Legal Protection for the Position of Indonesian Investors in the Joint Venture Agreement

Sri Purwaningsih[1*], Rubiyanto[2]

[1,2] Faculty of Law, University of 17 August 1945 Semarang, Indonesia
[*] Corresponding author:
Email : sripurwaningsih940@gmail.com

Abstract.

The agreement that forms the basis for developing a joint venture company is the joint venture agreement and articles of association. A joint venture agreement is an agreement between prospective shareholders of a joint venture company subject to the law of contract. The imbalance of position in making Joint Venture Agreements is because foreign participants (Foreign Participants) are more substantial, mainly if foreign parties (Foreign Participants) have cultivated their business strength in the form of multinational (transnational) companies. This imbalance can cause the emergence of such cooperation to be unnatural and result in the strong party controlling the weak party. Such a cooperative relationship becomes a subordinate relationship, not a level relationship, and needs each other. This research aims to find out the concept or theory of legal protection for the Indonesian side in the Joint Venture Agreement. This research is prescriptive normative juridical research. Normative legal research in this study uses secondary data in the form of legal materials obtained through literature studies and emphasizes speculative-theoretical steps and normative-qualitative analysis. It is necessary to improve regulations regarding Joint Venture Agreements to provide legal protection for Indonesia in the Joint Venture Agreement. Because the agreement that forms the basis for developing a joint venture company is a joint venture agreement and articles of association. A joint venture agreement is an agreement between prospective shareholders of a joint venture company subject to the law of contract. The terms of the joint venture agreement should reflect a clear relationship between the parties and describe the development of the relationship in the future.

Keywords: *Foreign Investment, Legal Protection, Joint Venture Agreement*

1. INTRODUCTION

Ways taken to increase economic growth include investment, use of technology, increase knowledge, improve organizational and management skills. In this case, investment plays an important role as part of the implementation of the national economy and is placed as an effort to increase national economic growth, create jobs, increase sustainable economic development, increase national technological capacity and capability, encourage people's economic development, and realize prosperity. society in a competitive economic system [1].

The purpose of implementing investment can only be achieved if the supporting factors that hinder the investment climate can be overcome, including legal certainty in the investment sector, highly competitive economic costs, a conducive business

climate and others [2]. By improving the various supporting factors. It is hoped that the realization of investment will improve.

Foreign investment in Indonesia can be carried out through the direct method, that the foreign capital is owned by a foreign State, foreign business entity, foreign legal entity and or Indonesian legal entity which is partially or wholly owned by a foreign party[3]. Foreign investment must be in the form of a limited liability company based on Indonesian law and domiciled in the territory and State of the Republic of Indonesia unless otherwise stipulated by law [4].

Domestic and Foreign Investments that invest in the form of a limited liability company are carried out by: a. take part in shares at the time of the establishment of the limited liability company: b. buy shares; c. perform other methods by the provisions of the legislation (Article 5 paragraph (1), (2) and (3) UUPM); Indirect investment is a short-term investment that includes transaction activities in the capital market and money market [3]. This capital market is called the short-term investment market because, in general, the sale and purchase of shares or currencies depend on fluctuations in the value of shares and or the currency to be traded [5].

The goal of investors is to get maximum results within a period that is not too long to be able to enjoy profits [6]. Or, this type of investment, which investors expect, is capital gain, meaning that there is income from the difference between buying and selling shares on the stock exchange (Article 1 point 4, Article 6 (1) of Law No. 8 of 1995 concerning Capital Markets. The parties must consider several things, namely the choice of business fields, policy aspects, the realization of agreements, and company establishment.

The fact is that the position of foreign investors is more fortunate than the recipients of foreign capital, namely developing countries. This unequal position causes various problems[7]. The imbalance of power in making *joint venture agreements* is because foreign participants are stronger, especially if foreign participants have fostered their business strength in the form of multinational companies [8].

Such an imbalance can cause the emergence of such cooperation to be unnatural and can result in the strong party controlling the weak party. Such a cooperative relationship becomes a sub-ordinate relationship, not a level relationship and needs each other [9].

II. METHODS

This research is prescriptive normative juridical research. Normative legal research in this study uses secondary data in the form of legal materials obtained through literature studies and emphasizes speculative-theoretical steps and normative-qualitative analysis. This research aims to find out the concept or theory of legal protection for the Indonesian side in the Joint Venture Agreement. The parties in the

joint venture and the wider community understand the legal protection in a Joint Venture Agreement.

III. RESULT AND DISCUSSION

A joint venture agreement is one of the steps that must be taken to establish PT. PMA. In this case, the parties referred to are Indonesian parties called Indonesian participants and foreign parties are called foreign participants [10]. The initial agreement must be made in the implementation of PT. PMA is about Investment policy, Ownership and management, Finance and fiscal policy, Labor policy, and Technology.

If the parties have found relevant parties to cooperate with, then "talks" will begin to realize this desire. The term "talk" here is defined as a negotiation process which is carried out in: (1) face to face or through; (2) means of communication (telephone); done (3) orally and or through; (4) writing (correspondence, facsimile and so on).

In this discussion, each party submits an offer offered by the other party. Furthermore, if there is a match about everything desired by both parties, then the conformity of the will is achieved. According to the law of engagement, the moment of unity of choice is when the offer (from the party offering) meets acceptance (by the offeree), which is when an agreement occurs. According to Article 1320 of the Civil Code, a contract is one of the conditions for the occurrence of a deal and the skills of the parties, certain things and objects are lawful. An agreement arises with the conflict of opinion between Indonesian entrepreneurs and foreign entrepreneurs. In the agreement, the parties agreed to jointly establish a joint venture company in Indonesia. Other matters regarding everything related to the joint venture company

The agreement to establish a joint venture that has been agreed upon by the parties mentioned above, is then stated in written form and is called an MOU (Memorandum of Understanding). Thus, an MOU is an agreement in written form made and signed by an Indonesian participant and a foreign participant, which contains outline provisions regarding the establishment of a joint venture company and matters relating to the joint venture. The MOU is drawn up in English, although the foreign businessmen come from Japan, Korea, Taiwan, China and others. The points that are outlined in the MOU include the names of participants, the amount of capital that must be paid up by each participant (equity or participation ratio), comparisons and the number of directors or commissioners.

After the company was established and operational, this MOU was no longer used. In this case, what is used as a guide is a joint venture agreement. The provisions outlined in the MOU above are further regulated in detail and set forth in written form. The writing that regulates this in detail begins with the creation of a draft. This draft was then studied by both parties. If one of the parties feels that there are things that are not in accordance with his will, then the matter is discussed again with the other party.

After achieving the opportunity in the sense that both parties agree, a Joint Venture Agreement is made.

According to Dhariswara K. Haryono, the purpose of investment or investment can only be achieved if the supporting factors that hinder the growing climate can be overcome, among others through:

1. Improved coordination between central and local government agencies;
2. Creation of an efficient bureaucracy of legal certainty in the field of investment.
3. Highly competitive economic costs; as well as
4. A conducive business climate in the field of employment and business security.

With the improvement in these various factors, it is hoped that the realization of investment will improve significantly. Investment has an important role in improving the economy and employment growth. Governments around the world are currently actively competing to create a better business climate to support investment activities.

Whether we realize it or not, foreign and domestic investment is beneficial for economic growth. In fact, many countries have realized that there are not many benefits derived from differentiating foreign investment from domestic investment. Both, directly or indirectly, greatly affect economic growth.

Moreover, foreign investment activities often play a role in opening up new markets and encouraging the entry of new technologies and skills. Even if investors repatriate profits, this is offset by the amount of capital invested, technology, market access and export activities obtained. On the other hand, a lack of investment activity will lead to a decrease in competitiveness, and weaken the relationship between the country's economy and international markets. For this reason, in terms of attracting investment, it is necessary and appropriate to highlight some fundamental changes that lead to increased mobility. Investment policies that contain strict restrictions and are practically widespread in almost all developing countries must be replaced by more open investment policies.

The foreign investment law must also guarantee equal treatment. Coordination between government agencies, between the government and Bank Indonesia, between central government agencies and regional governments. Regional governments have the widest possible autonomy to regulate and manage their own investment operations. Therefore, the speed of improving coordination must be measured by granting permits and investment facilities that have foreign power.

Investment law must be able to accommodate competition. There are at least three qualities that need to be created by a new legal product from the Investment Law, so that it can encourage foreign investment, namely stability; predictability; fairness.

The first two are prerequisites for the economic system to function. Predictability requires that the law brings certainty. Investors will come to a country if they believe that the law will protect their investment. Legal certainty is as important as economic opportunity and political stability. Second, it must be able to create stability, which is to be able to balance or accommodate competing interests in society. In this case, the Investment Law can accommodate the interests of foreign capital and

protect local entrepreneurs or small businesses. Third, fairness or justice such as equality of all people or parties before the law, equal treatment of all people and the existence of standard patterns of government behavior, are emphasized by many experts as a prerequisite for the functioning of market mechanisms and preventing excessive bureaucratic actions.

The provisions outlined in the MOU above are further regulated in detail and set forth in written form. The writing that regulates this in detail begins with the creation of a draft. This draft was then studied by both parties. If one of the parties feels that there are things that are not in accordance with his will, then the matter is discussed again with the other party. After achieving the opportunity in the sense that both parties agree, a Joint Venture Agreement is made.

The provisions of this joint venture agreement are used as the operational guidelines of the parties' companies. The notary's action against the joint venture agreement from a notary perspective is called legalization or waarmerking. In carrying out legalization, the notary reads the contents of the deed (joint venture agreement) to the appearers and explains the contents, then the appearers put their signatures [11].

The act of a notary affixing his stamp and initials to each sheet of the joint venture agreement above is an act of waarmerking. Notary will reject Waarmerking if the contents of the joint venture agreement are not the same as the parties' request regarding matters that must be included in the deed of establishment of the joint venture company. Thus, if a notary wants to grant a Waarmerking or even legalize a joint venture agreement that does not have the same content as the deed of establishment, it means that the notary concerned made a mistake. The discrepancy between the contents of the joint venture agreement and the contents of the joint venture company deed includes capital, management, management of the board of directors, adjustment of disputes and or the appointment of an international agency with the authority to settle disputes.

The agreements made by the parties in the establishment of a limited liability company are the promises set forth in the deed of establishment of the joint venture company.

The documents that must be submitted to the notary for making the deed of establishment of the joint venture company are:

1. Power of attorney from the foreign partner that has been signed by the Indonesian Embassy in the country where the foreign partner is domiciled;
2. Photocopy of passport of a person who does not act as a representative of a foreign partner;
3. The full names of the members of the Board of Commissioners and the Board of Directors, the latest addresses and nationalities of each of them.
4. Letter of approval from PMA and BKPMD.

Based on the above points, it is known that the establishment of PT. PMA can be carried out if the parties have obtained a Foreign Investment Approval Letter (SPPMA)

from BKPMD. Considering that the SPPMA procedure is a licensing (administrative) procedure, this procedure is not categorized as an agreement between the parties [11].

Point 3 above is a further elaboration of the provisions contained in the joint venture agreement. All joint venture agreements (100%) examined do not explicitly mention the names and certain positions in the company, but only mention the consideration of the number of commissioners and directors between the Indonesian side and their foreign partners.

In the deed of establishment of the joint venture company, the notary shall formulate the will of the parties based on the applicable provisions. The will of these parties has been stated in the joint venture agreement. Thus, the deed of establishment of the joint venture company shall contain as much as possible everything contained in the joint venture agreement. However, in practice not all of the things listed in the joint venture agreement are contained in the deed of establishment. Confidential matters, by the parties, are left in the joint venture agreement and are not included in the deed of establishment of the joint venture.

The requirements in point 3 above are necessary because in the application for approval to the minister of law and human rights the composition of the management of this joint venture company is mentioned for the first time. In practice, there are two ways of mentioning the composition of the management, namely, it is included in the deed of establishment and included as an attachment to the deed of establishment. In the latter case, the deed of establishment only mentions the composition of the number of directors and commissioners.

In all the deed of establishment of the joint venture company (100%) it turns out that the names of the composition of the board of directors and commissioners are not mentioned in detail, but are stated in a separate paper which is included as an attachment to the application for company approval to the Minister of Law and Human Rights[12].

Based on the capital of a company determines the size of a company. In this case a joint venture company, the capital of the company is partly owned by Indonesian participants and partly owned by foreign participants. The composition of the provision of funds to be paid up as the capital of a joint venture company affects the position concerned in making a joint venture agreement. The provisions for capital ownership must be included in the articles of association of the company. This is in accordance with Article 9 of Law No. 4 of 2007 concerning limited liability companies which reads:

To obtain the Minister's decision regarding the legalization of the Company's legal entity as referred to in Article 7 paragraph 4, the founders jointly submit an application through information technology services for the legal entity administration system electronically to the Minister by filling in the form that at least:

1. Name and place of domicile;
2. The period of establishment of the company;
3. The aims and objectives as well as the company's business activities;

4. The amount of authorized capital, issued capital, and paid-up capital;
5. Full address of the company.

Every act concerning money or having the purpose of payment or the purpose of an obligation that must be fulfilled with money if it is carried out in Indonesia, shall be carried out in Indonesian Rupiah, unless expressly other provisions are made in accordance with the laws and regulations [13].

If the deposit is made with company income (inbreng), then there must be a clause in the article regarding capital or at the end of the deed. UU no. 40 of 2007 also regulates that this is done in the form of money and/or in other forms. In the event that the share capital is paid in other forms as referred to in paragraph (1), the valuation of the share capital is determined based on the fair value determined according to the market price or by an expert who is not affiliated with the company. In this case, there is an extraordinary inequality, where Indonesian participants only hold very few shares, then determining the composition of the management based on a pure balance of share ownership will be very detrimental to Indonesian participants. Regarding this.

Management of the company (Article 92 paragraph 1 of Law No. 40 of 2007). Furthermore, Article 94 paragraph 1 states that members of the Board of Directors are appointed by the GMS, for the first time the appointment of members of the Board of Directors is carried out by the founder in the deed of establishment as referred to in Article 8 paragraph (2) letter b (Article 94 paragraph 2). Based on these provisions, it can be seen that for the first time the members of the board of directors are not appointed by the GMS, but are determined by the founders of the limited liability company concerned. In managing the company, the board of directors is fully responsible for the management for the interests and objectives of the company as referred to in Article 92 paragraph (1), the board of directors represents the company both inside and outside the court. Based on these provisions, it is known that the company's resignation is in the hands of the board of directors.

In addition to directors, each company also has a commissioner. Regarding the appointment of commissioners, it is carried out by the GMS (Article 111 paragraph 1). For the first time the appointment of the board of commissioners is carried out by the founder in the deed of establishment as referred to in Article 8 paragraph (2) letter b (Article 111 paragraph 2). Especially for joint venture companies, the appointment is carried out by Indonesian participants together with foreign participants.

According to Law no. 44 of 2007 that the Board of Commissioners supervises management policies, the general course of management, both regarding the company and the company's business, and provides advice to the Board of Directors. The supervision and providing advice as referred to in paragraph (1) is carried out for the benefit of the company and in accordance with the aims and objectives of the company (Article 108 paragraphs 1 and 2). The board of commissioners is responsible for the supervision of the company as referred to in Article 108 (1). Each member of the board of commissioners is obliged to act in good faith, exercise prudence, and be responsible in carrying out the duties of supervising and providing advice to the board of directors

as referred to in Article 108 paragraph 1 for the benefit of the company and in accordance with the aims and objectives of the company[14].

The provisions above show that the role of directors and commissioners is so important in a company. Thus it can be concluded that the success of the company depends on the honesty, expertise and dedication of the directors and commissioners. The goals and objectives of the company are the goals that must be achieved by the management of the company, because the success or failure of a company is one of the responsibilities of the company management, namely the directors and commissioners.

In accordance with the general explanation of Law no. 25 of 2007 concerning Investment, that in order to make a just and prosperous society based on Pancasila and the 1945 Constitution, it is necessary to carry out sustainable national economic development based on economic democracy to achieve the goals of the state. To accelerate national economic development to realize the political and economic development of Indonesia, it is necessary to increase investors to process economic potential into real power by using capital originating both from within the country and from abroad. An important principle that must be adhered to in economic development is that all efforts must be based on the capabilities and abilities of the Indonesian people themselves[15]. However, this principle should not cause reluctance to take advantage of the potentials of capital, technology and skills available abroad, everything is truly perpetuated for the economic benefit of the people without causing dependence on foreign countries.

IV. CONCLUSION

It is necessary to improve the regulations regarding the Joint Venture Agreement to provide legal protection for Indonesia in the Joint Venture Agreement. Because the agreement that forms the basis for developing a joint venture company is a joint venture agreement and articles of association. A joint venture agreement is an agreement between prospective shareholders of a joint venture company subject to the law of contract. The terms of the joint venture agreement must reflect a clear relationship between the parties and describe the development of the relationship in the future. The entire process of making a Joint Venture Agreement must be registered with the Minister of Law and Human Rights, starting with selecting the Negative Investment List (DNI), creating a Memorandum of Understanding (MoU) to making a Joint Venture Agreement.

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