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THE ROLE OF CYBER NOTARY IN THE FIELD OF DIGITAL INTERNATIONAL TRADE IN INDONESIA

Ridwan Sidharta* and Putu Eka Trisna Dewi

Master of Law, Postgraduate Program, Universitas Ngurah Rai, Denpasar, Bali-Indonesia

*E-mail: ridwansidharta@yahoo.com

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Abstract

In Indonesia, a notary refers to a public official appointed by the Government to perform some of the Government's functions in the field of civil law. In the context of Cyber Notary, the task of a public notary official is more to execute administrative processes combined with security technology by affixing a stamp/seal to a document/agreement file as a form of administration or registration of documents. This research is normative legal research. In this study, the legal materials which had been collected were analyzed in several stages, such as description, systematization and explanation. Philosophical nature of cyber notary in providing legal services to the community is based on the fundamentality of the theory of legal certainty which brings justice and legal certainty to the community into reality, especially through deeds made. The concept of cyber notary is to support Indonesia in the field of international trade based on UNCITRAL. Implementation of the UNCITRAL Model Law on Electronic Commerce in the application of electronic signatures in Indonesia has admittedly been regulated, such as in Article 11 paragraph 1 of the Electronic Information and Transaction Law and Article 59 paragraph 3 of Government Regulation No. 71 of 2019.

Keywords: cyber notary; international trade; electronic contract

1. INTRODUCTION

Technological advances have brought rapid changes and shifts in human being life without limits. The use of technology with this development has encouraged rapid business growth, because various information can be presented remotely and those who are to make transactions no longer have to meet face to face, but they make them only by using computer and telecommunications equipment (Dewi, 2019). Essentially, law moves dynamically, following the development of society (Riyanto, 2020); however, in a narrower sense, the law often lags behind in action in dealing with changing times and technological developments. The aspect of

human life that is developing rapidly is trading and sale and purchase. Sale and purchase of goods between countries is called international trade. From a legal perspective, this is transaction that involves the use of more than one national law (Tim Dibawah Pimpinan Prof. Hikmahanto Juwana, S.H., L.L.M., 2013).

A trade is called an international trade if the sale and purchase that is carried out results in a choice of law between two different legal systems and the goods traded must be transported across a country's borders. In the applicable legal order, it can be understood that the main elements of international trade include:

There is a cross-border sale and

purchase;

There is a choice of two different legal systems; and

There are foreign elements in the sale and purchase agreement (Simanjuntak, 2008).

In Indonesia, a notary refers to a public official appointed by the Government to perform some of the Government's functions in the field of civil law. This function is then understood as the authority possessed by a Notary as a public official. The main authority of a Notary is to make authentic deeds. An authentic deed is a deed drawn up before or by an authorized public official and in the form stipulated in the law. The legal system adopted by Indonesia is Continental European or Civil Law which considers that law is a written rule and puts forward written evidence as the strongest evidence. In the Indonesian legal system, an authentic deed has perfect evidentiary power, which means it is the strongest and can only be refuted as long as it can be proven otherwise. Notarial deed is an authentic deed as it is made by or before a Notary who has the authority and the form has been determined in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (*Undang-Undang Jabatan Notaris*, or abbreviated as *UUJN*).

For the notarial term, the 1961 Hague Convention gave rise to two concepts of the role of a Notary in realizing the effectiveness of electronic transactions - Cyber Notary and Electronic Notary (Supriadi, 2006). Cyber Notary was originally the brainchild of the American Bar Association Information Security Committee which was launched in 1994. This concept is widely implemented in countries that adhere to the Common Law system such as the United Kingdom, the United States, Canada and Australia, where a Notary is known as a Public Notary which is not appointed by an authorized official so that they are not bound by the necessity of a certain form or format of the deed regulated by law. In the Cyber Notary concept, the task of a public notary official is to perform administrative processes combined with security technology by affixing a stamp or seal to a

document or agreement document as a form of administration or registration of documents (Supriadi, 2006).

UNCITRAL (United Nation Commission on International Trade Law) has long provided recommendations regarding the legal value of electronic information and/or documents through the 1996 Model Law on E-Commerce, the United Convention on the Use of E-Communication in International Contracts on 2005, Model Law on E-Signatures 2001, and Promoting Confidence in E-Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods in 2009.

It is the actual time for Indonesian notaries to become cyber notaries in an effort to improve the service system in the notary sector in an effort to participate in advancing public welfare, educating the nation's life and implementing world order based on Pancasila in accordance with Paragraph 4 of the Preamble to the Constitution of the Republic of Indonesia of 1945. Because if the notary does not immediately make reforms regarding the *UUJN* and especially the notary itself, the notary will be confined in their own world. While today's modern world which is all cyber urgently demands all matters to be carried out practically, quickly, at affordable costs and certainly upholds the philosophical values of the notary itself in terms of credibility, dignity and status which are the most prioritized points in every measure of a notary.

In Indonesia, the notary's next role is to implement digital signatures on a number of agreement or contract documents in the context of international trade. To that end, in the present study the authors examine and analyze this matter more deeply by starting from the link between the practice of international buying and selling transactions and notarial practices. Notarial practice referred to in this study is the implementation of the Notary's position in relation to its authority in making authentic deeds.

This paper is a scientific work that is original or different from previous scientific writings. The advantage of this study compared to previous studies is that the present study focuses on discussing and analyzing the role of cyber notaries in the

field of digital international trade.

2. METHOD

This type of research is normative legal research. According to Peter Mahmud Marzuki, normative legal research is a process to find out legal rules, legal principles and legal doctrines to answer the legal issues at hand (Marzuki, 2010). This is in line with the prescriptive character of legal science. As a prescriptive legal science, legal science studies the purposes of law, the values of justice, the validity of legal rules, legal concepts and legal norms (Marzuki, 2010).

Approach is the researcher's point of view in choosing a spectrum of discussion space that is expected to be able to provide clarity on the description of a scientific work substance. In this study, the writers used several approaches: a statute approach; conceptual approach. These approaches are used because the legal issues that are the subject of discussion are related to certain legal concepts that are interrelated with one another.

The technique of analyzing legal materials in normative legal research includes that legal materials that have been collected are analyzed in steps which include description, systematization and explanation. The description is done by describing the content and structure of positive law, which is studied with the aim of looking into things to determine the meaning of the rule of law.

3. DISCUSSION

Philosophical Nature of Cyber Notary in Providing Legal Services to the Community

In the era of globalization, trade is no longer only carried out within one country, but can also be carried out between countries, known as international trade or international business (Dewi, 2021). The "borderless world" illustrates how quickly and rapidly technology is developing and playing a very crucial role, especially in communication technology such as being a liaison between individuals, community groups and corporations in a very fast and spectacular time without having to bring

parties who communicate to meet face to face (Dharmawan, 2015). Today, conventional transactions that use paper have changed to forms of transactions that use electronic systems. This is in line with the global agreement in the UNCITRAL forum which has long provided recommendations for legal value in electronic information and/or documents.

Indonesian Law, Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, was made appear as a manifestation of the government's efforts to provide legal certainty for transactions conducted electronically. As stated in the Electronic Information and Transaction Law, electronic system operators have an obligation to protect the data of users of their electronic system services so that they are not misused. The rationale for the existence of an obligation to protect the data of electronic system service users by electronic system operators is the precautionary principle (Mantili & Dewi, 2020).

In addition, the government also granted new authority for Notaries to certify transactions carried out electronically through the elucidation of Article 15 paragraph 3 of the Notary Office Act. The paragraph reads, "What is meant by "other authorities regulated in laws and regulations", among other things, refers to the authority to certify transactions carried out electronically (cyber notary), make deed of waqf pledge, and aircraft mortgage."

Ironically, the concept of cyber notary in Indonesia is still under debate. Even though technology allows the role of a Notary to play online and remote, legally it seems that this cannot be done. Therefore, the function and role of a Notary in the context of electronic transactions is very important to study in depth, with the aim that Indonesian Notaries can play a global role, especially in the context of international trade.

Philosophically there are various parameters in determining the size of the notary's ethical behavior, because there is no universal measure that applies throughout the world (Anshori, 2009). Even so, the measures that are not yet universal can be translated into principles or values that prevail and can be applied to a certain place, time and situation that is more or less commensurate. On a more concrete and factual level, it can be said that the measure for a notary's ethical behavior is what is referred to as a notary's code of ethics. Although the notary's code of ethics in practical terms raises issues concerning which authority is deemed authorized to make interpretations of the text of the notary's code of ethics, the code of ethics can already be used as a guideline to determine whether a notary is behaving ethically or unethically.

The course of the Notary profession seems to be faced with a problem that in the point of fact threatens the sustainability of the profession, such as that a notary official is required to maintain confidentiality about clients. Confidentiality about clients certainly becomes very sensitive for disclosure to public because the Notary in this case must comply with and obey the oath of office that cannot be challenged. In addition, Notaries who have responsibilities in the fields of private law, tax law, criminal law and notary discipline must serve the interests of the people, help create certainty and provide legal protection to members of the public in carrying out their positions in accordance with the provisions of laws and the Law on the Position of Notary Public (Dewi & Sidharta, 2022).

The position of a notary essentially has two fundamental core tasks – first, to provide service and legal certainty for the deeds they make; second, the notary is given the authority to maintain consistency in strengthening the law in civil law territory to guarantee a sense of security and peace to the public. If examined

based on the theory of legal certainty which highlights justice and legal certainty and if properly researched, this will guarantee the security and order of a state. Positive law is upheld and obeyed to achieve the goal of the law itself, that is to say, legal certainty and justice.

In general, if the idea of a cyber-notary can be implemented in Indonesia, the strength of proof of electronic information and transactions, which so far have often been perceived as having weak proving value, will have a stronger position because they can be understood like an authentic deed. Hence, this will increase public trust and security in electronic transactions. Even though the opportunity for a notary to play an electronic role seems invisible in the Notary Office Law, if there are other laws and regulations that provide an opportunity for that (for example, Government Regulations mandated by the Electronic Information and Transaction Law provide an opportunity for a Notary to provide support electronic certification services), the matter is actually still very relevant to the provisions of Article 15 paragraph (2) point (a) and paragraph (3) of the Law on the Position of Notary Public which has given other authorities to Notaries as long as they are in accordance with prevailing laws and regulations. In the theory of legal certainty, laws containing general rules serve as guidelines for individuals who behave in society, both in relation to fellow individuals and in relation to society. The existence of these rules and their implementation creates a legal certainty.

Concept of Cyber Notary in Supporting Indonesia in the Field of International Trade Based on UNCITRAL

UNCITRAL or United Nations Commission on International Trade Law is one of the special organs of the United Nations which is tasked with developing international trade law. With the Resolution 51/162 dated December 16, 1996, UNCITRAL formulated an important

rule of law, that is, UNCITRAL Model Law on Electronic Commerce, where the purpose of this model law is to promote uniform legal rules in the use of electronic computer networks or technology for commercial transactions (Adolf, 2010). There are three reasons for using the UNCITRAL Model Law on Electronic Commerce, namely:

A Model Law which is acceptable to countries with different legal systems, socio-economics. The Model Law can also render a significant development towards the harmonious development of international economic relations;

The Model Law was chosen since in the past the countries (and interested international organizations) proposed the use of this legal instrument; and

The use of Model Law can assist countries in making their national legislation in the field of e-commerce.

The main objectives of the formation of this law model are:

To provide rules regarding e-commerce addressed to national legislative bodies or legislature-making bodies of a country;

To provide more definite rules for electronic trading transactions.

In practice, the existence of an authentication method for electronic signatures, electronic information and electronic documents requires the involvement of a third party as an institution providing electronic certification held by the said third party (Certification Service Provider) and as the bearer of the trusteeship (Trusted Third Party). Related to this, signature authentication becomes an important matter. In essence there are three approaches in regulating electronic signature authentication procedures, such as:

Minimalist Approach or Functional Equivalent Approach (Catatan Sekretariat UNCITRAL, 2016), based on the UNCITRAL Model Law of E-Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001) which adheres to a

neutral technology principle and emphasizes at least the two main functions of electronic signatures, that is, identifying the signer and demonstrating the intent of the signatory with respect to the signed information. The requirements for the validity of transactions using electronic communication or information for international contracts are subject to the provisions of Article 9 of the UNCITRAL Model Law on Electronic Signatures (2001), where the transaction must meet the conventional requirements of a transaction consisting of a written, signed and original form;

Technology Specific Approach (Catatan Sekretariat UNCITRAL, 2016), which is e-signature arrangements that only point to a certain type of technology, namely the use of digital signatures with Public Key Infrastructure which is considered as the most perfect technique in answering the need for secured communication. This technological approach requires synergy with other related infrastructure. Regarding this approach, UNCITRAL shows three models, which are the self-regulation model, limited government involvement and the optimal role of the government in leading the Public Key Infrastructure process (Government led process);

Two-Tiered or Two Pronged Approach (Catatan Sekretariat UNCITRAL, 2016), which is the two-network approach adopted by many European Union (EU) countries based on Directive 1999/93/EC on Electronic Signatures, which highlights that there is a classification of electronic signature authentication, where the European Community provides criteria for recognizing electronic signatures into ordinary and advanced categories supported by an accredited certification body.

Implementation of the UNCITRAL Model Law on Electronic Commerce in the application of electronic signatures in Indonesia has been regulated as in Article 11 paragraph 1 of the Electronic Information and Transaction Law which stipulates: "Electronic Signatures have

legal force and legal consequences ...". Furthermore, Article 59 paragraph 3 of Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions (which is abbreviated as PP No. 71 of 2019) stipulates: "Electronic Signatures as referred to in paragraphs (1) and (2) have the legitimate legal power and legal consequences."

Taking into account the provisions regarding the validity of electronic signatures as stipulated in Indonesian positive law, then based on the Theory of Will (Wilstheorie) which states that intention is the will to make an action and the will to cause a result of that action, the result is desired if that effect is the intent of the action. If indeed the parties wish to make an agreement based on technological assistance, with the cyber notary concept, this can be the best solution while still prioritizing the wishes of the parties.

Notary as a position that performs part of the state's authority in the realm of private law which is closely related to aspects of public service and the economy in general, of course, should not be seen as a rigid and static position, but seek to make adjustments to actual phenomena and continue to support the government in guarding the direction of development in an order, safe and legal certainty (Nurita, 2012). This needs to be supported by the proactivity of the Notary itself so that this is always aligned and relevant to the times and technology through a service that is fast, precise and efficient so as to be able to support the acceleration of the economy.

4. CONCLUSION

Philosophical nature of cyber notary in providing legal services to the community is based on the fundamentality of the theory of legal certainty which states justice and legal certainty to the community, especially in the deed made by the notary referred to. The development and regulation of cyber

notaries in Indonesian positive law can be seen from the new authority for Notaries to carry out electronic transaction certification through the elucidation of Article 15 paragraph 3 of the Law on Notary Office and the Law on Electronic Information and Transactions. This is one manifestation of the government's efforts to provide legal certainty in transactions conducted electronically. Ironically, the concept of cyber notary in Indonesia is still under debate. Indeed, its concept in supporting Indonesia in the field of international trade based on UNCITRAL and the implementation of the UNCITRAL Model Law on Electronic Commerce in the application of electronic signatures in Indonesia has been regulated as in Article 11 paragraph 1 of the Law on Electronic Information and Transactions and Article 59 paragraph 3 of the Government Regulation No. 71 of 2019. If indeed the parties wish to make an agreement based on technological assistance, with the cyber notary concept, this can be the best solution but also still prioritizing the preference of the parties concerned.

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