CHAPTER I

INTRODUCTION

1.1 Background

Indonesia is a state based on the rule of law which faithfully upholds the 1945 Constitution of the Republic of Indonesia [1945 Constitution][1] and its Pancasila.[2] Although the 1945 Constitution is the highest form of law, the people are required to abide by other positive laws that are enacted by the people in governmental institution.

The social and economic welfare of the people are ensured by Article 33 and 34 of the above mentioned 1945 Constitution. It is ensured through several ways, especially on the perspective of its natural resources, more specifically on land. As it is stated in the 1945 Constitution that the land, the waters and the natural resources within shall be under the powers of the State and shall be used to ensure the greatest benefit of the Indonesian people.[3]

Land and its derivatives are regulated under the Basic Agrarian Law [Agrarian law] which is the Law No. 5 Year 1960 enacted on the 24th of September on the same year. The 1960 Agrarian Law is regulated in the broadest sense, namely as a compilation of a group of various legal fields, which regulates the right to control over natural resources. In that sense the Agrarian Law includes laws on land and water, the law governing the right to control over labor

[1] Article 3(1) of Law No.12 Year 2011 on the Establishments of Laws and Regulations
[2] Article 2 of Law No.12 Year 2011 on the Establishments of Laws and Regulations
[3] Article 33(3) of the 1945 Constitution

and certain elements in Indonesian space and room, mining law, fisheries law and forestry law.[4]

Since the Agrarian Law was enacted based on the reflection of article 33 of the 1945 constitution,[5] it also further explains and elaborate what was stated in Article 33(3) of the 1945 Constitution. There are 2 elements present in the above-mentioned article, which is a) under the power of the state, and b) ensuring the greatest benefit for the Indonesian people. The former element is a straightforward one where the institution that controls all the land, water and air in Indonesia is their government institution with boundaries coming from rights owned by the people.

For the 2nd element, 1st paragraph of the 9th article of the Agrarian Law mentioned that only Indonesian citizens have the rights to full relation with their own land, air and space.

In regard to land and its relationship, there are several rights given to the people to own a land and there are differentiation between the holder of rights. The rights given to own a land has been determined by the law and those are *Hak Milik, Hak Guna Usaha, Hak Guna Bangunan, Hak Pakai* (This thesis will focus on these four rights, and the explanation of these terms are explained further in the Conceptual Framework in Chapter 4 Page 38 of this thesis), *Hak Sewa, Hak Membuka Tanah, Hak Memungut Hasil Hutan.*[6]

With that being said, the highest land right is the *Hak Milik* of a plot of land,

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[4] Boedi Harsono, *Hukum Agraria Indonesia, Himpunan Peraturan-Peraturan Hukum Tanah,* (Jakarta: Djambatan, 1989), Foreword, Pg. 2

[5] With due regard of Page 2 of the Agrarian Law

[6] Article 16(1) of the Agrarian Law

which is explained in articles 20 to 27 of the Agrarian Law. As it is stated that *Hak Milik* is a hereditary right that is the strongest and fullest hierarchy between other rights one can have on a land.[7] Followed by the *Hak Guna Usaha*,[8] and *Hak Guna Bangunan*,[9] in no specific order of hierarchy.

In regard to the subjects of the owners of the land rights, residents who lives in Indonesia are not only Indonesian citizen, but also foreigners. In recent years, foreigners in Indonesia are increasing in number. One of the reasons because of the progress of science and technology, as well as openness between countries in international relations. Indonesia is also a developing country that has great potential that attracts many foreign investors to invest in Indonesia.[10] The several important factors that help with the development of the investment climate in Indonesia are namely: 1. attractive existing regulations and policies which support foreign investors to invest in Indonesia; 2. huge opportunity for high labor with relatively low wages; 3. a broad production market because of Indonesia's large population; 4. readily available natural resources; 5. political stability; 6. legal certainty and consistency of regulations and their easy to follow application.[11]

For example, for foreigners working in Indonesia, either through the shares they planted on a company in Indonesia, or their company in Indonesia. Although

[7] Article 20(1) of the Agrarian Law
[8] Articles 28-34 of the Agrarian law and Articles 2-18 of the Government Regulation No. 40 Year 1996 concerning *Hak Guna Usaha, Hak Guna Bangunan*, and *Hak Pakai*[GR No.40 Year 1996]
[9] Articles 35-40 of the Agrarian Law and Articles 19-38 of the GR No.40 Year 1996
[10] Margono, Sujud, *Hukum Investasi Asing di Indonesia*, (Jakarta: Novindo Pustaka Mandiri, 2008), Pg. 2
[11] *Ibid*,.

for legal entities foreigners do not have many opportunities to do business in Indonesia. However, there are fields certain that is open for the company to enter foreigners do business activities. These include oil mining and natural gas, navy and force air, especially for foreign transportation. Besides that, in the banking sector, the company foreigners can only set up a branch office at Indonesia.

These three rights mentioned in previous paragraphs are prohibited for any foreigners to capitalize on, since it has been clearly regulated in the laws, where *Hak Milik* is only given to Indonesian citizens/nationals,[12] while both Indonesian citizens and a legal entity established under Indonesian law and is domiciled in Indonesia is allowed to obtain the *Hak Guna Usaha*[13] and *Hak Guna Bangunan*.[14]

In regards to *Hak Milik*, there are provisions and articles in the Agrarian Law that determines when a *Hak Milik* is annulled and the land falls back to the state. Article 27(a)(4) stated that it can be the case when articles 21(3) and 26(2) is violated by the owner of the land.

Article 21(3) stated that "Any foreigner, who after the coming into force this Act has obtained the *Hak Milik* through inheritance, without a will or through communal marital property and any Indonesian citizen too, having the *Hak Milik* and losing nationality after the coming into force of this law, are obliged to relinquish that right within a period of one year after the obtaining of that right or after losing that nationality. If after the expiration of that period, the *Hak Milik* is not relinquished, then it becomes invalid by the provision that the right of other

[12] Article 21(1) of the Agrarian Law
[13] Article 30(1) of the Agrarian Law and Article 2 of the GR No.40 Year 1996
[14] Article 36(1) of the Agrarian Law and Article 19 of the GR No.40 Year 1996

parties, incumbent hereon, endure."

Article 26(2) states that, "Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the *Hak Milik* directly or indirectly to a foreign, to a national possessing a foreign nationality in addition to his/her Indonesian nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21, clause (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed."

So when a foreigner owns a plot of land with a *Hak Milik* certificate on the land, even if it is obtained legally, is given a period of one year to transfer it to an Indonesian national before the right of the land is annulled by law.

However, we need to know the boundaries that separate on who are acknowledged as Indonesian citizens and those who are foreigners. Law No. 12 Year 2006 regarding Citizenship of the Republic of Indonesia has clearly elaborated these terms to create a legal certainty and eliminates confusion on the separation of those two terms (Indonesian citizens and foreigners). As mentioned in article 2 of the law, those who are considered as Indonesian citizens are indigenous people and other nationals/people who are legally recognized as citizens. And article 4 further elaborates on the exhaustive lists on those who can be considered as an Indonesian national. Hence, foreigners are those not included in those articles mentioned above.

For foreigners since they are prohibited from obtaining *Hak Milik*, *hak*

guna usaha and *hak guna bangunan* of a land in Indonesia, they are left with only three rights regarding land ownership, which are:

a) Housing on a plot of land

1. *Hak Pakai*; or

2. *Hak Pakai* on a *Hak Milik* which is obtained based on an agreement of giving a *Hak Pakai* on a *Hak Milik* with an act made by the authorities

b) *Hak Milik atas satuan rumah susun* build on a land of *Hak Pakai* certificate.[15]

Previously, in the Agrarian Law, any foreigners could own a *Hak Pakai* on a land they purchase, but recently there was a newly enacted law that sets out a requirement on which foreigners are allowed to own such right. It is specifically mentioned in article 1 of the Government Regulation No. 103 Year 2015 concerning Ownership of Houses or Housing by Foreigners Domiciled in Indonesia[GR No.103 Year 2015] that foreigners who are allowed to own *Hak Pakai* are those whose existence provides benefits, does business, works, or invest in Indonesia. Hence with the existent of the law, it creates a more concrete barrier and expectation that a foreigner should be contributing to the social and economic values of Indonesia. This is in coherent with what Adrian Sutadi mentioned that foreigners that can be recognized as having a domicile in Indonesia are those who carry out economic activities in Indonesia regularly or at

[15] Article 4 of the GR No.103 Year 2015

any time, shall require the need to have a residence in Indonesia.[16]

The ownership of land, even in obtaining a right to land that are allowed for them, is difficult, since the foreigner who conducts has fulfilled the requirement above, needs to legally be given a residence permit/stay permit (*izin tinggal*). Because only foreigners with a stay permit are allowed to buy a land, as stipulated in the law.[17] Regarding the residence permit, it is further explained in Law No.6 Year 2011 concerning Immigration. Article 48(3) of the Immigration law divide the residence permit into five, where it is divided based on the visa that the foreigners have. Those residence permits are: a) diplomatic stay permit, b) official stay permit, c) visit stay permit, d) limited stay permit, and lastly e) permanent stay permit.

There is another regulation set out by the National Land Agency in Indonesia, in its Minister Regulation No. 13 Year 2016, where in its attachment; it states the minimum price of a condominium that can be bought by foreigners for different provinces. These minimum prices for a single condominium was set out by the government to differentiate the market between people in need of housing with foreigners that are wealthy, in order to prevent any foreign citizen from monopolizing the housing market in Indonesia.

[16] Adrian Sutedi, *Tinjauan Hukum Pertanahan*, (Jakarta: Pradnya Paramita, 2009), Pg. 268

[17] Article 1(1) of the Agrarian and Spatial Planning Ministry Regulation or Head of the National Land Agency No. 13 Year 2016 concerning Procedures for granting, releasing or transferring rights of residential or residential housing by foreigners domiciled in Indonesia

Table 1.1 Minimum price of a condominium (on *Hak Pakai* lands) that a foreigner can buy

Cities in Indonesia	**>Price in Rupiah**
DKI Jakarta	5 billion
Banten	1 billion
West Java	1 billion
Central Java	1 billion
Yogyakarta	1 billion
East Java	1,5 billion
Bali	2 billion
West Nusa Tenggara	1 billion
North Sumatera	1 billion
East Kalimantan	1 billion
South Sulawesi	1 billion
Others	750 million

Source : The Minister Regulation of the Agrarian and Space/Head of National Land Agency No. 13 Year 2016 regarding Procedures on Giving, Releasing or Transfer of Rights for Ownership on Residential or Residential Housing for Foreign People in Indonesia.

It can be seen that the minimum price for one unit of condominium is quite high, hence it does not inhibit the buying power of Indonesian citizen who

are trying to own a piece of land for their selves.

Secondly, foreigners are allowed to own individual housing which is built over the *Hak Pakai* over a land that is a government owned land, a right to manage, or *Hak Milik* over the land. However, this is similar to the *Hak Pakai* of land that has been discussed above, but there are limitations that need to be pointed out. As the Minister of Land and Space, and the National Land Agency, has also set out the minimum price of housing that a foreigner can buy. It is also set out in the Minister Regulation No.13 Year 2016.

Table 1.2 Minimum price of landed house that are allowed for foreigners

Cities in Indonesia	**>Price in Rupiah**
DKI Jakarta	10 billion
Banten	5 billion
West Java	5 billion
Central Java	3 billion
Yogyakarta	3 billion
East Java	5 billion
Bali	3 billion
West Nusa Tenggara	2 billion
North Sumatera	2 Billion
East Kalimantan	2 billion
South Sulawesi	2 billion
Others	1 billion

Source : The Minister Regulation of the Agrarian and Space/Head of National

Land Agency No. 13 Year 2016 regarding Procedures on Giving, Releasing or Transfer of Rights for Ownership on Residential or Residential Housing for Foreign People in Indonesia.

The prohibition of foreign ownership on land is due to the existence of a principle in our agrarian law which is the "*larangan pengasingan tanah*" or in Dutch is is known as *gronds verbing verbood*, namely that land in Indonesia may not be owned by foreign parties. This principle also provides protection for the state of Indonesia so that land that located in the territory of Indonesia does not fall into the hands of foreigners, which could result in the state being forced to pay foreigners to cultivate their own land in their own territory.[18]

Hak Pakai has a duration of 30 years with a right to extend it by 20 years of time, and when it has ended, the owner can re new the *Hak Pakai* for another 30 years before it expires.[19] However, foreigners still looks to own a *Hak Milik* on their land since it is the highest rights between the various rights allowed for a land. Especially a *Hak Milik* gives a more certain legal protection to their owners since it is a permanent right that can be easily transferred to other parties giving both parties legal certainty.

Although it is elaborated clearly that foreigners are not allowed to own such right, there are practices that has been done to evade the law. One common practice is the use of a nominee agreement [Nominee Agreement], where a foreigner asks for the permission of an Indonesian citizen to represent and use their name in buying a land. Although it can be seen that this practice is an

[18] Irma Devita Purnamasari, *Kiat-Kiat Cerdas, Mudah, dan Bijak Mengatasi Masalah Hukum Pertanahan*, (Bandung: Kaifa, 2011), Pg. 4 Paragraph 4

[19] Article 6 and 7 of the GR No.103 Year 2015

attempt to evade the law, there are no laws or any provision prohibiting this common practice, hence no one can really determine whether it is a violation of the law or not.

Before going into the definition and understanding of a Nominee Agreement, personally the author would like to understand better on the legal consequence of a nominee agreement after it has been made. And the implication it has on the parties binding themselves in the said agreement, and to other third parties, such as notaries, as the one making the deed, and even the national land agency.

Nominee, in its broadest sense can be define as a person designated to act for another as his representative in a rather limited sense, used sometimes to signify an agent or trustee.[20]

The term "Nominee Agreement" is originally derived from a Common Law's System, but has then spread widely among other countries, even those who adhered to the Continental Law's System, including Indonesia.[21] Hence, Nominee Agreement has been a plagued and is well recognized in Indonesian cities, among others are Jakarta and Bali, the most popular tourist destination in Indonesia. Since foreigners does not only travel to visit Bali, but also look to stay permanently there, but are only limited to leasehold lands (legal right to live in or use a building for an agreed/limited period of time).[22] However, there are more freehold lands (land on *Hak Milik*) being sold compared to leasehold, as a result, Nominee Agreement comes as a solution for foreigners to get freehold land

[20] Gamer, Brayan A., Black's Law Dictionary With Guide to Pronunciation, Edition: 7, Pg. 1072
[21] Sancaya, I Wayan Werasmana & O'Leary, Nella Hasibuan, "The Nominee Agreement in Bali", International Journal of Sosiological Jurisprudence, Volume 2; Issue 1, 2019, Pg. 27
[22] Definition of Leasehold, https://dictionary.cambridge.org/dictionary/english/leasehold, accesed on 04 December 2019

legally.[23]

Nominee Agreement, by its name is a type of an agreement, hence by logic it should be regulated by Book III of the Indonesian Civil Code regarding contracts and agreements. One of the major principle adopted by the Indonesian civil code is the principle of freedom of contract (asas kebebasan untuk berkontrak) stated in Article 1338 of the code.[24] The freedom of contract principle is coupled by the principle of open system which is practiced concerning the formation of contract.[25] The freedom of contract and open system principle does not only gives freedom to the parties involved in deciding the scope of the rules based on the interests of those involved, but it also gives freedom to decide on what agreement shall be made. In addition, according to article 1319 of the Indonesian civil code, it reassures the principle mentioned above by stating that, "All agreements whether nominated specifically or being known under no specific name shall comply with general rules that are the subject of this title and the preceding one." Hence, it is up to the parties to decide on what type of agreement they are trying to bind each other into, as long as they comply to general rules of contract law.

As they need to comply with general rules upheld in contract law, one of the first article that needs to be fulfilled is to comply with Article 1320 of the Indonesian civil code regarding the fulfillment of the subjective and objective elements of making an agreement. As it state that "In order to be valid, an agreement must satisfy the following four conditions: 1) there must be consent of

[23] Sancaya, I Wayan Werasmana & O'Leary, Nella Hasibuan, *Op. Cit.*, Pg. 27
[24] Article 1338 of the Indonesian Civil Code
[25] *Ibid.*

the individuals who are bound thereby, 2) there must be capacity to conclude the agreement, 3) there must be a specific subject, and 4) there must be a legal/lawful cause."

Aside from the understanding of an agreement discussed above, in Indonesia they adhere to the understanding of two types of agreement, namely *nominaat* and *innominaat* agreement. A *nominaat* agreement is an agreement that is that is regulated and specified in the Indonesian civil code such as an agreement of sale and purchase, leasing, civil partnerships, grants, loans or mortgage.[26] While an *innominaat* agreement is an agreement that grew and developed in practice and was not yet known when the Indonesian civil code was promulgated.[27] One example of an *innominaat* agreement is the Nominee Agreement itself.

Being a *innominaat* agreement does not lapse a Nominee Agreement to be excluded from the regulations mentioned in previous paragraphs, since according to Salim Sidik, it has the same element as a general agreement, such as

1. there is the present of the element of a rule of law, whether the rules of the law of the written or unwritten agreement;
2. there is a legal subject element, known as the parties to the Agreement;
3. there is the element of the legal object
4. there is a consensus element which constitutes the agreement of the party's will regarding the substance and object of the agreement;
5. there is the element of rights and obligations to the parties as a result of

[26] Salim H.S., *Hukum Kontrak, Teori dan Teknik Penyusunan Kontrak,* (Jakarta: Sinar Grafika, 2006), Pg. 48

[27] Salim H.S., *Perkembangan Hukum Kontrak Innominaat Di Indonesia,* (Jakarta: Sinar Grafika, 2003), Pg. 1.

the law arising from the Agreement.[28]

A Nominee Agreement is usually a type of agreement where the Indonesian citizen's name is used to represent the foreigner in buying the land, hence the name that is legally written as the owner of the land, is the Indonesian citizen.

The agreement is made in a deed by a notary, to make it qualify as an authentic deed. This is usually coupled with several other deeds that are used to prevent any legal problems when the Indonesian citizen acts in bad faith.

These other deeds are usually:

1. Sale and purchase deed, this deed is used to show as if there is a pseudo ownership takes place on the land, because the name of the Indonesian citizen is only borrowed for in a certificate, while actually the money comes directly from the foreigner.

2. Debt recognition deed, this deed is used to show as if the Indonesian citizen has a debt of some sum of money to the foreigner.

3. Leasing deed, this is to ensure that the foreigner will be able to use the land that they actually own by having a leasing agreement, which can be extended and be given to their heir.

4. Mortgage deed, since there is a debt recognition deed, the plot of land is tied as a mortgage if the Indonesian citizen has failed to pay their debt.

5. Statement, a deed to give assurance and legal protection to the foreigner saying that the Indonesian citizen will do any legal actions ordered by the owner of the land, which is the foreigner.

[28] Salim H.S., *Op.Cit.*, Pg. 4-5

6. Power of attorney given to the foreigner from the Indonesian citizen, by stating that the Indonesian citizen allows the land owned by him/her to be transferred on the request of the foreigner and allows the foreigner to utilize and collect profits from the land.[29]

The first four deeds mentioned in the previous paragraph are individual deeds made by the notary in ensuring the security for the foreigner who pays for the land, while the last two deeds, are usually provisions or regulations found inside the Nominee Agreement itself.

A Nominee Agreement other than creating a binding agreement between the parties, affects third parties such as notary when a dispute arises. Because even if the Notary is acting in good faith in creating a Nominee Agreement, they could still be called up as a defendant, although they aren't any present regulations regarding Nominee Agreement. This is because a Notary, acting with their power and authority as an authorized official, shall always act and be in accordance with the law.

In Law No. 30 Year 2004 concerning Notaries Duty it has been clearly stated in Article 4 Paragraph 2 that:

> "I swear that I will adhere to and be loyal to the State of the Republic of Indonesia, Pancasila and the 1945 Constitution of the State of the Republic of Indonesia, Law of Office of Notary Public and other laws and legislation. that I will perform my office trustworthily, honestly, accurately, independently, and non-unilaterally. that I will maintain my attitude, behaviour, and perform my obligations in accordance with code of ethics of my profession, honour, dignity, and responsibility as Notary

[29] Andina Damayanti Saputri, *Perjanjian Nominee Dalam Kepemilikan Tanah Bagi Warga Negara Asing Yang Berkedudukan Di Indonesia (Studi Putusan Pengadilan Tinggi Nomor: 12/Pdt/2014/PT.Dps), Jurnal Repertorium* ISSn: 2355-2646, Volume II No. 2 Juli-Desember 2015, Fakultas Hukum Universitas Sebelas Maret, Pg. 99-100

> Public. that I will keep secret the content of the deed and statement obtained in the performance of my office. that to be assigned in this office, I, directly or indirectly, with any name or on any ground, never and will not give or promise anything to anybody."

As it can be seen from the phrase that "I will adhere to and be loyal to the State of the Republic of Indonesia, …. and other laws and legislation," this shows that a sworn Notary shall always comply to the laws and legislation, and shall never detriment the Republic of Indonesia, since they are a sworn public officer. Hence, they must be responsible of the work that they have done.

According to researchers, they are in consensus that the legal consequence of a notary in making a Nominee Agreement is that they are responsible personally for the deed, as a general/public official, they are responsible administratively, and also by civil, code of ethics of notary and criminal position.[30]

This concept of a Nominee Agreement where a trustee is appointed by a foreigner to use his/her name in representing the foreigner creates some kind of a indirect ownership of the land in behalf of the foreigner, where it acknowledges that the Indonesian citizen should obey every order given by the foreigner regarding the plot of land he/she owns. In general, a Nominee Agreement as stated above, consists of a main agreement that covers several agreements and provisions such as land agreement, power of attorney to sell, option agreement, lease agreement, power of attorney, grant of will, and statement of heir.[31]

According to two Indonesian researchers, they also agree on the idea that a

[30] Wiryani, M & Utama, I. W. K. J., "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", Vol. 282, Atlantis Press, ICBLT 2018, Pg. 41-44

[31] Prof. Dr. Maria S.W. Sumardjono, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, (Jakarta: Kompas, 2006), Pg. 14

Nominee Agreement is made through a notarial deed, in order to accept a loan agreement made by the foreigners in purchasing the land using the name of an Indonesian citizen. So the funds are all from the foreigner, acting as the *de facto* land owner (Land rights that cannot be subject to ownership of the foreigner, usually lands on *Hak Milik* rights), but the *de jure* land is owned by the name of an Indonesian citizen.[32]

In addition, Nominee Agreements are made not only for land regarding *Hak Milik*, but also in the practice of buying shares in a company.

A Nominee Agreement is a type of contract and has been explained above, hence it requires the agreement and consent from both parties. In the idea of a Nominee Agreement in share ownerships, the agreement in the nomination formation in practice can be divided into two types of agreements. The first one namely by making direct agreements between the shareholders, including foreign citizen and Indonesian citizens, in limited liability companies. And the second one is indirect nominee by making several agreements, in creating as scenario that the owner of the shares are not the recipient of the benefits that comes with the owned shares, hence there are supporting documents instead of a direct Nominee Agreement.[33]

However, in Law No. 25 Year 2007 concerning Investment Law, it is specifically stated that:

"Domestic investors and foreign investors who make investments in the

[32] Azhari, M.E & Djauhari, "*Tanggung Jawab Notaris dalam Pembuatan Akta Perjanjian Nominee Dalam Kaitannya Dengan Kepemilikan Tanah Oleh Warga Negara Asing Di Lombok"*, Jurnal Akta, Vol 5(1), 2018, Pg. 43-50

[33] Wicaksono, L.S, "*Kepastian Hukum* Nominee Agreement *Kepemilikan Saham Perseroan Terbatas*", Jurnal Hukum Ius Quia Iustum, Vol 23(1), 2016, Pg. 42-57

> form of a limited liability company are prohibited from entering into an agreement and/or making a statement asserting that share ownership in a limited liability company is for and in the name of another person."[34]

And it is explained in its elucidation that this article is to prevent a situation where a company is formally owned by a person, but in actuality/reality or in substance that the owner is of the company is someone else, not as stated in the Articles of association. This can be seen as an example of a Nominee Agreement in the area of investment through shares of a company.

The legal consequence of making an agreement as stated above in an Investment climate is that it must be void from the beginning, "Where a domestic investor and a foreign investor enter into an agreement and/or make a statement as intended by paragraph (1), such an agreement and/or statement is declared to be void by operation of law."[35] However, it does not affect a Nominee Agreement made in regards to land ownership, but this shows that in another area of law, the practice of Nominee Agreement is already prohibited by the law.

In regard to a case of a Nominee Agreement on land ownership where it ends up in a dispute between the Indonesian national and a Foreign national, one of the example of a case in Indonesia happened in Bali, in which it was handled by the district court of Denpasar in Case No. 796/Pdt.G/2012/PN.Dps, in which the case continue to the high court No.12/Pdt/2014/PT.Dps until the Supreme Court case No.3020K/Pdt/2014.

In this case, Saito Hiromi (Plaintiff, a Japanese citizen) bought a land with the house attached on it in 1997, with a *Hak Milik* No. 2366/Pemecutan Kelod,

[34] Article 33(1) of Law No. 25 Year 2007 concerning Investment
[35] Article 33(2) of Law No. 25 Year 2007 concerning Investment

with an area of 180 m2, from Anak Agung Made Mahardika which is located in Lady Garden housing complex Plot 9, Gunung Soputan Street No. 99 Denpasar with a price of Rp. 150.000.000,00. However, since plaintiff is a Japanese national, she cannot own a plot of land based on a *Hak Milik* certificate, she come into an agreement with Choirul Anam (Defendant) to use defendant's name as the owner of the land, while also trusting the certificate to be held by the defendant. The sale and purchase deed number 137/Dps.B/1997 was dated on 12 September 1997 made in front of Josef Sunar Wibisono as the notary; the Certificate of the plot of land was changed to Defendant's name number 2366/Pemecutan Kelod on the 30th of September 1997. In this case the defendant was acting as a nominee of the plaintiff, since the purchase of the house and even the renovation of it was paid by the plaintiff.

Around November 2010, without the authorization of the plaintiff, the defendant sold the house and the land to Suwito Hartoyo based on the sale and purchase deed number 648/2010 dated on the 29th of November 2010 made in front of I Made Arnaja as the notary. The certificate of the land was also changed to be on behalf of Suwito Hartoyo's name which was published by the national land agency of Denpasar in 2010.

In the district court, the plaintiff request was rejected fully, in which Saito brought it to the high court, where they decided to strengthen the decision of the district court. Saito wasn't satisfied by the decision of both the district court and high court, which led her to submit the case into the Supreme court in which it was also rejected. This creates a legal uncertainty since there are yet no rules

regulating on Nominee Agreement so there was no legal basis that the judges based their decision on.

Another case which also happened in Bali, in case No.787/Pdt.G/2014/PN.Dps. The case was between Karpika Wati, the plaintiff, against Alain Maurice Pons and a notary, both as defendant I and II respectively. Plaintiff is an Indonesian citizen while defendant I is a foreigner. The plaintiff owned a land that she purchased on June 12, 2007 with a certificate No. 1022/Desa Pererenan, with an area of 975m2. The defendant I persuaded plaintiff to create several agreements and contracts with one another by giving a promise to the plaintiff that the defendant would build a villa on top of the land for free. However, the contracts made infront of defendant II were creating a scenario where the plaintiff is a nominee holder of the land.

The district court of Denpasar decided that there has been a smuggling of law conducted by both the defendants in creating the contracts that led to a Nominee Agreement formed between the Indonesian citizen and the foreigner. The district court hence decided that all the agreements created shall be null and void.

Both of the cases show a similar judgment from the judges, where they decided that a Nominee Agreement shall be considered as a null and void agreement. The legal reasoning behind both the decision was that the contract does not fulfill the objective requirement of Article 1320 of the Indonesian Civil Code.

To conclude, although there are lots of practice of a Nominee Agreement created by foreigners to “legally” own a land under the *Hak Milik*, which he/she

is otherwise deemed illegal to have, by using a nominee, there are still no laws enacted to regulate on this particular matter. Hence, the author hopes to discuss and analyse fully regarding this problem so far as to help legal practitioners and the public to avoid any problem arising from a Nominee Agreement in the future, and to give the best possible recommendation regarding this issue.

1.2 Formulation of Issues

In regard to the topic of this thesis and the legal issues that have been discussed above, the author will discuss the following formulation of issues:

1. How is foreign ownership on land and the practice of Nominee Agreement regulated under the Indonesian Civil Code and Agrarian Law?
2. Whether or not the practice of Nominee Agreement is against the principles stipulated in Indonesian Civil Code?

1.3 Research Purpose

The purpose of this research paper is to answer the formulation of issues mentioned above, which are namely:

1. To understand how ownership of land by foreigners and the practice of Nominee Agreement are regulated under the Indonesian laws.

2. To know whether the practice of Nominee Agreement is against the principles stipulated in Indonesian Civil Code.

1.4 Research Benefits

1.4.1 Theoretical Benefits

Theoretically, the author hopes that this research paper will give a better understanding to the readers on how land rights and it's relation with foreigners are regulated under the Indonesian law.

Theoretically, the author further hopes that this research paper will be beneficial to the readers by providing an insight on how a common practice, known as a Nominee Agreement, is done by foreigners to own land rights that are prohibited for them to possess. As well as it's legal implication and consequences towards the agreement itself and the parties conducting the practice.

1.4.2 Practical Benefits

Practically, the author hopes that this research paper would persuade the Indonesian government, especially the legislative, to amend the Basic Agrarian Law by incorporating articles regarding Nominee Agreement to prevent any future legal problems regarding the legal consequence of creating a Nominee Agreement.

Furthermore, the author hopes that this paper would be helpful to the general public, such as Indonesian citizens, foreigners, notaries, lawyers and other people who are directly/indirectly related to the making of a Nominee Agreement in the future, to better understand the legal consequence of it.

1.5 Framework of Writing

The research paper is divided into 5 chapters of discussion, namely:

CHAPTER I : INTRODUCTION

The first chapter, which is the introduction, consists of five main points, the first being background, followed by formulation of issues, research purpose, research benefits and lastly the framework of writing.

CHAPTER II : LITERATURE REVIEW

In the second chapter, the Author will determine the laws, regulations and policies that regulate about the ownership of land by foreigners and Nominee Agreement in Indonesia. The Author will also elaborate on the definition of Nominee Agreement, the parties to the said agreement along with the purpose of the parties, followed by the requirements of a valid agreement based on the principles stipulated in Indonesian Civil Code.

CHAPTER III : RESEARCH METHODS

This chapter will discuss in general about the type of research, the type of data, data analysis technique and the type of research approach. Followed by the types of research, data, data analysis technique and research approach that the Author use to discuss the issues in this thesis.

CHAPTER IV : DISCUSSION AND ANALYSIS

The fourth chapter will discuss the formulation of issues along with its solution. This chapter will be divided into two further sub-chapters and each sub-chapter will answer the respective research question as stipulated in Chapter Two of this thesis. The first sub-chapter will consist of the analysis on how does ownership of land by foreigners and the practice of Nominee Agreement are regulated under the Indonesian laws. While the second sub-chapter will analyze

whether the practice of Nominee Agreement is against the principles stipulated in Indonesian Civil Code.

CHAPTER V : CONCLUSION AND RECOMMENDATION

In the last chapter of the research paper, the author will conclude the the answer of the discussion and analysis conducted in the previous chapter. In addition to that, a recommendation on the best possible way to prevent any legal problems arising from the creation of a Nominee Agreement would be suggested by the author in regard to a creation of better legal policy and certainty for the general public.