

*Analysis of Decision 80/PDT.G/2018/PN.DPS: Nominee & Foreign Investment  
Agreement in Indonesia*

**Weny Ramadhania**

[wenyrmadhania@gmail.com](mailto:wenyrmadhania@gmail.com)

**Piramitha Angelina**

[piramithaangelina@oso.ac.id](mailto:piramithaangelina@oso.ac.id)

**Sandy Kurnia Christmas**

[Ch.sandykurnia@oso.ac.id](mailto:Ch.sandykurnia@oso.ac.id)

**Yudith Evametha Vitranilla**

[yudithevamethavitranilla@oso.ac.id](mailto:yudithevamethavitranilla@oso.ac.id)

**Muhammad Fadhly Akbar**

[Fadhlyan@oso.ac.id](mailto:Fadhlyan@oso.ac.id)

Prodi Hukum ,Fakultas Hukum, Universitas OSO

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**Abstract**

This article examines Denpasar District Court Decision No. 80/Pdt.G/2018/PN Dps relating to nominee agreements in collaboration at Bali Restaurants involving foreigners and Indonesian citizens which focuses on problems arising from the existence of a Nominee Agreement in terms of Foreign Investment in Indonesia as well as the application of law in Investment Foreigners comply with the legal certainty of investing, therefore the aim of this article is to provide an overview and analysis of these two aspects. This article uses a normative approach by analyzing secondary data qualitatively. The result of the article is that Decision No. 80/Pdt.G/2018/PN Dps has prohibited the use of Nominee Agreements in Foreign Investment in order to maintain transparency and a fair investment climate. The ruling confirms the Nominee Agreement prohibition for the sake of legal certainty in foreign investment, and the government is committed to regulatory compliance to support sustainable economic development. Therefore, as a legal product, foreign investment is required to comply with Indonesian investment law in accordance with Denpasar District Court Decision No. 80/Pdt.G/2018/PN.DPS, and the judge emphasized the obligation of Foreign Investment to comply with investment law provisions, reflecting the application of legal certainty in investing in Indonesia.

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## 1. Introduction

The Denpasar District Court Decision No. 80/Pdt.G/2018/PN DPS brings legal issues related to nominee agreements in restaurant business partnerships in Bali Province. This case highlights nominee agreements involving foreign nationals and Indonesian citizens. The analysis of this decision is important for understanding the legal regulations related to nominee agreements. In this context, the emphasis on legal regulations aims to explain how the implementation of foreign investment aligns with the applicable rules.<sup>1</sup>

This case reveals violations of the Investment Law, so it is necessary to understand the types of violations. This helps illustrate the certainty of regulations in foreign investment, in accordance with the laws applicable in Indonesia. This agreement is illegal because it is not based on the applicable regulations. Studying the discrepancies of documents with legal requirements and their impact on ownership rights in the Denpasar District Court Decision No. 80/Pdt.G/2018/PN DPS can enhance understanding of the legal aspects in such practices. Knowledge about the legality of nominee agreements in relation to the prevailing laws in Indonesia can avoid legal violations and protect legitimate ownership rights.

This information is important in formulating stronger regulations in foreign investment practices. The analysis of document non-compliance with legal requirements helps clarify actions that align with legal principles, as well as support the effectiveness of foreign investment in Indonesia in order to provide legal certainty and legal protection.<sup>2</sup>

Normative legal certainty refers to the creation of regulations that are promulgated clearly and logically. Its clear explanation does not cause doubt and is logical, ensuring that a system of norms does not conflict with other norms, thus avoiding norm conflicts.<sup>3</sup> Legal certainty refers to laws that are enforced clearly, consistently, and consensually, so their implementation cannot be disturbed by subjective circumstances.<sup>4</sup> Certainty and justice are not merely moral demands, but factually

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<sup>1</sup> Ida Bagus Made Ariyoga and Dewa Gede Rudy. (2020). Analisis Terhadap Perjanjian Nominee Sebagai Penyelundupan Hukum Dalam Kepemilikan Usaha Akomodasi Wisata Di Provinsi Bali, *Jurnal Kertha Desa*, 10 (8) : 681

<sup>2</sup> Margono, S. (2008). *Hukum Investasi Asing Indonesia*.

<sup>3</sup> Fauziah Rachmawati. (2019). Kepastian Hukum Transplantasi Organ Yang Mencerminkan Nilai Kemanusiaan, *Jurnal Hukum Media Bhakti*, 3 (1) : 82.

<sup>4</sup> R. Tony Prayogo. (2016). Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005t Tentang Pedoman Beracara Dalam Pengujian Undang- Undang, *Jurnal Legislasi Indonesia*, 13 (2) : 194.

characterize the law. A law that is uncertain and unjust is not a bad law. Law significantly influences the development of human civilization because it functions as a protector of social order, a tool for governance, and a means to achieve justice and truth. The three basic principles of law are justice, certainty, and utility.<sup>5</sup> Internal legal certainty based on the law and external legal certainty from outside the law are two objectives of legal certainty. The existence of law that can guarantee certainty can also ensure utility, ensuring the presence of clear laws that can refer to justice and usefulness. Internal legal certainty will be achieved if the law is codified in legislation using a logical and practical framework, ensuring that there are no conditions leading to multiple interpretations of the law and differing understandings among legal subjects.<sup>6</sup> Laws that reflect the will of the state and are created through an open system will be able to offer certainty regarding the regulated matters as part of the effort to establish order.

The definition of legal protection is a place of refuge for legal subjects, involving a series of preventive and repressive legal measures, as well as legal conceptualization to ensure justice, certainty, security, utility, and urgency.<sup>7</sup> This principle serves as the foundation in civil law, supporting the rights of legal subjects through regulations and legal principles. Legal protection is carried out through various legal institutions such as courts and prosecutors. The main objective of the law is to achieve justice, especially in the context of investment, by protecting the rights and obligations of legal subjects, including in contracts regulated by law.

## **2. Research Method**

This research method uses a normative approach in legal analysis.<sup>8</sup> The steps include data collection from primary and secondary legal sources such as laws, books, documents, and related literature.<sup>9</sup> Primary legal materials are statutory regulations. The primary legal materials consist of:

- Law Number 25 of 2007 on Investment;
- Civil Code;
- Law on the Implementation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law.

Data analysis is conducted by identifying important information, presenting data without omissions, and concluding results based on qualitative analysis steps. The

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<sup>5</sup> Satjipto Raharjo. (2003). *Sisi-Sisi Lain Dari Hukum Di Indonesia*.

<sup>6</sup> Fence M. Wantu. (2007). Antinomi Dalam Penegakan Hukum Oleh Hakim, *Jurnal Berkala Mimbar Hukum*, 19 (3) : 388.

<sup>7</sup> Satjipto Raharjo. (2003). *Sisi-Sisi Lain Dari Hukum Di Indonesia*.

<sup>8</sup> Soerjono Soekanto and Sri Mamudji. (2001). *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*.

<sup>9</sup> Soerjono Soekanto and Sri Mamudji. (2013). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*.

qualitative approach allows for an in-depth understanding of relevant legal phenomena, with a focus on interpretation, social relationships, justice, and individual or group implications. By utilizing primary, secondary, and reference data, this method produces information that explains and analyzes the substance of the research comprehensively.

### 3. Result and Discussion

#### **The Issues of Nominee Agreements in Foreign Direct Investment in Indonesia**

Investment is defined as activities carried out by domestic or foreign (foreign) investors to invest capital in the territory of the Republic of Indonesia as stated in Law Number 25 of 2007 concerning Investment (UUPM).

Foreign investors who wish to invest in the territory of Indonesia must do so through a Limited Liability Company, a legal entity based in the Republic of Indonesia, in accordance with Article 5 paragraph (1) of the Investment Law (UUPM). Article 7 paragraph (1) of the Company Law establishes the prerequisites for forming a Limited Liability Company, one of which is the creation of a notarial deed by two or more parties.<sup>10</sup>

Regulations governing industries where capital can be invested must be carefully considered when making investments. Presidential Regulation Number 44 of 2016 concerning the List of Closed Business Fields and Business Fields Open with Conditions in the Investment Sector, which has been replaced by Presidential Regulation Number 10 of 2021 concerning Investment Business Fields, contains regulations related to this matter. Due to these regulations, there are investment limitations that need to be considered.

By using a Nominee Agreement, foreign investors and Indonesian citizens can collaborate to establish a Limited Liability Company (PT) in Indonesia. In the agreement, Indonesian citizens will act as shareholders on behalf of foreign investors, allowing foreign investors to control and manage the shares of the PT without being hindered by restrictions that may exist in the Negative Investment List. Foreign investors enter into this agreement with the aim of obtaining full ownership of the company and its shares.

Nominee Agreement, often referred to as *Perjanjian Nominee*, refers to a form of name-lending agreement involving the participation of Indonesian citizens as shareholders in a Limited Liability Company. This agreement involves an individual referred to as a "nominee," who has a specific duty to perform legal actions on behalf of the individual or entity that appoints them. This practice often

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<sup>10</sup> Yunisavitri, E. (2012). Implementasi Peraturan Pemerintah Terkait Dengan Kepemilikan Saham Dari Modal Asing, *Unnes Law Journal*, 1 (1) : 35.

occurs in the context of investments, especially investments involving foreign investors who plan to invest their capital in Indonesia. Nominee, in the context of a Nominee Agreement, is someone who is given special authority to represent and carry out legal activities on behalf of the party that appoints them. This practice is generally used by foreign investors who wish to invest capital in Indonesia. Gunawan in the writing of Dinda et al states that in the understanding of the Black Law Dictionary, it can be seen that there are two parties in the concept of the nominee structure, namely:<sup>11</sup>

- Nominee, which is the party legally recorded or the legal owner and can only act with limited authority according to the agreement or instructions from the beneficiary;
- Beneficiary, which refers to a party not legally recorded but has the authority to direct the nominee and enjoy every benefit and advantage from every action of the nominee.

In the case of the two parties' relationship, the nominee represents the interests of the beneficiary, with the stipulation that all actions taken by the nominee must be in accordance with the agreement and must comply with the instructions given by the beneficiary. Both of these relationships are usually contained in an agreement, referred to as a nominee agreement.

It is important to understand that the Nominee Agreement is not only related to share ownership but also includes the nominee's responsibilities in decision-making and company operations. The nominee acts as the legal face of the company in the eyes of Indonesian law, while the actual owner can remain anonymous. The involvement of a nominee can provide a sense of security to foreign investors, especially regarding regulations and legal aspects in Indonesia. However, in practice, Nominee Agreements often attract controversy due to their potential for misuse.

In examining how a nominee agreement constitutes a legal violation, it must refer to contract law. The agreement in Article 1313 of the Civil Code states that an agreement is "an act where one or more persons bind themselves to one or more other persons." Prof. Subekti in his book states that a contract is an event where one person promises another person, or where two people promise each other to carry out something. It can be concluded that an agreement is a form of legal interaction or relationship involving two legal actions: an offer made by one party and the

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<sup>11</sup> Dinda Eva Aprilia, Nur Anggraini Hidayatullah, & Muhammad Iswan. 2021. Tinjauan Hukum Terhadap Perjanjian Nominee Yang Diberikan Secara Lisan. Jurnal Lex Suprema. Vol. 3, No. 2.

acceptance of that offer by the other party. This results in an agreement that outlines the terms and conditions binding both parties.

That in the case of making an agreement, there are important conditions that must be observed by the parties. This is contained in Article 1320 of the Civil Code, which states as follows:<sup>12</sup>

- The agreement that binds them;
- The ability to create an obligation;
- A specific subject matter;
- A reason that is not prohibited.

An agreement is a legal contract that establishes rights and obligations between several parties. These rights and obligations originate from various sources such as laws, regulations, expert opinions, and dictionaries in Indonesian or foreign languages. Basically, every agreement consists of the following fundamental components :

- The existence of legal norms governing agreements, which include written and oral forms.
- The existence of legal subjects who uphold rights as well as responsibilities that have been included in the agreement.
- A performance exists when an agreement is made to take an action, give something, or refrain from doing something.
- The existence of a mutual agreement between the parties involved.
- The agreement gives rise to legal consequences in the form of rights and obligations.

The nominee agreement is classified as an innominate agreement due to the absence of specific regulations and the lack of explicit mention in the articles of the Civil Code. A nominee agreement can be classified as a type of agreement that primarily focuses on the fulfillment of the obligations of the parties involved. In the Indonesian legal system, the use of nominee agreements, which are a type of innominate agreement, is not explicitly and specifically regulated. However, in practice, many parties use nominee agreements for the purpose of purchasing property or making investments in Indonesia. In reality, nominee agreements are used by mixed couples who do not enter into marriage contracts to own property in Indonesia, as well as by foreign parties (WNA) who use them to invest in

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<sup>12</sup> Kusumawati, Ni Putu Monika Ventari, Ni Ketut Sari Adnyani, Ketut Sudiarmaka. (2020). Keabsahan Pernajian nominee Antara Warga Negara Indonesia Dengan Warga Negara Asing Dalam Praktik Jual Beli Tanah Hak Milik Dikaji Dari Undang-Undang No. 5 Tahun 1960. Universitas Pendidikan Ganesha, Volume 3 No. 2.

Indonesia. As a result, nominee agreements are more often used in Indonesia for legal circumvention.

### **Regulation of Foreign Investment in Indonesia in Accordance with Legal Certainty**

In the world of international business, cross-border economic transactions have undoubtedly become a phenomenon. Analysis of this phenomenon often centers on the principle of justice. This principle is used to evaluate market procedures based on balanced rights and obligations as well as individual integrity.

The law plays an important role in creating comfort, order, and certainty in human behavior towards others. The purpose of the law is to regulate human behavior in relation to society and create order through the use of power. Legal certainty is an absolute requirement for a democratic and modern rule of law state.

Written and unwritten laws serve as guidelines for societal behavior and impose restrictions on actions that can be attributed to others. Legal certainty is created through the existence of clear regulations and their enforcement. The principle of legal certainty forms the foundation of all other principles of the rule of law.

Legal certainty allows a person to act in accordance with the applicable laws and regulations. This also helps realize the ideals of equality before the law and without discrimination. Legal certainty also protects citizens from arbitrary actions by the government and guides society to comply with the law.<sup>13</sup>

In the effort to achieve legal certainty, it is important to consider the theory of legal certainty based on four essential elements: law as a positive thing, law based on facts, facts clearly formulated in the law, and the difficulty of changing positive law. Another view on legal certainty emphasizes general rules that explain to the public what is permissible and what is not, as well as protection from arbitrary government actions. Legal certainty also includes the consistency and stability of judges' decisions in the same case from one ruling to the next.

Overall, legal certainty is the primary goal of the law, ensuring that the law is applied correctly and consistently to provide clear behavioral guidelines for society.

Clear and fair laws, as well as legal certainty, serve as the foundation for every country in regulating its economic activities, including foreign investment. Foreign investment has a significant impact on a country's economic growth, and to attract such investment, legal certainty is key. Good legal protection is necessary to provide

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<sup>13</sup> Samudra Putra Indratanto, Nurainun, Kristoforus Laga Kleden. (2020). *Asas Kepastian Hukum Dalam Implementasi Putusan Mahkamah Konstitusi Berbentuk Peraturan Lembaga Negara Dan Peraturan Pemerintah Pengganti Undang-Undang*. Jurnal Ilmu Hukum, Volume 16 No. 1.

security to investors, both domestic and foreign.<sup>14</sup> In Indonesia, the Investment Law and related regulations form a legal framework that ensures certainty for investors. Legal certainty and clear regulations also play an important role in protecting national interests and creating a conducive investment climate. Thus, economic and investment laws are interconnected in shaping a country's economic system, which ultimately contributes to sustainable economic development.

Factors such as legal certainty, investment regulations, and the Negative Investment List play a key role in attracting or deterring foreign direct investment in a country. Legal certainty is the guarantee that the law is applied and enforced fairly, providing investors with confidence in their rights and the security of their investments.<sup>15</sup> However, legal uncertainty, caused by unclear regulations or differing interpretations, can hinder investor interest. In Indonesia, the Negative Investment List is used to control foreign investment in certain sectors, but these restrictions can also hinder the growth of PMA. To improve the investment climate, it is important to consider how to attract foreign investors while protecting national interests and maintaining legal certainty, thereby creating a tax and regulatory framework that promotes economic growth and attracts foreign investment.

Legal certainty is influenced by the government's efforts to support foreign investors in the host country through guarantees or other actions. The Investment Law is a means used by the Indonesian government to provide guarantees and protection to foreign investors. Articles 6 to 9 of the Investment Law contain regulations related to the protection of foreign investors.<sup>16</sup>

Article 6 of the Investment Law states that the government provides equal treatment to all foreign investors conducting activities in Indonesia, in accordance with applicable laws. However, exceptions are granted to foreign investors from countries that have special agreements with Indonesia. This is an implementation of the principle of non-discrimination in investment, as regulated by the Law, which emphasizes the need to provide equal treatment to all investors, regardless of their nationality or the country of origin of the investor.

Article 7 of the Capital Market Law states that the government will not nationalize or expropriate investors' ownership rights without a law. If such actions are taken, the government will provide compensation based on market prices. If there is no agreement on the amount of compensation, the dispute will be resolved through

<sup>14</sup> Rahmadi Indra Tektona, et al. (2021). *Quo Vadis Undang-Undang Hak Cipta Indonesia: Perbandingan Konsep Ciptaan Artificial Intelligence di Beberapa Negara*. Negara Hukum, Volume 12, Halaman 285–305.

<sup>15</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana Prenanda Media Group, Jakarta, 2009.

<sup>16</sup> Aditya ZF, Winata MR. (2018). *Rekonstruksi Hierarki Peraturan Perundang-undangan di Indonesia*. Jurnal Negara Hukum, Volume 9, No. 1 : 81

arbitration. This affirms that nationalization actions must be in accordance with the law and followed by fair compensation payments, with arbitration as a dispute resolution mechanism if necessary.

the freedom to transfer assets and repatriate foreign exchange is regulated in Articles 8 and 9. According to the regulations, investors can transfer asset ownership to potential buyers or the proceeds from asset sales, but only to the extent that they comply with all relevant laws and regulations. If there are assets that do not comply with the regulations, the state will take over their ownership. There are several items that can be accepted for repatriation and/or foreign currency transfer, including:

- Profits in the form of income, bank interest, and dividends;
- Proceeds from the sale of assets;
- Income or wages for foreign workers;
- Proceeds from liquidation or sale;
- Royalties;
- Compensation from acquisition or transfer;
- Additional funds for investment;
- Compensation for Losses;
- Funds for replacing fixed assets, or purchasing raw materials
- Funds for loan or debt repayment;
- Capital; and
- Payment for technical assistance in accordance with Article 8 paragraph (3) of Law Number 8 of 1995 concerning Capital Markets.

The government has the authority to regulate reporting requirements and the execution of fund transfers for foreign investors in accordance with applicable regulations. This includes the freedom to conduct foreign currency transfers and repatriate investments. In addition, the government is entitled to receive taxes and/or royalties from the investment. If there are unpaid obligations, the court may decide to postpone the transfer and/or repatriation.

Foreign investors also have the right to access legal remedies for dispute resolution in case of violations. This is important because the implementation of foreign investment can lead to conflicts with the government or domestic investors.

Based on Articles 27 and 28 of the Capital Market Law, the government must cooperate with the Investment Coordinating Board (BKPM). BKPM has various responsibilities, including setting guidelines and standards for investment services, carrying out investment-related tasks, and helping investors overcome obstacles in making investments. This includes the management of domestic investments

outside the territory of Indonesia, as well as expanding business opportunities in investment activities.<sup>17</sup>

The discussion on foreign investment in Indonesia covers several key aspects. First, the legal framework and investment protection are important matters. The Investment Law (Law No. 11 of 2020 on Job Creation) regulates the resolution of disputes between investors and the government through discussions, agreements, or international arbitration, while international agreements such as the Multilateral Investment Guarantee Agency (MIGA) also provide additional protection for foreign investments. Second, factors attracting investors include political stability, economic certainty, and legal certainty, with legal protection of investors' rights and a conducive legal environment being important to attract investment. Third, the Omnibus Law is expected to simplify regulations and provide legal certainty that attracts more foreign investment. Fourth, investment challenges include regulatory ambiguity, overlapping regulations, and the difficulty of bureaucratic licensing, which are expected to be addressed by the Omnibus Law. Lastly, investors use various forecasting techniques to reduce risk, including basic forecasting, structuring, transmission, reviewing track records, and identifying costs. Sources of information include the Investment Law, international agreements such as MIGA, views from investment observers like Sentosa Sembiring, analysis of the Omnibus Law, as well as investment and risk management principles..

#### **4. Conclusion**

Decision No. 80/Pdt.G/2018/PN DPS requires PMA in Indonesia to comply with local investment laws. This emphasizes the importance of PMA's compliance with the applicable investment regulations in Indonesia. This is to ensure legal clarity in investments in this country. The practice of Nominal Agreements that violate Indonesian legal regulations is prohibited in order to maintain the integrity of the investment system and support sustainable economic development..

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<sup>17</sup> Maya Rosmayanti, Rani Apriani. (2023). *Kedudukan Penanaman Modal Asing Terhadap Pertumbuhan Ekonomi Nasional Berdasarkan Hukum Investasi*. Jurnal Panorama Hukum, Volume 8, No. 1 : 1–16.

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