Legal Consequences Of Using Power Of Attorney In Nominee Agreements: Flexibility And Legal Limitations

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Abstract.

The practice of nominee agreements involving the use of power of attorney has become an intriguing topic in the context of modern law. Nominee agreements refer to agreements entered into by certain parties, whereby one party cannot be the lawful owner of the ownership rights to an asset, particularly in the context of the participation of foreign nationals or among Indonesian citizens. However, this practice is also commonly employed by Indonesian citizens themselves, both in transactions between legal entities and individuals, as well as among individuals. Many of these practices are accompanied by formal resolutions through statements and power of attorney documents. This research aims to examine the legal consequences arising from such practices, as well as the extent to which they provide flexibility and the associated legal limitations.

Keywords : *Nominee agreements, Power of attorney, Legal consequence and Flexibility.*

I. INTRODUCTION

In conducting their daily activities, individuals inevitably engage in interactions with others, whether in economic, social, or political spheres. Such interactions can lead to a bond, which reflects the legal relationship between one individual and another, arising from legal events such as actions, occurrences, or specific conditions (Adonara, 2014). Such bonds may arise either due to legal provisions or based on agreements or contracts between individuals.Generally, in society, a legal obligation stems from an agreement made by parties mutually binding themselves in that agreement. Although the terms "agreement" and "obligation" are often used interchangeably, they carry distinct concepts. Obligation is more abstract, referring to the legal relationship concerning property between two or more individuals, while agreement is more specific, referring to a form of consensus that may involve obligations but not necessarily so. In other words, every agreement constitutes a form of obligation, but not all obligations can be considered agreements. An agreement is an event in which one commits to do something for another, or where two individuals promise to undertake a particular action or obligation. As a result, an agreement will give rise to rights and obligations in the context of property law for the parties involved in that agreement.An agreement is an event where an individual commits to performing something for another person, or where two individuals promise to carry out a specific action or obligation for each other (Prodjodikro, 2000).

Legally, the definition of an agreement is explained in the third book of the Indonesian Civil Code (KUH Perdata) concerning obligations. Article 1313 of the Civil Code states that an agreement is an act whereby one or more persons bind themselves to one or more other persons. For an agreement to be considered valid, it must meet the requirements set forth in Article 1320 of the Civil Code. These four requirements include the presence of agreement between the parties involved, legal capacity to enter into an obligation, the existence of a specific subject matter, and the presence of a valid cause. With the fulfillment of these four requirements, the agreement is considered legally binding for all parties involved in its formation.In principle, agreements can be divided into two types, namely named agreements (Nominaat) and unnamed agreements (Innominaat) (Salim 2006). Named agreements (Nominaat) are agreements that have specific names and are regulated by law. This type of agreement generally covers situations and needs that commonly occur in everyday life, such as buying and selling transactions, leasing, borrowing and lending, and so on. Each type of agreement has specific regulations in the law, which can be found in various articles

of the applicable legislation, especially in Book III of the Civil Code from Chapter V to Chapter XVIII.On the other hand, unnamed agreements (Innominaat) refer to agreements that are not specifically regulated in the Civil Code, but are commonly found in society.

This type of agreement is not limited in number, and its name can be tailored to the needs of the parties involved. The formation of such agreements is based on the principle of freedom to contract, which allows individuals to enter into agreements according to their respective interests (Soenandar, 2016).In contemporary society, there exists a variety of agreements that are not regulated in the Indonesian Civil Code (KUH Perdata), such as nominee agreements or commonly known as nominee agreements. Nominee agreements, or more commonly referred to as nominee agreements, fall under the classification of innominate agreements. This is because nominee agreements emerge, evolve, and are utilized by society without being encompassed within the provisions regulated in the Civil Code. Nominee agreements are generally applied in the context of land ownership in Indonesia, particularly involving foreign nationals or among Indonesian citizens. However, these agreements are also widely used by Indonesian citizens themselves, both between legal entities and individuals, as well as among individuals. These agreements are often accompanied by statements or power of attorney letters to provide affirmation regarding the ownership of the land.

II. METHODS

This research is a normative study which shares similarities with doctrinal research, where the main focus is on the reading and analysis of primary and secondary legal materials. The approach used in this research is deductive, which leads to the examination of legal issues to find appropriate solutions. Data is not collected in this legal research; therefore, to address legal issues and provide appropriate solutions, research sources are needed.Legal research sources can be divided into two types: primary legal materials and secondary legal materials (Marzuki, 2013). Primary legal materials are legal materials that have binding force and serve as the basis for other legal materials.

Meanwhile, secondary legal materials are closely related to primary legal materials and assist in analyzing and understanding existing primary legal materials. Secondary legal materials also provide explanations for other primary legal materials, such as books, journals, and articles that discuss the topic under investigation.The technique used to collect legal materials in this research is the library research technique, involving both primary and secondary legal materials. This technique involves reading, studying, examining, and analyzing legal materials while considering the issues being studied by the author. The analysis of legal materials is conducted using a qualitative approach, which refers to existing theoretical foundations (Fajar and Achmad, 2010).

III. RESULTS AND DISCUSSION

In Article 1313 of the Indonesian Civil Code (KUHPerdata), an agreement is described as an act whereby one individual or more bind themselves to one individual or more. An agreement forms a legal relationship between two parties, wherein one party is obliged or deemed obliged to perform a specific action, while the other party has the right to demand fulfillment of that obligation. The definition of an agreement refers to a legal act involving two or more parties, which requires mutual consent among them. This agreement involves the agreement of each party to carry out a specific action.It can be concluded that contract law is a legal norm that arises when someone promises to another party to perform an act without coercion or unilateral decision. Subekti states that the term "agreement" can also be equated with "consent" because both parties agree to perform an action. Thus, the terms "agreement" and "consent" have similar meanings because they both reflect the agreement between two parties to perform an action (Subekti, 1987).
Implicitly, a nominee agreement encompasses the following elements:

1) There exists an agreement of power of attorney between two parties, wherein the true owner acts as the grantor and the nominee as the grantee, based on the existing trust between the true owner and the nominee.
2) The granted power of attorney has specific characteristics with limitations on the types of legal actions.

3) The nominee or grantee acts as if representing the true owner before the law.

An agreement must have authentic grounds to be considered strong evidence, providing certainty, and offering legal protection for the parties involved as legal subjects within it. Agreements drafted by the parties can be deemed authentic if supported by certification from authorized officials. Herein lies the crucial role of a Notary, as Notaries have the authority to certify such agreements. Notarial certification provides the validity and legal strength necessary to ensure the validity and enforceability of the agreement.

Article 1792 of the Indonesian Civil Code (KUH Perdata) establishes the concept of power of attorney, which is an agreement whereby one person grants authority to another individual. The individual receiving such power acts on behalf of the grantor in conducting a particular affair. The granting of power of attorney involves consent, which encompasses the transfer of authority to another individual to carry out specific tasks on behalf of the grantor.In the context of today's busy life, individuals often find themselves unable to manage their own affairs, leading them to delegate authority to others to handle such matters on their behalf. When someone grants power to conduct an affair, the individual receiving the power performs legal actions or actions with legal consequences. Furthermore, the individual granted power of attorney performs these legal actions on behalf of the grantor or represents the grantor, meaning that whatever they do becomes the responsibility of the grantor, and all rights and obligations arising from such actions become the rights and obligations of the grantor.

The granting and acceptance of power of attorney can be done in various ways, including through the execution of public deeds, private documents, official letters, or even orally (Subekti, 1995).Granting power of attorney falls under the category of agreements wherein the performance of tasks is closely related to the individuals involved. In practice, we do not grant power to individuals we do not know but rather choose individuals we trust to handle those interests. Article 1814 of the Civil Code states that the grantor may revoke their power of attorney if desired and may compel the attorney-in-fact to return such power if necessary. The grantor can terminate the power of attorney at any time by providing reasonable notice. If the attorney-in-fact refuses to return the power voluntarily, they can be compelled through legal proceedings. The revocation of power of attorney must be announced through newspapers and written notices to the relevant parties (Subekti, 1995).

Legal Implications

In reality, the formal creation of nominee agreements is prohibited in Indonesia. However, the practice of nominee arrangements itself is not explicitly prohibited in Indonesia, so many resort to using nominee practices by creating private statements or power of attorney letters in front of a Notary. For example, if A purchases land and uses the name B to be stated in the certificate, they may then create a statement that the land is actually owned by A and only borrow B's name to facilitate the land ownership process, or by creating an absolute power of attorney letter to A.Generally, in ordinary agreements, the agreement will not be terminated upon the death of one party, but it is different with power of attorney. A power of attorney made in authentic form does indeed have legal force; however, the granting of power will end if the grantor dies as stated in Article 1813 of the Civil Code, "if the grantor dies, then the power given to the attorney-in-fact will end or become null and void".

Therefore, the heirs are obligated to inform the attorney-in-fact if they are aware of the granting of power and take necessary actions. Further explanations regarding the various ways of termination of power of attorney can be found in Articles 1813 to 1819 of the Civil Code.This can pose problems if a power of attorney letter is made in a nominee agreement. Although the power of attorney letter is made absolutely and without a clear time limit, the letter will still become null and void if the grantor dies. This will result in the legal termination of authority, and in the context of the previous example, the ownership of the land by A could be contested by the heirs of B and demand regarding the ownership of the land if A does not immediately transfer the title certificate. Therefore, the legal consequences of creating a power of attorney letter in a nominee agreement also need to be considered and evaluated.

Flexibility and Legal Limitations

The use of power of attorney letters in nominee practices is a topic that raises questions about the flexibility and legal limitations. Generally, a power of attorney letter is a document that grants authority to

someone to sell property or conduct transactions on behalf of the actual owner. On the other hand, nominee practices involve someone acting as a "nominee" or representative of the actual owner, often for secrecy or privacy protection purposes.Legal flexibility can be observed in how power of attorney letters can be used to facilitate nominee practices. The use of power of attorney provides flexibility for the actual owners to remain anonymous in property or business transactions, allowing them to protect their identity and privacy or to enable them to possess something prohibited by law, as is often the case in the practice of borrowing names among Indonesian and foreign citizens. This can also provide flexibility for the attorney-in-fact to act on behalf of the owner, which is often necessary in complex business transactions or large property transactions such as in the practice of borrowing names in corporate shares.Nominee practices, involving someone or an entity acting as a representative or holder of assets on behalf of the actual owner, have been the subject of debate in legal and business realms. Although efforts have been made to regulate these practices through laws, there are several limitations that need to be addressed in efforts to achieve effectiveness in regulating nominee practices.

Critical perspectives are required to understand the legal limitations that may arise in regulating these practices.One of the main limitations in the legal regulation of nominee practices is the difficulty in detecting and enforcing laws against less transparent practices. Property and business law experts such as Professor Michael L. Lahr from Rutgers University have highlighted how nominee practices can be used to conceal the true ownership of assets or properties, which in turn complicates the legal process of identifying responsible parties. In Indonesia, this practice is also often used in business transactions for security or privacy protection purposes but often leads to confusion in terms of legal responsibility or occurs in land ownership rights.Furthermore, limitations in legal regulations can create loopholes that allow the abuse of nominee practices. Although laws regulate these practices to some extent, some laws may not be specific or clear enough in establishing the necessary boundaries. This creates uncertainty in law enforcement and increases the risk of misuse of these practices for unlawful purposes.Critical perspectives are also needed to consider the opinions of Indonesian legal experts in addressing the limitations of legal regulation regarding nominee practices.

Legal experts such as Professor Hikmahanto Juwana from the University of Indonesia have emphasized the need for revision and improvement of more appropriate laws in regulating nominee practices in Indonesia. According to him, the laws should be more specific and clear in defining responsibilities, obligations, and sanctions related to nominee practices, as well as integrating stricter transparency requirements.The opinions of legal experts highlight the importance of continuously improving existing legal regulations to address the limitations in regulating nominee practices. This may include improving existing regulations, adding transparency requirements, and strengthening law enforcement. Additionally, public education and awareness of the risks and consequences of nominee practices need to be enhanced. In addressing these legal limitations, it is important for the government and stakeholders to work together in designing and implementing effective policies. With a holistic and evidence-based approach, we can strengthen legal regulations, increase transparency, and reduce the risk of abuse of nominee practices, thereby creating a fairer and more trustworthy business environment.Improvements in regulations governing nominee practices can help address legal ambiguities or loopholes and promote transparency in business transactions. Clear and firm regulations will strengthen compliance and minimize loopholes for abuse.

IV. CONCLUSION

Taking into account the aspects of flexibility and legal limitations in the use of power of attorney letters in nominee practices, it is important for the legal system to find the right balance. Flexibility must be maintained to allow owners to protect their privacy or conduct business transactions efficiently, but limitations must also be enforced to prevent abuse or fraud.Furthermore, the use of power of attorney letters in nominee practices can create ambiguity in property or business ownership. When someone acts as a nominee, but the property or business is legally registered in their name, it can lead to conflicts of interest or unclear ownership rights.The appropriate approach is to strengthen regulations and supervision over the use of power of attorney letters in nominee practices. This can be done through strict verification requirements

for power of attorney letters, strict law enforcement against the misuse of power of attorney letters, and greater transparency in property or business transactions. This way, legal flexibility can be maintained while minimizing the risks of abuse or fraud in the use of power of attorney letters in nominee practices.

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