

Notary Role in The Development of Tourism Industry: An Analysis of Business Licensing Policies

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Abstract

The issuance of Law No. 11 of 2020 on Job Creation with its implementing regulations has marked a new era in the business licensing process in Indonesia since the introduction of the Online Single Submission system in 2018. These new licensing policies offer a more simplified licensing process and requirements that are designated to be applicable for every business sector in its establishment process, including the tourism sector as one of the nation's biggest economic contributors. To obtain such benefits, tourism business players shall provide clear business information during the process of business registration in the licensing system and such information shall be provided under authentic corporate deeds that are made by a notary. This paper uses desk study research with a normative approach in analyzing the laws on licensing process, tourism sector, corporate matters, and notarial works that are prevails in Indonesia. This paper is not only elaborating on the business licensing process since the enactment of Law No. 11 of 2020 on Job Creation but it also analyses the relationship between the business licensing process and the notary's responsibility as a public officer who is authorized by the law to draw authentic deeds. By understanding that relation, the correlation between the notary's role and the development of the national tourism business, especially at the regional level could be identified. Thus, one of the efforts in developing tourism business across Indonesia is realized through notaries' capability in understanding tourism business and its relevant legal knowledge together with an equal notary distribution in tourism destination areas.

I. Introduction

As the largest archipelagic state in the world, Indonesia has unique landscapes and natural biodiversity. This country also become the home of more than 270 million multi-ethnic people with their cultural diversity. Those potencies make Indonesia considered as an attractive tourist destination with a total of 16.11 million foreign tourists in 2019¹, with a contribution from the tourism sector alone of USD 16.9 billion or equal to 4.7% of the nation's Gross Domestic Product (GDP) in the same year². Although these numbers are declining sharply due to the social limitation policy by the Government as the result of the Covid-19 pandemic situation³, the optimism for redeveloping the national tourism sector is still alive.

According to Nyoman S. Pendit, Tourism is the departure of people for a while in a short term to destination places outside of their daily residence and works as well as their activities while at the destination⁴. Meanwhile, Salah Wahab said that tourism is a human activity that is carried out consciously by receiving alternate services between people in another area for a temporary time in order to search for various satisfactions and differences from what he/she experienced in his/her residence⁵. Thus, there are several elements that support the definition of tourism, such as (1) travel that was done for a temporary time; (2) such travel is carried out from one place to another; (3) such travel is associated with an outing or recreation activity; and (4) the person who made the travel does not seek for an income in the visited places and solely become a consumer in that place⁶.

As the main law of the tourism sector, Law No. 10 of 2009 on Tourism as amended by Law No. 11 of 2020 on Job Creation ("**Job Creation Law**", together

¹ Ministry of Tourism and Creative Economy/Tourism and Creative Economy Agency, 2021, "*International Arrival Statistics 2020*", Jakarta: Pusat Data dan Sistem Informasi Kementerian Pariwisata dan Ekonomi Kreatif/Badan Pariwisata dan Ekonomi Kreatif, p. 9.

² See: Doddy Rosadi, 2021, "*Menparekraf: Kontribusi Pariwisata Ditargetkan 12 Persen dari PDB*", Available on website: <https://katadata.co.id/doddyrosadi/berita/6058264566a4b/menparekraf-kontribusi-pariwisata-ditargetkan-12-persen-dari-pdb>, Accessed July 20th, 2022.

³ As refer to: Amanda Kusumawardhani, March 22th, 2021, "*Sandiaga Incar Kenaikan Kontribusi Parekraf hingga 12 Persen dari PDB*", Available on website: <https://ekonomi.bisnis.com/read/20210322/12/1370673/sandiaga-incar-kenaikan-kontribusi-parekraf-hingga-12-persen-dari-pdb#:~:text=Kontribusi%20sektor%20pariwisata%20terhadap%20PDB,4%2C7%20persen%20pada%202019.&text=%E2%80%9C%20Selama%20ini%20kita%20kan%20selalu,wisatawan%20yang%20hadir%20ke%20Indonesia>, Accessed July 20th, 2022.

The number of foreign tourists declined to 4.08 million and the tourism sector contribution was in the number of USD 3.54 million in 2020. These situations made the tourism sector became one of the most impacted business sectors during the Covid-19 pandemic.

⁴ Nyoman S. Pendit, 1980, *Ilmu Pariwisata Sebuah Pengantar*, Jakarta: Pradnya Paramita, p. 30.

⁵ See: Oka A. Yoeti, 1996, *Pengantar Ilmu Pariwisata*, Bandung: Angkasa, p. 107.

⁶ *Ibid*, p. 109.

with Law No. 10 of 2009 known as “**Tourism Law**”) in the Article 6, stipulates that tourism development shall be realized through the implementation of a tourism development plan by paying attention to the diversity, and cultural and natural uniqueness, as well as human needs to travel. Under Article 7 of Tourism Law, such tourism development includes four matters which are tourism industry, tourism destination, marketing, and tourism institutions. With this article, the proper identification of what tourism affairs should cover will be able to make a vivid objective, strategy, and programs in improving the nations’ tourism⁷. Therefore, the development of the tourism industry besides providing a positive impact in the form of the increment in national income, shall be able to improve the economy of tourism destination areas, for example by increasing the number of employment, increasing the number of domestic or international tourists, improving the development of Indonesian art and culture, promoting culinary, hotel, and restaurant businesses, and providing easier facility and transportation⁸.

As part of national tourism development, the tourism industry is formed by the tourism businesses that are required to form their business entity before commencing the business activities. Besides choosing the form of business entity, a business player in the tourism sector shall also have its business judgment to decide the (i) details of business activity; (ii) amount of investment; (iii) market share of their product or service; and (iv) other business actions to maintain its business continuity. Every business action that will be taken at pre-and post-business establishment shall comply with the Governmental regulations, prevailing agreements, and be made in a good faith.

Reflecting on the above situation, the notary plays a big role in supporting the business needs of the tourism industry. Article 1 of Law No. 30 of 2004 as amended by Law No. 2 of 2014 on Notary Profession (“**Notary Law**”) defined Notary as a public official authorized to prepare the authentic deed and having other authorities as referred in this Law or under other laws. Such definition clearly explains that by its principle, the role of a notary in supporting business needs is reflected through its authority in making authentic deeds. Different from other common-private deeds which are not made before or by public officials including a notary, an authentic deed has a perfect power of proof as Article 1870 of the Indonesia Civil Code stipulates that an authentic deed provides between the parties and their heirs or the people who get rights from them, perfect proof of what is contained therein. The existence of an authentic deed gives legal certainty to the interested parties on their agreed legal actions and provides further legal protection on such action in any possible legal disputes.

⁷ Akiko Nada Atsmara and Bayu Mitra Adhyatma Kusuma, Relevance of Law No. 10 year 2009 about Tourism Towards Creative Economy as a New Platform of Tourism Development in Indonesia”, *Journal of Indonesian Tourism and Development Studies*, Vol 2 No. 1, January 2014, p. 37.

⁸ Isharyanto, Maria Madalina, and Ayub Torry S.K., 2019, *Hukum Kepariwisata & Negara Kesejahteraan (Antara Kebijakan dan Pluralisme Lokal)*, Jakarta: Halaman Moeka Publishing, p. 100.

Due to its important role in drawing authentic deeds for the needs of business, this research will focus on four points. **First**, it will give a general overview of tourism sector regulations in Indonesia and how to do tourism business in Indonesia, including its licensing matters. **Second**, it elaborates on the importance of corporate documentation as a requirement for tourism business registration and certain information that shall be considered in preparing such documents. **Third**, it analyses the role of the notary in the initial stage of tourism business entity establishment, especially in his/her responsibility in drawing authentic deeds and the relation with the prevailing tourism sector regulations. **Fourth**, it concludes the importance of notary existence for the development of the tourism sector, moreover in lack-investment areas. It shall be concluded that this research will give a clear picture of how a notary could give a significant contribution to the development of the national tourism industry.

2. Research Method

The research in this paper uses a normative approach by analyzing the prevailing regulations in the tourism sector and other regulations that are relevant to notarial works. Both types of regulation become the primary legal data for this paper. In addition to the primary legal data, this research is also supported by secondary legal data as obtained from the relevant books, journals, reports, and articles related to the tourism business and notarial matters. All of the collected data will be managed and analyzed together to describe the role of the notary in supporting the national tourism industry.

3. Results and Discussion

An Overview of Tourism Sector Regulations in Indonesia

Tourism Industry as Part of National Tourism Development

The law of tourism is a regulation that regulates the whole activities related to tourism and is naturally multidimensional as a manifestation of the needs of each person and country as well as interactions between tourists and local communities, fellow tourists, Government, and business players⁹. As previously mentioned, the tourism sector in Indonesia is generally regulated under the Tourism Law. Based on Article 8 of Tourism Law, the tourism development shall be implemented based on a master plan of tourism for each national, provincial, and district/city level, and such development is an integral part of the long-term

⁹ I Putu Gelgel, 2021, *Hukum Kepariwisata dan Kearifan Lokal: Menggagas Paradigma Pembangunan Hukum Kepariwisata yang Berstruktur Sosial Budaya Indonesia di Tengah Arus Globalisasi*, Denpasar: UNHI Press, p. 22.

national development plan. At the national level, the Government had issued Government Regulation No. 50 of 2011 on National Tourism Development Master Plan for 2010-2025 (“GR No. 50/2011”) which elaborates the goals of national tourism development in Article 2 as follows:

1. To improve the quality and quantity of tourism destinations;
2. To communicate Indonesia’s tourism destinations by using marketing media effectively, efficiently, and responsibly;
3. To create a tourism industry that can drive the national economy;
4. To develop tourism institutions and tourism governance that can synergize the development of tourism destinations, tourism marketing, and tourism industry in a professional, effective, and efficient manner.

As part of tourism development, the tourism industry plays an important role in the tourism business itself. In respect of this, Article 41 of GR No. 50/2011 elaborates on five actions that shall be taken for developing the national tourism industry such:

1. Strengthening of tourism industry structure;
2. Increasement of the competitiveness of tourism products;
3. Development of tourism business partnership;
4. Creation of business credibility; and
5. Development of environmental responsibility.

The five actions above require more concrete policies by the Government, especially since there are several identified problems in the current national tourism development as follows¹⁰:

1. Weak pioneering to open and build new tourist attractions in tourism destinations in accordance with the market trend;
2. Weak management of potential tourist attractions in tourism destinations in competing with other destinations to attract the interest and loyalty of existing tourist market segments;
3. Lack of the development of product management innovation and tourist attraction capacity, especially effort-oriented environmental conservation;
4. Lack of diversity in tourist attraction value in various themes by the utilization and elevation of the local area’s uniqueness and distinctiveness;

¹⁰ See: Isharyanto, Maria Madalina, and Ayub Torry S.K., *Op.Cit.*, p. 42-43.

5. There has been no integrated effort to handle the revitalization of tourist attractions in destinations that suffer degradation, both environmental, social, cultural, and economic degradation; and
6. Weak human resources and support of public infrastructure and tourist facilities.

In respect of the above, it could be understood that the weakness of the tourism development comes from internal factors like the low quality of tourism human resources, the weak tourism culture, and the limited infrastructure and flight¹¹. Regarding this, Article 30 and 31 of GR No. 50/2011 provides policy direction for investment development in the tourism sector such as:

1. The enhancement of the provision of investment incentives in the tourism sector in accordance with the prevailing law, by the following strategies:
 - a. Development of fiscal relief mechanism to attract foreign investment in the tourism sector in accordance with the prevailing law in the financial sector; and
 - b. Development of fiscal relief mechanism to stimulate domestic investment in the tourism sector in accordance with the prevailing law in the financial sector.
2. The enhancement of ease of investment in the tourism sector, by the following strategies:
 - a. Performance of de-bureaucratization of investment in tourism; and
 - b. Performance of de-regulation of regulations that hamper licensing activities.
3. The enhancement of investment promotion in the tourism sector, by the following strategies:
 - a. Provision of information on investment opportunities in tourism destinations;
 - b. Enhancement of investment promotion in the tourism sector at homeland and abroad; and
 - c. Enhancement of the synergy of investment promotion in tourism with certain sectors.

¹¹ See: Petrus Soerjowinoto, "Persoalan Hukum di Bidang Kepariwisata," in *Focus Group Discussion Kelompok Kerja Analisis Dan Evaluasi Hukum Terkait Kepariwisata*, Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia, Semarang, August 6th, 2020, p. 2.

Tourism Business and Licensing Policy

The national tourism development plan gives responsibility to the Government in developing the tourism sector, mainly by its role in supporting the private sector. The most important role of the Government in developing tourism is to provide a very adequate infrastructure (not only in physical form), expand the various forms of facilities to provide its best service, and perform coordination between Governmental apparatus with private parties, regulation, and general promotion abroad¹². It also should promote social equity, sustainable community tourism development, the value chain approach, and the need to remove barriers to investment¹³. From the perspective of law, the Government both Central and Regional governments have an important role in creating ideal regulations and policies for supporting the tourism sector itself. Ideal tourism regulations and policies shall be formulated since tourism is one of the mainstays of foreign income that can increase national or regional income¹⁴. Related to the last one, the Government has issued several regulations in recent years, starting with Government Regulation No. 24 of 2018 on Electronically Integrated Business Licensing Service (“GR No. 24/2018”) as the first legal basis that introduce the Online Single Submission (“OSS”) system. The OSS system is an online business licensing platform intended to accelerate and simplify the process of obtaining business licenses, and it can be accessed at anytime and anywhere by any business in Indonesia. The provision of the OSS system is a form of licensing system improvement that is carried out by the Central and Regional Government in order to make it more efficient, serving, and modern¹⁵. To obtain licenses through the OSS system, applicants shall register for a Business Identification Number (*Nomor Induk Berusaha* or “NIB”). Under Article 26 of GR No. 24/2018, this NIB is not only used for the purpose of licensing process but also as (1) Company Registration Number (*Tanda Daftar Perusahaan*) and (2) Importer Identification Number (*Angka Pengenal Importir*). During the NIB registration process, there are several requirements or information that should be filled by the applicant in the OSS system such as the Deed of Establishment (“DOE”) and its relevant Minister of Law and Human Rights (“MOLHR”) approval for business entities, business line, types of investment (which further related with the Indonesia Negative Investment List or *Daftar Negatif Investasi*),

¹² Anak Agung Adi Lestari and Ni Putu Noni Suharyanti, “Kebijakan Pemerintah Indonesia Dalam Pengembangan Pariwisata,” *Jurnal Hukum Saraswati*, Vol.2, No. 2, September 2020, p. 179-180.

¹³ USAID Governing for Growth (G4G) in Georgia, May 20th 2019, “Detailed Concept on the Law of Tourism,” Available on website: https://pdf.usaid.gov/pdf_docs/PA00W4N5.pdf, p. 10, Accessed July 20th, 2022.

¹⁴ Made Metu Dhana, 2012, *Perlindungan Hukum dan Keamanan Terhadap Wisatawan*, Surabaya: Paramita, p. 1.

¹⁵ Sigit Sapto Nugroho and Anik Tri Haryani, 2021, *Hukum Perizinan Berbasis OSS (Online Single Submission)*, Madiun: Lakeisha, p. 69.

the amount of investment plan, and other investment information. Any changes to the above information must also be submitted by the applicant to the OSS system.

The overall aim of the new system is to streamline the various processes involved in business licensing and to improve Indonesia's ease of doing business ranking¹⁶. Following the issuance of GR No. 24/2018, the Minister of Tourism and Creative Economy/Tourism and Creative Economy Agency ("MoT") issued the Minister of Tourism Regulation No. 10 of 2018 on Electronically Integrated Business Licensing Service within the Tourism Sector ("**MoT Regulation No. 10/2018**") with the main goal to integrate the procedure of obtaining tourism sector licenses with the OSS system. Further, Article 6 of MoT Regulation 10/2018 addresses two types of sectoral licensing which are (1) Business License or *Izin Usaha* in the form of Tourism Registration Certificate (*Tanda Daftar Usaha Pariwisata* or "**TDUP**") as issued by the OSS Agency on behalf of Minister, Governor, or Regent/Major, and (2) Commercial/Operational Licenses or *Izin Operasional/Komersial* in the form of Tourism Business Certificate (*Sertifikat Usaha Pariwisata* or "**Certificate**") as issued by Business Certification Agency (*Lembaga Sertifikasi Usaha*) within the tourism sector.

First, as the business license, Article 8 of MoT Regulation No. 10/2018 stipulates that TDUP is valid as long as the business runs, and to apply it, the applicant shall obtain NIB first. The purpose of establishing TDUP as a commitment after the issuance of NIB for tourism businesses in the implementation of business licensing is to ensure legal certainty for businesses, in the sense of legality that protects the legal umbrella, valid and binding under the law¹⁷. Under Article 11 of MoT Regulation No. 10/2018, this TDUP may cover more than one tourism business in a single location as long those businesses are managed by single business management.

Second, besides TDUP, the MoT Regulation No. 10/2018 has some provisions on the Certificate as the Commercial/Operational License of the tourism sector. Article 22 and 27 paragraph (2) of MoT Regulation No. 10/2018 stipulate that this license is mandatory to obtain by businesses who (i) had already obtained an NIB and TDUP; and (ii) issued for those who had fulfilled Tourism Business Standard (*Standar Usaha Pariwisata*) and conducted Tourism Business Certification (*Sertifikasi Usaha Pariwisata*). In addition, MoT Regulation No. 10/2018 on its Article 29 regulates that the Certificate is valid until three years after the issuance date, and it shall be renewed upon expiry by the holder.

¹⁶ Hukumonline, "The Online Single Submission system: Implementation Overview", *Indonesian Law Digest*, Issue 572, 24th August 2018, p. 1.

¹⁷ Alfon Octavianus Sitepu, Faisal Santiago, and Ricky Purwanto, "The Effectiveness of Licensing on Tourism Business Activity in the Area of the Toba Lake," *Proceedings of the 2nd International Conference on Business Law and Local Wisdom in Tourism*, December 2021, p. 10.

The Enactment of Job Creation Law and New Policies in the Tourism Sector

Before being elected as the President of Republic Indonesia for the second period, Joko Widodo in his political campaign committed that his administration would simplify every form of regulatory constraints in Indonesia by issuing the Job Creation Law and Micro-Small-Medium Enterprises (*Usaha Mikro, Kecil, dan Menengah* or “**UMKM**”) Empowerment Law together with the House of Representatives. Joko Widodo explained that each law will become an Omnibus Law, a single law that revises several and even dozens of laws¹⁸. In November 2020 the first Omnibus Law was issued by the enactment of the Job Creation Law which revokes two laws and revises 82 laws including the Tourism Law¹⁹. This law brings several major changes to the Tourism Law, especially on licensing matters.

First, the Job Creation Law introduces the new term “business licensing” or *perizinan berusaha* that replacing the term “business license” or *izin usaha*. Article 1 point 4 of Job Creation Law defines business licensing as legality that is given to business players for commencing and running business and/or activity. The essence of business licensing is similar to the business license which both are served for business legality and tools for the Government to control and monitor business compliance. However, under the Job Creation Law, the determination of business licensing is adopting a new approach known as “Risk-Based Assessment” (“**RBA**”) or *berbasis resiko*, as this kind of approach is also regulated under Government Regulation No. 5 of 2021 on Implementation of Risk-Based Business Licensing (“**GR No. 5/2021**”) which replaced GR No. 24/2018. Risk assessment is a systematic examination of a trade or commercial entity, premises, job, or process that is carried out for:

1. Identifying any significant hazards that are present.
2. Determining whether or not the owner or controller of that entity has already done enough to reduce the risk of someone being harmed to an acceptable level, and if not.
3. Deciding what further control measures he or she must take to reduce the risk to an acceptable level²⁰.

Article 7 of Job Creation Law stipulates that business licensing with RBA shall be conducted based on the determination of business risk and business

¹⁸ Lidya Julita S. and Chandra Gian Asmara, October 20th 2019, “Janji Jokowi Periode II: Realisasikan Omnibus Law”, Available on website: <https://www.cnbcindonesia.com/news/20191020162418-4-108482/janji-jokowi-periode-ii-realisasikan-omnibus-law>, Accessed July 20th, 2022.

¹⁹ Legalitas, February 26th 2021, “Daftar UU yang Diubah dan Dicabut Pasca Diterbitkannya UU Cipta Kerja”, Available on website: <https://www.legalitas.co.id/daftar-uu-yang-diubah-dan-dicabut-pasca-diterbitkannya-uu-cipta-kerja/>, Accessed July 20th, 2022.

²⁰ USAID Governing for Growth (G4G) in Georgia, *Op.Cit.*, p. 44.

activity scale level. Such level is calculated based on the valuation of danger and potential danger that occurred from the regarding business activity by referring to the aspects of health, safety, environment, and/or resources utilization and management. Other indicators such as type of business, business criteria, business location, limited resources, and/or volatility risk are also calculated. After such calculation is performed, the regarding business activity will be given with one of these three risk level statuses with each own business requirements as elaborated by Article 8-10 Job Creation Law below:

1. Low-risk business, which requires NIB.
2. Medium risk business, which requires NIB and Standard Certificate.
3. High-risk business, which requires NIB and license.

From the above, it could be understood that under the new Job Creation Law and GR No. 5/2021, an NIB is not only considered as a business identity, but it also becomes business legality for a low-risk business. This provision is regulated under Article 12 paragraph (1) of GR No. 5/2021 and this new policy brings benefits to low-risk businesses which are not required to apply for additional business licenses anymore. On the other hand, the previous business licensing policies in which the business player shall obtain both NIB and license still prevailed but only limited to high-risk businesses as regulated under Article 15 paragraph (1) of GR No. 5/2021. The term of a license under Article 15 paragraph (2) of GR No. 5/2021 means approval from the Central or Regional Government to conduct business activity that shall be fulfilled by the business player before commencing their business activity. The requirement of obtaining a license for high-risk businesses by the Government is intended to maintain Government's control over large businesses along with their business risks.

Besides low and high-risk businesses, Job Creation Law and GR No. 5/2021 also introduce a new business requirement for medium risk businesses which is the Standard Certificate. Article 1 paragraph (13) of GR No. 5/2021 defines a Standard Certificate as a statement and/or proof of fulfillment of business activity standard. The requirement of the Standard Certificate itself is related to the **second** change of Tourism Law under Job Creation Law: the revocation of the Certificate and its replacement by the new Standard Certificate itself. Article 54 paragraph (1) of Tourism Law stipulates that tourism business products, services, and management shall have their own business standard. Standardization is very important in the tourism sector since it serves as a "bridge" between tourists as the consumer of the tourism goods and services, with the tourism business as the producer. However, it should be noted that standardization cannot be done in all respects because tourism contains things that are unique (not available elsewhere)²¹. In addition, the introduction of the

²¹ Muhamad Rizal and Yul Maulini, "Development of Indonesian Tourism Law in the Tourism Industry 4.0", *Social Values and Society*, Vol. 2 No. 1, April 2020, p. 13.

Standard Certificate also means the Commercial/Operational Licenses for tourism businesses are no longer required. In relation to this, the MoT has issued Minister of Tourism and Creative Economy/Head of Tourism and Creative Economy Agency Regulation No. 4 of 2021 on Business Activity Standard on the Implementation of Risk-Based Business Licensing on Tourism Sector (“**MoT Regulation No. 4/2021**”) which gives guidelines on business standards that shall be fulfilled by the tourism businesses.

Lastly, the **Third** change of Tourism Law could be found in Article 67 of Job Creation Law which elaborates on thirteen tourism businesses as follows:

1. Tourist attraction;
2. Tourism area;
3. Tourist transportation services;
4. Tour and travel services;
5. Food and beverage services;
6. Provision of accommodation;
7. Organization of entertainment and recreation activities;
8. Organization of meetings, incentive trips, conferences, and exhibitions;
9. Tourist information services;
10. Tourism consulting services;
11. Tour guide services;
12. Water-based tourism; and
13. Spa.

Details of each tourism business are stipulated under Central Bureau of Statistics Regulation No. 2 of 2020 on Indonesia Business Field Classification which provides Indonesia Business Field Classification (*Klasifikasi Baku Lapangan Usaha Indonesia 2020* or “**KBLI 2020**”) code for each tourism business field. It is important for business players to know first about their business’s KBLI 2020 code since GR No. 5/2021 in Annexure 2 determines business risk levels from their KBLI 2020 code. As explained before, the business risk level will decide the licensing requirements that shall be fulfilled, including the business standard as this matter is regulated under MoT Regulation No. 4/2021.

The enactment of the Job Creation Law and its implementing regulations related tourism sector leads to an issue of whether MoT Regulation No. 10/2018 is still relevant or not. Basically, MoT Regulation No. 10/2018 is an implementing regulation of GR No. 24/2018 that was replaced by GR No. 5/2021. For the time being there are no new regulations that revoke MoT Regulation No. 10/2018 yet the enactment of GR No. 5/2021 brings legal uncertainty to the prevailing provisions of tourism business establishment and licensing matters. As the latest update the Constitutional Court of Republic Indonesia in its Court Decision No. 91/PUU-XVIII/2020 dated 25 November 2021 made numbers of major decisions

that affect the validity of Job Creation Law and its implementing regulations such as²²:

1. Declare the formation of Job Creation Law is unconstitutional and shall not be legally in so far as not interpreted to mean “it is not revised in two years since this decision is pronounced”;
2. Declare the Job Creation Law remains in effect until the revisions are made within the deadline as specified in this decision;
3. Order the lawmakers to perform revision in the period of a maximum of two years after this decision is pronounced, if within the given period no revisions are performed, then the Job Creation Law shall be permanently unconstitutional;
4. Declare in the event lawmakers are unable to complete the revision of the Job Creation Law within the period of two years then any law or clauses or substances of the law that have been revoked or amended by Job Creation Law shall be reinstated to be valid;
5. Declare to suspend any strategic and great impact action/policy, and shall be restricted to issuing new implementing regulations pertaining to the Job Creation Law;

It could be understood that Decision No. 91 suspends lawmakers, especially MoT, to issue new implementing regulations of GR No. 5/2021 in the tourism sector until 25 November 2023. It also means that MoT Regulation No. 10/2018 is still valid for the time being and leads to a conflict of norms in the tourism sector.

Referring to the above situation, such conflict could be resolved by using the approach of legal principles which are recognized in legal science. The conflict of norms between GR No. 5/2021 and MoT Regulation No. 10/2018 shows what is called a conflict of legal hierarchy in which GR No. 5/2021 as a Government regulation has a higher position than MoT Regulation No. 10/2018 that was issued by MoT. Regarding this, the legal principle of *lex superior derogate legi inferiori* shall be applied whereas regulation with a lower position in the legal hierarchy shall not contradict the regulation in the higher position. In the event of a conflict occurred, regulation in the higher position will disable the regulation in the lower position, therefore such higher-position regulation shall prevail²³. This could be concluded that GR No. 5/2021 which has a higher position than MoT Regulation No. 10/2018 prevails.

Corporate Documentation as The Requirement of Business Registration

²² Constitutional Court Decision No. 91/PUU-XVIII/2020, p. 416-417.

²³ Sudikno Mertokusumo, 2010, *Mengenal Hukum: Suatu Pengantar*, Yogyakarta: Cahaya Atma Pustaka, p. 121.

Licensing matters of the tourism sector and industry as above occurred after the establishment of a tourism business entity. Every business licensing requirement and relaxations as provided by the recent Government policies will also be determined on the date when such entity was born. Therefore, the authenticity and legality of business establishment hold an important key for every business player to take the next step for its business commencement.

Related to the above, the Investment Coordinator Agency (*Badan Koordinasi Penanaman Modal* or “**BKPM**”) as OSS administrator has issued BKPM Regulation No. 4 of 2021 on Guidelines and Procedures of Risk-Based Business Licensing and Investment Facility Service (“**BKPM Regulation No. 4/2021**”) which this regulation become one of GR No. 5/2021 implementing regulations. Under Article 19 paragraph (1) of BKPM Regulation No. 4/2021, a business player who registers for an NIB as its business requirement shall ensure the completeness of their corporate data in which paragraph (6) of the same article elaborates minimum information of such data as below:

1. Business entity name;
2. Type of business entity;
3. Investment status;
4. Deed of establishment number or registration number with its legalization;
5. Corresponding address;
6. Amount of capital plan;
7. Management and shareholder data;
8. Investor’s country, for foreign investment company;
9. Business entity purpose and objective;
10. Business entity phone number;
11. Business entity email; and
12. Business entity taxpayer identification number (*nomor pokok wajib pajak*).

Since the OSS system is intended to digitalize licensing process, there is no need for a business player to provide the data in physical form as Article 19 paragraph (8) of BKPM Regulation No. 4/2021 stipulates that such data are obtained automatically from the corporate information system maintained by MOLHR, except if the data are not digitally available. Such system is known as AHU Online which organized by the Directory General of General Legal Administration (*Direktorat Jenderal Administrasi Hukum Umum* or “**Ditjen AHU**”) of MOLHR. Every business entity establishment shall be registered by its founders through this platform before being granted its legal status by Ditjen AHU, whether such entity takes the form of (i) Civil Partnership; (ii) Firm; (iii) Limited Partnership (*Commanditaire Vennotschap* or “**CV**”); (iv) Limited Liability Company (*Perseroan Terbatas* or “**PT**”); and (v) Cooperative. Before registering its business, it is important for every business player to ensure its business entities are legally established. In general business establishment requires the same

corporate document which is the DOE and its included Article of Association (“AOA”) as the basis of the entity’s business activities. The AOA itself shall at least regulates:

1. Identity of the entity such as name and domicile;
2. Business purpose and objective;
3. Term period of the business;
4. Capital, including its ownership, business contribution, and transfer of ownership;
5. Business management, including managerial appointment and authority;
6. Internal meeting procedures;
7. Distribution of profit and loss;
8. AOA amendment procedures; and
9. Business dissolution or liquidation.

Due to its position as the business identity and guideline, an AOA shall be drawn as accurately as possible. Every business decision in the future will be determined based on the AOA. This is also applicable for licensing matters, in which business licensing requirements are determined based on the business information provided by AOA. In order to get certainty on its business licensing requirements, it is important for every business player to make their business purpose and objective in AOA comply with the latest KBLI 2020.

After deciding the business purpose and objective, the next information that shall be provided clearly in AOA is the business capital. Such information will determine the business activity scale and its business risk. Under Article 11 and 12 of BKPM Regulation No. 4/2021, the BKPM has specified business capital for (i) an UMKM business which is allowed to be invested until the maximum of IDR 10 billion; and (ii) large scale business, especially for a foreign investment company which its minimum investment shall be in the amount of IDR 10 billion.

Besides its capital amount, the capital ownership of a business entity is also important to know since there are certain provisions for foreign investment that shall be considered, especially for a PT. In Indonesia, foreign investment is generally governed under Law No. 25 of 2007 on Investment (“**Investment Law**”) and its implementing regulations. Article 12 of Investment Law stipulates that all business fields in Indonesia are open for investment except some those that are declared to be closed or opened with conditions for investment, especially for foreign investors. Such information is provided under Presidential Regulation No. 10 of 2021 as amended by Presidential Regulation No. 49 of 2021 on Investment Business Field (“**Presidential Regulation No. 10/2021**”) which this regulation is not only giving several limitations on foreign investment over certain business fields but it also determines on business fields that are required to (i) be allocated and (ii) perform partnership to/with cooperative and UMKM. Regarding this, tourism businesses are not subjected to any foreign investment limitation and made it become 100% open for foreign investors. However, there

are some tourism business fields that shall be allocated to cooperative and UMKM such as hostelry service, travel agent, and tour guide service if such businesses fulfill the following criteria under Article 5 paragraph (2) Presidential Regulation No. 10/2021 as follow:

1. Businesses that are not utilizing technology or utilizing simple technology;
2. Businesses that have a specificity of process, labor-intensive, and have a specific and hereditary cultural heritage; and/or
3. The capital amount is not more than IDR 10 billion, excluding land and building value.

This provision is very important, especially for local UMKM which must be fully protected from the possibility of bankruptcy due to the presence of large and/or multi-national companies, moreover in the tourism sector. However, the term “protected” should not be interpreted as an effort to prevent UMKM from the competition, but rather to increase its capacity so that one day it is able to compete with large and/or multi-national companies²⁴.

Notarial Deeds for Supporting Tourism Business Activities

As the basis of business establishment and its daily activities, both DOE and AOA shall be made in an authentic deed. According to Tan Thong Kie, an authentic deed has the role as the strongest evidence and has an essential judicial value in every legal relation when a dispute occurs in public life²⁵. Article 1868 of the Indonesia Civil Code defines an authentic deed as a deed drawn up in a legal format as determined by law, by or before public officials who are authorized to do so at the location where this takes place. An authentic deed determines clearly the right and obligation, guaranteeing legal certainty at the same time is expected to minimize the occurrence of disputes, even though such disputes, in the end, may not be avoided in the dispute settlement process²⁶. Further, under the general explanation of Notary Law, an authentic deed as the strongest evidence provides real contribution for ease and fast dispute settlement.

As one of the said public officials above, Notary is authorized by the Notary Law in preparing an authentic deed. In the context of business establishment, most of the prevailing regulations in Indonesia require business players to form their business entities with a notarial deed. This could be seen in the establishment of (i) Firm and CV under Article 22 of Indonesia Commercial Civil Code; and (ii) PT under Article 7 paragraph (1) of Law No. 40 of 2007 as amended by Job Creation Law on Limited Liability Company. In respect of Civil

²⁴ Muhamad Rizal and Yul Maulini, *Op.Cit.*, p. 13.

²⁵ Tan Thong Kie, 2007, *Studi Notariat & Serba-Serbi Praktek Notaris*, Jakarta: Ichtiar Baru Van Hoeve, p. 159.

²⁶ Sjaifurrachman and Habib Adjie, 2011, *Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta*, Bandung: Mandar Maju, p. 7.

Partnership and Cooperative, the prevailing legal provisions for each entity's establishment are not stipulate clearly whether an authentic or notarial deed is required.

First, on the establishment of a Civil Partnership, Article 1624 of the Indonesia Civil Code stipulates that a partnership is effective as its establishment agreement is reached. Related to this, Soekardono said that to establish a Civil Partnership, it is enough to do the formation verbally until an agreement is reached since the law does not require any written requirements. This means the establishment of Civil Partnership could be done only by a consensus²⁷. Although according to legal doctrine it is possible to establish Civil Partnership verbally, however in relation to other legal needs, especially for further needs of the partnership, it is still required for having written documentation²⁸. As an example of this, MOLHR's AHU Online also requires the submission of Civil Partnership's DOE and AOA in the notarial deed for business registration²⁹. Therefore, due to practical needs, the formation of a Civil Partnership by a notarial deed becomes mandatory although Indonesia Civil Code does not require such action.

Second, regarding the establishment of Cooperative, Article 7 paragraph (1) of Law No. 25 of 1992 on Cooperative only states that the formation of a cooperative shall be made by a DOE which includes the AOA. The Law does not oblige such documents made under a notarial deed. However, similar to Civil Partnership, practical needs will require Cooperative's DOE and AOA to be drawn in a notarial deed, including for the needs of registration in the AHU Online system³⁰.

As referred to above, AHU Online as a business registration system gives additional responsibility to the notary. The notary is not only responsible for preparing and drawing corporate documents in the form of authentic deeds but is also responsible for registering the documentation to AHU Online since all notaries in Indonesia shall have their own AHU Online account to access this system.

In performing the responsibility of preparing corporate deeds, it is important for a notary to understand his/her client's business intention. For the establishment of tourism businesses, a notary shall know thirteen tourism

²⁷ Soekardono, 1983, *Hukum Dagang Indonesia, Jilid. 1, Bagian. 2*, Jakarta: Rajawali Pers, p. 43.

²⁸ Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, and Togi Pangaribuan, 2014, *Pengantar Hukum Dagang*, Jakarta: Rajawali Pers, p. 33.

²⁹ Directory General of General Legal Administration, 2022, "Manual Book Sistem Administrasi Badan Usaha Persekutuan Perdata," Available on website: https://panduan.ahu.go.id/lib/exe/fetch.php?media=manual_book_-_panduan_persekutuan_perdata.pdf, Accessed July 20th, 2022.

³⁰ Directory General of General Legal Administration, 2022, "Pendirian Koperasi", Available on website: https://panduan.ahu.go.id/doku.php?id=pendirian_koperasi, Accessed July 20th, 2022.

businesses as classified by Article 14 of Tourism Law. By having a good understanding of the proposed business, a notary shall further explore technical details on how the client will run its intended business. This is important for a notary to identify the most suitable KBLI 2020 code for the client's business and the chosen code shall be defined clearly in AOA. The same approach shall also apply when a client intends to amend its business entity's AOA whereas a notary shall ensure the business and purpose in the AOA have been made in line with KBLI 2020. As previously explained, the information on business activities in the AOA is very important to determine the business risk and its licensing requirements. Therefore, a notary shall provide this information accurately in its drawn corporate deeds for the client's interest in doing business.

Besides the information on business purpose and objective, a notary shall also provide accurate information on business capital amount and ownership in the AOA. As explained before, the amount of capital invested will determine the business scale and business risk itself. In addition, business capital owners or investors will also decide whether the business will be subjected to investment limitations and restrictions as regulated under the Investment Law and its related regulations. Referring to this, a notary shall have proper investment knowledge and be able to identify any legal consequences of the investment matters. This should be more considered by a notary especially when his/her client came from a tourism business background. As referred to Article 14 of the Tourism Law, the tourism industry in Indonesia is made of various tourism businesses that could be run by an UMKM until international scale business. Due to the various capital amount and investors in this industry, any information on tourism-investment matters shall be informed by the notary to the client before the signing of corporate deeds.

Other than the above matters, a notary shall have good knowledge of commercial law. A notary should be capable to ensure that the prepared corporate deeds are not contradicting the law and appropriateness in the local society. Corporate matters such as business management, corporate actions, profit and loss distribution, and business dissolution shall be in line with the prevailing regulations and a notary shall provide a good legal education for his/her client related to this issue. Request of drawing a deed that is clearly contradicting with the law, appropriateness, and decency must be rejected³¹. Moreover, this matter is very important to be applied by a notary when dealing with a tourism-business client since the tourism industry activities with all of their consequences will be contacted with the human being as the subject and object of such tourism activity³². In addition, according Article 16 paragraph (1)

³¹ I Made Pria Dharsana, July 1th, 2021, "Notaris dan Prinsip Kehati-hatian dalam Menjaga Harkat Martabat Jabatan", Available on website: <https://tatkala.co/2021/07/01/notaris-dan-prinsip-kehati-hatian-dalam-menjaga-harkat-martabat-jabatan/>, Accessed July 20th, 2022.

³² See: I Putu Gelgel, *Op.Cit.*, p. 167.

letter a of Notary Law, a notary in performing its authority must act trustworthy, honest, thorough, independent, and protects the interest of the parties involved in legal actions. This means that a notary in performing its authority must put forward the precautionary principle so that the deed product that was made or requested in front of the notary has an authentic power.³³

The Importance of Notary Existence for the Development of Tourism Areas

The notary is a profession with special expertise that demands broad knowledge and a big responsibility to serve public interests as an official, namely public official who have a special character as well as a profession that carries out part of the Government's duties, namely by making the strongest tools of evidence in the form of an authentic deed³⁴. Referring to this, the notary profession plays important role in the development of the tourism industry through its authority in drawing corporate deeds for tourism business purposes. However, it should be realized that Indonesia's tourism industry is not equally developed.

The economic development and growth in Indonesia are not easy, the competition to increase investment competitiveness with other countries is very tough³⁵. Being an archipelago of around 17,500 islands, with 300 distinct ethnic groups, is an opportunity for the tourism sector but at the same time, it also becomes a challenge for both national and regional development, especially for local tourism itself. Income inequalities persist across provinces and districts despite Government policies aimed at reducing disparities, notably in terms of infrastructure investment and budget decentralization³⁶. This condition was reflected clearly in BKPM's report on the tourism investment realization report for January - June 2019 period (before the Covid-19 pandemic status), whereas Java and Bali areas were dominating the top 10 provinces with the highest tourism investment realization. The numbers of investment realization (realization numbers from Java and Bali area are colored in red) are as follows³⁷:

³³ I Made Pria Dharsana, *Op.Cit.*, "Notaris dan Prinsip ...".

³⁴ Ghansham Anand, 2018, *Karakteristik Jabatan Notaris di Indonesia*, Jakarta: Prenadamedia Group, p. 89.

³⁵ I Made Pria Dharsana, 2018, "Sebuah Catatan Tentang Majelis Pembina dan Pengawas PPPAT Sebagai Sarana Komunikasi dan Koordinasi Bagi PPAT," Available on website: <https://medianotaris.com/sebuah-catatan-tentang-majelis-pembina-dan-pengawas-pppat-sebagai-sarana-komunikasi-dan-koordinasi-bagi-ppat-berita616.html>, Accessed July 20th, 2022.

³⁶ Patrice Ollivaud and Peter Haxton, 2019, "Making The Most of Tourism in Indonesia to Promote Sustainable Regional Development," *Organisation for Economic Co-operation and Development*, Working Papers No. 1535, p. 14, <https://doi.org/10.1787.18151973>.

³⁷ Ministry of Tourism and Creative Economy/Tourism and Creative Economy Agency, 2020, "Laporan Kinerja Kementerian Pariwisata Tahun 2019", p. 67. Available on website <https://epformance.kemeparakraf.go.id/storage/media/378/LAKIP-Kemenpar-2019.pdf>, Accessed July 20th, 2022.

TABLE I. TOP 10 PROVINCES WITH HIGHEST FOREIGN AND DOMESTIC INVESTMENT REALIZATION (JANUARY – JUNE 2019)

No.	Foreign Investment			Domestic Investment		
	Top 10 Provinces	US Dollar (Million)	Indonesia Rupiah	Top 10 Provinces	US Dollar (Million)	Indonesia Rupiah
1	Bali	134.4	2,015,958.75	Bali	134.57	2,018,495
2	Kepulauan Riau	61.62	924,239.78	Jawa Tengah	64.44	966,588.84
3	Jawa Barat	36.28	544,181.13	DKI Jakarta	43	644,949.72
4	Nusa Tenggara Barat	33.72	505,733.82	Nusa Tenggara Barat	39.01	585,135.35
5	DKI Jakarta	29.63	444,402.14	Sumatera Barat	35.35	530,224.16
6	Nusa Tenggara Timur	10.54	158,140.14	Jawa Timur	35.29	529,424.81
7	Banten	6.57	98,524.58	Kalimantan Timur	26.59	398,841.80
8	Sulawesi Utara	3.25	48,731.65	Banten	23.53	352,908.35
9	Sumatera Utara	2.78	41,638.61	Jawa Barat	21.04	315,670.47
10	Jawa Timur	1.26	18,828.96	DI Yogyakarta	16.94	254,072.93

Source: BKPM, 2019.

The investment realization above shows how well the development of the tourism industry in a certain area, especially Bali as the main tourism destination in Indonesia. Tourism development in certain areas is marked by the increment in hotel numbers, restaurants, or infrastructure improvements that is related to tourism³⁸. However, there are several regencies and provinces that are depending their regional income from the tourism sector but do not receive sustained investment numbers, followed by their inability to realize proper investment for developing their regional tourism industry as seen by the low quality of their tourism infrastructures. Based on Ministry of Finance and Central

³⁸ Petrus Soerjowinoto, *Op.Cit.*, 3.

Bureau of Statistics, below are the top 10 regencies/cities in Indonesia that depends their regional income from the tourism sector in 2019³⁹:

TABLE II. *TOP 10 REGENCY/CITY WITH THE HIGHEST TOURISM SECTOR CONTRIBUTION TO REGIONAL INCOME (2019)*

No.	Regency/City, Province	Tourism Sector Contribution to Regional Income (%)
1	Badung, Bali	71.36
2	Sumba Barat, Nusa Tenggara Timur	69.19
3	Supiori, Papua	66.73
4	Kepulauan Anambas, Kepulauan Riau	62.66
5	Bintan, Kepulauan Riau	60.80
6	Lombok Utara, Nusa Tenggara Barat	57.69
7	Gianyar, Bali	54.29
8	Murung Raya, Kalimantan Tengah	53.35
9	Dogiyai, Papua	53.16
10	Mimika, Papua	49.77

Source: Ministry of Finance and Central Bureau of Statistics, 2019.

The above information shows certain areas in Indonesia that depended their regional income from the tourism sector but in the same year, their investment realization in the tourism sector was not high enough as could be seen from the previous BKPM's data. Moreover, there are still poor communities in areas with great tourism potential, therefore it can be said that the goals of tourism management have not been completely achieved⁴⁰. This could be considered a great challenge for them, especially for the eastern Indonesia area (since three

³⁹ Islahuddin, 2019, "10 Wilayah yang Bergantung Pada Wisata", Available on website: <https://beritagar.id/artikel/berita/10-wilayah-yang-bergantung-pada-wisata>, Accessed July 20th, 2022.

⁴⁰ Kamal Fahmi Kurnia, "Peraturan Penyelenggaraan Kepariwisata Dalam Perspektif Negara Kesejahteraan," *Jurnal Hukum Doctrinal*, Vol. 4, No. 1, March 2019, p. 909.

regencies in Papua were listed on the table above) like Maluku and Papua which have great tourism potential but low in tourism investment realization. It is also become more ironic knowing these areas are suitable to be Indonesia's top ecotourism destinations that are interested by millennials and their new green-tourism trend⁴¹.

In principle, there are certain factors that could improve investment realization numbers and notary is one of them. Through its drawn corporate deeds, a notary involves in a business establishment process and businesses are the concrete form of the investment realization itself. The low number of tourism sector investment realization in eastern Indonesia is also followed up by the fact that the number of notaries in this area is still low. According to former General Secretary of Central Administrator - Indonesia Notary Association or *Ikatan Notaris Indonesia* ("INI"), Yualita Widyadhari (now General Chairwoman of INI), 75% of notaries in Indonesia are distributed in Java⁴². As an illustration, former Head Program of Notarial Law Universitas Indonesia, Widodo Suryandono, stated that there is only one notary in Kaimana, Papua⁴³. Therefore, it could be learned that the Government's effort in creating an ease of doing business in lack-investment areas shall be followed by the presence of notary as its supporting element.

4. Conclusion

Based on the discussion above, it is concluded that a notary has a significant role in tourism business development through its drawn authentic deed during the business establishment stage. The information provided under the drawn corporate deeds such as DOE and AOA will determine the licensing requirements that shall be fulfilled by business players to establish and perform their business legally. Reflecting on this condition, a notary shall actively explore their client's business intention as he/she shall incorporate such intention clearly in the drawn corporate deeds. A notary must also ensure that his/her drawn corporate deeds have complied with the related prevailing laws. This should be understood since the current Government's licensing policy demands more specific business information under the corporate documents for the purpose of corporate assessment in granting licensing requirements and relaxations.

⁴¹ See: Janianton Damanik, "Modal dan Peluang Ekowisata," Kompas, 12th April 2022.

⁴² Eko Sutriyanto, January 18th 2016 "Tidak Hanya Kurang, Tenaga Notaris Kurang Merata di Wilayah Indonesia", Available on website: <https://www.tribunnews.com/nasional/2016/01/18/tidak-hanya-kurang-tenaga-notaris-kurang-merata-di-wilayah-indonesia>, Accessed July 20th, 2022.

⁴³ Lestantya R. Baskoro, 2018, "Indonesia Masih Kekurangan Notaris", Available on website: <https://hukum.tempo.co/read/1062029/indonesia-masih-kekurangan-notaris/full&view=ok>., Accessed July 20th, 2022.

Regarding on tourism sector, a notary shall have proper knowledge of both tourism as a business and its relevant law, moreover for a notary who is appointed in the tourism destination area. It is important to realize that the presence of notary in tourism destination areas affects the development of this sector at the regional level, therefore the quality and quantity of notaries in these areas shall be sufficient enough.

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