A. Context of the Study

An Unlawful act *(Onrechtmatige Daad)* in civil context is set out in Article 1365 of the Civil Code or Burgerlijk Wetboek ("BW"), Book III BW, explains regarding "the laws that are born under the law" which is stated that:

> *"every act that violates the law, which carries a loss to others, obliges the person who forfeited the loss of such damages''*.[1]

In Rosa Agustina's book, She clarifies the classification in determining the parameter of an unlawful act specifically in 4 conditions, which are;

1. Contrary to the legal obligations of the offender
2. Contrary to the subjective rights of others
3. Contrary to decency
4. Contrary to propriety, thoroughness, and caution.[2]

Based on the 4 conditions above, then I would like to take a case study in the dispute between PT Cipta Televisi Pendidikan Indonesia vs PT Berkah Karya Bersama arose due to the lawsuit proposed by Siti Hardiyati Rukmana as one of the president director of PT Cipta Televisi Pendidikan Indonesia in case of an unlawful act. In this case, Hary Tanoesoedibjo who has been a founder, shareholder and Executive President of Bhakti Investama Group since 1989 is the person who is accused in conducting unlawful act. In fact, PT Berkah Karya Bersama chooses Hary Tanoesoedibjo as an attorney in the acquisition of PT CTPI. The company is engaged in the investment management business, which buys ownership of various companies, fixes it, and then sells it back. During the

[1] Article 1365 Burgerlijk Wetboek.

[2] Rosa Agustina, *"Perbuatan Melawan Hukum"*, Pasca Sarjana Universitas Indonesia, Jakarta , 2003, p 17.

New Order period, Hary through his company conducted many mergers and acquisitions. It began on the accusation of unlawful act conducted by Hary Tanoesoedibjo regarding his action in the arranged Extraordinary General Meeting of Shareholder (EGMS) to replace the board of directors and commissioner. Siti Hardiyati Rukmana argued that Hary Tanoesoedibjo had violated the existing law about the company law in switching the board of directors and commissioners. On the other hand, the argument provoked by Hary Tanoesidibjo in replacing the board of directors and the commissioner was based on the investment agreement between them about debt to equity swap of PT Cipta Televisi Pendidikan mentioned on the investment agreement, Siti Hardiyati Rukmana will grant Hary Tanoesoedibjo 75% of shares. Prior to that Hary Tanoesoedibjo has provided $55 million USD Siti Hardiyati Rukmana as based on the investment agreement. As a matter of fact, Siti Hardiyati Rukmana granted the power of attorney to Hary Tanoesoedibjo to arrange EGMS which later has been revoked by Siti due to the unlawful action conducted by Hary Tanoesoedibjo.

According to Ridwan Khairandy, there are four principles of mutual agreement in the contract law which bind both parties. The four principles are:[3]

1. The principle of consensualism;
2. The principle of the contract binding;
3. The Principle of freedom of contract; and
4. The principle of good faith.

[3] Ridwan Khairandy, "*Iktikad Baik dalam Kebebasan Berkontrak"*, Program Pascasarjana Fakultas Hukum Universitas Indonesia, Jakarta, 2004, p 27.

Principles that comply with the case are the principles of contract binding (*pacta sunt servanda*) and the principle of good faith. The principles of contract binding stipulated on article 1338 verses (1) Burgerlijk Wetboek that stated:

> *"all agreements made lawfully in accordance with the law apply as a law for those who make it".*[4]

Meanwhile, the good faith principle is stipulated in article 1338 (3) which mentioned:

> *"an agreement must be carried out in good faith".*[5]

Mrs. Siti Hardiati Rukmana conducted a civil case review in the Cassation Appeal No 862 K/Pdt/2013 where it is stated that one of the main reasons in the decision is to cancel the verdict of the Central Jakarta High Court No. 10/Pdt.G/2010 on April 14, 2011.[6]

The Panel of Judges in the Supreme Court pointed out a sufficient reason to grant the appeal of Siti Hardiati Rukmana and the appellants in which the judges of the Supreme Court reasoning of the problems based on the decision of the High Court is clearly different from the decision of the High Court of Central Jakarta No. 10/Pdt.G/2010/PN.Jkt [7] which in the High Court's ruling regulates the matter of performances. However, in consideration of the Supreme Court, No. 862 K/Pdt/2013 in its verdict stated that this case is due to an unlawful act.

[4] Article 1338 Burgerlijk Wetboek.
[5] Article 1338 (paragraph 2) Burgerlijk Wetboek.
[6] Cassation app. 862 K / Pdt / 2013 the Supreme Court document desicion.
[7] Decision of the High Court of Central Jakarta number 10 / Pdt.G / 2010 / PN.Jkt.

B. The Identities of the Parties

1. The Disputing Parties

a. Applicants

1) Mrs. Siti Hardiyati Rukmana, PT Tridan Satriaputra Indonesia, PT Citra Lamtoro Gung Persada, Yayasan Purna Bhakti Pertiwi, Mrs. Niken Wijayanti, and Mohammad Jarman. based on Special Letter Power of Attorney No. 015/HP-JD.DSM-CHR/XI/09 dated on November 23, 2009. Herry Ponto S.H., LLM, Judiati Setyoningsih SH, Desmayani S. SH M.Kn, Christie Permata Winandya, SH. All of them are the active officers of the Financial Service Authority, located in Tower Building 14/A, Rasuna Said Block X-7, Lot 5, South Jakarta;
2) PT Tridan Satriaputra Indonesia, headquartered, at Citra Graha 9th Floor, Jalan Jenderal Gatot Soebroto, Kav 35-36, South Jakarta;
3) PT Citra Lamtoro Gung Persada, headquartered at Yusuf Adiwinata No. 14 Rt.003 Rw.001, Kelurahan Gondangdia, Menteng Sub-district, Central Jakarta;
4) Purna Bhakti Pertiwi Foundation, headquartered at, Granadi Building 6th Floor, Jalan H.R. Rasuna Said, South Jakarta, which in this case are all represented by their Legal Counsel: Harry Ponto, SH., LL.M., Judiati Setyoningsih, SH., Desmayani S, SH., M.Kn., Christine Permata Winandya, SH., Advocates at KAILIMANG & PONNTO Advocate Office, headquartered at

Tower of Kuningan, Lt. 14 / A Jl.H.R. Rasuna Said Block X-7 Kav. 5 Jakarta 12940, by virtue of Special Power of Attorney, dated on November 23, 2009, PT Cipta Televisi Pendidikan Indonesia, headquartered at Jalan Pintu II Taman Mini Indonesia Indah, East Jakarta;

b. Defendant

1) PT Berkah Karya Bersama is a limited liability company established under the law of the Republic of Indonesia, headquartered at Menara Kebon Sirih Building 5 floor number 17-19 Jakarta. Buty F Simangunsong and partner are at Menara Thamrin 14 floor number 1408 MH Thamrin Street lot 3, Jakarta based on Letter of Attorney 21 January 2013;
2) PT Sarana Rekatama Dinamika headquartered at Menara Kebon Sirih Lantai 8, Jalan Kebon Sirih no 17-19 Central Jakarta, in this case, is represented by its attorney: Agustinus Sidanding, SH., Sehat Damanik, SH., MH., Maher Syalal Hasybas, SH. Advocate at Law Office DSS & Partner, are at JDC Building Lt. 3, Jl.KH.Wahid Hasyim No 27 Kebon Sirih Central Jakarta;

and

1. PT Cipta Televisi Pendidikan Indonesia headquartered at Jalan Pintu 2 Taman Mini Indonesia Indah East Jakarta;

2. Sang Nyoman Suwisma resides at the office of PT Cipta Televisi Pendidikan Indonesia headquartered at Jalan Pintu 2 Taman Mini Indonesia Indah East Jakarta;
3. Sutjipto S.H resides at Gedung Bursa Efek Jakarta lantai 26 Jalan Jendral Sudirman Kav 52 South Jakarta;
4. Artine Savitri Utomo, resides at Jalan Permata Berlian Blok-Q No 2, Permata Hijau, South Jakarta;
5. Bambang Wiweko, SH, MH., resides at Pesanggrahan Raya no 35 A. 3rd Floor, North Meruya, West Jakarta;
6. Minister of Justice and Human Rights of the Republic of Indonesia, headquartered at Jalan Rasuna Said Kav 6-7, Kuningan, South Jakarta;
7. Yohanes Waworuntu, SE. as the President Director of PT. Scholarship Recommendation Dynamics resides at Kebon Sirih Tower 8th Floor, Kebon Sirih Street no 17-19 Central Jakarta.

2. The Panel of Judges and The Court

Decided at the Supreme Court's Consultative Meeting on Wednesday, October 2, 2013, by I Made Tara, S.H., the Supreme Court-appointed the Chief Justice of the Supreme Court as Chairman of the Assembly, Soltoni Mohdally, S.H., and Prof. Dr Takdir Rahmadi, SH, LL.M., the Supreme Court Justices as members, and was pronounced in the hearing open to the public on that day by the Chairman of the Assembly in the presence of the Members and assisted by Dadi Rahmadi, SH, MH, Substitute Registrar and not attended by the parties.

C. Statement of Facts

On August 23th 2002, PT Cipta Televisi Pendidikan Indonesia fought against PT Berkah who appointed Hary Tanoesoedibjo as the mandatary of PT Berkah to become an investor and help settle the debts of Mrs. Siti Hardiati Rukmana. The agreement between PT Berkah and Mrs. Siti Hardiati Rukmana et al. in the Investment Agreement was reached. Under the agreement, the obligations of PT Berkah obligation were to carry out the financing and restructuring of PT Cipta Televisi Pendidikan Indonesia's debts with the expenditure limit of up to U$55 million USD. PT Berkah was entitled to 75% shares in PT Cipta Televisi Pendidikan Indonesia through the issuance of new shares, as a guarantee of legal certainty for PT Berkah that would invest its capital to finance and restructure the debts of PT Cipta Televisi Pendidikan Indonesia.

On February 7th, 2003 and June 3rd, 2003 Plaintiff issued two power of attorney (irrevocable of the power of attorney) for the implementation of the Investment Agreement and Supplementary Agreement which override the provisions of Articles 1813, 1814 and 1816 of the Civil Code. The obligations funding is until a maximum amount of $55,000,000,00. After PT Berkah Karya Bersama implementing Investment Agreement, they found out that the loan PT CTPI has been taking over by BPPN (Badan Penyehatan Perbankan Nasional) and must be finished also the settlement of group loan of debtor and settlement of obligations of shareholders. This is because of the certainty of a single obligor concept where the debt settlement must be finished with a bundle and cannot be

separated. At that time, PT CTPI has a tax loan and need many tools and programs to recover the company.

On the investment agreement agreed upon parties stated that PT Berkah Karya Bersama agrees to supply fund for PT CTPI with total amount US$55,000,000.00 :

1. Until the total amount of US$ 25,000,000.00 for taking part of majority shares in TPI (until maximum 75% from the shares capital that subscribed in TPI) according to requirements and certainty Share Subscription Agreement that will be ratified TPI and shareholder of TPI and Berkah.
2. Until US$ 30,000,000.00 for refinancing/take over and loan restructuration of TPI.

As a result of EGMS on March 18, 2005, the possession of shares change with arising of new shareholders (PT Berkah Karya Bersama) Siti Hardiyanti rukmana has 1,34 % shares with total nominal Rp 11.024.000.000 with total shares of 22.048.000. PT Citra Lamtoro Gung Persada has 0,10 % shares with total nominal Rp 788.000.000 with total shares 1.576.000, Yayasan Purna Bhakti Pertiwi has 0,19% shares with total nominal Rp 1.575.000 with total shares 3.150.000. PT Tridan Satriaputra has 23% shares with a total nominal 190.000.000.000 with total shares 380.988.000, Mohammad Jarman has 0,05 % shares with total nominal 394.000.000 with total shares 788.000. Niken Vijayanti has 0,19 % of shares with a total nominal 1.575.000.000 with total shares of 1.350.000. PT Berkah Karya Bersama has 75 % shares with a total nominal 148.000.000.000 with total shares 1.235.100.000.

Based on that, PT Berkah Karya Bersama agreed on alteration of PT Berkah Karya Bersama obligation with Plaintiff such as:

1. Debt settlement PUDG (Penyelesaian Utang Debitur Grup) towards BPPN;
2. Debt settlement of PKPS (Penyelesaian Kewajiban Pemegang Saham) Yama Bank towards BPPN;
3. Tax loan settlement;
4. Renewal tool and program;
5. Convertible Bonds debt settlement.

Because of that, the alteration supplemental agreement made on June 3rd, 2003 that cannot be revoked (irrevocable power of attorney) on the implementation of the supplemental agreement that ignores certainty of articles 1813, 1814 and 1816 Indonesian Civil Code. Then, SHR (applicants) has a willingness to repaying the financial assessment that gives by the defendant and PT Berkah provided were fulfilled as stipulated in the agreement, Berkah legally obtained 75% shares in PT Cipta Televisi Pendidikan Indonesia (PT CTPI).

The result of consent based on an Investment Agreement and Supplemental Agreement, PT Berkah Karya Bersama offering three (3) optional choices for SHR (plaintiff) such as:

1. PT Berkah buying SHR shares;
2. SHR buying PT Berkah shares;
3. As an investment agreement, SHR 25% and PT Berkah get 75% shares on PT CTPI.

On March 10th, 2005, Director of PT CTPI sent an announcement for implementing EGMS that will be held on March 18th, 2005 to give a right to PT Berkah 75 % shares of PT CTPI. On March 16th, 2005, the Plaintiff revoked the power of attorney and supplemental agreement without the consent of PT Berkah. On March 17th, 2005, the Plaintiff change the structure of BOD and the shares owned by PT Berkah are invalid and voidable. But, not registered to KEMENKUMHAM (Kementrian Hukum Dan HAM)[8]. On March 18th 2005, a General Meeting of Shareholders was held Extraordinary defendant 1st shares (EGMS March 18th 2005) attended only by defendant 1th, who claimed to be the legitimate power of all defendant 1th shareholders, including the applicant, and carry out legal acts of decision making at the EGMS[9] 18th March 2005 which dealt with the decisions of all shareholders the defendant I, including the applicant. The result EGMS then registered on KEMENKUMHAM (Kementrian Hukum dan HAM).

On January 11th, 2010, applicant PT CTPI shareholders sued Hary Tanoe (PT BKB). SHR sued because she did not accept the results of the Extraordinary General Meeting of Shareholders (EGMS) of the PT CTPI dated March 18th, 2005. On April 14th, 2011, The Panel of Judges of the Central Jakarta District Court has ruled first-degree, which decided to grant the Plaintiff's claim in part and stated that the Defendants had committed an unlawful act. On April 20th, 2012, The PT

[8] The Ministry of Law and Human Rights of the Republic of Indonesia is a ministry within the Government of Indonesia that deals with legal and human rights matters. The Ministry of Law and Human Rights is subordinate and responsible to the President.

[9] An Extraordinary General Meeting (EGM) can be defined as a meeting of shareholders which is not an Annual General Meeting (AGM). It is held when some urgent issue becomes about the company arises or any situation of crisis and it requires the input of all senior executives and the Board.

BERKAH faction filed an appeal to the DKI Jakarta High Court and granted an appeal submitted by Berkah and CTPI, stating that the Central Jakarta District Court was not authorized to examine and try this case. Regarding the decision of the DKI Jakarta High Court, the plaintiff filed an appeal to the Supreme Court (MA) based on verdict number 862 K/ Pdt / 2013. On October 10th, 2013, The Supreme Court granted a request for cassation from the appellant. At the same time cancel the decision of the DKI Jakarta High Court (PT) and Central Jakarta District Court (PN).

D. Summary of Decision

The case between Mrs. Siti Hardiaty Rukmana against PT Berkah has been determined by the Panel Judges of the Supreme Court. Through decision No. 862 K / 2013. In the decision, the panel of judges determined as follows:

1. To grant the Cassation Application from the Cassation Appellant: 1. Mrs. Siti Hardiyanti Rukmana, 2. PT Tridan Satriaputra Indonesia, 3. PT Citra Lamtoro Gung Persada, 4. Yayasan Purna Bhakti Pertiwi;
2. Canceling the Jakarta High Court's Decision 629 / PDT / 2011 / PT.DKI dated April 20, 2012, which annulled the Central Jakarta District Court's Decision Letter no. 10 / Pdt.G / 2010 / PN.Jkt. April 14, 2011.

The Judges themselves in the principal case, according to provisions, rejected the Plaintiff's provisional requirements, and the defendants' exceptions to the whole. In the principal case, the judges:

1. Granted the Plaintiff's claim partially;
2. Declared that the Defendants have committed unlawful acts;
3. Declared that the results of the Defendant I's dated March 17th, 2005 were valid and in accordance with the law, stated in Deed No. 114, dated March 17th, 2005 made before Buntario Tigris Darmawa Ng, S.H., S.E., M.H., a notary in Jakarta;
4. Withdraw and declared any unlawful and non-enforceable acts due to any obligations arising as well as all the legal consequences of:
    a. Resolutions of the EGMS dated March 18th, 2005 and Notarial Deed No. 16 dated March 18th, 2005 and Deed No. 17 dated March 18th, 2005; both were made before the accused of Defendant IV (Bambang Wiweko, SH., M.H.), a notary in Jakarta;
    b. Resolutions of the EGMS dated October 19th, 2005 as stipulated in the Deed. 128 dated October 19th, 2005 made by Defendant V (Sutjipto, S.H.), a notary in Jakarta;
    c. Results of Decision of EGMS on December 23th 2005;
5. Sentenced the Defendant I to restore the condition of the Defendant I (PT Cipta Televisi Pendidikan Indonesia) as before:
    a. EGMS dated March 18th, 2005 as set forth in the Deed. 16 dated March 18th, 2005 and Deed No. 17, dated March 18th, 2005; both were made by the Defendant IV (Bambang Wiweko, SH, MH), a notary in Jakarta;