THE LEGAL CONSTRUCTION OF SHELL COMPANY IN THE PERSPECTIVE OF INDONESIAN COMPANY LAW

(Case Study: Panama Papers)

A BACHELOR DEGREE THESIS

By:

CITRA ASTARI

Student Number: 14410194

INTERNATIONAL PROGRAM

F A C U L T Y O F L A W

UNIVERSITAS ISLAM INDONESIA

Yogyakarta

2018

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Submitted in Partial Fulfillment of the Requirement to Obtain Bachelor's Degree (Tier-1) at Faculty of Law

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بسم الله الرحمن الرحيم

THESIS PAGE APPROVAL PRE FINAL EXAMINATION

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بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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iv

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vi

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MOTTO

“Treat people like how you want to be treated”

-Citra Astari

DEDICATION

I, with 'All of My Heart and Soul', Dedicate this beautiful thesis to:

ALLAH SWT.
As the only reason of our wholly-life-existence on earth.

The Loves of my life,

Ayah & Mama,
dr. Herta B. Riyanto & Dra. Eri Sensuarti

and the coolest sister on earth,
Karina Larasati

For all their never ending love, support, and motivation in every aspect of my beautiful life.

The Republic of Indonesia and Universitas Islam Indonesia,
As well as its citizen that can use this thesis for the purpose of a world brighter future

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ABSTRACT

In the mid-2015, the world was preoccupied with the phenomenon of the leaked of 1,5 million confidential documents of Panamanian Law firm, Mossack Fonseca, called Panama Papers. The documents have leaked the dark secrets of business and finance of entrepreneurs around the world, including Indonesia by establishing shell companies in tax havens for tax avoidance. Furthermore, this research will try to analyzed the perspective of Indonesian Company Law on Shell Company, also as a shell company, it analyzed the responsibilities of its shareholders based on Indonesian Company Law in comparison with Panamanian Company Law as the tax havens in Panama Papers. This research is a normative juridical research that was conducted by examining law and regulations, and then it used a comparative approach by comparing with Panamanian regulations on Company. As a result, under Indonesian Company Law, the shell company has been seen as 'Subsidiary Company' and 'Special Purpose Vehicle (SPV) Company'. As for its shareholders responsibilities, both under Indonesian and Panamanian Company Law they have the same regulation in which as the legal entity, the shell company shareholders liability is limited, and between shareholders and company assets are separated. However, the difference lies on the transparency of shareholder's information. As a matter of reducing these dark business activities, the government shall amend the company regulation which can cover all the business activity in Indonesia, so it can have a legal certainty to protect the entrepreneurs, as well as reducing the imposed tax on company. It is also important for the government to encourage its citizens to do tax amnesty and assets repatriation.

Keywords: Shell Company, Indonesian Company Law, Panama Papers.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

A. Context of Study

In the midst of incessant development agenda by countries worldwide in order to meet sustainable development, the world cannot ignore the importance of investment to support the successful development. For new emerging to poor countries, a structural change of economy can only be obtained through external donor funds, or one of them through investment from abroad, commonly known as Foreign Direct Investment (FDI).[1]

FDI (*Foreign Direct Investment*) is one of the important features of an increasingly globalized economic system. It begins when a company from one country invests in the long term to a company abroad. In this way, the company in the origin country (commonly called *'home country'*) can control the company in the destination country of investment (so-called *'host country'*) in whole or in part.[2] Typically, FDI is related to the investment of productive assets, such as the purchase or construction of a plant, the purchase of land, equipment or buildings; or construction of new equipment or buildings by foreign companies. The reinvestment of corporate income and the provision of short and long-term loans

[1] Aaron Cosbey, Howard Mann, Luke E. Peterson, Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements,* The International Institute for Sustainable Development, Canada, 2004, *ebook, Page v*.

[2] Yanuar Nugroho, *Memahami Investasi Langsung Luar,* Available online at http://www.downtoearth-indonesia.org/old-site/fifdi.htm, 2006, accessed on November 22, 2017.

between the parent company and the subsidiary company or its affiliates are also categorized as direct investments.[3] One of the models of investment in direct investment is the establishment of the corporation.

H.M.N. Purwosutjipto stated that the term corporation was born as the development in the commercial business which specifically arises from the company field, and then be regulated in Indonesian Commercial Law, but does not explicitly formulated in trader term and activity between traders.[4]

Discussing the Company/Corporation Law, usually, it will include the form and the type of business, in which, the Company Law is the whole regulations regulate the form and the type of business.

In Indonesia, the formulation and the content of company law are based on Indonesian Civil Code, Indonesian Commercial Code, and the other regulations as well as the agreements and jurisprudence.

Regarding this business matters, in mid-2015, the world was preoccupied with the phenomenon of leaked documents of Panama Papers by Germany's newspaper *Süddeutsche Zeitung* (SZ) from a whistle-blower named John Doe.[5] Panama Papers contains 2,6 terabytes data of 11,5 million confidential documents regarding financial and attorney-client information for more than 214,488 offshore entities from Panama's Law firm Mossack Fonseca.[6] The leaked of Panama Papers has given another problematic issue to the world since the

[3] *Ibid.*

[4] H.M.N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia 1: Pengetahuan Dasar Hukum Dagang*, 11th Edition, Djambatan, Jakarta, 1995, Page 5.

[5] The International Consortium of Investigative Journalists, *Giant Leak of Offshore Financial Records Exposes Global Array Of Crime And Corruption - The Panama Papers*. Available online at https://www.occrp.org/en/panamapapers/overview/intro/, 2016, accessed on November 6, 2017.

[6] *Ibid.*

documents have explicitly revealed the dark secrets of business and finance of most of the important people, World Public Administrators, Politicians, Wealthy businessman, and Celebrities all over the world. The documents have provided so much information on a shell company that registered in 21 tax haven countries.[7] In addition, the documents have also revealed thousands of illegal acts of many wealthy businessmen involved in concealment of assets, tax avoidance, money laundering, and other dirty practices – including therein, names of officials in Indonesia.

As matter of fact, Panama was listed as the top recipient of FDI in the Central American with an annual average of 1.75 billion USD of FDI flows between 2004 and 2009.[8] Despite the downturn in 2009 due to the deteriorating global economy, the FDI flows to Panama rose again in 2010 and in fact, maintaining its growth dynamics since then, providing an important source for the country's economic growth.[9] In 2016, FDI influx into the country reached over 5.2 billion USD (a 15.9% increase over the previous year), and this remarkable performance was due to favorable regulation for FDI and incentive measures adopted by the government in 2011.[10]

Indeed, setting up companies abroad (offshore company) is not illegal. Companies or individuals are freely set up companies in any country that they

[7] *Ibid.*

[8] Banco Santander, *Panama: Foreign Investment*, Available online at https://en.portal.santandertrade.com/establish-overseas/panama/investing, accessed on November 22, 2017.

[9] *Ibid.*

[10] *Ibid.*

desire included in the tax haven countries or also known as an offshore financial center.

The International Consortium of Investigative Journalists (ICIJ) with the Guardian and the BBC actually has shared the list of people in Panama Papers, among others are the state administrators from Indonesia. According to Tempo.Co., the Panama Papers mentioned 899 people and companies in Indonesia which has a shell company in several areas of tax haven countries.[11] In total, 803 in the form of shareholders names, 10 companies, 28 companies were created, and 58 names related parties.[12] *Tempo Magazine* has mentioned that in Indonesia, there are some name of state administrators in Panama Papers likes Luhut Binsar Pandjaitan (Coordinating Minister for Political, Legal & Security Affairs 2015-2016), Harry Azhar Azis (The Chief of State Audit Agency), Airlangga Hartanto and Johnny G. Plate (the member of DPR), Heru Lelono (the member of Special Staff of the former President Susilo Bambang Yudhoyono) and others.[13]

Normatively, saving money, investing, or establishing a company abroad is prevalent in the business world and there is no prohibition. Following the general principle of investing 'do not put your eggs in one basket', many rich people save money, buy stocks, or property in another country thinking that if something bad happens to their investment in their own country then there is money or remaining investment abroad. For a company, the placement of funds, investments and

[11] Anonymous, *Ada 803 WNI dalam Panama Papers , ini nama perusahaannya*, Available online at https://m.tempo.co/read/news/2016/04/06/090760178/ada-803-wni-dalam-panama-papers-ini-nama-perusahaannya, accessed on November 16, 2017.

[12] *Ibid.*

[13] *Tempo Magazine*, 1st edition, Mei 2016, *Page 93.*

establishment of a company abroad is common in order to diversify its investment portfolio and business expansion.[14]

The use of offshore companies primarily in countries called tax havens generally also becomes financial offshore centers with features as described in the OECD (Organization for Economics Co-operation and Development) report, which is there is almost no tax imposed or lack of effective information exchange or lack of transparency or no substantial activities.[15] One other feature of the tax haven in addition to banking secrecy which is often overlooked is confidentiality, for the ownership of a business entity supported in the domestic law of the country. Therefore, it would be difficult or even illegal to discover the owner of a business entity in that country.[16]

As a matter of fact, the Panama Papers has revealed the procedure of the concealment of assets and tax avoidance *modus* by establishing shell corporation in tax haven. The Mosseck Fonseca Law Firm mentioned in Panama Papers has been said to have expertise in shell corporation establishment. Shell corporation is a company without significant assets or business activity. Black's Law Dictionary defined shell company as "a firm that does not trade formed to raise funds, attempt the take over, go public or as the front for an illegal venture".[17] Generally, this shell corporation are established for start-up business, and sometimes, it is also related to the tax avoidance attempt.

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[14] Ruston Tambunan, *OPINI: Panama Papers, Salahkah WNI Taruh Uang Di Luar Negeri?*. Available online at http://bisnis.liputan6.com/read/2478848/opini-panama-papers-salahkah-wni-taruh-uang-di-luar-negeri, 2016, accessed on November 22, 2017.

[15] *Ibid.*

[16] *Ibid.*

[17] Black's Law Dictionary: *"What is Shell Company".* Available online at https://thelawdictionary.org/shell-company/, accessed on February 20, 2018, 1.20PM.

Andi Syafrani argued that Law No. 40 of 2007 as well as other regulation in Indonesia, does not specifically regulate the existence of the shell company because Law No. 40 of 2007 only regulate the establishment of company within the territory of Indonesia (onshore company).[18]

Basically, the terms corporation was derived from Commercial Law and as the Obligation Law which specifically arose from corporations field.[19] There are various kinds of company in Indonesia and most of them are the heritage of Dutch colonialization. Amongst other has been translated into Indonesian but there is also the kind of company in Indonesia that still use Dutch term like *Burgerlijk Maatschap/Maatschap, Vennootschap onder Firma* or Firma (Fa), and *Commanditaire Vennootschap* (CV). While the others have been translated into Indonesian like *Naamloze Vennootschap* (NV) become Perseroan Terbatas (PT).

Either theoretically or from its legal status, there are 2 forms of company: Legal Entity Company and Non-Legal Entity Company.[20] The Legal entity itself was derived from Dutch term *rechtperson* or in English term Legal Person.

Based on article 1653 of Indonesia Civil Code "In addition to an actual partnership, the law shall also acknowledge associations of individuals as legal entities, whether they are established by public authority or acknowledged as such, or whether they are permitted as lawful, or whether they are established with

[18] Anonymous, *Begini Hukum Indonesia Memandang Perusahaan Cangkang,* Available online at http://www.hukumonline.com/berita/baca/lt5707dd59b9f3c/begini-hukum-indonesia-memandang-perusahaan-cangkang, 2016, accessed on February 20, 2018, 1.53PM.

[19] Mulhadi, *Hukum Perusahaan: Bentuk-bentuk Badan Usaha di Indonesia,* Penerbit Ghalia, Bogor, 2010, Page 3.

[20] *Ibid., Page* 23.

a specific objective, provided that they do not violate the law or proper order."[21] Then we can conclude that there are 3 legal entities: Association held by the General Authorities, Association recognized by the General Authorities, and Association which permissible for a particular purpose that is not contrary to law or morals.

Legal entity is also called corporation, which means, a group of people who, by law, have the same purpose, or based on history to be united, which shows themselves as legal subjects and by law regarded as a unity. R. Subekti said that legal entity basically is the entity or group of people which have the rights and doing activity like a human, and has its own assets, as well as could be sued or being sued in front of the judge.[22]

According to E. Utrecht/Moh. Soleh Djidang, generally, there are 4 (four) legal entities:[23] Association (ex: Limited Liability Company, State Enterprises, Joint Venture), Partnership, Organization by Law, and Foundation. Furthermore, in Indonesia there are 3 (three) business legal entity: Limited Liability Company (*Perseroan Terbatas*), Foundation, and Cooperative (*Koperasi*).[24] While for Non-Legal Entity Company are: Civil Partnership (*Matschaap/Persekutuan Perdata*), Firma, and Limited Partnership (CV/*Persekutuan Komanditer*).[25]

The appearance of Shell Company has arisen a big question to the people. The shell company commonly established in Offshore Havens like Panama,

[21] See *Indonesian Civil Code Article 1653*. Page 198.
[22] Chidir Ali, *Badan Hukum,* Alumni, Bandung, 1987, Page 19.
[23] Chidir Ali, *Badan Hukum,* Alumni, Bandung, 1999, Page 72.
[24] Anonymous, *Jenis-jenis Badan Usaha dan Karakteristiknya.* Available online at http://www.hukumonline.com/klinik/detail/lt4f51947253585/jenis-jenis-badan-usaha-dan-karakteristiknya, 2012., accessed on February 26, 2018, at 10.53AM.
[25] *Ibid.*

Cayman Island, Hong Kong, Switzerland, etc. which become the popular kind of way for the entrepreneurs to protect their assets by using the *Nominee*[26] as the owner of the company, while the *Benefical* Owner of the company never be revealed. Most of these shell companies do not have a trade transaction, and do not have any business activity, but they are still legal and included as the company in general in offshore havens. However, since Panama Papers has revealed so many entrepreneurs as well as state officials all over the world, including Indonesia, it finally raises the question regarding what is exactly this shell company, how Indonesian law regulated this kind of company, and which type of business entity the shell company is.

Finally, through this paper, the author tried to analyze more deeply in regard to Indonesian Company Law Perspective on Shell Company as mentioned in Panama Papers since this big leaked document has mentioned the entrepreneurs and state officials from Indonesia, but this kind of company does not recognize in our law. The other problem is that if the shell company does not have any business activity such as trade transaction and others, then the writer needs to analyze regarding the rights and responsibilities of shareholders in the shell company since it is basically the same with the company in general.

[26] *Nominee is the entity/person (the registered owner) in whose name securities or other assets are recorded and held under a custodial agreement with the actual owner (called beneficial owner). Such arrangements are used where the beneficial owner is abroad, wishes to conceal his or her identity, or to facilitate a trade or collection of income from several securities. Banks, brokerage houses, and trust companies are usually appointed registered owners. Use of nominees, however, does not alter the position of the beneficial owner with regard to tax liabilities and reporting requirements.*

B. Problem Formulations

The problem formulation arise from the topic are:

1. How is the Indonesian Company Law Perspective on Shell Company?
2. What are the rights and responsibilities of shareholders in the Shell Company based on Indonesian Company Law in Comparison with Panamanian Company Law?

C. Research Objectives

The objectives of this research are:

1. To analyze how exactly is the Indonesian Company Law perspective on the Shell Company.
2. To know what are the rights and responsibilities of shareholders in the Shell Company based on Indonesian Company Law in Comparison with Panamanian Company Law.

D. Definition of Terms

From the title of this research, there some main terms as follows:

1. *Company:* company is an association of both natural and artificial person (and is incorporated under the existing law of a country).[27]

   Law No. 8 of 1997 article 1 point 1 stated that a company is any form of business which carries on regular and ongoing activities by obtaining

[27] Executive Programme: *Company Law,* Paper 1. Study material from The Institute of Company Secretaries of India by Delhi Computer Services, Dwarka, New Dehli. Page 2.

profit, whether held by individuals or business entities in the form of legal entities or non-legal entities, established and domiciled within the territory of the Republic of Indonesia.

2. *Shell Company:* Black's Law Dictionary defined shell company as "a firm that does not trade formed to raise funds, attempt the take over, go public or as the front for an illegal venture".[28]

   A shell corporation is a corporation without active business operations or significant assets. These types of corporations are not all necessarily illegal, but they are sometimes used illegitimately, such as to disguise business ownership from law enforcement or the public. Legitimate reasons for a shell corporation include such things as a startup using the business entity as a vehicle to raise, funds, conduct a hostile takeover or to go public.[29]

3. *Panama Papers:* It is the leaked 11,5 million secret files, the documents of more than 214.000 offshore companies (shell companies) in tax heaven countries owned by 141 politicians and so many world leaders, criminals, mafia groups, even celebrities.

E. Theoretical Review

As explained before, the terms company derived from commercial law which mentioned in Indonesian Commercial Code article 6 "Every person who runs a company is required to maintain records under the terms of his

[28] Black's Law Dictionary: *"What is Shell Company". op.cit.*

[29] Anonymous, *Shell Corporation,* Available online at https://www.investopedia.com/terms/s/shellcorporation.asp, accessed February 26, 2018.

company concerning the condition of his property and on what relates to his company, in such a manner that from the records held thereafter may be known to all of his rights and obligations".[30] However, this law did not further formulate or explain more regarding the meaning and definition of company.

In Indonesia, the company law is regulated under Indonesian Commercial Code and Indonesian Civil code. There are also some other regulation regarding the company law in insurance law, banking law, and sharia banking law, Intellectual Property Right Law, Limited Liability Company Law, SOEs Law, Cooperative Law, Foundation Law, and others. Besides legislation, there are also Government regulation, President Regulation, Presidential Decree, and Ministerial Decree.[31]

Law Number 3 of 1982 regarding Mandatory Company Registration (*UUWDP*) defines company as "any form of business which carries on any kind of business which is permanent, continuous, and established, operates and domiciled within the territory of the state of Indonesia for the purpose of obtaining profit."[32] The form of business here means business organization or business entity as the driver of each type of business. These business entity are regulated under the law, whether individual, partnership or legal entity.

Generally, business organization (*Badan Usaha*) are categorized into 2 (two): non-legal entity and legal entity. The differences between these two

[30] *See Article 6 of Indonesian Commercial Code (KUHD).*

[31] Kurniawan, *Hukum Perusahaan: Karakteristik badan Usaha Berbadan Hukum dan Tidak Berbadan Hukum di Indonesia*, Genta Publishing, Yogyakarta, 2014, Page 14.

[32] *See Law Number 3 of 1982 regarding Mandatory Company Registration.*

are:[33] in the legal entity, the establishment must be validated by the government, for example in the matter of Limited Liability establishment, there should be validation of the deed of incorporation and articles of association of the company by the government (Ministry of Law and Human Rights). While the non-legal entity, this kind of validation by the government are not required. For example, in the establishment of CV, even though the establishment are under the Notary deed, and being registered in District Court, but there is no need to be validated by the Ministry of Law and Human Rights.

The other difference is in non-legal entity, if the company bankrupt, the responsibility will include the private assets of the shareholders, while for legal entity the responsibilities are limited by the amount of shares paid/owned.[34]

The non-legal business entity including:[35]

1. Individual Company (*Perusahaan Perseorangan)*, which in the form of Trading Company (*Usaha Dagang/UD*);
2. Partnership, in the form of: Civil Partnership (*Maatschap*), Firma (*Fa*), Limited Partnership (*CV*).

While the legal business entity including:[36]

1. Airlines of Indonesia (IMA);

[33] Kurniawan, *op.cit,* Page 26.
[34] *Ibid.*
[35] Mulhadi, *op.cit,* Page 24.
[36] *Ibid.*

2. Limited Liability Company;
3. *Koperasi*
4. State-owned Enterprises (*BUMN)*: Persero and Public Company.

Generally, there are some characteristic of legal entity which makes it different wit the non-legal entity [37] [38]**:**

1. Assets Separation between company and the owner;
2. Certain Purposes;
3. Has their Private Interest;
4. Organized Organization
5. Recognized by the legislation
6. Validated by the government

The disclosure of the list of Entrepreneur, Politician and Officer who became client of Panamanian Law Firm "Mossack Fonseca" to establish a company which is a Shell Company. As the name implies "Shell Company", such a company has no content, but a company without active business operations or assets.

Shell Company shares are usually held by 1 (one) person who also acts as its President Director. So, the confidentiality of such a company is very strict and known only to the shareholder, the State where the company is founded, its law firm and God.[39] The shell company is generally used by

[37] Kurniawan. *op.cit,* Page 26.
[38] Mulhadi, *op.cit, Page 25.*
[39] Document of official website of DPR RI. *Shell Corporation.* Available online at http-//www.dpr.go.id/dokblog/dokumen/F_20160411_5768.pdf, accessed February 27, 2018, at 11.18AM.

entrepreneurs and companies to cover the ownership of an authorized company in a particular country.

These shell company represent a legal entity but there is no business transaction in the company. As a means of risk limitation in taxation matters, the shell company described, is actually a company as a whole, which is legal and has an identity as a taxpayer like a company in general. This identity in the business world and even internationally recognized and treated equally as a legal entity that has rights and obligations as an entity.

Risk limitation here is usually done by choosing the form of Limited Liability Company (LLC). This LLC legally has rights and separated obligations from its owner and treated as an individual. With the establishment of a legal entity or LLC for a business interest, then the risk will be limited to the company. All legal obligations will only affect the company.

Everyone knows that a business has a risk of failure. The entrepreneurs do not want a business pioneered by them become failure or there is a problem which give impacts on them totally. There must be a limit. That is why, suppose a company wants to form a new business either in joint venture, or build a company on their own. The company will create a new legal entity to limit the rights and obligations associated with the business by delegating it to a new company. This is a common thing that can be seen a business group that has a lot of business incorporated in it. This kind of way are called risk limitation in business world.

F. Research methods

1. Types of Data

The source of data is divided into three; primary legal materials, secondary legal materials and tertiary legal materials.

The primary legal materials for this research are laws and regulations including:

1) Indonesian Commercial Code;
2) Indonesian Civil Code;
3) Law Number 1 of 1995 (amended);
4) Law Number 40 of 2007 concerning Limited Liability Company;
5) Law Number 3 of 1982 concerning Mandatory List of Company;
6) Law Number 8 of 1997 concerning Company Document;
7) Law Number 5 of 1999 concerning The Prohibition on Monopoly Practice and Unhealthy Business Competition

The secondary legal materials including:

1) Books;
2) Jurisprudence;
3) Law Journal;
4) Expert Opinion;
5) Legal documents from some official websites including ICIJ website as the official world investigator for Panama Papers case;
6) Articles and News including Tempo magazines from its official websites or from the hardcopy collection from the library. As for the

tertiary legal materials are law and business dictionary including Black's Law Dictionary, Investopedia.

7) Internet.

Tertiary Legal Materials:

1) Dictionaries

2. Data Approach Methods

This research uses normative juridical approach as well as comparative approach. The normative juridical approach was done by examining and interpreting matters relating to theoretical principles of company in general, the concept of company in Indonesia since this paper was analyzed based on the perspectives Indonesian Law, Legal doctrine, as well as legal norms. The normative juridical approach is the approach taken based on the legal materials by way of examining theories, concepts, general principles of law as well as legislation associated with this research. This approach is also known as approach to literature, by studying books, legislation and other related documents with this research to every aspect within this topic and written by relatively highly qualified writers. After that, this research used comparative approach which was done by comparing legal regulations or court decisions in a country with the rule of law in another country but must be the same. Comparisons were made to obtain similarities and differences between the law and regulations as well as the court decision.

In this research, the writer compared between the responsibility of shareholders based on company law in Indonesia and panama.

3. Data Collecting Methods

The methods of data collecting were done by searching into the library and from the official website on the internet. This research was done by examining the documents, journals, and magazines to collect data and information, either in the form of books, scientific papers, laws and regulations, and others which connected with this study. After that, the data were learned and recorded, then finally were interpreted.

4. Data Analyze Method.

This research is a normative research, so the data was analyzed by using qualitative analysis which all the collected data was analyzed and given all the information as well as all the explanation. Furthermore, the data was examined based on Legislation, Law theory, Law Dictionary, and Expert Testimony.

G. Structure of Writing

This paper was analyzed regarding The Legal Construction of Shell Company in The Perspective of Indonesian Law in which the case study here about Panama Papers case in 2015.

The chapter I of this paper is the introduction that explain regarding the background of this paper title and what is exactly the main legal problem and the urgent of the title. In this chapter, the writer also explained the theoretical

review as the basic explanation in the next chapter such as the explanation of company and shell company in general whether from Indonesia or Internationally. There also be some explanation regarding the research methods, the types of data which are all the legal material used in this paper, the data approach method which is a normative juridical approach, how the data being collected, and the way of analyzing.

The chapter II explains regarding the introduction to Indonesian Company Law. The explanation included the definition based on the exiting regulations, the regulations, the types, the establishment of company, as well as the right and obligation of the shareholders. After that, there is an overview regarding Panamanian Company Law. In the end of chapter II, there is an explanation of company in Islamic perspective.

The chapter III of this paper answered and analyzed the problem formulations from chapter I. Firstly, this chapter began by analyzing the first question of problem formulation regarding how exactly is the Indonesian Company Law perspective on shell company. Secondly, the writer tried to analyze what are the responsibilities of shareholders in the shell company based on Indonesian Company Law in comparison with Panamanian Company Law.

On the last chapter (chapter IV) of this paper, the writer gave the conclusion from the research and gave some suggestion related to the legal problem of the topic.

CHAPTER II

AN INTRODUCTION TO INDONESIAN AND PANAMA COMPANY LAW

A. The Indonesian Company Law

According to R. Subekti, a legal entity is essentially an entity or association that can own rights and perform acts such as a human being, and has own property, may be sued or sued before a judge.[40] R. Rochmat Soemitro also argues that the legal entity (*rechtpersoon*) is a body that can have property, rights and duties as individuals.[41] The Company as a legal entity, in principle, the company's property is separate from the property of its founder/owner, therefore legal liability is also separated from the personal property of the owner of a legal entity.[42]

The company is an economic sense that is widely used in business activities. The term company arises then, and commonly referred to as trading, so that at that time, the term commercial law then raised. Commercial law is a special engagement of law that arises from the company's field.

The development of commercial world has led the development of commercial sense which related to the types of business and the business activity. In this development, then raised the company law which regulated in:

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[40] Chidir Ali, *op.cit.*, Page 19.
[41] *Ibid.*
[42] Munir Fuady, *Doktrin-doktrin Moderen Dalam Corporate Law & Eksistensinya Dalam Hukum Indonesia*, Citra Aditya Bakti, Bandung, 2002, Page 2.

a. Indonesian Civil Code (*KUH Perdata*)

b. Indonesian Commercial Law (*KUHD*)

c. And the others regulations.

The company term according to H.M.N. Purwosutjipto was born as the development in the commercial business which then been regulated in Indonesian Commercial Law (ICL). But Indonesian Commercial Code itself does not explicitly formulate what company in trader term and what is its activity between traders.[43]

The company law is a law that regulates the ins and outs of the company's legal form. Company Law is the specialization of several chapters in the Civil Code and KUHD (Codification) along with another legislation which regulating the company (written law that has not been codified).

Company law regulated 2 (two) categories of law which are: the law which regulate the forms of company, and the law which regulate the business activity.[44] The law that regulate the types of company generally including the types of partnership and types of corporation. Partnership including Firma, *Commanditer Vennotschap* (CV). While Corporations including Limited Liability Company and Cooperative.[45]

The form of individual business is the oldest form and most commonly used by entrepreneurs as a means of running business activities.[46] The process

[43] H.M.N. Purwosutjipto, *op.cit,* Page 5.

[44] Agus Sardjono, Yetty K. Dewi, Rosewitha Irawaty, Togi Pangaribuan, *Pengantar Hukum Dagang,* First Edition, Rajawali Pers, Jakarta, 2014, Page 25.

[45] *Ibid.*

[46] William F. Mc-Carty and John W. Bagby, *The Legal Environment of Business,* Irwin, 1990, Page 415.

of forming individual companies is also very simple and does not require certain formalities. For example, someone who wants to trade their own vegetables does not need to come to Notary's office or company registration office. He simply prepared vegetables and vehicles, then he is ready to sell around.

The entrepreneur who wants to run business by inviting his friends, they can choose a form of business partnership like firm or CV. In this form of business, the entrepreneur must share with his friends, whether in management or profit. In the case of execution of obligations or responsibilities, this form of business imposes a burden on all partners according to their own agreement or in accordance with the provisions of law.[47]

Meanwhile, if an entrepreneur wants to run a business, but personally he does not want to engage in corporate responsibility against a third party, they must invite at least one other person to establish a Limited Liability Company (LLC/PT). This form of business is one form of business incorporated. The entrepreneur involved in the management of the company in the form of PT/LLC is personally not responsible for all legal relationships made on behalf of the relevant PT, except for certain conditions.[48]

As a corporation, the establishment of the PT/LLC is relatively more complicated when compared to individual companies or partnerships. All requirements prescribed by law regarding the requirements of its

[47] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit*, Page 26-27.
[48] *Ibid., Page* 27.

establishment must be met. For example, without a Notarial Deed of establishment and without the authorization of a public authority (Minister of Justice) the LLC can not be established. Employers also can not be entirely free to manage their companies because they must also be subject to the rules set forth in the law and the articles of association which already approved by the public authorities.

I. Partnership (Persekutuan)

Partnership law is a set of laws or legal science that studies the forms of cooperation. If it is related with the commercial world, it can be referred to as a commercial association law or corporate law as a commercial business partnership.[49]

The form of business association can be classified into three forms, namely general Civil Partnership (*maatschap* or General Partnership), Firma (*vennootschap onder firma* or Partnership Firm), and Limited Partnership or better known as CV (*commanditaire vennotschap*).[50]

1. Civil Partnership (*Maatschap/Persekutuan Perdata*)

Civil partnership is the equivalent and translation of *burgerlijk maatschap* (private partnership). In common law system known as partnership. Partnership is a basic form of business or business organization.[51]

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[49] Ridwan Khairandy, *Pokok-pokok Hukum Dagang Indonesia*, FH UII Press, Yogyakarta, 2014, Page 25.

[50] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit*, Page 28.

[51] Ridwan Khairandy, *op.cit*, Page 26.

Angela Schneeman defines partnership as an association consisting of two or more persons doing joint ownership of a business for profit. Partnership can also be interpreted as an agreement between two or more persons to include money, labor and expertise into a company, to obtain shared profits in accordance with the agreed share or proportion.[52]

A Civil Partnership (*maatschap*) is an agreement between two or more persons, who promise to include something in the company with the intention that the profits derived from the company are shared among them.[53] Book 7A Title 9 Article 1655 of NBW define partnership as the agreement between two or more parties whose bound themselves by contributing something as mean to profit sharing between them.[54]

There are at least three **elements** from Civil Partnership, which are: **First**, Civil Partnership is Contract means that in a partnership, the contract law and principles will be applied.[55] **Second**, the obligation of each partner is capital contribution (*inbreng*). So that there will be no partner without any contribution. Besides capital (money), the contribution of partners could be in the form of goods, services, skill, knowledge, and others.[56] In another word, contribution

[52] Angela Schneeman, *The Law of Corporation, Partnership and Sole Proprietorship,* Delmar Publisher, New York, 1997, Page 17-18.
[53] *See article 1618 of Indonesian Civil Code.*
[54] Ridwan Khairandy, *op.cit,* Page 26.
[55] *Ibid., Page* 29.
[56] *See article 1619 of Indonesian Civil Code.*

is an absolute element in partnership.[57] And the **third** element, the partnership are established for the purpose of profit sharing, so that in partnership there will be no deal of profit sharing discrimination.[58]

Civil Partnership (*Maatschap*) has been **regulated** under Indonesian Civil Code Book III Chapter VIII from article 1618 to 1652. While in Netherland, the regulation for Civil Partnership are under *Boek 7 Titel 13 Nieuw Burgerlijke Wetboek* (NBW).[59]

Article 1624 The Indonesian Civil Code states that partnership shall enter into force upon the date of the conclusion (deal) of the agreement, if the agreement is not stipulated otherwise. Soekardono argued that in order to **establish** a civil partnership it was sufficiently done orally to reach a consent of the will because the law did not require written terms.[60] Therefor, the establishment of a civil partnership is quite consensual. However, the agreement to establish such a civil partnership shall be in compliance with the terms of the contract as set forth in the Third Book (Obligation) Part Two Section 1320 of the Indonesian Civil Code.

Although based on legal doctrine it is possible to establish Civil Partnership orally, but in relation to other legal matters, especially in subsequent partnership activities, written documents are required

[57] R. Soekardono, *Hukum Dagang Indonesia* (Volume 1 part 2), Rajawali, Jakarta, 1983, Page 41.

[58] *See article 1634 – 1635 of Indonesian Civil Code.*

[59] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit,* Page 33.

[60] R. Soekardono, *op.cit,* Page 43

since these written document has a really strong legal standing before the court. Thus, practically the establishment of a civil partnership still requires a written form, especially for the Firm and CV.

In the case of the internal relationship of a partnership, the chairman of the partnership is the partner itself. As for the appointment of the chairman od the partnership, it is fully authorized and agreed upon among the partners. Agreements can be made by putting them into a partnership agreement (articles of association), or it may also be done outside the articles of association. The appointment of the board as agreed in the articles of association is usually referred to as statutory appointment (*gerant statutaire*), since the agreement is set forth in the statutes of the partnership. The appointment of chairman outside the articles of association or in separate agreements that are separate from the articles of association are usually called mandated appointments (*gerant mandataire*).[61]

The obligation of contribution (*inbreng*) of all partners is an absolute element in the treaty to establish civil partnership in accordance with Article 1618, 1619 paragraph (2), 1625, 1626, and 1627 Civil Code. This income must be met by each partners. Failure to comply with this obligation may serve as a basis for appealing a performance suit to the concerned partners.[62] If there is a partner who contributes something other than money and goods (*zine nijverheid*),

[61] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit*, Page 37-38.
[62] *Ibid*, Page 34.

then it should be explained in such a way what the partnership agreement is entered and how much it contributes.[63]

Based on Article 1619 paragraph (2) Indonesian Civil Code determines that the partners obliged to contribute in the partnership capital. The contribution could be:[64]

1. Money (*geld*); or
2. Goods (*goederen*); or
3. Business or labor (*nijverheid*)

One of the essence of the company is profit-seeking, and loss is also a consequence. Article 1633 of the Civil Code, how to divide the profits and losses should be regulated in the agreement of the establishment of a civil partnership, provided that it is not allowed to give all the benefits to only one partner.[65]

If there is no rule on how to share profits and losses, then the provisions of Article 1633 paragraph (1) of the Civil Code stipulate that the division shall be made according to the principle of "balance" for income, which is calculated proportionally based on the balance of contributions or the income of each partners into the partnership, with income in the form of labor just equal to the smallest money or object.[66]

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[63] *Ibid, Page* 35.
[64] Ridwan Khairandy, *op.cit,* Page 32.
[65] *See Article 1635 paragraph (1) of Indonesian Civil Code (burgerlijk wetboek),*
[66] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit,* Page 40.

The partners in a civil partnership are **not entirely responsible** for the debts of the partnership, and each partner can not bind the other partnership, if they have not authorized him for it.[67] That provision implies that every partners acts only to represent itself. This means that a partner has no right to take legal action on behalf of the Partnership. Other partners who do not enter into an agreement with a third party will enter into the agreement if they authorize the partners acting for it or they have enjoyed the benefits of the agreement. Article 1655 of Indonesian Civil Code stated that in a civil partnership, an agreement created with the third party only bind the concerned partner (the partner who done the agreement).

Based on Article 1642 to Article 1645 of Indonesian Civil Code, the partner's responsibilities in partnership can be explained as follows:[68]

1. If the partner doing a legal relationship with the third party, then the concerned partner will the only one to responsible for the legal actions with the third party, even though it is under the name of the partnership;
2. The action will bind the other partners if:
    a. There is a power of attorney from another partners;
    b. The result of the actions or the profit has been enjoyed by the partnership.

[67] *See Article 1642 of Indonesian Civil Code (Burgerlijk Wetboek)*
[68] Ridwan Khairandy, *op.cit,* Page 40

3. If some partners of civil partnership having relationship with the third party, then the the partners can hold the same responsibilities even though their contribution are not the same, except the agreement has determined each responsibility of each partners;
4. If one of the partner having legal relationship with the third party in the name of partnership, then the partnership can directly sued the third party.

The dissolution of civil partnership is provided in Articles 1646 to 1652 of the Civil Code. Article 1646 of the Civil Code uses the word "*Maatschap eindight*" or the partnership ends.[69]

Article 1646 of Civil Code has determined that a civil partnership will be terminated caused by:[70]

1. The end of the promised time;

   The dissolution of civil partnership held for a certain time in accordance with the time agreed. If the civil partnership is promised to run for 2 years, for example starting from 18 July 1995, then a civil partnership will be terminated by law on 18 July 1996.[71]

   Article 1647 of the Indonesian Civil Code stated that the dissolution of partnerships made for a specified time before that time passes can not be prosecuted by any one of the partners

[69] *Indonesian Civil Code, Book 3, Chapter 8 [ICC Book 3]*
[70] *See Article 1646 of Indonesian Civil Code*
[71] Ridwan Khairandy, *op.cit,* Page 40

except for a valid reason; as if any other partner does not fulfill his duties or if another partner by constantly sick, becomes incompetent to do his work for partnership; or other such legitimate thing as well as importance, then it will be left to the judge to decide.[72]

2. Destruction of objects as the object of partnership or the achievement of the principal deeds of the partnership;

   If one of the partners has promised to include his possession of an item into the partnership, and this thing destroyed before that income is made, then the partnership thus becomes disband against all the partners. As soon as the partnership ended, if the goods are destroyed, if only the enjoyment of the goods is included in the partnership, while the right belongs to the partners. But the partnership does not become dispersed because of the loss of goods whose property has been included in the partnership.[73]

3. Termination by some or one of the partners;

   Based on article 1649 of Indonesian Civil Code, the partnership can only be disbanding at the will of some or a partner if the partnership has been made not for a certain time.

[72] *See Article 1647 of Indonesia Civil Code*
[73] *See Article 1648 of Indonesian Civil Code.*

Dissolution occurs, in that case, with a notice of termination to all other partner, provided the notice of termination occurs in good faith and is not done in a timeless manner.[74]

4. The death of one of the partners or the warship or bankruptcy of one of the partner.

   A civil partnership will be disbanding if one of the partners dies. Civil partnership also disbands if one of the partner with a court decision is declared to be under an aptitude. Similarly, if one of the partner is declared bankrupt by a commercial court, a civil partnership disbanded.

   Article 1651 of the Civil Code explains that if it has been agreed that if one of the partners died, the partnership would take place with his heirs, or would continue among the remaining partners then the promise must be obeyed.

   In the case of this second agreement, the heirs of the deceased partner have no right other than to demand the division of the company according to the circumstances at the time of the death of the partner, he shall be part of the profits but shall also bear the loss of the company which has occurred before the death of the partner leaving the heirs.[75]

   When civil partnership have disbanded, the next step will be a dismissal or liquidation action. The person conducting the

[74] *See Article 1649 of Indonesian Civil Code.*
[75] *See Article 1651 of Indonesian Civil Code.*

liquidation or dismissal is called a liquidator. Who becomes the liquidator of the civil partnership is usually appointed by the articles of association. If the articles of association do not specify the liquidator, the liquidator shall be appointed through the last meeting of partners. If this last meeting does not exist, the last board does it.[76]

2. Firm (*Vennootscha onder Firm*/Firma)

In the Indonesian Commercial Code there is no definition of *vennootschap* or partnership. In the Netherlands, based on Article 800 paragraph (1) Titel 13 Book 7 NBW, defines *vennootschap* as a cooperation agreement with the joint capital of two or more persons, the cooperating partners intend to gain material advantage to be shared with all partners in accordance with their respective income.[77]

According to article 16 of the Indonesian Commercial Code, the partnership with the firm is a civil partnership established to run a company by a joint name.[78]

From the definitions mentioned in Article 16 of the Commercial Code, it can be concluded elements of the Firm's definition, namely:[79]

[76] Ridwan Khairandy, *op.cit*, Page 41

[77] Article 800 paragraph (1) Titel 13 Book 7 of *Niew Burgerlijk Wetboek* (NBW) stated that *vennootschap is de overeenkomst tot samenwerking voor gemenschappelijke rekening van twee personen, de vennoten, welke samenwerking is gericht op het behalen van vermogensrechtelijk voordeel ten behoeve van alle vennoten door middle van inbreng door ieder van vennoten.*

[78] Ridwan Khairandy, *op.cit*, Page 47

[79] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit*, Page 47.

1. *Firm is a Civil Partnership*. Therefore, pursuant to article 1 of the Commercial Code, there shall also apply the provisions concerning the Civil Partnership set forth in the Civil Code with all its consequences.
2. *Firm runs business activities*. Accordingly, the criteria for carrying on business activities as described in the *memorie van toelichting* the abolition of article 2-5 in Commercial Code also apply to firms.
3. *Under a joint name (firm)*, firms in carrying out their business activities by using a common name (firm) as a separate identity shared by partners for their partnership.
4. *Partners responsibilities are personal to the whole*. No one is excluded from the authority of acting and signing the letter to the Firm.

As mentioned before that the Firm is a Civil Partnership, then the process of establishing the Firm is the same as the establishment of the Civil Partnership. The Commercial Code then regulates the formal matters of the Firm's establishment. According to Article 1 of the Commercial Code, it is stipulated that the Commercial Code may also regulate otherwise of those set forth in the Civil Code regarding the same matter, particularly regarding the establishment of the Firm.

The establishment of the Firm is formed by agreement among partners. The Firm's establishment is in fact not bound to a particular form, means that it can be established orally or in writing either by an

authentic deed or private deed. In practice, people prefer the establishment of the Firm by an authentic deed, a notarial deed, because it is closely related to the problem of proof.[80]

According to Article 22 of the Commercial Code, the Firm shall be established by an authentic deed, but the absence of such deed shall not be set forth as a pretext that may harm a third party.[81]

Basically, the Firm is already exist by the agreement among its founders, regardless of how to establish it. According to Article 23 of the Commercial Code, as soon as the deed of establishment is made, the deed shall be registered by the District Court in which the Firm is domiciled.[82] After the deed of establishment is registered at the Registrar of the District Court, the next stage is announced in the State Gazette of the Republic of Indonesia.[83]

The obligation to register and announce is a sanctioned requirement, as long as the registration and announcement have not been executed, the third party may regard the Firm as a public partnership, a partnership that:[84]

a. Running all sorts of affairs;
b. Established for an unlimited time; and

[80] R.T. Sutantya R. Handhikusuma and Sumantoro in Ridwan Khairandy, *op.cit,* Page 49.
[81] *See Article 22 of Commercial Code (NBW)*
[82] *See Article 23 of Commercial Code (NBW)*
[83] Ridwan Khairandy, *Pengantar Hukum Dagang,* First Print, FH UII Press, Yogyakarta, 2006, Page 24-25
[84] *Ibid.*

c. No one is excluded from the jurisdiction of acting and signing letters to the Firm.

Article 17 of Commercial Code stated that: *Every partner, except those unauthorized, has the authority to act, issue and receive money in the name of the Partnership, and bind the Partnership to the third parties, and third parties to the Partnership*. Moreover, the Article also stated that: *Unrelated acts, or which, for partners, by treaty not authorized to enter into, are not included in this provision.*

In principle, all the partners within the Firm are authorized to represent the Firm in legal activities, such as taking corporate actions and taking legal action on behalf of the Firm. Exceptions are granted to partners that are not authorized explicitly in article of association. In other words, not appointed as the management of the Firm concerned. This kind of partner does not have the authority to do the legal deeds that bind the Firm in question.[85]

The responsibilities of a partner in the Firma can be distinguished between internal responsibility and external responsibility.[86] Internal responsibilities of the partners are balanced with the income (*inbreng*). Whereas the external responsibilities of partners within the Firm under Article 18 of the Commercial Code are the personal responsibility for the whole, in which all the partners are responsible for all partnership deals,

[85] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit,* Page 58

[86] Ridwan Khairandy, *op.cit,* page 51.

although made by other partners, including those that arise from unlawful acts.[87]

As a Partnership, the dissolution of Firm is also bound to the Article 1646 to Article 1652 of Civil Code for the dissolution of partnership. Otherwise, the dissolution of Firm is also regulated under Article 31 to Article 35 of Commercial Code.[88]

Article 31 paragraph (1) of Commercial Code stated that the dissolution of Firm before the time specified in the agreement or as the impact of the resignation or dismissal, as well as the extension of time due to the time specified, and amendments to the agreement shall be made by an authentic deed, registered and published in the Additional to the State Gazette of the Republic of Indonesia (*Tambahan Berita Negara Republik Indonesia)*. And paragraph (2) of the same article stated that omission in registration and publication resulting in the non-effectiveness of the dissolution, resignation, or dismissal, or alteration to a third party.[89]

3. Limited Partnership (*Commanditaire Vennotschap/Persekutuan Komanditer)*

[87] *Ibid.*
[88] M. Natzir Said, *Hukum Perusahaan di Indonesia I (Perorangan),* Alumni, Bandung, 1987, Page 167.
[89] *See Article 31 of Commercial Code.*

Article 16 of the Commercial Code states that a *Commanditaire Vennotschap* (CV) is a partnership to run a company formed between one or more partners who bear responsibility solely for all (solidarity responsibility) on one party, and one or more persons as money-lenders (*geldschieter*) on the other parties.[90] The CV settings themselves are inserted in the Firm settings. It can be understood because CV has more than one active partners, so it is also called Firm, especially in relation to the external aspect (third party).

Based on the definition, the structure of CV consists of 2 kind of partners which are *Komandit* Partner and *Complemetary* Partner.[91] The *Komandit* Partner often referred to as "partner who release money" because they are the ones who include money to be use as CV's capital. But the fact that many experts avoid or disagree with the term of "partner who release money" because the interpretation instead makes it as only *Komandit* Partner to include capital. Though CV is also a civil partnership where is the agreement to enter something to share the benefits that occur because of it. Therefore, *Complementary* Partner are also required to enter their capital.[92]

Establishment of CV is not much different from Firma. In general, the establishment of the CV is always by notarial deed. The deed of establishment shall be registered at the Court where the CV is

[90] C.S.T. Kansil, *Pokok-pokok Pengetetahuan Hukum Dagang Indonesia,* Aksara Baru, Jakarta, 1984, Page 81

[91] Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, *op.cit,* Page 61

[92] *Ibid.,* Page 61-62

domiciled. Thereafter, the summary of the deed of establishment of CV shall be published in The Additional State Gazette of the Republic of Indonesia (*Tambahan Berita Negara Republik Indonesia*).[93]

The regular/Complementary Partner has an obligation to put money or goods into the Partnership or to incorporate its power to carry on the Partnership. The Complementary Partner has unlimited liability for losses suffered by the Partnership in its business. The *Komandit* Partner only puts money or goods into the Partnership and is also responsible only for the capital (*Inbreng*) that they include.

In relation to a third party, the *Komandit* Partner does not have an outgoing relationship with a third party, whereas the Complementary Partner has the relationship and can also act not only as a managing partner but also a legal action on behalf of the Partnership with the third party.[94]

As explained before, CV basically is a Firm based on Article 19 to 20 of Commercial Code. Then the regulations regarding the dissolution of CV are also based on Article 1646 to Article 1652 of the Civil Code, with additional to Article 31 to 35 of Commercial Code.

II. Corporation/Limited Liability Company (LLC)

The term Limited Liability Company was formerly known by Dutch term *Naamloze Vennootschap* or NV. While in Indonesian term known as

[93] Ridwan Khairandy, *op.cit,* Page 30
[94] M. Natzir Said, *op.cit*, Page 204

Perseroan Terbatas or PT. The term PT has standardized by people and has been used by various regulations like Law No. 8 of 1995 regarding Capital Market, and Law No. 40 of 2007 as the amendment of Law No. 1 of 1995 regarding Limited Liability Company (*Perseroan Terbatas*) (Indonesian Company Law).[95]

Limited Liability here referring to the responsibilities of the shareholders which limited to the amount of shares that they owned. Article 1 point 1 of Law No. 40 of 2007 stated that "*Limited Liability Company hereinafter known as Corporation shall be a legal entity that is capital partnership, established based on an agreement to perform businesses with authorized capitals that all are divided in shares and has met requirements as stipulated in this Law and its implementing regulations*." And the Limited Liability of shareholders itself has been mentioned in Article 3 paragraph (1) of Law No. 40 of 2007 which stated that "*Company Shareholders shall not be responsible personally on any agreement entered into on behalf of a Company and shall not be responsible on financial damage experienced by a Company exceeded shares controlled by them*."[96]

Book 2 Titel 4 Article 64 Paragraph (1) of NBW defines NV as a Corporation or Legal Entity which established by the transfer of shares which which is divided into the authorized capital wherein the shareholder

[95] Ridwan Khairandy, *op.cit,*, Page 63.
[96] *See Law No. 40 of 2007 concerning Limited Liability Company.*

is not personally liable for any losses suffered by the Company, except only limited to paid-up capital.[97] [98]

As mentioned before, Limited Liability Company (LLC) has been regulated under Law No. 40 of 2007 concerning Limited Liability Company. And from article 1 Point 1, there are at least 5 elements of LLC:[99]

1. LLC is a Legal Entity;

   Basically legal entity is a body which can have rights and obligations to commit an act like a human being, has his own wealth, and is sued and sued before the court. LLC is referred to as an artificial person because it is a human engineering to form an entity that has the same status, position, and authority as humans.

   In law, the legal subject consists of humans (*Natuurlijk Persoon*) and legal entities (*Rechtpersoon*). Since a legal entity is a legal subject, the legal entity is an independent body, regardless of the founder, member, or shareholder. Legal Entity may conduct business on its own behalf, shall pay taxes and apply business permits on behalf of itself.

2. LLC is a Capital Partnership;

[97] Book 2 Titel 4 Article 64 Paragraph (1) of NBW "*De naamloze vennootschap is een rechtperson met een in overdraagbare aandelen verdeelt maatschappelijk kapitaal. Een aandelhouder s niet persoonlijk aansprakelijk voor hetgeen in naam de vennootschap wordt verricht en is niet gehouden boven het bedrag dap op zijn aandeel behoort te wonden gestort in de verliezen van de vennootschap bij te dragen, Ten minste een aandeel wordt gehouden door een ander dan anders dan voor rekening van vennootschap op een van haardochtermaatschappijen.* "

[98] Ridwan Khairandy, *Hukum Perseroan Terbatas*, FH UII Press, Yogyakarta, 2014, Page 3.

[99] *Ibid*, Page 5-62.

Different with the Civil Partnership which consist of two or more persons who know each other personally, doing business in which there is the nature of personality in the Partnership. LLC is a Capital Partnership (*Persekutuan Modal*) in which the main purpose is capital accumulation as much as possible within the time limit specified in the articles of association, does not matter who will enter the capital.

3. LLC established based on agreement;

   Article 1 point 1 of Law No. 40 of 2007 states that the company is a legal entity established under the agreement. This provision means that the company must comply with the provisions stipulated in the Contract Law. So in the establishment of the company, other than subject to corporate law, it also subject to the law of the agreement (contract law).

4. LLC is conducting business activity;

   Since LLC is a Capital Partnership, then the goal of a company is to seek profits as much as possible in the way of doing business activity. According to Article 1 Letter b of Law No. 3 of 1992 concerning the mandatory company registration, company is any form of business that is permanently and continuous and established, working and domiciled within the territory of the Republic of Indonesia for the purpose of obtaining profit. And Article 1 point 2 of Law No. 8 of 1997 concerning Company's Document defines the company as a form of business conducting activities on a regular basis and

continuously with the aim of obtaining profit, whether held by an individual or business entity in the form of a legal entity or non-legal entity, established and domiciled within the territory of the Republic of Indonesia.

5. The capital of LLC consisted of shares.

   In the establishment of company there always be the need of capital. The initial capital of the company are from the separated wealth of its founder. Article 31 paragraph (1) Law No. 40 of 2007 states that the company's capital consists of all of the par value of the shares. The authorized capital is the total nominal value of the existing shares in the company.

Regarding the establishment of the Company is regulated in Chapter II, Part One of Law No. 40 of 2007, which consists of Article 7 -14. Based on UUPT, there are several requirements that must be fulfilled in order to establish a company as a legal entity:[100]

1. Established by 2 (two) person or more;

   This requirement has been regulated under Article 7 paragraph (1) of Law No. 40 of 2007 which stated that ”*A corporation shall be established by 2 (two) persons or more …*”.[101] According to law, the founders (promoters) is the persons who took part intentionally to establish the Company. These people will take all the requirements for

[100] M. Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2016, Page 161.

[101] *See Article Paragraph (1) of Law No. 40 of 2007, “A corporation shall be established by 2 (two) persons or more with notarial deed prepared in Indonesian language.”*

the sake of the company establishment. Since one of the requirement is that the founders of the Company are at least 2 (two) persons, then the legalization as the legal entity can not be made if the founders of less than 2 persons.

2. Establishment in the form of Notarial deed (*Akta van Oprichting, Deed of Incorporation or Articles of Incorporation)*;

   The second requirement regulated by Article 7 paragraph (1) of Law No. 40 of 2007 is how to establish a company must be made "in writing" (*schriftelijk, in writing*) in the form of deed:[102]

   - In the form of Notary Deed (*Notariele Akte*), shall not take the form of an underwritten deed (*underhandse akte*, private instrument);
   - The requirement of the Establishment Act must be in the form of a Notarial Deed, not only as a *probationis causa*. It means that the Notarial Deed not only as the evidence of the agreement of Company Establishment, but it also as the solemnitatis causa, which means that if the company establishment does not have a Notarial Deed, then the company establishment cannot be validated by the Government through The Ministry of Justice and Human Rights. [103]

[102] *Ibid.*
[103] M. Yahya Harahap, *op.cit*, Page 168-169.

3. Made in Indonesian Language;

   Since the Company is an Indonesian Company and under the territory of Indonesia, then the documents needed for its establishment shall be made with Indonesian Language.

4. Each founder must take part the shares;

   Article 7 paragraph (2) of Law No. 40 of 2007 stated that "*Any founder of corporation shall be obliged to take parts of shares when a corporation was established*."[104] Means that, when the founders come to a Notary to make an Establishment Deed, every founder has taken a share of the Company. Subsequently, it is contained in the Deed of Establishment in accordance with the provisions of Article 8 paragraph (2) letter c which requires to contain in the Deed of Founder concerning the name of shareholders who have taken shares of shares, details of the number of shares and the nominal value of the issued and paid up shares.

5. Approval from the Minister of Justice and Human Rights.

   The other requirement of the company establishment, Article 7 paragraph (4) stated that "*A corporation shall obtain a legal entity status on the date of the issuance of Ministerial Decree on legalization of a corporation as a legal entity*."[105]

[104] *See Article 7 Paragraph (2) of Law No. 40 of 2007*
[105] *See Article 7 Paragraph (4) of Law No. 40 of 2007.*

In order for a Company to legitimately stand as a legal entity, it must obtain an "validation/ratification" from the Minister. The validation issued in the form of a Ministerial Decree called the Legal Entitlement Decision of the Company.

Membership of a company is based on the ownership of one or more shares of the company. Each share represents only a small fraction of the total assets owned by a small part of the company. The shareholders do not have a special share of the company's wealth. It wholly owned by the company or the LLC.

The shares issued by the company to the shareholders is “outstanding share”. Capital stock is the collective capital from the founders of the company in the first establishment which divided in stocks, and this capital stock refers to the value received by the company through the outstanding share.[106]

In the beginning of company establishment, the founders have contributed their **capital**, and these capital called “equity”. And after that, the company will issue equity securities in the form of stocks. The shareholders has the obligation to to take the shares in certain nominal as determined by the Law and/or article of association.[107]

Some countries including Indonesia has various kinds of equity shares, which are:[108]

1. Authorized Capital (*maatchappelijk kapitaal*);

[106] Ridwan Khairandy, *op.cit,* Page 105.
[107] *Ibid, 106.*
[108] *Ibid.*

The authorized capital represents the total nominal value of shares in a company determined in the articles of association of the Company, comprising of capital consisting of shares issued by the company along with the nominal value of each of the issued shares.[109]

According to Article 32 paragraph (1) of Law No. 40 of 2007, "Authorized capital of a corporation shall be minimum RP. 50,000,000 (fifty million rupiah)." But there is exception for paragraph (1) based on paragraph (2) on the same Article, "Law stipulates certain business activity may determine minimum amount of capital of corporation that is total amount is more than the provision of authorized capital as determined in paragraph (1)." And paragraph (3) stated that "Modification of total amount of authorized capital as referred to in paragraph (1) shall be determined in Government Regulation."[110]

2. Issued Capital/Paid up Capital (*geplaatst kapitaal*);

   It is the capital that the founders can afford to be paid into the company's finance when the company is established, which determines the correct nominal amount of shares issued by the company.[111]

   Regarding this issued capital, Article 33 of law No. 40 of 2007 has been regulated it, which in paragraph (1), it is stated that "Minimum

[109] Angela Scheeman, *The Law of Corporations and Other Business Organization,* Delmar Cengage Learning, New York, 2013, Page 418.
[110] *See Article 32 of Law No. 40 of 2007.*
[111] Ridwan Khairandy, *op.cit,* Page 109.

25% (twenty five percent) of total authorized capital as referred to in Article 32 must be placed and deposited entirely." According to paragraph (2) of the same Article, "Subscribed capital and deposited entirely as referred to in paragraph (1) shall be proved with legitimate deposit receipt." And on paragraph (3), explained that "Further issuance of shares shall be conducted at any time adding subscribed capital must be deposited completely."[112]

3. Subscribe Capital (*gestort kapitaal*).

   This is the company's capital in the form of cash or any other form submitted to the founder to the company's finances when the company is established.[113]

   Deposit of such capital stocks according to Article 34 paragraph (1) of Law No. 40 of 2007 shall be done in the form of money and/or in other form. According to the explanation of Article 34 paragraph (2), generally the deposit of shares is in the form of money. However, it is possible to deposit shares in other forms, whether in the form of tangible or intangible goods, which can be assessed with money and accepted by the company. The deposit of shares in the form other than money shall be accompanied by details explaining the value or price, types, status, place of residence, etc. as deemed necessary for the clarity of the deposit. And based on paragraph (3) of the same article explained that "Shares deposit in form of immovable goods must be

[112] *See Article 33 of Law No. 40 of 2007.*
[113] Ridwan Khairandy, *op.cit,* Page 110-111.

announced in 1 (one) newspaper or more, within 14 (fourteen) days as from the establishment deed is signed or as from RUPS decides such shares deposit."

Shares represent the amount of money invested by an investor in a company, whose profit from the Company in the form of dividends is proportional to the amount of money invested.

Shares are personal property of shareholders in the form of intangible movable property, but can be transferred. Therefore, shareholders may sell their shares in pledge or fiduciary. So that all the rights attached to the shares in the packet switch to the recipient of shares.[114]

As a member of the company, the shareholders basically have no interest in the management of the company's assets. His position is only a shareholder and has limited roles such as:

1. Participated in the General Meeting of Shareholders (GMS);
2. Rights for dividend;
3. Participated for the remaining assets of the company after liquidation.

The shareholder is not responsible for any contracts and transactions made by the company, and only responsible for the company's debt as much as its amount of shares.

[114] M. Yahya Harahap, *op.cit,* Page 257.

Every shareholders have the right to attend the General Meeting of Shareholders/GMS (*Rapat Umum Pemegang Saham*). Law No. 40 of 2007 has regulated regarding GMS in Chapter VI Article 75 to Article 91.

Article 1 point 2 of Law No. 40 of 2007 stated that GMS is one of the bodies in a Company (LLC). And based on Article 1 letter 4, GMS or Shareholders' General Meeting, hereinafter known as RUPS, shall be a Corporation element that has authority that is not provided to the Directors and Board of Commissioners within a period determined in this Law and/or Article of Association.[115]

As the General Meeting of Shareholders, based on Article 76 paragraph (1), the GMS is organized in a domiciled of Corporation or in a place where a Corporation perform its core business activities as determined in article of association. For Public Limited Company, the GMS may be organized in a domicile of stock exchange house where its shares is registered, and all these meetings must be within territory of the Republic of Indonesia.[116]

The GMS also can be held through electronic media as long as it is fulfilled the requirements under Article 77 of Law No. 40 of 2007.

Article 138 to Article 141, Chapter IX of Law. 40 of 2007 contains provisions on the examination of the Company. The

[115] *See Article 1 Chapter 1 (General Provisions) of Law No. 40 of 2007.*
[116] *See Article 76 of Law No. 40 of 2007.*

examination of the company may be conducted for the purpose of "obtaining data" or "obtaining information, as required by the "allegation" (*vermoeden, presumption*):

a. The Company engages in unlawful acts that harming shareholders or third parties;
b. Members of the Board of Directors or the Board of Commissioners conduct unlawful acts that harm the Company or its shareholders or third parties.

If any suspected allegations are made to the company, board of directors, board of commissioners, shareholders or other parties may request to the Court to be examined against the Company.[117]

The dissolution of company is regulated under Chapter X of Law No. 40 of 2007 on Article 142 to Article 152. LLC or Corporation dissolution shall be occurred:[118]

a. Based on a Decision of GMS;
b. Due to the time expiration based on article of association;
c. Based on the court order;
d. By revocation of insolvency based on the commercial court judgementt hat has final legal binding force, insolvent properties of a corporation are inadequate to pay insolvent expenses;

[117] M. Yahya Harahap, *op.cit,* Page 526.
[118] *See Article 142 of Law No. 40 of 2007.* Chapter X has mentioned the way of Corporation Dissolution, Liquidation, and Termination of Legal Entity Status of Corporation.

e. Due to insolvent properties of a corporation that has been bankrupt are under insolvency as stipulated in Law concerning Bankruptcy and Debt Moratorium; or

f. Due to revocation of business license of a corporation that requires a corporation shall conduct liquidation based on prevailing laws and regulation.

Based on Article 143, the dissolution of the corporation shall not cause a corporation loses its legal entity status until its liquidation is completed and responsibility of liquidator is accepted by the GMS or the court. And as from his dissolution, in any newspaper mentioning a corporation shall be stated a word "being liquidated" at the back side of the corporation's name.[119]

After that, within no later that 30 days since the date of dissolution, a liquidator shall be obliged to notify all creditors on dissolution of a corporation by announcing this dissolution in newspaper and State Gazette of the Republic of Indonesia, and also, notifying the dissolution of this corporation to the Minister to be registered in the list of company that a corporation is in liquidation.[120]

Article 142 paragraph (2) letter a, of the Company Law stipulates that after the dissolution of the company either because it is dissolved by the GMS, by the determination of the court, or based on the commercial court decision under the Bankruptcy Law and the

[119] *See Article 143 paragraph (1) and Paragraph (2) of Law No. 40 of 2007.*
[120] *See Article 147 paragraph (1) of Law No. 40 of 2007*

Postponement of Debt Payment Obligations, shall be followed by the appointment of a liquidator or curator. The appointment depends on who conducts the dissolution. Paragraph (3) shall then determine, in the event of dissolution under a GMS decision, the term of establishment established in the articles of association has expired or with the revocation of bankruptcy under a commercial court ruling and the GMS not appointing the liquidator, the director acting as the liquidator.[121]

In the matter of dissolution happened by the revocation of bankruptcy, Article 142 paragraph (4) determine that the commercial court at the same time deciding the curator's dismissal by referring to bankruptcy law and postponement of debt obligation.[122]

B. The Panamanian Company Law

Panama's economy generated an annual growth of over 6% during the period between 1950 and 1981, but then stagnated at 1,9% per year during 1977-1987 which caused by the result of the second oil crisis and debt.[123] Panama itself located in Central America, bordered to the North with the Caribbean Sea, to the South by the Pacific Ocean, to the East by the Republic of Colombia and the West with the Republic of Costa Rica, while the capital

[121] *See Article 142 paragraph (2) to paragraph (6) of Law No. 40 of 2007.*
[122] *Ibid.*
[123] PricewaterhouseCoopers, *Doing Business: A Guide for Panama*. Available online at www.PwC.com/interamericas, 2013, Page 17.

is in Panama City.[124] Panama is a constitutional republic in which its legal system are based on civil law system, judicial review of legislative acts in the supreme court of justice, accepts compulsory ICJ jurisdiction, with reservations.[125]

Panama which offering an almost "zero tax base" for its corporations are governing corporate by legislation under Panamanian Corporation Law No. 32 of 1927 and the Commercial Code.[126]

The Panamanian law recognizes 5 different forms of legal entities:[127]

1. Corporations or Stock Company *(Sociedad Anonima)*

   Companies incorporated in accordance with the Law and limited by shares.
2. Limited Liability Company (*Sociedad de Responsabilidad Limitada*)
3. General Partnerships/Civil Partnership (*Sociedad en Nombre Colectivo*)

   A partnership with legal personality, which mostly popular with lawyers;
4. Ordinary Limited Partnership/Comandite Company (*Sociedad en Comandita Simple*)

   A hybrid of a partnership and a company;
5. Joint – Stock Company (*Sociedad en Comandita por Acciones*)

Most of times, in Panama, the investor operate business as corporations (company), partnership or sole proprietor. But establishing corporations is the

[124] *Ibid.*
[125] The Document of bizserve Consultant LTD. *Panama.* Available online at http://www.bizserve.eu/files/9813/7760/3277/Panama.pdf, accessed on April 2, 2018, 10.53PM.
[126] *Ibid.*
[127] PricewaterhouseCoopers, *op.cit,* Page 21.

popular one since the Panama Government provided a not-so-complicated procedures and there are a lots of legal firm in Panama offering services in establishing a company there.

Moreover, the foreign companies may establish branches or agencies in Panama and there are 2 must file document for the registration to The Public Registry in Panama, which are: Branch and/or Permanent establishment, and Joint-venture contract documents. In the company **establishment**, the procedure are based on the commerce's code and the special rules governing LLC's or corporations.[128] In accordance to the law, the document will be drafted by the practicing attorney which appointing subscribers and approving the incorporation by laws, which make them as an official representatives.[129] These local attorney then will get the deed ready and there is no obligations for the foreign investor coming to Panama to sign it, while the board and shareholders can be either nationals or non nationals, individuals or juridical entities.[130]

In the matter of incorporation, the procedures of corporation establishment are under Law No. 32 of 1927, Section I Article 1 to Article 18. Article 1 of that Law stated that in order for the establishment, there shall be two or more persons with any nationality, although not domiciled in the Republic of Panama, may incorporate a corporation for any lawful purpose.[131]

[128] *Ibid,* Page 22.
[129] *Ibid.*
[130] *Ibid.*
[131] *See Article 1 of Panamanian Company Law, Law No. 32 of 1927.*

Similar to the establishment of company worldwide, there shall be an article of association submitted in the beginning of its establishment (under Article 2 of Law No. 32 of 1927).

Based on Law No. 32 of 1927, there are two (2) minimum shareholders, and since the incorporations requires two founders, each shareholder entitled to at least one shares and there is no minimum of capital requirements.

As a matter of facts, establishing company in offshore havens including Panama known to be easy, fast, and effective immediately. It has been reported by PricewaterhouseCoopers Firm that the incorporation in Panama takes one day (24 hours), while the incorporation of branches may take longer, but no more than three days on average.[132]

Panama has one of the best anonymous corporation laws in the world since 1927, with over 500,000 corporations and foundations have their domicile in Panama, making Panama as the second largest offshore business centre behind Hong Kong.[133] Many entrepreneurs around the world protect their asset by establishing Panama Corporations since it offer global asset protection, privacy and investment diversification.[134]

Establishing a corporation especially in offshore haven is one of the global asset protection which can be used for international trade, to hold offshore bank accounts, and to own real estate and other asset outside the

[132] *Ibid.*

[133] The Document of Panama Offshore Legal Services, *How to Protect Your Assets Offshore*, 2013, Page 21.

[134] *Ibid.*

home country. With the easiness, fast, and affordable in its establishment, the corporation owner does not have to present in Panama and the process can be completed in just a few days. The best feature in Panama Corporations Law is that the ownership will stay anonymous and most of the corporations owner will prefer using anonymous ownership rather than being on record as the owner of the corporation.[135]

A nominee directors and officer are another form of anonymous ownership where the law firm's employees act as the directors and officer, so the real owner will never be reveal.

By having a registered corporation, the entrepreneurs can open a bank account in Panama and take advantage to Panama's bank secrecy laws which has a really strict protection. Besides, no business or commercial license is required unless the entrepreneurs sell products or services inside Panama, while the corporate seal is not required either.[136]

The most of it all is tax savings in which Panama does not have tax income earned outside the country. The Panama Offshore Legal Services has listed the tax savings in panama, such as:[137]

- No capital gains tax resulting from the purchase & sale of securities outside of Panama. If the corporation buys and sells stocks & commodities using a non-Panamanian stock or commodities market: there will be no capital gains tax.

[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*

- No taxes on bank interest income. So the corporation can open a savings account or certificate of deposit tax free in any bank.
- No taxes on issuance of corporate shares. Investor can contribute funds tax free lieu of being issued shares in the corporation.
- Dividends paid to shareholders derived from income outside of Panama will be tax free.
- Flat annual franchise tax of only $300 is paid to the Panama government so the corporation remains in good standing.

Currently, lots of investor has established a corporation in Panama since Panama has one of the most anonymous corporation laws in the world, as well as as one of the strictest bank secrecy laws worldwide. By using this advantages, the investor established the corporation then applying these special laws of Panama, so that no one can know who is the real owner of the corporation as well as the asset. The corporation will be using *Nominee* directors and officers as the representative of the corporation in documents record.

C. The Islamic Perspective on Company

The business problem is the universal life activity for mankind. Humans doing business activities no other to meet the basic demands in life that cannot be postponed, such as clothing, food, and so forth. Even to improve the quality of life, humans are not only pursuing the essentials, but also the secondary, tertiary, and so on. This is reflected in today's modern era that demands the need, as well as the higher quality of life. Even modern humans

today demand more life needs than that. This phenomenon can be observed in the need of communication and transportation equipment is increasingly diverse and increasingly sophisticated that began loved by the wider community that was indeed very helpful for human in all activities including business activities.

Business activities in the broadest sense are all forms of business undertaken by human beings, whether in material or non-material, intellectual or physical, as well as matters relating to life or after life. Al-Quran which is the main source of Islamic teachings, in which much talked about verses about aqeedah and *iman* followed by verses about work.[138]

In the Qur'an, there are many verses about work. A total of 602 words,[139] in various forms, among others, there are 22 words 'charity' (working), as his word which means:

مَنْ عَمِلَ صَٰلِحًا مِّن ذَكَرٍ أَوْ أُنثَىٰ وَهُوَ مُؤْمِنٌ فَلَنُحْيِيَنَّهُۥ حَيَوٰةً طَيِّبَةً ۖ وَلَنَجْزِيَنَّهُمْ أَجْرَهُم بِأَحْسَنِ مَا كَانُوا۟ يَعْمَلُونَ ﴿٩٧﴾

" Whoever does righteousness, whether male or female, while he is a believer-We will surely cause him to live a good life, and We will surely give them their reward [in the Hereafter] according to the best of what they used to do." [QS., an-Nahl, 16:97]

[138] Muhammad Djakfar, *Hukum Bisnis: Membangun Wacana Integrasi Perundangan Nasional dengan Syariah*, UIN-Malang Press, Malang, 2009, Page 116. In Al-Ikhlas, there are some verses about *iman* with good deed.

[139] Al-Khayyath, Abdul Aziz, *Etika Bekerja dalam islam*, ter. Moh. Nurhakim, Gema Insani Press, Jakarta, 1995, Page 13.

This verse of Al-Quran defined working as a good deed, and for those who do good, then Allah will bless them with reward which more than they have done. So it means that, when some has done working as hard as they can, then Allah will reward it with lots of fortune.

In this connection in a hadith narrated by Al-Bukhari affirmed, "*No one food is eaten by a person better than the food of his own business."*[140] Furthermore still in terms of how high the value of work in the Islamic view, Umar bin Khattab states "*If I die between my legs working for the grace of Allah swt, which is more better than died or killed as mujahid fi sabilillah*".[141] [142]

In the literature of *(maraji')* fiqih, or the Islamic economy both conventional *(salafiyah/qadimah)* and modern *(khalifiyah/'ashriyah)* can be found some kind of business that has been institutionalized among Muslims worldwide.[143] The permissibility of Muslims to do various fields of business by law, among others, can refer to the rules of *fikhiyah* which states

[140] *Ibid., Page* 20.

[141] Muhammad Djakfar, *op.cit,* Page 117.

[142] Mujahid is someone who jihad fi sabilillah and attack and fight against the enemy, then either he finally killed or open the way of victory for his colleagues and defeated their enemies, while he did it because Allah ta'ala said: "*Indeed, Allah has purchased from the believers their lives and their properties [in exchange] for that they will have Paradise. They fight in the cause of Allah, so they kill and are killed. [It is] a true promise [binding] upon Him in the Torah and the Gospel and the Qur'an. And who is truer to his covenant than Allah? So rejoice in your transaction which you have contracted. And it is that which is the great attainment."* [At-Taubah 9:111). While *Fisabilillah* is a person struggling in the way of Allah in the broadest sense in accordance with fiqh scholars. The point is to protect and nurture religion and to elevate the phrase of *tauhid,* such as fighting, preaching, trying to apply Islamic law, rejecting the slanders caused by enemies of Islam, stem the flow of ideas that are against Islam.

[143] Muhammad Djakfar, *op.cit.* Page 118.

"Basically, all forms of *muamalah* may be done, unless there is a proposition that forbid it".[144]

In principle, Muslims are given the freedom to do business in various forms to meet the needs of life as long as the law does not prohibit it. If there is a law that forbids because there is a certain *illat* (reason), it is certainly the business should not be done by anyone. A company whose main business of producing liquor (*khamr*) or a kind of additive drugs for example, is clearly prohibited in Islam because the goods produced can damage the mental and public health. Similarly, night club business is not allowed in Islam because its impact on society is no less exciting with the impact of drinking and drugs.

But in the development of the modern world, alongside with economic progress in different parts of the world, however, Islam must be able to accommodate contemporary economic institutions. In this case, Islam can adopt, modify, and then legitimize the model of the institution to be recognized as The Legal Forms of the Islamic Business Enterprise. Concrete examples that can be found include banking institutions for conventional banking system. In conventional banking system, there are some aspects in transactions like ideas and production that opposite with shariah because the conventional banking system contains elements of usury. Therefore, there is a need for a review so that justice can be felt by all parties. In the end, the non-recurring banking system was born in Indonesia, among others: Bank Muamalah Indonesia with its various products based on sharia, and after that,

[144] Tim Penulis Dewan Syariah Nasional Majelis Ulama Indonesia, *Himpunan Fatwa Dewan Syariah Nasional,* Dewan Syariah Nasional Majelis Ulama Indonesian dan Bank Indonesia, Jakarta, 2003, Page 70.

the shariah banking institution are emerging in Indonesia like. BNI Syariah, BTN Syariah, Bank Syariah mandiri, and others.[145]

In the modern economic system, there is a form of business called the Company or in Islam known as *Shirkah*. The company in the capitalistic system is a transaction that because of this transaction, two or more people each bound to give shares in a capital-intensive project, by providing investment, either in the form of property or work in order to get the revenue sharing from the project, either in the form of profit (dividend) or loss.[146]

The forms of business in Islam can be classified into three groups, namely Privat Enterprise (Tijaratun Fardiyah), Perseroan (Syirkah), and The State's Business Enterprise.[147]

a. Privat Enterprise (*Tijaratun Fardiyah*)

Islam justifies the existence of private property through a legitimate business. Islam also values and gives the owners a competence to take the initiative in the development of the business It's just that in private ownership in Islam "not infinite/unlimited", because all of it is essentially belongs to Allah swt and is his mandate to man. This is different from the capitalistic system that raised the distance between the rich and the poor. As a result, there will be sovereignty to consumers, tyranny of the price system and the pursuit of profit, by manipulating nature and humans.

[145] Muhammad Djakfar, *op.cit.* Page 119.
[146] Taqiyuddin An-Nabhani, *Membangun Sistem Ekonomi Alternatif: Perspektif islam,* Penerbit Risalah Gusti, Surabaya, 1996, Page 168.
[147] Muhammad Djakfar, *op.cit.* Page 122.

Therefore, Islam makes the signs that the owner of the company does not damage the natural environment and harm humans, either directly or indirectly.

b. Perseroan (*Syirkah*)

According to Mahmud Syaltut, *syrikah* is something new because it have not been known by *fuqaha* in ancient time which divided *syirkah* in some kinds:[148]

1. *Syirkah 'abdan,*

   This is a cooperation between two or more persons to undertake a business in which the outcome/wages are shared between them by agreement, such as the convection business, the building, and so forth. Abu Hanifah and Malik are allow it, while Syafi'I is prohibit it.

2. *Syirkah muwafadhah,*

   This is a cooperation between two or more persons to undertake a business with the capital of money and services with the same conditions of capital, religion, have the authority to do legal deeds and each is entitled to act on behalf of *syirkah*. The *Imam mazhab* has prohibited this kind of *syirkah,* except for Abu Hanifah whose allow it.

3. *Syirkah wujuh,*

[148] *Ibid, Page* 123.

This is a cooperation between two or more persons to buy something without a capital of money, but only based on the trust of the businessman by profit sharing agreement (the profit shared based on their respective parts).

4. *Syirkah inan,*

   This kind of cooperation between two or more person in capital for doing business based on profit and loss sharing in accordance with the respective capital.

5. *Syirkah Mudharabah or Qiradh*

   This cooperations between parties will share its profit based on the agreed portions, but if there is any looses, it will not be subjected to the *syirkah* members, but being returned to the *syara'* law.[149]

6. *Mussaqqah*

   This is a *syirkah* in which the owner of the garden will give the maintenance rights of his garden, while the result of the garden will be shared based on *akad.*

Furthermore, for the dissolution of *syirkah. Syirkah* is the transaction in which in *syara'* is *mubah.* Therefore, *syirkah* is nullified by the death of one of the transactors, or one of them is insane, or controlled by another because of his ignorance or because one of them dismissed it.[150] And if one of the parties (in *syirkah* relations) demanding dissolution,

[149] *Syara' Law is a set of rules in Islam, shown by Allah Almighty who is revealed to the Prophet Muhammad as his apostle which must be followed by every Muslim based on belief and morals both in relation to God, man or his environment.*

[150] Muhammad Djakfar, *op.cit.* Page 126.

then the other party must meet these demands. If they are composed of several parties, then one of them demand dissolution, while the other is still willing to continue the *syirkah*, then the other status remains as the party bound to *syirkah*. And there is a possibility that the *syirkah* needs to be renewed.[151]

c. The State's Business Enterprise

State-owned companies in the history of Islam emerged initially on landlords following their losing leaders, and eventually the land that left behind was taken and overrun by the Islamic government as a victorious group in war.[152] Furthermore, the land is used by the state for the benefit of the state in terms of economic improvement. The land is cultivated by the small community as an agricultural enterprise. Enterprises like this continue to grow until the Umayyad period.[153] And now the great role of this country can be seen in some parts of the Islamic world.

Based on the number of owners, according to applicable state legislation, a company may be classified as a sole proprietorship and partnership company. Sole Proprietorship are established and owned by one entrepreneur. This is what *Tijaratun Fardiyah* means in Islamic law. Partnership companies are established and owned by several

[151] *Ibid.*
[152] *Ibid., Page* 127.
[153] El-Ashker, Ahmed A. Fattah, *The Islamic Business Enterprise*, Croom Helm, London, 1967, Page 69.

entrepreneurs who work together in a partnership in Islamic law called *Syirkah*.

While based on the status of ownership, the company is classified into private companies and state enterprises. Private company is a kind of company that is owned by private party (community). And the state company is a company controlled and owned by a state, commonly called as State-Owned Enterprises (SOEs).

The Aims of Company in Islam

In classical economic law applies the motto: "seek maximum profit with the least cost". Understanding this slogan its logical consequence, born what is known by the motto *homo homini lopus* which means that one human being werewolf from another human.

This is not the case in Islam. An Entrepreneur according to Islam generally should be oriented to the demands of *syara'* which comes from the principal on the Qur'an and hadith which there are several principles, namely:

1. *Tasamuh* (Principles of Equations and Tolerance)

   All human beings or all parties in connection with the enterprise, whether the employer (manager), laborer, producer to consumer have the same position before the law (islam). And for that, they must be careful (*ikhtiyad*) and to respect others in carrying out their respective functions by sticking to the applying values and norms. Otherwise, without exception, they will be subject to sanctions.

2. *'Adalah* (Justice)

   A producer should employ workers (subordinates) by giving wages or other rewards (compensation) fairly and proportionately. Similarly, to the consumer, among others how to order the quality of production (goods) in accordance with the standard price so that the feel not harmed materially and gain satisfaction.

3. *Ta'awun* (Principle of Mutual help)

   In this principle, there is the need of an awareness from every parties, since in the business, one party (producer) will help another party (consumer), and vice versa.

Muhammad Nejatullah Siddiqi, in his book, The Economic Enterprise in Islam, formulates corporate goals as the goal of economic activity.[154] The objectives of a company according to Islam can be summarized as follows:

1. Meet the necessities of life;
2. Meeting family needs;
3. Meeting long-term needs;
4. Providing the needs of the abandoned families;
5. Provide social assistance and donations in the way of Allah swt.

The purpose of economic activity is directed to meet the self's need without exaggeration before fulfilling the demands (obligations) on the family, both in short and in long term. And then it will be expands to external

[154] Muhammad N. Siddiqi, *Kegiatan Ekonomi Islam,* Translator: Anas Sidik, Bumi Aksara, Jakarta, 1991, Page 3.

interests of social interest and fight in the way of Allah swt. In this case it is intended that every entrepreneur as a businessman must realize that the profit the company earned is essentially a faith and belongs to Allah swt. And as a faith, it is expected that the property (*mal*) has a social function that must be submitted to the rightful targets (*mustahiq*) in accordance with the instructions of the *Shari'a*. Thus, the wealth does not accumulate for the domestic (internal) interest of the property owner. But there needs to be a balance-*tawazun* with social (external) interests, so the gap will not happen.

Islam emphasizes that work is not only a social obligation (*insaniyah*), but also a *syar'i* (*uluhiyah*) obligation. Therefore, every person (Muslim) who acts as a businessman/entrepreneur means that he must implement two obligations at once. In working to meet the needs of his life, Islam gives freedom to the people to choose the profession according to their choice, interests, and ability. Among others, is through the business world by opening various types of businesses, one of them by establishing a company or *syirkah*.

On the other hand, Islam reminds that in establishing a company, part of the profits earned must be utilized to meet the interests of self, family, and society to achieve prosperity (*falah*) in ridla of Allah swt.

CHAPTER III

THE LEGAL CONSTRUCTION OF SHELL COMPANY IN THE PERSPECTIVE OF INDONESIAN COMPANY LAW

(Case Study: Panama Papers)

News about the investigation of "Panama Papers" led by the International Consortium of Investigative Journalist (ICIJ) and *Suddeutsche Zeitung* has been discussed since this 2.6 terabyte document is known to come from a leaked document from a law firm named Mosseck Fonseca & Co. (MF). The document revealed the practice of asset concealment and tax evasion that allegedly carried out a number of entrepreneurs, politicians, and also the state officials around the world including from Indonesia.[155]

Another interesting point is how to practice asset concealment and tax evasion mode by establishing a 'shell corporation' in countries known as Tax Haven. Panamanian law firm has been mentioned to have expertise in establishing a shell corporation.

The term shell company is actually a term for a company that is legally exist but commercially passive. Indeed, shell company is generally an ordinary company. Most entrepreneurs use shell company as a start-up company[156]. The shell company legally exists but has no business activity in it (vacuum). There are so many companies that have already registered but not yet active, even it already

[155] International Consortium of Investigation Journalist (ICIJ). *Panama Papers: The Power Players.* Available online at https://www.icij.org/investigations/panama-papers/the-power-players/, accessed on March 26, 2018, 2.25AM.

[156] *a startup company, according to Steve Blank, is an organization formed to search for a repeatable and scalable business model*.

has NPWP (Nomor Pokok Wajib Pajak), however the tax return is zero because there is no activity. Shell companies should not only be overseas or in tax haven country. In Indonesia, many companies are actually can be categorized as shell companies. Whether it is a start-up or a suspended company. Unfortunately, the term shell company itself is not recognized under Indonesia Law, especially under Indonesian Company Law.

As a matter of fact, the practice of shell company itself are known by entrepreneurs in Indonesia, especially for the multinational corporations, even though it is not regulated under Indonesian Law, but still, the characteristics of shell company are happening to be exist in some Indonesian Companies.

A. The Shell Company in The Perspective of Indonesian Company Law

Previously, foreign investment were made by individuals or groups of loosely organized associates venturing abroad to make quick profits.[157] While nowadays, the new types of investment made by the multinational corporations are intended to last for a long period of time. Moreover, the law which focuses on the protection of the individual or group individual, then focuses on the process of investment made by the multinational corporations.[158] The multinational corporations seek to enter the investment with the state agencies or entities in many developing countries.

In Indonesia, in the present time, many of the companies take advantage of the principle of Limited Liability. In utilizing this principle, a Company

[157] M. Sornarajah, *The International Law On Foreign Investment,* Third Edition, University Press, 2010, Page 60.
[158] *Ibid.*

may establish a "Subsidiary Company" to run a "Parent Company" business. Thus, in accordance with the Separation Principle and Distinction Principle which known as the "separate entity", the assets of the Parent Company with the Subsidiary are "isolated" against the potential Loss that will be experienced by one of them.[159]

The Group Company can be found, consisting of a number of even hundreds of Company as a Subsidiary (*Perseroan Anak*). These Holding Companies or Parent Company are most likely not active in business or trade activities. It is just that the shares are invested in various Subsidiaries, and then the Subsidiary Companies will conduct the business activities or vice versa. The Subsidiary then establishes another Subsidiary Company. Under such conditions, there is sometimes no separation and distinction about the existence of the economy and assets, employees or segregation of business and the Board of Directors between Holding Company and Subsidiary Company. However, the Company Law still treats the subsidiary company as a separate company.

The Indonesian Company Law No. 40 of 2007 does not explain or govern the provisions concerning the Company Group or the Holding Company. Practically, there are so many Indonesian companies that implement such practices in the framework of investment and business extension.

[159] M. Yahya Harahap, *op.cit*, Page 49.

Prior to the amendment of Law no. 40 of 2007, there was Law no. 1 of 1995 on Limited Liability Company. In Article 29 of the Law states that on paragraph (1) "The Company is prohibited from issuing shares for its own." In addition, on paragraph (2), it is stated that the prohibition of share ownership as referred to in paragraph (1) shall also apply to a subsidiary of shares issued by its parent company.[160]

In principle, the issuance of shares is an effort to collect capital, then the obligation to deposit the shares should be charged to other parties. The Company shall not issue shares for its own. The prohibition includes a prohibition on cross-ownership which occurs when the Company has shares issued by another Company that owns the Company's shares, either directly or indirectly.[161]

Law No. 1 of 1995 concerning Limited Liability Company (before it was amended with Law No. 40 of 2007), in its Explanation Part of Article 29, explained that in principle, the issuance of shares is an effort to collect capital, then the obligation to deposit the shares should be charged to other parties. For the sake of certainty, this Article specifies that the company may not issue shares for its own.[162] There is another explanation that has been deleted or has been changed after amendment, which is:

"... Larangan memiliki sendiri saham yang dikeluarkan suatu induk perusahaan berlaku juga bagi anak perusahaan."

[160] *See Article 29 of Law No. 1 of 1995 concerning Limited Liability Company.*
[161] *See The Explanation of Article 36 paragraph (1) of Law No. 40 of 2007*
[162] Similar to the explanation of *Article 36 paragraph (1) of Law No. 40 of 2007.*

"Larangan bagi anak perusahaan memiliki saham yang dikeluarkan oleh induk perusahaan didasarkan pada pertimbangan bahwa pemilikan saham oleh anak perusahaan tidak dapat dipisahkan dari pemilikan oleh induk perusahaannya."

"yang dimaksud dengan 'anak perusahaan' adalah perseroan yang mempunyai hubungan khusus dengan perseroan lainnya yang terjadi karena:

a. *lebih dari 50% (lima puluh persen) sahamnya dimiliki oleh induk perusahaannya;*
b. *lebih dari 50% (lima puluh persen) suara dalam RUPS dikuasai oleh induk perusahaannya; dan atau*
c. *kontrol atas jalannya perseroan, pengangkatan, dan pemberhentian Direksi dan Komisaris sangat dipengaruhi oleh induk perusahaannya.*[163]

Others than what already explained again by Article 36 of Law No. 40 of 2007, in the explanation of Article 29 of Law No. 1 of 1995, there are *prohibitions* of owning shares issued by a parent company which actually also applied to subsidiaries. These are based on the consideration that the

[163] *See The Explanation of Article 36 paragraph (1) of Law No. 40 of 2007*

ownership of shares by a subsidiary cannot be separated from the ownership by the parent company.

The Article explained that Subsidiary Company means a company that has a special relationship with another company that occurs because whether more than 50% of its shares are owned by the parent company and/or more than 50% (fifty percent) of the votes in the General Meeting of Shareholder are controlled by the parent company as well as if the control over the course of the Company, appointment and dismissal of the Board of Directors and Commissioners influenced by the parent company.[164]

M. Yahya Harahap in his book explained that the Article 29 of Law No. 1 of 1995 which has explained about Subsidiary Company are actually similar to the Section 736 and 736A of British Company Act 1989:[165]

144

"Subsidiary", "holding company" and "wholly-owned subsidiary".

(1) In Part XXVI of the Companies Act 1985 (general interpretation provisions), for section 736 substitute—

736

"Subsidiary", "holding company" and "wholly-owned subsidiary".

(1) A company is a "subsidiary" of another company, its "holding company", if that other company—

[164] *Ibid.*
[165] M. Yahya Harahap, *op.cit*, Page 52.

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,

or if it is a subsidiary of a company which is itself a subsidiary of that other company.

(2) A company is a "wholly-owned subsidiary" of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

(3) In this section "company" includes any body corporate.

Even though Law No. 40 of 2007 does not explain and give further explanation regarding the Subsidiary Company, but the definition of subsidiary company which previously explained by Law No. 1 of 1995 is nearly the same (similar) to the Section 736 and 736A of British 1989 Company Act.[166]

Shell company itself is a name for an active company but looks like it does not appear to have any business or asset activity, these companies generally

[166] *British 1989 Company Act regulated and redefinition regarding Holding and Subsidiary Company. The redefinition happened as the general Concept of Group Company as the way to accommodate the European Community (EC) program.*

operate as investment company or takeover companies. Shell companies do not always associate with illegal or unlawful businesses, as they are often useful for potential startups. In addition, they can act as tax evasion for legitimate businesses.

Referring to the explanation above, the shell company which mentioned in Panama Papers, under Indonesian Company Law, can be categorized or similar subsidiary company. Because based on Panama Papers case, the practices of the establishment of shell companies which mostly in the form of Limited Liability Company/LLC there, have the purpose to protect the assets of the *benefical* owner of the company by doing investment. It was done because this tax havens countries have been offering lots of conformities in establishing a company which gives the investor around the world benefits.

The company in Indonesia especially a multinational corporation (MNC) can invest by establishing the shell company in the form of LLC at offshore havens under the name of *Nominee.* After that, the company can protect their assets by allocating it to their new subsidiary company (the shell company) in Panama. The company (based in Indonesia) then will buy/own 50% or more of the shares from that shell company and became the majority shareholder (the parent company).

As a matter of fact, Panama as host-country has provided at least five types of companies that can be established by the investor[167], and the most popular one is in the form of Limited Liability Company or in Indonesia is

[167] *See Chapter II of this Paper, page 53.*

Perseroan Terbatas/PT. As previously explained, the tax havens have been the favorite places to invest, especially in its direct investment since the establishment of company is really easy and quick. There are few complicated requirements, and even the establishment of company can be done in 24-hours.

If we considered the shell company as subsidiary company, then it will be in the form of Limited Liability Company/*Perseroan Terbatas.* Both Panamanian Company and Indonesian Company Law have considered the Limited Liability Company/LLC as a corporation. Under Indonesian Company Law No. 40 of 2007, it stated that:

> *"Perseroan Terbatas yang selanjutnya disebut perseroan adalah badan hukum yang merupakan persekutuan modal, didirikan berdasarkan perjanjian, melakukan kegiatan usaha dengan modal dasar yang seluruhnya terbagi dalam saham dan memenuhi persyaratan yang ditetapkan dalam undang-undang ini serta peraturan pelaksanaannya".*

According to Ridwan Khairandy, basically a legal entity/corporation is an entity that has the rights and obligations to commit an act like a human being, has their own wealth, and is sued and sued in front of the court.[168] Moreover, Khairandy has concluded that corporation is a legal association which has comprised some substantive elements, such as:

1. *Limited Liability*

[168] Ridwan Khairandy, *op.cit.,* Page 66.

Essentially, the founders or shareholders or members of a corporation are not personally liable for any loss or corporate debt. The shareholder's responsibility is limited to the maximum amount of shares he holds.

2. *Perpetual Succession*

   As a corporation that exists in its right, membership changes do not affect on its status or existence. In Limited Liability Companies, shareholders may transfer their shares to a third party, in which the assignment does not cause any trouble to the company.

3. *Have Its Own Wealth/Assets*

   All the existing wealth is possessed by the entity itself. The asset or wealth is not owned by owners, members, or any shareholders.

4. *It has a contractual authority and can sue and be sued on its own behalf.*

   Legal entities as legal subjects are treated like human beings with contractual authority. The agency may enter into a contractual relationship in the name of itself. As a legal subject, a legal entity may be prosecuted before the court.

As a subsidiary company in the form of LLC, the shell company is a corporation in which has a limited liability whereas the members and the shareholders are not personally liable for the company's losses and debts. The company also will have its assets. In which that between the company's and the members or shareholders' assets are separated. The shell company as corporation will be treated as a legal subject that has its contractual rights as well as can be sued or sued in front of the court.

In the Panama Paper case, the MNC or the Limited Liability Company from Indonesia will establish a company in Panama in the form of LLC (a corporation) under the name of *Nominee.* Furthermore, under Panamanian Law, the application of *Nominee* is allowed, there is no obligation to report the *Benefical* owner of the company. After that, the MNC from Indonesia will buy the 50% shares of the company and become the majority shareholder or what we called by Parent Company. Through that way, the MNC is investing indirectly as well as protecting their assets by transferring it to a subsidiary company, in the form of shares. For the reason that these MNC are implementing the Limited Liability element of corporation in which the asset of the Parent and the subsidiary company are separated, and the parent company as the shareholder are not personally liable for its subsidiary losses or debts.

In the matter of 'company', under Panamanian Law, the shell company has been categorized into a company since it is in the form of Limited Liability Company which is a Corporation. Under Indonesian Company Law, if we considered the shell company as a subsidiary company, then the shell company is a company in the form of corporation.

The term company itself has been also regulated under Law No. 3 of 1982 concerning Mandatory List of Companies, as well as Law No. 8 of 1997 concerning Company's Document.

Article 1 Letter b of Law No. 3 of 1982 concerning Mandatory List of Companies, it stated that:

"Perusahaan adalah setiap bentuk usaha yang menjalankan setiap jenis usaha yang bersifat tetap dan terus menerus dan yang didirikan, bekerja serta berkedudukan dalam wilayah Negara Republik Indonesia"

Under that article, there are at least three elements of company:

1. Any types of business;
2. Constant and continuous; and
3. In the territory of Republic of Indonesia;

Under the Panama Paper case, the subsidiary company was established in the form of LLC which means in the type of corporation (legal business entity). Most of these companies are basically doing an investment business in the host-country like Panama since the tax havens country provided a really easy investment procedure as well as imposing lower tax for foreign investment. As for the last element, if we based on Panama Papers case, these companies are happening to be existed in Panama, not in the territory of Indonesian Republic, so these regulations cannot be imposed to the subsidiary in Panama since it will be subjected to Panamanian Law. However, as for the first two elements, the shell company as subsidiary company can actually be categorized as company.

While under Law No. 8 of 1997 concerning Company's Document, Article 1 point 1 stated that:

"Perusahaan adalah setiap bentuk usaha yang melakukan yang melakukan kegiatan secara tetap dan terus-menerus dengan tujuan memperoleh keuntungan dan atau laba, baik yang diselenggarakan oleh

orang-perorangan maupun badan usaha yang eberbentuk badan hukum atau bukan badan hukum, yang didirikan dan berkedudukan dalam wilayah Negara Republik Indonesia".

Basically, the definition of company between Law No. 3 of 1982 and law No. 8 of 1997 are the same. However, there are additional sentences in Article 1 point 1 of Law No. 8 of 1997, in which the business activity aimed to get as much profit as possible. The subsidiary company mostly aimed to get much profit for the company which actually 50% of the shares owned by the parent company as the majority shareholder.

Ridwan Khairandy has concluded the elements of Company based on both Laws, which are:[169]

1. Types of business, whether by Individuals or Business Entity;
2. Doing business activity constantly and continuously;
3. For the purpose of gaining profits.

Based on these elements, the shell company as subsidiary company can be actually categorized as a company.

In its practice, sometimes, it can be found that 1 (one) Parent Company owned more that 2 subsidiaries, and so far, there is no prohibition on such ownership/activity. There are also some practices where one parent company established a shell company in Panama, and then this subsidiary will establish another subsidiary. Then, under LLC (subsidiary) company in Panama, they will buy the share again in the Parent Company. Such action is clearly

[169] Ridwan Khairandy, *op.cit.*, Page 16.

prohibited under Indonesian Company and Competition Law. Article 36 of Law No. 40 of 2007 stated that:

> *Perseroan dilarang mengeluarkan saham baik untuk dimiliki sendiri maupun dimiliki oleh perseroan lain, yang sahamnya secara langsung atau tidak langsung telah dimiliki oleh perseroan.*

This prohibition is understandable because, in principle, the issuance of shares is an effort to collect capital. The obligation to deposit the shares should be charged to other parties and not the company itself. So, for the sake of certainty, the company is prohibited to issue shares for its own. The prohibition is not only a prohibition of double shareholdings, but also includes a prohibition of cross holding which occurs when the Company owns shares issued by another Company that owns shares issued by another Company that owns the Company's shares, either directly or indirectly.

Based on that article, the company is prohibited to issue shares to be owned by them or any other company, which owned the shares directly or indirectly. The ‘other company’ here also refers to subsidiary company which parent company has become the majority shareholders. Therefore, these practices are clearly prohibited by Indonesian Law.

In the old Indonesian Law Company (Law No. 1 of 1995) shares ownership by cross holding and double shares was also applied to subsidiaries company (article 29 of Law No. 1 of 1995). The prohibition of a subsidiary

having shares issued by the parent company was based on the consideration that the ownership of shares by a subsidiary cannot be separated from the ownership by the parent company.

If it is found that due to a legal event causing a limited liability company A to controls; own shares; or shares owned by another limited liability company whose shares are directly or indirectly owned by the limited liability company A. Then, within 1 (one) year after the date of acquisition, the shares acquired shall be transferred to another party who is not prohibited from owning shares in the company. The status of such shares may not issue voting rights in the General Meeting of Shareholders and shall not be counted in determining the amount of quorum to be attained in accordance with the provisions of the law and/or the articles of association.[170]

Under Panama Papers case, there were lots of these practices happened. Unfortunately, it will be difficult to prove such practices since the shell company (subsidiary company) were used *Nominee* to hide the *Benefical Owner*. Moreover, under tax havens especially Panamanian Law, it will be included as a crime to reveal the information of the company there. Under such Law, it will be difficult to know whether or not the parent company own the subsidiary there since there is no information regarding the *Benefical Owner* (parent company).

[170] Gunawan Widjaya, *Tanya Jawab mengenai Perseroan Terbatas,* Forum Sahabat, Jakarta, 2008, page 32.

In addition, as the businessmen (*pelaku usaha)*, under Article 27 of Law No. 5 of 1999 concerning The Prohibition on Monopoly Practice and Unhealthy Business Competition, it is stated that:

> *"Pelaku usaha dilarang memiliki saham mayoritas pada beberapa perusahaan sejenisyang melakukan kegiatan usaha dalam bidang yang sama pada pasar bersangkutan yang sama, atau mendirikan beberapa perusahaan yang memiliki kegiatan usaha yang sama pada pasar bersangkutan yang sama, apabila kepemilikan tersebut mengakibatkan:*
>
> *a. Satu pelaku usaha atau satu kelompok pelaku usaha menguasai lebih dari 50% (lima puluh persen) pangsa pasar satu jenis barang atau jasa tertentu;*
>
> *b. Dua atau tiga pelaku usaha atau kelompok pelaku usaha menguasai lebih dari 75% (tujuh puluh lima persen) pangsa pasar satu jenis barang atau jasa tertentu.*

From that article, there are several elements that are defined:[171]

1. Businessmen Element;
2. Majority Shares Element
3. The Company Element
4. The Concerned Market Element

[171] The Document of FH UI by Indar Sri Bulan. Available online at http://lib.ui.ac.id/file?file=digital/131560-T%2027519-Tanggungjawab%20pribadi-Analisis.pdf, accessed on April 16, 2018, at 2.11AM. Page 22-24.

5. Establishing Some Companies Element;
6. Market Share Element

The feared forms of action may result in unhealthy competition as intended by the provisions of Article 27 of Law No. 5 of 1999 are:

i. the ownership of a majority share in a company which has the same business activity in the same relevant market if such shareholding leads to a dominant position, or;
ii. Establish several companies that have the same business activities in the same relevant market if they result in the abuse of dominant positions.

The impact of the two actions/activities as mentioned above is the occurrence of controls that create the dominant position. It is a major element of the prohibition of majority ownership and the establishment of several companies that have the same business activities. However, if the main element is not unfulfilled, then the ownership of a majority share and the establishment of several companies that have the same business activities are not prohibited by Law no. 5 of 1999. The main emphasis is on the consequences to be derived from the activity.

As for the investment purpose, if we analyze using Indonesian Investment Law, this multinational corporation will establish a subsidiary company abroad in the form of Foreign Investment. Under Law No. 25 of 2007 concerning Investment, there are some articles which actually refer to the transfer of asset to another company or shareholder, as happened between parent company and subsidiary company.

In article 8 paragraph (1) Law No. 25 of 2007, the investor allows to transfer its assets to the other party based on the applicable regulations.

As for the establishment of the limited liability company for investment purpose, Article 5 paragraph (3) stated that:[172]

"Penanam modal dalam negeri dan asing yang melakukan penanaman modal dalam bentuk perseroan terbatas dilakukan dengan:

a. Ambil bagian saham pada saat pendirian;

b. Membeli saham;

c. Melakukan cara lain sesuai dengan ketentuan peraturan perundang-undangan."

In addition to additional share capital in the company itself. A company incorporated in the framework of foreign direct investment which has commercial production may also establish a new company, buy shares of companies which established in the framework of domestic investment and/or foreign investment, as well as domestic investment, which have been stand-by itself whether they have been or have not been commercially produced, through the capital market.[173]

In its relation to Panama Papers case, most of the business actor established these subsidiary companies to protect their assets abroad. The company there happens to do investment business. Whether the investment

[172] *See Article 5 paragraph (3) Law No. 25 of 2007 concerning Investment*
[173] *See Article 8 of Law No. 25 of 2007 concerning Investment*

business is in the same market share or not, then it can be investigated by going through the company's document for its business activities. It draws to our attention that this company is being called shell company for a reason. It means that this company happens to have no business activity at all, so the fear of dominant position will not be met as long as it can be proven so.

Another perspective under Indonesian Company Law, in Taxation aspect, explains that a shell company is a name for an active company but it looks like it does not appear to have any business or asset activity, this company generally operates as investment company, takeover companies or act as Offshore Financial Centers. Generally, this company uses legal entities in the Bahamas Islands, the British Virgin Islands, the Channel Islands, and the Cayman Islands. These companies are suspected of being a hiding place for individual businesses or other corporate organizations.[174]

Shell companies do not always associate with illegal or unlawful businesses, as they are often useful for potential startups. In addition, they can act as tax evasion for legitimate businesses.[175] The tax avoidance function is what makes the shell company used as a vehicle to perform financial 'maneuvers' of a company. Therefore, there are firms that act as shell-making companies. Its presence is usually located in tax-haven countries such as

[174] Anonymous, *Begini Hukum Indonesia Memandang Perusahaan Cangkang*. Available online at http://www.hukumonline.com/berita/baca/lt5707dd59b9f3c/begini-hukum-indonesia-memandang-perusahaan-cangkang, 2016, accessed on March 26, 2018, at 8.18AM.

[175] Pramudya A. Oktavinanda. *Special Purpose Vehicle Dalam Tinjauan Hukum dan Ekonomi*. Available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312053, accessed on March 26, 2018, 8.20AM.

Panama and the British Virgin Islands (BVI). One of them is Mossack Fonseca in Panama Island.

According to the Indonesian Tax Consultant Association, shell companies are often equated with the Conduit Company or Special Purpose Vehicle (SPV) in connection with its functions.[176] In Indonesia, shell companies are also called intermediate companies. Shell corporation or Special Purpose Vehicle (SPV) is mentioned for entrepreneurs around the world to simplify business interests. It is alleged that many Indonesian businessmen and companies are using SPV to keep their funds from being detected by the tax authorities and legal authorities in the country. SPV itself has a bad image, because many SPVs are established in tax haven countries or regions that provide very low tax rates, or even tax free, plus bank secrecy protection. With these characteristics, SPV can be used as a mean of tax avoidance or embezzlement, as well as money laundering of corruption, narcotics or human trafficking.[177]

In terms of taxation, there are at least two understanding of SPV:

1. According to Ministry of Finance Regulation Number 258/PMK.03/2008, Article 1 stated that "*A special purpose company or conduit company as referred to in paragraph (1) shall be a special purpose company or conduit company established for the purpose of the sale or transfer of shares of a company established or domiciled in a country which provides tax protection (Tax Haven Country) having a special relationship with an*

[176] Akhmad Solikin. *op.cit.*, Accessed on March 26, 2018, 8.23AM.
[177] *Ibid.*

entity established or domiciled in Indonesia or a permanent establishment in Indonesia."[178]

This definition relates to the interest of Article 26 of withholding Tax Income (PPh) on income from the transfer or sale of shares received or obtained by foreign taxpayers.

2. According to Ministry of Finance Regulation Number 127/PMK.010/2016, Article 2 paragraph (4) defines SPV as "*Intermediate enterprises established solely to perform certain special functions for the benefit of its founders, such as purchase and/or investment financing; and does not engage in active business activities."*[179]

Based on Panama Papers case which revealed the existence of a shell company established by Indonesian businessmen in Panama that was not registered in the company document, the Indonesian Government then through the Minister of Finance issued a policy of tax amnesty to entrepreneurs to encourage them to report such activities because it is an asset that must be imposed as tax object.

In its definition, the Regulation of Ministry of Finance Number 127/PMK.010/2016, Article 2 paragraph (4) states that this kind of company was established solely to perform certain special function for the benefit of its

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[178] *See Peraturan Menteri Keuangan Nomor 258/Pmk.03/2008 tentang Pemotongan Pajak Penghasilan Pasal 26 Atas Penghasilan Dari Penjualan Atau Pengalihan Saham Sebagaimana Dimaksud Dalam Pasal 18 Ayat (3c) Undang-Undang Pajak Penghasilan Yang Diterima Atau Diperoleh Wajib Pajak Luar Negeri.*

[179] *See Peraturan Menteri Keuangan Republik Indonesia Nomor 127 /Pmk.010/2016 Tentang Pengampunan Pajak Berdasarkan Undang-Undang Nomor 11 Tahun 2016 Tentang Pengampunan Pajak Bagi Wajib Pajak Yang Memiliki Harta Tidak Langsung Melalui Special Purpose Vehicle.*

founders, such as purchase and/or investment financing, and does not engage in active business activities. This definition of SPV has a similar characteristic of a shell company, since the shell company itself does not have any business activity at all. That is why it is called shell since it is a company or a corporations but does not have its business activity like a shell without its content.

In addition to negative transactions, SPV can actually be used to facilitate transactions. For example, a shell company can be used for start-up financing before the company operates.

SPV can appear in many forms, although generally the most commonly used form is corporate corporation, also known as a limited liability company ("PT") in the context of Indonesian Company Law.

The Corporation (hereinafter referred to as the Limited Liability Company/*Perseroan Terbatas*) is a legal entity having 6 main characteristics:[180]

a. It is a legal entity which established under a legislation;
b. It is a legal subject separate from its founder (shareholder);
c. There is a separation between ownership and management;
d. The ownership thereon may be freely transferable;
e. The term of establishment may be unlimited;
f. There is limitation of liability for the owner (limited liability.

[180] Stephen Bainbridge, *Corporation Law and Economics*, Foundation Press, New York, 2002, ebook, Page 2.

SPV is created with very specialized functions, especially to limit the financial risks of the SPV owners concerned (and in some contexts, the interests of the SPV's creditors). Therefore, SPV has certain features that are quite easy to identify, such as: not having employees, no physical location, and no substantive business/economic decision (not running business).[181] These characteristics clearly differentiate the role of SPV with the Corporation which in principle conducts business actively for profit.

SPV covers the financial risks of its parent by using the concept of: separation of owners from corporations, and limited liability. By establishing SPV, every SPV owner (either personal or in the form of a Parent Corporation) can separate its assets and liabilities legally from its SPV assets and liabilities, and may limit its responsibilities in SPV.[182]

The Organization for Economic Co-operation and Development ("OECD") recognizes that the presence of SPV is very useful in an economy market and an integral part of the foundation of global financial activity.[183] Therefore, most of times, shell company is allegedly as the SPV because the definition of shell company is actually the same with SPV. The shell company based on Panama Papers is the Company where there is no business activity, no trade

[181] Tyson Taylor, *Detrimental Legal Implications of OFF-Balance Sheet Special Purpose Vehicles in Light of Implicit Guarantees*, University of Pennsylvania Journal of Business Law 11, 2008-2009, Page 1014.

[182] Pramudya A. Oktavinanda. *Special Purpose Vehicle Dalam Tinjauan Hukum dan Ekonomi*. *op.cit.*, Accessed on March 26, 2018, 7.57AM.

[183] Organization for Economic Co-operation and Development (OECD), *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, OECD Publications, France, 2001, Page 13.

transaction, and and can be used to protect the owner's asset by doing the limitation risk.

The leaked data of Panama Papers contains information since 40 years ago, from 1977 to early 2015. Unfortunately, the existence of this document allows the public to peek at how the offshore world works, how the dark funds flow in the global financial world in secret, encouraging the birth of many modes of criminality and robbing the state's finance from unpaid taxes.[184]

Most services offered by offshore companies do not violate the law, if it is used by law-abiding citizens. However, this document shows how banks, law firms and business actors often to not follow applicable legal procedures to ensure their clients are not involved in corruption, tax breaks or other criminal activities.

All of this entrepreneurs are making use of shell company and enjoying the tax advantages provided by Panamanian Government. In the end, there are lots of unlawful action commercially even criminally like transfer pricing to do tax evasion and tax avoidance, money laundering from corruption in their home-country. These unlawful action happens by transferring the asset to the shell company which then protected by Panamanian secrecy law in corporations and banking.

In fact, in some cases, there are intermediaries who try to protect themselves and their clients by deliberately hiding suspicious transactions or manipulating records like Mosseck Fonseca. Recently, the Mosseck Fonseca

[184] Anonymous, *Panama,* Available online at https://investigasi.tempo.co/panama/, accessed on April 16, 2018 at 8.25AM.

Law firm from Panama Papers has closed their firm due to the bad reputation caused by the leaked document of Panama Papers.

B. The Rights and Responsibilities of Shareholder in The Shell Company based on Indonesian Company Law in Comparison with Panamanian Company Law

As a legal entity, the shell company has the same nature with legal entity in general which is limited liability, whether it is as a subsidiary company or as the special purpose vehicle (SPV) company.

A consistent development of what is considered to be the general authority of a company generally regulated in corporate legislation, and concretized in the company's articles of association. This consistent development is a development toward a wider recognition of the authority of a company.

Theoretically, we can distinguish between the authority (powers) company with the intentions and purposes of a company. Authority is a trust given to a company committing a legal act with a third party. The inception of a Subsidiary due to the merger process in the form of a Limited Liability Company shall have an independent status as a legal entity. The subsidiary shall be its own rights and liabilities, and shall also own its own juridical independence with its shareholder's assets (including the parent company as the majority shareholder).[185]

[185] Ratna Yuliani, *Tanggung Jawab Induk Perusahaan Terhadap Anak Perusahaan dalam Suatu Perusahaan Kelompok.* Naskah Publikasi, Fakultas Hukum Univesitas Muhammadiyah Surakarta, 2013.

As a corporation under Indonesian Company Law, the shell company which considered as a subsidiary company in the form of LLC has given its shareholders rights and responsibilities. As for its shareholder's rights, the rights and privileges of shareholders are an important part of determining the determinants or controls in the company. The shareholder is possible within the company to have the privilege of proposing directors and/or commissioners within the company. According to Article 52 paragraph (1) Law No. 40 of 2007, the share entitles the owner to:

a. the right to attend and vote in the GMS;
b. the right to receive dividend payments and the remainder of the proceeds of liquidation; and
c. the right to exercise other rights under the law.

Subject to paragraph (2) of the same article, the right of the shareholder shall take effect only after the shares are recorded in the register of shareholders on behalf of the owner. The right may also be exercised after all share ownership requirements have been met. Because otherwise, the party obtaining the ownership of such shares cannot exercise rights as shareholders and the shares are not counted in the quorum under Article 48 paragraph (3).

Each share gives its owner an indivisible right. In 1 (one) share owned by more than 1 (one) person, the right arising from the shares used by appointing 1 (one) person as joint representative.

In more detail, the rights of shareholders in the company include:[186]

[186] M. Yahya Harahap, *op.cit,* Page 305-341

1. Right to manage and control the company, among others:

    a. voting right to elect and dismiss directors and commissioners;
    b. voting right to amend the articles of association in the matter of the management of the Board of Directors, Commissioners, General Meeting of Shareholders, LLC's capital and shares, and others;
    c. the right to require that the company be properly managed for the benefit of the enterprise which also means for the benefit of all shareholders.

2. The right to ownership of the company, among others:

    a. right to the distribution of dividends;
    b. right to the distribution of assets when the company is liquidated;
    c. right to equal treatment by management and majority shareholders against important transactions such as issuance of new shares, amendments to the articles of association, purchase of shares of other companies, etc.;
    d. right to be registered as a shareholder in the company register book.

3. The right to immunity from personal responsibility for the liabilities of the company's debt.

4. Other additional rights, among others:

    a. right to information and inspection of the company;
    b. right to sue LLC in preventing loss or in order to save the company
    c. right to claim compensation.

A company in running its business is definitely in touch with other parties (third party). The Company makes buying and selling transactions, loans from banks, leases and so forth. Usually if the transaction can run smoothly or in good conditions/situation then the company will be safe, but if the opposite happens, there are problems such as companies do breach of contract, then, who will be responsible?. Since the transaction conducted by the company, then the issue of responsibility is affected by its status, whether it is a legal entity or not. The existence of the difference status affects the party that should be responsible to the third party.[187]

In essence, the provisions concerning the terms of the shareholders of the Company shall be regulated in the articles of association with due observance of the requirements issued by the competent authority in accordance with the provisions of the laws and regulations. The fulfillment of the requirements as specified in connection with the asset of rights as shareholder is included in the vote counted at the General Meeting of Shareholders.

As it is known that a limited liability company is a form of business entity that limits the liability of its founders/shareholders only to/at full deposit of its shares. It can thus be simplified that essentially the founders/shareholders of a limited liability company cannot be accountable for more than the liabilities associated with the shares. This is in accordance with the rights and obligations of the limited shareholders.

[187] Gatot Supramono, *Kedudukan Perusahaan sebagai Subyek dalam Gugatan Perdata*, PT. Rineka Cipta, Jakarta, 2007, Page 135.

Provisions under Article 3 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Company states that:

(1) Pemegang saham Perseroan tidak bertanggung jawab secara pribadi atas perikatan yang dibuat atas nama Perseroan dan tidak bertanggung jawab atas kerugian Perseroan melebihi saham yang dimiliki.

Furthermore, paragraph (2) of the same Article determines that shareholders are personally liable for the engagement made on behalf of the company if:

(2) Ketentuan sebagaimana dimaksud pada ayat (1) tidak berlaku apabila:

a. persyaratan Perseroan sebagai badan hukum belum atau tidak terpenuhi;

b. pemegang saham yang bersangkutan baik langsung maupun tidak langsung dengan itikad buruk memanfaatkan Perseroan untuk kepentingan pribadi;

c. pemegang saham yang bersangkutan terlibat dalam perbuatan melawan hukum yang dilakukan oleh Perseroan; atau

d. pemegang saham yang bersangkutan baik langsung maupun tidak langsung secara melawan hukum menggunakan kekayaan Perseroan, yang mengakibatkan kekayaan Perseroan menjadi tidak cukup untuk melunasi utang Perseroan.

Parent companies (as the majority shareholders) may enter into material contracts in relation to subsidiary activities. Thus, the juridical responsibility of an act perpetrated by a subsidiary to a limited extent may be borne by the parent company. This can happen for example in the case of assets of the parent company collateral to the debts made by a subsidiary.[188]

In order to penetrate the independent responsibilities of a legal entity, *in casu* the responsibilities of a subsidiary, so that the parent company as the majority shareholder may also be asked for responsibility of the subsidiary business, in this case, the parties may also make a personal contract, in the matter, for example, to guarantee the debts of a subsidiary, by creating a corporate guarantee, personal guarantee, or limited warranty.[189]

The legal relationship between the parent company and subsidiaries after the merger is the parent company as the majority shareholder of its subsidiary. This relationship makes the parent company has authority control the running of the company with majority share ownership. Between subsidiaries and their respective parent companies stand alone. The parent company and its subsidiaries have their own articles of association as the positive law for the Limited Liability Company. If they violated it, it will result in a canceled transaction. If any party sues a subsidiary, when there is a subsidiary violating the rights, then the one sued by the party who feels aggrieved is the subsidiary

[188] Ratna Yuliani, *op.cit.* Page 10.
[189] *Ibid.,* Page 91.

itself. Parent company does not need to be involved in being sued, because the subsidiary is legally responsible for their own activities.

The parent company or the other shareholders may be liable for the legal actions of its subsidiary (breach of contract), if it can be proven that:[190]

a. The presence of the parent company's or other shareholder's intervention into the subsidiary company's business, such as:
    1. The parent company does intervention in determining the management of the company, finance, business decisions, and cause of the loss of the company;
    2. Acts committed by a subsidiary for the interests of the parent company or the shareholders;
    3. Parent company or shareholders improperly ignores the issue of financial adequacy of subsidiaries.
b. Responsibility of the parent company because of doctrine *piercing the corporate veil*.
    1. Control of subsidiaries by the parent company or the shareholders.
    2. Use of control by the parent company to commit fraud, dishonesty, and other unfair actions.
    3. Loss caused by a breach of obligations or duties of the parent company.

Expansion of responsibilities of majority shareholder/parent company based on contractual contracts such as by making corporate guarantee, personal guarantee, or limited warranty.

[190] Ratna Yuliani, *op.cit.* Page 12.

In another side, under Panamanian Law, in general, the management of corporate affairs is held by the board of directors, and shareholders only relate some administrative functions.

However, under Panamanian Law, shareholders constitute the supreme power of the corporation, and shareholder action is necessary in relation to:[191]

1. an amendment to the Articles of Association;
2. the removal of directors;
3. provided by the Articles of Association or legislation adopted by shareholders, adoption, amendment and revocation of the Bylaws;
4. extraordinary corporate issues such as the sale, leasing, exchange or disposal of capital assets, including customers and privileges, franchises and rights;
5. provided by the Articles of Association, transfer of assets in trust or to guarantee or pledge them, to guarantee corporate liability or any third party;
6. agreements for the merger or dissolution of corporation.

However, aside from the above provisions, in the Articles of Association or Bylaws, there is no special requirement for the holding of shareholder meetings. Without the provisions of the Articles of Association or Bylaws, a shareholder meeting shall be held in the Republic of Panama. A written notice of the time, place and purpose must be given to call the meeting of the

[191] The Document of Hatstone Abogados. *A Guide to Panamanian Companies.* Available online at http://www.hatstone.com/content/uploads/2013/08/HAB-BN-Companies-21.12.151.pdf, accessed on April 3, 2018, 3.25AM.

company's shareholders. Such notice shall be provided on behalf of the President, Vice President, Secretary or Assistant Secretary, or any person or person authorized for this purpose by the Statutes or Bylaws.

As a corporation or legal entity, most of shell companies in Panama basically are limited liability companies owned by legal entities around the world. Similar with Indonesia, in Panama, the shareholders have a limited liability toward the company. The shareholders are only responsible as much as the shares the owned, except it has been regulated different under Article of Association.

However the difference is that if in Indonesia, the shareholders shall be disclosed and listed under Company's document, in Panama, the minimum shareholder is one (1), and there is no requirement to disclose the details of subsequent shareholder. In other words, Panamanian law has a really strict regulation in governing its Company's Information. As the impact, it would be difficult to know who is the real owner (benefical owner) or the shareholders of such company in Panama.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Finally, after the analysis from the research, it can be concluded that:

1. The shell company mentioned in Panama Papers, under Indonesian Company Law, Law No. 1 of 1995 amended by Law No. 40 of 2007 concerning Limited Liability Company, can be categorized as subsidiary company. Because based on Panama Papers case, the practices of the establishment of shell companies there, has the purpose to protect the asset of the benefical owner of the company. The Corporation in Indonesia can invest by establishing the shell company in offshore havens under the name of *Nominee.* After that, the Corporations can protect their assets by allocated it to their new subsidiary company (the shell company) in Panama. The Corporation (based in Indonesia) then will buy/owned 50% or more of the shares and become the majority shareholder (the parent company). Another perspective under Indonesia Company Law, also comes from the taxation aspect, in which, the shell companies are often equated with the Conduit Company or Special Purpose Vehicle (SPV) company in connection with its functions. In Indonesia, shell companies are also called intermediate companies. SPV is created with very specialized functions, especially to limit the financial risks of the

SPV owners concerned (and in some contexts, the interests of the SPV's creditors). Therefore, SPV has certain features that are quite easy to identify, such as: not having employees, no physical location, and no substantive business/economic decision (not running business), in which this characteristic can be concluded as the same as shell company in Panama.

2. As for its shareholder's rights and responsibilities, the shell company in the perspective of Indonesian Law s the same as the shareholders in Limited Liability Company/Legal Entities. The rights are basically regulated under Article 52 of Law No. 40 of 2007. While for the responsibilities, there is a limitation between the responsibilities of shareholders and the company. Article 3 of Law No. 40 of 2007 stated that the shareholders are not responsible personally for any agreements made under the name of company. The risk is covered by the shareholders as much as the amount of investment they made in the company. So, basically, the shareholders are not responsible privately or individually for company's debt, except there is another agreement made by them. While under Panamanian Law, most of the shell company is actually a Limited Liability Company because Panamanian Company Law has a really special regulation which regulate the company in a whole, which is under Law No. 32 of 1927. So, both under Indonesian and Panamanian Law, the responsibility of shareholders is "Limited Liability". The difference is that in Panamanian law, these kind of shareholders thing as well as it shares

are no listed under Company's document, so it will be difficult to expose the shareholders identities as well as the benefical owner of the company.

B. Recommendation

1. As the time goes by, the business world has been developed. The regulation in Indonesia, especially the company law need to be amended, so it will cover all the new aspect of modern business.
2. The high numbers of the imposed company tax in Indonesia actually the reasons why lots of its entrepreneurs establish a company in offshore havens, so they can get the advantages provided by these offshore havens (tax avoidance). That is why the government need to decrease the tax or give more encouragement to its citizen in implementing the tax amnesty and assets repatriation effectively.

BIBLIOGRAPHY

Books:

Aaron Cosbey, Howard Mann, Luke E. Peterson, Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements,* The International Institute for Sustainable Development, Canada, 2004.

Al-Khayyath, Abdul Aziz, *Etika Bekerja dalam islam,* ter. Moh. Nurhakim, Gema Insani Press, Jakarta, 1995.

Agus Sardjono, Yetty K. Dewi, Rosewitha Irawaty, Togi Pangaribuan, *Pengantar Hukum Dagang,* First Edition, Rajawali Pers, Jakarta, 2014.

Angela Schneeman, *The Law of Corporation, Partnership and Sole Proprietorship,* Delmar Publisher, New York, 1997.

_____, *The Law of Corporations and Other Business Organization,* Delmar Cengage Learning, New York, 2013.

Chidir Ali, *Badan Hukum,* Alumni, Bandung, 1987.

_____, *Badan Hukum*, Alumni, Bandung, 1999.

C.S.T Kansil, *Pokok-pokok Pengetetahuan Hukum Dagang Indonesia,* Aksara Baru, Jakarta, 1984.

El-Ashker, Ahmed A. Fattah, *The Islamic Business Enterprise,* Croom Helm, London, 1967.

Gunawan Widjaya, *Tanya Jawab mengenai Perseroan Terbatas,* Forum Sahabat, Jakarta, 2008,

Gatot Supramono, *Kedudukan Perusahaan sebagai Subyek dalam Gugatan Perdata*, PT. Rineka Cipta, Jakarta, 2007.

H.M.N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia 1: Pengetahuan Dasar Hukum Dagang,* 11th Edition, Djambatan, Jakarta, 1995.

Kurniawan, *Hukum Perusahaan: Karakteristik badan Usaha Berbadan Hukum dan Tidak Berbadan Hukum di Indonesia,* Genta Publishing, Yogyakarta, 2014.

M. Natzir Said, *Hukum Perusahaan di Indonesia I (Perorangan),* Alumni, Bandung, 1987.

Muhammad N. Siddiqi, *Kegiatan Ekonomi Islam*, Translator: Anas Sidik, Bumi Aksara, Jakarta, 1991.

Muhammad Djakfar, *Hukum Bisnis: Membangun Wacana Integrasi Perundangan Nasional dengan Syariah*, UIN-Malang Press, Malang, 2009.

Mulhadi, *Hukum Perusahaan: Bentuk-bentuk Badan Usaha di Indonesia,* Penerbit Ghalia, Bogor, 2010.

Munir Fuady, *Doktrin-doktrin Moderen Dalam Corporate Law & Eksistensinya Dalam Hukum Indonesia,* Citra Aditya Bakti, Bandung, 2002.

M. Yahya Harahap, *Hukum Perseroan Terbatas,* Sinar Grafika, Jakarta, 2016.

M. Sornarajah, *The International Law On Foreign Investment,* Third Edition, University Press, 2010.

Organization for Economic Co-operation and Development (OECD), *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, OECD Publications, France, 2001.

R. Soekardono, *Hukum Dagang Indonesia* (Volume 1 part 2), Rajawali, Jakarta, 1983.

Ridwan Khairandy, *Pengantar Hukum Dagang,* First Print, FH UII Press, Yogyakarta, 2006.

_____, *Pokok-pokok Hukum Dagang Indonesia*, FH UII Press, Yogyakarta, 2014.

_____, *Hukum Perseroan Terbatas*, FH UII Press, Yogyakarta, 2014.

Stephen Bainbridge, *Corporation Law and Economics*, Foundation Press, New York, 2002.

Taqiyuddin An-Nabhani, *Membangun Sistem Ekonomi Alternatif: Perspektif islam*, Penerbit Risalah Gusti, Surabaya, 1996.

Tim Penulis Dewan Syariah Nasional Majelis Ulama Indonesia, *Himpunan Fatwa Dewan Syariah Nasional*, Dewan Syariah Nasional Majelis Ulama Indonesian dan Bank Indonesia, Jakarta, 2003

William F. Mc-Carty and John W. Bagby, *The Legal Environmentof Business,* Irwin, 1990.

Journals:

Tyson Taylor, *Detrimental Legal Implications of OFF-Balance Sheet Special Purpose Vehicles in Light of Implicit Guarantees,* University of Pennsylvania Journal of Business Law 11, 2008-2009.

Documents:

Executive Programme: *Company Law,* Paper 1. Study material from The Institute of Company Secretaries of India by Delhi Computer Services, Dwarka, New Dehli.

PricewaterhouseCoopers, *Doing Business: A Guide for Panama*. Available online at www.PwC.com/interamericas, 2013.

The Document of official website of DPR RI. *Shell Corporation.* Available online at http-//www.dpr.go.id/dokblog/dokumen/F_20160411_5768.pdf.

The Document of Panama Offshore Legal Services, *How to Protect Your Assets Offshore,* 2013.

The Document of Hatstone Abogados. *A Guide to Panamanian Companies.* Available online at http://www.hatstone.com/content/uploads/2013/08/HAB-BN-Companies-21.12.151.pdf.

The Document of bizserve Consultant LTD. *Panama.* Available online at http://www.bizserve.eu/files/9813/7760/3277/Panama.pdf.

The Document of FH UI by Indar Sri Bulan. Available online at http://lib.ui.ac.id/file?file=digital/131560-T%2027519-Tanggungjawab%20pribadi-Analisis.pdf

Ratna Yuliani, *Tanggung Jawab Induk Perusahaan Terhadap Anak Perusahaan dalam Suatu Perusahaan Kelompok.* Naskah Publikasi, Fakultas Hukum Univesitas Muhammadiyah Surakarta, 2013.

Law and Regulations:

Indonesian Commercial Code (KUHD).

Indonesian Civil Code/KUHPerdata (*burgerlijk wetboek*).

Panamanian Civil Code.

Law Number 3 of 1982 regarding Mandatory Company Registration.

Law Number 8 of 1997 concerning Company's Document

Law No. 40 of 2007 concerning Limited Liability Company (Law Number 1 of 1995 concerning Limited Liability Company)

Law No. 5 of 1999 concerning The Prohibition on Monopoly Practice and Unhealthy Business Competition

Panamanian Company Law, Law No. 32 of 1927.

Peraturan Menteri Keuangan Nomor 258/Pmk.03/2008 tentang Pemotongan Pajak Penghasilan Pasal 26 Atas Penghasilan Dari Penjualan Atau Pengalihan Saham Sebagaimana Dimaksud Dalam Pasal 18 Ayat (3c) Undang-Undang Pajak Penghasilan Yang Diterima Atau Diperoleh Wajib Pajak Luar Negeri.

Peraturan Menteri Keuangan Republik Indonesia Nomor 127/Pmk.010/2016 Tentang Pengampunan Pajak Berdasarkan Undang-Undang Nomor 11 Tahun 2016 Tentang Pengampunan Pajak Bagi Wajib Pajak Yang Memiliki Harta Tidak Langsung Melalui Special Purpose Vehicle.

Websites:

Anonymous, *Ada 803 WNI dalam Panama Papers , ini nama perusahaannya*, Available online at https://m.tempo.co/read/news/2016/04/06/090760178/ada-803-wni-dalam-panama-papers-ini-nama-perusahaannya.

Anonymous, *Jejak Korupsi Global dari Panama,* available online at https://investigasi.tempo.co/panama/

Anonymous, *Begini Hukum Indonesia Memandang Perusahaan Cangkang.* Available online at http://www.hukumonline.com/berita/baca/lt5707dd59b9f3c/begini-hukum-indonesia-memandang-perusahaan-cangkang, 2016.

_____, *Jenis-jenis Badan Usaha dan Karakteristiknya.* Available online at http://www.hukumonline.com/klinik/detail/lt4f51947253585/jenis-jenis-badan-usaha-dan-karakteristiknya, 2012.

Anonymous, *Shell Corporation.* Available online at https://www.investopedia.com/terms/s/shellcorporation.asp.

Black's Law Dictionary: *"What is Shell Company".* Available online at https://thelawdictionary.org/shell-company/.

Banco Santander. *Panama: Foreign Investment*. Available online at https://en.portal.santandertrade.com/establish-overseas/panama/investing.

Ericaris Saputra, *Panama Papers Dan Penghindaran Pajak,* Available online at https://pemeriksaanpajak.com/2016/05/02/panama-papers-dan-penghindaran-pajak/, 2016.

Pramudya A. Oktavinanda, hjn*Special Purpose Vehicle Dalam Tinjauan Hukum dan Ekonomi.* Available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312053.

Ruston Tambunan, *OPINI: Panama Papers, Salahkah WNI Taruh Uang Di Luar Negeri?*. Available online at http://bisnis.liputan6.com/read/2478848/opini-panama-papers-salahkah-wni-taruh-uang-di-luar-negeri, 2016.

The International Consortium of Investigative Journalists, *Giant Leak of Offshore Financial Records Exposes Global Array Of Crime And Corruption - The Panama Papers*. Available online at https://www.occrp.org/en/panamapapers/overview/intro/, 2016.

The International Consortium of Investigation Journalist (ICIJ), *Panama Papers: The Power Players,* Available online at https://www.icij.org/investigations/panama-papers/the-power-players/.

Yanuar Nugroho, *Memahami Investasi Langsung Luar,* Available online at http://www.downtoearth-indonesia.org/old-site/fifdi.htm, 2006.