

Legal Position of Notary Deed that Does Not Meet the Elements of the Agreement in the Conception of Legal Certainty

Jonathan Nau*)

*) Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, E-mail: triviumlawoffic@gmail.com

Abstract. *This study aims to determine and analyze the legal position of a notary deed that does not fulfill the elements of the agreement in the conception of legal certainty through the study of the Cooperation Agreement Deed No. 86 dated 28 June 2008 made by Notary Yoshephina Vestha Raya, SH. normative juridical with analytical descriptive research specifications. The type of data used is secondary data consisting of primary, secondary and tertiary legal materials, namely legislation, jurisprudence and court decisions that have permanent legal force, books, journals and expert opinions, as well as dictionaries or encyclopedias. All data was collected through a literature study, where the data collected was analyzed using qualitative analysis. The results of the study show that: First, a deed that has united two legal actions that have different characters and elements, namely on the one hand there is cooperation in the management of mining land (Innominaat agreement) but on the other hand there is a transfer of material rights that must be made in the form of a Nominaat agreement thus contradicting the elements of the Nominaat agreement. Such agreement deed is a violation of statutory provisions or contrary to the legality of the four terms of an agreement as stipulated in Article 1335 of the Civil Code, 1337 of the Civil Code, which relates to Article 1338 of the Civil Code and Article 1339 of the Civil Code and violates the principle of "One Deed for One Legal Action" as the legal principles of Supreme Court Jurisprudence in Decision Number 1440K/Pdt/1996 dated 30 June 1998. Second,*

Keywords: Agreement; Compliance; Elements.

1. Introduction

This research is motivated by the existence of a deed that unites two legal acts in one notarial deed, one of the notarized deeds that combines two legal acts into one agreement can be seen from the deed of Cooperation Agreement Number 86 dated 28 June 2008 made by Notary Yoshephina Vestha Raya, SH, where in

the deed of the cooperation agreement there are two legal actions, namely the processing of mining land and there is also an act of transferring material rights in which the procedure and form of the agreement as well as its elements have been determined and regulated in the Civil Code which is known as a special agreement or *nominaat* agreement, but by a Notary made and put together in the form of an innominate agreement deed thereby eliminating the elements of a nominate agreement.

Whereas in contract law, agreements or commonly called contracts by name are divided into 2 (two) groups, namely named agreements and anonymous agreements. A Named Agreement in Dutch (*benoemd overrenkomst*) or a special agreement is an agreement that has its own name, the agreement is named by the legislator and has the character, conditions, elements and legal basis that has been specifically determined in the Book of Laws Indonesian Civil Code (KUHPerdata). Broadly speaking, named agreements that are regulated and known in the Civil Code include: sale and purchase agreements, exchanges, leases, work agreements, civil partnerships, associations, grants, safekeeping of goods, borrowing, fixed and bad interest, profit-making. profit, Power of Attorney, Debt Insurer and Peace.¹

Whereas furthermore, in addition to named agreements as specifically determined in the Civil Code, there are also agreements that are not named or often called (*innominaat*), the mention of this nameless agreement is because the agreement is not specifically regulated in the Civil Code and the Criminal Code but is based on the principle of freedom of contract, this is in accordance with the provisions of Article 1319 of the Civil Code which basically states that: "All agreements, both those with a special name and those that are not known by a certain name, are subject to the general regulations contained in this chapter and other chapters".²

The fundamental difference between the 2 (two) types of agreements is that in named or nominal agreements, the law has determined the names and elements that must be fulfilled in a contract or agreement, both essential elements, natural elements and accidental elements. For example, in a sale and purchase agreement (*kopen en verkopen*) the essential element that must exist and be included in the sale and purchase contract is an agreement regarding the goods and the price, without an agreement regarding the goods and the price, then the sale and purchase must be considered as having never happened or canceled for the sake of the law, as well as regarding *naturalia* elements, where this element is always considered in the contract because of the law if the parties do not

¹R. Subekti, 1996, Civil Code (*burgerlijk Wetboek*) with the addition of the Basic Agrarian Law and the Marriage Law, PT. Pradnya Paramita, Jakarta, p. 364-466

²*Ibid.* P. 339

specify otherwise, for example,³Meanwhile, in an anonymous or anonymous agreement, the elements are not specified or regulated specifically in the Civil Code, but are based on habits that arise and grow in society, or in general, are only based on the principle of freedom of contract.⁴

The fundamental difference between a named agreement and an anonymous agreement as described in the paragraph above has a legal consequence that in agreements or contracts involving a legal action that has been determined or named by law, it must be made by referring to the terms the terms or elements that have been specified in each title of the agreement, this is as stated by Habib Adjie, which basically states that the nominaat notary deed is a deed whose substance or contents of the deed is an order or application of the types of agreements whose names have been determined (any) in titles I, II, III, IV and V up to titles XVIII of the Civil Code.⁵

2. Research Methods

The approach method in this study uses a normative juridical research method with descriptive analytical research specifications. The type of data used is secondary data consisting of primary, secondary and tertiary legal materials, namely legislation, jurisprudence and court decisions that have permanent legal force, books, journals and expert opinions, as well as dictionaries or encyclopedias. All data was collected through a literature study, where the data collected was analyzed using qualitative analysis.

3. Results and Discussion

3.1. Legal Position of Notary Deed That Does Not Meet the Elements of the Agreement

Article 1337 of the Civil Code which expressly states that: "a cause is prohibited, if it is prohibited by law, or contrary to good decency or public order". The article requires that in a contract what is to be achieved by the parties in the agreement or contract must be accompanied by good faith, and not contrary to laws and regulations, public order and decency. What is meant by "statute" in Article 1337 of the Civil Code must be interpreted as any generally binding rules that are promulgated or declared valid as law by the authorized holders of power.⁶Article

³Ahmadi Miru, 2010, Contract Law and Contract Design, PT. Raja Grafindo Persada, Jakarta. P. 31

⁴Habib Adjie, April 9 2018, Named Agreement and Unnamed Agreement (provision of notary appointment examination for extraordinary members), Management of the Indonesian Notary Association, https://www.academia.edu/38697579/Makalah_Dr_HABIB_ADJIE, accessed on 8 May 2022.

⁵Ibid.

⁶Rachmad Setiawan, 2020, Translation of the Law of Engagement (General Teachings of Agreement) Mr. AS Hartkamp, Yrama Widya, Bandung. P. 311

1373 of the Civil Code adheres to the principle of not only adhering to laws in a formal sense (those made by the President and the DPR), but also any rules that apply generally that are promulgated or enforced by the competent authority for that purpose.⁷ Thus, it also includes statutory regulations under the law.

Article 23 AB (*Algemene Bepalingen van wetgeving voor Indonesia*) which states that "laws which have to do with public order or good morals, cannot be removed by action or approval". Furthermore, the Supreme Court through the Supreme Court Regulation Number 1 of 1990 explained the principles or principles of public order which are defined as a basic foundation of the entire legal system and society in Indonesia (public order).⁸ M. Yahya Harahap argues that public order contains a narrow meaning and a broad meaning. In a narrow sense, the scope of public order is limited to positive legal provisions, thus what is meant by a violation/contrary to public order is only limited to violations of laws and regulations. Meanwhile, in a broad sense, the scope of public order includes all legal values and principles that live and grow in public awareness, including the values of decency and general justice principles.⁹

Based on the regulations associated with the opinion above, it can be interpreted that positive law (legislation) is the entire rule governing public order, so that any action that is not based on or contrary to statutory provisions (positive law) is interpreted as an act contrary to the principle of public order. That is why Gustav Radbruch revealed in his theory which basically states that positive law (legislation) must be obeyed because positive law regulates human interests (related to public order).

Named agreements (*nominaat*) regulated in the Civil Code, especially those relating to the transfer of rights to material goods in the form of buying and selling, exchange, grants and others, are part of the entire legislation governing the transfer of material rights can easily be found in Book III of the Civil Code. Of course, the purpose of regulating *nominaat* contracts, especially those related to the transfer of a material right, is to provide order for the community and protection for the community, both the parties conducting material transactions and other communities related to their material transactions.

As a rule that requires the achievement of order and legal protection for society through legal certainty, contract law in its history of development initially adhered to a closed system. This means that the parties are bound by the meaning contained in the law. This is due to the influence of the teachings of

⁷Ibid.

⁸Supreme Court Regulation Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards

⁹ [www. Hukumonline.com](http://www.Hukumonline.com), access date July 30, 2022

legism which holds that there is no law outside of the law. This can be seen and read in several decisions of the Hoge Raad from 1910 to 1919.¹⁰ However, due to limited arrangements regarding the types of contracts specified in the Civil Code, while on the other hand there are types of agreements that grow, live and develop in society such as leasing contracts, franchises, surrogate mothers, production sharing, joint ventures, it is possible by contract law to make an agreement outside what is specified in the Civil Code which is often called an anonymous agreement (*innominaat*).¹¹ It should be noted that one of the innominate agreements in the form of a leasing contract has been recorded or regulated by statutory provisions.

Sourced from the history of contract law associated with the desire for order or order in society as well as legal protection of the community above through a positive legal regulation, it can be understood that positive legal regulations (KUHP *Perdata*) which regulate the interests of society, especially regarding the transfer of material rights cannot be ruled out. or deviated by the argument that the open system is adhered to in Book III by using the principle of freedom of contract, because the open system in Book III is only intended for the type or form or nature of contracts that have not been regulated in Book III of the Civil Code while the types of agreements regarding the transfer of material rights have been determined by type -types in the Civil Code, be it by buying and selling, exchanging, grants, income in the company, inheritance (either by death or by will) and others.

The application of nominal contracts as well as restrictions on the principle of freedom of contract, in addition to what has been stated above, is also found in the provisions of Article 1320 of the Civil Code which is closely related to Article 1335 of the Civil Code which prohibits contracts without a cause or made based on a false or prohibited cause, Article 1337 of the Civil Code which prohibits a contract that is contrary to law, decency and public order as well as the provisions of Article 1339 of the Civil Code which designates the attachment of a contract to the nature of the contract, law, decency and custom.

The provisions mentioned above clearly desire that the legal provisions that have been regulated in laws and regulations may not be deviated, especially regarding the type or nature of contracts that have been determined in statutory provisions, including regarding the transfer of material rights whose form or nature has been specifically determined. in legislation, especially in the Civil Code. In addition, A. Hartkamp in his book on the Law of Engagement (*Guide in Studying Dutch Civil Law*) states that one of the provisions that limits freedom of

¹⁰Salim H.,S., 2010, *Contract Law Theory and Contract Preparation Techniques*, Sinar Graphic, Jakarta, p. 8

¹¹*Ibid.*, p. 28

contract can also be seen from the provisions of Article 1337 paragraph 1 BW/ Article 1338 (1) of the Civil Code which reads "only agreement that applies according to the law that applies as a law for the parties."¹² Furthermore, Hartkamp stated that legislators sometimes limit freedom by using a formal form that has been determined by law. Hartkamp then gave an example of how compensation and peace are regulated in a formal form in the Civil Code with the aim of protecting parties against haste (hasty), the sanction of which is insanity.¹³

Hartkamp further states that freedom of contract is part of human freedom rights. When determining the limits of this freedom, one must always remember that humans are social beings and civil law does not only regulate and protect the interests of each individual, but also the common interest (*gemeenschap*).¹⁴

The binding power of nominate agreements, especially regarding the transfer of material rights in its implementation, has been followed and confirmed in several statutory provisions, one example can be found in the provisions regarding the transfer of rights over land which only recognizes the transfer of rights based on sale and purchase, exchange, grants, income within the company, transfer of rights by auction, as well as transfer of rights by inheritance.¹⁵

Based on the legal arguments above, the authors conclude that the clause on the transfer of 80% shares contained in the Cooperation Agreement deed Number 86 dated 28 June 2008 is a clause that is contrary to legislation which clearly requires the transfer of material rights to be made in the form of a special contract or contract nominate, and because the transfer of material rights is made in an innominate form (cooperation agreement), the agreement has eliminated the elements of the agreement which must always be present in an agreement in the form of nominate, be it the elements of *Essentialia*, Elements of *Naturalia* and *Accidental Elements*. This is because in Deed 86 dated June 28 2008 which is named "Cooperation Agreement" there is no apparent counter-performance (rights and obligations) which is an essential element in the contract, whether in the form of objects which are 80% shares (who owns the shares and what percentage of each shareholder is to be transferred), and there is also no obligation for the party to take over the 80% shares. With this element not being clear, other elements such as the *Naturalia Element* and the *Accidental Element* are not clear.

Whereas apart from being contrary to the law as referred to in Article 1337 of the Civil Code, the innominaat agreement in the form of a cooperation

¹²Rachmad Setiawan, *OpCit.* P. 50

¹³*Ibid.*

¹⁴*Ibid.*, p. 55

¹⁵Government Regulation Number 24 of 1997 concerning Land Registration

agreement deed Number 86 dated 28 June 2008 is an agreement that has no causation as specified in Article 1335 of the Civil Code, because the contract has combined two legal actions that have the nature or different characters into one legal action, where on the one hand the goal of both parties is cooperation in the management of mining land but on the other hand there is also a clause on the transfer of rights which has implications for the transfer of rights over the mining land. The two legal actions cannot be combined because they will eliminate each other.¹⁶ which a *contrario* prohibits agreements from being made with several types of agreements which are mutually contradictory in nature, thus hindering their application.

3.2 Responsibilities of Notaries for Deed Products That Do Not Meet the Elements of the Agreement

The implementation of imposing sanctions as a form of notary's responsibility in carrying out the making of the deed can be seen from the legal relationship between the notary and the parties who can appear before the notary. When the appearers come to the Notary so that their actions or actions are formulated into an authentic deed in accordance with the Notary's authority, and then the Notary makes the deed at the request or desire of the appearers, then in this case it provides a basis for the Notary and the appearers to have a legal relationship. Therefore, the Notary must guarantee that the deed he made is in accordance with the legal rules that have been determined, so that the interests concerned are protected by the deed. With such a legal relationship,¹⁷

The legal relationship between the appearer and the Notary can be included or qualified in the form of default if there is a contractual legal relationship between the appearer and the Notary,¹⁸ whereas in the context of unlawful acts (*onrechtmatigedaad*) it can be seen from the core of unlawful acts, namely that there is no contractual relationship between one party and another party. Unlawful acts can occur if one party harms another party either intentionally or unintentionally.

Unlawful acts (*Onrecht Matigedaad*) in Article 1365 of the Criminal Code as follows: "any unlawful act, which brings harm to another person, obliges the person who because of the mistake of issuing the loss, compensates for the

¹⁶Book 6. Algemeen gedeelte van het verbintenissenrecht. Title 5. Overeenkomsten in het algemeen. Afdeling 1. Algemene bepalingen Article 215: Voldoet een overeenkomst aan de omschrijving van twee of meer door de wet geregelde bijzondere soorten van overeenkomsten, dan zijn de voor elk van die soorten gegeven bepalingen naast elkaar op de overeenkomst van toepassing, behoudens voor zover deze bepalingen niet wel verenigbaar zijn of de strekking daarvan in verband met de aard van de overeenkomst zich tegen toepassing verzet.

¹⁷Habib Adjie, 2009, *Civil & Administrative Sanctions Against Notaries as Public Officials*, Refika Aditama, Bandung, p. 110

¹⁸*Ibid* p. 111

loss".¹⁹

Whereas the Article then describes the elements of Unlawful Acts as follows:

- a. There is an act that is active (doing something) or passive (not doing something);
- b. There is an element of error on the part of the perpetrator, be it intentional or negligent;
- c. These actions must be against the law, which include: Actions that violate applicable laws; Which violates the rights of others guaranteed by law; Actions that are contrary to the legal obligations of the perpetrator; Actions that are against decency;
- d. There is a loss for the victim and the loss must have a causal relationship between the act and the loss;

Regarding the elements of the unlawful act above, if it is related to the duties of a Notary who is obliged to ensure the fulfillment of all applicable legal provisions or ensure that there is no violation of law in making the authentic deed, then it can be concluded that if in making an authentic deed it turns out that there is a clause which contrary to the law as stated in the Deed of Cooperation Agreement Number 86 dated 28 June 2008 which contained a share release clause, in which the clause turned out to be contrary to the 4th condition regarding Halal Cause which resulted in non-fulfillment of the elements of the agreement both essentialia elements, naturalia elements and accidental elements as stated in the author's first discussion, then the Notary can be prosecuted for committing an unlawful act as referred to in Article 1365 of the Civil Code above, if based on the Deed of Cooperation Agreement Number 86 dated 28 June 2008 causes the transfer of property rights of legal subjects which has brought losses to said legal subjects.

Whereas in addition to civil sanctions, notaries in making authentic deeds may also be burdened with administrative sanctions. Administrative sanctions can be imposed on a Notary if in the exercise of his/her position he makes an authentic deed violating the provisions of Article 16 paragraph (1) letter a UUJN, namely dishonest, not thorough, not independent, impartial, and does not protect the interests of the parties involved in legal actions.²⁰

A Notary is required to act carefully which is manifested from the principle of accuracy. The principle of accuracy requires that a Notary in taking an action must be prepared and based on the applicable legal rules. Examining all the

¹⁹Aprilia Putri Suhardini, Imanudin & Sukarmi, March 2018, Accountability of Notaries who commit acts against the law in making authentic deeds, Journal of Deeds Vol. 5 No. 1, Unissula, Semarang, p. 265

²⁰Habib Adjie, Op Cit. P. 117

evidence shown to the Notary and listening to the statements or statements of the parties must be carried out as the basic material to be set forth in the form of a deed.²¹

Related to the explanation above, it can be concluded that in carrying out the duties of a Notary, the Notary must act carefully in the sense that he understands every legal provision in making authentic deeds, both the statutory provisions governing the procedures and procedures for making authentic deeds as well as the statutory provisions. invitations related to the material of a deed, especially those related to the terms of the validity of the agreement. The release of shares clause which is broken down in the Cooperation Agreement Number 86 dated 28 June 2008 is an agreement clause that is contrary to statutory provisions, especially the 4th condition of the agreement concerning Halal Causes which causes the elements of the agreement to be non-fulfillment, both essential elements, elements of naturalia and accidental elements which result in the law of the agreement being "null and void". Violation of these provisions causes a Notary to be declared unprofessional and careless in carrying out his duties, therefore a Notary as a public official who is given the authority to carry out legal provisions in making authentic deeds should act professionally by understanding and implementing all statutory provisions. - Legislation relating to internal aspects (UUJN) as well as external aspects (other legislation outside UUJN).

Sanctions for Notaries who violate the provisions of Article 16 paragraph (1) letter a UUJN, can be in the form of ethical witnesses, namely: a. rebuke; b. Warning; c. Temporary Suspension; d. Honorable discharge from association membership; e. Dishonorable discharge from association membership. In addition to the ethical sanctions as above, Notaries who violate the provisions mentioned above are also subject to administrative sanctions in the form of: a. Written Warning; b. temporary stop; c. Honorable discharge; and d. Dishonorable discharge.²²

4. Conclusion

That an agreement that does not fulfill the elements of the agreement or whose elements conflict with each other is an agreement that has no causalities so that it conflicts with the objective terms of the agreement. In the context of the Deed of Cooperation Agreement Number 86 dated 28 June 2008, the deed has united two legal actions which have different characters and elements, namely on the one hand there is cooperation in the management of mining land (Innominaat

²¹Ibid. P. 85

²²Article 16 paragraph (11) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary

agreement) but on the other hand there is a transfer of material rights that must be made in the form of a Nominaat agreement thereby eliminating the elements of a Nominaat agreement. Such a deed of agreement is a violation of statutory provisions or contrary to the 4th condition of the validity of an agreement as stipulated in Article 1335 of the Civil Code, 1337 of the Civil Code.

5. References

Books:

- [1] Ahmadi Miru, 2010, *Hukum Kontrak dan Perancangan Kontrak*, PT. Raja Grafindo Persada, Jakarta
- [2] Aprilia Putri Suhardini, Imanudin & Sukarmi, Maret 2018, Pertanggungjawaban Notaris Yang Melakukan Perbuatan Melawan Hukum Dalam Pembuatan Akta Otentik, *Jurnal Akta Vol. 5 No. 1, Unissula*, Semarang
- [3] Habib Adjie, 2009, *Sanksi Perdata & Administratif Terhadap Notaris Sebagai Pejabat Publik*, Refika Aditama, Bandung
- [4] Habib Adjie, 9 April 2018, *Perjanjian Bernama dan Perjanjian Tidak Bernama (pembekalan ujian pengangkatan notaris bagi anggota luar biasa)*, Pengurus Ikatan Notaris Indonesia,
- [5] Peraturan Mahkamah Agung Nomor 1 Tahun 1990 tentang Tata Cara Pelaksanaan Putusan Arbitrase Asing
- [6] Peraturan Pemerintah Nomor 24 Tahun 1997 tentang Pendaftaran Tanah
- [7] R. Subekti, 1996, *Kitab Undang-undang Hukum Perdata (burgerlijk Wetboek) Dengan Tambahan Undang-undang Pokok Agraria dan Undang-undang Perkawinan*, PT. Pradnya Paramita, Jakarta
- [8] Rachmad Setiawan, 2020, *Terjemahan Hukum Perikatan (Ajaran Umum Perjanjian) Mr. A.S. Hartkamp*, Yrama Widya, Bandung
- [9] Salim H.,S., 2010, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Sinar Grafika, Jakarta
- [10] Undang-undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-undang Nomor 30 Tahun 2004 tentang Jabatan Notaris

Internet:

- [1] https://www.academia.edu/38697579/Makalah_Dr_HABIB_ADJIE
- [2] www.hukumonline.com