



Legal Certainty of Guarantor for the Existence of Foreign Investors in Indonesia

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Published: 15/09/2019

How to cite (in APA style):

Rusdiko, I, M., Widia, I, K., & Rideng, I, W. (2019). Legal Certainty of Guarantor for the Existence of Foreign Investors in Indonesia. *Jurnal Hukum Prasada*, 6(2), 123-129. doi: <http://dx.doi.org/10.22225/jhp.6.2.1086.123-129>

Abstract

One of the effects of globalization is the development of an increasingly complex investment scope, among others, the emergence of certain Foreign Investors who set up companies in Indonesia with management status and full ownership by these investors. This has obscured the provisions regarding guarantors for their existence in the Indonesian Territory as stipulated in Law No. 6 of 2011 concerning Immigration. The Law on Limited Liability Companies and the Investment Law, does not provide a regulation regarding the obligation of the existence of Indonesian Citizens in the management of companies established by foreigners who have been guarantors. The formulation of the problem to be examined is: how is the legal certainty of the guarantor and who can be the guarantor for the existence of the foreign investor in obtaining a residence permit in Indonesia. This type of research is normative legal research because of the absence of norms, referring to Article 63 paragraph (1) of Law Number 6 Year 2011 concerning Immigration. Based on the results of the study concluded that there has been a vacuum of norms regarding guarantors for certain foreign investors in obtaining guarantors that guarantee their existence in the Territory of Indonesia. This causes legal uncertainty for the guarantor and the investor in obtaining a residence permit. Therefore it is necessary to deregulate existing laws and regulations so that the guarantor and investors get legal certainty and protection while they are in the territory of Indonesia.

Keywords: Foreign Investors; Guarantor; Stay Permit

INTRODUCTION

In the last decade or often referred to as the era of globalization, non-physical boundaries between countries are increasingly difficult to distinguish and even tend to be borderless state. Ayubbi (2018) explained that one of the efforts the government could do to attract foreign investors in the infrastructure project was the need for a government guarantee mechanism or a special guarantor body that provided legal certainty (Ayyubi, 2018). With the border between one country and another getting closer, moreover almost all countries today have opened up to foreign investors, the opportunity to invest is very open (Sembiring, 2018). To increase economic competitiveness in the face of the ASEAN Economic Community and the dynamics of the globalization of the world economy, the Indonesian government has made a policy package by opening certain types of business fields that were previously declared closed or open with requirements in the field of investment. In addition, regulations governing investment activities also tend to provide convenience to investors.

The regulation has a significant impact on the development of science and technology that is needed to support the development and welfare of the Indonesian people. But it cannot be denied that with the presence of activities, legality and mobility of foreigners in Indonesia, it can also cause new problems. Because when discussing foreign investors, not only investment problems that will arise, the problem of the existence and activities of the

investor itself is one of the things that often cause problems because it is regulated by different laws and regulation.

In Article 12 Paragraph (1) of Law Number 25 of 2007 concerning Investment (Law No. 25/2007) regulated business fields or types of businesses that are open to investment activities, except business fields or types of businesses that are declared closed and open with requirements. Based on these provisions, it can be interpreted that for businesses that are open to investment activities, foreign investors can invest and develop their own business including being able to have total shares and manage their business fully (the management of directors are all foreigners).

Article 7 Paragraph (1) Law Number 40 of 2007 concerning Limited Liability Companies (Law No. 40/2007) states that the Company is established by 2 (two) people or more with a notary deed made in Indonesian. In its explanation, what is meant by "person" is an individual, both Indonesian and foreign citizens or an Indonesian or foreign legal entity. The provisions in this paragraph affirm the applicable principle based on this law that basically as a legal entity, the Company is established based on an agreement, because it has more than 1 (one) administrator. In its management, it is not regulated regarding the obligations of the existence of Indonesian citizens. This provision causes the emergence of foreign companies with stewardship status and full ownership by foreigners.

On the other hand, Article 63 Paragraph (1) of Law Number 6 the Year 2011 concerning Immigration (Law No. 6/2011) states that certain foreigners who are in the territory of Indonesia must have a guarantor who guarantees its existence. In its explanation, what is meant by Certain Foreigners is foreigners who hold a Limited Stay Permit (ITAS) or Permanent Stay Permit (ITAP). Logically it can be interpreted that every foreigner holding the ITAS or ITAP, must have a guarantor that guarantees its existence.

Taking into account these provisions, it is very clear that there is a legal problem, namely the law governing investment and limited liability companies, creating new problems in the field of immigration. On the one hand, the government in its policy provides an opportunity for foreigners to invest by establishing a company with stewardship status and full ownership by foreigners, on the other hand to be able to stay and manage their business, these investors must have guarantors and residence permits that are regulated by regulations different legislation.

According to (Isrok., *et al*, 2015) Who explained the legal problem according to Mathias Klatt, it cannot be determined what the law is right (legal indeterminacy) which might be caused by various things such as vagueness, ambiguity, inconsistency (inconsistency) based on the dictionary of absorption words that are not aligned or incompatible, concepts that are fundamentally contradictory or competing, which are called gallies as evaluative openness or concepts that are still open to evaluation. Evaluative openness according to the author can be intended, among others, the existence of a vacuum (norm of vacuum), and norm conflict (conflict of norm) (Isrok., *et al*, 2015).

Based on this background, This research aims to conduct a more in-depth study of the provisions of the presence of foreigners in Indonesia with the aim of investing as well as residing in Indonesia. Furthermore, this research was limited on the legal certainty of the guarantor for the existence of foreign investors in Indonesia and Who can be the guarantor of the existence of Foreign Investors in Indonesia

METHODS

This research is using normative legal research using a legal approach, conceptual approach and comparative approach. The type of research is normative legal research because of the absence of norms, referring to Article 63 paragraph (1) of Law Number 6 Year 2011 concerning Immigration.

RESULT AND DISCUSSION

Legal Certainty of Guarantor for the Existence of Foreign Investors in Indonesia

In various literature on economic law and or business law, the terminology of

investment can mean investment carried out directly by domestic investors, foreign investors (Foreign Direct Investment, FDI), and investments made indirectly by foreign parties (Foreign Indirect Investment, FII) (Sembiring, 2018). UU no. 25/2007 states that investment is all forms of investment activities, both by domestic investment and foreign investment to conduct business in the territory of the Republic of Indonesia. Whereas in the explanation of Article 167 Paragraph (2) Letter c Government Regulation Number 31 of 2013 concerning Implementation Regulation of Law Number 6 Year 2011 concerning Immigration, it is stated that investors are foreign investors and / or foreign shareholders in a company in Indonesia.

From some understanding of the investment, there is no difference in principle between investment and investment. The term investment is more used in the language of legislation while the term investment is a term that is popular in the business world. Paying attention to the notion of investment based on Law No. 25/2007, investors can be grouped into 2 (two), namely:

1. Domestic Investors, namely Indonesian citizens, Indonesian Business Entities, Republic of Indonesia, or Regions that make investments in the Territory of the Republic of Indonesia.
2. Foreign Investors, namely Foreign Citizens, Foreign Business Entities and / or Foreign Governments who make investments in the territory of the Republic of Indonesia.

Article 5 letter b of Law No. 25/2007, stipulates that foreign investment must be carried out in the form of a Limited Liability Company (PT) under Indonesian law and domiciled in Indonesia, unless otherwise stipulated by law. To establish a business entity in the form of PT, Article 7 Paragraph (1) Law No. 40/2007 states that PT was established by 2 (two) people or more with a Notary Deed made in Indonesian. It is not regulated whether the company can be established with full management by foreigners or there is an obligation for the existence of Indonesian citizens in its management.

PT obtains legal entity status on the date of issuance of a Ministerial Decree concerning the ratification of the Company's legal entity. To get the ratification, the founder must submit an application through the legal entity administrative system information technology services electronically to the Minister by filling in the form format that contains at least:

1. Name and domicile of the company;
2. The period of establishment of the company;
3. The purpose and objectives and business activities of the company;
4. Amount of authorized capital, issued capital and paid up capital; and
5. Full address of the company.

After the company is declared valid, the founder then submits a licensing application that includes an agreement to carry out investment activities. Article 5 Paragraph (1) Regulation of the Head of Investment Coordinating Board Number 6 Year 2018 concerning Guidelines and Procedures for Licensing and Investment Facilities (PerKaBKPM No. 6/2018) states that companies that will start a business must first have a Business Number (NIB)) and Business Licensing. Business Licensing is registration that is given to business actors to start and run a business and or activity, and is given in the form of an agreement as outlined in the form of a letter / decision or fulfillment of requirements and or commitments.

Some important things that can be learned from the description above are:

1. All fields or types of businesses that are open for investment activities, based on the same principles of operation and cannot be calculated from the country of origin by Law No. 27/2007, investors can invest their capital using domestic investors that are included and equipped with full shares.
2. To establish a foreign investment company, must be in the form of a limited company (PT). Based on Law No. 40/2007, there is no agreement from Indonesian citizens for the management of a company established by foreigners.

Both of these problems have brought major changes to investment activities in Indonesia. The investment concept that was previously only understood as an investment activity, is now growing that foreign investors can also actively manage the business and can even own and manage their business without involving Indonesian citizens in their management. Based on this, based on the existence and activities, foreign investors can be grouped into 2 (two), namely:

1. Passive Foreign Investors are foreign investors who reside or reside abroad. This group of investors generally only shares or invests in a company in Indonesia but does not directly and actively manage the company. His name is not included in the management of directors or commissioners, but only in the ownership of capital / shares.
2. Active Foreign Investors, namely foreign investors who reside in the territory of Indonesia, actively participate in managing their businesses, are included in the management of the company (directors or commissioners), and are even large majority shareholders whose total shares are owned by foreigners. The emergence of this investor group has obscured the provisions regarding guarantors for the existence of these investors in the territory of Indonesia.

Article 48 of Law No. 6/2011 states that "Any foreigner who is in the territory of Indonesia must have a residence permit granted in accordance with his visa". This provision is an manifestation of the Indonesian immigration policy politics which adheres to a selective policy, where only foreigners who provide benefits and do not endanger security and public order are allowed to enter and be in Indonesian territory. A visa can be interpreted as a written statement given by an authorized official that contains an agreement for foreigners to travel to the territory of Indonesia and becomes the basis for granting a residence permit.

Visas consist of Diplomatic Visas, Service Visas, Visit Visas and Limited Stay Visas. In Minister of Law and Human Rights Regulation Number 24 of 2016 concerning Technical Procedures for Requests and Giving Visit Visas and Limited Stay Visas (Permenkumham No. 24/2016), visas for foreign investors are classified into 2 (two) types, namely:

1. Visas with C313 Index are given to foreign investment with the intention of not working to invest for a maximum of 1 (one) year, and
2. Visas with C314 Index are given to foreign investment with the intention of not working to invest for a maximum of 2 (two) years.

Residence permits can be interpreted as permits granted to foreigners to be in Indonesian territory. The residence permit consists of a Diplomatic Stay Permit, Office Stay Permit, Visit Stay Permit (ITK), Limited Stay Permit (ITAS) and Permanent Stay Permit (ITAP). Based on Republic of Indonesia Minister of Law and Human Rights Regulation Number 27 of 2014 concerning Technical Procedures for Granting, Extension, Rejection, Cancellation and End of Visit Stay Permit, Limited Stay Permit and Permanent Stay Permit and Exceptions from the Obligation to Have a Residence Permit No. 27/2014) the residence permit that can be owned by a Foreign Investor is ITAS or ITAP.

Globalization has created transnationalisation which can be identified as the movement of migrants throughout the territory of the world that is not only human, but also simultaneously participates and moves the political policies of a country, the movement of money and human capital, the movement of a group of races or nations, social problems and culture both individually and in groups, and changes in security and order conditions in a domestic and regional area (Santoso, 2012). Anticipating the adverse effects of globalization, strong regulations are needed to ward off negative impacts and can take advantage of the positive effects of globalization. One of the juridical grounds legalized by Law No. 6/2011 is to expand the subject of immigration crime, so that it covers not only individuals but also corporations and guarantor of the entry of foreigners into Indonesian territory, so that the criminal provisions for guarantor are one of the new provisions in the immigration law.

Article 63 Paragraph (1) Law No. 6/2011 states that certain foreigners in the territory of Indonesia must have a guarantor who guarantees their existence. In the explanation,

what is meant by certain foreigners is a foreigner who holds ITAS or ITAP. So logically it can be interpreted that every foreigner holding the ITAS or ITAP, must have a guarantor who guarantees its existence. Guarantor is a person or corporation responsible for the existence and activities of foreigners while in Indonesia (Article 1 point 26 of Law No. 6/2011).

All processes for obtaining an immigration permit cannot be separated from the guarantee letter from the guarantor as an administrative requirement, both for the visa application process and residence permit. The guarantee letter is signed by someone who is normatively responsible for the guarantee given as stated in the statement and guarantee. Article 96 Minister of Law and Human Rights Regulation No. 27/2014, mentions that:

1. Guarantor consists of:
 - a. Individual Indonesian citizens; or
 - b. Corporations represented by Indonesian citizens or foreigners holding Limited Stay Permits or Permanent Stay permits, as directors or equivalent positions whose names are listed in the organizational structure or deed of establishment of a company, body or institution.
2. The person responsible consists of
 - a. Indonesian citizen husband or wife;
 - b. Indonesian citizen father or mother.

From these provisions, guarantor for foreigners in general can be classified as follows:

1. Individual Indonesian Citizens, namely an Indonesian citizen who with his own awareness and will guarantees foreigners to enter Indonesian territory for the purpose of tourist or social visits. In its implementation, this type of guarantee is intended for visa type applications and visit residence permits to be able to stay in the Indonesian territory for a maximum of 6 months from the time the entry is given.
2. Indonesian citizens as directors or equivalent positions whose names are listed in the organizational structure or deed of establishment.
3. Foreigners Holders of ITAS or ITAP as directors or equivalent positions whose names are listed in the organizational structure or deed of establishment which is the guarantor of other foreigners in the corporation.
4. Person in charge as husband or wife (father or mother) of Indonesian citizens, namely guarantor intended for foreigners who have a family relationship with Indonesian Citizens as Husbands or Wives and Children who are not more than 18 years old.

Based on the statutory approach, normatively it can be interpreted that Law No. 25/2007 and Law No. 40/2007, does not provide regulations regarding the obligation of the existence of Indonesian Citizens in the management of companies established by foreigners who so far can be positioned as guarantors. This causes the emergence of certain foreign investors with management status and full ownership by these investors. Who will be the guarantor for the investor to obtain a residence permit as required by Article 63 Paragraph (1) of Law No. 6/2011 jo Article 96 Paragraph (1) letter b Permenkumham No. 27/2014. There are no norms that can be used as a basis by investors in obtaining guarantors to obtain residence permits in Indonesia. The legal vacuum has caused legal uncertainty for guarantors in providing guarantees and investors in obtaining residence permits.

Van Apeldoorn, argues that "legal certainty" has two sides. First, the side can be determined in concrete matters. This means that justice seekers (*justiabellen*) want to know what is the law (*inconkreto*) in special matters before they litigate. Second, the legal security side, meaning protection for the parties against the arbitrariness of judges ([Apeldoorn, 1986](#)). Certainty contains several meanings, namely ([Wantuu, 2011](#)):

1. clarity;

2. does not cause multiple interpretations;
3. does not cause contradiction;
4. can be implemented.

According to Gustav Radbruch, legal certainty is one element of what is called the ideals of law (the idea of law) in addition to elements of justice (justice) and propriety (expediency). Legal certainty requires that law be a positive law (Sumadi, 2008). Legal certainty is the implementation of the law in accordance with the sound so that the community can ensure that the law has been implemented properly. If the importance of law is associated with investment, investors need legal certainty in carrying out their business. This means that investors need there is one measure that is a handle in carrying out investment activities.

When compared with Law Number 16 of 2001 concerning Foundations (Law No. 16/2001), in Article 9 Paragraph (5) Jo Article 12 Government Regulation Number 63 of 2008 concerning Implementation Regulations of Law Number 16 Year 2001 concerning Foundations mentioned that a foundation established by foreigners or foreigners with Indonesian people, one of the management members who serves as chairman, secretary, or treasurer must be held by Indonesian citizens. When connected with the guarantor, implicitly the provision has regulated the need for a person (Indonesian Citizen) who is in a foundation / organization which legally has a moral obligation to provide understanding or direction of the activities of the foundation / organization so that it does not deviate from the applicable provisions. In this case, an Indonesian citizen can act as a guarantor.

Guarantor for the Existence of Foreign Investors in Indonesia

Noting the provisions above, the author has not found any legal instruments that can be used as a basis for determining who can be a guarantor for foreign investors who specifically own a company with stewardship status and full ownership by foreigners. Provisions of Article 96 Paragraph (2) letter b Permenkumham No. 27/2014 cannot accommodate these investors to obtain guarantors who guarantee their existence in Indonesia, unless the investor has an Indonesian Citizen or Wife as referred to in Article 96 Paragraph (2) letter c Permenkumham No. 27/2014.

The absence of these norms has created uncertainty for both the guarantor and foreign investors as well as policy executing officers who have no basis in carrying out their duties. So in addition to legal certainty, guarantors and foreign investors and officers do not get legal protection as a result of their actions because they do not have a clear legal basis or umbrella.

Noting this, legislation that regulates investment and high permits should be adjusted so that the government's enthusiasm for increasing investment can provide legal certainty and protection for all parties. This is in line with Sunaryati Hartono's thoughts quoted by Kristian that the meaning of legal development includes 4 (four) things, namely (Kristian, 2018):

1. Perfecting.
2. Change to be better and more modern.
3. Hold something that didn't exist before.
4. Eliminating something that is in the old system, because it is not needed and no longer fits the new system.

CONCLUSIONS

Based on the description and discussion as well as the analysis carried out on the formulation of the problem can be concluded as follows:

1. Legal certainty for guarantors for the presence of foreign investors in Indonesia cannot be realized, because there are no regulations that can provide regulation. UU no. 6/2011 and its derivatives, Permenkumham No. 27/2014 cannot accommodate. Likewise with Law No. 25/2007 and Law No. 40/2007 does not provide a regulation regarding the obligation of the existence of Indonesian Citizens in the management of companies

established by foreigners, who have so far been positioned as guarantor as Act No. 16/2001.

2. Guarantor for the presence of foreign investors in Indonesia has not yet been explicitly regulated in legislation, so there is no legal instrument that can be used as a basis for determining who is the guarantor for foreign investors who specifically own a company with management status and full ownership by foreigners to obtain residence permit in Indonesia. However, if the foreign investor has an Indonesian Citizen or Wife, in obtaining a residence permit, the husband or wife can become a responsible person with consideration of family unification (not for investment reasons).

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