
The Nominee Agreement in Bali

I Wayan Werasmana Sancaya* dan Nella Hasibuan O'Leary
Faculty of Law, Universitas Warmadewa, Denpasar, Bali-Indonesia
*werasmana.sancaya@gmail.com

Published: 28/02/2019

How to cite: Sancaya, I, W, W., & O'Leary, N, H. 2019. *The Nominee Agreement in Bali*. Sociological Jurisprudence Journal. Volume 2 Issue 1. Page 26 - 31. <http://dx.doi.org/10.22225/scj.2.1.970.26-31>

Abstract

The title of this research is "The Nominee Agreement in Bali". It aims discuss the meaning of the nominee agreement and the nominee agreement system in Bali. The study applies normative research approach to discuss about the nominee agreement and its system in Bali. The result is a nominee is a person or firm whose name is used as a guarantee for other properties used to facilitate transactions, while leaving the customer as the actual owner. The nominee agreement itself can be explained as follows. In a nominee agreement, the owner conveys property to a nominee to whom the latter consents to hold and execute transactions on behalf of the owner. The purpose of the agreement is to provide outlines for legal purposes of the ownership of certain property and the role of the nominee. The nominee agreement made by the notary which consists of overpower of the freehold land belonging to Indonesian citizens by foreigners without legal power and is null and void when it is promised that foreigners can control the freehold land juridically and have a bad faith when making the nominee agreement.

Keywords: Agreement; Freehold Land; Foreigner; Indonesian; Nominee

I. INTRODUCTION

Nominee is a person who is proposed for an office, membership, award, or like title or status (Garner, 2004). An individual seeking nomination, election or appointment is a candidate. Thus the process of a foreign nominee agreement generally comprises the creation of three agreement deeds, but may also be made in one or two deeds but still contains the three purposes of those deeds. In the end, the nominee agreement made by the Indonesian Notary, which contains power over for foreigners toward the freehold land belonging to Indonesian citizens has no legal power and is null and void when it is promised that foreigners can control the freehold land juridically and have a bad faith when making of the nominee agreement. However the nominee agreement will have the legal force if there is a good faith and promises that foreigners can only control the physical aspect of the freehold land for a limited period of time, like for a period of 25 years and can be renewed for a period of 20 years and can be renewed again, so it is not for forever time as the term of the freehold land rights. Nominee is an agreement on innominate, in which the agreement on innominate is an agreement that grows and develops in practice and is not yet known when civil law is promulgated in Indonesia. Nominees are one example of the innominate agreement. This practice arises in Indonesia because it is based on regulatory factors and other factors, namely the personal reasons of the beneficiary itself. This personal reason is the secret and personal interest of the beneficiary itself (Pahlevi, Prananingtyas, & Lestari, 2017).

Pertiwi concludes in her research there are three important points in constructing the nominee agreement (Pertiwi, 2018):

- 1) Legal Structure. Because a system will not run well if there is no credible law enforcement, therefore law enforcement officers in this case the Notary Supervisory Board, and all law enforcement officers improve security systems and sanction.
- 2) Legal substance (substance of the law) of all related rules with nominees, the content/substance part must have clarity norm. There is a prohibition against nominee which is an act against the

law, and also the existence of strict sanctions.

- 3) Legal culture, that is, the legal construction expected for the agreement. This nominee is done with use and adjusted with the existing Legal Culture in Indonesia which must emphasize more on the community's awareness and also, if necessary, the socialization regarding this nominee.

Based on the three points, the agreement maker must be more careful and must race against the law or the attorney that applies to an area, especially in this study is Bali.

The term "nominee agreement" is originally derived from a Common Law's System but spreads wide not only among Common Law's Countries but also among Continental Law's Countries, in this case included Indonesia. That is where the nominee agreement not only well recognized in the capital city of Jakarta but also in the most popular tourist Island in Indonesia, such as Bali. Many foreigners not only travel around Bali but also they are very interested in staying permanently in Bali. However they are not entitled to a freehold land as. In fact most of lands for sale in Bali are freehold land. As a result, in this case, the nominee agreement comes out as the solution to get freehold land through Indonesian in nominee agreement.

A legal action that can be made to anticipate the occurrence of a dispute over a nominee agreement in which it contains legal acts of transitional ownership of land between Indonesian citizen and foreign citizen is settled by litigation to obtain legal certainty on the nominee deed, because the land law is regulated in Special Act. The legal consequence of a notary who wishes to make a nominee deed is to incur personal responsibility for the notary, the liability of a notary as a general official in the production of a nominee agreement is the administrative responsibility, civil, code of ethics of notary and criminal position (Wiryani & Utama, 2018).

Sudini (2018) in her research states a nominee is an agreement involving two citizens of different countries as a means to obtain power in the form of ownership rights to land by foreign citizens. By using nominees, foreign nationals can control the land they purchase, just as native citizens can master. In fact, the nominee agreement has not yet obtained a legitimate arrangement and is also unknown in the legal system in Indonesia, especially in the provisions concerning the legal system of agreements stipulated in the Indonesian Civil Code (Sudini & Utama, 2018). The research of Sudini and Utama was conducted in Indonesia and examined the problem of land ownership may be foreigners. Wicaksono (2016) in his research found nominee agreements have grown and developed in the community, because of the needs of the community. Agreement for nomination formation in practice can be divided into direct nominee agreements, namely by making direct agreements between those involving share ownership in limited companies for and on behalf of others and making indirect nominees (indirect nominations) by making several agreements compiled with the aim that the recipient receives benefits and does not directly own the shares (Wicaksono, 2016). Azhari and Djanuari in their research conclude that nominee agreement is made through a notarial deed, which is to accept a loan agreement by foreigners in purchasing land/land using the name of an inhabitant of Indonesia. In other words, an agreement nominating an agreement made between someone who according to law cannot be the subject of certain land rights, in this case Indonesia, with the intention that the person can control (own) the de facto land of ownership, but the de jure land is owned by the name of an Indonesian citizen. In other words, Indonesian citizens are borrowed by foreigners (nominees) (Azhari & Djauhari, 2018).

II. METHOD

This study applies general normative study method to approach the discussion of nominee agreement in Bali. To help enlarge our discussion, we collect related literature, such as The books, journal articles on laws, dissertation and related sources from the internets to help us in diagnosing and interpreting the given problems encountered in our analysis on the essence of nominee agreement covering its meaning and system of implementation in business transaction in Bali, particularly in land affairs.

III. DISCUSSION

The Definition and Meaning of Nominee Agreement

Nominee agreement is an attempt to give possibility for foreigners to have the land right that is prohibited by the The Indonesian basis of Agrarian law (UUPA) by using the guise of transaction on

behalf of the Indonesian citizen, thus not violating the formal judicial rules. The agreement made using such authority to the Indonesian citizens as the nominee is smuggling law. The legal smuggling is still taking place, consequently the validity of the nominee agreement is questionable, and the position of the grounds due to the agreement of the nominee becomes obvious as in the case of Denpasar District Court's Decision No. 787/Pdt.G/2014/PN.DPS (Gandasari, 2016). About the definition of the nominee agreement itself, here are two basis:

- 1) Under a nominee agreement, the real shareholder sells his shares to a nominee and makes a commitment to repurchase them at a specific price, usually in an effort to remain anonymous. Also called warehousing agreement, Chapter 40 of the Verimmen.
- 2) A nominee agreement is an arrangement between two parties where one person consents to acting as a director, secretary or shareholder for a company which is owned by someone else.

Furthermore, the purpose of the nominee agreement itself can be explained as follows: firstly, in a nominee agreement, the owner conveys property to a nominee who the latter consents to hold and execute transactions on behalf of the owner. Second, the purpose of the agreement is to outline for legal purposes the ownership of the property and the role of the nominee.

As the comparison, the nominee is often called as the *trust*, in which a *trust* is a legal device by which property is held by one person for the benefit of another. The person who sets up the *trust* is called the settlor. The property that is held in trust is the corpus or trust fund (Brown & Sukys, 2001)

The Object of Nominee Agreement

The Object of nominee agreement is as follows:

- 1) Director: A nominee director is someone who in fact is renting his or her name to the clients.
- 2) Administrator: A nominee management agreement is a contract between yourself the beneficial owner of your offshore company and your company's nominee administrator.
- 3) Shareholding: The nominee shareholding relationship would usually be confirmed by appropriate declarations or pre-configured share transfer documents from the nominee toward the actual clients.
- 4) A nominee is an individual or entity, which acts on behalf of a beneficial owner. Most often the nominee pretends to be the owner of an entity, asset, or transaction to provide a veil of secrecy as to the beneficial owner's involvement. Many offshore entities provide nominee services whereby they will provide a nominee to act as owner of your arrangement but generally will not act unless instructed to by the beneficial owner.
- 5) A person who is proposed for an officer, position, or duty.
- 6) A person designated to act in place of another, usually in a very limited way.
- 7) A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.
 - a) It can be concluded that the object of the nominee agreement in the UK is:
 - b) Land or property, i.e. all types of land ownership including land tenure or short term leasehold land as well as land titles;
 - c) A home, which is a right to a permanent establishment or an apartment owned by a person for a certain period of time;
 - d) Shares in the company, i.e. stocks issued and published in companies owned by the shareholders;
 - e) Other objects, such as large, medium and small cruises, four or two wheeled motor vehicles;
 - f) Position or position, position of a person as a director or secretary in a company, but unable to perform its position or position.
 - g) Thus, the nominee agreement in the UK is not just a piece of land but it may also be other objects such as stocks can be promised as well to be mastered by others on the basis of an agreement with the owner.

The Process of Nominee Agreement

As is known that the Nominee Agreement is an agreement whereby one of the parties agrees to act as a director or shareholder and so forth, with the process of system being described as follows:

- 1) Standard Recitals For legal purposes, a nominee agreement represents an arrangement in which the owner registers the property in the name of a nominee so that the latter legally holds the property and all the rights related to it such as mortgages, interests, easements, licenses, leases, by-laws and charges. Unlike the owner, the nominee has no beneficial interest in the property.
- 2) Deed of Indemnity The persons or company acting as the nominee must be indemnified against the potentially harmful actions carried out by the person who actually runs the company. The agreement is typically known as a deed of indemnity and is signed by the persons purchasing the company nominee services. Although standard deed of indemnities exists, they can, occasionally be altered to include or exclude specific activities which one or both parties might request.
- 3) Power of Attorney A power of attorney is provided by the nominee to the purchaser as a means to granting that person authority to run and act for the company. As the nominee will take little or no part in the actual day to day operations of the new business, the real owners of the company require evidence that they own and are in charge of the company. This is in spite of the fact there is no visible evidence at Companies House to suggest that they are in any way connected with the business. A power of attorney will essentially state that the purchaser has unlimited authority to act for the company and that they are the beneficial owners of the shares.

Thus the process of a foreign nominee agreement generally comprises the creation of three agreement deeds, but may also be made in one or two deeds but still contains the three purposes of those deeds.

The Important of Nominee Agreement

The agreement is a legal relationship between two or more parties, in the property field, where one party must fulfill the performance, and the other party is entitled to the achievement (Isnaeni, 2017). The Nominee Agreements are important to be made especially for parties who is involved in nominee agreement itself. Nominee Agreement could be explains as follows:

One of the most important things that someone will do to have their Notary or lawyer draw up a nominee agreement between his and his/her you and your nominee client to cover his/her your purchase of land which he/she is legally not allowed to own. Let us make no bones about it, that is the law and there is really no acquisition around it.

The other most important thing is when you draw up the loan agreement between you and your Nominee to cover your loan to him for the value of the property i.e. for those newbies you are loaning your nominee the money to buy the land that is in his name but you have the use of it in perpetuity. Remember to include the value of the house that has yet to be built on it. Let us say for the purpose of argument that your land will cost 100,000,000 Rupiahs and you intend to put a house of similar price on the land. Then you make out the loan agreement for 2 billion, even if the house has not been built yet, when it is you who want that value reflected in your loan to your nominee.

Otherwise your nominee might borrow the money to pay off his loan and take custody of the land and get the house for nothing. It must be a good business if you can get it. In addition, there is no court in the land that would dispute one's ownership since it is in black and white on your loan agreement.

One more thing, in your choice of nominee find a cultivate someone of reasonable standing in the community. Possibly someone in a managerial situation with a large family and possible higher up in the community level. Some hair-raising stories about nominee and acquaintances of many years standing, turning into monsters overnight, rich monsters, with your money. It seems that someone who is going into the entire relationship on a professional basis is a much better bet than someone with an emotional connection. Thus an important nominee agreement is made with purposes to protecting the land purchased on behalf of the nominee, in the control of foreigner, as well as to protect the money used for the purchase of the land remains in value.

The Practice of Nominee Agreement in Bali

From the data that were found, it has been knowing that a lot foreigners have done the transaction over freehold land through making Indonesian citizens as their nominee, especially in Bali Province,

whose procedures as follows (Bali Web Design, 2008):

- 1) A foreigner nominates an Indonesian to hold the title of land. Ownership of land is transferred from the previous owner to the Indonesian nominee. The foreigner and the Indonesian nominee sign a number of agreements recognizing the Indonesian nominee as the 'legal owner' while declaring the foreigner as the 'rightful owner'.
- 2) A purchase via this process involves an element of risk embedded upon the foreigner. Considering that Indonesian law clearly states that foreigners cannot hold freehold title, it is a debatable topic whether or not a nominee agreement will be recognizable by Indonesian law.
- 3) If a good healthy relationship is appropriately maintained with the Indonesian nominee then there should never be any reason to test the validity of these agreements in court. However, the fragility of human relationships must be taken into consideration when calculating the level of risk involved in this process.

We can see that how good is the procedures and the practice of the nominee agreement in the future its really depend on how healthy are their social relationship of the parties, which are between the Indonesian nominees and the foreigners. If their relationship will end up early then basically the nominee agreement could be terminated early, but if their relationship ~~encounters no obstacles~~ the nominee agreement will last for long time between them.

The nominee agreement made by the notary, which contains an over control of foreign citizens toward lands belonging to Indonesian citizen, has no legal power and is null and void when it is promised that foreigners can control the freehold land juridically and have a bad faith when making the nominee agreement. However, the nominee agreement will have the legal force if there is a good faith and promises that foreigners can only control the physical side of freehold land for a limited period of time, like for a period of 25 years and can be renewed for a period of 20 years and can be renewed again. However it cannot be in a forever control as the term of the freehold land rights (Hasibuan, 2012).

Article 1319 of the Civil Code stipulates' "All agreements, whether with special or unnamed, names by a particular name, are subject to the general rules contained in this chapter and any other chapters" (Suparni, 1995). Thus, the nominee agreement could be covered by this Article.

IV. CONCLUSION

The nominee agreement itself can be explained as follows. In a nominee agreement, the owner conveys property to a nominee to whom the latter consents to hold and execute transactions on behalf of the owner. The purpose of the agreement is to provide outlines for legal purposes of the ownership of certain property and the role of the nominee.

The nominee agreement made by the notary, which contains an over control of foreign citizens toward lands belonging to Indonesian citizen, has no legal power and is null and void when it is promised that foreigners can control the freehold land juridically and have a bad faith when making the nominee agreement. However, the nominee agreement will have the legal force if there is a good faith and promises that foreigners can only control the physical side of freehold land for a limited period of time, like for a period of 25 years and can be renewed for a period of 20 years and can be renewed again. However it cannot be in a forever control as the term of the freehold land rights

References

- Azhari, M. E., & Djauhari. (2018). Tanggung Jawab Notaris Dalam Pembuatan Akta Perjanjian Nominee Dalam Kaitannya Dengan Kepemilikan Tanah Oleh Warga Negara Asing Di Lombok. *Jurnal Akta*, 5(1), 43–50.
- Bali Web Design. (2008). *Bali Property Indonesia, Own Property In Indonesia*.
- Brown, G. W., & Sukys, P. A. (2001). *Business Law* (10th ed.). New York: Glencoe McGraw-Hill.
- Gandasari, B. (2016). Akibat Hukum Perjanjian Pinjam Nama (Nominee) Dalam Hal Penguasaan Dan Pemilikan Hak Atas Tanah Di Indonesia Oleh Warga Negara ASING. Universitas Diponegoro.
- Garner, B. A. (2004). *Black's Law Dictionary* (8th ed.). Texas: Thomson West.
- Hasibuan, N. (2012). *Nominee Agreement That Made To Control Freehold Land of Indonesian citizen by Foreign Citizen*. Universitas Brawijaya Malang.
- Isnaeni, H. M. (2017). *Agreement Law*. Surabaya: Revka Petra Media.

- Pahlevi, K., Prananingtyas, P., & Lestari, S. N. (2017). Analisis Yuridis Terhadap Penggunaan Saham Pinjam Nama (Nominee Arrangement) Ditinjau Dari Peraturan Perundang–Undangan Di Indonesia. *Diponegoro Law Journal*, 6(1), 1–19.
- Pertiwi, E. (2018). Tanggung Jawab Notaris Akibat Pembuatan Akta Nominee Yang Mengandung Perbuatan Melawan Hukum Oleh Para Pihak. *Jurnal Ius*, 6(2), 246–258.
- Sudini, L. P., & Utama, I. W. K. J. (2018). Nominee Agreement Made For The Purposes Of Land Ownership By Foreign Citizens On The Basis Of A Notarial Deed. *Jurnal Notariil*, 3(2), 109–115.
- Suparni, N. (1995). *Civil Code*. Jakarta: Rineka Cipta.
- Wicaksono, L. S. (2016). Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan Terbatas. *Jurnal Hukum Ius Quia Iustum*, 23(1), 42–57.
- Wiryani, M., & Utama, I. W. K. J. (2018). Land Rights Ownership by Foreign Citizens through Nominee Agreement in Tourism Investment in Bali. In *Proceedings of the International Conference on Business Law and Local Wisdom in Tourism (ICBLT 2018)* (Vol. 282, pp. 41–44). Atlantis Press.