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Legal protection for notaries in the establishment of foreign investment limited liability companies based on name loan agreements

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Abstract
The economic growth of a country is influenced by foreign investment in the form of limited liability companies. However, name loan agreements, which are prohibited by Article 33 paragraph [1] of the Investment Law (UUPM), frequently occur. Court decisions that deem such agreements valid create legal uncertainty and disadvantage notaries in their obligation to provide legal counseling and verification of the parties involved. This ambiguity hinders the performance of notarial duties by Article 15, paragraph [1] of the Notary Law (UUJN).
This research aims to analyze the regulation regarding name loan agreements in establishing limited liability companies for foreign investment based on statutory provisions and the legal protection for notaries concerning the establishment of such companies based on name loans from a legal perspective.
The research method employed is normative juridical, using library research to address research questions 1 and 2. This study also utilizes primary legal materials, secondary legal materials, and tertiary legal materials as sources of legal information to answer the research questions.
The findings indicate a lack of legal certainty regarding the UUPM in Indonesia. This is evident from court decisions that recognize name loan agreements as valid despite clear prohibitions in the UUPM. Statutory regulations delineate the authority and obligations of notaries in the UUJN; however, in establishing limited liability companies involving foreign investment based on name loan agreements, notaries are only formally responsible according to the UUJN without considering broader legal implications.
Evaluating court decisions that validate name loan agreements is necessary to prevent legal uncertainty. Additionally, a review of statutory regulations is needed to ensure that notaries have a clear role and responsibility concerning establishing limited liability companies for foreign investment, thereby providing clearer legal certainty regarding name loan agreements.

Keywords: Notary, limited liability company, foreign investment, namelending

Introduction

Investment is investing money or capital to increase or at least maintain the value of the capital. Meanwhile, foreign investment refers to investments by foreign parties to run a business in the territory of the Republic of Indonesia, which are carried out based on an agreement or contract. (Supancana, 2006) [6]

Foreign direct investment in Indonesia is understood in a limited sense, where foreign parties or foreign companies buy shares in local companies directly (not through the capital market) or establish new companies. This investment process can be done through the Investment Coordinating Board (BKPM) or other related departments.2 In investing in Indonesia, foreign investors must obtain various permits per applicable regulations.

Foreign investors also face restrictions on investment, including prohibited sectors, share ownership restrictions, and certain conditions, as stipulated in Presidential Regulation No. 10 of 2021 concerning Investment Business Sectors. This regulation distinguishes between Closed Business Sectors, which are only for the Central Government, and Open Business Sectors. Open Business Sectors include priority business sectors and partnerships with Cooperatives and MSMEs. There are three types of open business sectors for foreign investors: business sectors without foreign involvement, business sectors with share ownership restrictions, and business sectors that are completely open without restrictions. In the context of Foreign Investment (PMA), the state has an important role in controlling investment activities by foreign investors. However, the state's control rights must continue to be upheld. One of these rights is the state's right to regulate opportunities and limit foreign investors in managing natural resources. This is regulated through applicable positive legal regulations, including Law No. 25 of 2007 concerning Investment (UUPM) and its derivative regulations.

The main objective of establishing UUPM is to create a conducive investment environment for foreign investors. This law regulates various important aspects, such as limiting foreign investors from using name-borrowing agreements by Article 33 paragraph [1] of UUPM; domestic investors and foreign investors who invest in the form of limited liability companies are prohibited from making agreements and/or statements that confirm that share ownership in the limited liability company is for and in the name of another person. If such an agreement is made, the agreement and/or statement will be considered null and void, as regulated in Article 33 paragraph [2] of UUPM. Then, based on Article 1320 in conjunction with Article 1337 of the Civil Code (KUHPerdata), it is stated that agreements that conflict with statutory regulations are null

and void because they violate one of the objective requirements for the validity of an agreement, namely a lawful cause.

De jure nominee shares are indeed recorded as belonging to Indonesian citizens because their names are registered in the shareholders list. However, de facto, the shares belong to the beneficiary. One way the beneficiary protects the rights to their shares is by making a name-borrowing agreement, either in writing or verbally. Based on Article 1320 of the Civil Code, an agreement must not be made in writing, so verbal agreements also have legal force. If a dispute arises regarding an oral agreement, written evidence can be used to show the agreement's existence, such as in the form of a letter or statement letter.

An example of a name-borrowing agreement in foreign investment occurred in Sabang City, where PK (a foreign citizen) acted as the beneficial owner and OE (an Indonesian citizen) as the nominee. This agreement was stated in a stamped statement signed by OE and his wife, where the agreement was that PK gave OE money to buy two plots of land as capital participation in establishing PT SHR. The purpose of this agreement was so that PK could control the PT and the company's assets, namely Building Use Rights (HGB). This shows that despite legal prohibitions, individuals are still looking for ways to get around regulations to achieve foreign investment goals. (Fairul, 2024) [2]

In establishing a Foreign Investment Limited Liability Company, foreign citizens are permitted to establish an Indonesian legal entity as a Limited Liability Company (PT) by Law No. 40 of 2007 concerning Limited Liability Companies (UUPT). They can invest capital by purchasing shares directly or through the stock market. Based on Article 7 paragraph [1] of the UUPT, a Company is established through a deed of establishment made by a notary, and to establish a PT, at least two people are required to make a promise to each other. This confirms the principle that applies under this law, which states that, as a legal entity, a company is established based on an agreement. Therefore, it has more than 1 (one) shareholder.

The UUPT does not explain the mechanism for fulfilling the minimum requirement of [2] (two) shareholders if only 1 (one) person owns shares. In the explanation of Article 7 paragraph [1] of the UUPT, the person referred to is an individual, either an Indonesian or foreign citizen or an Indonesian or foreign legal entity. The requirement for establishing a PT, which requires a minimum of 2 (two) shareholders, can trigger the emergence of the practice of borrowing names. Generally, foreign investors who want to control a PT indefinitely tend to use borrowing names as a solution to fulfill these requirements. This way, they can hide their ownership and still control the company.

In establishing a Foreign Investment Limited Liability Company, a notary acts as the maker of an authentic deed, namely the deed of establishment of the PT. A notary is a public official (openbare ambtenaren) who has the main task and obligation of making authentic deeds. Thus, a notary exercises part of the state's power in civil law to serve the public who needs evidence or legal documents in the form of authentic deeds. Therefore, a notary acts as a public official who guarantees the authenticity of the documents they make (deeds). (Thamrin, 2011) [3]

In the provisions of Article 15 paragraph [1] of the UUJN, there is a prohibition for notaries from making deeds that violate the laws and regulations in force in Indonesia. This prohibition aims to ensure that notaries act by applicable laws and maintain the integrity and validity of the legal documents they make. As a public official authorized to do deeds, notaries must be able to carefully consider and analyze the process of doing the deed. This process begins when the parties meet the notary and submit statements, both in the form of formal requirements and administrative requirements that form the basis for making the deed. The notary's responsibility also includes the validity and form of the authentic deed produced. Furthermore, in the provisions of Article 13 of the Notary Code of Ethics (KEN), notaries who violate the UUJN can be dismissed with honor or dishonor by the authorized agency. Thus, the notary in question will lose his membership in the Indonesian Notary Association (INI).

In making a deed of establishment of a PT for PMA, a notary has an important role, as regulated in Article 15 Paragraph [2] Letter e UUJN, which provides the authority to provide legal counseling. Article 16 Paragraph [1] Letter d UUJN also emphasizes that a notary may not refuse to do a deed according to the parties' request unless a reason is regulated by law. Regarding legal protection, notaries carry out their duties with a strong legal umbrella through the Notary Honorary Council (MKN), which allows for repressive actions by Article 66 Paragraph [1] UUJN, namely in giving approval or refusing requests from investigators who wish to summon a notary in the trial process. This legal protection aims to prevent arbitrary actions by investigators against notaries in court.

There is a legal vacuum when the deed of establishment involves a name-borrowing agreement that is often undetected because it can be done verbally. Although oral agreements are recognized as valid, name-borrowing among business actors, including foreign investors, is often used to avoid existing legal regulations. The prohibition on making an agreement stating ownership of shares in a PMA in the name of another person is regulated in Article 33 paragraph [1] of the UUPM. If such an agreement is made, the agreement and/or statement will be considered null and void by law, as regulated in Article 33 paragraph [2] of the UUPM. About the prohibition on the nominee concept in Article 33, paragraphs [1] and [2] of the UUPM, notaries are prohibited from doing deeds that conflict with the law by Article 15, paragraph [1] of the UUJN.

In the practice of making a deed of establishment of a Foreign Investment Limited Liability Company, there is a legal vacuum that results in the absence of explicit regulations regarding the role and responsibilities of a notary regarding the name-borrowing agreement made by the parties before the deed of establishment is made. This situation creates legal vulnerability because foreign citizens can carry out the practice of a name-borrowing agreement to control PT assets, which can potentially harm the state. Therefore, this study, entitled "Legal Protection of Notaries for the Establishment of a Foreign Investment Limited Liability Company Based on a Name Borrowing Agreement," is very important to be carried out.

Materials and Methods

Based on this research is a normative legal research method, which means an approach taken by examining theories and concepts and reviewing laws and regulations relevant to this research. Normative legal research places law as a building

of a norm system. The norm system includes the principles, norms, and rules of laws and regulations, agreements, and legal doctrines (teachings). This normative research aims to identify the concepts or bases in law to provide a deeper understanding of the structure and systematics of applicable law. The research approach used in this research uses the statute approach method. This research also uses a case approach to find patterns or trends in these legal cases. Then this research also uses a comparative legal approach to compare other countries' laws, regulations, and legal systems. With this analysis technique, the emphasis will be placed on qualitative data, which focuses on an in-depth understanding and interpretation of legal phenomena. The analysis will be directed at non-mathematical data, which includes texts, narratives, and the social context surrounding legal norms. (Sunggono, 2016) [5]

Results and Discussion

The implementation of name borrowing in Indonesia faces various significant legal obstacles. Violations of the objective requirements stipulated in Article 1320 of the Civil Code regarding lawful causes, as well as the provisions in Article 1337 of the Civil Code, which emphasizes that agreements must not conflict with the law, are the main reasons why name borrowing is difficult to enforce before the law. This incompatibility is further strengthened by the provisions in Article 52 paragraph [4] of the UUPT, which regulates the concept of share ownership by dominium plenum, as well as the requirements for establishing a Limited Liability Company, which requires a minimum of two shareholders, as stipulated in Article 7 paragraph [1] of the UUPT.

When a name loan agreement is made without fulfilling the objective requirements stipulated in Article 1320 of the Civil Code due to a false cause or contrary to law, the agreement is normatively considered null and void. This means that the agreement is considered to have never existed and was never born. The requirement of a lawful cause in an agreement aims to ensure that a judge supervises the agreement. The judge can check that the agreement's objectives can be implemented and do not conflict with the law, public order, and morality. In the context of a name loan agreement in share ownership, this agreement violates Article 48 paragraph [1] of the UUPT, which states that shares must be issued in the owner's name.

The legal culture in society to comply with regulations also faces challenges because the level of compliance can decrease when the benefits of borrowing names appear, both for nominees who receive compensation and beneficiaries who fully control the shares. The unclear provisions in the UUPT regarding the prohibition of borrowing names contribute to the development of this practice in society. As a result, the regulation of borrowing names in Indonesia is ineffective regarding law enforcement, culture, and the provisions of the UUPT itself. Then, the prohibition on borrowing names in the UUPM becomes inefficient because the existing policy is limited to capital investment.

In the consideration of the panel of judges of the Banda Aceh High Court with Decision Number 57/PDT/2022/PT BNA, the agreement between the beneficiary and nominee, which is normatively known as a name borrowing agreement, was declared valid. The Statement Letter contained in the agreement is considered evidence of suspicion by the provisions of Article 164 HIR/284 RBg and Article 1915 of the Civil Code. Thus, the contents of the Statement Letter have evidentiary value in this case, especially because of its conformity with the witness's testimony. Therefore, the panel of judges decided to recognize the validity of this type of agreement.

When viewed from the legal principles applicable in Indonesia, there are situations where the provisions between laws and regulations differ. In the case above, the panel of judges considered that the name-borrowing agreement between the beneficiary and nominee could be used as evidence of suspicion through a Statement Letter made by the nominee, which was supported by witness statements by Article 1915 of the Civil Code. However, on the other hand, the provisions in Article 33, paragraphs [1] and [2] of the UUPM state that the type of agreement made by the beneficiary and nominee is null and void by law. In this context, the applicable legal principle is lex specialis derogat legi generalis, which means that more specific provisions override general provisions. Therefore, the provisions in the UUPM that are more specific regarding the prohibition and validity of name-borrowing agreements should be prioritized and applied.

Several principles need to be considered in lex specialis derogat legi generalis. First, the provisions in general law remain valid unless specifically regulated in a more specific law. Second, the provisions of lex specialis must be equal to the provisions of lex generalis (the law must be equal to the law). Third, the provisions of lex specialis must be in the same legal environment (regime) as lex generalis. (Asikin, 2015) [1]

In the above case, the panel of judges confirmed that the nominee and beneficiary agreements remain legally binding despite violations of the UUPM. However, this raises questions about the invalidity of the agreement, which should be an important focus in the decision. The UUPM expressly prohibits domestic and foreign investors from making agreements stating share ownership for and on behalf of other people.

The agreement made by the beneficiary and nominee can potentially violate this provision. The validity of an agreement that violates applicable legal provisions should be questioned. Although the panel of judges considered that the agreement could be recognized because of the evidence and agreement between the parties, the violation of the UUPM should raise serious doubts about the agreement's validity. According to applicable legal principles, an agreement contrary to the law should not be recognized as valid.

Legal considerations taken by the Panel of Judges that do not heed violations of the UUPM have the potential to weaken the principle of legal compliance and the integrity of the legal system as a whole. This can also threaten investors' confidence in the future, which is very important for economic growth and the development of strategic sectors in this country. Therefore, strengthening law enforcement and compliance with existing regulations must be a priority so that freedom of contract can go hand in hand with maintaining compliance with applicable laws.

Overall, the implementation of name borrowing in Indonesia faces significant legal obstacles, especially related to non-compliance with the provisions of the Civil Code and the UUPM. Although name-borrowing agreements are considered legal, this practice often operates in a legal gray area that reduces compliance with existing regulations. The

ambiguity in regulations and the inability of law enforcement to detect this practice create legal uncertainty that has the potential to harm third parties and disrupt the investment climate. Freedom of contract cannot be used as an excuse to violate the law, and the decision of a panel of judges to ignore violations of the UUPM can undermine the integrity of the legal system and threaten the trust of domestic and foreign investors.

Legal protection efforts for notaries can be explained through the theory of legal protection put forward by Pilipus M. Hadjon. According to him, legal protection focuses more on "government actions" and divides legal protection for the community into two types. First, preventive legal protection aims to prevent disputes by encouraging the government to be careful in decision-making. Second is repressive legal protection, which aims to resolve disputes after they occur, including handling outside the courts. When applied to notaries, this legal protection is more preventive. Preventive legal protection functions to prevent violations of the community's rights by the authorities so that individual rights can be properly protected. Thus, legal protection for notaries protects their profession and ensures that the rights of all parties involved in the transaction can be maintained. (Hadjon, 1997)

Based on this principle, the concept of a state of law based on Pancasila will develop other elements, such as establishing a functional and proportional relationship between state powers. Dispute resolution must be carried out through deliberation, while the judiciary is the last step. In addition, human rights do not only focus on rights and obligations but also the balance between the two. This is different from the concept of the rule of law, which emphasizes the principle of equality before the law, and the concept of rechtstaat, which emphasizes that the government must base its actions on laws.

The concept of a state based on the abovementioned law is rooted in the Indonesian State Philosophy, namely Pancasila. The principle of legal protection mentioned is the basis. It explains that legal protection provided by the state is based on guaranteeing human rights by prioritizing the principle of wetmattigheid, namely that government actions must be based on law. Therefore, legal products are very important to achieve effective legal protection. In addition, law enforcement officers must commit to carrying out their duties by applicable regulations without discrimination.

UUJN is a legal product designed to provide certainty and legal protection for notaries who carry out their profession as officials who make authentic deeds. In UUJN, various provisions regulate the form of legal protection for notaries, especially in the context of civil disputes.

Legal protection for the position of notary is regulated in Article 66 of the UUJN, which regulates the formation of the MKN. The MKN consists of representatives of notaries, government, and academics and functions as a legal protection institution for notaries related to deeds made by or before them. The position of the MKN in providing legal protection for notaries related to deeds they make reflects the independent nature of this institution. The MKN is not part of the government that appointed it, so in exercising its authority, the MKN issues decisions that other parties or institutions do not influence. Thus, decisions taken by the MKN are final and cannot be contested.

In establishing a Foreign Investment Limited Liability Company, such as PT Sunset Hill Resort Sabang, it is known that the investors have made a name borrowing agreement before the deed of establishment is made before a notary. The purpose of this agreement is to simplify administration and other purposes. However, foreign citizens also have a hidden intention to control the PT's assets in the form of land with Building Use Rights (HGB) status. In this case, the notary who made the deed of establishment cannot be sued by the disputing parties. This means that the notary cannot be held responsible, even though the actions of the investors who made the name borrowing agreement before establishing the PT violate the provisions of Article 33 paragraphs [1] and [2] of the Investment Law and Article 48 of the Limited Liability Company Law.

In this case, the notary's obligation to recognize the person appearing is based on formal truth. Namely, the truth stated in the document shown to them. For example, a deed of establishment is made before a notary, with a clause at the beginning stating "Before me." This clause indicates that the notary drafted the deed based on information provided by the parties present. In Supreme Court Decision Number 702 K/Sip/1997, it is explained that the function of a notary is to record and write down what is desired and conveyed by the parties appearing before him. So, the notary has no obligation to conduct an in-depth investigation of the information provided by the person appearing.

Based on the explanation, the notary's obligation to recognize the person appearing who wants to perform a legal act in a deed is based on formal truth, not material truth. Therefore, the notary is not responsible for any discrepancy between the information in the formal document and the facts. For example, suppose a person appearing comes to a notary to establish a limited liability company and states that he is acting on his behalf when, in fact, he is acting as a nominee for the benefit of the beneficiary based on a name loan agreement. In that case, the notary will not be responsible for any losses that may occur in the future. This is because the notary's obligation to recognize the person appearing and the information he obtains is limited to formal truth by the documents submitted by the person appearing when dealing with the notary. (Santira, 2024) [4]

Furthermore, in establishing a PT, the establishment process is carried out by making a deed of establishment before a notary. The parties explain their intentions and objectives to the notary, who will then record, compile, and formulate the information into an authentic deed. The notary is responsible for the truth of the information provided by the parties in the deed. However, the actual truth is beyond the notary's responsibility because the notary is only responsible for the formal truth stated in the document.

The conclusion that can be drawn from the explanation above is that the legislation has provided preventive legal protection, especially in preventing disputes involving notaries in the preparation of the deed of establishment of the Sunset Hill Resort Limited Liability Company in Sabang. This can be seen from the fact that no lawsuits were filed regarding the validity of the deed of establishment, even though it is known that prospective investors have entered into a name loan agreement before establishing the limited liability company. This practice violates the provisions stipulated in Article 33, paragraphs [1] and [2] of the UUPM.

In carrying out his duties, the notary is not responsible for any inconsistencies or deficiencies in information, such as the existence of the name-borrowing agreement. Therefore, the notary who made the deed of establishment of PT Sunset Hill Resort Sabang cannot be held responsible for the deed. In carrying out his obligations and authorities, the notary followed the applicable regulations so that no violations occurred. Creating a name-borrowing agreement carries significant risks because this agreement is highly dependent on trust between the parties involved. This uncertainty can trigger potential disputes in the future, especially if the relationship between the parties is not managed properly. In situations where trust begins to fade, the risk of dispute becomes higher, which can result in losses for all parties.

Name lending agreements also face additional challenges due to the lack of regulations that govern this practice. This legal ambiguity creates a situation where the parties involved do not have clear guidelines regarding their rights and obligations. This legal uncertainty can make parties feel insecure, so they may be reluctant to enter such agreements.

Conclusion

The regulation of name-borrowing agreements in Indonesia faces serious challenges due to the lack of strict sanctions in the law so this practice remains illegal but difficult to detect and creates legal uncertainty. This is detrimental to third parties, reduces investor confidence, and hampers economic growth. In contrast, countries such as Thailand and the Philippines implement strict regulations with severe sanctions, such as the FBA and Commonwealth Act No. 108, which create a safer legal environment and support stable economic growth.

The role and responsibilities of notaries in establishing a Foreign Investment Limited Liability Company are very important in providing legal protection for the parties. Notaries must comply with all relevant regulations, such as the UUJN, UUPT, and UUPM, to prevent disputes and maintain the integrity of their profession. In the case of the deed of establishment of PT Sunset Hill Resort in Sabang, the absence of a lawsuit regarding the validity of the deed shows that the legal protection provided is preventive. Although it is known that there is a name-borrowing agreement that violates the provisions of the UUPM, notaries cannot be held responsible for the deed because they have carried out their duties by applicable law. Thus, the notary's compliance with the regulations protects the parties' interests and ensures that they are not liable for any possible lack of information.

Suggestion

The Indonesian government must formulate clear and firm regulations on borrowing names, including definitions, limitations, and severe sanctions such as fines and imprisonment. Increasing the capacity of law enforcement, socializing with business actors, and strengthening the role of notaries in verification are also important. In addition, international collaboration, regular supervision, and transparency of the reporting system will help create a safe investment environment, increase investor confidence, and support economic growth.

Notaries are only required to know formal facts and are not responsible for information from the person appearing if they carry out their duties according to the law. Training on the risks of borrowing names, recognizing suspicious signs, and monitoring mechanisms will provide notaries with legal protection and trust. This step is expected to maintain justice and certainty of legal practice in Indonesia.

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