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Notary's Responsibilities in Carrying Out *Validation* Nominee Agreement on Foreign Share Ownership and Legal Consequences of Establishing a Company Based on the Agreement

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Abstract
This research is based on the decision of the Denpasar District Court Number 80/Pdt.G/2018/PN.Dps which aims to analyze the responsibility of notaries in carrying out nominee agreements for share ownership in limited liability companies and the legal consequences of establishing limited liability companies established based on nominee agreements. The approach method used in this research is a normative juridical approach method which carries out research based on library research. Research results show that the practice of nominees or borrowing names for share ownership in a company to avoid applicable legal provisions still often occurs, even though the law clearly prohibits this practice, this can give rise to conflicts in the future. This research provides a deeper understanding of the extent to which notaries can be involved in the substantial issues of nominee agreements as well as the legal impact of nominee agreements on the establishment of limited liability companies. In this dispute, the nominee agreement regarding ownership of shares which was authorized by a notary is contrary to law and therefore invalid, null and void and does not have binding legal force.

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1. INTRODUCTION

Indonesia is a developing country that has great potential, so many local and foreign investors invest in Indonesia. There are several important factors that make the development of the investment climate in Indonesia a goal for investors (Margono, 2008). Basically, the form of investment is divided into 2 (two), namely domestic investment (PMDN) and foreign investment (PMA) based on Article 1 number 2 of Law 25 of 2007 concerning Capital Investment ("Capital Investment Law").

Foreign investors who are interested in investing in Indonesia have inhibiting factors, one of which is the negative list investment rules which are explained in the Presidential Regulation of the Republic of Indonesia Number 39 of 2014 concerning the List of Closed Business Fields and Business Fields that are Open with Requirements in the Investment Sector. The limited share ownership that can be owned by foreign investors often encourages them to make nominee agreements for share ownership with the intention of borrowing the name of an Indonesian citizen as a shareholder. Practices like this are actually contrary to Article 33 paragraph (1) of the Investment Law.

A nominee agreement for shares is an agreement and/or statement confirming that the share ownership in the limited liability company is for and on behalf of another person. Basically, nominee agreements are prohibited from being made based on Article 33 paragraph (1) of the Investment Law, this has also been strengthened in Article 48 paragraph (1) of the Limited Liability Company Law which states that shares are issued in the name of the owner, so the shares must be in the name of the owner. shareholders, the name of the shareholder cannot be different from the owner.

In notarial practice, a notary is not willing to draw up a nominee agreement in the form of an authentic deed or legalize the nominee agreement because in that case the notary must get to know the presenter(s), read and explain the contents of the private deed to the presenter(s), as well as provide legal advice and explanation of relevant laws and regulations to the parties concerned (Soedewo, 2004). In this case, the notary can be required to provide compensation if the notary makes a mistake that causes losses to interested parties, So in practice there is no notary who is willing to make an authentic deed or legalize the nominee agreement for the shares. because making an authentic deed that violates the law will result in liability for the notary. Even though the notary is not willing to make an authentic deed or legalize the nominee agreement, however In practice, an alternative breakthrough arises, namely that the nominee agreement is not made with an authentic deed or legalized by a notary, but the agreement is certification by a notary with the aim of ensuring certainty of the date and existence of the agreement.

Waarmerking is the act of a notary who records private deeds carried out by related parties. In this process a notary only records the private deed in the register book intended for that purpose so that no lawsuit can be filed against the notary. This is based on the opinions of several scholars (Prayitno, 2018) which states that the notary is responsible for carrying out *certification* only limited to recording the date in the register intended for that purpose. This means that the notary is not responsible for the contents of the agreement entered into *Certification*. This breakthrough is one of the reasons why there are still notaries who are willing to do certification against the nominee agreement.

Denpasar District Court Decision Number 80/Pdt.G/2018/PN.Dps as the object to be analyzed. In this decision, the plaintiff named Michael Tanner wanted to open a restaurant business in Bali and invited the defendants to work together, they agreed to establish a company with the formation of the company as an initial step. to take care of all legal documents related to the planned restaurant. This process involves making a private agreement, which is then trademarked by a Notary, referred to as a Nominee Agreement or Name Borrowing. However, after the entire process of the company founding documents was completed, a dispute arose regarding the distribution of shares. The plaintiff claimed that the distribution of shares was not in accordance with the cooperation capital agreed upon in the cooperation agreement. In his lawsuit, the Plaintiff wants the cancellation of the Nominee Agreement which was made privately but was trademarked by a Notary, on the grounds that it is null and void by law. Apart from that, the Plaintiff also demanded that the Deed of Establishment of the Company established based on the Nominee Agreement also be declared null and void.

The practice of waarmerking by notaries on nominee agreements made under their own hands is an alternative option in nominee practice. This assumes that the notary's responsibility is only limited to recording the date in the register, does not involve substantive responsibility for the agreement, but in the case above it is related to the agreement. nominees that are made privately and warmed up by a notary can potentially cause a conflict due to the bad faith of the parties and will have an impact on the company's deed of establishment in the future.

Based on the background above, in this research the author intends to analyze the responsibilities of notaries in carrying out nominee agreements for share ownership in limited liability companies, as well as the legal consequences of establishing limited liability companies established based on nominee agreements.

PROBLEM FORMULATION

Based on the background described above, this research can obtain the following problem formulation:

1. What are the notary's responsibilities in carrying out *certification* nominee agreement for share ownership in a limited liability company?
2. What are the legal consequences of the Deed of Establishment of a limited liability company made based on a nominee share ownership agreement *certification* by a notary?

2. APPROACH METHOD

The approach method that the author uses in writing this article is normative juridical which uses secondary data obtained from required literature or legal materials (Soekanto, 2010). The approach used is the statutory approach (*statue approach)* namely an approach using applicable laws, especially Law Number 25 of 2007 concerning Capital Investment, Law No. 40 of 2007 concerning Limited Liability Companies and Law Number 20 of 2004 concerning the Position of Notaries as amended by Law Number 2 of 2014 concerning Amendments to Law 30 of 2004 concerning the Position of Notaries ("UUJN") as well as the Civil Code (*Civil Code*).

3. DISCUSSION

1. **What are the responsibilities of the notary who carries it out? *certification* nominee agreement for share ownership?**

   According to Law Number 20 of 2004 concerning the Position of Notaries as amended by Law Number 2 of 2014 concerning Amendments to Law 20 of 2004 concerning the Position of Notaries ("UUJN") a notary is a public official who has the authority to make authentic and authorized deeds. other. This is stated in Article 15 paragraph (1) UUJN which states that a notary has the authority to make authentic deeds regarding deeds, agreements and stipulations which are required by statutory regulations to be stated in authentic deeds, guarantee certainty of the date of making the deed, keep the deed providing *fat* copy and collection of deed, all of that as long as the making of the deed is not assigned or excluded to other offices or other persons prescribed by law.

   In addition to the authority as referred to above, based on Article 15 paragraph (2) UUJN notaries also have the authority to certify signatures and determine the certainty of the date of private letters by registering them in a special book, recording private letters by registering them in a special book register, making copies of the original of the letter under his hand in the form of a copy containing the description as written and depicted in the letter in question, verifying the suitability of the photocopy with the original letter, providing legal counseling regarding making deeds, making deeds relating to land, or making auction minutes deeds.

   Apart from the authority as intended in Article 15 paragraph (1) and paragraph (2) UUJN, Notaries have other authorities regulated in statutory regulations.

   Based on the description above, it can be concluded that one of the powers of a notary relating to this writing is to record documents privately by registering them in a special book list or what is known as *certification*. *Validation* has the meaning of a private deed that is recorded and registered in the notary's office protocol. The deed is perfect or complete, there is already a signature of the party(s) on the deed and it is possible that the date of completion of the deed is long before the date it is registered/waarmarked. So, it is very likely that the deed creation date and the registrar/warmerking date are not the same (Prayitno, 2018).

   In relation to the deed under the hand that has been registered (*certification*) by a Notary, the strength of the evidence is the same as a private deed that is not registered. This means that even if there is a seal of office and a signature by a Notary on a private

deed, it does not affect the legal strength of the evidence. If the signature is denied, the judge must order that the authenticity of the letter be checked. If the signature is acknowledged by the person concerned, then the underwritten deed has force and becomes perfect evidence. The contents of the statement in the private deed can no longer be denied, because the signature on the private deed has been acknowledged by the person concerned (Rahmadhani, 2020). Due to the advantages of waarmeking, in practice, many nominee agreements are carried out by notaries.

As explained in the introduction, in the context of establishing a foreign investment company, it often happens that for certain reasons, foreign shareholders borrow the name of an Indonesian to act as shareholders in a limited liability company. Agreements like this are often referred to as nominee agreements or nominee arrangements. Legal relationship between *beneficiary* (foreign entity) with *nominee shareholders* is based on *nominee agreement.* Through *nominee agreement*, *nominee shareholders* act for and on behalf of *beneficiary* (foreign entity).

Implementing the share nominee practice in Indonesia, no share nominee agreement is made that only consists of one agreement, but consists of several agreements that when connected to each other will produce this share nominee Which can be said as *nominee arrangement* (Kevin Pahlevi, 2017). Therefore, whether an agreement in establishing a limited liability company is a nominee agreement must be seen from the substance of the agreement, not from the title of the agreement.

In the context of establishing a foreign investment company, it is clear that name borrowing agreements or nominee arrangements are prohibited by law. In this case, Article 33 paragraph (1) of the Capital Markets Law clearly prohibits it and Article 33 paragraph (2) provides legal sanctions of invalidity (*no*) on the agreement:

(1) *Domestic investors and foreign investors who invest in the form of limited liability companies are prohibited from making agreements and/or statements confirming that share ownership in the limited liability company is for and on behalf of another person.*

(2) *In the event that domestic investors and foreign investors make agreements and/or statements as intended in paragraph (1), the agreements and/or statements are declared null and void by law.*

Considering this prohibition, in practice there are no notaries who are willing to make authentic deeds containing nominee agreements or legalize private deeds containing *nominee arrangements*. This is because the regulation is clear, namely that in the event that a notary makes an authentic deed that violates the law, the notary can be held accountable.

Apart from that, notaries are also not willing to legalize private deeds that contain nominee arrangements because of the legalization issue the notary must know the presenter(s), read and explain the contents of the private deed to the applicant(s), as well as provide legal advice and explanation of the relevant laws and regulations to the parties concerned. So, in this case, inevitably, when carrying out legalization, the notary will know the contents of the private deed that will be legalized and if the private deed contains a nominee arrangement, then it is certain that the notary will know and it will also be considered a violation of the law if he continues to carry out the legalization.

In contrast to making an authentic deed or the act of legalizing a private deed by a notary where the notary is assumed to know the contents of the deed, in the context of

waarmerking theoretically the notary does not have any responsibility regarding the act of waarmerking a private deed. So, notaries often recklessly dare to waarmerking nominee agreements or nominee arrangements.

Related with *certification* regarding private deeds, in reality it must be divided into two, namely:

First, the notary does it *certification* help create the deed under the hand for the parties and then after the deed under the hand is signed by the parties, deed referred to in-*certification* by the same notary; In this case, it is clear that there is the involvement of a notary to help make a private deed which is then trademarked by the notary himself; In this context, the notary is considered responsible if he knows that the deed under his hand has been *certification* is an act that violates the law or is against the law;

Second, the notary does its *certification* do not interfere in the binding of the deed under the hand. In the latter case, the agreement under the hand is made by the parties themselves and after being signed by one of the parties or the parties ask a notary to do *certification* to the agreement under the hand. In this context, the notary is deemed not to know the contents of the private deed because the deed was executed by the parties without any intervention or assistance from the notary who executed it. *certification* so that the notary is not responsible, the only thing that is responsible is the existence of the deed and it is acknowledged since it is registered by affixing the notary's signature and seal of office as well as the notary's protocol number (Prayitno, 2018). However, in the case of a notary helping to make the deed privately before it is executed. *Certification*, then this fulfills the provisions of Article 1365 of the Civil Code and the notary can be held civilly liable.

In Article 1365 of the Civil Code, unlawful acts are defined as follows:

> *"Every unlawful act that causes harm to another person requires the person whose fault it was to cause the loss to compensate for the loss."*

That, what is meant by Unlawful Acts according to M.A. Moegni Djodjodirdjo in his book entitled "*Act against the law*" is:

> "*Negligent action, which violates other people's rights or is contrary to the legal obligations of the perpetrator or violates morality or is contrary to propriety that must be heeded in social interactions regarding other people or things";*

That since the Decision *Supreme Court* dated January 31, 1919 in the matter *Lindenbaum v. Cohen*, the concept of Unlawful Acts has developed and expanded and since then there are 4 (four) criteria for Unlawful Acts, namely contrary to the legal obligations of the perpetrator, violating the subjective rights of other people, violating the rules of morality, contrary to the principles of decency, accuracy and attitude. the caution that a person or official should have in issuing policies.

Based on the Decision *Supreme Court* in the Netherlands, the definition of Unlawful Acts does not only include acts that are contrary to articles in the applicable laws and regulations but also includes acts that violate decency in society.

According to Mariam Darus Badrulzaman states that the conditions that must exist to determine an act as an Unlawful Act (Badrulzaman, 1996) are that there must be an act - what is meant by this act is either a positive or a negative act, meaning that every behavior is done or not act, the act must be against the law, there is a loss, there is a causal relationship between the act against the law and the loss, and there is a mistake.

Based on the things above, it can be concluded that an act fulfills the elements of an Unlawful Act if it fulfills the following things:

- The existence of an act: An unlawful act begins with the actions of the perpetrator. It is generally accepted that by action here we mean either doing something (active) or not doing something (passive);
- The Act Must Be Against the Law; The act is against the law: The act carried out must be against the law since 1919, this element of being against the law is interpreted in the widest possible sense, which includes the following matters:
  a. Acts that violate applicable laws;
  b. Who violates the rights of others guaranteed by the law of the perpetrator;
  c. Actions that are contrary to the perpetrator's legal obligations;
  d. Acts contrary to morality (*good morals*);
  and Actions that are contrary to good attitudes in society to pay attention to the interests of others;

- There are Losses; There is a loss (*injury*) for Plaintiffs Reconvention is also a condition for claims based on Articles 1365 of the Civil Code and 1366 of the Civil Code to be used. In contrast to losses due to default which only recognize material losses, losses due to unlawful acts in addition to material losses, jurisprudence also recognizes the concept of immaterial losses which will also be valued in money;
- There is a cause-and-effect relationship between the act against the law and the loss;
- Error; Unlawful acts must contain an element of error (*school element*) in carrying out the act (Reconvention Defendant). Legally, it is said to be an error if it meets the following elements: *First*, element of intentionality. *Second*, the omission element (*negligence, culpa*). *Third*, there is no justification or excuse (*justification*), like *force majeur*, self-defense, insane and others.

In the legal considerations in the decision, the Panel of Judges stated the following: *"Considering that, in the event that the Notary did not know from the start that the deed of establishment of the Limited Liability Company he was making was a nominee agreement, it is true that the Notary cannot be held responsible regarding the execution of the deed, however, in the aquo case, Defendant I as the Notary was aware of the agreement for the establishment of the Limited Liability Company. is a nominee agreement, where the Notary should have refused to make the deed of establishment, but this was not done by Defendant I as Notary and ignored the provisions of the Law, in which case Defendant I can be said to have committed an unlawful act;"*

Based on the legal considerations of the Panel of Judges above, it can be concluded that even though it is based on statutory regulations, the notary's responsibility is to carry out *certification* only ensures the correctness of the date of the registered deed, but in the event that the notary knows that the content or substance of the underhand deed which is being faked is a deed that violates the law, then the notary becomes jointly responsible, that is, he has committed an unlawful act as intended in Article 1365 of the Civil Code.

Based on the discussion above, it is known that although the theory of notary responsibility is in context *certification* is that the notary is not responsible for the act of misrepresenting the deed as long as the notary does not help to make it, but based on Decision No. 80/Pdt.G/2018/PN.Dps dated 6 May 2019, the Panel of Judges at the Denpasar District Court still stated that the notary who carried out the *certification* an act that violates the law is also do acts against the law because the notary even just did it

certification However, the notary is deemed to be aware of the existence of the nominee arrangement so that the notary is deemed to have committed an unlawful act.

Based on the above, a lesson can be learned that before the notary does *certification* by a deed made privately, the notary has an obligation to at least know the contents of the deed to be executed.*certification* and if it is known that the private deed will be certification If it turns out to be against the law, the notary can refuse to do *certification*. The right of refusal is regulated in Article 16 paragraph (1) letters a and e UUJN which states that in carrying out his office a Notary is obliged to:

"a. act trustworthy, honest, thorough, independent, impartial, and safeguard the interests of parties involved in legal actions;

and provide services in accordance with the provisions of this Law, unless there are reasons to refuse it;"

In the explanation of Article 16 paragraph (1) letter e UUJN, it has been stated that what is meant by "reason for refusing" is a reason which results in the Notary not taking sides, such as the existence of a blood or marital relationship with the Notary himself or with his husband/wife, one of the parties does not have the ability to act to carry out actions, or other things that are not permitted by law. Apart from that, the Notary as a public official creates legal certainty and legal protection for members of the public and prevents the emergence of legal problems in the future, so in the process of making a deed which is under their authority, the Notary should apply the prudential principle, including others carefully and carefully examine the documents, both subject and object, which will later be included in the authentic deed made by the notary.

2. **The legal consequences of establishing a limited liability company which is established based on a nominee share ownership agreement *certification* by a notary**

As mentioned above, in the concept of the Company Law, the establishment of a Limited Liability Company is seen as an agreement. This is confirmed in Article 1 Number 1 UUPT which states that:

"*Limited Liability Company, hereinafter referred to as the Company, is legal entity which is a capital association, established based on the agreement, carry out business activities with authorized capital which is entirely divided into shares and fulfill the requirements stipulated in the Law this and its implementation rules*".

Based on this provision, it is impossible for a company to be founded by just one shareholder or owned by just one shareholder, except in the case of a limited liability company which is a state-owned enterprise or an individual limited liability company.

As a consequence of the establishment of a limited liability company based on an agreement, the validity of the agreement is measured based on Article 1320 of the Civil Code ("Civil Code") where in this article there are elements that must be fulfilled for the validity of an agreement, namely (a) agreed by those who bind themselves, (b) ability to act, (c) certain objects and (d) lawful causes.

The requirements mentioned above relate to both the subject and object of the agreement. The first and second requirements relate to the subject of the agreement or subjective terms. Meanwhile, the third and fourth requirements relate to the object of the agreement or objective conditions.

The distinction between these two groups of requirements is also related to the issue of agreement invalidity. If the objective conditions in the agreement are not fulfilled, then the agreement is null and void or the agreement has been canceled from the start (*no* or *null and void ab intitio*). If the subjective conditions are not met, the agreement can be canceled.

Law Number 25 of 2007 concerning Capital Investment, in Article 33 paragraph (1) states explicitly that both domestic investors and domestic investors capital foreigners who invest in the form of limited liability companies are prohibited from making agreements and/or statements confirming that ownership of shares in the limited liability company is for and on behalf of another person.

The provisions in Article 33 paragraph (1) of the Investment Law above are compelling legal provisions (*coercive law*) resulting in a violation of legal provisions force will result in the agreement conflicting with the law. Therefore, Article 33 paragraph (2) of the Investment Law provides sanctions for violations of what is intended in paragraph (1), namely that the agreement or statement is declared null and void by law:

> *(2) In the event that domestic investors and foreign investors make agreements and/or statements as intended in paragraph (1), the agreements and/or statements are declared null and void by law.*

In Decision No. 80/Pdt.G/2018/PN.Dps dated 6 May 2019 the Panel of Judges at the Denpasar District Court consistently believes that a nominee agreement is an agreement that is against the law and therefore the agreement must be declared null and void. In its considerations the Panel of Judges stated the following:

> "*Considering, that because the agreement and statement made privately dated 31 May 2017 is a nominee agreement, the agreement must be declared null and void, therefore the petitum lawsuit number 4 is granted;*

As explained above, in the UUPT concept, limited liability companies are established based on an agreement. So, if the underlying agreement is null and void by law, then the deed of establishment of the limited liability company will also be null and void by law. In Decision No. 80/Pdt.G/2018/PN.Dps dated 6 May 2019, the Panel of Judges at the Denpasar District Court, the Panel of Judges provided the following legal considerations:

> *"Considering, that because the deed of establishment of the Limited Liability Company PT Mitra Sekata Perdana Number 06 dated 31 May 2017 is based on a cooperation agreement as well as agreements and statements dated 31 May 2017 which are declared null and void, then the deed is declared null and void and has no force the law is binding so that the lawsuit petition number 6 is granted;"*

Furthermore, after the Panel of Judges considered that the deed of establishment of a limited liability company based on an agreement was null and void, the Panel of Judges handed down the following decision:

> *"Declare that it is null and void and has no binding legal force. THE DEED OF ESTABLISHMENT OF THE LIMITED COMPANY PT. MITRA SEKATA PERDANA Number 06 dated 31 May 2017, made before DEBBY SINTYAWATI TJAHJANTO, SH., MKn Notary in Badung Regency."*

Even though the Panel of Judges stated that the deed of establishment of the company was declared null and void and did not have binding legal force, the Panel of Judges did not make a connection between the annulment of the deed of establishment and the existence of a limited liability company. From a logical point of view, if the deed of establishment of a limited liability company is declared null and void, then the establishment of the company should not be and as a result the existence of the limited liability company as a legal entity must also be declared null and void. However, in this decision, the Panel of Judges refused to cancel the decision to establish a limited liability company. This is stated in the consideration of the Panel of Judges as follows:

"Considering, that regarding the Plaintiff's demand to order Co-Defendant I to cancel and revoke the Decree on Legal Entity of PT Mitra Sekata Perdana, and to order Co-Defendant II to cancel all permits of PT Mitra Sekata Perdana, according to the Panel of Judges it is not based on law and is not within the authority of the Court State, then the petitum for lawsuit numbers 9 and 10 must be rejected;"

Considering the considerations above, it can be concluded that the cancellation of the deed of establishment of a limited liability company does not necessarily result in the legal entity of the limited liability company becoming invalid by itself. In order for the establishment of a company to be invalid, the decision to ratify the legal entity must be revoked or annulled and this is not the authority of the District Court, but the absolute authority of the State Administrative Court.

4. CONCLUSION

Based on the discussion above, the following can be concluded:

The notary remains responsible for the agreement made under the signed hand when the content or substance of the underhanded deed that is being trademarked is a deed that violates the law;

The legal consequences of a nominee agreement for ownership of the shares held *certification* by a notary is to cause the deed of establishment of a limited liability company to become invalid and not have binding legal force, but this does not necessarily cause the legal entity of the limited liability company to be dissolved.

5. SUGGESTION

Based on the conclusions above, the author suggests that although in terms of *certification* The notary is not responsible for the contents of an agreement entered into *certification.* However, it is best for the notary to first examine the contents of the under-hand agreement he intends to execute. *Certification*. If the notary knows or reasonably suspects that the contents of the agreement *certification* If the agreement violates the law, the notary should refuse to carry out *certification* of the agreement in order to avoid legal action in the future.

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