

Notary Liability of The Company's Nominee Deed Limited

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Abstract: The concept of a nominee in the legal system in Indonesia has several legal transactions that use the nominees concept, the management of the company by the nominee director. Pursuant to article 33 paragraph (1) UUPM which confirms that domestic investment and foreign investment investing in the form of a limited liability company is prohibited from making any agreement and/or statement that confirms that the ownership of shares in the company is limited to and on behalf of others. Furthermore, article 15 paragraph (1) UUJN states that "the notary authorized to create an authentic deed of all deeds, agreements and assignments required by the laws and/or regulations required by the interested to be expressed in the authentic deed, ensuring the certainty of the date of the deed, storing the deed, giving copies, and quotations of the deed, all of which are during the creation of the deed nor assigned or excluded to other officers or other persons established By the law. " This type of approach is the method of normative juridical approach, which emphasizes in terms of legislation and regulations and legal norms that are relevant to this issue. The results of this study showed that a notarized accountability of the nominees deed was made by a notary in the term of 4 (four) Civil liability stipulated in article 20 of UUJN, the responsibility of the criminal notary legal pursuant to article 13 UUJN, the legal responsibility of the notary administratively under the provisions of article 65 UUJN, and the legal responsibility of notarized code of conduct based on article 6 UUJN.

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I. INTRODUCTION

Foreign investors are interested in investing in Indonesia with a number of benefits gained, among others, abundant natural wealth and cheap labour wages, but not all sectors of the business are closed to foreign investors as is stated in the negative investment list set by the Investment Coordinating Board (hereinafter referred to as BKPM). Some areas of business include negative investment lists, including production of weapons, gunpowder, explosives, war equipment, and so on. Restrictions by the Indonesian government in investing by foreigners become one of the background of the concept of the nominees in stock ownership, known as the nominees term shareholder (Wicaksono, 2016: 43).

Investment or investing is a term known in daily business activities as well as in the language of statutory regulations. The term investment is popular in the business world, while the term of investment is commonly used in statutory regulations. However, basically both terms have the same understanding, so sometimes used interchangeable (Sigit Teteki Triwis, 2016: 15).

In general, investments are differentiated into Foreign Direct Investment and Undirect Investment/portfolio Investment. Direct investment is often interpreted as investing activities involving: (i) transfer of funds; (ii) Projects that have a long-term project; (iii) The purposes of obtaining regular income (the purpose of regular income); (iv) Participation from the participation of person transferring the Fund and (v) a business risk (risk). While the investment portfolio is often associated with investments made through the capital market or exchange by means of purchasing securities, so as not to involve the transfer of funds for long-term projects and hence the expected revenue is also more short in the form of capital gains obtained at the time of sale of such securities and not regular income, which investors are not involved in the management of the Risk of business activities carried out by the company, but rather is associated with market risk.

Indonesia is a developing country that has great potential so that many local investors as well as foreign investors are investing in Indonesia. The development of the investment climate in Indonesia is at least influenced by some important factors that become investor's objectives, including (Pramono, 2006: 173):

1. The existence of regulations or discretion supporting foreign investors to invest in Indonesia;
2. A large workforce with a relatively low wage;
3. Wide production market due to the large population of Indonesia;

4. Source of natural wealth available;
5. Political stability;
6. The existence of legal certainty and consistency of regulations and application.

Foreign investors who are interested in direct investment in Indonesia because there are some benefits that are being caught by the rules of negative list investment, which is contained in the Presidential Regulation number 36 year 2010. The government which in this case is the capital Investment Coordinating Board prohibits foreign financier from investing in order to provide protection against the lives of Indonesian people.

With the restrictions imposed by the Government as contained in a provision in the regulation of the legislation certainly causes certain individuals to find a way out by giving birth to new concepts, such as the concept of Nominee. It is one of the reasons underlying the use of the nominees concept in Indonesian legal system there are several legal transactions that use the concept of nominees, among others in the ownership of shares by foreigners, ownership of land by Foreign nationals, as well as the management of the company by the nominee director (Widjaja, 2003: 179).

There are provisions of foreign investors to invest in the form of limited liability company and the criteria and requirements for investing in certain business areas, especially the terms of stock ownership, causing foreign investors Can not fully master the control and management of the company. In fact, full mastery over control and management of its corporate activities is essential for foreign investors to get the profit. This is what generally encourages foreign investors to keep the company's shareholding process limited to and on behalf of others, namely the name of the Indonesian citizen, known as the nominees term.

Foreign investors generally choose a limited liability company as a form of legal entity to conduct its investment activities in Indonesia directly (direct investment). In Indonesia, the establishment of PT pursuant to Law No. 40 year 2007 of the Limited Liability company (hereinafter referred to as "UUPT") of article 7 paragraph (1), can be made by 2 persons or more. In the explanation of UUPT article 7 paragraph (1), which means the person is an individual, either Indonesian citizen or foreign or Indonesian or foreign legal entity.

The establishment of a foreign company provides many advantages for Indonesia, but can be obtained from the profit and taxes, it can also provide jobs for the Indonesian people. In the interaction between individuals, the Government provides and establishes restrictions that often contain prohibitions on a particular action. Violations of the restrictions set by the government must result in sanctions for individuals who break them. With the restrictions imposed by the Government as stipulated by the Presidential Regulation No. 39 year 2014 which now has been renewed to DNI Presidential regulation No. 44 year 2016 on the list of closed business fields and open Business field with the requirements in the field of investment, certainly causes certain individuals to find a way out by giving birth to new concepts such as the concept of the nominee (Indriani, 2010: 14).

The most assertive rule of law prohibits nominees in Indonesia in article 33 paragraph (1) of Law No. 25 of 2007 on Investment (hereinafter referred to as "UUPM") which confirms that domestic investment and foreign investment investing in the form of limited liability is prohibited from making an agreement.

In connection with the prohibition of the nominees concept contained in article 33 paragraph (1) and (2) of the UUPM, the notary is requested to make the nominee deed stating the ownership of the shares in the PT for and on behalf of the other person by the parties, should Provide legal counseling to the parties who come to him, that it is prohibited by law and notary is not allowed to make the nominee deed.

Article 15 paragraph (1) UUJN states that "the notary authorized to create an authentic deed of all deeds, agreements and assignments required by the laws and/or regulations required by the interested to be expressed in the authentic deed, ensuring the certainty of the date of the deed, storing the deed, giving copies, and quotations of the deed, all of which are during the creation of the deed nor assigned or excluded to other officers or other persons established by Law ". In fact, there is still a notary who runs his office not in accordance with the UUJN and the Code of ethics, so that there are still many notary who is willing to make a deed which is prohibited by law. One of them is the nominee, this is a violation of the UUJN and the Code of ethics, and that break it can lead to the law, namely such as the sanction of the notary and even in article 33 UUPM mentioned that notarial deed that there is a treaty and/or statement that confirms that the ownership of shares in the company is limited to and on behalf of.

In practice, many foreign investors have established a PT-shaped company in Indonesia using the name of Indonesian citizen. It is of course to avoid bureaucratic processes such as principle permits and also about the magnitude of the capital for the establishment and the taxes imposed, so that this nominee's practice is often used. As in the establishment of PT. XYZ based in Jakarta, whose shareholders are Mr. Basuki Samin and Tuan Ahmad Andrian which are set forth in the Deed of incorporation, when actually Mr. Basuki Samin and Mr. Ahmad Andrian is just a person whose name Loan and the actual capital or shareholder is Mr. Yao Siang Chu and Mrs. Tjai Katrine Liu, both of which are Hongkong citizens. In addition, there are 2 more PT which also the name of the shareholder listed in the list of his company is an Indonesian citizen, while the owner of the capital

and the actual stock is Investor from Malaysia. Based on the background outlined, the author identifies some of the issues, namely how the notary deed of the nominees Act is made in the conduct of his office.

This writing will use the normative research method of research that discusses and analyzes the systematics of the law as a fundamental milestone of consciousness that in the present life law is indispensable in various aspects of life so that The law must fulfill the principle of justice for all Indonesians. And the validity of the law can apply accordingly without distinction in order to attain a justice for the life of society.

II. LITERATURE REVIEW

Literally, nominees, have two distinct meanings. First, nominees refer to a proposal, or nominate a candidate or candidate to occupy a specific position, to obtain a particular award, or for other types of candidacy. Secondly, nominees give understanding as someone representing the interests of the other party. In this second sense, a nominee is distinguished from a power giver in the circumstances; Where the nominee becomes the owner of an object (including the interest or birthright of an alliance) that is in its treatment; While the recipient of power has never been the owner of an object (including interest) administered by this nominee (Widjaja G. , 2008: 43).

By looking at the above sense, it can be noted that in the concept of nominees are known to be 2 (two) parties, the nominee party is legally recorded and the beneficiary that enjoys every advantage and benefit from the actions that By a legally registered party. There are 2 (two) parties in the nominee giving birth to 2 (two) types of ownership in the ownership of shares that use the nominees concept, which is the registered and legally recognized owner (legal owner) and the actual owner enjoy the following benefits Loss arising from the object owned by the legal owner by law, the legal owner is the rightful holder of that item, which of course has the right to divert, sell, overburden, ensure and take any action on Related objects, while the beneficiary party is not recognized as the owner of the legal object.

The nominee structure referred to in writing this thesis is a structure that resulted in a beneficiary having the power to control the nominee, where a nominee is only the registered owner of an object, and the owner Actually, the beneficiary that control and manage and benefit from the object. In the nominees structure shareholder the existence of a person or a certain party used as the shareholder of the nominee is only limited as the registered owner of the amount of a certain share. A nominee is not undertaking any activity other than as a registered owner even further a nominee only performs the activity based on the will and or command of beneficiary.

The nominees agreement is categorized as one of the forms of the Innominaat agreement because there has been no specific arrangement of it and is not expressly stated in the Criminal clauses. In the Indonesian legal system, the Nominee agreement as one of the forms of the Innominee agreement is not expressly regulated and specifically, but in practice some parties use the Nomine agreement to purchase the property or Investing in Indonesia.

The provisions of a nominee agreement generally contain the following:

1. Name and identity of Beneficiary and Nominee;
2. The background of the nominee agreement, e.g. the interest of beneficiary to appoint the nominee as the nominee's shareholder in a company that will make a public offering,
3. Purpose of appointing nominees by beneficiary;
4. The number of nominees Fee payable by beneficiary to the nominee as compensation for the use of the name and identity of the Nominee for beneficiary interest;
5. instructions to be made by the nominee;
6. The rights and obligations of the nominee;
7. exemption against nominees;
8. period of duration of the nominee agreement;
9. Termination of the nominee Agreement;
10. language and domicile of applicable law;
11. Settlement of disputes.

In practice it is also found that a shareholder nominee structure is formed using the nominee statement. Basically the material of a nominee's statement is a statement of the nominee's shareholder who explains that the money deposited in the company is derived from beneficiary so that all profits and losses including the tax burden arising In connection with the ownership of shares by the nominee's shareholder on the company is the right and responsibility of beneficiary.

Along with the creation of the nominee agreement or nominee statement, in general the establishment of the shareholder nominee structure is also equipped with the absolute power given by the nominee to beneficiary to perform any action relating to the shares held by the nominee in the company including to attend the general meeting of shareholders held by the company, receive dividends, and/or transfer the rights to the

shares. The agreement/statement and the power is made in order to provide assurance or protection to beneficiary as the actual owner of the object owned by a legally nominee.

In addition to the nominees structure established using the nominee agreement or the nominee statement, a direct nominee structure can also be found within the collective custody of the custodian bodies stipulated in the Law No. 8 The year 1995 on the capital market, where the custodian institution hereinafter became registered shareholder in the limited liability company. The collective custody agreements made by and between the Emite and the custodian agencies, one of which is the Central Securities Depository (LPP) shall govern with strict and clear the rights and obligations associated between the two Of the parties, including the rights derived from such collective agreements, especially those relating to the rights of the owner of the account in the collective custody of the issuer and so on (Widjaja G., 2008: 77).

Based on the collective custody agreement, it can be explained, understood and understood why it is recorded in the issuer's register of shareholders is the Central Securities Depository (LPP), while the right to attend the general meeting Shareholders of the issuer are holders of a "sub" account in the central Securities Depository.

Indirect nominees structure is a nominees structure formed by making multiple agreements layered with the intention that beneficiary indirectly control and accept Ownership of the shares. This structure is generally formed by making an arrangement nominee.

The practice of the arrangement nominee between the principal investor (beneficiary) and the shareholder nominee is usually done based on a set of documents and agreements commonly known in Indonesian law, such as credit agreements, Agreement, the Cessi Agreement, and the authorization letter. Therefore in practice, the principal investor and nominee shareholder do not sign the nominee agreement or nominee statement, but instead do the arrangement nominee. The following explanation of the agreements in the framework of the arrangement nominee is often done in Indonesia:

1. Credit Agreement, between the principal investor as the creditor and the shareholder nominee where the loan will be used by the debtor to pay the stock capital deposit at the company-in question;
2. Agreement on the stock pledge between the principal investor as a pledge (Pledgee) and nominee shareholder (Pledgor), where the shares issued on the deposit made using the loan money is assumed by the nominee shareholder to the principal investor.
3. The Cessi agreement on dividends between the principal investor and the shareholder nominee, where the right to the dividend shared by the company to the nominee shareholder as the shareholder is transferred to the principal investor.
4. An absolute authorization letter to the GMS in which the shareholder nominee as the shareholder of the company grants Absolute authority to the principal of the investor to be able to request the GMS, attend and issue a vote in the GMS of the company Concerned. The absolute nature of the power of the GMS, which means that the letter of authorization cannot be withdrawn by the Authorer, where it is usually done by waiving the provisions of article 1813, 1814 and 1816 of the Law Code Civil (KUHPer).
5. An absolute letter of authorization to sell the shares given by the nominee shareholder to the principal investor, in which case the particular occurrence of principal investor can sell the shares owned by the shareholder nominee.

In addition to the documents above the nominee arrangement often also comes with other documents such as option Agreement, credit agreement with the company that is targeted by equipped with the guarantee of assets owned by Company in question.

III. NOTARY LIABILITY OF THE NOMINEE DEED MADE BY THE NOTARY IN THE CONDUCT OF HIS OFFICE

According to the results of an interview innominate agreement is a type of agreement that is not known by a particular name, but still has the same elements as the agreement in general, namely (Nominee, 2019):

1. The existence of the rule of law, whether written or unwritten agreement law;
2. The existence of elements of legal subject, the parties to the Agreement;
3. The existence of elements of legal object, such as achievement in agreement;
4. The existence of the word agreement which is a conformity statement of the Parties ' will concerning the substance and object of the Covenant;
5. The existence of elements of rights and obligations for the parties as a result of the law arising from the agreement.

Duties and obligations which are based on legal authority, both on the basis of the law and from the agreement, may give rise to the responsibility of the implementers because any authority given shall always be followed by the obligations or responsibilities. Notarized authorized in the making of deed authentic, therefore the notary in question is obliged to fulfill all requirements that have been determined, the consequences arising for notary as a general officer given the authority In the creation of an authentic deed, then it must be

responsible and in case of breach or deviation to the creation of the deed, the deed made by the notary also invalid. The party or those who feel harmed by the notary action outside of the authority, then the notary can be sued in a civil law to the district Court and even notary can be prosecuted criminally accountable.

Based on the Supreme Court ruling of the Republic of Indonesia, number 419/PDT. G/2016/PN. JKT. The plaintiff is one of the founders of PT. Bahari Lines Indonesia ("Company")/defendant, as based on the deed of establishment No. 39 of 6 September 2010 which was made in the presence of Dradjat Darmadji, S.H., notary in central Jakarta and the decree of the Minister of Law and Human rights ratification 1 number: AHU49051. AH. 01.01. Year 2010 dated 18 October 2010.

Then the plaintiff as a shareholder and legal commissioner in the defendant company, to the entire process of switching the shares of the plaintiff to the defendant 1 including the resignation process of the plaintiff from his position as The Commissioner in the defendant, has been explicitly deduced that all transitional procedures of the plaintiff and resign

The verdict of the judges, notary as the author of the Treaty deed is only asked for information. There was no problem found by the notary public. The analysis of the author of the judge in breaking the matter based solely on the Civil Code which the parties involved is an act against the law not on the contract of agreement made. ation procedures of the plaintiff as Commissioner of the company contain legal defects both in formil and Materfil, and is clearly an act against the law.

The notary in the event of his position there is an obligation set in the legislation, if the notary is proven to commit acts violate the law then there are some responsibilities that are presented to him notary such as:

1. Legal liability of civil notary

The responsibility is civil and regulated in article 20 of UUJN, stating that the notary can execute his position in the form of civil union while paying attention to independence and imposition in the conduct of his office. Further arrangements are governed by the Ministerial Regulation. But to currently the minister related to this has not yet made the regulation related to the responsibility by the notary. This policy can then be used as a notarized reference of the civil responsibility.

- a. Violate the rights of others,
- b. Contrary to the legal obligations of the perpetrator,
- c. Contrary to Decilation,
- d. Contrary to the contravention in regard to the self-interest and property of others in the Association of Daily Living (Salam, 2019).

The Authentic Act in fact contains formal correctness in accordance with what the parties inform the notary. However, notary has an obligation to input that what is contained in notarial deed has been understood and in accordance with the will of the parties, by the way to read it so as to clear the contents of notarial deed, and give Access to information, including access to relevant statutory regulations for the parties. Thus the parties can determine freely to approve or disapprove the contents of the notarial deed that will be taken into your hands.

2. Legal liability of criminal notary

Pursuant to article 13 UUJN, the notary was dismissed in disrespect by the minister because it was sentenced to imprisonment based on a court ruling that had acquired the legal force remained because of a criminal offence threatened with a prison criminal of 5 (Five) years or more.

The criminal deed conducted by the notary in its capacity as an authorized general officer makes the deed and not in the context of the individual as a citizen in general, the elements in the criminal act, include:

- a. Human deeds,
- b. Fulfill the formulation of legislation, so that a deed can be called as a criminal act must fulfill the formulation of legislation means apply the principle of legalitas, which states that "nulum delictum nulla poena sine praevia lege poenali" Which means that no act is prohibited and threatened by criminal if it is not or has not been declared in a rule of law.
- c. It is against the law, the nature of counter-law in criminal acts is an absolute condition and also a condition of material. At least 2 (two) opinions on the meaning of the element of nature against the law which is a translation of the Dutch language "Wederrechtelijk", in the sense of formil and in the sense of Meteriil (Salam, 2019).

Based on the understanding of criminal acts, the consequences of criminal acts may result in criminal liability, if the legal subject is a mistake, so it is known as a slogan that says "Geen Straf zonder schuld" or no PID Ana without mistakes, mistakes can be in the form of intentional (dolus) or misconduct (culpa).

The Criminal Code formulation (KUHP) concerning criminal action that is closely related to the notary public is the criminal act relating to the Counterfeit letter (section 263), the secret of the Position (Section 322 paragraph 1), and the counterfeiting By the official (section 416).

The notary in conducting his profession is at least bound by the three articles and in doing the notary work should always pay attention to it. The three chapters are related to what is known or qualified by the counterfeit letter (Valshheid in Geschrift). The forgery of the Epistle to article 263 is restricted to counterfeit

letters that can publish a right or an alliance or an exempt from debt and counterfeit letters aimed at proving an incident, that it is not actually a letter "an sich" That publishes rights or obligations but raises rights and obligations is an agreement (Overeenkomst) between two parties contained in the letter concerned (deed).

In relation to the notary public as a general officer in the creation of a stock nominee agreement deed it is true that if a notary or criminal offence may be subject to criminal prosecution pursuant to the article relating to the Counterfeit letter As well as other articles relating to the duties of his office as a notary, but in the context of the material truth on a notarial deed in carrying out his profession through a juridical contract that a notary is actually a facilitator of the Party to the ACTE (deed of the parties) if the counterfeiting is the parties who make the deed and notary in this matter materially not involved then the involvement of notary public in a criminal offence made by the parties can not Withdrawn into the realm of criminal liability, unless the notary knows that the parties to make the deed is in bad faith or by the deed will cause a criminal offense.

The material truth on a deed is essentially the responsibility of the parties while the formyl truth of the deed becomes a notarized responsibility, so there is a relation between the Materiyl deed and notary by Theoretically it can be concluded that a notary can be detached from criminal prosecution unless otherwise demonstrated.

3. Legal responsibilities of the notary administrative

In the provisions of article 65 UUJN-P states that; "Notary responsible for every deed he made, although the notary protocol has been handed over or transferred to the depository of protocol notary". Meanwhile, in the provisions of article 84 UUJN-P is: "That the notarized notary is responsible for the validity of the authentic deed which he made and if there is a defect in the law that resulted in the loss of its otenity (deed under the hands) and Of the parties concerned, the notary public may be prosecuted to reimburse fees, damages and interest".

With the explanation above, neither unfamiliarity nor omission of these things cause the notary can be held liable for the error, and was sentenced according to the provisions of Article 85 UUJN-P, namely (Salam, 2019):

- a. Oral rebuke;
- b. Written strikes;
- c. Temporary dismissal;
- d. Termination with respect, or;
- e. Dismissal.

This sanction is an accountability given by the Government in the form of legislation to a notary public. Administrative accountability further prioritizes the notary duties and authorities in the conduct of the unlawful position.

IV. CONCLUSION

The notary liability of the nominee deed made by the notary in the conduct of his office does not explain the existence of the nominees deed only to believe in the percentage of civil, criminal, administrative, and notarized code of ethics. By committing unblemish deeds and committing violations of duty and prohibition of office. Further related to the existence of the nominees has not clear any restrictions contained in the law. There should be further studies regarding the use of nominees in Indonesia.

Pursuant to article 85 and article 9 of the notary UUJN can be suspended while the notary has committed a misguided deed and a breach of obligations and prohibitions. But in article 85 UUJN does not clearly display the limitations of the making of the nominee deed, the notary may be subject to sanctions. While according to article 33 paragraph (1) UUPM that domestic investors and foreign investors who make investments in the form of limited liability shall not make a treaty and/or statement that confirms that the ownership of shares in the company is limited to and on behalf of others. The reason for this prohibition is to avoid the occurrence of a company that is normatively owned by a person, but materially or the substance of the owner of the company is another person. This is to circumscribe provisions in statutory regulations that restrict the existence of the field of business that is closed to foreigners or open to foreigners with certain requirements in the field of investing.

REFERENCES

- [1]. Syahrizal Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, Dan Hukum Nasional*, Kencana, Jakarta, 2011, p. 7
- [2]. Indriani, I. (2010). Perkembangan Hukum Perseroan Terbatas dan Praktik Penggunaan Nominee Oleh Investor Asing. *Journal Unpam*, 2, 14.
- [3]. Pramono, N. (2006). *Bunga Rampai Hukum Bisnis Aktual*. Bandung: Citra Aditya Bakti.
- [4]. Salam, S. (2019, Agustus 12). Notaris di Banda Aceh. (A. Nominee, Interviewer) Banda Aceh.
- [5]. Sigit Teteki Triwis, I. K. (2016). Analisis Kekuatan Perjanjian Nominee Saham Dalam Perseroan Terbatas Penanaman Modal Asing (PT.PMA). *Jurnal Ilmiah Prodi Magister Kenotariatan*, 15.

- [6]. Wicaksono, L. S. (2016, Januari). 'Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan Terbatas. *urnal Hukum IUS QUIA IUSTUM*, 23(1), 43.
- [7]. Widjaja, A. Y. (2003). *Seri Hukum Perseroan Terbatas*. Jakarta: Cet. ketiga, Raja Gafindo.
- [8]. Widjaja, G. (2008). *Hak Individu dan Kolektif Para Pemegang Saham*. Jakarta: Forum Sahabat.

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