

# LEGAL REVIEW ON THE EASE OF DOING BUSINESS BASED ON THE LAWS AND REGULATIONS IN INDONESIA THROUGH THE RIGHT OF BUILDING OF PARTNERSHIPS (CV)

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## LEGAL REVIEW ON THE EASE OF DOING BUSINESS BASED ON THE LAWS AND REGULATIONS IN INDONESIA THROUGH THE RIGHT OF BUILDING OF PARTNERSHIPS (CV)

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### ABSTRACT

A lot of countries are competing to elevate the rank in the Ease of Doing Business (EODB). There are ten categories in the EODB, one of which is about land registration as a legal certainty and protection for the rights holders of a plot of land, a stacking house unit, and other rights. The Right of Building is given to Partnerships based on the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 and this is done to give land service convenience so as to increase investments and encourage economic growth in all regions of the Republic of Indonesia. The circular letter is issued considering that Indonesian EODB still ranks 106th with the category of land registration. Based on the above background of this research, the problem analysed in this research is about the ease of doing business in Indonesia especially regarding land regulation through the Right of Building of partnerships based on the laws and regulations in Indonesia. The research results in the fact that the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 has a very good intention to encourage land registration in Indonesia and it can also encourage the ease of doing business in Indonesia, especially in the aspect of land registration.

Keywords: EODB, Partnership, Right of Building

### INTRODUCTION

The high speed of the world's development greatly influences the business world. People's needs are previously based on what producers sell, but now it is the producers that must be able to fulfil what people need, which is getting more various, so that they can survive in the business world. A few years ago, Indonesia got prepared for ASEAN Economic Society and now it focuses on elevating the rank of the ease of doing business (hereinafter abbreviated as EODB). EODB becomes very important for countries nowadays with the purpose of having more and more foreign investors that are willing to invest in Indonesia. This is definitely expected to trigger domestic businesses to be more productive and creative in competing with foreign investors.

Indonesia is promoting doing businesses in a simple and efficient way after World Bank 2020 rates the Indonesia's EODB index to be in the 73<sup>rd</sup> position<sup>1</sup>. One of the EODB indicators is land registration as a legal certainty and protection for the rights holders of a plot of land, stacking house unit, and other rights. Land registration can be done depending on the types of the rights ownership of the land that is going to be registered, namely the Right of Ownership (hak milik), the Right of Building (hak guna bangunan), the Right to Cultivate (hak guna usaha), or the Right of Use (hak pakai).

In 2019, the Minister of Agrarian and Spatial Planning/Head of National Land Authority issued the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 about Giving the Right of Building to Partnerships (Commanditaire Vennootschap or CV). According to Article 36 Act Number 5 of 1960 about Basic Regulations on Agrarian Principles (hereinafter abbreviated as BRAP), the ownership of the Right of Building is for individuals who are Indonesian citizens or for legal entities. The problem is when a partnership without a legal entity owns the Right of Building, although in fact this partnership's ownership of the Right of Building can become an option for a domestic business actor to run a business in Indonesia.

Based on the above background of the study, the problems analysed in this research is about the ease of doing business in Indonesia through the Right of Building owned by a partnership based on the laws and regulations in Indonesia.

### METHOD

The methodology that used in this research is descriptive, that trying to give a picture of the actual problems based on the facts that appear. Furthermore, the research methods used in accordance with the formulation of the problem which is the focus of this study.

The approach used in this study is juridical normative law research that takes literature data supported by the data fields. Normative research, which is the main research in this study is a legal research library materials. In this study is basic data research classified as secondary data. Normative juridical research using secondary data. In the legal research, secondary data includes primary legal materials, secondary law, and tertiary legal materials.

The analysis technique used with a qualitative approach. In this qualitative approach is not used statistical parameters. Deductive method is used for the data obtained from the literature search, whereas the inductive method is used for the data obtained from the field and complementary in this study.

## ANALYSIS

There are 10 (ten) assessment indicators of EODB in Indonesia, namely:

1. Management of various licenses to start a business;
2. Building permit for business activities;
3. Land registration as a legal certainty and protection for the rights holders of a plot of land, a stacking house unit, and other rights;
4. Tax payment and amount to companies according to the applicable taxation rules;
5. Borrowers' and lenders' legal rights associated with the guaranteed transactions and into the credit information;
6. Cost and time in solving trade disputes and the quality of legal processes;
7. Time and cost procedures in acquiring electrical network connections, good power procurement, and electricity consumption costs;
8. Ease in exporting goods from companies having comparative advantage and importing spare parts;
9. Ease in recovery rate in commercial bankruptcy and the power of bankruptcy legal framework; and
10. Protection for minority shareholders in a country.<sup>ii</sup>

This paper will discuss the relationship between the EODB and the granting of right to build for building of partnership (*Commanditaire Vennootschap* or CV) in Indonesia. Before discussing further, the authors will first describe the types of land rights in Indonesia based on Basic Agrarian Law of 1960 (BAL 1960) and Indonesian types of partnership.

Land rights are divided into right of ownership, right to cultivate, right of building, right of use. Right of ownership (*hak milik*) is the most complete form of individual right on land<sup>iii</sup>. It gives the holder the right to use land including the earth underneath, and also the water and air above it, so long as they are directly required in connection with the use of the land<sup>iv</sup>. In principle right of ownership may be owned only by Indonesia nationals, whether authentic Indonesian nationals or Indonesian nationals of foreign descent<sup>v</sup>. Foreigners are prohibited to own right of ownership except in special circumstances and for limited periods of time. Usually, the Government will grant foreigners only the right of use (*hak pakai*) or the right to rent land (*hak sewa*) owned by another party<sup>vi</sup>.

Right to cultivate (*hak guna usaha*) is right to use land for other agricultural purposes is for a fixed period of time not to exceed 35 years, extendible for 25 years. This right to cultivate is regarded as *hak milik*, to be of a "real" character. It can also be encumbered with hypothec or *crediterverband* of released to the State<sup>vii</sup>.

In connection with the focus of this article on building use rights, the discussion of building use rights will be elaborated in more depth. Right of building (*hak guna bangunan*) is a title on land which gives its holder the right to erect and possess, for a fixed period of time, a construction situated on another person's land. The right of building may exist either on State or private land<sup>viii</sup>. Right of building may be transferred to another party<sup>ix</sup>. It may also be given as security for a debt through mortgage (*hypotheek*) or "*credietverband*".<sup>x</sup> Initially the right of building may not be granted for longer than 30 years<sup>xi</sup>, upon the request of the title holder, and considering the purpose and condition of the buildings involved, the period may be extended for up to 20 years. Thus, in effect, right of building is available for a period of up to 50 years<sup>xii</sup>. Upon request of the person concerned, right of building is granted via a decree issued by the minister of internal affairs / director general of agrarian affairs. The recipient of the title is required to pay entry-money, the amount of which is based on an estimate of the land value as privately owned land. The value of right of building for 30 years is considered equal to half of the land's value as privately owned land. According to Art. 38 of the BAL, the right of building must be registered at the Land Registration Office. The holder of title is given a certificate as evidence of his title. According to article 32 par. 3 of the BAL, right of building can be transferred to another party. This implies that the title may be inherited by the legal heirs in the event of the holder's death. Right of building can also be transferred to another party by way of purchase, exchange, presentation as gift or legacy. The procedures are similar to those for the transfer of right of ownership. In the event that the receipt of title is a corporation or an individual who already owns 5 or more pieces of land, consent for the transfer of title is required before it is registered by the Head of the Land Registration Office. The section on termination of the right of exploitation applies *mutatis mutandis* to the right of building<sup>xiii</sup>.

Right of use (*hak pakai*) is a title on land which gives its holder the right to use and obtain the product of a certain piece of land. The land which right of use is applied may be used as a building site or for agricultural purposes<sup>xiv</sup>. In principle, right of use is of limited duration.

Furthermore, we will discuss the type of partnership in Indonesia focusing in the build of partnership (*commanditaire vennootschap* "CV"). Indonesian law provides for three distinct types of partnerships. As the basic legislation relating to partnership dates from the colonial period, these are still referred to by their Dutch names: *Maatschap* (Indonesian "perseroan"), *Firma* (abbreviated "Fa"), *Commanditaire Vennootschap* (abbreviated "CV").

The build of partnership (*Commanditaire Vennootschap* "CV") is a partnership consisting of one or more ordinary partners and one or more silent partners<sup>xv</sup>. The Indonesian Commercial Code does not provide a clear definition of CV. However, based on Article 19 of the Indonesian Commercial Code, it can be seen that the CV structure consists of 2 groups or 2 types of allies. Group 1 is an active / limited ally / ordinary partner, and group 2 is a passive / complementary ally / silent partner<sup>xvi</sup>. An ordinary partner is personally liable for the entire debt of the partnership. A silent partner, who only contributes capital to the partnership, is liable only to the extent of his contribution. The presence of a silent partner is the essential feature of a CV or limited

partnership. The status of a silent partner is significantly different from the of a creditor. Whereas a creditor retains his claim on the CV event after the partnership assets if there are such profits. A silent partner shares in the losses as well as the profits of the partnership; in either case, he gains or loses only to extent of his contribution<sup>xvii</sup>

The prevailing view is that third parties may not sue the silent partners. Third parties dealing with the CV may sue only the CV or the ordinary partners, thus leaving it to the ordinary partners to get from the silent partners whatever is their due. However, if a silent partner gives the appearance of having managing powers of the CV, he may be sued as an ordinary partner by a third party (Art. 21 Commercial Code). A silent partner is regarded as giving such managerial appearance if he performs acts of management (Art. 20 Commercial Code) or if his name is inserted into the firm name when he has not formerly been an active partner (Arts. 20 and 30 (2) Commercial Code)<sup>xviii</sup>.

The EODB category related to the issuance of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT/02/01/VI/2019 about Giving the Right of Building to Partnerships (*Commanditaire Vennootschap*) is category number 3, which is land registration as a legal certainty and protection for rights holders of a plot of land, a stacking house unit, and other rights. Giving the Right of Building to Partnerships based on the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 is to give the ease of land services in increasing investments and encouraging the economic growth in all regions of the Republic of Indonesia.<sup>xix</sup> The circular letter is issued considering that Indonesia's EODB of land registration is still ranked at the 106<sup>th</sup> place.<sup>xx</sup> The Right of Building according to BRAP Article 35 is the right of building and owning buildings on land which is not one's property for a period of no longer than 30 years and it can be extended by a period of maximum 20 years.

The Right of Building stated in BRAP has a limited period and can be transferred to not only Indonesian citizens but also corporations established according to Indonesia Law with national or foreign investments, or joint investments.<sup>xxi</sup> Number 5 letter d of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 arranges that the recording of the registration of the Right of Building for partnerships should be done:

- “ 1) On behalf of all the commanding and complementary members of the partnership; or
- 2) One of the commanding and complementary members *commanditaire vennootschap* with the consent of all the commanding and complementary members.”

A partnership (CV) is established by one or more persons who bear full responsibility to the first party (complementary partners or partners responsible for the running of the partnership) and one or more persons as the cash releaser (commanding partners or partners that place capital in the partnership) to other parties.<sup>xxii</sup> The issuance of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 concerning the registration of land with the Right of Building for Partnerships (*Commanditaire Vennootschap* or CV) still causes confusion due to the fact that the regulation at least has 2 (two) perceptions, namely:

First, the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 contradicts other rules. The subjects that can own the Right of Building as stated in Article 36 BRAP in conjunction with Article 19 Government Regulation Number 40 of 1996 about the Right of Exploitation, the Right of Building, and the Right of Use are Indonesian citizens or corporations that are established according to Indonesia law and having their domicile in Indonesia. A partnership is an enterprise which is not a legal entity; thus, if it is based on the two articles, a partnership should not be able to have the Right of Building on land, so that the issuance of the circular letter creates a norm conflict against the condition in Article 36 section (1) BRAP in conjunction with Article 19 Government Regulation Number 40 of 1996 about the Right of Exploitation, the Right of Building, and the Right of Use. Giving the Right of Building to partnerships is a form of a nominee's agreement which reflects the enterprises' personal acknowledgment that the land right is owned by the partnership, which is prohibited; therefore, this has no legal certainty.<sup>xxiii</sup> Besides, Land Deed Official will not make a transitional deed of the land rights into the Right of Building for a partnership owing to the fact that it will not take a risk in the future for the deed made if it becomes a problem since the policy is contradictory to BRAP.<sup>xxiv</sup> Another problem about the legal uncertainty of giving the Right of Building to a partnership is when one of the partners dies or is out of the partnership or if there is a change of partners, while in fact the partners' names are already listed in the certificate.<sup>xxv</sup>

Second, the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 is not contradictory with other rules. The implementation of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 is in order to implement the duties and authorities of the Minister of Agrarian and Spatial Planning/Head of National Land Authority which is mandated by the legislation and which is not contradictory with Article 36 BRAP, although in its execution it will face some constraints. The constraints are especially about the ownership of the partners of the Right of Building which depends on the income given by the partners and the agreement on the profit sharing, which can result in the uncertainty of the authority of the Right of Building.<sup>xxvi</sup>

In the writers' opinion, the dictum of the circular letter is not contradictory with other rules, namely Article 36 BRAP in conjunction with Article 19 Government Regulation Number 40 of 1996 about the Right of Exploitation, the Right of Building, and the Right of Use of Land because the recording of the registration of the Right of Building for a partnership uses the names of all commanding members or one of the members with the approval of all the members in the partnership, which is arranged in Number 5 letter d in the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019. The recording of the registration still uses an individual name of a personal name so as to fulfil the requirement of the registration of the Right of Building in Article 36 BRAP. In other words, the Circular Letter of the Minister of Agrarian and

Spatial Planning/Head of National Land is not conflicting with the current rules because the issuance of certificates still uses the names of the partners (commanding or complementary partners, or both) of a partnership or CV, and not the name of the partnership. In other words, the registration of the Right of Building for a partnership meets the category of an individual citizen of Indonesia, and not the category of a legal entity due to the fact that the registration of the Right of Building uses the partner's name and not partnership. The positive impact of the registration of the Right of Building for a partnership resulted from the issuance of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 is that it can support Indonesia's EODB in land registration.

## CONCLUSION

Based on the above description, the conclusion of the research is that the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 has a very good intention to encourage land registration in Indonesia so that Indonesia's rank of *Ease of Doing Business* can increase from the 106<sup>th</sup>. The Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 can encourage business actors, who specifically in this case are partnerships, to have the opportunity through the partners to get the Right of Building which can last for 30 (thirty) years and can be extended to a maximum 20 years, which can later be used to increase the business actor's productivity. The Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 supports Indonesia's Ease of Doing Business, especially in land registration. The Minister of Agrarian and Spatial Planning /Head of National Land Authority needs to emphasize the intent of the Circular Letter of the Minister of Agrarian and Spatial Planning/Head of National Land Authority Number 2/SE-HT.02.01/VI/2019 to avoid many interpretations.

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<sup>xii</sup> BAL art. 35 paragraph 2.

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