

Partnership Agreement between Notary and the Banks in Standard Agreement That Influence the Independence of Notary in the Creation of Authentic Deed

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Abstract:

Background: Notary is a public official who runs the profession based on principles of trust, honesty, thoroughly, independently, impartially, safeguarding the interests of those involved in law-drafting. As an independent profession because it is free from interference from any party, cooperation between notaries and banks by binding themselves with a cooperation agreement, not only damages the authority of an independent notary profession, but also has the potential to prioritize the interests of banks as creditors compared to the community as debtors which both require the services of a notary service in drafting authentic deeds.

Research Method: This research is an empirical legal research, the research approach of this research is a sociological juridical approach, which is an approach that is done by looking at the reality that exists in practice in the field. Sources of data used in this study were taken from primary, secondary and tertiary data. Primary data used in sociological juridical research are data obtained from field research/interviews. The data used to complete the primary data are derived from literature review, the material used is through acts, books, magazines, newspapers, articles, journals, and website along with other references that support this research. Tertiary data are supporting legal materials that provide guidance and explanations for primary and secondary legal materials. Tertiary legal material in the form of information sources, namely the legal dictionary, Indonesian dictionary and encyclopedia. Data were analyzed qualitatively to get a description of the partnership agreement between the notary and the bank in drafting the deed of the bank credit agreement.

Results: Partnership agreement between public notary and banking is an act that is prohibited in the notary position law and notary ethics code. The agreement makes a notary not independent, thus affecting the disruption of services provided by the public notary.

Conclusions: The partnership agreement between the notary public and the bank makes the notary not independent in carry out his professional obligations because he prioritizes services to the bank instead of those who do not cooperate with notary.

Kata Kunci: Notary, Independent, Authentic Deed

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I. BACKGROUND

As a public official who has the authority to make an authentic deed as mandated by statutory regulations, the notary is obliged to act trustfully, thoroughly, honestly, impartially in carry out his position and authority and safeguarding the interests of the parties involved in legal actions. This is stated in Article 1 (1) of Indonesian Law Number 2 of 2014 on Amendment of Indonesian Law Number 30 of 2004 on the Position of Public Notary (called UUJN) and as referred to in Article 16 paragraph (1) letter a of the UUJN and Article 3 of the Notary Ethics Code.

The word dependence or independence in the Indonesian Dictionary means being able to stand alone,¹ can carry out their own actions in drafting decisions without relying on other organs or institutions. Independent in performing their duties, position and authority of the notary is also often termed the independence which has independent meaning, its own, stand-alone, and free.² At an institution or individual that is independent, then the individual or institution has the freedom to what is desired, no intervention by any party and in the office of a notary public in carrying out the duties and authority of his position, which is the management concept which means managerially the institution can stand alone without relies on his superiors or to other parties³.

The need for a public notary is because the deed in which the notary's statement is written is the most perfect evidence, therefore the notary must be trustworthy and provide assurance that the deed he made, as a strong evidence and providing legal protection for the community. One of the deeds which has an authentic value is in the form of an agreement, which in its drafting, the notary directs and provides counseling to the parties who will make the agreement so that the contents of the agreement do not conflict with the law, public order and decency.⁴ Regarding the strength of the deed as evidence is contained in Article 1866 of the Civil Code which states, the evidence consists of: written evidence, evidence with witnesses, allegations, confession, and oath”.

In relation to banking activities, the vital role of notaries in drafting deeds related to the drafting of deeds of contracts / product agreements from banks, one of them is drafting bank credit agreements involving customers as debtors with the Bank as creditors, both parties need certainty and legal protection, the credit agreement made by the bank legally requires a notary assistance in the capacity of a public notary who has the authority to make an authentic deed. The basic establishment of partnership between the bank and the notary, is due to the bank's interest in authenticating the credit agreement, which in broad outline forms of cooperation is related to the credit agreement, the binding of the credit and its supporting deeds, such as binding of credit guarantees whose interests are to secure the interests of the bank.⁵ In initiating cooperation, the bank offers a matter of cooperation with a notary, or vice versa, where the partnership agreement between the bank and the notary is not regulated in the Banking law or the Notarial law.

Agreement between the bank and the notary made in writing or verbally, where the terms or provisions of the agreement is typically determined by the bank and there is no freedom of the notary to determine the contents of the agreement although in favor of the bank and the detriment of the notary, if the notary agreed that the agreement was made but if not, the cooperation will not be established.

Former Chairperson of the Indonesian Notary Association (INI) Harun Kamil believes that the partnership agreement model offered by the bank, not only harms the notary, but also undermines the dignity of the notary, often the bank dictates a notary in drafting a credit agreement even though he thinks the bank is more dominant in drafting the loan agreement, it can also occur because of the credit agreement presented to the notary is in the standard form. In such case, even though the credit agreement has potential problems, for example due to a problematic guarantee letter, the bank still forces a notary to make a deed.⁶

The risk of a partnership agreement between a notary and the bank is very diverse, in addition to the "holding" of the professional responsibilities of the public notary, the potential for being sued by the customer (debtor) towards the bank is also dragging the notary. In some cases, notaries were sued by banks for various reasons, motivated by the ineffectiveness of cooperation both the notary to the bank. At least it can be seen in the case with the decision No. 536 / Pdt.G / 2011 / PN MDN with plaintiff on behalf of Rina Marlina against PT. Bank Danamon Tbk and against the notary Juwita Siregar as defendants I and II respectively.

Defendant II was sued by the plaintiff, because Defendant II did not interpret the amount of debt and the loan period with the two Stand Loosd debt guarantees in Defendant I, in the deed of transfer and handover agreement (cessie) between the plaintiff and defendant I, causing confusion to the plaintiff and drafting the plaintiff in debt with Defendant I. In another case that ensnared a public notary public, Elly Safiana, who was based in Banda Aceh, sued PT. Bank Mandiri (Persero) Tbk as its partner, at the Banda Aceh District Court with case number 62/Pdt.Bth/2017/ PN BNA regarding acts against the law, relating to the auction of mortgage financing facility guarantees, although the Plaintiff claimed to have pay off the credit facilities provided by the defendant, but the defendant still controls the mortgage certificate which then leads to collateral auction. It was pointed out by the plaintiff due to the termination of partnership unilaterally by the plaintiffs, because of the cooperation between the plaintiff and defendant are considered not running well.

Another case which also undermined the credibility of the public notary occurred in the Sekayu District Court, where Warso Asrofi as the plaintiff sued PT Bank Mandiri Sekayu Branch for omitting the certificate of ownership in the plaintiff's name as a collateral for credit to the defendant with case number 28/Pdt.G/2018/PN.Sky, but the denial by the bank said that the ownership certificate with No. 966Ds. Sidomukti An. Warso Asrofi was omitted by the defendant's partner notary.⁷

Based on the explanation above, a legal problem which will be examined in this paper is, how is the effect of the partnership agreement between public notary with the bank through a standard agreement on the independence of the notary in drafting an authentic deed?

II. RESEARCH METHOD

Types of Research: This type of research is empirical legal research.

Research Approach: In this study used juridical sociological approach, the approach taken by the fact that exist in the field.

Research Location: This research was conducted around the city of Banda Aceh and Aceh Besar regency.

Research period: This research was conducted for approximately 6 months, starting on September 2019 to February 2020.

Population: Population on this research included The population is all of the object to be studied, therefore, the population in this study are the notaries in the public notary office in Banda Aceh and Aceh Besar, creditors and debtors, as well as all parties involved in the process of drafting a partnership agreement.

Sampling technique: Sampling collection in this research was done by purposive sampling.

Data analysis: The data was analyzed qualitatively to describe about partnership agreement between the notary and the bank in the process of drafting deed of bank credit agreement.

III. RESEARCH RESULTS

The principles are the basis and foundation for the notary to execute authority on the implementation of office duties by promoting self-reliance based on the UUJN one of which is the principle of Equality, that is, notaries in providing services to the public may not side or discriminate with one to another, based on socio-economic conditions or other reasons, only legal reasons can be used as a basic reason by notaries to not providing services to clients, because in particular case, notaries can also provide legal services which are free of charge to those who are unable (Article 37 of UUJN).³ In addition, in the principle of proportionality in Article 16 paragraph (1) letter a UUJN is a manifestation of the principle of proportionality, in which notaries in performing their duties and positions shall keep the interests of the parties involved in legal actions, shall give priority to the balance between the rights and obligations of the parties facing a notary, so that the interests of the parties are maintained proportionally which is then poured into a notarial deed. The principles of the implementation of a good notary duty are notary corridors in carrying out their duties and authority accompanied by maintaining the authority of the profession of public notary. However, in practice the independence of the notary is often compromised by attaching themselves by means of cooperation with the bank in drafting authentic deed, with a partnership agreement

In carrying out the duties of a public notary, there are several notary independence as a form of professionalism in carrying out his position, i.e.:

A. The independence of notary in drafting deed;

Notary principles that characterize Latin notary (civil law) are public officials appointed by the state, authorized to draft authentic deeds that carry out their positions independently and impartially, and to keep the contents of the deed and information obtained confidential. Notary in drafting an authentic deed which then becomes the strongest evidence is a necessity in certain legal actions, this is based on:⁸

a) Protection of those who are "weak" in their legal position because of their socio-economic conditions, after hearing the notary's explanation so that they are cautious;

b) The second category relates to the form of the agreement that legal actions by the makers of the Act are considered very important;

c) The third category relates to legal actions carried out that are not contrary to the law, public interest and good morals.

B. The independence of notary in office administration.

The notary office is bound by the UUJN and the notary ethics code, so there are restrictions where any kind of jobs that may not be delegated to others. Notary office management is needed, in relation with notaries in providing services to their clients to be more effectively.

A professional notary is a notary who has the skills in organizing all technical activities and managing information and data in the office he leads to achieve his goals effectively. Saving a notary protocol is part of the formal aspect that a notary must do to support the realization of legal certainty over certain circumstances of events and legal actions, because the notary protocol is a proof of contract (post contractual).

The importance of protocol notary is not only understood as the state archives and even a track record on legal events that a person experiences in the field of private law, therefore, the obligation to keep and maintain not only required along the notary office and/or have authority, but to the state of the notary is not able, declared unable, felt unable or for some reason deemed not authorized to save and maintain the notary protocol through the mechanism established by Article 63 and 64 of the UUJN, therefore the notary must transfer responsibility for the obligation to another notary.⁹

C. The independence of notary against fellow.

Not only with clients, notary's ethics code also regulates the notary's relationship with fellow colleagues, i.e:

a) mutual aid, mutual respect for fellow Notaries in family atmosphere;

b) shall maintain mutual respect and defend the honor and reputation of the notary corps;

c) not adversely compete fellow notary, both moral and material;

d) it is prohibited to form groups of fellow colleagues who are exclusive in order to serve the interests of an agency let alone cover the possibility for other Notaries to participate;

D. The independence of notary with the state.

The notary as a state official is appointed and dismissed by the Minister in accordance with Article 2 of the UUJN, however institutionally, the structure chart (organigram) is clearly separated from other institutions, even though the notary is appointed and dismissed by the Minister of Law and Human Rights (*Kemenkumham*), but institutionally notary does not mean being a subordinate of the Ministry of Human Rights and as well as not existed in the structure of the Department of Law and Human Rights of the Republic of Indonesia, in addition, a notary public is not well paid by the State like another State officials, they also do not receive a pension from the country. Revenue generated of the notary is generated from notary services in terms of drafting a deed or providing free services to those who are poor.

The form of notary's independence in providing services to those who need their services is shown by the notary ethics in providing services, namely:¹⁰

1. Prioritizing service to the interests of society and the state
2. Treat every client that comes regardless their economic status or social status.
3. Providing notary services in drafting deed and any other services for people who can not afford without charging fees.
4. It is forbidden to sign the deed that already drafted by someone else.

Notary is a public official whose authority is given by the Law in drafting and signing authentic deed. The term public official is a translation of the term *openbare ambttenaren* contained in Article 1 of the UUJN, stating that the notary public is the only public official who is authorized to make an authentic deed regarding all acts, agreements and stipulations required by a general regulation or by the interested parties as desired to be stated in an authentic deed, guaranteeing the certainty of the date, keep the deed and provide the grosse, copies and quotations, as long as the drafting of the deed was regulated by a general regulation, this not also assigned or excluded to other officials.³

The authority of the notary as a public official can also be traced to the Article 1868 of the Indonesian Civil Code which states "An authentic deed is a deed prescribed by the law, and made by a public official in the place in which it is made".

The existence of notaries as public officials is indispensable in the making of authentic deed for recording a legal act, but this does not seem to be realized by a notary, whereas in terms of needs, the banks need notary more than the interests of a public notary public to the bank.

Although it has been guaranteed by the law, violations committed by notaries still occur frequently, as a result of being not mandated by the notary in carrying out his profession, and broadly also having an impact on falling in spirit and honor of his profession.

In practice, the partnership between notary with the bank begins with the submission of the cooperation carried out by the notary to the intended bank by attaching several conditions, that is:

- a. A copy of the decision of the Minister of Law and Human Rights of the Republic of Indonesia on the appointment of a Notary;
- b. A copy of the Decree of the Minister of Agriculture and Spatial Planning of the Republic of Indonesia on the appointment of the Land Deed Official (PPAT);
- c. Tax identification number;
- d. Member card of Indonesian Notary Association;
- e. Member card of Land Deed Official Association

After completing the requirements referred above, the notary submits an application to the head of the intended branch office. According to the Head of Bank BPN Banda Aceh Branch Office, notaries of bank partners are not necessarily those who have practiced in a long time/experienced the nearest location to the bank, most importantly, the partner also serves as the Land Deed Official (PPAT) due to the housing credit (KPR) becomes one of the object of the agreement, so that a notary at the same time as PPAT is needed in the land sector.

In contrast to BPN's policy, PT Bank Aceh Syariah requires that the notary who collaborates with them has to be a senior notary, because they are considered more competent in making the deed. However, the similarities between the two standards regarding the form of the agreement between the notary and the bank, must be in the form of a standard agreement. However, if the agreement is in written form, there are differences in the contents of the agreement, as follows:

1. Partnership agreement between notary with Bank BPN, the agreement contains 8 articles, as follows:
 - a. Article 1 regarding the Scope of Partnership Agreement;
 - b. Article 2 regarding Procedure for Work Submission;
 - c. Article 3 regarding Fees;
 - d. Article 4 regarding Method of Payment;
 - e. Article 5 regarding the Period of Work Submission;
 - f. Article 6 regarding Fine and Sanction;
 - g. Article 7 regarding Legal Domicile;

- h. Article 8 regarding Closing.
2. Partnership agreement between notary with Bank Aceh Syariah, the agreement contains 9 articles, as follows:
 - a. Article 1 regarding Purpose and Objectives;
 - b. Article 2 regarding Scope of Partnership Agreement;
 - c. Article 3 regarding Responsibility;
 - d. Article 4 regarding Period of Binding Completion;
 - e. Article 5 regarding Method of Payment;
 - f. Article 6 regarding Confidential Information;
 - g. Article 7 regarding Period of Agreement;
 - h. Article 8 regarding Dispute Resolution;
 - i. Article 9 regarding Other Provisions.

Standard agreements arise because of the freedom of contract between parties that have a balanced position, the deals that occurs in the agreement is the result of negotiations between the parties¹¹. Partnership agreement between notary and the bank in making a bank loan agreement made in the form of a standard agreement made by the bank, according to Saddam, one of the Loan Documentary Staff at the Bank Tabungan Negara (Bank BTN) said that the purpose of making a partnership agreement between a notary with the bank in the form of a standard agreement is to protect the interests of the bank, in addition to more effectively and more efficiently¹². According to him, a collaboration was made between banks and notaries in standard agreements, so that each party bound in the agreement could know the rights and obligations, which could be done and which were forbidden to be done, and if one party violated the contents of the agreement, then it is the basis for taking legal action.

According to Saddam, arrangements regarding notary obligations in the partnership agreement including: First, Receiving payments from the bank after the completion of the work that has been granted by the banks; Second, Receiving files required in connection with the completion of the work provided by the bank; Third, notary obligation to complete the work assigned by the bank in accordance with the time frame that has been specified in the clause on partnership agreements; Fourth, the obligation to pay late fees to the bank if the notary in completing work exceeds the period specified in the partnership agreement. Meanwhile, the bank's obligation to submit documents relating to credit agreements and other supporting deeds and receive honorarium for work completed.

Violation of liability done by a notary, for example, not completing work within the specified deadline of 2 (two) months, the bank will impose a notary sanction in the form of late fee of 5 (five) percent of the value / cost of legalizing the credit agreement and making a deed.

Ika Sulityowati as a notary who has a notary office in the Aceh Besar Regency, said that the determination of the amount of sanctions for late completion of work by the notary public, made the notary work more optimally, even though the making of supporting deeds for a credit agreement requires a long time. According to her, the notary must still be based on the deadline agreed in the cooperation agreement. However, according to him, setting deadlines is beneficial for banks. Setting such deadlines makes the bank seem to be an exclusive client to be served, and overrides service to other clients.

The determination of sanctions on notary performance actually shows an imbalance between the position of the notary with the bank, as if the imposition of a notary liability to the bank, is so large compared to the bank's obligation to the notary. The existence of a standard clause in relation to the obligations of the parties causes an imbalance of rights and obligations in the cooperation agreement between the notary and the bank in making a bank credit agreement because there are several clauses that are considered to be detrimental to the notary. A position imbalance can also lead to inequality, making it incompatible with the legal conditions of an agreement. The most important thing in the principle of balance in the agreement is the equal rights and obligations of the parties, although sometimes one party has higher rights and obligations than the other party so that makes the other party look weak.¹³

The background to the emergence of a cooperation agreement is the socio-economic situation, community needs and / or company needs, where there are corporate interests that must be protected so that business can continue, thus the partnership agreement is urgently needed in addition to being still acceptable to both parties. The standard agreement is known in Dutch as *standard voor waarde*, which in English law is known as *standard contract*. Standard contract is an agreement that has been determined and has been outlined in the draft of a form, this agreement is determined by one party, especially the strong economy against the weak economy.¹⁴

According to Husna, a notary who has an office in Banda Aceh, even though the bank determines the clauses in which there is a partnership agreement, the notary can actually take the attitude of whether to reject or

accept the contents of the agreement, but if refusing the consequences, the cooperation between the notary and the notary bank in making a credit agreement.

The imbalance between the notary's position and the bank in the cooperation agreement is due to the weak role of the Indonesian Notary Association as a notary professional organization in Indonesia and the Regional Supervisory Council in overseeing the notary's performance, not only making the notary's position weak and unequal to the bank in partnership. But it also has the potential to harm the client/customer in making a loan agreement.

Losses incurred from the credit agreement due to inequality of the notary to the bank, for example prior to the signing of a credit agreement by the parties to the customer with the bank, the notary did not read out the contents of the deed of credit agreement in advance, it is submitted by one of the bank customers, Rizal Kurniawan. The notary's obligation to read the deed in the presence of the attorney attended by at least 2 (two) witnesses is contained in the provisions of Article 16 paragraph (1) letter m UUJN, while the exception to the reading of the deed in front of the client is because the parties have read it themselves, know and understand its contents, but not from the notary's desire not to read the deed in front of the audience, provided the provisions in accordance with UUJN, in closing the deed must be given a description of the reasons why the deed was not read.

The reading of the contents of the agreement before it is signed by the parties must be done and is part of the counseling of the contents of the agreement by the notary to the parties as well as providing an opportunity for the parties specifically his debtor to ask about the contents of the agreement, and ascertain whether the contents of the agreement are in accordance with the wishes of the prospective debtor, so that the parties freely and consciously approve the contents of the agreement. But the reason for time efficiency is because many credit agreements that must be signed by a notary make the credit agreement not read.

Generally, debtor knowledge about the contents of the credit agreement so that the contents of the agreement must be read among others:

1. Regarding interest;
2. Regarding the term of repayment;
3. Regarding whether before the period of repayment but has been paid, how is the interest removed;
4. Regarding collateral when the debtor defaults.

Notary that does not meet the provisions in Article 16 paragraph (1) letter m and paragraph (7) of the UUJN that is not reading the deed to the registrar when signing the deed means that the notary has been negligent and made a mistake in carrying out his/her office duties. One legal consequence of not reading the deed by the notary at the time of signing the deed will cause the deed degradation. Degradation of the deed caused a deed should change the status of an authentic deed turns into a private deed. The legal consequences are contained in Article 16 paragraph (9) of the UUJN which states "if one of the conditions referred to in paragraph (1) letter m and paragraph (7) is not fulfilled, the relevant deed only has the power of proof as a private deed."

In addition to the above prohibition of cooperation between notaries relating to the making of a deed with notary independence, to avoid notaries from the practice of unfair competition between notarians, this is reflected in Article 4 number 10 of the Notary Ethics Code and Article 36 of the Notary Position Law, rules the code of ethics gives more guarantees to maintain the occurrence of unhealthy competition between Notaries, which reads Notaries and others who assume and carry out the position of Notary are prohibited: working with service bureaus/persons/legal entities that essentially act as intermediaries for find or get clients. In addition to profit notary avoid alignments with one of his clients because of the presence of the partnership agreement.

Notaries in performing his respective duties should know the limits of what is the authority, duties and the prohibition, because it has been clearly stipulated in UUJN, so that the notary can be held responsible for the services he provides.

IV. KESIMPULAN

A cooperation agreement between the notary with the banks in credit agreement is prohibited in the UUJN and a code of conduct because it results in the notary's not being independent in carrying out their duties

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