The New Indonesian Company Law: Does it Support Good Corporate Governance?

Abstract:

The Indonesian government promulgated Law No. 40 of 2007 on limited liability companies which replaced Law No. 1 of 1995. The reformation of the law was undertaken for the purpose of supporting the implementation of good corporate governance.

In the discussion of corporate governance in Indonesia, particular attention has been paid to board of commissioners, since under the Indonesian two-tier board regime the board of commissioners is a company’s pivotal organ. The organ has responsibility for ensuring that the company’s management doing its duties well. It says that in the context of Indonesia, the board of commissioners is a seminal company’s organ in an attempt to implement good corporate governance principles.

This article attempts to explore the new law and critically analyses the concept of board of commissioner under the new law, which is to answer the question as to whether the law can be a legal tool for creating the world-class of commissioners or professional commissioners in Indonesia. This found that the Indonesian two-tier board model under the new law includes the company organs, the general meeting of shareholders, the board of directors, and the primary issue of board of commissioners. Also, this found that the new law regarding board of commissioners has several uniqueness of Indonesian two-tier board consisted of one size fits all, board of commissioners is representative of shareholders rather than company, the board of commissioners only has right to suspend of board of directors, there are two types of commissioners which are independent and delegated commissioners. This paper suggested that the new law was specifically not designed to create world-class board of commissioners so that would not help the government implement good corporate governance principle.

Keywords: Two-tier board, Board of Commissioners, and Indonesian company law

This paper has been presented at Seminar on Law No. 40 of 2007 Concerning Limited Liability and Good Corporate Governance held by Padang Ekspres and Anggrek Law Firm on December 18, 2007 in Padang.


The comments received from reviewers through the refereeing process, as well as informal feedback following conference presentations, have been addressed and integrated in the final form of the article.
3.1 INTRODUCTION

On August 16, 2007 the Indonesian government promulgated Law No. 40 of 2007 on limited liability companies which replaced Law No. 1 of 1995. The law entered into Republic of Indonesian Gazette No. 106 of 2007 and came into operation on the date of promulgation.\(^1\) The reformation of the law was undertaken for the purpose of supporting the implementation of good corporate governance. This can be clearly read in the general elucidation\(^2\) of the law.\(^3\) It was confirmed in the Minister for Law and Human Rights’ speech before the Indonesian Parliament (Dewan Perwakilan Rakyat) when introducing the bill.\(^4\)

The government’s concern about corporate governance is reasonable. In June 2006, a survey on perception of corporate governance standards conducted by Political and Economic Risk Consultancy revealed that Indonesia was ranked 10 of 12 countries with a score of 7.5 which is considered poor in terms of corporate governance standard. The first

\(^{1}\) Article 161 Law No. 40 of 2007.
\(^{2}\) Under the Indonesian Law model, laws are complemented by elucidations that are part of the law.
\(^{3}\) General Elucidation of Law No. 40 of 2007
rank was Singapore followed by Japan and Hong Kong which received 2.4, 3.8 and 4.2 respectively.® Indonesia’s score reflects that the movement of corporate governance in Indonesia (introduced and started in 1999 by incepting the National Committee for Corporate Governance that was successful in establishing a Code for Good Corporate Governance) has not brought a significant alteration for Indonesian companies yet.

In the discussion of corporate governance in Indonesia, particular attention has been paid to board of commissioners, since under the Indonesian two-tier board regime the board of commissioners is a company’s pivotal organ. The organ has responsibility for ensuring that the company’s management doing its duties well. It is parallel to Fama and Jensen’s assertion that, from the agency theory perspective, the board is a company element that runs monitoring duties for shareholders’ interests.® It says that in the context of Indonesia, the board of commissioners is a seminal company’s organ in an attempt to implement good corporate governance principles.

The discussion of the roles of board of commissioners has been widely debated in Indonesia during the past 9 years® by both corporate governance organizations and commentators. For instance, the Forum for Corporate Governance Indonesia (FCGI),® a leading Indonesian corporate governance organization, points out that the Indonesian

---

® As mentioned earlier the corporate governance movement in Indonesia has been starting in 1999 by establishing a national committee and then producing a code of corporate governance.
® FCGI is an Indonesian corporate governance organization which is established on 8 February 2000 by 5 professional and business organizations such as Association of Indonesian Listed Companies (AEI), Indonesian Accountant Association-Management Accountant Compartment (IAI-KAM), Indonesian Financial Executive Association (IFEA), Indonesian Netherlands Association (INA) and Indonesian Society for Transparency (MTI). This has actively participated to promote corporate governance in Indonesia.
companies need world-class board of commissioners for good corporate governance to exist.\(^9\) In a similar vein, a commentator maintains that professional commissioners are essential prerequisite for improving performance of Indonesian enterprises,\(^10\) indeed to achieve good corporate governance.

This article attempts to explore the new law and critically analyses the concept of board of commissioner under the new law, which is to answer the question as to whether the law can be a legal tool for creating the world-class of commissioners or professional commissioners in Indonesia. It starts off with a discussion of the nature of the two-tier board by providing the selected history and its practices in the civil law countries such as the Netherlands, Germany and French. The second part of article then examines the Indonesian two-tier model under Law No. 40 of 2007, which consists of company organs, general meeting of shareholders, board of directors and board of commissioners. Part 3 outlines board of commissioners in general, its roles, the requirement to be a member of board of commissioners and its types. Part 4 is a discussion, which discusses the unique of Indonesian two-tier board which encompasses one size fits all, the board of commissioners is representative of shareholders, the board of commissioners does not have rights to appoint and dismiss management board and the new types of commissioners; independent and delegated commissioners and the dream of world-class board of commissioners. A conclusion will be provided at the end of this article.


3.2 THE NATURE OF THE TWO-TIER BOARD

To grasp the concept of two-tier board, it is worthwhile to briefly outline the history of the concept as well as the experience of some leading civil law countries (i.e. the Netherlands, Germany and France), which will be discussed below.

The issue of the two-tier board emerged over the last four hundred years when the Dutch Verenigde Oostindische Compagnie (V.O.C) in its existence. The V.O.C was established in 1602, which has been regarded as the first success of huge trading company, the first business to have given rise to issues of corporate governance, as well as the first multi national company over the world. At its inception, the V.O.C applied a single board, which consisted of seventeen directors. A director appointed by governors of six chambers, which was representative of six cities, namely Amsterdam, Middelburg, Rotterdam, Delft, Hoorn and Enkhuizen. The board was a powerful company organ, which put in order all of company activities such as arranging and deciding the company’s business strategies, preparing the shipping routes and providing the binding resolutions for chambers. However, in 1623, the government reduced the power of board of directors by creating the Committee of Nine. The committee had four primary duties. These included the provision to provide advice to management, approving the annual report, controlling the directors’ competence, and presenting a

---

14 Hopt and Leyens, above n 11, 137
board meeting as well as to inspecting the premises and documents of company.\textsuperscript{15} From the historical point of view the establishment of the Committee of Nine could be assumed as a milestone of the development of the two-tier board in the world.

The supervisory board is made up of non-executive directors.\textsuperscript{16} Its primary task is to supervise and advise the management board.\textsuperscript{17} Furthermore, the application of the two tasks is that the supervisory board has the rights to appoint and dismiss the management board as well as to adopt the annual financial statement of the company.\textsuperscript{18} In addition, the supervisory board is a company element that has right to approve the major decisions of the management board such as the dismissal of a substantial number of employees and the company’s large investment planing.\textsuperscript{19} In effect, there are three functions of the supervisory board, which include counselling the management board, ratifying decisions made by the management board and controlling the activities of the management board.\textsuperscript{20}

In terms of the appointment of management board by the supervisory board, both shareholders and members of the work council can recommend and contest the position of the supervisory board.\textsuperscript{21} In debunking this relationship, Empel, a leading commentator writes: 'The supervisory board is not subordinated to the shareholders and need not accept instructions from them. Its sole concern is the interest of the corporation and the

\textsuperscript{15} Ibid \\
\textsuperscript{16} Gregory F. Maassen and Frans A J. van den Bosch, 'On the Supposed Independence of Two-tier Boards: formal structure and reality in the Netherlands' (1999) 7(1) \textit{Corporate Governance: An International Review} 31 \\
\textsuperscript{17} Tom R. Ottervanger and Ralph M. Pais, 'Employee Participation in Corporate Decision Making: The Dutch Mode' (1981) 15 \textit{International Lawyer} 403 \\
\textsuperscript{18} Ibid \\
\textsuperscript{19} Ibid \\
\textsuperscript{20} Sytse Douma, 'The Two-tier System of Corporate Governance' (1997) 30(4) \textit{Long Range Planning} 613 \\
\textsuperscript{21} Martijn van Empel, 'The Netherlands ' in Arthur Pinto, R and Gustavo Visentini (eds), \textit{The Legal Basis of Corporate Governance in Publicly Held Corporations: A Comparative Approach} (1998) 132
enterprise concerned. On the other hand, the management board is not subordinated to the supervisory board. Accordingly, action taken by management in response to a decision of the supervisory board is their own responsibility'.

The Netherlands’ two-tier board is now regulated by the Two-tier Structure Reform Act, which came into effect on 1 September 2004. This legislation applies to all Dutch public companies (*naamloze vennootschappen*). Through the Act, the powers of the work council have been modified and the greatest authority has been given to the general meeting of shareholders to elect and dismiss members of supervisory board. Also, the general meeting of shareholders has right to refuse any proposal for designation of supervisory directors.

The two-tier board model was introduced in French in 1856 at first. It required a company to have a supervisory board in addition to a board of management. As a supervising company organ, the supervisory board had four main tasks: ' (1) reviewing the books, accounts, and investments of the company; (2) making annual report to shareholders; (3) calling general meetings; and (4) if necessary, initiating the wind-up of the company'. In 1867, the French government formally enacted a Commercial Code which firmly divided the board of companies into two organs – executive and supervisory board. However, in 1940, the Vichy Regime of France abolished the two-tier board model. The regime imposed a new policy on corporate structures by enacting Law of

---

22 Ibid, 133
24 Ibid
November 16, 1940.  Twenty years later, in 1966, the two-tier board model was reintroduced in France by promulgating the Commercial Code 1966, called as the 1966 Reform. The law is voluntary one, which allows business people to choose either a unitary or two-tier board in operating their companies. Just as it is the case in other civil countries’ rules, the French law set up two boards in a company, namely directorate or directoire and supervisory board or council de surveillance. The former is an executive management which has responsibility to run the company while council de surveillance is a company’s organ that has duty to supervise the directoire.

Further to the 1966 Reforms, the supervisory board was empowered to elect members of the directorate but it does not have powers of dismissing. The law also gives the supervisory board rights to insist the directorate to submit quarterly reports, which seems to apply the monitoring functions. In terms of number of members who are appointed to the supervisory board, a company should have three to twenty-four, who are appointed by shareholders at their meeting. Labours have rights to both elect and sit in the supervisory board but no more than one-third of the total number of the board.

As a corollary, through the 1966 Reforms, there are three of the primary tasks of the supervisory board, they are: first, authorizing the directorate to make a certain decision;

---

26 Ibid 19
27 Ibid
28 Ibid, 20
29 Ibid, 23
30 Ibid
two, monitoring activities the directorate; and third, reporting its finding to shareholders.\(^{31}\)

In Germany, Plessis notes that the supervisory board was interjected into the German Commercial Code in 1861. Through the German Commercial Code (\textit{Algemeines Deutsches Handelsgesetzbuch}) of 1861, a German company might have two boards:\(^{32}\) management board (\textit{Vorstand}) and supervisory board (\textit{Aufsichtsrat}).\(^{33}\) The management board is responsible for running the daily activities of company while supervisory board is a company’s element that has roles to supervise the management board.\(^{34}\) Then in 1870 the German Government promulgated the mandatory supervisory board of 1870. This is a law that obliges every German Companies stock exchange to apply two-tier board model regardless of their size and workforce.\(^{35}\) As a result, under the mandatory supervisory board, there were two characteristics of the German two-tier board. Firstly, management and supervisory board are company’s organs that have tasks to be performed separately. Secondly, members of supervisory board are elected by shareholders and in large company up to half members are appointed by employees as regulated by both the Management Relation Act of 1952 and the Codetermination Act of 1976.\(^{36}\) Writing in 2007, two noted academics, Du Plessis and Sandrock, in terms of codetermination,

\(^{31}\) Ibid


\(^{36}\) Ibid n 36
discloses that there are three types of the German codetermination, namely Full Parity Codetermination, Quasi-Parity Codetermination and One-Third Codetermination.\(^{37}\)

Overall, the law puts the supervisory board in a strong position over the management board. The tasks of the supervisory board are mainly four, namely: first, appointing and dismissing management board; second, monitoring management board’s jobs; third, approving annual report; fourth, intervening into company that has a serious affected.\(^{38}\) Those functions can be understood as the implementation of supervising and advising roles of supervisory board.

With regards to the original idea of the two-tier board in Germany, a distinguished academic Baums argues that its intention was to give stockholders an opportunity to put their representative to protect their rights against executive board. Then, however, this has been amended to give other stakeholders, employees, to participate in supervisory board in controlling management board of the company.\(^{39}\) Simply put the contemporary of the Germany two-tier board not only considering the shareholders’ interest but also to protect the other stakeholders’ rights, including public interest.\(^{40}\)

\(^{39}\) Theodor Baums, ‘Company Law Reform in Germany’ (2003) 3(1) *Journal of Corporate Law Studies* 184
\(^{40}\) Hopt, above n 35
3.3 THE INDONESIAN TWO-TIER BOARD

The history of the two-tier board system formally began in Indonesia in 1995 following the enactment of Law No. 1 of 1995 dealing with Limited Liability Company.41 Prior to this, Indonesia employed the two-tier structure model under the Dutch Commercial Code of 1847 because as a colony of the Netherlands Indonesia has to follow its colonial laws, included the company law.42 Law No. 40 of 2007 currently exists to regulate the two-tier board in Indonesia, which is the successor to Law No. 1 of 1995.

As such pointed earlier, the main feature of the two-tier board model is the clear demarcation of roles the management and the supervisory board of a company. Consequently, under this model (as the other civil law countries) there are three legal entities in a company consisting of general meeting of shareholders, management board and supervisory board.43 This contrasts with the unitary model which has two components in the company, namely the general meeting of shareholders and the board of directors.

In the Indonesian context, the supervisory board is designated as the board of commissioners (dewan komisaris). The existence of the supervisory board is outlined in article 1 (2) and 1 (6) of Law No. 40 of 2007, which state that the board of commissioner is one of the three compulsory company organs that have to be established by an

41 In Indonesia the limited liability company is called as Perseroan Terbatas (“PT”), which is similar to the naamloze vennootschap (“NV”) in the Netherlands; see Benny Simon Tabalujan, 'The New Indonesian Company Law' (1996) 17(3) University of Pennsylvania Journal of International Economic Law 885
43 Plessis, above n 32, 21; Tüngler, above n 35, 233
Indonesian company with a primary task as a supervisor of company’s management. A graphical illustration of the three of company organs are set out in figure 1.

Figure 1: Three Legal Entities

3.3.1 The General Meeting of Shareholders (GMS)

The General Meeting of Shareholders (thereafter referred to as GMS) is the supreme organ of a company. Article 1 paragraph 4 of Law No. 40 of 2007 defines the GMS as ‘...the Company organ which has powers which are not delegated to the Board of Directors and Board of Commissioners within the limits stipulated in this law and/or the company’s Article of Association’. As a supreme organ, the GMS has authority to make decisions relating to the organization structure of company (i.e. creating and changing the company’s by-law, merging, doing spin-off, liquidating the company etc.), in addition to deciding both the rights and obligations of shareholders and issuing new shares and to share/utilize the company’s returns. In practice, through a GMS, a shareholder can

---

44 Article 1 paragraph 4 Law No. 40 of 2007
insist either the board of directors or the board of commissioners to provide information regarding company as long as it relates to the GMS’ agendas and is not against the interest of corporation.\textsuperscript{46}

A GMS consists of the annual GMS and other GMS.\textsuperscript{47} The latter is also known as the extraordinary GMS. The annual GMS must be held no later than 6 (six) months as from a fiscal year is over\textsuperscript{48} and the extraordinary GMS can be held at any time as the need for the shape of corporation.\textsuperscript{49}

The convening of a GMS, both annual and extraordinary GMS are generally initiated by the board of directors.\textsuperscript{50} However, the board of commissioners could convene for a general meeting should the board of commissioners does not conduct it.\textsuperscript{51} Furthermore, ‘if Directors or Board of Commissioners do not make summons of RUPS [GMS] within time period as referred to in Article 79 paragraph (5) and paragraph (7), shareholders requesting for RUPS [GMS] may send a request to the chairman of the District Court that its legal jurisdiction includes a domicile of Corporation to make an order to provide a permit to petitioner to make summons of RUPS [GMS] by him/herself.\textsuperscript{52}

The most strategic task of GMS, however, is that of appointing and dismissing both board of directors and board of commissioners. As the very powerful and the highest organ, it is

\textsuperscript{46} Article 75 paragraph 2 Law No. 40 of 2007
\textsuperscript{47} Article 78 paragraph 1 Law No. 40 of 2007
\textsuperscript{48} Article 78 paragraph 2 Law No. 40 of 2007
\textsuperscript{49} Article 78 paragraph 4 Law No. 40 of 2007
\textsuperscript{50} Article 79 paragraph 1, 3, and 4 Law No. 40 of 2007
\textsuperscript{51} Article 79 paragraph 6 letters a and b Law No. 40 of 2007
\textsuperscript{52} Article 80 paragraph 1 Law No. 40 of 2007
in a position to elect and remove both members of board of directors and board of commissioners. No other organ is endowed with this strategic capability.

The GMS can dismiss the board of directors at any time by mentioning specific reasons. Further, the elucidation of this article explains that the term specific reasons mean the board of directors does not meet the requirement being a member of board of director if he or she, for example, through their conduct deliberately makes the company to incur losses.

### 3.3.2 The Board of Directors (Dewan Direksi)

Suffice here to point out several basic principles of board of directors, since the focus of this article will primarily lie on the board of commissioners. Article 1 paragraph 5 of Law No. 40 of 2007 describes that 'Directors shall be a Corporation element that shall be authorized and responsible completely against the management of Corporation for the interest of corporation in accordance with goals and objectives of Corporation and shall represent a Corporation, both in or out or the Court based on the provisions of Article of Association'. In other words, the board of directors is the executive management of the company that looks after the day-to-day activities of the company. Thus, as an executive company organ every member of the board of directors is fully liable personally if he or she is committing a wrongdoing or is negligent in performing his or her duties.
In terms of number of board of directors, the law states that a company must have at least one member of the board of directors.\textsuperscript{57} However, corporation has business in a sector of the mobilisation of public funds, the issue of acknowledgement of indebtedness to public, or a public corporation is obliged to have at least two members of the board of directors.\textsuperscript{58}

In practice, however, members of board of directors are appointed by the general meeting of shareholders\textsuperscript{59} for a specific term with the possibility of being re-elected.\textsuperscript{60} In terms of the board of directors’ election mechanism such as nomination, election, substitution and dismissal are regulated by each company’s article of association.\textsuperscript{61}

\textbf{3.3.3 The Board of Commissioners (Dewan Komisaris)}

\textbf{3.3.3.1 General}

The definition of board of commissioners is set out in article 1 paragraph 3 of Law No. 40 of 2007, which defines it as a corporation organ which has duties to generally and specifically supervise and advise the board of directors in accordance with the company’s article of association. In effect, the board of commissioners means a company’s element which has duties of making sure the board of directors is operating the company properly in which it does not involve in day-to-day activities of company.

\textsuperscript{57} Article 92 paragraph 3 Law No. 40 of 2007
\textsuperscript{58} Article 92 paragraph 4 Law No. 40 of 2007
\textsuperscript{59} Article 94 paragraph 3 Law No. 40 of 2007
\textsuperscript{60} Article 94 paragraph 3 Law No. 40 of 2007
\textsuperscript{61} Article 94 paragraph 4 Law No. 40 of 2007
The board of commissioners is a compulsory for any company in which each company must have at least one member. However, the board of commissioner that has more than one member called as collective board in which every member cannot act separately. In this sense, its act has to be based on board of commissioners’ decision. Furthermore, much the same as the board of directors’ provision, a company should have 2 or more members of the board of commissioners if it is a big company i.e. company which is doing business in sector of mobilisation funds from the public, issuing an acknowledgment of debt, or it is a public company. This provision presumably intends to protect public interest from the big companies’ activities.

Every member of the board of commissioners is appointed by a GMS for a specific period with the possibility of being re-appointed. Furthermore, the procedures of the nomination, election, substitution and dismissal are regulated by the articles of association of a particular company. The GMS stipulates the remuneration of board of commissioners.

As already mentioned, the main duties of board of commissioners are to supervise and advise board of directors. This means that the board of commissioners is responsible to look at the board of directors doing his or her duties with good faith. Therefore, in order that the board of commissioners can undertake its duties appropriately the law obliges

---

62 Article 108 paragraph 3 Law No. 40 of 2007  
63 Article 108 paragraph 4 Law No. 40 of 2007  
64 Article 108 paragraph 5 Law No. 40 of 2007  
65 Article 111 paragraph 1 Law No. 40 of 2007  
66 Article 111 paragraph 3 Law No. 40 of 2007  
67 Article 111 paragraph 4 Law No. 40 of 2007  
68 Article 113 Law No. 40 of 2007
every member of the board of commissioners to behave his or her duties with good manner and a full sense of responsibility for the interest of company and in line with company’s goals and objectives.\textsuperscript{69} Comparable to the board of directors, under this law every member of board of commissioners is fully responsible personally if he or she is at fault or is negligent in performing his or her tasks. Also, the provision regarding the dismissal of member of board of directors applies to a commissioner.\textsuperscript{70}

Apart from the above issues, in terms of the position of board of commissioners, article 108 paragraph 2 states that 'supervision and providing advices as referred to in paragraph (1) shall be conducted for the interest of a Corporation and in accordance with goals and objectives of Corporation'.

3.3.3.2 The role of board of commissioners

The law provides some particular roles of board of commissioners. According to article 64 paragraph 1, it should be written in the articles of association of a particular corporation, one of the roles of board of commissioners is to receive annual plan of corporation from board of directors.\textsuperscript{71} Also, based on the articles of association of a corporation, board of commissioners has the mantle to approve the annual plan of the company.\textsuperscript{72} However, if the articles of association stipulate that the annual plan should be approved by a GMS, board of commissioners has responsibility for analysing the annual

\textsuperscript{69} Article 114 paragraph 2 Law No. 40 of 2007
\textsuperscript{70} Article 119 Law No. 40 of 2007
\textsuperscript{71} Article 64 paragraph 2 Law No. 40 of 2007
\textsuperscript{72} Article 64 paragraph 2 Law No. 40 of 2007
In terms of annual report, there are two roles of board of commissioners; they are to analyse and sign it. Moreover, the board of commissioners is also responsible to approve the proposal of interim dividend of company which is prepared by board of directors.

Basically, the convening of a GMS is a board of directors’ job. However, it will be a board of commissioners’ task if the board of directors does not conduct the GMS but it should be done based upon a court’s decision. The other one that relates to a court is that the board of commissioners is able to represent the company in a court should board of directors has a conflict of interest for the company. The board of commissioners is in a position to decide the board of directors’ remuneration. This, however, should be undertaken by board of commissioners if the general of shareholders meeting authorizes it.

As has been stated, the nomination, election, substitution and dismissal of board of directors is absolutely tasks of a GMS, the law gives a room to board of commissioners to suspend the board of directors by providing specific reasons. The exposition of this article states this provision is to guarantee the company operating well before the company makes a permanent decision through a GMS.

73 Article 64 paragraph 3 Law No. 40 of 2007
74 Article 66 paragraph 1 Law No. 40 of 2007
75 Article 67 paragraph 1 Law No. 40 of 2007
76 Article 72 paragraph 4 Law No. 40 of 2007
77 Article 81 paragraph 2 Law No. 40 of 2007
78 Article 99 paragraph 2 letter b Law No. 40 of 2007
79 Article 96 paragraph 2 Law No. 40 of 2007
80 Article 106 paragraph 1 Law No. 40 of 2007
81 The elucidation of Article 106 paragraph 1 Law No. 40 of 2007
Apart from those, a company may write down in its articles of association to grant a power to board of commissioners to give a writing approval or assisting to board of directors in undertaking particular legal acts. In addition to this, based on the articles of association, board of commissioners may undertake the act of managing the company in specific situations for specific period. Lastly, a board of commissioners has power to approve the merger and takeover of the company. An overview of the role of board of commissioners is set out in Table 1.

**Table 1: List of the role of board of commissioners under Law No. 40 of 2007**

<table>
<thead>
<tr>
<th>No.</th>
<th>Role</th>
<th>Condition(s)</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>To receive an annual plan</td>
<td>Should be stated in the company’s articles of association</td>
<td>Article 64 (1)</td>
</tr>
<tr>
<td>2.</td>
<td>To approve an annual plan</td>
<td>- Should be stated in the company’s articles of association</td>
<td>Article 64 (2)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- As long as it does not abuse other rules</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>To analyse annual plan</td>
<td>If the company’s annual plan be approved by general meeting of shareholders</td>
<td>Article 64 (3)</td>
</tr>
<tr>
<td>4.</td>
<td>To analyse annual report</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>To sign company’s annual report</td>
<td></td>
<td>Article 66 (1)</td>
</tr>
<tr>
<td>6.</td>
<td>To approve interim dividend</td>
<td></td>
<td>Article 72 (4)</td>
</tr>
<tr>
<td>7.</td>
<td>To call shareholders for holding general meeting</td>
<td>Based on court’s decision</td>
<td>Article 81 (2)</td>
</tr>
<tr>
<td>8.</td>
<td>To decide board of management’s remuneration</td>
<td>Should be authorized by general meeting of shareholders</td>
<td>Article 96 (2) and (3)</td>
</tr>
<tr>
<td>9.</td>
<td>To represent company in a court</td>
<td>If all of members of board of management have conflict of interest</td>
<td>Article 99 (2) (b)</td>
</tr>
<tr>
<td>10</td>
<td>To suspend member of board of management</td>
<td></td>
<td>Article 106 (1)</td>
</tr>
<tr>
<td>11</td>
<td>To give a writing approval or assisting to board of directors to do particular legal action</td>
<td>Should be stated in the company’s articles of association</td>
<td>Article 117 (1)</td>
</tr>
<tr>
<td>12</td>
<td>To organize company in particular condition and time</td>
<td>Should be stated in the company’s articles of association</td>
<td>Article 118 (1)</td>
</tr>
<tr>
<td>13</td>
<td>To approve draft of merger of company</td>
<td></td>
<td>Article 123 (3)</td>
</tr>
<tr>
<td>14</td>
<td>To approve the takeover of the company</td>
<td></td>
<td>Article 125 (6)</td>
</tr>
</tbody>
</table>

### 3.3.3.3 The requirements of member of board of commissioners

Article 110 (1) subparagraphs a, b and c of the law regulates the requirements to be a member of the board of commissioners by stating that a person can be elected as a member of the board of directors if he or she has legal capacity. Persons who are disqualified from becoming members of the board are those who have been declared insolvent 5 years prior to the election; a member of board of directors or board of commissioners who has been declared to be at fault in causing a company to be declared

---

82 Article 117 paragraph 1 Law No. 40 of 2007  
83 Article 118 paragraph 1 Law No. 40 of 2007
insolvent; or a person who has been sentenced for engaging in a criminal act which causes a loss to state funds or relating to finance sector. Furthermore, the elucidation of the chapter explains in detail as to finance sectors which are bank, non-bank, stock exchange and other sectors that relates to public funds mobilisation. This provision also applies to the board of directors.

3.3.3.4 The types of board of commissioners

Regarding the types of board of commissioners are regulated in article 120 paragraphs 1, which has given opportunity to both founders and owners of company through the company’s articles of association for establishing one or more independent commissioner and one delegated commissioner. As a result, in a company there might be three types of commissioner, namely ‘ordinary commissioner’, independent commissioner and delegated commissioner.

Furthermore, the law asserts that an independent commissioner is elected by a GMS’ decision, who must be an unaffiliated person with main shareholders, member of board of directors and/or member of board of commissioners. From the elucidation of this chapter can be read the term of independent commissioner referred to the code for good of corporate governance of Indonesia, which is the so-called outside commissioner.

In terms of the delegated commissioner, article 120 paragraphs 3 and 4 regulate that the delegated commissioner is member of board of commissioners who is appointed based on

---

84 Elucidation of Article 110 (1) subparagraph c Law No. 40 of 2007
85 Article 120 paragraph 2 Law No. 40 of 2007
86 Elucidation of Article 120 paragraph 2 Law No. 40 of 2007
result of board of commissioners’ meeting. Unfortunately, there is no detail explanation of delegated commissioner. Article 120 paragraphs 4 merely states that tasks and roles of delegated commissioner would be provided in the company’s article of association, which should be not against the tasks and roles of board of commissioners and does not prevent the board of directors’ jobs as a company management.

3.4 DISCUSSION

3.4.1 The Uniqueness of Indonesian Two-Tier Board

The law contains some novel thoughts which do not exist in the other two-tier board countries’ provisions, as follows.

3.4.1.1 One size fits all

Under Law No. 40 of 2007 the two-tier board is compulsory, regardless of size, listing or type. In this sense, under the law, a limited company must have a board of management and board of supervisory even though it is, for instance, a small company, non-listed company or a family company. Borrowing the term of American corporate governance, it could also be described as “one size fits all”. Yet, this is significantly different from the other two-tier board countries i.e. the Netherlands, Germany and French. In the Netherlands, however, under the Two-tier Structure Reform Act of 2004, the two-tier board applies only to Dutch public companies (naamloze vennootschappen). By comparison, in German the two-tier structure is only obligatory for stock corporations.

---

87 Article 120 paragraph 3 Law No. 40 of 2007
88 Article 120 paragraph 4 Law No. 40 of 2007
89 In America, under the Sarbanes Oxley Act of 2002, listed companies have to comply with the principles of corporate governance, regardless of size which called as one size fits all.
90 Groenewald, above n 23, 300
irrespective of their size and workforce.\textsuperscript{91} While in French system, under the Commercial Code of 1966, a company is free to choose either a unitary or two-tier board.\textsuperscript{92}

3.4.1.2 The board of commissioners is representative of shareholders

One might assert that except for the delegated commissioner, members of board of commissioners are representatives of the company. This is because article 108 paragraph 2 of Law No. 40 of 2007 states that every member of the board of commissioners undertake their duties to company’s interest. This argument is also supported by elucidation of this article. In addition, by referring to article 85 paragraphs 4 which provides that in the voting session every member of board of commissioners are inhibited to be a representative of shareholders, a commentator argues that board of commissioners is representative of company.\textsuperscript{93}

From a practical standpoint, however, a member of the board of commissioners (except the delegated commissioners) is actually a representative of shareholders rather than the company. Articles 111 paragraphs 1 and 119 explicitly establish it by stating the election and dismissal of members of the board of commissioners can be undertaken by a GMS. It means that under these articles, shareholders are the boss of every member of board of commissioners because their tenure depends on the boss’ intention; the boss could be dismissing them at anytime, of course, by providing a specific reason. Therefore, logically, commissioners would obey their boss’ instructions even if it would be the company’s disadvantage.

\textsuperscript{91} Tüngler, above n 35, 231
\textsuperscript{92} Aste, above n 25, 21
\textsuperscript{93} Tumbuan, above n 45, 27
Both academically and in practice, the discussion of whether a board of commissioners is a representative of shareholders or represents a company began a long time ago. In the past, a board of commissioners was a representative of shareholders only. In its development (as raad van commissarissen in the Netherlands) a board of commissioners is not only a representative of shareholders but it also represents a company as well as society.⁹⁴

3.4.1.3 The board of commissioners only has rights to suspend management board

As mentioned earlier, the most strategic roles of supervisory board in the particular countries (i.e. the Netherlands and Germany) are appointing and removing member of board of management. Plessis argues that the appointing and removing rights are cornerstones of the two-tier model.⁹⁵ On these positions the supervisory board is a strong company organ. As a consequence, the board of management has to run the company carefully and professionally otherwise the 'punishment' will be applied by the supervisory board.

Dissimilar to this, however, according to Law No. 40 of 2007 the Indonesian board of commissioners only has the power to suspend members of the board of directors.⁹⁶ In other words, it cannot permanently dismiss the member of board of director given that he or she disadvantages the company. Thus, the board of commissioners could not run its supervising role to the maximum.

---

⁹⁵ Plessis, above n 32, 25
⁹⁶ Under Law No. 40 of 2007 management board equal to board of directors
3.4.1.4 Independent Commissioner

As stated in article 120 paragraphs 1 and 2, the law introduces independent commissioner. The elucidation of article 120 paragraph 1 provides that the independent commissioner means outside director. The term of the outside director is known in the one-tier board model\(^97\) countries such as Australia. In Anglo-Saxon countries, an independent director is an important element in the company’s structure because a company has only one board, which undertakes both management and supervisory tasks. In the Australian context, for example, the roles of independent director are to protect the shareholders’ interest and supervise the company management without involving in daily activities of the company.\(^98\)

It is therefore no doubt that, the concept of the Indonesian independent commissioner is adopted from the Australian model. It can be traced by unfolding the debate surrounding the independent commissioner since 1999 in which academics and corporate governance organizations proposed to define what independent commissioner is. One of the proposals came from FCGI, which reveals that 'The criteria of the Independent Commissioners were taken by the FCGI from the criteria of the Australian stock exchange authority on the Outside Directors. The criteria for Outside Directors in that one tier system were translated into criteria for Independent Commissioners in the Position Paper of FCGI'.\(^99\)

That is publicly known that the proposal has been adopted by the National Committee for Corporate Governance then now adopted by Law No. 40 of 2007.

---

\(^{97}\) Baums, above n 39, 184; Andre Jr., above n 33, 1824


It says that the law seems to conclude that –except Independent Commissioner, board of commissioner is not an independent company organ given that under the concept of two-tier board every member of board of commissioners is independent. As a result, in the perspective of legal transplantation concept, the drafter of the law might be undertaking a wrong method of legal transplantation. Many legal scholars doing research on activities of legal transplantation in developing countries, which conclude that most of them are unsuccessful because it has never been considering the local conditions of the import countries such as legal cultural and legal systems. In this regard, the law maker has never considered the prevailing Indonesian legal system in adopting the outside director to be independent commissioner.

3.4.1.5 The Delegated Commissioner

The Delegated Commissioner is a completely new concept in Indonesia. As mentioned above, article 120 paragraphs 3 and 4 and its elucidation does not define what the delegated commissioner is, except that it would be regulated by the articles of association of company.

Quoting Bloembergen, Regar argues that delegated commissioner is a company organ that has two positions in a company; as a commissioner and a management member. In practice matter, further, a member of delegated commissioner might be doing three kinds of jobs: one, as a commissioner with a specific task; two, as a chief of board of directors

---

100 For the detail of legal transplantation in Indonesia especially on corporate governance matter, see generally Jeremy J. Kingsley, Transplantation: Is this What the Doctor Ordered and are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World – A Case Study of Corporate Governance in Indonesia (2004) 21 Arizona Journal of International & Comparative Law 501
that as if delegated commissioner; and finally, as a pure of delegated commissioner.\textsuperscript{101}

Departing from the Bloembergen’s argument, it could be said that the concept of delegated commissioner blurred the concept of the two-tier board that extremely separates between board of commissioners and board of directors. This is, indeed, like a concept of unitary board in which there is only one board in a company.

\subsection{The Dream of World-Class Board of Commissioners}

No one has formally defined, at least in the Indonesia context, what is world-class board of commissioners. However, this article would attempt to define it. World-class board of commissioners is a board that behaves professionally and devotes itself to the company is of supervising and advising the management board to improve the efficiency in order to gain the company’s maximum returns. As stated by the Oxford dictionary, the word of professionally means “in a way that shows skill and experience”.\textsuperscript{102} Simply put, the term of world-class board of commissioners means every member of board commissioners must have a relevant skill, experience and devotion to the job as a minimum requirement. Such three things have been a serious problem of Indonesian commissioners.

Going back to the purpose of the article is to answer the question of whether the new law can be a legal tool for creating the world-class of commissioners to support the government’s hope in implementing good corporate governance, it then produce a more specific question: Does the law essentially encourage the board of commissioner to be the so-called world-class? The answer will be discussed below.

\textsuperscript{101} Regar, above n 94, 45-46
Article 110 paragraph 1 letters a, b and c on the requirements to be a commissioner does not dictate a company’s owners or shareholders to appoint a professional commissioner. These provisions only obstruct a culprit to be a commissioner, which means that an unprofessional person can be a company’s commissioner as long as he or she has never committed wrongdoings five years prior to the appointment. As abovementioned the law is divided culprit into two categories: first, as a person who has been declared to be at fault in causing a company to be declared insolvent; second, a person who has been sentenced for engaging in a criminal act which causes a loss to state funds or relating to finance sector. It could be said that the law does not care with the issue of professional commissioners. Hence, it is hard to imagine that an Indonesia company’s board of commissioner to be a world-class when the law does not put the professional issue as a requirement.

In terms of the devotion issue, these provisions are also not concerned with this. In this sense, a high-rank official of the Government’s department, for example, can be a commissioner of a State-owned Enterprise given that he or she does not have enough time to perform his or her duties as a commissioner.

In this regard, it is fair to exemplify the conditions of being members of supervisory board in Germany according to the German Stock Corporation Law (Aktiengesetz “AktG”) as summarized by Plessis; ‘a. Only fully competent, natural persons may serve as members of the supervisory board; b. A person is disqualified from serving on more than nine supervisory boards at the same time; c. A person cannot at the same time serve
on the management board and supervisory board of a particular corporation; d. Nobody can serve on the supervisory board if he is the authorized and lawful representative (eg member of the management board or a manager) of one of the corporation’s subsidiaries; e. To prevent interlocking supervisory and management boards, an authorized and lawful representative (eg member of the management board or a manager) of one corporation is sometimes prohibited to serve as member of another corporation’s supervisory board.  

Those requirements are sufficient clear to encourage the German board of commissioners to be professional, even though legal scholars criticize that in practice the AktG on that matter contains weaknesses i.e. infrequent meetings, and less informed.  

One might argue that, however, the weakness of the article 110 paragraphs 1 letters a, b and c would be closed by article 110 paragraph 2. This article gives a room to a particular or technique institution to add additional requirements of being a commissioner. That may or may not be worth. In this sense, the law would be depending on other institutions in establishing the so-called world-class board of commissioners. In fact, in Indonesia particular institutions such as the Bank of Indonesia have promulgated specific provisions in which anyone who wants or is nominated to be a commissioner meets a fit and proper test, while state-owned companies non-bank have never employed it. As a result, it could be mentioned that the law cannot be conceptually categorized as a legal tool to both create the so-called world-class board of commissioners and support the hope of government in implementing good corporate governance.

---

103 Plessis, above n 32, 22-23
104 Tüngler, above n 35, 241
105 Baums, T., above n 39, 187
106 Through the Provision of Bank of Indonesia No. 5/25/PBI/2003 on Fit and Proper Test, the Bank of Indonesia applies fit and proper test as additional requirement of being member of board of commissioners in addition to the company law’s requirement.
Additionally, a weak position of board of commissioners also contributes to prevent the Government to reach its hope. As disclosed earlier, under the law the board of commissioners does not have rights to appoint and dismiss the board of management. This is a primary factor to prevent the board of commissioner behaving professionally. The other uniqueness of the law that has been discussed earlier such as the compulsory two-tier board, the suspension right, the independent commissioner and the delegated commissioner are also not provisions that are designed to encourage the board of commissioner to be a world-class.

3.5 CONCLUSION

This paper has discussed the role of Board of Commissioners under the law No. 40 of 2007 and its relation with the hope of the government to implement good corporate governance. It has described the selected history of two-tier board system and its practices in some civil law countries. This has also sketched the Indonesian two-tier board model under the new law, included the company organs, the general meeting of shareholders, the board of directors, and the primary issue of board of commissioners. The role of board of commissioners, the requirement of being member board of commissioners and the types of board of commissioners were explained in great details. The exploration of the new law regarding board of commissioners found several uniqueness of Indonesian two-tier board consisted of one size fits all, board of commissioners is representative of shareholders rather than company, the board of
commissioners only has right to suspend of board of directors, there are two types of commissioners which are independent and delegated commissioners.

From these it is fair to conclude that the new law was specifically not designed to create a world-class board of commissioners so that would not help the government implement good corporate governance principle.