International Journal of Law in Changing World

**Volume 3 Issue 2** (2024) ISSN 2764-6068

**Research article**
**JNL:** https://ijlcw.emnuvens.com.br/revista
**DOI:** https://doi.org/10.54934/ijlcw.v3i2.104

# COMPARATIVE ANALYSIS OF THE VALIDITY OF NOMINEE AGREEMENT ON THE OWNERSHIP OF SHARES BETWEEN INDONESIA AND SINGAPORE

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**Article Information:**

Received
August 22, 2024
Reviewed & Revised
December 1, 2024
Accepted
December 1, 2024
Published
December 29, 2024

**Keywords:**

nominee agreement,
share ownership,
limited liability company

**ABSTRACT | 摘要 | RESUMEN**

Share ownership as a form of investment is regulated by laws that protect companies and their shareholders. In addition to these laws and regulations, shareholder agreements and the Civil Code safeguard the interests of shareholders and the company. Nonetheless, legal circumvention often occurs due to investment restrictions, such as the widespread practice of Nominee Agreements. However, some of these regulations confuse the Nominee and the Beneficial Owner (BO), allowing for abuse and violation of the Law. This research focuses on the concept of nominee shareholding agreement in Indonesia and its comparison with Singapore, using the theories and concepts of comparative Law, legal entity, corporate organ, agreement, share, shareholder, beneficial owner, and legal principles approach to show that Indonesia rejects and prohibits nominee agreements, while Singapore protects certain conditions for nominee shareholders and nominee directors who meet their requirements. This difference in approach is reflected in the legal consequences given to parties who violate these regulations in each country.

**FOR CITATION:**

Ricky, C., Sugianto, F., & Maretta, Y. (2024). Comparative Analysis of the Validity of Nominee Agreement on the Ownership of Shares between Indonesia and Singapore. International Journal of Law in Changing World, 3 (2), 53-76. DOI: https://doi.org/10.54934/ijlcw.v3i2.104

## 1. INTRODUCTION

Referring to Article 1313 of the Indonesian Civil Code (hereinafter referred to as the "KUHPer"), "an agreement is an act pursuant to which one or more individuals bind themselves to one another". According to this provision, an agreement shall fulfill the elements of being entered into by at least two persons and consenting to bind to one another. However, fulfilling these elements is not enough to render an agreement valid and enforceable by Law. This leads to the question of the implication of agreement in establishing a company. In terms of Limited Liability Company, the lex generali on Limited Liability Company in Indonesia (hereinafter referred to as "PT") is the Law of the Republic of Indonesia Number 40 of 2007 on Limited Liability Company (hereinafter referred to as the "UUPT"). However, there has not been any business activity that allows PTs with 100% foreign ownership to run legally in Indonesia. This came to be the reason for the existence of nominee shareholder agreement that is applied up to this day. Through a nominee agreement, a foreign shareholder may hold 100% ownership of a company to run in the sector upon which 100% foreign ownership is prohibited[1].

In practice, however, nominee agreement is considered a form of fraus legis practice. Fraus legis, or legal smuggling, refers to an action an individual conducts to obtain a legal consequence in the form of a right based on foreign laws, in which, if such an action was based on domestic laws, the same right would not be recognized. Nominee agreement is considered a form of practicing legal smuggling in Indonesia because there have been several laws and regulations governing matters concerning nominee agreement. Having said this, the practice of nominee agreement appears as if Indonesia recognizes shareholders' rights that are based on laws and regulations applicable in foreign countries[2].

Compared to the Indonesian legal system, the requirement for forming an agreement in Singapore is as different as possible from that in Indonesia. An agreement is deemed effective and has a legally binding power at the time it obtains the consent of the parties bound therein and creates an obligation in exchange for something of value. A valid agreement is then referred to as a contract, which is generally set under the Singapore Civil Law Act 1909 (hereinafter referred to as the "Civil Law Act"). Generally, a valid contract consists of an offer and its acceptance, consideration, and intention to create legal relations and capacity. In terms of business activities, Singapore has fewer restrictions as compared to Indonesia.

https://doi.org/10.54934/ijlcw.v3i2.104

Any person wishing to establish a company in Singapore must consider the laws and regulations on Real Estate, Broadcasting, Financial Services and Banking, and Professional Services[3].

Regarding contractual arrangements, it is often found in practice that the parties arranging the contract are not the actual parties having the interest to do such. Instead, the actual interested parties tend to "borrow" other parties' names for one thing and another. These arrangements confuse people between the Nominee and the beneficiary. However, as previously mentioned, some states acknowledge the existence of both the Nominee and beneficiary. Yet, others only recognize the existence of the beneficiary, therefore rendering the Nominee to the practice of legal smuggling and even Law violations. Beneficiary per se refers to a person enjoying a property of which a trustee, executor, etc., has legal possession. It may also be defined as one who receives benefits, profits, or advantages. The term "beneficiary owner" (hereinafter referred to as "BO") was first introduced through the Organisation for Economic Co-operation and Development Model Convention with Respect to Taxes on Income and on Capital (OECD Model Tax Convention). However, the said convention did not provide the interpretation of BO in specific[4].

On the other hand, the term "nominee," according to Black's Law Dictionary, refers to one designated to act for another as their representative in a rather limited sense, sometimes to signify an agent or trustee. In addition, the Cambridge Dictionary defines Nominee as a person chosen to look after someone's shares, bonds, etc. Given the interpretations, however, similarity in the context of possession of an individual's property (whether in the form of benefits, profits, advantage, etc.) underlies the confusion between beneficial owners and nominees. From The 2009 GT Group New Zealand Case[5] and The 2020 Beirut Explosion Case[6], it is seen that both the practice of BO and Nominee have induced serious legal violations, such as tax evasion, drug cartel, money laundering, and any other violations, not to mention that the practice of BO and Nominee tend to exempt the violator due to being unable to be tracked. Given these facts, however, the laws and regulations governing matters concerning the practice of BO- either international, Indonesian, or Singaporean- seem to be more flexible than those concerning nominees.

Considering the foregoing discussion, this research aims to analyze the issue of how the legal system affects the validity of nominee agreement in Singapore compared to Indonesia. Given the abovementioned problems, this paper proposes to evaluate the legal issues addressed, namely the nominee agreement on the ownership of shares and the comparison of the legal system between Indonesia and Singapore.

https://doi.org/10.54934/ijlcw.v3i2.104

## 2. LITERATURE REVIEW

### 2.1 Legal Entity

In order to understand the concept of legal entity, it is crucial to comprehend the concept of legal subject. Legal subject refers to anything able to reserve rights and capable of acting legally to reserve rights[7]. In the legal field, the legal subject is divided into two categories, namely persons and legal entities. Persons are considered legal subjects due to the ability to reserve rights (namely, subjective rights, or as further referred to as civic rights), meaning that rights have existed at the time of a Person's birth. Not only that, Persons are considered legal subjects due to the ability to act legally to reserve rights, or in other words, the inherent capability of acting legally to be a legal subject, namely as a proponent of rights and obligations[8].

### 2.2 Shares

Article 1 point 1 of UUPT mentions that PT refers to a legal entity constituting a joint capital, established based on an agreement, conducting business activities with its Authorized Capital divided into Shares, which satisfies the requirements as stipulated in this Law and its implementing regulations. It is further detailed in Article 31(1) of UUPT that the Authorized Capital of a PT consists of the entire nominal value of Shares. This indicates that shares may be defined as a person's capital participation in a PT. On the other hand, in Singapore, under Section 4(1) of the Companies Act, Share is interpreted as the capital of a corporation and includes stock except where a distinction between stocks and shares is expressed or implied. The subscription of Shares in a company generates rights to the holders, such as the rights to attend the GMS, voting rights, rights to receive dividends and remaining assets resulting from liquidation, rights to bring legal action on behalf of the company (derivative action), and so on[9].

### 2.3 Shareholder

Article 52(1) of the UUPT, states that the shareholders reserve the right to attend and vote in the GMS. Apart from that, it is also established that the shareholders also reserve the rights to receive the payment of dividend and the remaining wealth resulting from liquidation, as well as any rights that are set out under the UUPT, which include the rights to (1) file a claim against the PT to the District Court in the event that the decision of the GMS and the Boards have inflicted unjust and unreasonable damages to the shareholders; (2) request to the PT for the shares to be bought in a reasonable amount in the event that the shareholder concerned dissent to the actions of the PT that harm the shareholders or the PT itself, which

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include the amendments of the Articles of Association, transfer or guarantee of the assets of the PT amounting to more than 50% (fifty percent) of the net assets of the PT, merger, consolidation, acquisition, or segregation; and (3) be exempted from individual liability toward the obligations entered into on behalf of the PT exceeding the amount of shares the shareholders hold, under specific conditions[10].

### 2.4 Nominee Agreement

According to the Black's Law Dictionary, the term Nominee refers to a designation to act for another as the representative in a limited sense; in other words, to act as a nominee means to act for another or represent the other[11]. A nominee agreement, often arrangement or service, is simply described as "basically renting another person's name to protect the identity of the real beneficial owner." This statement points out a connection between the Nominee and the Beneficial Owner (BO). However, as was mentioned previously, BO is not necessarily a nominee. In practice, the existence of both the concept of Nominee and BO does not always generate positive impacts [12].

### 2.5 Beneficial Owner

The corporate ability of Shareholders is often associated with Beneficial Owner (Pemilik Manfaat in Indonesian terms). The definition of BO was first introduced through the Financial Action Task Force (FATF) Recommendations 2012 (hereinafter referred to as the "FATF Recommendations"). The FATF is an inter-governmental institution whose task is to apply and support the effective implementation of Anti Money Laundering and Terrorism Financing Programs[13]. Through the FATF Recommendations, BO refers to the "natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted, including those persons who exercise ultimate effective control over a legal person or arrangement through a chain of ownership or by means of control other than direct control [14].

## 3. RESEARCH METHODOLOGY

This research is a normative legal research, also referred to as doctrinal legal research, which is defined as a research based on the utilization of relevant rules, regulations, and norms as its subject matter[15]. Due to the fact that this research focuses on the analysis of laws and regulations, namely the Civil Code of the Republic of Indonesia, Law of the Republic of Indonesia Number 40 of 2007 on Limited

https://doi.org/10.54934/ijlcw.v3i2.104

Liability, Law of the Republic of Indonesia Number 25 of 2007 on Investment, Civil Law Act 1909 of the Republic of Singapore, and Companies Act 1967 of the Republic of Singapore.

Data, specifically statistics, is the main source being used in this research. This research uses Secondary Data as its source. In collecting the Secondary Data, this research involves the utilization of:

1. Primary Legal Materials

Primary Legal Materials are legal materials that involve the element of authority, which include but are not limited to laws and regulations; jurisprudence; bilateral, multilateral, and international treaties; and other legal materials that hold legally binding power. Therefore, this research will focus on the utilization of:

a. Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata*);

b. Law of the Republic of Indonesia Number 40 of 2007 on Limited Liability Company (*Undang-Undang Republik Indonesia Nomor 40 Tahun 2007 tentang Perseroan Terbatas*);

c. Law of the Republic of Indonesia Number 25 of 2007 on Investment (*Undang-Undang Republik Indonesia Nomor 25 Tahun 2007 tentang Penanaman Modal*);

d. Law of the Republic of Indonesia Number 6 of 2023 on the Stipulation of the Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation (*Undang-Undang Republik Indonesia Nomor 6 Tahun 2023 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2022 tentang Cipta Kerja menjadi Undang-Undang*);

e. Government Regulation of the Republic of Indonesia Number 8 of 2021 on the Criteria for Limited Liability Company Authorized Capital and the Registration of Establishment, Amendments, and Dissolution of Micro and Small Enterprises (*Peraturan Pemerintah Republik Indonesia Nomor 8 Tahun 2021 tentang Modal Dasar Perseroan serta Pendaftaran Pendirian, Perubahan, dan Pembubaran Perseroan yang Memenuhi Kriteria untuk Usaha Mikro dan Kecil*);

f. Government Regulation of the Republic of Indonesia Number 47 of 2012 on Social and Environmental Responsibility of Limited Liability Company (*Peraturan Pemerintah Republik*

https://doi.org/10.54934/ijlcw.v3i2.104

*Indonesia Nomor 47 Tahun 2012 tentang Tanggung Jawab Sosial dan Lingkungan Perseroan Terbatas*);

g. Government Regulation of the Republic of Indonesia Number 43 of 2011 on the Procedures for Filing and Using the Name for Limited Liability Company (*Peraturan Pemerintah Republik Indonesia Nomor 43 Tahun 2011 tentang Tata Cara Pengajuan dan Pemakaian Nama Perseroan Terbatas*);

h. Presidential Regulation of the Republic of Indonesia Number 13 of 2018 on the Implementation of the Principle of Identifying the Beneficial Owners of a Corporation for the Purposes of Prevention and Eradication of Money Laundering and Terrorism Financing (*Peraturan Presiden Republik Indonesia Nomor 13 Tahun 2018 tentang Penerapan Prinsip Mengenali Pemilik Manfaat dari Korporasi dalam Rangka Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Tindak Pidana Pendanaan Terorisme*);

i. Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 15 of 2019 on the Procedures for the Implementation of the Principle of Identifying the Beneficial Owners of a Corporation (*Peraturan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia Nomor 15 Tahun 2019 tentang Tata Cara Pelaksanaan Penerapan Prinsip Mengenali Pemilik Manfaat dari Korporasi*);

j. Civil Law Act 1909 of the Republic of Singapore;

k. Companies Act 1967 of the Republic of Singapore; and

l. Sale of Goods Act 1979 of the Republic of Singapore.

## 4. RESULTS AND DISCUSSION

### 4.1 The Concept of Nominee Agreement on the Ownership of Shares

In Indonesia, the general provisions on agreements are governed under Article 1233 to Article 1338 of Book III of the KUHPer. It establishes that the purpose of an agreement is either to provide something, to do something, or not to do something. Agreements are divided into 2 (two) categories, namely

agreements with a specific title [or as referred to as *Perjanjian Bernama* or *Benoemde Contracten Nominaat*], and unnamed agreements (or as referred to as Perjanjian Tidak Bernama or Onbenoemde Contracten Innominaat). The examples of Benoemde Contracten Nominaat may include but are not limited to Sale and Purchase Agreement, Lease Agreement, Custody Agreement, Carriage Agreement, Insurance Agreement, and the other forms of agreement as set out under Book III Chapter V to Chapter XVII of KUHPer as well as the KUHD. On the other hand, the provisions on Onbenoemde Contracten Innominaat may not be found to be governed by the KUHPer. However, according to Article 1319 of the KUHPer, both Benoemde Contracten Nominaat and Onbenoemde Contracten Innominaat are subject to the provisions as set out under the prevailing laws and regulations of the Republic of Indonesia[16].

Regarding the validity of an agreement, Article 1320 of KUHPer came to be the pivotal ground in determining the validity of an agreement. According to the article a quo, in order to render an agreement valid, there are 4 (four) elements the parties shall satisfy in the first place, namely (1) consent of the parties bound therein, (2) capacity of the parties bound therein, (3) the existence of a specific object, and (4) the existence of a permitted cause. The first 2 (two) elements are known as the subjective requirements, and the remaining 2 (two) are known as the objective elements. In obtaining the first element, namely consent of the parties bound therein, the parties shall take several forms of conduct into account so as not to bring forth *wilsgebreken.* According to Article 1322 to Article 1328 of KUHPer, consent shall not be obtained through mistake (*dwaling*), duress (*dwang*), and/or fraud (*bedrog*). As for the second element, namely the capacity of the parties bound therein, according to Article 1329 to Article 1331 of KUHPer, in order to be deemed capable of entering into an agreement, the parties shall not be deemed at Law as (1) minors, who have not reached the age of 21 (twenty-one) years and have not reached matrimony; and (2) persons under guardianship, who are deemed to be in a continuous state of simple-mindedness, insanity, rage, and/or improvidence. Prior to the issuance of the UUP, the law considered married women as persons incapable of entering into an agreement. However, through the issuance of the UUP, married women are no longer prohibited from entering into agreement because the UUP considers the rights and the standing of married women as equivalent to those of the husband's. The failure to fulfill the subjective requirements brings forth the rights of the parties bound therein to file a request to the Court for the nullification of the agreement.

In relation to the third element – or the first objective requirement – for entering into an agreement, namely the existence of a specific subject matter, Article 1332 to Article 1334 assert that a valid subject

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matter constitutes objects (1) that are considered as tradable properties, (2) whose nature is to be determined, (3) whose quantity shall be able to be determined or calculated, and/or (4) that are not inheritance which has not occurred. As for the last element, namely the existence of permitted cause, Article 1335 to Article 1336 of KUHPer establish that a cause that is considered permitted is a cause that does not indicate fraud, is not prohibited by the applicable laws and regulations of the Republic of Indonesia, is asserted, and is not on the contrary to morality or public order (*goede zeden*). The failure to fulfill the objective requirements grants the Law the right to declare the agreement null and void from the beginning (*void ab initio*), meaning that the agreement is considered to have never been entered into from the beginning, and the parties are to be returned to the status quo ante or the state/circumstance as it existed before the existence of the agreement.

In relation to the nominee agreement, the provisions governing matters in relation to nominee agreements may not be expressly found. However, a nominee agreement is classified under *Onbenoemde Contracten Innominaat* since its concept is not explicitly set out under any laws and regulations. Nominee Agreements may be divided into 2 (two categories), namely[17]:

1. Direct Nominee Structure

Direct Nominee Structure is a set of structures of nominee practice between the beneficiary and the Nominee, conducted by directly entering into an assertive and unambiguous nominee agreement.

2. Indirect Nominee Structure

Indirect Nominee Structure is a set of structures of nominee practice between the beneficiary and the Nominee, conducted by entering into numerous layers of agreement to conceal the actual interests of the beneficiary and the Nominee.

In relation to the concept of Nominee Agreement on the Ownership of Shares, a defect as to its validity may be found in the failure to fulfill the objective requirements, namely the 4th (fourth) element, that is, the existence of a permitted cause. The provisions governing matters related to the determination of whether or not a cause is permitted may be found set out under Article 1335 and Article 1336 of KUHPer. According to these Articles, a cause is considered permitted if the cause (1) does not indicate fraud, (2) is not prohibited by the applicable laws and regulations of the Republic of Indonesia; (3) is asserted, and/or (4) is not contrary to morality or public order (goede zeden). The practice of Nominee

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Agreements on the Ownership of Shares is said to contain prohibited cause due to the fact that the cause contained therein:

1. Indicates fraud
2. Is prohibited by the applicable laws and regulations of the Republic of Indonesia
3. Is on the contrary to morality or public order (*goede zeden*)

The definition of morality is not limited only to ethics. It encompasses a broader interpretation rather than just ethics. Morality is also defined as conformity with recognized rules of correct conduct, and it may also be defined as a system of duties. On the other hand, an agreement is considered to be contrary to public order or public policy if it results in a breach of Law, harms citizens, or causes injury to the State. It has been elaborated previously that the practice of Nominee Agreement on the Ownership of Shares violates Article 33 of the UUPM as well as Article 48 of the UUPT. Not only that, the practice of Nominee Agreement on the Ownership of Shares – combined with the practice of nominee directors as shown in the 2009 GT Group New Zealand case and the 2020 Beirut Explosion case – has caused harm to the citizens as well as the State. This points out that the practice of Nominee Agreement on the Ownership of Shares is contrary to morality and public order (*goede zeden*).

From the aforementioned, it is seen that the practice of Nominee Agreement on the Ownership of Shares contains a prohibited cause and, therefore, does not meet one of the objective requirements, namely the existence of a permitted cause. As the consequence of failing to fulfill the objective requirements, the agreement is then declared null and void (*void ab initio*) [18]. However, this raises the question of the rights of the legal owner and the beneficial owner (BO) since the agreement is then considered to have never been entered into from the beginning, yet the ownership of shares became unclear. Nevertheless, it has been established through Article 48(1) of the UUPT that the shares are issued in the owner's name. Therefore, as the legal consequence of the Nominee Agreement on the Ownership of Shares having been declared null and void, the Nominee is entitled to the ownership of shares and the beneficiary is prohibited from exercising its rights under the laws and regulations of the Republic of Indonesia as well as the Articles of Association of the PT. However, the Nominee – now the legal owner of the shares, or the now shareholder – shall reimburse the then beneficiary the number of shares the shareholder holds [19], taking into account the payment made by the beneficiary at the time of the initial purchase of the shares [20].

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### 4.2 The Legal System on the Validity of Nominee Agreement in Singapore as compared to Indonesia

The Companies Act provides 2 (two) interpretations of shares. It is mentioned in Section 4(1) of the Companies Act that shares – as in the share capital – is defined as the share capital of a corporation and include stock except where a distinction between stocks and shares is expressed or implied. However, there is also voting share – in relation to a body corporate – which is defined as the shares issued in the body corporate. Bear in mind that neither does it include the share to which, in no circumstances, is there attached a right to vote, nor does it include the share to which there is attached a right to vote only (1) during a period in which a dividend (or part of a dividend) in respect of the shares is in arrear; (2) upon a proposal to reduce the share capital of the body corporate; (3) upon a proposal that affects rights attached to the share; (4) upon a proposal for the disposal of the whole of the property, business, and undertakings of the body corporate; or (5) during the winding up of the body corporate. As mentioned in Section 4(1) of the Companies Act that shares is the capital of the corporation or the corporate body. In order for shares to give rise to the rights and obligations of the members of the company (hereinafter referred to as the "Members"), especially shareholders, the corporation must have been established in the first place[21].

There are several steps, according to the Companies Act, that a corporation must take in order to establish itself. In pursuance of Part 3 Division 1 of the Companies Act, the steps of which are as follows:

1. The parties to determine the form of the company
2. The parties wishing to establish a company to make a Company Constitution
3. The parties to submit the Constitution to the Registrar

#### *4.2.1. The Validity of Agreement in Singapore*

The elements of the validity of an agreement in Singapore are distinct from those in Indonesia. However, the concept of agreement validity between these two countries is more or less the same. There is the concept of consent, capacity, illegality, and so forth. The differences between agreement validity in these two countries may be found in the designation and categorization of each element. In Indonesia, the elements of the validity of an agreement are categorized into consent, capacity, specific subject matter,

https://doi.org/10.54934/ijlcw.v3i2.104

and permitted cause, supported by the principle of good faith and the grounds for defence through the mechanism of indemnification of costs, damages, and interests (CDI) through breach of contract or torts lawsuit. On the other hand, the elements of the validity of an agreement in Singapore may be categorized into (1) offer, acceptance, and consideration; (2) meeting of the minds; (3) capacity; and (4) the principle of good faith; supported by various defence mechanisms[22].

As for the principle of good faith, it is automatically applied when the contract was entered into by having fulfilled the aforementioned elements, and the parties agreed to conclude it [23]. There are no guidelines on how the principle of good faith should be implemented. However, through the Socimer International Bank Ltd. v. Standard Bank Ltd. case in 2008, as well as the Black's Law Dictionary, the principle of good faith may be implemented by executing such a contract with honesty, faithfulness to the duty or obligation, being observant to the business, and excluding the intent to defraud or to seek unconscionable advantage from the other party. Whether implicit or explicit, insofar as the parties have taken the aforementioned measures, the parties may be considered to have acted in good faith [24]. For the purposes of comparing the agreement validity in Singapore with its counterpart in Indonesia, Table 1 presents the differences between these two countries.

Table 1. Differences between the Agreement Validity in Singapore and Indonesia

| | **Singapore** | **Indonesia** |
|---|---|---|
| **Elements** | 1. Offer, Acceptance, and Consideration<br>a. Invitation to Treat<br>b. Firm Offer<br>c. Mirror-Image Rule<br>d. Postal Rule<br>e. Illusory Promise<br>2. Meeting of the Minds<br>a. Fraud<br>b. Frustration<br>c. Mistake | 1. Consent<br>a. Mistake (*kekhilafan*)<br>b. Duress (*paksaan*)<br>c. Fraud (*penipuan*)<br>2. Capacity<br>a. Minors<br>b. Persons under Guardianship<br>3. Specific Subject-Matter<br>4. Permitted Cause |

https://doi.org/10.54934/ijlcw.v3i2.104

| | **Singapore** | **Indonesia** |
|---|---|---|
| | d. Misrepresentation<br>e. Duress<br>f. Undue Influence<br>g. Unconscionability<br>3. Capacity<br>a. Minors<br>b. Impairment or Disturbance in the Functioning of the Mind | |
| **Defences** | 1. *Force Majeure*<br>2. Hardship<br>3. Implied-in-fact Contract<br>4. Parol Evidence Rule<br>5. Promissory Estoppel<br>6. *Non Est Factum*<br>7. *Contra Profentem* | Force Majeure (*overmacht*) |
| **Remedies** | 1. Illegality<br>2. Inequality of Bargaining Power<br>3. Quasi-Contract<br>4. *Quantum Meruit*<br>5. *Culpa in Contrahendo*<br>6. Specific Performance<br>7. Rescission | Remedies for costs, damages, and interests (CDI) on the basis of *Wanprestasi* lawsuit under Article 1238 of KUHPer<br>or<br>Request for the nullification of the agreement on the basis of Article 1266 and/or Article 1267 of KUHPer, provided that the agreement did not set out the wavering of the said articles in the agreement [25]. |

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### *4.2.2. Corporate Organs in Singapore*

As opposed to the concept of organs of PT in Indonesia – which acknowledges the existence of the BoC –, Singapore does not acknowledge the BoC, nor Commissioner. In Singapore, the "organs" of a company are categorized into Directors, Shareholders, and Secretaries [26]. The mechanism of each organ is as follows:

1. Directors

The provisions on the mechanism of Directors are set out under Part 5 Division 2 of the Companies Act. Every company in Singapore shall at least have one Director who resides in Singapore, has attained the age of 18 (eighteen) years and has full legal capacity. In the event that the company only has one Director, the said Director (sole Director) may also be the sole Member of the company. The appointment of Directors, as set out under Section 149B and Section 150 of the Companies, is conducted by the company through a resolution passed at a General Meeting unless otherwise provided by the Constitution [27].

2. Shareholders

The Companies Act provides the shareholders with certain rights and protection. However, the shareholders are only allowed to exercise their rights once the company has been incorporated in accordance with the laws and regulations. This is due to the fact that not only does a legally incorporated company give its members the right to exercise all the functions of an incorporated company, but it also proves the validity of the said functions of an incorporated company being exercised [28].

3. Secretaries

The existence of Secretaries – as may be found governed under Section 170 of the Companies Act – in a company in Singapore is a requisite. A Secretary is a natural person whose principal place of residence is only in Singapore, who is not debarred or disqualified from acting as the Secretary of the company and who has the requisite knowledge, experience, professional and academic requirements, as well as membership of professional associations to discharge the functions of Secretary of the company [29].

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#### *4.2.3. Beneficial Owner in Singapore*

Under Section 386AB of the Companies Act, Beneficial Owner (BO) – or as and hereinafter referred to as the Controller so as not to confuse with BO in Indonesia – is defined as a legal entity having a significant interest in or control over the company. The Sixteenth Schedule of the Companies Act asserts that a legal entity is considered to have a significant interest if (1) the person concerned has an interest in more than 25% (twenty-five percent) of the shares in the company or (2) the person concerned has an interest in one or more voting shares in the company and the total votes attached to those shares is more than 25% (twenty-five percent) of the total voting power in the company. On the other hand, a legal entity is considered to have significant control over the company if the person concerned (1) holds the right to appoint or remove the Directors who hold the majority of the voting rights – or equivalent person thereof –; (2) holds more than 25% (twenty-five percent) of the voting rights of the company; or (3) has the right to exercise or exercises significant influence or control over the company. Under Section 386AJ(1) and Section 386AK(1), the Controller is required to notify the company that the person concerned is a registrable Controller, with the date on which the person concerned became or ceased to be a registrable Controller contained therein, and that there has occurred a relevant change – if any – in the prescribed particulars of the registrable Controller, with the date on which the change occurred and the particulars of the change contained therein [30].

#### *4.2.4.* Nominee Agreement on Shares Ownership in Singapore

Compared to the validity of nominee agreement in Indonesia, the laws and regulations applicable in Singapore focus on the concept of Nominee as an individual rather than a form of agreement. According to these provisions, the practice of both nominee Directors and nominee Shareholders is permissible. Instead, nominee directors' existence and rights –one of which is to be undisclosed – are protected under Section 386 AKA(2). However, in order to be protected under the laws and regulations of Singapore, according to Section 386AL (1) and (2) as well as Section 386 ALB (1) and (2), the nominee Directors and Shareholders must be registered through prescribed particulars at a prescribed time. It is also seen that the rights to exercise power due to shareholding in determining whether a corporation is a subsidiary of another corporation is protected under Section 5(3)(b), stating that "in determining whether one corporation is a subsidiary of another corporation, any shares held or power exercisable (i) by any person

https://doi.org/10.54934/ijlcw.v3i2.104

as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity." This shows that Nominee, whether in terms of nominee Directors and nominee Shareholders or in terms of nominee agreement on the ownership of shares, is permissible insofar as the practice complies with the laws and regulations applicable in Singapore.

Table 2. The Differences between the Legal System on the Validity of Nominee Agreement on the Ownership of Shares between Indonesia and Singapore.

| | **Indonesia** | **Singapore** |
|---|---|---|
| **Designation of Terms** | PT | Company |
| | Articles of Association | Company Constitution |
| | *Rapat Umum Pemegang Saham* | General Meetings |
| | *Pemilik Manfaat* | Controller |
| | *Itikad Baik* | Good Faith |
| **The Formation of Company** | 1. The parties to submit a name for the PT<br>2. The parties to enter into a Deed of Establishment of the PT<br>3. The parties to request for SKDP and NPWP<br>4. The parties to arrange the Articles of Association of the PT<br>5. The parties to submit a request for SIUP<br>6. The parties to request for the registration of the TDP | 1. The parties to determine the form of the company<br>2. The parties to make a Company Constitution<br>3. The parties to submit the Constitution to ACRA<br>4. ACRA to approve or refuse such registration<br>5. The subscribers to the Constitution and other persons to become a Member of the company |

https://doi.org/10.54934/ijlcw.v3i2.104

| | | |
|---|---|---|
| | 7. Announcement by the Ministry of Law and Human Rights into the State Gazette | |
| **Corporate Organs** | 1. Board of Directors<br>2. Board of Commissioners<br>3. Shareholders | 1. Directors<br>2. Shareholders<br>3. Secretaries |
| **The Creation of Shares** | When the PT has obtained a complete status of a legal entity, namely after having been registered to the Minister of Law and Human Rights and received the proof of registration, as set out under Article 7(4) of the UUPT. | When there is *prima facie* evidence as to the exercisability of all the functions of an incorporated company, namely at the time the registration of the Members is entered in the register of the Member, as set out under §190(4) and §196A(6) of the Companies Act. |
| **Validity of Contract** | 1. Consent<br>a. Mistake (*kekhilafan*)<br>b. Duress (*paksaan*)<br>c. Fraud (*penipuan*)<br>2. Capacity<br>a. Minors<br>b. Persons under Guardianship<br>3. Specific Subject-Matter<br>4. Permitted Cause | 1. Offer, Acceptance, and Consideration<br>a. Invitation to Treat<br>b. Firm Offer<br>c. Mirror-Image Rule<br>d. Postal Rule<br>e. Illusory Promise<br>2. Meeting of the Minds<br>a. Fraud<br>b. Frustration<br>c. Mistake<br>d. Misrepresentation<br>e. Duress<br>f. Undue Influence<br>g. Unconscionability<br>3. Capacity<br>a. Minors<br>b. Impairment or Disturbance in the Functioning of the Mind |
| **Beneficial Ownership** | Regulated under:<br>1. PERPRES 13/2018<br>2. PERMENKUMHAM 15/2019 | Regulated under: |

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| | | |
|---|---|---|
| | Requirements:<br>1. ownership of over 25% of the shares of the PT<br>2. ownership of over 25% of the voting rights in the PT<br>3. receipt of over 25% of the benefits or net profits of the PT annually<br>4. authority to appoint, replace, or dismiss the BoD and the BoC<br>5. authority or power to control influence or control the PT<br>6. actual ownership of the fund or shares of the PT | §386AB, §386AC, §386AF, §386AJ, §386AK, and Sixteenth Schedule of the Companies Act<br><br>Requirements:<br>1. interest in more than 25% of the shares in the company<br>2. interest in one or more voting shares in the company and the total votes attached thereto is more than 25% of the total voting power in the company<br>3. authority to appoint or remove the Directors who hold the majority of the voting rights as well as the equivalent persons thereof<br>4. ownership of more than 25% of the voting rights of the company<br>5. authority to exercise or actually exercise significant influence or control over the company [31] |
| **Nominee Agreement** | Prohibited under:<br>1. Article 1320 KUHPer<br>2. Article 48(1) of UUPT<br>3. Article 33(1)(2) of UUPM<br><br>The consequence of entering into a nominee agreement on the ownership of shares is that the agreement will be declared null and void. The Nominee is then required to repay the beneficiary of the total nominal of shares being entered into, and the beneficiary is to yield the shares as well as the rights thereof to the Nominee (which, upon such payment, is then considered as the legal owner). | Permitted under:<br>1. §386AKA(1)(2) of the Companies Act<br>2. §386ALA(1) of the Companies Act<br><br>The existence of nominee Directors and nominee Shareholders are acknowledged and protected insofar as complying with the provisions set out in the laws and regulations applicable in Singapore, which include but are not limited to having been registered through prescribed particulars in a prescribed manner at a prescribed period of time. |

https://doi.org/10.54934/ijlcw.v3i2.104

## 5. CONCLUSIONS

In conclusion, agreement validity concepts generally differ between Indonesia and Singapore. This is due to the fact that Indonesia and Singapore possess different legal systems. On one hand, Indonesia adheres to the Civil Law (European Continental) legal system, while on the other hand, Singapore adheres to the Common Law (Anglo-Saxon) legal system. Apart from that, historical-wise, Indonesia was occupied by the Dutch. To this day, the Civil Code used in Indonesia, namely the KUHPerdata, just as its name suggests, is the Civil Code of the Netherlands and has yet to be amended. On the other hand, Singapore was occupied by the British, and to this day, most of Singapore's laws and regulations still use the laws and regulations applicable to the United Kingdom. In relation to the concept of Nominee Agreement on the Ownership of Shares, due to the difference between the legal systems being adhered to by these two countries, one prohibits the use of Nominee Agreement in any form, and the other acknowledges the use of Nominee Agreement, especially in terms of Nominee Shareholders as well as Nominee Directors. The former, being Indonesia, through Article 33(1) of the UUPM juncto Article 48(1) of the UUPT, prohibits using Nominee Agreement in any form. Unlike Indonesia, Singapore acknowledges the Nominee Agreement on the Ownership of Shares. Despite it being not expressly stated, it may be found that the provisions on nominee shareholders and nominee directors are set out under §386(1) ALA junctis §386(1) AKA and §386(2) AKA of the Companies Act, provided that the company shall keep its register in the prescribed form and at the prescribed place.

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## ABOUT THIS ARTICLE

**Conflict of interests:** The authors declare no conflicting interests

**Acknowledgments**: With the help of several people and organizations, this paper represents the end of an extensive scholarly journey. I would want to sincerely thank everyone for their essential advice, insightful criticism, and unwavering support during the research and writing phases. I also want to express my gratitude to the university for giving me the tools and setting I needed to carry out this research. The effectiveness of this investigation was greatly aided by the staff at the library and the availability of legal databases.

# ANÁLISIS COMPARATIVO DE LA VALIDEZ DEL ACUERDO DE NOMINADO SOBRE LA PROPIEDAD DE ACCIONES ENTRE INDONESIA Y SINGAPUR

**RESUMEN**

La propiedad de acciones como forma de inversión está regulada por leyes que protegen a las empresas y a sus accionistas. Además de estas leyes y regulaciones, los acuerdos entre accionistas y el Código Civil salvaguardan los intereses de los accionistas y de la empresa. No obstante, a menudo ocurre la evasión legal debido a restricciones de inversión, como la práctica generalizada de los acuerdos de nominados. Sin embargo, algunas de estas regulaciones confunden al nominado con el Propietario Beneficiario (Beneficial Owner, BO), lo que permite abusos y violaciones de la ley. Esta investigación se centra en el concepto de acuerdos de propiedad de acciones mediante nominados en Indonesia y su comparación con Singapur, utilizando teorías y conceptos de derecho comparado, entidad jurídica, órgano corporativo, acuerdo, acciones, accionista, propietario beneficiario y enfoques basados en principios legales. Se demuestra que Indonesia rechaza y prohíbe los acuerdos de nominados, mientras que Singapur protege ciertas condiciones para accionistas nominados y directores nominados que cumplen con sus requisitos. Esta diferencia de enfoque se refleja en las consecuencias legales aplicadas a las partes que violan estas regulaciones en cada país.

Palabras clave: acuerdo de nominado, propiedad de acciones, sociedad de responsabilidad limitada

# 印尼与新加坡关于股份所有权提名协议有效性的比较分析

摘要

作为一种投资形式，股份所有权受到法律法规的保护，这些法规旨在保护公司及其股东。除了这些法律和法规，股东协议和民法典也保障了股东和公司的利益。然而，由于投资限制，法律规避现象经常发生，例如提名协议的广泛实践。然而，这些规定中的某些内容将提名人和实益所有人（Beneficial Owner, BO）混淆，从而导致滥用和违法行为。本研究重点探讨印尼的股份提名协议概念及其与新加坡的比较，采用比较法、法人实体、公司机关、协议、股份、股东、实益所有人及法律原则的理论和概念方法。研究表明，印尼拒绝并禁止提名协议，而新加坡在特定条件下保护符合要求的提名股东和提名董事。这种差异反映在两国对违反这些规定的当事人所施加的法律后果中。

关键词：提名协议、股份所有权、有限责任公司

https://doi.org/10.54934/ijlcw.v3i2.104