CHAPTER I
INTRODUCTION

1.1 Background

According to John Stuart Mill, humans are *homo economicus*, meaning that humans are rational persons who have an infinite ability to pursue economic goals for their own interest.[1] In other words, humans naturally possess an infinitely logical basis (*rationale*) to endeavor anything it takes to increase their economic value. A concrete example that supports this idea is that humans work in order to obtain money, to which the money will be used for their own personal interests, such as to buy daily necessities and to entertain themselves. Given the foregoing example, however, the idea that humans are *homo economicus* is not limited solely to work since the essence of this idea is not only generating economic value, but also increasing economic value.

A further explanation on how humans increase their economic value is seen from the practice of holding shares of a company, which has lately become popular among the society. The practice of investing through shares has soared up due to the fact that individuals may generate profit without having to work. By holding a certain percentage of shares of a company, profit would be generated through capital gain and dividend.[2] Capital gain refers to the profit generated from a sale of

[1] Wilson, R.C., "Homo Economicus: Meaning, Overview, and Criticisms". https://www.investopedia.com/ask/answers/08/homo-economicus.asp, accessed on 20 August 2023.

[2] Nurmutia, E. "Keuntungan dari Saham Disebut Apa? Berikut Pengertian, Jenis dan Cara Menghitung". https://www.liputan6.com/saham/read/5301266/keuntungan-dari-saham-disebut-apa-berikut-pengertian-jenis-dan-cara-menghitung#, accessed on 20 August 2023

investment assets.[3] In a simpler term, when an individual bought shares at Rp 100,- and sold it at Rp 150,-, the said individual generated a capital gain of Rp 50,- per shares. On the other hand, dividend refers to the profit generated from the distribution of a company's revenue based on the percentage of shares a shareholder holds through the company's Board of Directors' discretion.[4]

In daily practice, the ownership of shares does not occur naturally. In order to be able to own shares, persons have to go through several procedures, the most crucial of which is to enter into an agreement, namely shareholders agreement. This is due to the fact that the shareholders agreement governs crucial (1)business matters, such as business plan, company management, right issue (or as referred to as *Hak Memesan Efek Terlebih Dahulu* in Indonesian term, often abbreviated as HMETD), limitation of transfer of shares, and dividend distribution, as well as (2)legal matters, such as identity, purposes and objectives, rights and obligations, scope of time, restrictions, liabilities, means of remedies, and ways of dispute settlement.[5] Through shareholders agreement, the interests of both the company which issues the shares and the person holding its shares are protected.

In practice, there are several elements that need to be fulfilled in the first place in order for the agreement to come into effect. Referring to Article 1313 of the Indonesian Civil Code (hereinafter referred to as the "KUHPer"), "an agreement

[3] Redaksi OCBC NISP, "Apa itu Capital Gain? Ini Arti, Jenis, & Cara Menghitungnya". https://www.ocbcnisp.com/id/article/2021/06/02/capital-gain-adalah, accessed on 20 August 2023.
[4] Hayes, A., "Dividends: Definition in Stocks and How Payments Work". https://www.investopedia.com/terms/d/dividend.asp, accessed on 20 August 2023.
[5] Sida, N., "Perjanjian Pemegang Saham: Pengertian dan Cara Membuatnya". https://blog.justika.com/dokumen-bisnis/perjanjian-pemegang-saham/, accessed on 20 August 2023.

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, to only fulfill these elements is not enough to render an agreement valid and enforceable at law. Further referring to Article 1320 of the KUHPer, in order to be effective, an agreement shall be entered into with consent - that may not be obtained by mistake, duress, fraud, and/or fear out of deference - from parties deemed capable by the law, containing a specific subject matter that is not prohibited by the laws and regulations. Given this provision, therefore, in order to be effective and have a legal binding effect, the shareholders agreement shall fulfill the aforementioned elements. However, the creation of a shareholder agreement is not only set under the KUHPer. Since shareholder agreements are pertaining to matters in relation to Limited Liability Companies in specific, therefore the creation of a shareholder agreement shall take into account the relevant laws and regulations as well.

This leads to the question as to the implication of agreement in the establishment of 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"). According to the UUPT, agreement takes a major role in the establishment of a PT. This is seen from Article 1 Point 1 of the UUPT which explicitly mentions that "Limited Liability Company refers to a legal entity which constitutes a joint capital, established based on an agreement, conducting business activities with its Authorized Capital (or as

referred to Modal Dasar in Indonesian term) divided into shares, which satisfies the requirements as stipulated in this Law and its implementing regulations". The establishment of a PT is not solely determined through a shareholder agreement. There are several other agreements that need to be prepared. Those of which include but are not limited to work agreement, investment agreement, profit sharing agreement, terms of use agreement, and non-disclosure (confidentiality) agreement.[6] Therefore, in order to protect the interests of the interested parties, agreements shall take into account the aforementioned provision.

As far as PT is concerned, it pertains to business activities. Due to the issuance of the Presidential Regulation No. 49 of 2021 on the Amendments of Presidential Regulation No. 10 of 2021 on Investment Line of Business (also known as the Negative Investment List or *Daftar Negatif Investasi* or DNI) the restriction on the ownership of a company is dependent on the type of business activities it runs. For instance, PTs that run in the field of boats industry shall only be owned 100% by domestic shareholders, PTs that run in the field of air transport support services may be owned by 49% foreign shareholders at maximum, and PTs that run in the field of toll road management may be owned by 95% foreign shareholders at maximum. However, there has not been any business activity that allows PTs with 100% foreign ownership to legally run in Indonesia. This came to be the reason as to the source of the existence of nominee shareholder agreement that is applied up to this day. Through a nominee agreement, a foreign shareholder may hold 100%

[6] Ghasani, D., "8 SURAT PERJANJIAN YANG PERLU DISIAPKAN SEBELUM PEMBUATAN PT". https://xwork.co/blog/8-surat-perjanjian-yang-perlu-disiapkan-sebelum-pembuatan-pt/, accessed on 25 August 2023.

ownership of a company to run in the sector upon which 100% foreign ownership is prohibited.

In practice, however, nominee agreement is considered as a form of practice of *fraus legis*.[7] *Fraus legis* or as referred to as legal smuggling refers to an action an individual conducts for the purposes of obtaining a legal consequence in the form of right on the basis of foreign laws, in which, if such an action was based on domestic laws, the same right would not be recognized.[8] Nominee agreement is considered as a form of practice of legal smuggling in Indonesia due to the fact that there have been several laws and regulations governing matters in relation to 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.

In comparison to the Indonesian legal system, the requirement as to the formation of an agreement in Singapore is as distinguished as with Indonesia. An agreement is deemed to be effective and have a legal binding power at the time it obtains the consent of the parties bound therein and creates obligation in exchange for something of value.[9] A valid agreement is then referred to as a contract, in which it is generally set under the Singapore Civil Law Act 1909 (hereinafter referred to

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[7] Prakosa, H., "Larangan Praktek Nominee Arrangement Dalam Perspektif Kemudahan Berusaha (Easy of Doing Business)". https://siplawfirm.id/larangan-praktek-nominee-arrangement-dalam-perspektif-kemudahaan-berusaha-easy-of-doing-business/?lang=id#:~:text=Nominee%20Arrangement%20Merupakan%20Penyelundupan%20Hukum&text=Dengan%20adanya%20larangan%20dalam%20bentuk,1338%20Ayat%20(1)%20KUHPerdata., accessed on 27 August 2023.

[8] Prasetyo Ade Witoko and Ambar Budhisulistyawati, "PENYELUNDUPAN HUKUM PERKAWINAN BEDA AGAMA DI INDONESIA", Jurnal Pasca Sarjana Hukum UNS, Vol. 7, No. 2, July - December (2019), pg. 252.

[9] BBC Incorp Content Team. "Singapore Contract Law: Key Features Explained". https://bbcincorp.com/sg/articles/singapore-contract-law, accessed on 27 August 2023.

as the "Civil Law Act"). Generally, a valid contract consists of offer and acceptance, consideration, intention to create legal relations, and capacity. The depiction of the fulfillment of the said elements may be seen from Section 6(e) of the Civil Law Act which explicitly mentions that "No action shall be brought against any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorized by him."

In terms of business activities, Singapore has less restrictions as compared to Indonesia. Any person wishing to establish its company in Singapore needs to take into account the laws and regulations on Real Estate (as regulated by the Singapore Land Authority, the Housing and Development Board, and the Jurong Town Corporation), Broadcasting (as regulated by the Info-Communications Media Development Authority under the Broadcasting Act 1995 and the Newspaper and Printing Presses Act 1974), Financial Services and Banking (as regulated by the Monetary Authority of Singapore under the Banking Act 1970), and Professional Services (as regulated by the Legal Services Regulatory Authority under the Ministry of Law).[10] However, as it has been mentioned previously, in terms of establishing a company in Singapore, the interested person shall, prior to complying with the said laws and regulations, take into account the laws and regulations on the

[10] Lovells, H.. [Article about transactions within key sectors such as real estate, broadcasting, financial services and banking, and professional services subject to foreign restrictions]. https://www.lexology.com/library/detail.aspx?g=a2cef2f0-82d6-4104-9a03-51a352c0f726#:~:text=Singapore%20has%20relatively%20minimal%20restrictions,regulated%20by%20sector%2Dspecific%20regulators, accessed on 27 August 2023.

formation of contract, the examples of which include the Civil Law Act, Companies Act 1967 (hereinafter referred to as the "Companies Act"), and Sale of Goods Act 1979 (hereinafter referred to as the "Sale of Goods Act"). This is due to the fact that companies' activities, including but not limited to the establishment, are based on contractual arrangements.

As far as contractual arrangements are concerned, 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 render people confused between nominee and beneficiary. However, as it has been previously mentioned, some States acknowledge the existence of both nominee and beneficiary, yet the other only acknowledge the existence of beneficiary, therefore, rendering nominee as a practice of legal smuggling, even violation.

Beneficiary *per se* refers to a person having the enjoyment of property of which a trustee, executor, etc., has the legal possession.[11] It may also be defined as one who is in receipt of benefits, profits, or advantage.[12] 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. The convention only provided the concept of BO in the following Articles:

[11] Henry Campbell Black, Black's Law Dictionary (Fourth Edition), (Minnesota: West Publishing Co., 1968), pg. 199. Parrot Estate Co. v. McLaughlin. D.C.Cal., 12 F.Supp. 23, 25.
[12] Henry Campbell Black, Black's Law Dictionary (Fourth Edition), (Minnesota: West Publishing Co., 1968), pg. 199. Bauer v. Myers, C.C.A.Kan., 244 F, 902, 908.

Article 10
DIVIDENDS

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed
   a. 6 per cent of the gross amount of the dividends, if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
   b. 15 per cent of the gross amount of the dividends in all other cases."

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

Article 11
INTEREST

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable

according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12
ROYALTIES

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

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.[13] In addition to that, the Cambridge Dictionary defines nominee as a person who has been 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

[13] Henry Campbell Black, Black's Law Dictionary (Fourth Edition), (Minnesota: West Publishing Co., 1968), pg. 1200. Schuh Trading Co. v. Commissioner of Internal Revenue, C.C.A.7, 95 F.2d 404, 411.

nominees. Some cases suggest that the beneficial owner is a nominee. Such a circumstance may be found in the following prominent cases:

The 2009 GT Group New Zealand Case

In December 2009, an aircraft en route North Korea - Iran leased by SP Trading was detained in Bangkok. The cargo manifest listed oil drilling equipment as its contents while the Thai Authorities discovered explosives, rocket-propelled grenades, and materials for the construction of surface-to air missiles. Upon such discovery, the New Zealand Authorities detained the listed Sole Director of SP Trading, Lu Zhang, a Chinese immigrant. However, it was discovered that Lu Zhang was an unwitting participant of such an event. It was also found that SP Trading listed its Corporate Shareholder as Vicam Limited, which listed its Director as Nesita Manceau (while in fact, the actual Director was the member of Geoffrey Taylor's family), a professional nominee with more than 400 New Zealand companies listed under her name. Manceau happens to be the Sole Shareholder of the GT Group and GT Group is the Sole Shareholder of Vicam Limited. Holding dual roles as a Nominee Director as well as the Nominee Shareholder allowed Manceau to successfully cover the actual perpetrator of the crime. Up to this time, there is no charge towards the crime of obscuring the identity of the Taylor family and GT Group, illegal arms trafficking, and providing shell companies associated with the Sinaloa drug cartel as well as Magnitsky tax evasion case. As a response to this, the New Zealand Authorities amended its Company Law, requiring every New Zealand company to have a director of a local resident real individual whose name and date of birth shall be registered. Upon this amendment, the use of New Zealand shell companies have significantly fallen despite the amendments having only affected less than 1% of the total 550.000 companies on the register.[14]

[14] Gerard Ryle (International Consortium of Investigative Journalists), "Inside the shell: Drugs, arms and tax scams". https://www.icij.org/investigations/offshore/geoffrey-taylor/, accessed on 3 November 2023.

The 2020 Beirut Explosion Case

In August 2020, a massive explosion occurred in a port located in Beirut, causing death to 100 people and injury to 4000 people. The explosion was discovered to have been triggered by a fire, burning a cargo of ammonium nitrate that had been confiscated from the near-derelict MV Rhosus ship since October 2013. The bill of lading[15] suggests a transit for the shipment of 2.750 tonnes of ammonium nitrate from Georgia to Mozambique. It also listed the shipper as Rustavi Azot and the consignee as the International Bank of Mozambiques on behalf of Fábrica de Explosivos de Moçambique. However, it was found that the company had not ordered from Azot directly. Instead, it explained that it had ordered from an intermediary called Savaro Limited, a UK company. Savaro Limited listed its owner as Marina Psyllou, which at the same time held office as its Sole Director. Psyllou was listed as the owner of Savaro Limited through being the Sole Shareholder of the company Status Grand Limited, in which this company was also listed as the Sole Shareholder of Savaro Limited. Apart from being the Sole Shareholder of Status Grand Limited (granting the ownership of Savaro Limited) and the Sole Director of Savaro Limited, Psyllou also controlled Interstatus Limited, a company listed as the secretary for Savaro and is owned by Cypriot Interstatus Business Services, through being listed as a Director and the Beneficial Owner of Interstatus Limited. Despite being registered in the UK Beneficial Ownership, Psyllou is in fact solely acting as a nominee for the real owner. This is a violation toward UK law on beneficial ownership. However, up to this time, the likelihood of sanctions being applied in such an event is extremely low due to several factors, including but not limited to UK's weak register rules enforcement, jurisdiction (being in Cyprus), the fact that Psyllou is listed as the Compliance Officer for the Cypriot Interstatus Business Services, and that Psyllou had no involvement as well as knowledge in the companies' operation. Thus, the true source of explosion, being the owner of the ammonium nitrate remains untraceable.[16]

[15] **AUT**. According to Evan Tarver (Investopedia, March 17 2023), a bill of lading is a "contract issued by a transport company to a shipper that spells out the quantity, type, and destination of the goods being shipped. It serves as a receipt of the shipment, and can help prevent the theft of goods being transported".
Retrieved from https://www.investopedia.com/terms/b/billoflading.asp#:~:text=A%20bill%20of%20lading%20is%20a%20contract%20issued%20by%20a,theft%20of%20goods%20being%20transported, accessed on 3 November 2023.

[16] Zoe Tidman (The Independent), "Beirut explosions: Timeline of events". https://www.independent.co.uk/news/world/middle-east/beirut-explosions-lebanon-timeline-a9655161.html, accessed on 3 November 2023.

Form the aforementioned cases, 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 - either international, Indonesian, or Singapore - laws and regulations governing matters in relation to the practice of BO seem to be more flexible as compared to those in relation to Nominee.

1.2 Formulation of Issues

In consideration to the foregoing discussion, this research aims to analyze the following issues:

1. How is the concept of nominee agreement on the ownership of shares in Indonesia?
2. How is the legal system on the validity of nominee agreement in Singapore as compared to Indonesia?

1.3 Research Purposes

Given the formulation of issues as aforementioned, the purposes of this research are namely as follows:

1. To solve the legal issues being addressed, namely the concept of nominee agreement on the ownership of shares and the comparison of the legal system between Indonesia and Singapore on that matter; and

2. To conduct a further legal development on the concept as well as the validity of nominee agreement in comparison between Indonesia and Singapore.

1.4 Research Benefits

1.4.1 Theoretical Benefits

It is hoped that, theoretically speaking, through this research, the Author will be able to identify how the legal framework of nominee agreement is implemented in both territory of Indonesia based on the KUHPer and the Law No. 40 of 2007 on Limited Liability Company and Law No. 25 of 2007 on Investment, including but not limited to the amendments of part of the provisions contained therein (as contained in Law No. 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation (hereinafter referred to as the "UU Ciptaker") as well as the other relevant laws and regulations, and further compare it with the legal system as applied in Singapore based on the Civil Law Act, Companies Act, and Sale of Goods Act. Subsequently, from the comparison of the legal system between the two aforementioned countries, it is hoped that the Author will be able to identify the concept of nominee agreement on the ownership of shares in both the territory of Indonesia and Singapore. After having succeeded to identify the importance of such an agreement, it is hoped that the Author will be able to further identify the validity of nominee agreement both in Indonesia and Singapore.

1.4.2 Practical Benefits

Through this research, the Author hopes that this research will practically be able to provide inputs to the lawmakers in the event that a new company law is to be made and applied in the future, by identifying the loopholes that have existed and continued to exist hitherto in the contemporary company laws and regulations. Apart from that, it is also hoped that this research may provide helpful and beneficial contents for future Universitas Pelita Harapan students, whether from the Faculty of Law or from the other faculty, in conducting research on similar topics. Lastly, through this research, it is hoped that the issues being discussed may participate in the development of legal science, technology, and methodology, as well as in national development.

1.5 Framework of Writing

In assisting the readers to comprehend the topic being discussed, this research is arranged into as follows:

CHAPTER I : INTRODUCTION

In this chapter, it is aimed that the Author will provide an overview on the topic that will be further discussed in this thesis. This chapter contains five subchapter, namely background, which introduces a brief explanation on the topic being discussed in this thesis; formulation of issues, which addresses the main questions being addressed in this research; research purposes, which identifies the main aims

of this research; research benefits, which contains the Author's hope in conducting this research; and framework of writing, which contains the overview of the chapters being constructed in this research.

CHAPTER II : LITERATURE REVIEW

This chapter contains 2 subchapter, namely theoretical framework, which contains the explanation on the theory being discussed in this research, namely Comparative Legal Analysis; and conceptual framework, which contains the explanation on the concepts being discussed in this research, such as Legal Entity, Shares, Organs of Corporate Management, Shareholder, Agreement, Nominee Agreement, and Beneficial Owner.

CHAPTER III : RESEARCH METHODOLOGY

Through this chapter, the Author will provide the information on the type of research, type of data, data analysis methodology, research approach, and data analysis having been chosen by the Author.

CHAPTER IV : ANALYSIS & DISCUSSION

In this chapter, the Author will discuss the findings based on the issues that were previously identified by dividing this chapter into two subchapters. The first subchapter being the discussion on the first issue, that is the concept of nominee

agreement on the ownership of shares, and the second subchapter being the discussion on the second issue, that is the validity of nominee agreement on the ownership of shares in Indonesia as compared to Singapore.

CHAPTER V : CONCLUSION & SUGGESTION

Through this chapter, the Author will infer the topic having been discussed in the preceding chapters. In addition to that, in the efforts of fulfilling the practical benefits as aforementioned, the Author will provide suggestions in connection with the discussion and conclusion of this research.