

# THE NEW INDONESIAN COMPANY LAW

BENNY S. TABALUJAN\*

## 1. INTRODUCTION

On March 7, 1995, the Indonesian government enacted a new law regulating limited liability companies (the *Undang-Undang Tentang Perseroan Terbatas* or "UUPT").<sup>1</sup> The UUPT came into force on March 7, 1996.<sup>2</sup>

The pre-UUPT company law of Indonesia was based largely upon twenty-one articles in the Indonesian Commercial Code (the *Wetboek van Koophandel, Kitab Undang-Undang Hukum Dagang* or "KUHD").<sup>3</sup> These provisions were first promulgated in 1847

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\* BEc LLB *Monash* LLM *Melbourne*; AIArBA; barrister & solicitor, Supreme Court of Victoria and the High Court of Australia; senior lecturer, Nanyang Business School, Nanyang Technological University, Singapore.

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<sup>1</sup> Undang-Undang Republik Indonesia Nomor 1 Tahun 1995 Tentang Perseroan Terbatas [Law Concerning the Limited Liability Company, Law No. 1 of 1995] [hereinafter UUPT]. The official text is published in LEMBARAN NEGARA [STATE GAZETTE] No. 13 of 1995, with the Elucidation (*Penjelasan*) in the TAMBAHAN LEMBARAN NEGARA [SUPPLEMENT TO STATE GAZETTE] No. 3587. The Elucidation of a law contains a useful explanation of the law and usually is considered to be authoritative for purposes of interpretation. A compilation comprising the text of the UUPT, its Elucidation, and additional parliamentary papers can be found in UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 1 TAHUN 1995 TENTANG PERSEROAN TERBATAS [Law No. 1 of 1995 of the Republic of Indonesia Concerning Limited Liability Companies] (1995). An English translation of the UUPT and its Elucidation is available in LAW OF THE REPUBLIC OF INDONESIA NO 1 — 1995 CONCERNING LIMITED LIABILITY COMPANIES (1995).

<sup>2</sup> See UUPT, *supra* note 1, art. 129.

<sup>3</sup> Many of the important Indonesian legislative instruments from the Dutch period to the modern day, including the Civil, Commercial, and Criminal

during the Dutch colonial rule. The UUPT constitutes the first major revision of Indonesian company law since the 1847 code, and the only revision since Indonesia became independent in 1945. Indonesia's rapid economic progress has spurred calls from both local businessmen and foreign investors for a new company law more suited to Indonesia's modern commercial sector. The 129 articles of the UUPT respond to this concern, and are aimed at ushering in a period of increased corporate governance and responsibility.

This paper examines some of the major features of the UUPT. Section 2 provides a brief summary of Indonesian business entities. Section 3 compares select aspects of the pre-UUPT company law with their corresponding provisions in the UUPT. Section 4 discusses implementation issues associated with the UUPT. The conclusion, Section 5, offers some tentative conclusions about the UUPT's significance and effect on Indonesian company law.

## 2. BUSINESS ENTITIES

There are three main types of business entities in the Indonesian commercial arena: sole proprietorships, partnerships, and companies.<sup>4</sup> Sole proprietorships appear to dominate the informal sector. Many of these businesses are not officially registered with Indonesian authorities because of the nature and activities of the informal sector. The formal business sector is primarily composed of incorporated entities and partnerships. These two categories of business entities are explained below.

### 2.1. *Partnerships*

Indonesian law recognizes several types of partnerships.<sup>5</sup> The

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Codes, may be found in the very useful — but not comprehensive — compendium W.A. ENGELBRECHT & E.M.L. ENGELBRECHT, *HIMPUNAN PERATURAN PERUNDANG-UNDANGAN REPUBLIK INDONESIA* [COMPILATION OF LAWS OF THE REPUBLIC OF INDONESIA] (1992).

<sup>4</sup> There are two other types of business entities, although they are fewer in number: cooperatives (*koperasi*) and state corporations (*badan usaha milik negara*). For a brief description of all five types of entities, see HARDIJAN RUSLI, *PERSEROAN TERBATAS DAN ASPEK HUKUMNYA* [THE LIMITED LIABILITY COMPANY AND ITS LEGAL ASPECTS] 5-16 (1996).

<sup>5</sup> See generally CHARLES HIMAWAN & MOCHTAR KUSUMAATMADJA, *SURVEY OF INDONESIAN ECONOMIC LAW - BUSINESS LAW: CONTRACTS AND BUSINESS ASSOCIATIONS* 23-39 (1973) (describing the characteristics of the different partnerships recognized under Indonesian law).

three main types of partnerships and their applicable legislation are:

TYPE	LEGISLATION
<i>Perseroan perdata (maatschap)</i>	Civil Code
<i>Perseroan firma (vennootschap onder firma, firma or fa.)</i>	Commercial Code
<i>Perseroan komanditer (commanditaire vennootschap, CV)</i>	Commercial Code

Specialized partnerships, called *reederij* (*perusahaan perkapalan* or shipping firms), also exist and are used specifically for shipping activities.<sup>6</sup>

Although absolute equivalents between these partnerships and partnerships under the common law tradition are difficult to establish, the *maatschap* and the *firma* most closely resemble the concept of an ordinary partnership under English law.<sup>7</sup> The *commanditaire vennootschap* is similar to the common law limited partnership.<sup>8</sup>

## 2.2. Companies

The Indonesian equivalent of the incorporated limited liability company is the *perseroan terbatas* ("PT"). It was originally referred to in Dutch as the *naamloze vennootschap* ("NV").<sup>9</sup> Some older companies still use the abbreviation "NV" although most companies today use the abbreviation "PT."

Apart from the standard PT, another form of incorporated company, the *maskapai andil Indonesia (maatschappij op aandeelen)*, existed prior to World War II. Some such companies continue to operate today. Used by indigenous Indonesians, this form of incorporation is governed by a set of rules contained in a separate

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<sup>6</sup> See Wetboek van Koophandel, Kitab Undang-Undang Hukum Dagang [Indonesian Commercial Code] art. 323 [hereinafter Commercial Code].

<sup>7</sup> See MARJORIE J. SINKE, LEGAL LANGUAGE: US-DUTCH LEGAL CONCEPTS ON BUSINESS & TAX LAW: A GLOSSARY 67 (1990). The *maatschap* is used to conduct a profession whereas the *firma* is used to conduct a business. See *id.*

<sup>8</sup> See *id.* at 33.

<sup>9</sup> Literally, association without a name, from the French equivalent, *société anonyme*.

ordinance.<sup>10</sup>

The preamble to the UUPT specifically states that one purpose for its enactment is to abolish the distinction between a PT and a *maatschappij op aandelen*.<sup>11</sup> The UUPT's goal is to bring both types of limited liability companies under one common corporate regime.<sup>12</sup>

### 3. THE COMPANY LAW FRAMEWORK — OLD AND NEW

Articles 36 through 56 of the Commercial Code contain the pre-UUPT regulations governing the PT. The UUPT repealed these twenty-one articles<sup>13</sup> when the UUPT came into force on March 7, 1996.<sup>14</sup> This section of this Article compares the pre-UUPT regulations under the Commercial Code with the new regulations under the UUPT.

#### 3.1. Incorporation Process

Under the Commercial Code, the incorporation of a PT required three steps. First, the PT's deed of establishment (*akta pendirian*) was executed before a notary in the form of an authentic deed.<sup>15</sup> Typically, the deed included the articles of

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<sup>10</sup> See Ordonansi Maskapai Andil Indonesia (Ordonantie op de Indonesische Maatschappij op Aandelen), Staatsblad 1939: 569 Juncto 717. The Dutch introduced a legal system that operated along ethnic lines. The three ethnic groups were indigenous Indonesians, foreign Asians (including Chinese), and Europeans. See generally SUDARGO GAUTAMA & ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW: UNITY IN DIVERSITY, (Rev. ed. 1974). The *maskapai andil Indonesia* was intended for use by indigenous Indonesians. See *id.*

<sup>11</sup> See UUPT, *supra* note 1, pmbl. § (c).

<sup>12</sup> See *id.* Upon the UUPT coming into force, existing PTs have a period of two years to conform to its provisions. See *id.* art. 125(3). Companies in the form of a *maskapai andil Indonesia* have a transitional period of three years to file the required documents and obtain the necessary approval to convert into a PT. See *id.* art. 126(1).

<sup>13</sup> See *id.* art. 128(1).

<sup>14</sup> See *id.* art. 129.

<sup>15</sup> See Commercial Code, *supra* note 6, art. 38. An authentic deed (*akta otentik*) or notarized deed is a formal deed prepared by and executed before a notary. A notary (*notaris*) is a legally trained public official appointed by the Department of Justice (*Departemen Kehakiman*) to authenticate deeds. Under Indonesian law, some legal documents must be in the form of authentic deeds. Authentication verifies that the deed is properly executed by the parties and, at law, the deed is conclusive proof on the matters to which it refers. See Civil Code art. 1870. The basic legislation applicable to notaries is the Dutch

association of the PT. Second, after the completion of the deed of establishment, the notary applied for formal approval from the Department of Justice.<sup>16</sup> Third, upon approval, the PT was registered with the State Court<sup>17</sup> that had jurisdiction over the domicile of the PT.<sup>18</sup> The *State Report* (*Berita Negara*) published the details of the PT, including the PT's full articles of association.<sup>19</sup> A separate 1982 law — the Law on Compulsory Enterprise Registration (*Undang-Undang Wajib Daftar Perusahaan*)<sup>20</sup> — imposed the additional requirement of registering the company in a Register of Companies maintained by the Department of Trade (*Departemen Perdagangan*). Prior to the enactment of the UUPT, however, the registration requirement apparently was not strictly enforced.

Under the UUPT setting up a PT also requires executing the deed of establishment (which includes the articles of association, *anggaran dasar*),<sup>21</sup> obtaining Department of Justice approval,<sup>22</sup> and publicizing the deed in the *State Report*.<sup>23</sup> The new incorporation process, however, contains two significant differences. First, upon receipt of the application for incorporation, the Department of Justice must provide a written response within

Reglement op het Notaris-ambt in Indonesie (*Peraturan Jabatan Notaris di Indonesia*, [Regulations on the Office of Notary in Indonesia], Jan. 11, 1860.

<sup>16</sup> See Commercial Code, *supra* note 6, art. 36.

<sup>17</sup> Indonesia has three levels of courts in its general courts system: Supreme Court (*Mahkamah Agung*); High Court (*Pengadilan Tinggi*); State Court (*Pengadilan Negeri*). State Courts are courts of first instance. Under the Commercial Code, they also function as depositories of certain legal documents, including documents relating to companies. See, e.g., Commercial Code, *supra* note 6, arts. 38, 47. The geographical district of each State Court determines its jurisdiction. There are approximately 250 State Courts located throughout Indonesia. Jakarta itself has five State Courts. See generally, C.S.T. KANSIL, PENGANTAR ILMU HUKUM DAN TATA HUKUM INDONESIA [INTRODUCTION TO THE JURISPRUDENCE AND LEGAL SYSTEM OF INDONESIA] (8th ed. 1989) (describing the structure of the Indonesian court system).

<sup>18</sup> See Commercial Code, *supra* note 6, art. 38.

<sup>19</sup> See *id.* The *State Report* (*Berita Negara*), an official government publication, is not to be confused with the *State Gazette* (*Lembaran Negara*), the official journal containing the text of laws.

<sup>20</sup> Law No. 3 of 1982, LEMBARAN NEGARA [STATE GAZETTE] No. 7 of 1982.

<sup>21</sup> See UUPT, *supra* note 1, arts. 7-8.

<sup>22</sup> See *id.* art. 9.

<sup>23</sup> See *id.* art. 22.

sixty days.<sup>24</sup> The time limit is intended to alleviate the current problem of delays in obtaining Department of Justice approval and results from the government's initiatives to streamline the incorporation procedure. Second, the UUPT omits the requirement of registering the approved deed of establishment in the State Court. The only registration requirement is that the company be registered in the Register of Companies (*Daftar Perusahaan*) maintained by the Department of Trade.<sup>25</sup> The UUPT still requires details of the PT to be published in the supplement to the *State Report*.<sup>26</sup>

By substituting the requirement of registration at the State Court with registration in the Register of Companies, the UUPT in effect imposes a new sanction for failing to register in the Register of Companies. Until registered in the Register of Companies and publicized in the *State Report*, a new PT's liability rests with its directors.<sup>27</sup> In other words, under the UUPT personal liability arises if the new company fails to register in the Register of Companies. Consequently, it is reasonable to expect that in the future there will be greater compulsion for directors to comply with this registration requirement. In turn, the Register of Companies maintained by the Department of Trade may well become *the* central registry of companies — a feature that has been missing from the Indonesian company framework until now.

### 3.2. *Minimum Number of Shareholders*

The UUPT requires that a PT must have a minimum of two shareholders at all times.<sup>28</sup> If a PT has only one shareholder and it does not remedy this within six months, this shareholder incurs personal liability for the agreements and losses of the PT.

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<sup>24</sup> See *id.* arts. 9(2)-(3).

<sup>25</sup> See *id.* art. 21. Registration is to be made within 30 days of approval from the Department of Justice. See *id.* art. 21(2).

<sup>26</sup> See *id.* art. 22. The application to publish in the supplement to the *State Report* must be made within 30 days from the PT's date of registration in the Register of Companies. See *id.* art. 22(2).

<sup>27</sup> See *id.* art. 23. With respect to Article 23, the Elucidation states that this sanction is in addition to any other sanctions imposed by the Law on Compulsory Enterprise Registration. See Elucidation of the Law of the Republic of Indonesia No. 1 of 1995 in LAW OF THE REPUBLIC OF INDONESIA NO. 1 - 1995 CONCERNING LIMITED LIABILITY COMPANIES, *supra* note 1, art. 23 [hereinafter Elucidation].

<sup>28</sup> See UUPT, *supra* note 1, art. 7.

Furthermore, the court has the discretion to wind up the PT.<sup>29</sup>

These requirements mark a departure from the Commercial Code system which did not require a PT to have a minimum of two shareholders throughout its existence.<sup>30</sup> The new UUPT requirements raise the question whether a PT can be a wholly-owned subsidiary of another PT. The answer appears to be no. Article 7 clearly states the minimum requirement of two shareholders.<sup>31</sup> The Elucidation of Article 7(1) goes further by affirming that, conceptually, a PT is a creature of contract.<sup>32</sup> The contractual theory of a company is thus the basis for the stipulation that a PT requires two or more shareholders at all times.

Current foreign investment regulations, however, allow a foreign investor to establish a 100% foreign-owned subsidiary.<sup>33</sup> If interpreted to mean that one foreign shareholder owns 100% of the PT, then these foreign investment regulations seem contradictory to the UUPT. The Department of Justice and the Invest-

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<sup>29</sup> See *id.* art. 7(4).

<sup>30</sup> Although the Commercial Code is silent on this point, as a matter of practice a PT was thought to require at least two shareholders for incorporation. See HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 41. Once incorporated, a single shareholder could have wholly owned a PT. See Luc Habets, *Bringing the Company Law into the 20th Century*, ASIA LAW, Jan.-Feb. 1995, at 34.

<sup>31</sup> See UUPT, *supra* note 1, art. 7.

<sup>32</sup> See Elucidation, *supra* note 27, art. 7(1).

<sup>33</sup> See Government Regulation of the Republic of Indonesia: No. 20 of 1994, Re Shares Ownership in Companies Established in the Framework of Foreign Capital Investment, art. 2(1) (May 19, 1994); see also Anthony Klok & Tony Hudson, *Investing and Doing Business in Indonesia*, 67 L. INST. J. 685, 686 (1993). A Government Regulation is one of several forms of legislative instruments used in Indonesia. The commonly cited hierarchy for such instruments is as follows: (1) Constitution (*Undang-Undang Dasar 1945*, UUD 1945); (2) People's Consultative Assembly (MPR) Resolutions (*Ketetapan MPR*, Tap MPR); (3) Laws (*Undang-Undang*, UU); (4) Government Regulations (*Peraturan Pemerintah*, PP); (5) Presidential Decree (*Keputusan Presiden*, Keppres); and (6) Other regulations such as Ministerial Regulations (*Peraturan Menteri*) and Ministerial Instructions (*Instruksi Menteri*). See DPR-GR Memorandum Concerning Sources and Hierarchy of Laws of the Republic of Indonesia (*Memorandum DPR-GR Mengenai Sumber Tertib Hukum Republik Indonesia Dan Tata Urutan Peraturan Perundangan Republik Indonesia*), MPRS Resolution No. 20 of 1966. The proliferation of regulations at various levels which are sometimes not entirely consistent with each other contribute to the difficulty involved in understanding Indonesian law. For a brief discussion of this problem see, Arief T. Surowidjojo & Ahmad Fikri Assegaf, *Doing Business in Indonesia*, ASIA BUS. L. REV., Jan. 1995, at 11.

ment Coordinating Board (*Badan Koordinasi Penanaman Modal* or "BKPM") — the body that generally oversees foreign investment into Indonesia — have discussed this issue with a view to resolving any possible inconsistency in the future.

### 3.3. *Separate Legal Entity*

The Commercial Code did not explicitly give a PT legal status separate from its shareholders and officers. In practice, however, a PT was accepted as a separate legal entity.<sup>34</sup>

Nevertheless, the Commercial Code's silence on this point created some uncertainty as to the precise legal status of the PT in at least two situations: during the period between the execution of the deed of establishment and publication of the notice in the *State Report*, and when the promoters failed to register the PT in the State Court and publish the required notice in the *State Report*.<sup>35</sup>

The UUPT addresses this problem and limits the scope of the "liability gap" associated with this uncertainty. It expressly provides that a PT obtains the status of a separate legal entity (*status badan hukum*) when approved (*disahkan*) by the Minister of Justice.<sup>36</sup> It follows that upon approval, the shareholders and officers of the PT are no longer personally liable for the obligations of the PT, subject only to specific contrary provisions in the UUPT. Section 3.4. of this paper discusses the provisions that impose personal liability upon the officers of the PT. Meanwhile, shareholders can still be held personally liable if, for example, they manipulate the PT with malicious intent for their own interests or participate in an unlawful act committed by the PT.<sup>37</sup>

### 3.4. *Directors and Commissioners*

Indonesian company law, following the Dutch civil law tradition, adopts a two-tier management structure comprised of a board of directors (*direksi*) and a board of commissioners (*dewan komisaris*).<sup>38</sup> The Commercial Code required every company to

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<sup>34</sup> See HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 44.

<sup>35</sup> See *id.* at 42.

<sup>36</sup> See UUPT, *supra* note 1, art. 7(6).

<sup>37</sup> See *id.* art. 3(2).

<sup>38</sup> For a useful description contrasting the Anglo-American one-tier with the European two-tier structure, see Bernhard Grossfeld, *Management and*



have a board of directors, but did not mandate the appointment of a board of commissioners.<sup>39</sup> The provisions of the Commercial Code did not state a mandatory number of directors or commissioners, although a company's articles of association commonly required a minimum number.

Under the Commercial Code system, the directors managed the company. A general meeting of shareholders (*rapat umum pemegang saham* or "RUPS") had the power to appoint and remove the director or board of directors.<sup>40</sup> Commissioners, usually appointed by the founders or subsequently appointed by the shareholders, supervised and advised the directors.<sup>41</sup> All state-owned limited liability companies and all listed public companies were required to appoint a board of commissioners. In practice, most private companies also had a board of commissioners.

A company's articles of association could grant the board of commissioners the responsibility of protecting shareholders' interests when the directors' and shareholders' interests conflicted. In many companies, the directors needed to obtain the prior approval of the board of commissioners before obtaining loans, providing guarantees, or encumbering company property.<sup>42</sup>

In some respects, the UUPT simply codifies matters that a company's articles of association or the Department of Justice's policies previously addressed. For example, the UUPT retains the two-tier management structure, with the basic functions of directors to manage (*mengurus*) and represent (*mewakili*) the company now clearly stipulated.<sup>43</sup> The UUPT also retains the commissioners' role of supervising (*mengawasi*) and advising

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*Control of Marketable Share Companies*, in 13 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 4, 6-10 (Alfred Conrad ed., 1973).

<sup>39</sup> See Commercial Code, *supra* note 6, art. 44.

<sup>40</sup> See HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 48-50.

<sup>41</sup> See *id.* at 50-51.

<sup>42</sup> See Frederick B.G. Tumbuan, *Indonesian Corporation Law in Relation to Investment and Securities* 1 INDONESIA-SINGAPORE L. SEMINAR 123, 130 (1993) [hereinafter Tumbuan, *Indonesian Corporation Law*].

<sup>43</sup> See UUPT, *supra* note 1, arts. 1(4) & 82; Fred B.G. Tumbuan, 'Fiduciary Duties' Direksi Perseroan Terbatas Menurut Undang-Undang No. 1 Tahun 1995 [Fiduciary Duties of Directors Pursuant to the UUPT] (June 12, 1995) [hereinafter Tumbuan, *Fiduciary Duties*] (on file with author).

(*memberikan nasihat*) the directors.<sup>44</sup> The UUPT adopts the familiar practice of the RUPS, appointing both directors<sup>45</sup> and commissioners.<sup>46</sup> The power of a RUPS or a board of commissioners to suspend a director, which is usually enshrined in the articles of association, is now expressly provided for in Article 92.<sup>47</sup>

In addition, the UUPT introduces some significant changes. For instance, all PTs must now have a board of commissioners, formerly an optional feature.<sup>48</sup> Furthermore, all public companies,<sup>49</sup> companies in the business of mobilizing funds from the public, or companies that issue debt instruments must now have at least two commissioners<sup>50</sup> and two directors.<sup>51</sup> The UUPT specifically enumerates the qualifications of directors and commissioners. A director or commissioner must be an individual who: (a) has legal capacity; (b) has never been a bankrupt; (c) was never a director or commissioner responsible for a company becoming bankrupt; and (d) has not committed a criminal offense causing financial loss to the state within the five years prior to being named a director or commissioner.<sup>52</sup>

The UUPT also distinguishes between the collegial nature of the board of directors and the non-collegial nature of the board of commissioners.<sup>53</sup> Where a PT has more than one commissioner, the board of commissioners constitutes a council (*majelis*).<sup>54</sup> According to the Elucidation, where there is more than one commissioner, no individual commissioner can represent the

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<sup>44</sup> See UUPT, *supra* note 1, arts. 1(5), 97.

<sup>45</sup> See *id.* art. 80(1).

<sup>46</sup> See *id.* art. 95(1).

<sup>47</sup> For a sample articles of association provision to this effect, which the Department of Justice accepted, see Kartini Muljadi, *Company Law in Indonesia, in COMPANY LAW AND PARTNERSHIP LAW IN SELECTED ASIAN COUNTRIES* 67, 94-95 (Christian Salbaing ed., 1986). The sample provision is remarkably similar in substance to Article 92 of the UUPT.

<sup>48</sup> See UUPT, *supra* note 1, art. 94(1).

<sup>49</sup> For an overview of the differences between public and private companies, see discussion *infra* section 3.6.

<sup>50</sup> See UUPT, *supra* note 1, art. 94(2).

<sup>51</sup> See *id.* art. 79(2).

<sup>52</sup> See *id.* arts. 79(3), 96.

<sup>53</sup> See Tumbuan, *Fiduciary Duties*, *supra* note 43.

<sup>54</sup> See UUPT, *supra* note 1, art. 94(3).

PT.<sup>55</sup> In contrast, when a PT has more than one director, each director has the individual authority to represent the PT, unless the articles of association provide otherwise.<sup>56</sup>

Although the primary responsibility for managing the company falls upon the directors, commissioners may, in some situations, enjoy certain management powers. For example, the articles of association or the RUPS may authorize a commissioner to manage the company for a specified period.<sup>57</sup> In this situation, he is given the rights (*hak*), authority (*wewenang*), and responsibilities (*keajiban*) of a director.<sup>58</sup>

The UUPT introduces what appears to be a greater scope of potential liability faced by directors and commissioners. For example, if the company's annual accounts are incorrect or misleading, the directors and commissioners are personally liable to all parties who suffer losses, unless the directors and commissioners can establish that they are not at fault.<sup>59</sup> Interestingly, the UUPT does not define the "parties," leading to the possibility that, *prima facie*, the duty extends to prospective investors and creditors.

Furthermore, each director and commissioner faces personal liability for any error or negligent act committed in the discharge of his responsibilities.<sup>60</sup> The UUPT does not define "error" or "negligence," making it possible that reliance will be placed on Anglo-American concepts of fiduciary duties. In the case of a breach of any of these provisions, a shareholder controlling at least ten percent of the issued shares with valid voting rights may, in the name of the company, sue the hapless director or commissioner for the loss suffered by the company.<sup>61</sup> Since the shareholder initiates the legal action in the name of the company, it can be considered a derivative action.

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<sup>55</sup> See Elucidation, *supra* note 27, art. 94(3).

<sup>56</sup> See UUPT, *supra* note 1, art. 83(1).

<sup>57</sup> See *id.* art. 100(2). The Elucidation explains that a commissioner may be authorized to manage the company only when there are no directors. See Elucidation, *supra* note 27, art. 100(2).

<sup>58</sup> See UUPT, *supra* note 1, art. 100(3).

<sup>59</sup> See *id.* arts. 60(3)-(4).

<sup>60</sup> See *id.* arts. 85, 98.

<sup>61</sup> See *id.*

### 3.5. *Share Capital and Voting Rights*

The Commercial Code allowed PTs to issue registered shares as well as bearer shares.<sup>62</sup> Bearer shares had to be fully paid upon issuance.<sup>63</sup> The transferral of bearer shares occurred upon mere delivery, whereas the transferral of registered shares required a deed of transfer.<sup>64</sup> In practice, most company shares were registered shares. This was compulsory for banks, finance companies, and PTs created through joint ventures with foreign parties under the foreign investment regulations.<sup>65</sup>

Although not specifically stated in the Commercial Code,<sup>66</sup> it was widely accepted in practice that a company must have at least one general meeting of shareholders annually. Typically, a company's articles of association contained provisions on how the shareholders' meeting should be convened and conducted. The business of the meeting included the acceptance of annual accounts,<sup>67</sup> issuance of new shares, declaration of dividends, and appointment of directors and commissioners.

Each share would carry one vote at shareholders' meetings.<sup>68</sup> The Commercial Code system did not recognize non-voting shares.<sup>69</sup> If permitted by the articles of association, voting could be undertaken by proxy. Directors and commissioners, however, could not act as proxies for shareholders.<sup>70</sup> This rule was

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<sup>62</sup> See Commercial Code, *supra* note 6, art. 40.

<sup>63</sup> See *id.* art. 41.

<sup>64</sup> See *id.* art. 42; see also HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 45 (noting that the company's articles of incorporation usually specified the means of transferring registered shares).

<sup>65</sup> See HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 45.

<sup>66</sup> See *id.* at 48.

<sup>67</sup> See Commercial Code, *supra* note 6, art. 55(1).

<sup>68</sup> Article 54 of the Commercial Code actually provides for a complicated system of proportional voting intended to protect minority shareholders. It stated that, where a PT issues more than 100 shares, each shareholder having 100 or more shares can exercise only six votes. See *id.* art. 54(4). This provision was commonly side-stepped in practice through an ingenious "block-voting" system. See HIMAWAN & KUSUMAATMADJA, *supra* note 5, at 47. Eventually, the authorities enacted Law No. 4 of 1971 which allows shareholders to use either the system described in Article 54(4) or a one-share-one-vote system. See *id.* The latter was the one in popular use.

<sup>69</sup> See Commercial Code, *supra* note 6, art. 54(1).

<sup>70</sup> See *id.* art. 54(5).

intended to ensure that the directors and commissioners maintained their independence from the shareholders.

The UUPT introduces several new rules regarding share capital and voting rights. The UUPT requires a minimum authorized capital of twenty million Rupiah for all PTs.<sup>71</sup> At incorporation, at least twenty-five percent of the capital must be subscribed, of which fifty percent must be paid.<sup>72</sup> The remaining fifty percent must be paid upon the PT receiving approval from the Department of Justice.<sup>73</sup> Future subscriptions must be paid in full,<sup>74</sup> thus effectively prohibiting partially-paid shares.

Like the Commercial Code, the UUPT allows a PT to issue registered and bearer shares.<sup>75</sup> Unlike the Commercial Code, however, the UUPT also allows a PT to issue non-voting shares.<sup>76</sup> In addition, under the UUPT, a PT can issue redeemable and convertible shares, cumulative and non-cumulative shares, and preference shares.<sup>77</sup> A PT must have at least one class of ordinary shares (*saham biasa*), however, which must carry voting rights.<sup>78</sup>

Payment for shares can be made in cash or in other forms ("in kind"). Payment in kind — such as a sale of real property in consideration for the issue of shares — requires an expert valuation.<sup>79</sup> Personal claims against the company cannot be used as consideration for issuing shares.<sup>80</sup> Moreover, public companies can only issue shares for cash.<sup>81</sup>

A company cannot issue shares to itself or to its subsidiary

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<sup>71</sup> See UUPT, *supra* note 1, art. 25(1). Higher minimum levels may be required for public companies and companies in particular sectors, e.g., banks and financial institutions. See *id.* art. 25(2).

<sup>72</sup> See *id.* arts. 26(1)-(2).

<sup>73</sup> See *id.* arts. 26(1)-(3).

<sup>74</sup> See *id.* art. 26(4).

<sup>75</sup> See *id.* art. 24(2).

<sup>76</sup> See *id.* art. 46(4)(a).

<sup>77</sup> See *id.* art. 46(4).

<sup>78</sup> See *id.* art. 46(3).

<sup>79</sup> See *id.* art. 27(2).

<sup>80</sup> See *id.* art. 28(1). The Elucidation for Article 28(2) points out that convertible bonds are an exception and will be regulated separately. See Elucidation, *supra* note 27, art. 28(2).

<sup>81</sup> See UUPT, *supra* note 1, art. 27(4).

(*anak perusahaan*).<sup>82</sup> The Elucidation defines a subsidiary as a company in which: (a) the parent company (*induk perusahaan*) owns more than fifty percent of its shares; (b) the parent company controls more than fifty percent of the voting rights in a general meeting of shareholders; and/or (c) the parent company influences management control, the appointment, and the dismissal of directors and commissioners.<sup>83</sup>

Although a PT cannot issue shares to itself and to its subsidiaries, it may, under certain conditions, buy back issued shares from its shareholders.<sup>84</sup> These shares are not cancelled (unless the buy-back is part of a capital reduction exercise which Articles 37-41 govern),<sup>85</sup> but are held as "treasury shares" which the PT may sell at a later date.<sup>86</sup> While the PT or its subsidiaries hold the shares, the shares cannot be counted to form a quorum, nor can the voting rights attached to the shares be exercised.<sup>87</sup>

Shareholders exercise voting power at general meetings. An annual general meeting of shareholders must be held within six months from the end of the company's financial year.<sup>88</sup> Among other matters, this meeting is to approve the annual report,<sup>89</sup> which includes the annual accounts.<sup>90</sup> All of the directors and commissioners must sign the annual report.<sup>91</sup> The accounts must comply with the Financial Accounting Standards (*Standar Akuntansi Keuangan*) used in Indonesia.<sup>92</sup> If the company is

<sup>82</sup> See *id.* arts. 29(1)-(2). The rationale given in the Elucidation is that the principle underlying the issuing of shares is capital accumulation. Some argue that this principle is inconsistent with a company issuing shares to itself or its subsidiary. See Elucidation, *supra* note 27, art. 29.

<sup>83</sup> See Elucidation, *supra* note 27, art. 29.

<sup>84</sup> See UUPT, *supra* note 1, art. 30. Essentially, the two conditions are that the buy-back must be financed from net profits and the nominal value of shares held by the PT, and its subsidiaries must not exceed 10% of the PT's issued capital at any time. See *id.*

<sup>85</sup> See Elucidation, *supra* note 27, art. 30.

<sup>86</sup> See G.W. Christian, Liabilities of Directors and Commissioners Under the New Indonesian Company Law 9 (Mar. 22, 1995) (on file with author).

<sup>87</sup> See UUPT, *supra* note 1, art. 33.

<sup>88</sup> See *id.* art. 65(2). In addition to the annual general meeting, provisions are also made for other — extraordinary — general meetings.

<sup>89</sup> See *id.* art. 60(1).

<sup>90</sup> See *id.* art. 56.

<sup>91</sup> See *id.* art. 57(1).

<sup>92</sup> See *id.* art. 58.

engaged in a public offer for funds, issues debt instruments, or is a public company, a report of the accounts, audited by a public accountant, must also be presented at the general meeting of shareholders.<sup>93</sup>

One important area of change is the increased protection granted to minority shareholders under the UUPT. For example, all shareholders have pre-emptive rights which allow them to maintain or increase their proportionate share in the company before the company offers the shares to other parties.<sup>94</sup> A more potent right derives from the provision which entitles a shareholder controlling not less than ten percent of the issued shares with valid voting rights to request that the State Court appoint an investigating panel with respect to the company.<sup>95</sup> This right is expected to be used where the company, directors, or commissioners are suspected of having committed an illegal act that causes loss to the shareholders, third parties, or the company itself.

### 3.6. *Public Companies*

Indonesian public companies are also organized in the form of a PT. Under the Commercial Code, it was not possible to determine whether a PT was a private or public company on the basis of its name. The deed of establishment and articles of association commonly contained provisions which distinguished a private PT from a public PT. The key differences were in the type of capital structure, the transfer of shares, and the rights of shareholders.

The UUPT defines a public company (*perusahaan terbuka*) as a company whose capital and number of shareholders meet "certain criteria," or a company that makes an offer to the public.<sup>96</sup> The law gives no details explaining what is meant by "certain criteria." Indeed, as a whole, the UUPT does not contain many provisions specifically addressed to public companies.

However, a number of provisions scattered throughout the UUPT affect public companies. Among them are those that require a public company to: (a) include the abbreviation "*Tbk*"

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<sup>93</sup> See *id.* art. 59.

<sup>94</sup> See *id.* art. 36(1) for new shares; see also *id.* art. 51(1) for issued shares.

<sup>95</sup> See *id.* art. 110. This right of investigation is based on the Dutch concept called the *enquête*. See SINKE, *supra* note 7, at 40.

<sup>96</sup> See UUPT, *supra* note 1, art. 1(6).

at the end of its name;<sup>97</sup> (b) comply with government regulations — to be issued separately — regarding its capital structure;<sup>98</sup> (c) issue shares only against full cash payment by the shareholder;<sup>99</sup> (d) submit its annual accounts to a public accountant to be audited;<sup>100</sup> (e) advertise its general meeting of shareholders in two daily newspapers;<sup>101</sup> and (f) have a minimum of two directors<sup>102</sup> and two commissioners.<sup>103</sup>

A catch-all provision in the UUP T provides that the UUP T applies to all companies engaged in the capital market (which would include listed public companies) unless otherwise regulated by specific laws and regulations applicable to the capital market.<sup>104</sup>

Apparently, no official records exist that contain the number of public companies in Indonesia. Companies listed on the two stock exchanges — the Jakarta Stock Exchange (*Bursa Efek Jakarta*) and the Surabaya Stock Exchange (*Bursa Efek Surabaya*)<sup>105</sup> — must be public companies. Theoretically, however, not all public companies have to be listed.<sup>106</sup>

Once listed, public companies must comply with the rules of the stock exchange as well as the rules promulgated by the

<sup>97</sup> See *id.* art. 13(3). "*Tbk*" is an abbreviation of *terbuka*, which means "open" or "public."

<sup>98</sup> See *id.* art. 25(3).

<sup>99</sup> See *id.* art. 27(4).

<sup>100</sup> See *id.* art. 59(1)(c).

<sup>101</sup> See *id.* arts. 69(3), 70.

<sup>102</sup> See *id.* art. 79(2).

<sup>103</sup> See *id.* art. 94(2).

<sup>104</sup> See *id.* art. 127.

<sup>105</sup> For an introduction to the Indonesian stock market, see generally ROBERT CHIA ET AL., *GLOBALIZATION OF THE JAKARTA STOCK EXCHANGE* (1992) and SUMANTORO, *PENGANTAR TENTANG PASAR MODAL DI INDONESIA* [INTRODUCTION TO THE INDONESIAN CAPITAL MARKET] (1990).

<sup>106</sup> This may be inferred from the wording of Article 1(6) of the UUP T. See UUP T, *supra* note 1, art. 1(6). Moreover, Indonesian company law under the Commercial Code and the UUP T does not stipulate a maximum number of shareholders for private companies. Such stipulation may, of course, be inserted by the promoters and shareholders in the articles of association of particular companies — perhaps this is what is envisaged by the "certain criteria" of Article 1(6). There is thus no reason to adopt a public company status simply to accommodate a large number of shareholders. Therefore, although there is no legal obligation to list a public company, it is difficult to envisage why a company would be structured as a public company unless it is for the purpose of listing.



government securities watchdog, the Capital Market Supervisory Board (*Badan Pengawas Pasar Modal* or *Bapepam*), and the new Law Concerning the Capital Market.<sup>107</sup>

### 3.7. *Dissolution*

Under the Commercial Code, a PT may be dissolved in a number of circumstances, including by a decision of the shareholders at a general meeting or by judicial order.<sup>108</sup> Unlike companies in common law countries that have perpetual succession, PTs were established under the Commercial Code for a limited period (usually seventy-five years) with the possibility of seeking an extension.<sup>109</sup> If established for a fixed period<sup>110</sup> or specific object, the PT could be dissolved when the period expired or the object was achieved.<sup>111</sup>

At first glance, it appears that the UUPT retains the concept of a fixed time limit for a company.<sup>112</sup> The wording of Articles 6 and 12(c) suggests that a PT is expected to have a fixed lifetime.<sup>113</sup> However, the Elucidation to Article 6 makes it clear that fundamentally, a PT does not have a finite lifetime; where a fixed period is desired, it must be specified in the articles of association. Where the articles of association specify a fixed period, it may be amended.<sup>114</sup> Either way, companies under the

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<sup>107</sup> Undang-Undang Republik Indonesia Nomor 8 Tahun 1995 Tentang Pasar Modal [Law Concerning the Capital Market, Law No. 8 of 1995] [hereinafter UUPM]. The UUPM was enacted in November 1995 and came into operation on January 1, 1996. See *id.* art. 116. The official text of the UUPM is published in the LEMBARAN NEGARA [STATE GAZETTE] No. 64 of 1995 and its Elucidation is published in the TAMBAHAN LEMBARAN NEGARA [SUPPLEMENT TO THE STATE GAZETTE] No. 3608. For an English translation of the law and its Elucidation, see A LAW OF THE REPUBLIC OF INDONESIA CONCERNING THE CAPITAL MARKET — UNOFFICIAL ENGLISH TRANSLATION (1996).

<sup>108</sup> See Commercial Code, *supra* note 6, art. 37; see generally HIMAWAN & KUSUMATMADJA, *supra* note 5, at 51-52 (describing the causes for which a PT may be dissolved and the methods of dissolution).

<sup>109</sup> See generally Tumbuan, *Indonesian Corporation Law*, *supra* note 42, at 131-32 (establishing the basis for this 75 year period).

<sup>110</sup> See Commercial Code, *supra* note 6, art. 46.

<sup>111</sup> See *id.*

<sup>112</sup> See UUPT, *supra* note 1, art. 6.

<sup>113</sup> Compare *id.* arts. 6, 12(c), with *id.* art. 15(2)(d) which seems more equivocal on this point.

<sup>114</sup> See UUPT, *supra* note 1, art. 15(2)(d).

UUPT enjoy the potential for perpetual succession.

On the issue of corporate dissolution, one particularly vexing problem under the Commercial Code was Article 47, which stipulated that when a company suffers losses amounting to seventy-five percent or more of its issued capital, it was deemed to be dissolved at law.<sup>115</sup> In such a situation, the directors would be personally liable for transactions entered into after reaching the seventy-five percent limit.<sup>116</sup> Given the fact that many Indonesian companies were (and still are) highly leveraged, Article 47 was always of concern — if not on a practical level, at least on a theoretical level — to lawyers and their corporate clients.<sup>117</sup> Upon dissolution, the directors usually liquidated the assets of the company and paid all debts.<sup>118</sup>

To the relief of lawyers and businessmen alike, there is no provision in the UUPT equivalent to Article 47 of the Commercial Code.<sup>119</sup> The UUPT states that a company may be dissolved in three ways: (a) by a decision made during a general meeting of shareholders; (b) upon the expiration of the period of existence specified in its articles of association; or (c) by an order of the court.<sup>120</sup> Shareholders received any surplus. The UUPT increases the number of situations in which the court may order a company to wind-up. These situations include where the public prosecutor requests such winding-up in the public interest or where a single shareholder who holds not less than ten percent of the voting shares requests the court to wind up the company.<sup>121</sup>

When a company is wound-up, a liquidator must be appointed to liquidate the company.<sup>122</sup> If no liquidator is appointed, the directors will act as the liquidator.<sup>123</sup> Unlike the Commercial Code, the UUPT provides detailed rules on the powers of, and the procedures to be followed by, a liquidator.<sup>124</sup>

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<sup>115</sup> See Commercial Code, *supra* note 6, art. 47.

<sup>116</sup> See *id.*

<sup>117</sup> See the discussion on Article 47 in Muljadi, *supra* note 47, at 84-85.

<sup>118</sup> See Commercial Code, *supra* note 6, art. 56.

<sup>119</sup> The relief of one Jakarta lawyer is obvious in Arief T. Surowidjojo, *Indonesia's New Company Law*, 11 ASIA BUS. L. REV., Jan. 1996, at 13, 16.

<sup>120</sup> See UUPT, *supra* note 1, art. 114.

<sup>121</sup> See *id.* arts. 117(a)-(b).

<sup>122</sup> See *id.* art. 115(4).

<sup>123</sup> See *id.* art. 122(1).

<sup>124</sup> See *id.* arts. 118-24.

### 3.8. Mergers & Acquisitions

The Commercial Code does not specifically regulate company mergers and acquisitions. There has been no specific enactment on such activities since Indonesian independence in 1945. Instead, the spate of mergers and acquisitions in the last decade has been loosely governed by a complex set of rules comprising various industry-specific regulations, regulations issued in respect to listed public companies, and general contract law.<sup>125</sup>

With Part VII (Articles 102-09) of the UUPt, Indonesia ushers in its first set of laws specifically designed to govern mergers and acquisitions. Part VII provides the general principles applicable to this area of law. It is expected that more detailed regulations will be issued subsequently.<sup>126</sup>

It is important that the Indonesian terms used in Part VII — *penggabungan*, *peleburan*, and *pengambilalihan* — are understood correctly.<sup>127</sup> *Penggabungan* (merger) refers to a company becoming part of another existing company.<sup>128</sup> *Peleburan* (amalgamation) refers to a transaction in which two companies dissolve themselves to form a new company.<sup>129</sup> In a merger, one company dissolves.<sup>130</sup> In an amalgamation, both of the companies

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<sup>125</sup> For a summary of the pre-UUPt legal framework for mergers and acquisitions, see Melli Darsa, *Indonesia — Building a Legal Framework for M&A*, ASIAN CORP. L., Mar. 1993, at 33.

<sup>126</sup> See UUPt, *supra* note 1, art. 109.

<sup>127</sup> There is some lack of uniformity in the English terms used for these three words, particularly in respect of the first two. For each I have tried to adopt English equivalents which best reflect the underlying transaction described in the UUPt.

<sup>128</sup> See UUPt, *supra* note 1, art. 102(1).

<sup>129</sup> See *id.*

<sup>130</sup> One commentator has interpreted the merger provision of Article 102 of the UUPt as implying that in a merger both companies remain as separate entities, but are under one management. See ANISITUS AMANAT, PEMBAHASAN UNDANG-UNDANG PERSEROAN TERBATAS 1995 DAN PENERAPANNYA DALAM AKTA NOTARIS [A STUDY ON THE LAW CONCERNING THE LIMITED LIABILITY COMPANY AND ITS APPLICATION TO A NOTARIAL DEED] 146-47 (1996). Although, conceivably, the wording of Article 102 of the UUPt may be interpreted this way, it is submitted that this interpretation is not correct. The better view is that a merger involves one company being dissolved while the other remains. See Hardijan Rusli, *supra* note 4, at 130-31, (citing a decree of the Minister of Finance, No. 637/KMK 04/1994, dated 29 December 1994). This is also the position taken by Arief T. Surowidjojo, *supra* note 119, at 20. According to this view, where there are more than two companies merging,

involved in the amalgamation dissolve.<sup>131</sup> *Pengambilalihan* (acquisition) refers to a company or individual taking over a company through a purchase of the latter's issued shares.<sup>132</sup> In an acquisition, no company dissolves.

The new rules essentially require companies involved in a merger, amalgamation, or acquisition to take two steps. First, the directors must prepare a proposal that the respective companies, through a general meeting of the shareholders, must approve.<sup>133</sup> Shareholders representing no less than seventy-five percent of the issued shares with voting rights must attend the meeting. A majority of those shareholders attending, at least seventy-five percent of such shares represented at the meeting, must give their approval.<sup>134</sup> Second, the proposal approved by the shareholders in a general meeting, together with any articles of association that require amendment, must be forwarded to the Minister of Justice for reporting purposes or, if necessary, for his approval.<sup>135</sup>

The UUPT also requires mergers, amalgamations, and acquisitions to "take into account" (*memperhatikan*) the interests of minority shareholders and employees of the companies as well as the interests of the public and of competition generally.<sup>136</sup> The law does not identify the persons upon whom this responsibility falls. Presumably, it includes the management and perhaps the shareholders of the respective companies.

Significantly, this provision, along with Article 102 of the UUPT, does not prohibit outright mergers, amalgamations, and acquisitions which have anti-competitive effects. The Elucidation to Article 104(1) states that in considering a merger, amalgamation, or acquisition it is important to prevent the rise of a monopoly or monopsony, both of which are against the public interest.<sup>137</sup> This seems to grant wide discretion to the authorities to reject a proposed merger, amalgamation, or acquisition on

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then all the companies will be dissolved except for the one which is to remain after the merger.

<sup>131</sup> See UUPT, *supra* note 1, art. 107(1).

<sup>132</sup> See *id.* art. 103(2).

<sup>133</sup> See *id.* art. 102(3) (listing rules for mergers & amalgamations); *id.* arts. 103(3)(b), (4)(b), (5)(b) (listing rules for acquisitions).

<sup>134</sup> See *id.* art. 76.

<sup>135</sup> See *id.* art. 106.

<sup>136</sup> See *id.* art. 104.

<sup>137</sup> See Elucidation, *supra* note 27, art. 104(1).

the basis that the proposal would unfairly affect the interests of the persons specified. How such discretion will be exercised in the future is an interesting question given the current debate in Indonesia regarding the activities of conglomerates.<sup>138</sup>

#### 4. IMPLEMENTATION ISSUES

At the time of writing, the UUPt has only been in operation for approximately six months. It is thus too early to evaluate fully the implementation issues surrounding the UUPt. It is possible, however, to make some tentative comments concerning the operation of the UUPt in the past few months.

##### 4.1. *Implementing Regulations*

Given that the UUPt, like most Indonesian laws, is general in nature, its operation requires the use of implementing regulations (*petunjuk pelaksanaan*, or *juklak*). These implementing regulations may be in the form of government regulations (*peraturan pemerintah*), decrees (*keputusan*), other lower-level legislation, or guidelines. Thus, numerous provisions in the UUPt specifically provide that additional rules will also be made in the form of government regulations.<sup>139</sup>

As of April 1996, there have been three decrees (*keputusan*) and one circular letter (*surat edaran*) issued by the Department of Justice<sup>140</sup> concerning the implementation of the UUPt: (a) Decree of Minister of Justice M.01-PR.08.01 of 1996 dated March 11, 1996, concerning the procedure for the application and ratification of a company's deed of establishment; (b) Decree of Minister of Justice M.02-PR.08.01 of 1996 dated March 11, 1996, concerning the procedure for the application and grant of approval for a deed amending a company's articles of association; (c) Decree of Minister of Justice M.03-PR.08.01 of 1996 dated

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<sup>138</sup> Interestingly, the preamble in the Elucidation states that the UUPt includes provisions and procedures concerning mergers, amalgamations, and acquisitions in order to avoid unhealthy competition arising from the concentration of economic power in a minority and to prevent the formation of monopolies and monopsonies that would deprive the society. See *id.* pmbi.

<sup>139</sup> See, e.g., UUPt, *supra* note 1, arts. 28, 36, 51, 109.

<sup>140</sup> The text of the decrees and their appendices together with the text of the circular letter can be found in PETUNJUK PELAKSANAAN UNDANG-UNDANG PERSEROAN TERBATAS [IMPLEMENTING REGULATIONS OF THE LAW ON THE LIMITED LIABILITY COMPANY] (1996).

March 11, 1996, concerning the procedure for submitting a report on a deed amending a company's articles of association; and (d) Circular letter of the Department of Justice C-UM.01.10-2 dated April 12, 1996, issued by the Directorate-General of Law & Legislation in relation to amendments to a company's articles of association.

The first decree annexed three standard models of the deed of establishment — each of which includes a set of articles of association — to be used in the establishment of new PTs. The three standard models appear identical except for one provision, Article 9 in each model, which deals with transfers of shares. Standard Model I applies where the company has no restrictions concerning the right of shareholders to transfer shares. Standard Model II includes, as part of Article 9, certain pre-emption rights. Standard Model III includes a variation of the Article 9 used in Standard Model II.

At one stage, it was hoped that the authorities would issue a comprehensive set of implementing regulations for the UUPT. However, events have shown that this will not take place. Instead, the implementing regulations will be issued gradually over time. Hence, the implementing regulations issued to date deal with the establishment of new PTs and amendments to the articles of associations of existing PTs. No doubt additional implementing regulations will be issued in the future concerning other aspects of the UUPT. Meanwhile, the fact that implementing regulations are issued on a gradual basis means that specific issues that the UUPT only broadly addresses and specific questions the UUPT does not deal with at all must temporarily remain unanswered.

#### 4.2. *Ratification by Minister*

One of the issues that concerned commentators was whether there are any sanctions if the Minister of Justice does not ratify a company's deed of establishment within the sixty-day period stated in Article 9(2) of the UUPT. The UUPT itself does not deal with this eventuality. Indeed, some had expressed the hope that if the Minister of Justice does not grant approval within sixty days, then the deed should automatically be deemed approved.<sup>141</sup>

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<sup>141</sup> See Surowidjojo, *supra* note 119, at 15.

However, it appears that one of the recent implementing regulations may now shed some light on this point. Article 3 of the Minister of Justice Decree No. M.01-Pr.08.01 of 1996 expressly states that within sixty days from the date of receipt of the application for ratification of the deed of establishment, the Minister is to approve or reject the application for ratification. Hence, it seems that it is incumbent upon the Minister to issue either a letter of approval or a letter of rejection within the sixty-day period.<sup>142</sup> It is now clear that the idea of a deemed approval in the absence of a formal approval cannot be maintained. It remains unclear, however, whether there is any appeal from the Minister's decision to reject an application for ratification.

#### 4.3. *Paid-up Capital*

Another implementation issue which has arisen deals with the paid-up capital required at the incorporation of a new company. The UUPT stipulates that the minimum authorized capital of a new company is twenty million Rupiah (approximately \$12,000 U.S. dollars).<sup>143</sup> The UUPT further requires twenty-five percent of the authorized capital to be issued at incorporation and, upon issuing shares, each share must be paid-up to at least fifty percent.<sup>144</sup> Moreover, upon ratification by the Minister of Justice all issued shares must be fully paid up.<sup>145</sup> The end result is that upon ratification, a company must have at least twenty-five percent of its authorized capital issued and fully paid-up.

To date, the Department of Justice has strictly enforced the paid-up capital requirement.<sup>146</sup> This has created significant problems for BKPM-approved foreign joint venture ("PMA") companies. The practice of the BKPM is to allow the shareholders of a PMA company to pay up their capital in stages, as the company undergoes its start-up phases.<sup>147</sup> A PMA company may delay fully paying-up its authorized capital until it commences

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<sup>142</sup> See *id.*

<sup>143</sup> See UUPT, *supra* note 1, art. 25(1).

<sup>144</sup> See *id.* art. 26.

<sup>145</sup> See *id.* art. 26(3).

<sup>146</sup> See Sri Indrastuti Hadiputranto & Wimbanu Widyatmoko, *Unresolved Issues in the Company Law*, ASIA LAW, July-Aug. 1996, at 27.

<sup>147</sup> See *id.*

es commercial production.<sup>148</sup> This could be up to three years from the incorporation date of the PMA company.<sup>149</sup>

Under the UOPT provisions, however, even a PMA company must have paid up at least twenty-five percent of its authorized capital at incorporation.<sup>150</sup> For a joint venture that involves hundreds of millions of dollars, this means the shareholders must make a significant cash outlay from the very beginning of the venture. Hence, new foreign investment applications to the BKPM should take into account the stricter capitalization requirements under the UOPT.<sup>151</sup>

#### 4.4. *The Single Shareholder Company and the Transitional Period*

Another practical issue which has arisen affects companies with only one shareholder — typically a wholly-owned subsidiary of another company. Article 7 of the UOPT requires that a company at all times must have a minimum of two shareholders. If a company has only one shareholder for a period of more than six months, then that shareholder becomes personally liable for any acts or losses of the company.<sup>152</sup>

It appears that the Department of Justice has taken the view that Article 7 of the UOPT applies immediately. The two-year transitional grace period granted by Article 125(3) of the UOPT — intended to allow existing companies to take necessary steps to comply with the UOPT — does not suspend the application of Article 7 of the UOPT. In other words, single-shareholder companies in effect had until September 7, 1996 (six months after the UOPT came into force on March 7, 1996) to find at least another shareholder, failure of which would result in personal liability being imposed upon the single shareholder.<sup>153</sup>

### 5. CONCLUSION

The UOPT marks a major step in the development of the

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<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See UOPT, *supra* note 1, arts. 25(1), 26.

<sup>151</sup> See Hadiputranto & Widyatmoko, *supra* note 146, at 28.

<sup>152</sup> See UOPT, *supra* note 1, art. 7(4).

<sup>153</sup> See Hadiputranto & Widyatmoko, *supra* note 146, at 28.



Indonesian company law framework. Currently, other commercial law sectors are also being examined, credit for which should go to the Economic Law and Improved Procurement System ("ELIPS") project conducted under the auspices of the office of the Indonesian Coordinating Minister for the Economy, Finance & Development. For example, the new capital market law, the UUPM, was enacted in November 1995. The changes form an integral part of the government's push towards improving the overall commercial law system in Indonesia.

This paper has attempted to provide an overview of the UUPM and elaborate on some of the major differences between the UUPM and the previous company law system. The UUPM is now in effect and some of the early teething problems associated with its implementation have also been canvassed. The consensus appears to be that, despite some initial implementation problems, the introduction of the UUPM into commercial application has been relatively smooth.

Although it may be premature to predict how the UUPM will deal with the complex issues of Indonesian company law that are likely to arise in the future, it may be appropriate to offer some tentative conclusions based on the matters discussed in this paper. First, the UUPM is a landmark legislation in the Indonesian corporate scene. Its enactment reflects the political will of the Indonesian authorities to reform the corporate legal framework to be more attuned to modern commercial activity. In this respect, the UUPM is an important, if modest, positive step. Although some parts of the UUPM merely codify existing practice or government policy, it is important to note that the UUPM now gives these practices and policies the force of law. The UUPM should be welcomed to the extent that it generates greater legal certainty in the Indonesian corporate sector.

Second, the new provisions on mergers and acquisitions, the duties and liabilities of directors and commissioners, and the rights of minority shareholders bring to the fore, perhaps for the first time, the corporate governance debate in Indonesia. Lawyers and businessmen in Indonesia will have to grapple with these provisions. Perhaps they will result in more litigation. Perhaps they will bring more fairness and transparency into Indonesian corporate affairs. Much will depend on how the Department of Justice administers and the courts enforce the UUPM and its implementing regulations.

Finally, the UUPT appears to be a unique legislative mix of civil and common law concepts. The UUPT retains civil law concepts such as the two-tier management structure and the company investigation. However, the provisions relating to the duties of directors and commissioners may give rise to notions of "negligence" which may come to rely to some degree on concepts of equity from the Anglo-American tradition. It is tantalizing to speculate that what we may be seeing is the blending (or harmonizing) of the civil and common law traditions with Indonesia's own cultural values and notions of social justice to create a uniquely Indonesian corporate law jurisprudence.