

**THE NOTARY'S AUTHORITY IN ENSURING THE VALIDITY OF  
INTERNASIONAL CONTRACTS WITH A CHOICE OF LAW****Nur Hikmah Armiandi**

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**Abstract**

Globalization has increased cross-border business interactions, resulting in international business contracts involving multiple jurisdictions and legal systems. A critical clause in these contracts is the choice of law or the selection of foreign law. This article aims to analyze the authority of notaries in ensuring the validity of international business contracts involving foreign law under Indonesian law. The method used is normative juridical with statutory and conceptual approaches. The study finds that notaries have attributed authority to draft authentic deeds, provide legal counseling, and ensure that contract clauses comply with national legal principles. Notary involvement plays a preventive role in minimizing disputes by aligning contract contents with public policy. Therefore, the notary's preventive role is essential in ensuring legal certainty for parties engaging in cross-jurisdictional agreements.

**Keywords :** Notary, Internasional Bussiness Contract, Choice of Law, Legal Certainly

**INTRODUCTION**

In the era of globalization, economic relationships between nations are increasingly unavoidable, with international business contracts serving as a crucial pillar in a country's economic development. The term "contract" is widely popular and its scope is extensive, including in the business sector (Fuady, 2001). To meet public demand, business activities must continue, whether through domestic or international business transactions via import and export processes (Fuady, 2001).

Carrying out international business transactions today is not a difficult task. Advancements in technology provide significant opportunities for the international community to engage in relationships with one another (Ratna & Makka, 2018). The parties involved in these transactions are not only individuals but also large corporations.

The subjects involved in international business transactions can be a country with another, governmental and non-governmental international organizations, individuals, and legal entities (Razmiati & Sulaiman, 2019). However, it is undeniable that to conduct these business activities, the parties must carefully understand the legal principles of the partner country (Jaelani, 2023). This understanding significantly impacts the execution of the agreement.

An international contract is fundamentally an agreement between two or more people that creates an obligation to perform or not perform a specific action, and its implementation involves parties from different countries (Gautama, 2002). This means that every party named in the contract is obligated to carry out its terms in good faith.

International contracts often face challenges due to a lack of understanding of the laws applicable in the countries involved. Given the diversity of the international community, it is not easy to unify common intentions and goals to create a conducive international business environment (Simanjuntak, 2006). Therefore, every transaction must be subject to the rules of international law or the national laws of each country. One essential element of these transactions is the creation of a contract, which serves as a guide for the rights and obligations of the parties.

The involvement of a Notary, as an official authorized to create authentic deeds, is crucial for ensuring a contract's validity according to the laws in Indonesia (Rosiana & Aisyah, 2024). Article 15 of Law No. 2 of 2014 on the Notary Profession states, "A Notary is authorized to create Authentic Deeds concerning all acts, agreements, and stipulations required by law and/or desired by the interested parties to be stated in an Authentic Deed." Based on this authority, a Notary can also assist foreign investors related to Authentic Deeds where there are agreements between parties for business activities in the form of a legal entity (Yusrizal, 2018).

A Notary has the important task of legalizing and regulating the legal relationships between parties in business dealings. Furthermore, the Notary profession supports the requirements of the ASEAN Economic Community (AEC) related to written evidence in various sectors such as the economy, banking, land, trade, and social, at global, regional, national, and international levels. The purpose of these rules is primarily to establish the rights and obligations of each party, provide protection, and ensure legal certainty to prevent disputes (Lantanea, 2017).

The Notary's duty to promote legal certainty for foreign investors in the context of direct foreign investment involves providing legal services such as creating a Deed of Establishment for a Limited Liability Company (PMA), Minutes of the General Meeting of Shareholders (GMS) for Share Transfers, or drawing up cooperation agreements with local investors (Yusrizal, 2018).

Although a Notary acts only as a facilitator, their involvement in drafting international business contracts is essential to guarantee legal certainty, reduce the risk of disputes, and protect the interests of all parties. When creating an international business contract, a Notary

must ensure that all parties have the necessary authority. Once all parties have agreed, the Notary will then create the deed. Given the importance of a contract in a business transaction, specific requirements are needed to ensure it complies with applicable laws. Therefore, in practice in Indonesia, the process of creating international business contracts always involves a Notary as a public official with the authority to draft and/or legalize business contracts (Salim, et al., 2011).

In the business world, especially in Indonesia, trust is often prioritized over formal legality. Many transactions are conducted based on long-standing business relationships, where both parties feel that a private contract is sufficient without involving a Notary. Additionally, many foreign companies investing in Indonesia have international agreement standards that often differ from Indonesian law. They are more comfortable using private business contracts that can be adapted to their home country's laws. Some companies are reluctant to use a Notary's deed because documents created in the presence of a Notary may be more easily accessible to third parties or certain authorities. A private contract offers greater confidentiality regarding the terms of the agreement and business strategies, especially in high-risk or strategic deals.

Although a private contract has legal force (as long as it meets the valid agreement requirements in Article 1320 of the Civil Code), in some cases, it is more difficult to prove in court than a Notary's deed. However, many business actors still choose private contracts because they prefer to rely on negotiation and arbitration to resolve disputes rather than the court system. They also believe that a good business relationship is more important than formal legality. In contrast, a Notary's deed has perfect legal force because it is considered authentic evidence and has faster executorial power, without the need for a lengthy evidentiary process in court, as stated in Article 1, paragraph 1 of Law No. 2 of 2014 on the Notary Profession and Article 1869 of the Civil Code.

Private business contracts remain a primary choice for many Indonesian and foreign business actors due to efficiency, flexibility, lower costs, and trust in business relationships. However, from a legal standpoint, a Notary's deed provides stronger legal protection and is better for dispute resolution. Therefore, the choice between a private contract and a Notary's deed depends heavily on the scale of the business, the nature of the transaction, and the parties' desire for legal security.

The Notary profession has a preventive nature, meaning that while it does not directly protect the parties, its role is vital in creating deeds or agreements (Pradiptasari, 2017). Furthermore, the Notary profession is authorized to verify the validity of documents in any engagement or agreement. Notaries are also expected to provide legal advice and explanations about the law to the parties involved, preventing potential problems or disputes, and ensuring the smooth operation and legal certainty of business activities for the public or investors (Pradiptasari, 2017).

## **RESEARCH METHODS**

I used a normative legal research method in this thesis, which means I gathered data from a literature review. The research type focuses on the level of vertical and horizontal synchronization and is prescriptive. I used a statutory approach and a conceptual approach to analyze the legal issues, drawing on both primary and secondary legal sources.

## **RESULT AND DISCUSSION**

### **A. The Authority of a Notary in Ensuring the Validity of Deeds**

Authority refers to a legal action that is regulated and granted to a position based on the applicable laws. A Notary's authority in Indonesia is one of attribution and is limited to Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 concerning the Notary Profession (UUJN) (Adjie, 2008).

Article 1, paragraph 1 of the UUJN defines a Notary as a public official authorized to create authentic deeds and who has other authorities as specified in the law or based on other laws. This definition describes a Notary's function in a narrow sense. A broader definition of a Notary, according to Black's Law Dictionary, is a public official whose functions are to: (1) administer oaths; (2) prove (and authenticate) and officially stamp certain types of documents for credit and authenticity in foreign jurisdictions; (3) receive acknowledgments of deeds and other conveyances and certify the same; and (4) perform certain official acts, especially in commercial matters, such as noting records and bills, recording foreign drafts and marine protests in cases of loss and damage (Black, 1968).

This definition of a Notary shows that in addition to their function as an administrator of important documents, Notaries also function to create business or commercial contracts. Further details on the authorities of a Notary as a public official are regulated in Article 15 of the UUJN, which divides their authority into three categories: general authority, special authority, and other authorities regulated by statutory laws.

#### 1. General Authority

The general authority of a Notary, as stated in Article 15, paragraph (1) of the UUJN, mentions that "a Notary is authorized to create authentic deeds concerning all acts, agreements, and stipulations required by statutory regulations and/or desired by the interested parties to be stated in an authentic deed, to guarantee the certainty of the deed's date, to store the deed, and to provide grosses, copies, and excerpts of the deed, all of which are valid as long as the creation of these deeds is not assigned or an exception is made for another official or person specified by law."

Based on the explanation of the article above, a Notary is generally authorized to create deeds as long as the parties desire it or if the law requires the deed to be in the form of an authentic deed. The creation of a deed by a Notary must be based on statutory regulations and/or what is desired by the interested parties to be stated in an authentic deed to ensure the rights and obligations of the parties for the sake of legal certainty, order, and protection for the interested parties and for society as a whole.

#### 2. Special Authority

Furthermore, Article 15, paragraph (2) of the UUJN grants a Notary special authority to perform certain legal actions, including: a. Certifying signatures and confirming the date of private documents by registering them in a special book (legalization); b. Recording private documents by registering them in a special book (waarmerken); c. Creating a copy containing the details as written in the original document; d. Certifying photocopies against the original (legalization), such as a power of attorney, statement, or letter of consent; e. Providing legal counseling regarding the creation of a deed; f. Creating deeds related to land; and g. Creating auction minutes deeds.

#### 3. Other Authorities

Other Notary authorities, according to Article 15, paragraph (3) of the UUJN, are determined by other legal rules, such as the authority to certify transactions, create deeds of establishment for cooperatives, political parties, and others. In addition to the authorities regulated in the UUJN, a Notary is also obligated to keep the contents of deeds and information obtained during the performance of their duties confidential, unless otherwise stipulated by law that the Notary is not obligated to keep them confidential and must provide the necessary information related to the deed (Supriadi, 2008).

The UUJN establishes a Notary as a public official, which has the legal consequence that a Notary's Deed holds an authentic status and has an executorial nature. Article 1868 of the Civil Code defines an "authentic deed as a deed created in the form determined by law, by or in the presence of a public official who is authorized at the place where the deed is created." Meanwhile, Article 165 of the HIR states that "an authentic deed, which is a deed created by or

in the presence of an official who is authorized to do so, is complete evidence between the parties and their heirs and those who obtain rights from it regarding what is contained therein as a mere notification."

According to Irawan Soerodjo, there are three essential elements for the formal requirements of an authentic deed to be met (Soerodjo, 2003):

1. It must be created in a form according to legal provisions.
2. It must be created by or in the presence of a public official.
3. The public official must be authorized to do so in the place where the deed is created.

A Notary performs a social function in creating authentic deeds based on the request of the parties or the public who need services in deed creation. As a public official authorized to create authentic deeds, a Notary can be held responsible for their actions related to their work in creating the deed. The scope of a Notary's responsibility includes the material truth of the deed they create. There are four important aspects of a Notary's responsibility as a public official concerning material truth (Anshori, 2009): a. The Notary's civil liability for the material truth of the deed they create; b. The Notary's criminal liability for the material truth of the deed they create; c. The Notary's liability based on the Notary Profession Regulations for the material truth of the deed they create; d. The Notary's liability in carrying out their official duties based on the Notary's code of ethics.

In practice, there are two types of Notary deeds: deeds created by a Notary and deeds created in the presence of a Notary. A deed created by a Notary is also called a *Deed of Relaaas*. Meanwhile, a deed created in the presence of a Notary is also called a *Deed of Party/Akta Partij*. A *Deed of Relaaas* authentically describes an action performed or a situation seen or witnessed by the creator of the deed, which is the Notary themselves, in carrying out their duties as a Notary. An *Akta Partij* contains information about what happened due to actions performed by another party in the presence of a Notary, meaning it is explained or narrated by another party to the Notary in the performance of their duties and for the purpose of having that information or action stated by the Notary in a deed created in the Notary's presence.

A Notary's deed, as an authentic deed, is a form of evidence with strong and full probative power that plays an important role in every legal event in society. One of these is in business or commercial activities. Among the many desires for deed creation in business activities, this legal research focuses on deeds related to limited liability companies.

A Limited Liability Company is a form of business often chosen by business actors due to its limited liability. As explained in Article 3, paragraph (1) of Law No. 40 of 2007, "a Company's shareholder is not personally responsible for obligations made in the name of the Company and is not responsible for the Company's losses beyond the shares they own."

Fundamentally, every individual who wants to be involved in the business world does not want to experience losses, especially if it affects their personal assets. To avoid this risk, they establish a Limited Liability Company as their form of business. Law No. 40 of 2007 indirectly places Notaries in a crucial position in the creation of deeds related to limited liability companies.

As explained in Article 1, paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies, "a Limited Liability Company is a legal entity, an association of capital based on an agreement to conduct business with a basic capital in the form of shares and fulfilling the requirements stipulated in the relevant law and its implementing regulations." Furthermore, Article 7 of Law No. 40 of 2007 regulates that "a Company is established by 2 (two) or more people with a Notary's deed created in the Indonesian language." Thus, it can be interpreted that one of the important duties of a Notary is to create the deed of establishment for a Limited Liability Company.

The deed of establishment also contains the company's articles of association, which is a crucial part of the establishment of a limited liability company. In addition to establishing a

Limited Liability Company Deed, a Notary is also responsible for creating deeds related to amendments to the company's articles of association. In carrying out its business activities, a Limited Liability Company is guided by the company's objectives and purposes to obtain profit. For a company to obtain more profit, steps are needed to improve the company's performance. These steps can include business expansion, such as increasing production, distribution, and sales; adding business partners to expand the scope of the company's business activities; adding capital to increase the effectiveness and efficiency of business activities; and various other steps. All these steps are generally carried out with the approval of the General Meeting of Shareholders (hereinafter referred to as GMS).

The GMS is a forum for a Limited Liability Company that accommodates its shareholders or investors. The GMS, as explained in Law No. 40 of 2007, is a meeting held by the shareholders, which grants authority not held by the Board of Directors and the Board of Commissioners. The decisions made by the GMS are controlled by the shareholders for the operation of the company. The GMS's decision serves as the foundation for the company's operations. The results of a GMS decision can include changes to the articles of association, mergers, consolidations, acquisitions, or separations of the company; the submission of an application for the company to be declared bankrupt; or other matters deemed necessary to be decided by the GMS.

## **B. The Notary's Role in Ensuring Legal Certainty of International Business Contracts**

For a contract to be considered valid, it must meet certain requirements. The requirements for a valid contract under the common law system are as follows (Pramono, 2017):

### 1. Offer and Acceptance

A contract begins with an offer and acceptance. An offer is a promise to do or not do something specific in the future, addressed to anyone. Article 15 of the CISG states that "(1) an offer becomes effective when it reaches the offeree, and (2) an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer." This means an offer is effective when it reaches the party it's addressed to, and even if it can't be revoked, it can be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer itself.

Therefore, if a request is not addressed to a specific person, it is only considered a general invitation to make an offer. However, if it is only addressed to the parties making the offer until the contract is signed, the offer can be withdrawn if the withdrawal reaches the offeree before they send their acceptance.

There are also irrevocable offers, as stated in Article 16 of the CISG, if: i) The offer indicates that it is irrevocable, either by stating a fixed time for acceptance or otherwise. ii) It is reasonable for the offeree to believe the offer is irrevocable because they have acted in accordance with the request in the offer. An offer ends when the rejection of the offer reaches the offeror. Therefore, a statement made or conduct shown by the offeree that indicates agreement constitutes an acceptance.

### 2. Meeting of the Minds

In a "meeting of the minds," two important things are present:

- a. There is an agreement between the parties about the object of the contract. If the object is clear, the contract is considered valid. However, if the agreement is made with fraud, mistake, duress, or unconscionability, the contract becomes invalid and can be voided. If a contract is translated as a meeting of minds, one party must understand and agree with the other party's thoughts. To understand what the parties are thinking, they must use language to convey their thoughts.
- b. An objective approach is accepted in both the civil law and common law systems, but the underlying basis is different. The basis of common law is the bargain, while

civil law is based on a meeting of the minds.

### 3. Competent Parties and Legal Object Matter

Competent parties refers to the legal capacity of the parties to enter into a contract or agreement. A person entering into a contract or agreement must be of legal age. Legal object matter refers to the legality of the subject matter. An object is considered valid if it does not violate the law and public order. A contract is considered valid under the U.S. common law system if it meets certain requirements: agreement, capacity to contract, and a lawful object (Dirdjosisworo, 2013).

## C. Choice of Law in International Business Contracts

The issue of choice of law for an international contract is a classic problem in international contract law. A law chosen by one party is not necessarily accepted by the other. Even if the law is ultimately chosen, it does not mean there are no problems. There are many reasons why a court may or may not apply that choice of law. If a contract contains a choice of law clause, the law applicable to the contract is the law specified in the contract, because what has been agreed upon by both parties is valid as a law for those who make it (Khairandy, 2013).

There are several theories in private international law that can be used to find the law that should apply (*lex cause*) to a relationship where there is no choice of law. These theories are: the *lex loci contractus* theory, the *lex loci solutionis* theory, the *proper law of contract* theory, and the *most characteristic connection* theory, as follows:

### 1. The Lex Loci Contractus Theory

According to the *lex loci contractus* theory, the applicable law is the law of the place where the contract was made. This is a classic theory that is not easy to apply in the practice of modern international contract making because the contracting parties are not always present face-to-face to form the contract in one place (*contract between absent persons*). They can contract over the phone or through other communication means. An alternative to the weaknesses of this theory is the post box theory and the acceptance theory. According to the post box theory, the applicable law is the law of the place where the offeree's post box sends the acceptance of the offer. According to the acceptance theory, the applicable law is the law of the place where the offeror receives the acceptance of the offer.

### 2. The Lex Loci Solutioonis Theory

According to the *lex loci solutioonis* theory, the applicable law is the law of the place where the agreement is performed, not the place where the contract was signed. The main difficulty with this contract is if the contract is not to be performed in one place, such as in the case of a sale that involves parties (seller and buyer) who are in different countries and have different legal systems.

### 3. The Proper Law of Contract Theory

According to the *proper law of contract* theory, the applicable law is the law of the country that is most naturally applicable to the contract, by finding the center of gravity or the most intimate connection with the contract. According to Morris, the proper law of a contract is the legal system intended by the parties, or if that intention is not explicitly stated or cannot be inferred from the surrounding circumstances, then the proper law for the contract is the legal system that has the closest and most real connection to the transaction (Khairandy, 2013).

The implementation of a choice of law clause in a conflict of laws gives the parties the right to determine the law that applies to their business. However, there are limitations: a choice of law is only permitted in the field of contract law, it must not concern mandatory law, and it must not lead to evasion of the law (Gautama, 2002).

According to Dr. Bambang Syamzuar Oyong, S.H., M.H., a choice of law clause is a very essential element in a contract that contains a foreign element. A choice of law clause is

included to address future disputes. There are two important things to consider when creating a dispute resolution clause:

1. If the parties have not included a choice of forum clause, any disputes that arise will be resolved through the courts. This is because out-of-court dispute resolution can only take place based on a written agreement between the parties. The consequence is that the parties will face a time-consuming resolution process until the court's decision has permanent legal force. If, in the middle of the contract, the parties want to choose an out-of-court dispute resolution, they must first make an addendum in the presence of a notary.
2. The parties must not include two choices of forum at once in an agreement; they must choose one of the two, either arbitration or the court mechanism. If a choice of forum clause states "any disputes that arise in the future will be resolved through the courts or arbitration" or "if any disputes that arise in the future cannot be resolved through arbitration, then the dispute resolution will be submitted to the courts," this is not allowed. A clause like this does not provide a solution but is a fatal error. The consequence is that such a clause is called a "nonsense arbitration clause" because it is meaningless or futile and cannot be enforced. The solution for the parties is to immediately create an addendum and replace the clause by making a clear choice between the two forums: dispute resolution through arbitration or through the courts.

Therefore, a notary should provide explanations related to the choice of law or choice of forum clauses to the parties so they understand every consequence that arises from each decision they will carry out.

## CONCLUSIONS

Notaries have a crucial role in ensuring the validity of international business contracts, especially those involving foreign law. The authority of a Notary, which is derived from Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 on the Notary Profession (UUJN), provides a strong legal basis for Notaries to function as public officials who create authentic deeds. In practice, a Notary's role is not just administrative; they also have a high degree of legal and ethical responsibility to ensure the validity of the agreement's substance, its compliance with national legal regulations, and the protection of the rights and obligations of all parties involved. This becomes even more critical in international business contracts that contain foreign elements, as they involve different legal systems across countries. Notaries are tasked with ensuring that a contract meets all the requirements for a valid agreement, both according to Indonesia's national legal system and international law, such as the elements of offer and acceptance, the meeting of the minds, and the legality of the subject matter of the agreement. Furthermore, in contracts that do not explicitly state the applicable law, a Notary must understand various theories in private international law, such as *lex loci contractus*, *lex loci solutionis*, and *the proper law of the contract*, to help the parties choose the right legal basis. A Notary's duty also includes protecting the parties from one-sided clauses, unclear rights and obligations, and potential legal disputes. Through their diligence and integrity, a Notary can create a contract that is valid, fair, and in accordance with both national and international law, providing maximum legal protection for the parties involved.

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