

Legal Force of Validity of Notarial Deed Signed with Electronic Signature (Comparative Study between Indonesian Law and Australian Law)

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Abstract

The rapid development of technology has led to reforms in all aspects of human life. Electronic signatures are a product of technology that can facilitate transactions for business people. Currently, Notary is a profession that plays an important role for the economic world in Indonesia, but until now there is no law that facilitates Notaries to carry out their positions to make a deed that can be signed electronically, where in Indonesia an authentic deed made by a Notary must be signed before a Notary, cannot be done electronically. This article examines the legal force and validity of a notarial deed signed with an electronic signature in accordance with Indonesian and Australian law.

Keywords: electronic signature, legal force, notary deed validity

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1. Introduction

Indonesia has a very promising business environment. According to data from the Ministry of Cooperatives and Small and Medium Enterprises (KemenkopUKM) for March 2021, the number of MSMEs reached 64,2 million. As time goes by, it is possible that the number of companies will continue to increase and this shows the potential for Indonesia's economic development which is supported by the business sector. As such, legal certainty for parties subject to business activities in Indonesia is essential for the smooth operation of commercial enterprises in the country, and the existence of such a system and such legal arrangements is a prerequisite for conducting commercial activities in Indonesia.

Clearly, economic expansion also increases the likelihood of international cooperation. In this sense, the Indonesian government, in its capacity as a regulator, will be able to enact regulations that provide legal certainty, fostering confidence and trust among companies engaging in cooperative activities both between local firms and in relation to international collaboration. In addition, the government has a vital responsibility to play in preserving the country's political stability, so that international investors feel secure investing in Indonesia. Along with the development of the era, objects that are traded in the business world are no longer objects that can be seen with the eye, but objects that are intellectual property rights.

Notaries as one of the public officials in Indonesia have the duty to make authentic deeds which are very much needed in business activities in Indonesia and related to Indonesia's cooperation with other countries, such as making agreement deeds and deed of establishment of business entities. One of the most crucial parts of a notarial deed is the parties' signatures, which attest to their familiarity with and acceptance of the document's terms. In the event of a disagreement, the notarial deed will be of no use as evidence because it will be invalid without the parties' signatures.

Generally, signatures are made directly, which means that the parties place their wet signatures in a deed. However, as a result of the evolution of the current period, there is now something that is known as an electronic signature. Electronic Signature can be done without having to meet face to face, because the parties can send their signatures via the internet network, so that Electronic Signature actually makes it easier for parties to carry out transactions because it is more efficient in terms of time and also the costs that must be incurred by the parties involved, in this case related to the making of a notarial deed. However, the most important point is whether or if the notarial deed that was signed using an electronic signature carries the same weight of law as a traditional signature, which would enable it to provide the parties concerned with legal certainty and protection.

As for notary activities, the notary profession exists not just in Indonesia but also in a number of other nations, including Australia. Indonesia is a unitary state, whereas Australia is a federation of states. As a result, agreements for notarial activities between Indonesia and Australia are inevitably distinct. New South Wales is one of Australia's states, with Sydney as its capital. In notarial activities in Indonesia and Australia, which will be the primary focus of this research, there must be a major difference regarding the legality of the notarial deed signed using an electronic signature. It is quite intriguing to investigate further the legitimacy of notarial deeds

signed with an electronic signature.

Electronic Signature greatly facilitates various activities because it can be carried out by related parties without having to meet face to face, for example if the parties are going to carry out a sale and purchase transaction where the object of selling the berries is in Indonesia while the parties are abroad or even one of the parties is a citizen foreign countries, Electronic Signature certainly provides ease of transaction, saving in terms of time and cost, associated with a notarial deed, this will also make it easier for a notary to make a deed.

Because of the rapid pace at which technology is progressing, it is crucial that this study be conducted so that we may gain a deeper understanding of, and new insights into, the legal force and validity of notarial deeds signed electronically. With the validity related to the Notary Deed signed with the Electronic Signature, this will encourage the improvement of public services in the private sector. Hence, the author is interested in further researching this problem in a thesis entitled "Legal Force of Validity of Notarial Deed Signed with Electronic Signature (Comparative Study Between Indonesian Law and Australian Law)".

Based on the description above, the problem can be formulated as follows:

1. What is the nature and regulatory model of Electronic Signature according to positive law in Indonesia and Australia (State of New South Wales)?
2. How is the validity of the Notary Deed signed with the Electronic Signature in Indonesia and Australia and its implications in contract law in Indonesia and Australia (State of New South Wales)?

2. Literature Review

2.1 Comparative Law Theory

According to the theory put forward by René David related to Comparative Law Theory, as published in George Mousourakis's book. This legal comparison can be focused on three main issues, namely: (i) legal substance; (ii) legal structure; (iii) legal culture. Substance, in this case refers to the rules related to electronic signatures. Furthermore, the legal structure here refers to the institutions or institutions that implement these provisions and rules, while the legal culture refers to the response of society/practice to the application of rules/provisions related to the enforcement of electronic signatures.

2.2 Legal Certainty Theory

Legal certainty shows that each individual knows his rights and obligations so that peace, justice and order can occur in social life. According to Sudikno Mertokusumo, legal certainty is a guarantee that the law must be implemented in a good way. Legal certainty requires efforts to regulate law in statutory regulations made by authorized and authoritative parties, so that these rules have a juridical aspect that can guarantee certainty that the law functions as a rule that must be obeyed (Asikin, 2012).

2.3 Legitimacy (Validity)

Theory of Legal Validity is one of the most important theories in the science of law. The theory of validity or legitimacy of law (legal validity) is a theory that teaches how and what are the conditions for a rule of law to be legitimate and valid in effect, so that it can be applied to society (Munir, 2013). Besides, it is also known as the Coherence Theory which is associated with legal truth, the coherence theory is implemented at the *ius constituendum* level (legal ideas) which is adapted to the reality of people's behavior. The legal truth that is to be fulfilled in this aspect is the priority aspect of justice (Harefa, 2016).

2.4 Notarial Deed

Notary Deed is an official document issued by a Notary. The notary deed is an authentic deed in which Article 1870 of the Civil Code states that the notary deed has absolute and binding evidentiary power. The position of the Notary Deed is very strong in being a proof of trial.

2.5 Electronic Signature

Based on Law of the Republic of Indonesia Number 11 of 2008 concerning Information and Electronic Transactions Article 1 point 12 highlight that "An electronic signature is a signature consisting of electronic information that is attached to, associated with, or related to other electronic information that is used as a means of verification and authentication."

According to Mason (2000) in the journal he wrote that electronic signatures can be expressed in various forms. Electronic Signature includes "I receive" signs, pins, typing names into emails or word documents, scanned signature manuscripts, biodynamic signatures and digital signatures. Further, the most important thing is that there is sufficient evidence to show that the person who signed the document made the electronic signature attached to a document.

3. Methodology

The type of this research was Normative Research. The approach method used in this study includes Statute Approach, Conceptual Approach, Comparative Approach. The data to be used in this study were as follows:

- 1) Primary Legal Materials:
 - a. Law Number 11 of 2008 concerning Information and Transactions
 - b. Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Information and Transactions
 - c. Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary
 - d. Government Regulation Number 71 of 2019 concerning Implementation of Electronic Systems and Transactions
 - e. Constitutional Court Decision Number 20/PUU-XIV/2016
 - f. Electronic Transactions Act No 8
 - g. Public Notaries Act 1997

- 2) Secondary Legal Materials

Secondary legal materials were data obtained from official documents, books related to the object of research, research results in the form of reports, theses, and dissertations which function to provide explanations related to primary legal materials.

- 3) Tertiary Legal Materials

Legal materials obtained from additions such as legal dictionaries, encyclopedias, relating to the problem to be studied.

The data collection technique in this study was through literature review by studying bibliography, e-journals and the internet to obtain secondary data which was carried out by collecting, studying and understanding and quoting from books and laws and regulations related to this research. The results of the analysis of legal materials were interpreted using the (a) systematic interpretation method; (b) grammatical; and (c) theological.

4. Result and Discussion

4.1 *The Nature and Model of Electronic Signature Regulation According to Positive Law in Indonesia*

4.1.1 Model of Electronic Signature Arrangement According to Positive Law in Indonesia

In Indonesia, electronic signatures are governed by the UU ITE (ITE Law). The ITE Law regulates important matters, namely the requirements for electronic signatures, the legal consequences arising from the implementation of electronic signatures for the subject, in this case, the signatory. Furthermore, Electronic Certificates, which are a form of electronic signature, which are certified electronic signatures, are regulated in Article 51 of Government Regulation Number 71 of 2019 concerning Implementation of Electronic Systems and Transactions (PP PSTE 71/2019).

The legal force for electronic signatures can arise if the electronic signature meets the applicable requirements, which are in accordance with Indonesian laws and regulations. The requirements for an electronic signature are contained in Article 11 of the ITE Law:

Article 11

(1) Electronic Signatures have legal force and legal consequences as long as they meet the following requirements:

- a. Electronic Signature creation data is related only to the Signer;
- b. the data for making an Electronic Signature during the electronic signing process is only in the power of the Signer;
- c. all changes to the Electronic Signature that occur after the time of signing can be known;
- d. all changes to the Electronic Information related to the Electronic Signature after the time of signing can be known;
- e. there is a certain method used to identify who the Signatories are; and
- f. there are certain ways to show that the Signatory has given consent to the relevant Electronic Information.

By fulfilling the conditions stated in Article 11, electronic signatures in Indonesia will be legally valid, whereby electronic signatures can become valid evidence.

Everyone who is involved with an Electronic Signature certainly has an attachment to the responsibilities arising from the affixing of the Electronic Signature. In connection with these responsibilities as stated in Article 12 of the ITE Law, namely:

Article 12

(1) Everyone involved in Electronic Signature is obliged to provide security for the Electronic Signature he uses.

- (2) Electronic Signature Security as referred to in paragraph (1) at least includes:
 - a. the system cannot be accessed by other unauthorized persons;
 - b. Signers must apply the precautionary principle to avoid unauthorized use of data related to making Electronic Signatures;
 - c. The Signer must, without delay, use the method recommended by the Electronic Signature organizer or other appropriate method and must immediately notify someone who the Signer considers to trust the Electronic Signature or to the party supporting the Electronic Signature service if:
 1. the Signer knows that the Electronic Signature creation data has been compromised; or
 2. Circumstances known to the Signer may pose a significant risk, possibly due to the compromise of the Electronic Signature creation data; and
 3. in the event that an Electronic Certificate is used to support an Electronic Signature, the Signatory must ensure the correctness and integrity of all information related to the Electronic Certificate.

Everyone who violates the provisions referred to in paragraph (1), is responsible for all losses and legal consequences that arise.

Further explanation regarding Electronic Certificates is contained in Article 51 of Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions (PP PSTE 71/2019), namely:

- a. Electronic System Operators are required to have Electronic Certificates;
- b. Electronic System Users may use Electronic Certificates in Electronic Transactions;
- c. To have an Electronic Certificate, Electronic System Operators must submit an application to the Indonesian Electronic Certification Operators (PRSE Indonesia);
- d. If necessary, the Ministry or Institution may require Electronic System Users to use Electronic Certificates in Electronic Transactions.

Thus, in Indonesia, the use of electronic signatures that are legal and guaranteed legal protection are certified electronic signatures, as stipulated in the ITE Law, which is further regulated more specifically in Government regulation (PP) 82/2012 and Government regulation (PP) 71/2019.

4.1.2 Model Electronic Signature Arrangement under Australian Law (State of New South Wales)

Australia is a country that is divided into several states, one of which is the State of New South Wales. The state and territory governments are responsible for all matters not relegated to the Commonwealth, and they also adhere to the principle of responsible government. Within the states, the Queen is represented by a Governor for each state.

Electronic Signatures in NSW, Australia, are regulated in the Electronic Transactions Act 2000 No.8. According to documents published by education.nsw.gov.au which is the official website of the State Government of New South Wales Australia, in accordance with the Electronic Transactions Act 2000 No.8, it is stated that:

“The term E-Signature or “electronic signature” means a method of signing an electronic message that:

- (A) Identifies and authenticates a particular person as the source of the electronic message; and
- (B) Indicates such person's approval of the information contained in the electronic message.

• *A digitally signed document is a self-contained, portable and fully sustainable source electronic record that can be verified and trusted by internal and external parties independent of the organization or supplier of the electronic signature technology.”*

According to the above, the term E-sign or electronic signature refers to a method of signing electronic messages that identify and authenticate a person as the source of an electronic message, as well as indicating someone's approval regarding the information contained in an electronic message. Digitally signed documents are electronic records that can be continuously verified and trusted by internal and external parties of electronic signature technology organizations.

The use of electronic signatures in the state of New South Wales, Australia, must meet the required attributes for use, just like Indonesia, which has requirements to determine the legitimacy of an electronic signature. In the document uploaded by nsw.edu.gov.au, it is stated that what must be met in implementing an electronic signature is:

- a. The electronic signature must be unique and only valid as the signature of the person who owns the signature.
- b. Have the capability as a verification tool.
- c. Is under the control of the person who has the signature.
- d. The electronic signature is linked to the data in such a way that if the data is changed, the use of the electronic signature becomes invalid.
- e. In accordance with the requirements stated in the law.

In Australia, electronic signatures are regulated in the Electronic Transactions Act 1999 Section 10, which describes the basic elements that must be met by the electronic signature method, namely:

“(1) If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:

- (a) in all cases—a method is used to identify the person and to indicate the person’s intention in respect of the information communicated; and
- (b) in all cases—the method is used was either :
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
- (c) if the signature is required to be given to a Commonwealth entity, or to a person acting on behalf of Commonwealth entity, and the entity requires that the method is used as mentioned in paragraph (a) be in accordance with particular information technology requirements—the entity’s requirement has been met; and
- (d) if the signature is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph(a)”

All of Australia's states and territories are working feverishly to catch up with these new laws concerning electronic signatures, but all of Australia's states and territories also have laws that either complement or complement the regulations about electronic signatures.

In the state of New South Wales in Australia, electronic transactions related to electronic signatures are further regulated in the Electronic Transactions Act 2000 No 8 (New South Wales) which in Section 9 includes the same rules as stated in the Electronic Transactions Act 1999 Section 10 preloaded.

As a comparison, in the United States, specifically in the state of California, the use of electronic signatures must have certain purposes which are contained in the official website of the California state government, namely:

Purpose of Digital Signatures

The American Bar Association identifies the following as the general purposes for signatures:

- (a) *evidence*: A signature authenticates a record by identifying the signer with the signed document. When the signer makes a mark in a distinctive manner, the writing becomes attributable to the signer
- (b) *ceremony*: The act of signing a document calls to the signer's attention the legal significance of the act and helps prevent inattention or inappropriate approval
- (c) *approval*: In certain contexts, a signature expresses the signer's approval or authorization of the record or the signer's intention that it has legal effect
- (d) *efficiency*: A signature on a written document often imparts a sense of clarity and finality to the transaction, and may lessen the subsequent need to inquire beyond the face of a document

Basically, the use of a digital signature from this explanation aims to express approval from the signatory which is done digitally, as well as causing legal consequences for the party signing the document electronically, more specifically, signing the document with a digital signature.

4.2 Legal Force of Validity of Notary Deeds Signed with Electronic Signature and Its Implications for Contract Law in Indonesia and Australia (State of New South Wales)

4.2.1 Legal Force of the Validity of a Notary Deed Signed with an Electronic Signature and Its Implications for Contract Law in Indonesia

A notary as a public official of the state has the authority to make a deed, where the deed is called an authentic deed. The definition of an Authentic Deed, which is one of the powers of a Notary, is contained in Article 1868 of the Civil Code, which reads:

“An authentic deed is a deed drawn up in a form determined by law by/or before a public official authorized for that purpose, at the place where the deed was made.”

As can be seen from the definition of an Authentic Deed contained in the law above, there are elements that can be drawn, namely:

- (a) Made in the form determined by law; and
- (b) In the presence of the authorized public official where the deed was made.

Authentic deed made in accordance with applicable laws and regulations, will later become valid evidence in the eyes of the law. Thus, the Notary has the obligation to include that what is contained in the Notary deed, has really been understood and is in accordance with the wishes of the parties, namely by reading it so that the

contents of the Notary deed become clear, as well as providing access to information, including access to applicable laws and regulations related to the parties signing the deed, thus the parties can determine the contents and agree to the contents of the deed made by the parties before a Notary.

According to Alwesius, in his book entitled *Fundamentals of Notary Deed Making Techniques*, a Notary is a public official authorized to make authentic deeds regarding all actions, agreements and stipulations required by laws and regulations and/or desired by interested parties to be stated in the Authentic Deed (Alwesius, 2019).

The form of the agreement of the parties that determines the contents of the authentic deed made by the parties is indicated by the affixing of the signatures of the parties on the deed made, and the signature is affixed before a notary. Signing is the most important thing in making a deed, by adding a person's signature it is assumed that he bears the truth of what is written in the deed or is responsible for what is written in the deed (Moechthar, 2017).

The benefits of an authentic deed, which in English are called the benefits of deed authentic, while in Dutch it is called *wet uitkeringen authentiek* related to the use or advantages of an authentic deed (Salim, 2015). The benefits of an authentic deed include:

1. Define clearly the rights and obligations;
2. Guarantee legal certainty;
3. Avoiding disputes;
4. The strongest and most complete written evidence; and
5. In essence, it contains formal truths in accordance with what the parties notified to the notary.

In notarial practice, authentic deed and private deed are often known, where according to the previous explanation, an authentic deed is a deed made by a public official, namely a notary, while a private deed is only made by the parties without any intervention from a public official. It should be underlined that in notary practice in Indonesia there are also so-called private deed legalized by a Notary, and this deed is still not an authentic deed because even though it is legalized by a Notary, the underhanded deed is still not a deed drawn up by a Notary.

Authentic deed made by a Notary is divided into 2 (two) forms, namely:

1. Party Deed (*Partij*)

According to Herlien Budiono, in the deed of parties, "making" the deed consists of drafting; reading of the deed by a notary; as well as the signing of the deed by the appearers, witnesses and notaries. The deed of parties is a deed that contains what happened based on the information given by the appearers to the notary in the sense that they explain and tell the notary and for this purpose they deliberately come to the notary so that the information or actions are stated by the notary in a notarial deed and who (the) appearers signed the deed (Salim, 2015).

The deed of parties as explained above is a deed made directly before a notary, which consists of drafting, reading and signing the deed by the appearers, witnesses and notary (Alwesius, 2019).

2. *Relaas* Deed / Official Deed

The *relaas* deed is a form of deed made for authentic evidence of actions taken on a condition that is seen or witnessed by the notary himself in carrying out his position as a notary (Salim, 2015). The *Relaas* Deed does not provide evidence regarding the information given by (the) appearers by signing the deed, but provides evidence regarding the actions and facts witnessed by the notary in carrying out his position. Included in this *relaas* deed are, for example, deed of Minutes of Lottery, Deed of Minutes of General Meeting of Shareholders of a Limited Liability Company (Alwesius, 2019).

There is one fundamental difference between the *Relaas* Deed and the Deed of Parties, which is related to the signing activity. In the Deed of *Partij* (Parties), the signatures of the parties are absolute, so that if there are parties who do not sign the deed, then the deed is deemed not to exist, whereas in the Deed of Officials (*relaas*), the signature is not an absolute requirement of the deed, so if there are parties who cannot attend or even do not want to sign the deed, then this is explained in the deed of the agreement.

Regarding the discussion of an authentic deed from a notary in accordance with the previous explanation, each deed always has a signature element in it, however, in the previous explanation there is no specific explanation regarding how the signature is meant for an authentic deed. Is the signature a direct signature or can it be a certified electronic signature?

However, as contained in Article 38 UUJN-P it is stated:

- (3) Final or Closing Deed contains:

- a. a description of the reading of the Deed as referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7);
- b. a description of the signing and place of signing and place of signing or translation of the Deed, if any;
- c. full name, place and date of birth, occupation, position, position and place of residence of each deed witness; and

- d. a description of the absence of changes that occurred in the making of the Deed or a description of any changes which could be in the form of additions, deletions or replacements as well as the amount of the changes.

In letters a and b of Article 38 paragraph (4) of the UUJN (Notary Position Law) it is stated that in closing the deed, the reading of the deed and the description of the signing and the place for signing the deed must be included in an authentic deed. As such, it will be difficult to contain information about the signing of an authentic deed, if the deed is done using an electronic signature, although it is not explained in detail in the UUJN whether an authentic deed must be signed with a wet signature or can be done electronically.

Furthermore, Article 16 paragraph (1) letter m of UUJN-P stipulates that one of the obligations of a notary in carrying out his position is:

“reading the Deed before the appearers attended by at least 2 (two) witnesses, or 4 (four) special witnesses for the making of a private will, and signed at the same time by the appearers, witnesses and Notary.”

Hence, it can be concluded that an authentic deed in Indonesia still has to contain a wet signature, because the reading and signing of the deed must be attended in person by the appearer listed in the authentic deed. If an authentic deed made by a Notary is signed electronically even though it uses a certified electronic signature and is in the form of a digital signature issued by companies authorized to issue digital signatures as stipulated in laws and regulations, the authentic deed is still considered incomplete and it will be questioned whether the authentic deed is considered legal and the strength of the proof will be doubted because it does not meet the requirements for making an authentic deed as contained in UUJN-P.

In addition, for a deed to fulfill the authenticity, there are conditions that must be met related to the authority of the Notary concerned with the deed. This authority covers 4 (four) things, including:

1. The notary is authorized insofar as it concerns the deed he made;
2. The notary is authorized insofar as it concerns the person for whose benefit the deed was drawn up;
3. The notary is authorized as long as it concerns the place where the deed was made;
4. The notary is authorized as long as the time of making the deed (Notodisoerdjo, 1993).

According to Sita Arini Umbas (2017), in general there are 3 (three) legal powers possessed by an authentic deed, namely:

1. Outward evidentiary power. By external evidentiary power, this means the ability of the deed itself to prove itself as an authentic deed. According to Article 1875 of the Civil Code, this ability cannot be granted to deed made privately.
2. The power of formal proof. With the strength of this formal proof by means of an authentic deed it is proven that the official concerned has stated in the writing, as stated in the deed and apart from that the truth of what is described by the official in the deed.
3. Strength of material evidence. As far as the material evidentiary strength of an authentic deed is concerned, the certainty that what is stated in the deed is valid proof of rights and applies in general unless there is evidence to the contrary (Umbas, 2017).

In its development, electronic signatures in the business world have indeed become an alternative for business people to be able to facilitate business activities. Indonesia has enormous potential in various types of businesses which will continue to advance the Indonesian economy. Business actors in Indonesia are Indonesian Citizens and Foreign Citizens while still guided by the laws and regulations in Indonesia.

Notary is one of the supporting professions for the business world in Indonesia, where products from Notaries, namely authentic deeds themselves, are really needed in the business world to provide legal certainty for business people. Currently, Electronic Signatures cannot be applied to Authentic Deeds because there is still a legal vacuum regarding the arrangements that legalize Authentic Deeds to be signed electronically.

Contracts in Indonesia are made based on important principles which are the basic principles of agreements as contained in CHAPTER III of this study, including the principle of consensually which states that an agreement will become law for those who enter into an agreement, as well as the principle of freedom of contract, where the parties who make a contract, can make a contract freely as long as they do not violate the law so that the contract can apply legally and has the power of proof in the eyes of the law. Clearly, a valid contract must meet the legal requirements of the agreement contained in Article 1320 of the Civil Code.

A contract in relation to a notary is also an authentic deed if the contract is drawn up before or by a notary, but if it is not made before a notary, then the contract is not an authentic deed, but still applies as law for the parties to the contract. An example that is often encountered as a form of contract that is not an authentic deed, is a cooperation contract between a distributor company and a retail store where an item is supplied by the distributor to be sold to consumers from the retail store, usually in some cases, this cooperation contract is carried out electronically or manually with a stamp as a reinforcement of the contract.

The use of Digital Signatures in a contract certainly has major implications in the world of contracts in Indonesia, this is related to the efficiency of time, effort and especially related to funds. Indeed, the creation of a digital signature requires a fee to be paid to companies issuing certified electronic signatures, but if it is

elaborated, there are many advantages to be gained by using digital signatures as explained in the previous sub-chapter.

Today, electronic signatures in Indonesia are more widely used in the financial world, such as in banking, insurance, fintech, and investment companies. In Indonesia, people can already use electronic signatures to form an account, apply for credit and loans, credit restructuring, apply for insurance policies, and create insurance contracts. It can also be seen that several administrative services have used a system that enforces electronic signatures, with the Covid-19 Pandemic the potential for using electronic signatures is increasingly open, even in formal activities (Tim Publikasi Hukumonline, 2022).

Regarding the implications of a notarial deed signed with an electronic signature, it can be emphasized that in Indonesia, it currently does not allow a Notary to use an electronic signature in making the deed, thus, a notarial deed cannot be signed with an electronic signature, if it is forced for a deed to be signed with an electronic signature, then the deed becomes invalid in the eyes of the law.

As explained in the previous discussion, the product of a notary, in this case what is characteristic of a notary in Indonesia is an authentic deed made by a notary. Notarial deed, as stated in the law, cannot be signed electronically because there are no regulations that allow this, moreover the law stipulates that an authentic deed is made by a notary and signed in front of a notary, which means the signature of a authentic deed must be signed with a traditional signature.

In terms of contracts in Indonesia, for example in the business world, there are contracts that are needed, for example cooperation contracts and so on. In the event that a business or trading contract is signed using an electronic signature, as long as the electronic signature meets the requirements for the validity of an electronic signature, and the contents of the contract do not violate laws and regulations and the making of the contract is in accordance with its legal requirements agreement stipulated in Article 1320 of the Indonesian Civil Code, a contract signed using an electronic signature will be deemed legally valid and will have the power of evidence in court.

Contracts that use digital signatures provide many conveniences for the contracting parties as stated in the previous discussion regarding the benefits obtained by using digital signatures for a contract.

Furthermore, in the world of trade in Indonesia, related to Limited Liability Companies which are regulated in Law Number 40 of 2007 concerning Limited Liability Companies (UUPT), it is stated that the establishment of a limited liability company is submitted using an electronic administration system to the Minister of Law and Human Rights. In Article 10 paragraph (6) of the Company Law it is stated that the Minister issues a decision regarding the ratification of the Company's legal entity that is signed electronically. In the establishment of a limited liability company, the approval decision from the company's legal entity is signed electronically by the Minister, but in practice, the Deed of Limited Liability Company Establishment as submitted with the electronic system must be signed directly because the Deed of Limited Liability Company is one of the products of an Indonesian Notary.

4.2.2 The Legal Force of the Validity of a Notary Deed Signed with an Electronic Signature and Its Implications for Contract Law in Australia

After all, there are distinctions between Indonesian and Australian notaries, and these variances come from the fact that the two countries' legal systems are distinct. To be able to know the legal force of the validity of the Notary Deed signed with TTE in Australia, it must be understood first that Notaries in Australia have several practices.

Notaries in Indonesia and Australia have one significant difference regarding their authority. Notaries in Indonesia have the authority to issue an authentic deed, whereas in Australia, a Notary is not authorized to make an authentic deed. Notaries in Australia have the authority to:

“A Notary Public principally:

- Attests documents and certifies their due execution for use in Australia and overseas countries
- Prepares and certifies powers of attorney, wills, deeds, contracts and other legal documents, for use in Australia and overseas countries
- Administers oaths for Australian and international documents
- Witnesses signatures to affidavits, statutory declarations, powers of attorney, contracts, and other documents, for use in Australia and overseas countries
- Verifies documents for use in Australia and overseas countries
- Certifies copy documents for use in Australia and overseas countries
- Exemplifies official documents for use internationally
- Notes and protest bills of exchange
- Prepares ships' protests”

“Justice of the Peace (JPs) in Australia provides services similar to American notaries, but are not permitted to witness documents for use in foreign countries. Notaries Public have this exclusive right and are the only true

international "JP" in Australia". In Australia, Judges provide services similar to American Notaries, but are not allowed to act as witnesses for documents to be used in a foreign country. Public notaries have 'exclusive' authority to carry out this task.

From the description above, it can be seen that the function of an Australian Notary is focused on document legalization activities as well as being a witness in the signing of important documents. There is no explanation stating that a Notary in Australia can issue a deed as an Indonesian Notary has the authority to make an authentic deed. As such, we cannot see the implications of electronic signatures for notarial deeds in NSW, but related to trading contracts, electronic signatures can be used in NSW, even this has been in effect for a long time, of course electronic signatures in NSW are also issued by third parties such as PSrE in Indonesia. In general, the third parties that issue electronic certificates in NSW are known as the Adobe company.

As already noted, that the role of the Notary in Australia, there are significant differences that can be seen clearly. The authority of a Notary in Indonesia can be seen in Article 15 of Law 2/2014. Indonesian notaries have the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in an authentic deed, guarantee the certainty of the date of making the deed, save the deed, provide grosse, copies and quotations deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law.

In addition, the Notary has the authority to:

1. legalize the signature and determine the certainty of the date of the private letter by registering it in a special book (legalization);
2. record private letters by registering in a special book;
3. make a copy of the original letter privately in the form of a copy containing the description as written and described in the letter concerned;
4. verify the compatibility of the photocopy with the original document;
5. provide legal counseling in connection with the making of the deed;
6. making deeds related to land; or
7. make a deed of minutes of auction.

In addition to these authorities, Notaries have other authorities regulated in laws and regulations.

A very significant difference between an Indonesian Notary and an Australian Notary is that a Notary in Australia in the state of NSW does not have the authority to make an authentic deed, because the scope of authority is limited. In Indonesia, this authority is the main authority of a Notary. Hence, the authentic deed in Australia in the state of NSW is still questionable.

As seen from the description above, Notaries in Australia have several roles that are seen to be more prominent than other authorities, namely to legalize documents and witness the signing of important documents related to the law (to legalize documents and witness the signing process of documents).

The products produced by Australian Notaries in the states of NSW and Indonesia are very different. Indonesian Notaries produce 4 (four) legal products, namely:

1. Notarial Deed
2. Legalization
3. Waarmeking
4. Legalize

Whereas in Australia, in the state of NSW, a public notary has the function of verifying whether a document is genuine or not.

With regard to deeds signed with electronic signatures in Indonesia and in Australia in the state of NSW, this has not been legally permitted, because in both legal systems, it has not been specifically regulated regarding the signing of notarial deeds that are signed electronically. As another comparison, in the state of California, United States, the role of a California Notary is similar to that of an Australian NSW Notary, namely to legalize documents using a Notary Seal (official Notary seal), as well as to witness the signing of documents.

According to data uploaded from the official website of the Australian Government, the state of New South Wales, regarding electronic signatures, it is stated that:

"However, there remain specific types of transactions where 'wet signatures' are required. These tend to be transactions where there is a need for high confidence in the validity of the transaction – such as deeds, statutory declarations or wills."

In more detail, the data is described as follows:

"The following documents should not be signed electronically, as there would be doubt as to the legal validity of the document:

- Deeds. Deed is excluded from the scope of the ET Act. The exclusion applies because of the operation of clause 5(f) of the Electronic Transactions Regulation 2017, which excludes documents that are required to be witnessed.

- Documents to give effect to the transfer or a registered lease of land.
- Statutory Declarations. Similar to Deeds, this class of documents requires a witness to observe the maker signing the document, and then also signing the document as a witness. Failure to meet the witness requirements will at this time mean the document will not be legally valid.
- Formal determinations by the Secretary in relation to salaries and conditions of employment e.g.: Teaching Service Act 1980, section 13.
- Instruments of Delegation, whereby the Secretary formally delegates powers to other officers of the Department.

From this explanation, there are significant similarities in the use of electronic signatures in the states of NSW, Australia and Indonesia, where a document which is a deed cannot be signed electronically. Electronic signatures in NSW can be used for commercial purposes, but documents related to a notary must still be signed directly or face to face between the parties making an agreement.

As previously discussed, the function or duties of a Notary in Indonesia and Australia which is a similarity is to witness the signing of documents as stipulated by the laws of the two countries. In carrying out their duties, notaries from the two countries have not been able to carry out their duties as Witnesses or witnesses from signing documents electronically, but notaries in Indonesia and Australia must be present and sign documents with wet signatures.

In relation to contracts for business activities, it is also stated in the data uploaded on the official website, namely:

“Can I use an electronic signature for external business transactions?”

The same general principles about the validity of electronic signatures apply to external transactions.

In relation to major transactions, it will be prudent to obtain specific legal advice. In general, the more materially significant the transaction (in terms of monetary value, length of term, extensiveness of compliance obligations), the more consideration will be appropriate to whether, and if so, how a digital signature may be applied.

For more minor transactions, digital signatures can be utilized if the above four requirements (identification, intention, reliability and consent) are met.”

From this explanation, it can be concluded that although the duties and functions of Notaries in Indonesia, Australia in the State of NSW and the United States in the State of California, there are significant differences, related to the enforceability of electronic signatures in the exercise of their profession, the most prominent similarities that can be seen, i.e. electronic signatures cannot yet be used in the implementation of the notary profession in the three countries, where for every signing carried out by a notary in the three countries, both signing the deed and signing as a witness, can only be done face to face using a wet signature, in the three countries even electronic signatures are still used only in business activities such as cooperation contracts, and so on.

5. Conclusion

The nature and model of electronic signature arrangements in the two countries, both in Australia and in Indonesia, refers to the understanding of deeds in trading or buying and selling contracts, in both countries there are no explicit arrangements related to the existence of effectiveness or supervision of the deed signed electronically. This is based on practice that occurs in Australia, where the understanding of deeds is not aimed at authentic deeds, but rather those related to the making of contracts, whether it is a contract of sale and purchase, leasing of land, housing, apartments, or other movable objects. This also happens in Indonesia, until now in Indonesia there is no practice of making authentic deed based on electronic signatures. In other words, that the provisions in the UUJN (Notary Position Law) in Indonesia which require that the parties making the contract must appear directly to a notary, become imperative. Hence, in the researcher’s perspective, authentic deed cannot be replaced with a deed made with an electronic signature. Thus, the regulations that can regulate the existence of protection, implementation and supervision of deeds made with electronic signatures, need to be studied more deeply by considering aspects of legal certainty, security, and benefits for all parties involved.

The force and validity of the deeds made electronically, as explained in the first conclusion, it is very clear that the two countries are still considering carefully the making of deeds made electronically. The authenticity of the deed is extremely susceptible to counterfeit, which can be committed by anyone using IT technology, copywriter art and graphic technology, artificial intelligence, and other techniques. Regarding the legal force of a deed made electronically by a notary, it is very dependent on recognition of the state, currently an electronically signed deed has not received explicit recognition from the state, this can be seen from the absence of arrangements related to an authentic deed made electronically. On the other hand, it is believed that in practice, contracts created by the community, such as in the business world, apply to deeds that are signed electronically, in this case, contracts of cooperation between the parties.

In order to expand the scope of services in trade and investment activities, the government needs to explore

possibilities or opportunities to regulate the existence of technical implementation, supervision, and development of electronically made deeds. This is necessary considering that transactions that will develop in the era of free trade will involve various parties with diverse backgrounds. Therefore, the Government together with the People's Legislative Assembly of the Republic of Indonesia need to formulate an appropriate regulatory model in providing protection and opportunities for the implementation and development of electronically signed deeds. This can be done through improving the norms or rules that complement the protection system for electronically signed deeds.

Currently, with the enactment of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning Formation of Legislation, it can be seen in article 97B that currently the Formation of Legislation can be done electronically and the signing is done electronically by using a certified electronic signature. This presents a significant opportunity for the Government and the People's Representative Council of the Republic of Indonesia to revise the provisions related to electronic signatures and authentic deeds contained in UUN (Notary Position Law) and UUNITE (ITE Law), so that electronic signatures can be used in the future for notarial activities in Indonesia.

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