS whether it is by the quorum, party that agrees, or has passed a period of time, the legal act committed by allies of the board on behalf of the CV is not binding on the company and the founders who are allied to the PT shall be personally liable to all the consequences arising from legal acts committed. Therefore, the existence of the first GMS is considered as an affirmation and approval of all agreements and legal acts committed by the founders.

As a subject to the provisions of Article 13 paragraph (5) of the Company Law, the first GMS after obtaining the status as a legal entity **is not required** in the event that the legal act is committed or agreed in writing by all of the founders/allies prior to the establishment of the Company. This means that the legal acts committed by the founders of a PT that were formerly allies of the CV, if it has been mutually agreed to be transferred to the Limited Liability Company, upon the establishment of the PT, the first GMS referred to in Article 13 paragraph (1) is not required. Approval of the founders of this Limited Company is further can be poured in premises/recitals in the deed of establishment of PT.

It should be noted that the exemption as referred to in Article 13 paragraph (5) of UUPT can only be applied if all the allies of the CV are the founders of the PT. In the event that any other party wishes to enter as a founder or an organ of a PT, it is still necessary to have a GMS to firmly accept, take over and affirm in writing the legal actions of the CV which are to be transferred to a PT. In the event that the GMS as

intended is not executed, the allies of the CV shall remain responsible for its legal actions on behalf of the CV into the responsibility of each partner in a mutually exclusive manner as stipulated in Article 18 of the Commercial Code.

Legal Consequences of the Conversion of the *Commanditaire Vennotschap* (CV) to a Limited Liability Company (CV) against the Conducted Agreements

It has been explained previously that the main purpose of conversion of a CV into the PT is so that the agreements made by the ongoing Parties may be transferred to the PT. The conversion of the form of a CV into a PT resulted in the status of a CV automatically terminated by law and changing into a PT. The change of the form of the CV into a PT was held in order to avoid the stages of dissolution of the existing CV that will cause an impact on the agreements it has made to be settled on the spot, but on the other hand the agreements made with the third party have not yet expired or done.

As for the legal consequences of the conversion of the CV into a PT can be reviewed from various aspects. In relation to the conversion thereof, the change of the CV into a PT means to change the status of the company that was not previously incorporated as a legal entity, and hence the position of the CV as the party of the obligations made for the law shall be transferred to the PT. In relation to its responsibilities and management, the conversion of the CV into a PT will result in the transfer of responsibilities of the CV which in this case its operations are organized by the Managing Partners, to the responsibility of the PT and carried out by the Board of Directors. In connection with what is described above, it is necessary to renew the agreements that have been made. This is deemed mandatory to be carried out even in the course of the change, the founders of the PT have announced plans to conduct this conversion. This means that legally the treaties have been made by the CV, especially written agreements (*scriftelijk*), needs to be updated.

In the legal relationship embodied in the form of agreements, Sri Soedewi Masjchoen Sofwan argues that there are at least two parties, the Creditors as the party having receivables, and the Debtor as the party having the debt (Sri Soedewi Masjchoen Sofwan, 1980). If it is associated with the Agreement made by the CV through its Managing Partner, the CV can be positioned as Creditor or as Debtor.

In the case of a CV as a creditor, in addition to notification to the Debtor of the CV, the contract or agreement that has been made shall be renewed. Renewal of the agreement as intended, aiming to make the treaty made by the parties permanently bind the

parties perfectly. In order to renew the agreement with the third parties, it is necessary to identify the forms and types of agreements previously made by the CV. This is necessary considering that in Article 12 of the company's Articles of Association there is the possibility of limiting the authority of the Board of Directors as determined by the founders. In this case it is necessary to reiterate that the requirement shall refer to the presence or absence of limitations on the authority of the Board of Directors in representing the PT.

As well as in the case of a CV as a creditor, in the case of a CV having the position of a Debtor, the contract or agreement that has been made with the Creditor shall be renewed in order for the agreements made by the parties remain binding on the parties perfectly. In relation to the position of the company as a debtor, it should be noted that some agreements may be accompanied by additional agreements that aims to support the implementation of the principal agreement, or commonly known as the *accessoir* agreement. One of the *accessoir* agreements commonly encountered in the practice on the community is the collateral agreement.

Based from its type, collaterals can be differentiated into material guarantee and personal guarantee. Material guarantees are collateral for certain items owned by the debtor or third party property designated specifically for the benefit of certain creditors (Trisadini P. Usanti, et. al., 2016). The guarantee made by the parties is classified as a material agreement not an *obligatoir* agreement, and thus the right arose from a material agreement is a material right. Several types of commonly known guarantee institutions in Indonesia are *Gadai* (*pand*), *Hypotheek*, *Hak Tanggungan* (Mortgage), and *Fiduciare Eigendom Overdracht* (FEO/Fidusia). In addition to the material guarantee, known also the existence of Individual Guarantees that usually use the terms of the guarantee agreement (*borgtocht*). Article 1820 BW defines guarantee as an agreement with which a third party, in the interest of the debtor, binds himself to fulfill his indebted obligations when the debtor does not comply with his ageement. This indicates that the guarantee agreement is an *accessoir* agreement as well as the material agreement.

In relation to an agreement positioning a CV as a debtor with a material agreement in the form of a principal agreement accompanied by a guarantee agreement, then both treaties need to be renewed together. The *Ratio Legis* of renewal of the principal agreement which involves a guarantee agreement is because of the involvement of a third party in a guarantee agreement or commonly known as third party guarantees.

This renewal is aimed at ensuring that the inherent guarantee agreement on the updated treaty remains perfectly binding on the parties. On the other hand, renewal of this warranty agreement is a reaffirmation of the guarantor of the updated principal agreement.

Renewal of all agreements, specifically agreements originate from written agreements, is principally intended to provide optimal legal protection to all parties, creditors, debtors and even to third parties as guarantors. The creditor obtains legal protection for the accomplishment of the achievement, the debtor obtains legal protection for his/her rights as the debtor in the agreement, while the third party guarantors get legal protection in relation to the assurance of the status of the principal agreement made. With the realization of optimal legal protection for the parties, it is expected that the objectives of law in order to in order to actualize certainty, justice, and expediency can be realized

Conclusion

Whereas the conversion of the CV into PT is possible to be carried out without having to terminate the CV first. This conversion resulted in the status of the CV to be automatically dissolving by law and changing into a PT. The process of conversion divided into stages of Calculation and Assessment of Assets of CV; Announcement of the Plan of conversion, Including the Plan of Inclusion of Assets of CV into Issued Capital on the PT; and Adjustment of Articles of Association of CV into the Deed of Establishment of PT

In relation to the transfer of rights and obligations of the CV to the PT, in the case of all partners of the CV are the founders of the PT, no GMS is required to take over the rights and obligations of the founders. The transfer of rights and obligations shall be done in writing as set forth in the Deed of Establishment of PT, specifically on the part of premises/recitals. However, in the case of any founder of a PT is not an ally of the CV, and all the founders wish to include any legal action that has been made into the PT to be established, it is necessary to hold the first GMS to receive or take over all rights and obligations of the CV in accordance with the provisions of Article 13 paragraph (1) UUPT.

The conversion of the CV into a PT brings the legal consequence that the position of the CV as a party on a contract shall be transferred to the PT. In connection with the conversion, it is necessary to renew the agreements it has made in both the Creditor

and the Debtor positions. About all the agreements made in the position of the Debtor that are supported by a guarantee agreement, the party providing the guarantee shall renew the guarantee agreement to provide optimal legal protection for both the Debtor, the Creditor and the third Party as the guarantor. With the realization of optimal legal protection for the parties, it is expected that the objectives of law in order to actualize certainty, justice, and expediency can be realized

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