

Harmonizing the Legality of Nominee Agreements with Corporate Law in Indonesia

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Article Info

Received: 2025-02-12

Revised: 2025-04-21

Accepted: 2025-06-26

Keywords:

Law;

Virality;

ITE Law.

Abstract

Abstrak

The business process of development that occurs in Indonesia is increasingly marked by the rampant implementation of nominee agreements to form Limited Liability Companies (PT), especially carried out by foreign parties who want to avoid restrictions on share ownership. Although contractually nominee agreements can be categorized as agreements that are appropriate to meet the legal requirements as stipulated in Article 1320 of the Civil Code. However, substantially, its existence is contrary to the principles and provisions of corporate law, especially in Law Number 40 of 2007 concerning Limited Liability Companies. This study aims to analyze the legal disharmony between the legality of agreements according to civil law and the principle of legality of establishment and ownership of shares in company law. This research uses normative juridical methods with laws and regulations, conceptual, and case study approaches. The results of the study show that the nominee agreement creates legal ambiguity that has the potential to harm the legal interests of the parties and weaken the integrity of the national legal system. Therefore, synchronization between the two needs to be done. This synchronization can be done through strengthening supervision, enforcing the principle of transparency, and harmonizing regulations across sectors.

Keywords: Nominee agreement, legality of agreement, limited liability company, legal synchronization, corporate law.

I. Introduction

In the dynamics of modern business practices, especially in the field of investment, various forms of agreements have emerged that aim to accommodate the interests of the parties. One of the growing practices is the use of nominee agreements, which are agreements in which a person acts on behalf of another party in the ownership of shares in a Limited Liability Company. In Indonesia, this practice is often used by foreigners who want to avoid restrictions on share ownership in certain sectors regulated in the Negative Investment List (now called the Indonesian Business Field Standard Classification – KBLI).

Normatively, nominee agreements are often considered valid under civil law because they meet the requirements for the validity of the agreement as stipulated in Article 1320 of the Civil Code. However, in the context of company law, this kind of agreement has the potential to violate the basic principles of legality of the establishment and ownership structure of a PT as regulated in Law Number 40 of 2007 concerning Limited Liability Companies. This raises questions about how to synchronize between treaty law and corporate law in dealing with the nominee agreement phenomenon.

The problems that arise are not only normative, but also practical. Many parties are harmed by the inconsistency between the substance of the agreement and the legal structure of the company established under the agreement. In addition, this practice can open loopholes for abuse of the law and threaten the integrity of the national investment system.

Through this research, the author seeks to examine more deeply the clash between the legality of civil agreements and the company's legal provisions related to share ownership. This research also aims to offer solutions in the form of legal synchronization so that there is clarity and legal certainty for the parties involved and for the state as a regulator.

2. Research Method

This research is normative legal research that aims to examine the synchronization between the provisions of civil law regarding the legality of agreements and the company's legal provisions regarding the ownership structure in a Limited Liability Company. The approaches used in this study are the statute approach, the conceptual approach, and the case approach.

The legislative approach is used to examine the applicable positive legal norms, especially those related to the requirements for the validity of agreements according to the Civil Code and the regulation of the establishment and ownership of shares in Law Number 40 of 2007 concerning Limited Liability Companies. A conceptual approach is used to understand the basic concept of nominee agreement, including relevant legal principles such as the principle of freedom of contract, the principle of transparency, and the principle of substance over form. Meanwhile, the case approach is used to analyze court decisions related to nominee agreements, in order to identify legal practices and the tendency of judges' interpretations of these conflict norms.

The data sources used are secondary data, including laws and regulations, legal literature, scientific journals, and court decisions. The data collection technique is carried out through library research, while the data analysis technique is carried out qualitatively by focusing on systematic and argumentative interpretation of the law.

3. Results and Discussion

The Practice of Shareholder Nominees is reviewed from Law No. 25 of 2007 concerning Investment

Law No. 25 of 2007 concerning Investment has also been regulated regarding the prohibition of nominees who have not previously been regulated by these provisions in Law No. 1 of 1967 concerning Foreign Investment and Law No. 6 of 1968 concerning Domestic Investment. The articles in the Investment Law can be interpreted as prohibiting the practice of nominees, which are as follows:

1. Article 33 paragraph (1) of the Investment Law which states that domestic investors and foreign investors who invest in the form of a limited liability company are prohibited from making agreements and/or statements that affirm that the ownership of shares in a limited liability company is for and on behalf of others.
1. Article 33 paragraph (2) of the Investment Law states that in the event that domestic investment and foreign investment make an agreement and/or statement as intended in paragraph (1), the agreement and/or statement is declared null and void. The concept of nominee is basically unknown in the Continental European or Anglo-Saxon system that applies in Indonesia. Law in Indonesia is only familiar with the concept of nominee and often

uses it in several legal transactions since the increase in foreign investment around the 90s. Foreign investors are interested in investing their capital in Indonesia based on the consideration of several benefits obtained, including abundant natural wealth and relatively low labor wages.

With the affirmation of the prohibition of nominee shareholders in article 33 paragraph (1) of the Investment Law, any nominee shareholder documents made without the need for legal analysis are null and void. This null and void situation results in the nominee's shareholder document having no legal force and the position of the parties will return to its original state before the existence of the nominee's shareholder document. This can mean that the shareholder whose name is used to be the actual shareholder is in accordance with the deed of establishment/articles of association, while the payment from the foreign investor to buy the shares must be returned as debt by the registered shareholder. The reason for this prohibition is to avoid the occurrence of a Company that is normatively owned by a person, but materially or substantially the owner of the company is someone else. This is to get around the provisions in laws and regulations that limit the existence of business fields that are closed to foreigners or open to foreigners with certain requirements in the field of investment.

The provisions on the prohibition of nominee shareholders are also considered to apply to all foreign investments made in the form of limited liability companies, whether it is investment in business fields based on Law No. 25 of 2007 through the Ministry of Investment / Investment Coordinating Board or other business fields that are carried out not through the Ministry of Investment / Investment Coordinating Board, namely banks and securities, for the following reasons:

- a. Investment both domestic and foreign capital in the form of a limited liability company does not only include limited liability companies established through the Ministry of Investment / Investment Coordinating Board but also includes investments made outside the Ministry of Investment / Investment Coordinating Board.
1. The prohibition on nominee shareholders is only an affirmation of the validity of an agreement or agreement regarding nominee shareholders which according to the law is a lie about a fact.

The Legality of the Nominee Agreement in the Perspective of Civil Law

In general, a nominee agreement is a form of civil contract executed by two or more parties, where the first party (beneficial owner) appoints the second party (nominee) to formally own or control a right, usually in the form of shares in a limited liability company. In the Civil Code, the conditions for the validity of the agreement are listed in Article 1320 which include: (1) agreement of the parties; (2) the ability to make agreements; (3) a certain thing; and (4) a *halal* cause.

Nominee agreements generally meet these elements, especially if they are made in writing and consciously agreed upon by both parties. However, problems arise when nominee agreements are used to circumvent the provisions of foreign ownership restrictions in certain business areas in Indonesia. In this case, a clause aimed at concealing the actual ownership of a foreign entity can be considered a form of *simulatie* (pseudo-agreement), which in Indonesian jurisprudence and legal doctrine has the potential to be null and void if its purpose is contrary to the law or public policy.

Furthermore, Article 1337 of the Civil Code states that a cause is not *halal* if it is prohibited by law or contrary to decency or public order. Thus, even if the nominee agreement is formally valid, it can be considered null and void if it aims to disguise the identity of foreign investors in order to invest in closed or restricted sectors. In this case, the nominee agreement not only risks violating the provisions of corporate law, but also national investment law.

Legal Perspective of Limited Liability Companies: The Validity and Impact of the Nominee Agreement

In Law No. 40 of 2007 concerning Limited Liability Companies, the main principles held are legality, transparency, and protection of the interests of shareholders and third parties. In Article 52 paragraph (1) of the Limited Liability Company Law, it is emphasized that shares give the right to their holders to attend the General Meeting of Shareholders, receive dividends, and obtain the remaining wealth from liquidation. These rights are granted to the rightful shareholders, i.e. those listed in the register of shareholders.

When a nominee agreement is used, the formal shareholder on the list is only a representative of another party who actually has rights and control. This creates a mismatch between formal and substantive ownership, which in practice can make it

difficult to identify liability, tax calculations, and legal accountability.

In addition, there is no explicit provision in the PT Law regarding the recognition of beneficial owners. The absence of this regulation causes many nominee agreements to operate in the gray realm of the law. This kind of practice opens up opportunities for abuse, including tax evasion, money laundering, and violations of the latest Positive Investment List (DPI) which replaces the Negative Investment List.

Jurisprudence and Court Practice Review

Some court rulings show the tendency of judges not to recognize the validity of nominee agreements made with the aim of circumventing legal restrictions. One example is Supreme Court Decision No. 601 K/Pdt/1983, where the nominee's agreement was declared null and void because it was contrary to the rules on property ownership by foreign nationals. Similarly, in some cases related to mining and energy, the Supreme Court has tended to reject recognition of nominee structures that obscure actual ownership.

This shows that at the judicial level, there are efforts to enforce the substance of the law over the formal form. This means that the existence of a formally valid agreement does not necessarily receive legal protection if its content and purpose are contrary to applicable regulations or the public interest.

Legal Synchronization Efforts: Realizing Certainty and Compliance

Seeing the clash between the legality of the agreement according to the Civil Code and the principles of legality and transparency in company law, concrete synchronization steps are needed. These efforts can be made in several forms:

1. **Regulatory Reform and Affirmation of Beneficial Ownership Status.** The government needs to affirm normatively in the PT Law or through its implementing regulations regarding the position and recognition of beneficial owners. In the global context, the OECD and FATF have encouraged the disclosure of beneficial ownership as a measure to prevent money laundering and corruption. Indonesia can adopt this principle more firmly.
2. **Reporting and Transparency Obligations by State Institutions.** Through cooperation between the Ministry of Law and Human Rights, OJK, and BKPM, a centralized reporting system can be implemented that requires companies to report the actual ownership structure. This is important to prevent abuse of

- nominee agreements and strengthen investor confidence.
3. Consistent Law Enforcement. Law enforcement officials need to be given a thorough understanding of the legal risks of nominee practices. In addition, the court must also be given clear guidelines in assessing the validity of nominee agreements so that there are no inconsistencies in the decision.
 4. Legal and Compliance Education for Business Actors. Business actors need to be given an understanding of the legal risks of using a nominee structure that is contrary to national law. This education can be part of a preventive approach so that business people do not look for legal loopholes alone.

4. Conclusion

The nominee agreement phenomenon reflects the complex legal dynamics in business practices in Indonesia, especially in the field of investment and shareholding in Limited Liability Companies. Nominee agreements are often used as legal instruments to accommodate the interests of certain parties, including foreign parties, in controlling the shares of a company that are legally prohibited or restricted. From a civil law perspective, a nominee agreement fulfills the elements of the validity of the agreement as stipulated in Article 1320 of the Civil Code: the existence of an agreement, competence, certain objects, and halal causes. However, this validity becomes problematic when the substance and purpose of the agreement turn out to be contrary to public law, especially company law and investment law.

Limited Liability Companies as a subject of law have governance and legal structure that are expressly regulated in Law Number 40 of 2007 concerning Limited Liability Companies. The use of nominee agreements in this context has the potential to violate the company's fundamental principles, such as the principles of transparency, legal certainty, and legal accountability from shareholders. When there is a separation between formal owners and beneficial owners, legal gaps arise that can have an impact on the validity of the company's decision-making, tax obligations, and the legal rights and responsibilities of the parties involved.

From the perspective of the national legal system, the practice of nominee agreements that are abused to circumvent regulations actually creates legal loopholes that are detrimental to many parties. On the one hand, the parties are engaged in a legal relationship that is not fully recognized by corporate law. On the other hand, the state loses control over the direction of investment and potential state revenue from the tightly regulated sector.

Therefore, synchronization between civil law (especially treaty law) and corporate law is very important. This legal synchronization is not only aimed at uniting the two regulatory systems, but also as a form of harmonization between freedom of contract and the principles of legality and legal compliance in corporate governance. There needs to be normative clarity regarding the legal boundaries of nominee agreements, including the need for explicit arrangements regarding the recognition and disclosure of beneficial ownership in Indonesian company law.

Furthermore, a more integrative and progressive legal approach should be developed, taking into account international practices that emphasize the importance of transparency, anti-corruption, and the prevention of money laundering. Governments, legislatures, and supervisory authorities must play an active role in revising and harmonizing regulations across sectors in order to create a legal system that is not only responsive to economic development, but also ensures justice and legal certainty for all parties.

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