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Legal Certainty of the Role of Notaries in Electronic General Meetings of Shareholders of Limited Liability Companies in an Effort to Support the Asean Economic Community

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Abstract: Technological advances and in an effort to improve services to the community, a concept has been introduced in the world of public services that uses Information and Communication Technology (ICT) such as the General Meeting of Shareholders (GMS) of Limited Liability Companies which can be conducted conventionally or via teleconference or videoconference, thus demanding the role of Notaries in an effort to provide legal certainty for the implementation of the General Meeting of Shareholders (GMS) of Limited Liability Companies. The problem in this study is how is the legal certainty of the role of notaries in general meetings of shareholders of limited liability companies electronically in an effort to support the ASEAN Economic Community? This study is a normative legal study using secondary data and analyzed descriptively. The results of the study show that the legal certainty of the role of notaries in general meetings of shareholders of limited liability companies electronically in an effort to support the ASEAN Economic Community can be carried out by playing a role in organizing electronic certification as a registration authority (RA) that verifies data and the identity of users of electronic signatures, for example in the case of General Meetings of Shareholders (GMS) of Limited Liability Companies which can be conducted conventionally or via teleconference or videoconference. If done by teleconference or videoconference, then everything that is discussed that occurs must be recorded and stored in a storage medium for that purpose as an Electronic Document and must be stored by the Notary as part of the Minutes of the Deed, also as part of the Notary Protocol, which at some point if needed, for example for evidence in court can be reopened. However, the Notary's obligation is to continue to make the Minutes of the Deed in the form of ordinary paper, which has been done so far.

Keyword: Legal Certainty, Notary, ASEAN Economic Community.

INTRODUCTION

The opening of the 1945 Constitution of the Republic of Indonesia contains the basis of the state, namely Pancasila. The opening in part III states that the articles of the Constitution of the Republic of Indonesia are the embodiment of the opening, which also means showing the

implementation of Pancasila. One of the mandates in the constitution is development in the field of people's prosperity through science and technology.

Along with the development of science and technology, especially in the field of information technology that allows the absence of boundaries between domestic and even international regions. This requires nations in the world to adapt both in the development of human resources, natural resources and even economic development. This means that in the future with the development of technology and information, any relationship including the economy will move towards a free era. This has happened in the ASEAN Economic Community (AEC).

The ASEAN Economic Community or ASEAN Community is a manifestation of intra-ASEAN cooperation in the Declaration of ASEAN Concord II in Bali, October 2003. The ASEAN Economic Community is one of the pillars of the realization of ASEAN Vision 2020, together with the ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC).

A very large community of ASEAN countries, there are no territorial boundaries in the economic sector. Where a country can freely enter market competition. The ASEAN economic community is free from various obstacles, prioritizing increased connectivity, utilizing various cooperation schemes both intra-ASEAN and between ASEAN and partner countries, especially FTA partners, and strengthening the role of entrepreneurs in the process of internal integration of ASEAN and with partner countries.

According to Rizal and Aida, the formation of the ASEAN Economic Community is carried out through four strategic frameworks, namely achieving a single market and a unified production base, a competitive economic region, equitable economic growth and integration with the global economy. These integration steps are strategic in achieving strong competitiveness and on the other hand will contribute positively to society. ASEAN as a whole and individual member countries. The establishment of the ASEAN Economic Community also makes ASEAN's position stronger in facing international negotiations, both in responding to the increasing tendency of regional cooperation, and in ASEAN's bargaining position with dialogue partners, such as China, Korea, Japan, Australia-New Zealand, and India.

Achieving the ASEAN Economic Community requires the implementation of liberalization and cooperation measures, including enhanced cooperation and integration in new areas such as: human resource development and capacity building; closer consultation on macroeconomic and financial policies; trade financing policies; improved infrastructure and communication linkages; development of electronic transactions through e-ASEAN; industrial integration to leverage regional resources; and increased private sector involvement. One of the parties that has a role in the success of the ASEAN Economic Community is the Notary.

A Notary is a Public Official who is authorized to make authentic deeds and other authorities as referred to in Law Number 30 of 2004 concerning the Position of Notary. Authentic writings in the form of authentic deeds made in a form determined by law, made before authorized officials and at the place where the deed was made. In the era of the ASEAN Economic Community which will enter freely into market competition, of course it will also have an impact on the profession of Notary who works in the legal field.

in the realm of making deeds of agreement between citizens or between institutions, both government and non-government, as well as making deeds related to land rights, One example is the General Meeting of Shareholders activity which was initially carried out by meeting directly and face to face, but with the development of technology, it can be done via teleconference media (Teleconference GMS) where the signing of a notarial deed will also be possible electronically.

Based on the background above, the problem in this research is how to ensure legal certainty for the role of notaries in electronic general meetings of shareholders of limited liability companies in an effort to support the ASEAN Economic Community?

METHOD

This research is basically a normative legal research, because the target of this research is law or normative principles in the form of legal principles and legal systems. Normative research in this study is research that describes or illustrates in detail, systematically, comprehensively and in depth the basis for thinking about the legal certainty of the role of notaries in general meetings of shareholders of limited liability companies electronically in an effort to support the ASEAN Economic Community.

This research is descriptive in nature because it describes the applicable laws and regulations and is linked to legal theories in their implementation practices related to the problems to be studied. The data obtained will be analyzed using qualitative analysis.

RESULTS AND DISCUSSION

Notaries Deed and Legal Certainty

L.J. van Apeldoorn is of the opinion that the meaning of legal certainty is the certainty of a law. However, legal certainty does not create justice because the definite values in the law require certain things, whereas the interests of humans/residents are never certain. Rochmat Soemitro has a different opinion, legal certainty is justice because the legal certainty that is manifested in the law has accommodated the value of justice. Legal certainty is certainty, namely the aim of every law. In making laws and regulations that are binding on the public, efforts must be made to ensure that the provisions contained in the law are clear, firm and do not contain double meanings or provide the opportunity for other interpretations.

Legal certainty should contain the value of justice. Legal certainty is the enforcement of all applicable written laws and regulations in the life of society, nation and state. This means that a law is said to have legal certainty if it is fair and can be applied in law enforcement practices. However, justice here is not individual justice but equal justice or social justice so that law enforcement for the sake of social justice can ignore individual justice and even human rights.

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law is enforced, that those who are legally entitled can obtain their rights and that decisions can be implemented. The aim of legal certainty is to create legal protection which has the meaning of protection using legal means or protection provided by law, aimed at protecting certain interests, namely by making the interests that need to be protected into a legal right. This also applies to notarial deeds which have perfect evidentiary force.

A deed made before or by a notary is considered an authentic deed according to the form and procedures stipulated in the provisions of Article 1 number 7 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, that a Notarial Deed, hereinafter referred to as a deed, is an authentic deed made by or before a notary according to the provisions and procedures stipulated in this law.

A deed is a form of proof through writing that is deliberately created to explain a legal act. Authentic deeds have perfect evidentiary power, so they do not need to be made or supplemented with other evidence. If a party denies it, that party must prove their statement in accordance with applicable legal regulations.

An authentic deed has the power of proof both physically, formally and materially, with the following explanation:

1. The power of proof is born (uitwenduge bewijskracht)

The power of external proof (uitwenduge bewijskracht) is the power of proof based on the external condition of the deed, meaning that a letter that looks like a deed must be accepted, considered, and treated as a deed, until proven otherwise. This external proof emphasizes that an authentic deed physically has the power to prove its own validity as an authentic one.

2. Formal Proof of Power (formele bewijskracht)

Formal proof of an authentic deed is proof based on the truth of what is described by the official who made the deed in the authentic deed, the truth of the date and time the deed was made, the truth of the signatures contained in the deed, the truth of the identity of the parties in the deed and the place where the deed was made. This proof guarantees the truth of what exists and is stated in the deed, regarding the statements and signatures of the parties.

The power of this formal proof in an authentic deed is proven, that the public official concerned has stated in writing, as stated in the deed regarding the truth of what is described in the deed as something that was done and witnessed in carrying out his position. In a formal sense, as far as the *ambtelijke* act proves the truth of what was witnessed, namely what was seen, heard by the official himself in carrying out his position. In a formal sense, the truth and certainty of the date of a deed, the truth of the signature contained in the deed, the truth regarding the identity of the person present, the place where the deed was made are guaranteed. In terms of this formal proof, the position of the *partij akten* and *ambtelijke akten* are the same.

3. Strength of Material Evidence (*materielle bewijskracht*)

It is the power of proof based on the truth or falsity of the contents of the statement signed in an authentic deed. That the legal event stated in the authentic deed really happened, so that it can provide certainty regarding the material of the deed. Thus, proof is based on the desire for others to assume that the contents and for whom the contents of the information in the deed apply, as true information and is intended to be used as evidence for themselves. So from this point of view, a deed only provides evidence for the parties in the deed.

In *materiele bewijskracht* explains that regarding the certainty of what is stated in the deed or proving that which is valid for the parties who made the deed or those who receive rights and obligations because of the deed, unless there is evidence to the contrary. This means that not only the reality is proven by an authentic deed, but the contents of the deed are considered proven as true for every person who orders a deed to be made as evidence against him.

Shareholders of Limited Liability Companies in an Effort to Support the ASEAN Economic Community

Indonesia is one of the countries with the largest population in the Southeast Asia region. Indonesia is a heterogeneous country with various types of tribes, languages, and customs that stretch from Sabang to Merauke. The ASEAN Economic Community in 2015 was formed with the mission of making the ASEAN economy better and able to compete with countries whose economies are considered more advanced.

In addition, this step is also expected to make ASEAN's position more strategic in the international arena. Indonesia hopes that the realization of the ASEAN economic community can open the eyes of all parties, so that there is a dialogue between sectors. Later, it is also expected that there will be mutual complementarity among stakeholders in the economic sector in these ASEAN countries. For example, infrastructure. When talking about infrastructure, perhaps Indonesia is still considered very lacking, be it in the form of highways, airports, ports, and so on. In this case, Indonesia can benefit and exchange experiences with other ASEAN members. When viewed from the demographic side of human resources (HR), Indonesia in facing the ASEAN Economic Community is actually one of the productive countries. When viewed from the age factor, based on BPS data in 2013, the majority of Indonesia's population or around 70% of it is of productive age. One of the fields that is of productive age is Notary.

The position of Notary is held or its presence is required by legal regulations with the aim of helping and serving the community who need authentic written evidence regarding circumstances, events or legal acts. Article 16 of Law Number 30 of 2004 concerning the Position of Notary regulates the Obligations of Notaries.

If a Notary does not carry out the obligations as referred to in Article 16 paragraph (1) letters a to k, then the Notary concerned will be subject to administrative sanctions as regulated

in Article 84 of Law Number 30 of 2004 concerning the Position of Notary, whereas a Notary who does not carry out the Obligations as regulated in Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary, then the deed made before or by the Notary concerned, will result in the deed only having the force of proof as a private deed or the deed being null and void by law, which can be a reason for the party who suffers a loss to demand reimbursement of costs, damages and interest from the Notary concerned.

The obligations of a Notary as stated in Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary, namely reading the deed before the person appearing in the presence of at least 2 (two) witnesses and signed at that time by the person appearing, witnesses and Notary. In the Explanation it is emphasized that the Notary must be physically present and sign the deed before the person appearing and witnesses.

The substance of the article must be linked to Article 39 paragraph (2) and (3) of Law Number 30 of 2004 concerning the Position of Notary, which emphasizes that the Notary must know the parties appearing, and this introduction must be stated explicitly in the deed, and for witnesses it is also stated in Article 40 paragraph (3) and (4) of Law Number 30 of 2004 concerning the Position of Notary. The substance of the articles is that the parties appearing, the witnesses and the Notary must be known to the Notary based on their identity shown to the Notary, and be in the same place at that time and be physically present, both the parties appearing, the witnesses and the Notary.

The substance of these articles becomes contradictory if linked to Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, which states that in addition to holding a GMS as referred to in Article 76 of Law Number 40 of 2007 concerning Limited Liability Companies, a GMS can also be held via teleconference, video conference or other electronic media which allows all GMS participants to see and hear each other directly and participate in the meeting.

In the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies, what is meant by approved and signed is approved and signed physically or electronically. So far, if a limited liability company holds a General Meeting of Shareholders (GMS), it is done conventionally, namely the persons appearing, witnesses and Notary must be in the same place and at the same time, and be physically present before a Notary as stipulated in Article 76 of Law Number 40 of 2007 concerning Limited Liability Companies. However, based on Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, a GMS may be held outside the provisions stated in Article 76 of Law Number 40 of 2007 concerning Limited Liability Companies.

The substance of the two articles is regulated in different laws, the implementation of the duties of a Notary is regulated in Law Number 30 of 2004 concerning the Position of Notary and the establishment of a limited company is regulated in Law Number 40 of 2007 concerning Limited Liability Companies, one of the articles of which in implementing the GMS has eliminated the provisions regarding the obligations of Notaries as referred to in Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary.

These two conflicting regulations can put a Notary in a corner when the GMS deed is problematic or as evidence in the legal process, in the sense that if there is a problem regarding the results of the GMS regarding the procedure for making a Notary deed, is it subject to Article 16 paragraph (1) i of Law Number 30 of 2004 concerning the Position of Notary or to Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies and the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies. These problems can be seen from various aspects, including from the aspect of the principle of statutory preference *lex specialis derogate legi generali*, then and the electronic evidence (evidence) aspect.

The principle of legislative *lex specialis derogate legi generali*, This principle refers to two laws and regulations that hierarchically have the same position, and the legal act is ordered

by law, and the one that makes the law is the same institution. However, the scope or substance of the two laws and regulations is not the same. In this case, Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary regulates the obligations of Notaries, that in making a deed, the parties, witnesses and Notaries must be present at the same time, place and physically face each other, and if this is not done, there will be sanctions for/against the Notary, while Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies regulates that in making a deed of a GMS of a limited liability company, physical presence is not required, because electronic media can be used, what is important is that the participants of the GMS and the Notary can hear and see each other and participate, and signatures can be done electronically.

In the position as above, then the *lex generalis*, namely Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary and its *lex specialis*, namely Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies. With this kind of legal construction, then the provisions of sanctions contained in Article 84 of Law Number 30 of 2004 concerning the Position of Notary if Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary, if the Notary does not carry it out becomes invalid. And Article 16 paragraph (1) letter i of Law Number 30 of 2004 concerning the Position of Notary only applies to deeds other than the GMS deed referred to in Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies.

On the second issue, that the deed of the GMS as the implementation of Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies will be made in the form of a copy that has often been made by Notaries, which needs to be given a clear position, namely regarding the procedure or method of the electronic GMS, can it be used as evidence in court? The author is of the opinion, Notaries in the era of electronic activities entering the ASEAN Economic Community can play a role in organizing electronic certification as a registration authority (RA) that verifies the data and identity of electronic signature users.

In the latest developments as mentioned above, in certain cases, evidence stored electronically can be accepted as valid evidence in court proceedings. Indeed, if the provisions of Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies can be carried out, then the Notary is obliged to store recordings of the GMS electronically which are part of the Notary's archives or minutes and also part of the Notary's Protocol, in anticipation of if at some point it is needed as evidence in the court process.

Specifically for Minutes and Copies or Notary Quotes, it is mandatory to make them on paper as has been done so far, they cannot be made in electronic media (as Electronic Documents). This is related to the provisions of Article 5 paragraph (1) and (4) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, that:

1. Electronic Information and/or Electronic Documents and/or printed results are valid legal evidence.
2. The provisions regarding Electronic Information and/or Electronic Documents as referred to in paragraph (1) do not apply to:
 - a. letters which according to the law must be made in written form; and

- b. a letter and its documents which according to the law must be made in the form of a notarial deed or a deed made by the deed-making official.

Another thing that also needs to be considered in implementing Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies regarding the beginning and end of the Notarial deed. As is known, Article 38 of Law Number 30 of 2004 concerning the Position of Notary Public is in substance for the parties appearing, witnesses and Notary to be in the same place, at the same time and physically together at that time and place. In this regard, it is necessary to make a clear statement regarding the GMS being implemented via electronic media

The provisions of Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies have opened a new era in the world of Notaries, at least the era of Notary by Digital for certain fields is permitted by law, although in this case further work is still needed, for example the government and Notary professional organizations to immediately create legal regulations regarding the technical implementation of GMS through the electronic media. Although now electronic media is already being used by Notaries for the process of ratifying a limited liability company as a body and other related matters through *Sisminbakum* (Article 9 paragraph (1) and its Explanation of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with Regulation of the Minister of Law and Human Rights of the Republic of Indonesia, Number: M-01-HT.01-10 of 2007 concerning Procedures for Submitting an Application for Ratification of a Legal Entity and Approval of Changes to the Articles of Association, Submission of Notification of Changes to the Articles of Association and Changes to Company Data).

In subsequent developments, the use of electronic media is not only to implement the provisions of Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies, but perhaps also for other legal actions, because what is important is that there is a legal basis for implementing it. As long as the legal basis does not yet exist, it cannot be implemented, except to implement the provisions of Article 77 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies in conjunction with the Explanation of Article 77 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies.

CONCLUSION

Legal certainty of the role of notaries in electronic general meetings of shareholders of limited liability companies in an effort to support the ASEAN Economic Community can be done by playing a role in organizing electronic certification as a registration authority (RA) that verifies the data and identity of users of electronic signatures, for example in the case of a General Meeting of Shareholders (GMS) of a Limited Liability Company which can be done conventionally or via teleconference or videoconference. If done via teleconference or videoconference, then everything discussed that occurs must be recorded and stored in a storage medium for this purpose as an Electronic Document and must be stored by the Notary as part of the Minutes of the Deed, also as part of the Notary Protocol, which at some point if needed, for example for evidence in court can be reopened. However, the Notary's obligation is to continue to make Minutes of the Deed in the form of plain paper which has been done so far.

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