

## **The Role of Design and Analysis of the Agreement Made In the Notary**

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**Abstract:** The purpose of this study is to know what the role of design and analysis of agreements made before the notary, and to know what constraints often found notary in designing an agreement. The method of this research is normative research, ie research on legal principles, synchronization and legal system by using legal interpretation.

**Keyword:** The Role Of Design, Analysis Of The Agreement

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### **I. INTRODUCTION**

The development of business transactions related to the investment climate has been growing quite rapidly. The presence of Law No. 25 of 2007 on investment is expected that investors, both foreign investors and domestic investors can invest in Indonesia<sup>1</sup>. The current rules mentioned are not able to compensate for the speed of the birth of these policy packages, making policy focus more difficult to be realized. Or it can be said that economic development grows and develops in all fields by following the free trade system, the development of the law runs slowly, so that the Indonesian nation must race against global economic development in the atmosphere of development of a stagnant national law. Economic development and economic institutions of Indonesia are not followed by the development of laws that support and manage the economy adequately. One of the impacts of the lagging of Indonesian law in regulating and overseeing the development of business today, namely the number of business people, especially those who have dominance in the case of capital unilaterally determine the clauses in the agreement as a result of not or not yet regulated in the legislation . Or on the other side of the business indirectly began to submit to foreign law which basically has not been regulated in the legislation of Indonesia because of the need to follow the development of the global economy that ultimately foreign parties have dominance in terms of design of existing agreements. In general, an agreement is designed and designed by only one party and signed without judicial and in-depth analysis of the law used. While the parties have equal opportunity in determining the things to be agreed upon<sup>2</sup>.

The law is not an entirely autonomous institution, but rather in a position linked to other sectors of life in society. One aspect of such circumstances is that the law must always make adjustments to the goals to be achieved by society, the Law has dynamics. Legal politics is one of the factors causing such dynamics to occur, because it leads to *iure constituendo*, the law that should apply. Legal reform should also be interpreted as a selection of the old legal product to keep taking values that are in accordance with the ideality and reality of the State of Indonesia or because of its universal nature.

In Indonesia until now the provisions on the treaty law are still regulated in the old legal rules, which in its own place, ie in the Netherlands the law has been amended.

The current treaty law in Indonesia is the Covenant Law as contained in Book III of the Civil Code (Civil Code). In fact, various types of agreements have grown and developed within the community as a result of global economic developments such as franchise, joint venture, contract construction and engineering, licensing, agency and distributions, power plant, Hire purchase, Trustee Agreement, Merger Agreement, Loan Syndication , and of course there are many more.

Therefore, the ability to formulate and design agreements is a requirement that must be possessed in a business negotiation which in practice is applied in placing bargaining position (bargaining position). Rudhi Prasetya mentioned that the technique of negotiating skill is one of the factors of success, but ultimately the most decisive "bargaining position" of the parties. Technical matters such as the design and analysis of treaties or agreements that are made in the legislation that ultimately lead to many legal problems behind the day.

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<sup>1</sup> NS. Indiraharti. Aspek Keabsahan dalam Hukum perjanjian. Jurnal Hukum PROIRIS, 2013

<sup>2</sup> Virza Benzani, Tesis tentang Peranan perancangan dan analisa perjanjian dalam hukum bisnis

## **II. PROBLEM FORMULATION**

Based on the background that has been described above, then the issues that will be the author discuss is as follows

What is the role of design and analysis of agreements made before the notary? and What are the constraints facing the notary in designing an agreement?

## **III. THEORETICAL FRAMEWORK**

### **1. The Law of Engagement, Agreement, and Contract**

The law of engagement is a distinctive legal concept in the civil law system. This legal institution is derived from the Roman legal tradition. The Laws of Engagement in the civil law system, as adopted by France, Germany, the Netherlands, Spain and Indonesia, constitute a unity which includes the Law of Contract and the act against the Law. The two areas of law are placed in a common category, the Law of Alliance<sup>3</sup>.

In the Indonesian legal system, the engagement is placed in Book III Het Burgerlijk Wetboek voor indonesie (here translated into Indonesian into the Civil Code) concerning the Engagement, herein set out an engagement that is born out of treaties (agreements) and engagements born due to laws such as unlawful acts, voluntary representation, and unpaid payments.<sup>4</sup>

The meaning of the word engagement or verbintenis or obligation can be traced to an old source in Roman law. The first term used is obligare. Also known as the term obligation by literal obligation means "one is bound". Today the word bondation is broader. The word refers to a reciprocal relationship that shows a person has the personal right to demand another person as an obligation to be fulfilled. The party that has the obligation is referred to as the debtor, while the other party entitled to demand the fulfillment of such obligations is the creditor<sup>5</sup>.

The law of Engagement is the translation of Verbintenissenrecht (Dutch). The law of engagement is the whole law of the ordering of the engagement, the apache is examined by definition, it appears that the study object of the Engagement Law is not only the obligations known in Book III of the Civil Code, but also the attachments known in Book I The Civil Code, namely the engagement in the field of Family and Moral Law, but some opinions tend to define the Engagement Law whose object of study is focused on Book II and Book III of the Civil Code, and defines as a rule of law governing the legal relationship between one legal subject and the legal subject the other in the field of property, where the subject of law that one is entitled to an achievement, while other legal subjects are obliged to meet the achievements<sup>6</sup>.

Based on the definition of engagement, can be drawn elements inherent in the engagement namely: Legal relationships are relations that are regulated and recognized by law. This legal relationship will eventually result in certain legal consequences. In the legal relationship, the relationship between the two parties inherent a right on one side and obligations on the one hand. These rights and obligations can be maintained before the courts.

In the field of Wealth Law The law of wealth is the legal provisions relating to the haka and the obligations that can be judged by wealth. This wealth is the whole Rights and Duties of the person (personen). The party's relationship to the engagement must be a legal relation of wealth. The legal relationship in the property law is the legal relationship of money arising from the engagement of things and the obligation must have a monetary value or at least can be spelled out with a certain amount of money. So, not to determine whether the legal relationship is a benchmark used is the relationship must be assessed with some money.

The parties to the engagement are the subject of the engagement. The subject of this engagement is two parties, namely the debtor and the creditor. The debtor is the party that has the obligation to implement an achievement, while the creditor is the party who has the right to fulfill an achievement of the debtor. The party in the engagement is not identical to the person. In the context of Civil Law one can mean a personal being may also include a legal entity. A debtor or creditor may consist of several persons or legal entities.

Achievement is the object of engagement. Achievement itself is a debt or obligation that must be implemented in a bond. Article 1234 of the Civil Code Law provides the following classification of achievement:

- a. giving something;
- b. do something;
- c. do nothing;

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<sup>3</sup> Khairandy, Ridwan, 2013. *Hukum Perjanjian Indonesia dalam Perspektif Perbandingan*. Yogyakarta: FH.UII Press.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> HS. Salim, 2011, *pengantar Hukum Perdata tertulis (BW)*. Jakarta: Sinar Grafika.

Then achievement as the object of engagement must meet certain conditions, namely must be specific or at least determined, The object is authorized by the Law, and the achievement should be possible<sup>7</sup>.

## **2. Understanding The Agreement**

In Indonesian law the notion of agreement is found in article 1313 of the Civil Code (herein referred to as the treaty); "An agreement is an action by which one or more persons commit themselves to one or more persons". The notion of agreement by Steven H. Gifis, as quoted by Munir Fuady, gives the understanding of the agreement as an agreement, or a series of agreements whereby the law provides redress against default. of the treaty, or to the implementation of the treaty by law is considered a duty in the Legal Dictionary, the treaty is a written agreement between two parties in trading, lease and so forth.

In the same definition of the treaty is a legal sanctioned agreement between two more to engage in or not engage in engagement activities Whereas the meaning of the agreement in the same dictionary is an agreement made by two or more written or oral parties, each agreeing to comply with the content of the Agreement which have been created together. The notion of agreement as mentioned by Lawren M. Friedman in his book American Law, defines the notion of agreement with "Contracts is the body of law that by a large concerns voluntary agreement. The Agreement is a legal instrument generally concerned with voluntary agreements. While understanding the agreement in Terminology Law, English-Indonesia; is an agreement between two or more parties which, in consequence, each will perform or not perform a particular action. As quoted by I.G.Ray Wijaya, in his book Designing a Covenant, the understanding of the agreement in the Black's Law Dictionary, the agreement is defined as a covenant agreement between two or more persons that creates an obligation to do or to not do anything special. Contract: An agreement between to and more persons which creates an obligation to do or not to do a peculiar thing ". In view of the limitations of this agreement, it can be said that between the treaty and the covenant have the same meaning, also according to the Black's Law Dictionary, it is said that Agreement also has a broader understanding of the agreement<sup>8</sup>.

So does the agreement in Black's Law Dictionary (Seventh Edition 1999) Contract; an agreement between two or more parties creating obligations that are enforceable or other wise recognizable at law (a binding contract); In everyday practice, the terms of the agreement give some impression or connotation, among others, (1) the agreement is only to set a written agreement; (2) an agreement is a law governing mere business agreements; (3) agreements are also often interpreted as international treaties or agreements with international, multinational corporations; (4) The law of the sole agreement of the law governing the treaties whose performance is exercised by both parties. An agreement is an event in which two or more persons promise to do or not to engage in a particular activity, usually in writing. The agreement or "Contracts" (in English) and "Overeenkomst" (in Dutch) in a broader sense are often referred to as the covenant term, although in this description the author uses the terms of the agreement for the treaty which in fact has almost the same meaning.

## **IV. DISCUSSION**

### **Review of Notary Position**

Notary comes from the Roman language Notarius which has the meaning as a scribe wrote. Notarius name is derived from the word Literaria Memota which means a sign of writing (letter mark) or a character that states a word used to write or describe something. This term gradually has a different meaning from the original, it is estimated that in the second century AD which is called by that name are those who record with fast writing. In northern Italy which is the center of commerce, the notary is known as Latijnse Notariaat. The characteristics or characteristics of this institution are then reflected in the current notary:

- a) appointed by the general authorities;
- b) for the benefit of the general public; and
- c) receive his services (honorarium) from the general public.

In Indonesia, a notary has been known since the Dutch when colonizing Indonesia. In its development the Notarial Law enacted in the Netherlands further became the basis of the laws and regulations of Notariat. which is enforced in Indonesia. At that time precisely on August 27, 1620, under the Dutch Government someone who was first appointed as a notary is Meichior Kerchem. After the appointment by Governor General Jan Pieterszoon Coen, then the number of notaries in the city of Jakarta is added, and since the need for the notary services is very much needed, not only in Jakarta but also outside the city of Jakarta then subsequently appointed notaries by the authorities- local authorities. Thus began a notary developing in the territory of Indonesia that applied in Indonesia. At that time precisely on August 27, 1620, under the Dutch Government someone who was first appointed as a notary is Meichior Kerchem. After the appointment by Governor General Jan Pieterszoon Coen, then the number of notaries in the city of Jakarta is added, and since the need for the notary services is very much needed, not only in Jakarta but also outside the city of Jakarta then subsequently

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

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#### **V. NOTARY Public Officer**

According to Matome M. Ratiba in his book *Convecaying Law for Paralegals and Law Students* states: "Notary is a qualified attorneys which is admitted by the court and is an officer of the court in both his office as notary and attorney and as notary he enjoys special privileges." The position of notary is essentially a public (privatenotary) officer commissioned by the general authority to serve the needs of the community for authentic evidence which provides certainty of civil law relationships, so, as long as authentic evidences are still required by the legal system of the state then the notary's office will still need its existence in middle of society. Article 1 of the UUJN states that "a Notary is a public official authorized to make an authentic deed and other authority referred to in this Law." In Article 1 Sub-Article 1 of the UUJN-P affirms that "a Notary is a public official authorized to create an authentic deed and has other authorities as referred to in this Act or under any other Act."

The validity of a notary public office as a general official also derives from Article 1868 of the Civil Code which states that, "An authentic deed is a deed in the form prescribed by law made by or in the presence of the ruling general official for that place in which the deed is made". Under this provision it is clear that an authentic deed must be made by or in the presence of a public official, and a notary legal product of an authentic deed is a product of a public official. Authentic deeds can not be released with the power of proof. The purpose of the confrontants comes before a notary and asks to pour it in an authentic deed whether to be made by a notary or by an interlocutor is to have the legal act done by obtaining legal certainty. The parties may make the agreement that has been poured into the authentic deed as a powerful and perfect evidence. Article 1870 of the Civil Code provides that authentic deeds provide certainty between the parties and their heirs or those entitled to them, a perfect proof of what is contained therein. The power of perfect proof is the evidentiary power of the evidences that causes the value of proof of evidence which causes the value of proof of the evidence to be sufficient upon itself. Simply in the sense that certain evidence does not require other evidence to prove an event, legal relationship, or rights and obligations. For example, land certificates as authentic deeds have perfect proof power to prove one's ownership of the land in the certificate, without requiring the testimony of witnesses or other evidence.

A deed is a writing which was deliberately made to be evidence when an event was signed and signed.<sup>60</sup> Thus, an authentic deed made by or in the presence of a notary is expected to ensure the certainty, order and protection of the law. According to R. Soegondo argued that to be able to make an authentic deed, a person must have a position as a public official. In Indonesia, an advocate, even if he is an expert in law, is not authorized to make an authentic deed, as it has no position as a public official. Instead a civil registry employee (*Ambtenaarvande Burgerlijke Stand*) even though he is not a lawyer, he is entitled to make an authentic deed for certain things, for example to make birth certificates, marriage certificates, death certificates. This is because civil registry officers by law are designated as general officials and authorized to make those deeds.

Based on Law no. 2 Year 2014 on the position of Notary, hereinafter referred to as UUJN, can be seen that Notary has important role and function in legality of transaction in Indonesia, even notary also understood as trusted third party. The services of a notary have become a necessity of society, not only in the making of deed, but also as a witness or mediator of the transactions conducted.<sup>7</sup> However, UUJN has not explicitly regulated the authority of notary in the notarial deed of electronic notary. Article 1 point 7 UUJN states: "Notarial deed, hereinafter referred to as Deed, is an authentic deed made by or in the presence of a Notary under the form and ordinances established in this Law".

Editorial Article 1 point 7 UUJN, provides an understanding that notarial deed must be made before the notary, meaning that the parties must face to the notary. Thus, the notarial notarial deed above, indicates that the opportunity to make notarial deed by utilizing the development of information technology is very small, considering the Notary Law requires the making of the deed held before the notary. Similarly, the arrangement can be used as the legal basis for making the deed electronically in Law no. 11 Year 2008 on Information and Electronic Transactions hereinafter referred to as the ITE Law. This law expressly imposes restrictions on the notary's authority to make the deed electronically. This may be observed in the provisions of Article 5 paragraph (4) of the ITE Law, stating that Electronic Information and / or Electronic Documents as referred to in paragraph (1) shall not apply to letters which by law shall be made in writing and letters along with their documents which by law shall be made in the form of a notarial deed or deed made by the official deed.

Based on the legal substance of UUJN and the Civil Code which regulates the mechanism of authentic deed making, and the requirement of authenticity of notary deed, it is understood that the use of notarized deed electronically by the notary does not fulfill the authentic authenticity requirement. The use of notarized deeds electronically made by a notary does not conform to the function and purpose of authentic deed making, which provides legal certainty and has evidentiary value.

The Civil Code is a general rule of law governing the notary's authority as a public official, whereas the notary's office law is a *lex specialis* of the rules governing the duties and authorities of notaries as public officials. Similarly, Law no. 11 of 2008 on Information and Electronic Transactions, as a special rule (*lex specialis*) of the general provisions concerning transactions conventionally regulated in the Civil Code. Thus, analyzing the concept of application of information and communication technology in making the notarial deed of the third notary must be done further assessment of the three laws.

The phenomenon that currently occurs in the community, that the people feel the benefits of communication done electronically, whether it's doing e-commerce transactions (e-commerce), make an agreement / contract (e-contract) and so forth. This fact, when it is associated with the prevailing laws regulating the authority of the notarial office, has not fully accommodated the benefit of the law, thus providing legal guarantees for the community<sup>9</sup>.

The notary authority regulated in Article 15 paragraph (1) in conjunction with Article 1868 Civil Code, if it is related to the electronic deed making can be done basically by using video conference communication technology. The problem, however, is whether the authority of notary deed contained in Article 1868 Civil Code can be fulfilled.

## VI. CONCLUSION

1. Notary is a public official authorized to make an authentic deed and has other authorities as referred to in this Act or under any other law. Notarial Deed (Deed) is an authentic deed created by or in the presence of a Notary under the form and ordinance specified in the Notary's Office Law. There are 2 (two) types / categories of deeds, namely deeds made by Notaries, commonly referred to as the Deed of *Relaas* or *Minutes*, and deeds made before the (*overbaan*) Notary Public, commonly referred to as the Deed of *Parties* or the Act of *Partij*
2. Constraints faced by Naotaris in the making of Notary Deed are made on the basis of the request of the parties, without the request of the parties, the deed will not be made by the Notary, the Act of *Relaas* is a deed made by Notary on the request of the parties, in order Notary to record or write down everything something that is discussed by parties related to legal action, lies in the honesty and integrity of the parties in providing information that will be published in the deed.

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