



The Characteristics of Notary Cover Notes for Banking Credit Distribution

Erna Mastiningrum¹; Endang Prasetyawati²; Moch. Isnaeni³

¹ Doctoral Degree Student of Law of 17 Agustus 1945 University Surabaya, Indonesia

² Lecturer of Law Faculty of 17 Agustus 1945 University Surabaya, Indonesia

³ Lecturer of Law Faculty of Airlangga University and 17 Agustus 1945 University Surabaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v8i11.3207>

Abstract

There is a Cover note in the banking world that has become a custom (customary law) in disbursing housing loans. A notary issued the covernote because there are requirements related to the object of the guarantee that has not been resolved. The absence of regulations that regulate covernotes causes a lot of problems, especially for Notaries. This study is intended to analyze and find the authority of a Notary as a General Officer in issuing Covernotes and the function of covernotes issued by Notaries in the context of disbursing Banking Credit. The research method used is normative legal research using 3 (three) kinds of problem approaches, namely the statutory and conceptual approaches. Based on the study results, it was concluded that the making of a covernote is not the authority of a Notary as a Public Official. The making of a covernote by a Notary is only based on the trust of banking institutions in the information submitted by a Notary. Covernote was born based on customary law that applies in the banking world to implement the prudential banking principle in credit disbursement.

Keywords: *Covernote; Notary; Credit Distribution*

Introduction

Every object that is bound as collateral remains in the debtor's hands, while the creditor only has the right to guarantee material goods. It is possible that in terms of granting credit by the Bank, there are several requirements related to land that has not been fulfilled. The land to be pledged as collateral may still be in the process of being certified or being renamed. Banks will certainly not provide credit if the requirements submitted have not been met. To overcome this incompleteness, generally, Notaries complete it through a Covernote as a notification or as a statement that the land documents of the credit applicant customers are still in the process of being certified or still in the process of installing mortgage rights, or in the process of changing the name of the certificated.

In the event of imposing mortgages, the Bank is more often and accustomed to using covernotes in the credit disbursement process, accompanied by a circle with collateral for land rights. The covernote process is not an element or part of making a mortgage certificate that ends with its registration at the land agency. However, this covernote is often used as a substitute for lack of proof of collateral, as a quick

guide for banks in disbursing credit. In this condition, it can be said that the covernote is part of making a mortgage certificate because the covernote is part of the process of forming two legal events, namely a credit loan agreement and a mortgage agreement.¹

In the banking world, covernotes are customary or customary Law which is considered to have binding legal force for the parties. Covernote is used as a condition in the credit application process but is used as a temporary guarantee when completing the authentic deed made by a notary. In this case, the authentic deed in question is the process of transferring the name of the land ownership certificate, the roya process, the splitting of the land certificate into two certificates, and or other arrangements.² However, in general, a covernote is made and issued by a notary as a statement to ensure legal certainty regarding the process of giving a deed or document that is in operation.³

The covernote is issued by a notary because his work has not been completed concerning the duties and authority of giving an authentic deed to explain that the act issued is still in process and explains that the mortgage certificate is a requirement for the birth of a guarantee bond agreement from the loan disbursement agreement by the Bank.

However, there is no single article that can be interpreted as the authority of a notary to issue a certificate which is referred to as a covernote. Therefore, if we look at the binding strength, we only look at the covernote, which is usually used as collateral by banks in conducting financing. Therefore, the covernote is not an authentic deed, because it is not stated in the Law regarding the authority of a notary to issue an authentic deed. And there are no articles in the Notary Position Act and its amendments that indicate the covernote as an authentic deed, but only in the form of a certificate.

Methods

The present study uses normative legal research methods to find solutions to existing legal problems.⁴ The research approaches used are the statute approach and the conceptual approach.

Discussion

Based on the provisions in the Law on Notary Positions, there is no single article that can be interpreted as the authority of a notary to issue a certificate called a covernote that has been commonly used in banking practice. Therefore, notaries do not have the authority as stated in the Law on Notary Positions to issue covernotes so that if you see how the legal force of the covernote is, the covernote has no legal force and cannot guarantee legal certainty because there is no article in the Notary Position Act which indicates that the covernote is an authentic deed.

Covernote serves as an information handle for banks regarding transactions and stages of legal actions processed by a Notary. As with its position as a supporting document, a covernote in the form of a certificate is different from an authentic deed under the authority of a Notary. As regulated in Article 1868 of the Civil Code, an authentic deed has the meaning of a deed made in a form that is by the provisions of the Law, and the deed is caused by or made before a public official who has the authority to

¹ Christina Tri Kurniasari, Krisnadi Nasution, and Sri Setyadi, 'Dasar Hukum Pelaksanaan Mitigasi Resiko Kredit Pada Sektor Perbankan Di Indonesia', *Jurnal Akbar Juara*, 2020 <<https://doi.org/10.1016/j.solener.2019.02.027>>.

² Jonneri Bukit, Made Warka, And Krisnadi Nasution, 'Eksistensi Asas Keseimbangan Pada Kontrak Konsumen Di Indonesia', *DiH: Jurnal Ilmu Hukum*, 2018 <<https://doi.org/10.30996/dih.v0i0.1788>>.

³ Pande Nyoman Putra Widiyantara, A.A Sagung Wiratni Darmadi, "Akibat Hukum *Covernote* Yang Dibuat Oleh Notaris Dan Pejabat Pembuat Akta Tanah", *Jurnal Kertha Semaya*, Vol. 7 No. 9, 2019, h. 4

⁴ H Isnaini and W Utomo, 'The Existence of the Notary and Notarial Deeds within Private Procedural Law in the Industrial Revolution Era 4.0', *International Journal of Innovation, Creativity and Change*, 2019 <<http://www.scopus.com/inward/record.url?eid=2-s2.0-85079637568&partnerID=MN8TOARS>>.

do so at the place where the deed was done.⁵ On the other hand, an authentic deed is a deed made by an official authorized by the authorities according to predetermined provisions, either with or without assistance from interested parties, which records what the interested parties have requested to include in it. In addition, the authentic deed contains a statement from an official who explains what was done or seen before him.

Covernote is the act of a notary issuing a certificate that is not included in the category of the notary's authority to act. A notary covernote also cannot be judged as something that has legal force, more precisely, only as a statement that explains something related to matters related to the activities of a notary. However, the reality on the ground is that a covernote made by a notary is used as a letter with legal force, as in the example in the banking world described in the previous chapter. As a result of the covernote made by a notary, it causes several problems that can bring the notary into legal trouble.

The use of covernotes in credit agreements cannot be separated from the role of the Bank itself. Banks, in practice, often for reasons of business competition in getting prospective debtor customers to act less carefully because of fears of running away from debtor customers to other banks. In providing credit, banks should still have to take ways to ensure that the loans to be disbursed will not have problems. This is by the provisions of Article 29 point (3) of the Banking Law, which states that in providing credit or financing based on sharia principles and carrying out other business activities, banks are required to take methods that do not harm the Bank and the interests of customers who entrust their funds to the Bank.⁶

Banks must apply the precautionary principle, which is a principle that is used as a guideline for smooth business and as a guide for banks to assess potential debtor customers. The prudent banking principle is a principle or principle which states that banks, in carrying out their functions and business activities, must act prudently to protect public funds entrusted to them.

The rules in UUJN certainly have nothing to do with covernote because this is not within the authority of a notary, and the making of covernotes is also not prohibited. This means that the notary can make or not make the covernote if deemed unfit to be issued; it depends on the attitude of the notary concerned. Thus, the covernote, which is considered to be of good value or not, is still limited to the attitude held by each notary in dealing with the situation of each notary. Associated with the notary principle of propriety, it is explained that etiquette is the guardian of the implementation of laws whose ideas are fairness.

Looking for the value of etiquette in making a covernote which is a one-sided act by a Notary, it is necessary to look at the attitude of the Notary. This attitude is a wrong independent attitude which is an initiative without being guided by any laws. Notaries can use this attitude of independence in making decisions while in the community.⁷ In making decisions, especially in making a covernote, the moral attitude that is tested, especially concerning one's stance, is the first attitude, namely; if the covernote is issued later, it will cause harm to the parties, then, in this case, the moral philosophy of the notary will be questioned because the notary himself either intentionally or unintentionally knows the risks that will occur in the future when making the covernote.

It has been explained that the professional moral considerations of a Notary must be harmonized with social values. Social values within the scope of a Notary, especially those related to Notary activities serving the community's needs, cannot be separated from the habits that are born in the life of the

⁵ Hatta Isnaini Wahyu Utomo, 'The Position of Honorary Council of Notary in Coaching Indonesian Notaries', *Journal of Law, Policy and Globalization*, 92 (2019) <<https://doi.org/10.7176/jlpg/92-12>>.

⁶ Hari Wibisono, H. Moch. Isnaeni, and Endang Prasetyawati, 'Authorization Entities (Legal Guarantee Review)', *International Journal of Multicultural and Multireligious Understanding*, 2019 <<https://doi.org/10.18415/ijmmu.v6i6.1210>>.

⁷ Mas Rachmat Hidayat, Krisnadi Nasution, and Sri Setyadji, 'Kekuatan Hukum Pengikat Hak Tanggungan Atas Jaminan Kredit', *Jurnal Akrab Juara*, 2020 <<https://doi.org/10.11693/hyhz20181000233>>.

community. Patterns born in social life encourage Notaries to carry out their duties and authorities outside of the UUJN, such as one of them in making covernote letters.

According to one jurist and sociologist, Eugen Ehrlich said: "society is a general idea that can be used to denote all social relations, namely family, village, social institutions, state, nation, economic system as well as legal system and so on." Ehrlich views all Law as social Law, but in the sense that all legal relations are characterized by socio-economic factors. The economic system used in production, distribution, and consumption is decisive for legal purposes. Ehrlich further argues that "Law is subject to specific social forces.

The Law itself will not be effective because the order in society is based on the social recognition of the Law and not because of its official application by the state. Social order is based on the fact that the Law is accepted based on social rules and norms reflected in the legal system. Consequently, Ehrlich assumes that those who act as parties who develop the legal system must have a close relationship with the values adopted in the society concerned. This awareness must exist in every member of the legal profession tasked with developing living law and determining the scope of positive Law concerning living Law.⁸

According to Ehrlich, the interpretation of the Law born in society can be concluded that the Law born in the community will not be effective in its application because the Law in the community is not a law recognized by the state. Therefore, the parties who are closely related in carrying out the legal system, one of which is a notary, must align themselves with the relationship embraced in the community's values. Thus, making a covernote that is not regulated in the UUJN and is not part of the authority of a Notary is a realm of need in the community, especially what is requested by the parties as part of the interests that are considered necessary by the parties requesting it.

Therefore, a Notary, as a part of serving the interests of the community in issuing a covernote requested by the parties who appear, does not necessarily refuse to make it even though it is not regulated in the UUJN but must still reflect the values of decency that are considered worthy of the Notary covernote issued—taking into account the risks and responsibilities as a Notary Officer who upholds the UUJN and the values contained in the Notary code of ethics.

This is in line with the application of responsive legal theory where the purpose of the Law is to serve the needs of the community; the Law that has been created is considered unable to accommodate the needs of the community; therefore, there is a tendency to shift according to the symptoms or desires that are deemed appropriate by the community, which in the end justice is not obtained from justice. Only procedural, but judge that looks at the context or circumstances in which a condition is occurring.⁹

A solution must be found that must be done so that there is no legal uncertainty in the community experiencing the context of the situation. However, again as it can be concluded from Ehrlich's intention that the Law that was born out of the needs of the community will not be effectively implemented because it is not recognized by the state, the same is the case with the covernote, which is a letter that was born not because of the provisions of the Law but because of the basis of habit. In response to this, it can be seen from the side of the legal vacuum.¹⁰

The legal vacuum must be defined first. Legal vacuum is a concept of Law that is recognized in the civil law system. Legal vacuum refers to a condition where written Law has not regulated a situation. In the standard law system, this concept is not known because a judge has the right to find or create laws. The impact of a legal vacuum caused by things or circumstances that are not (yet) regulated will result in

⁸ Darji Darmodiharjo dan Shidarta, *Pokok-Pokok Filsafat Hukum: Apa Dan Bagaimana Filsafat Hukum Indonesia*, Gramedia Pustaka Utama, Jakarta, 2006, h. 129

⁹ Agung Sakti Pribadi, Made Warka, and Slamet Suhartono, 'Laws of Authority and Uncertain Law On the Beach Reclamation Activities in The Gulf Coast of Jakarta', *International Journal of Scientific and Research Publications (IJSRP)*, 2019 <<https://doi.org/10.29322/ijsrp.9.12.2019.p9654>>.

¹⁰ H.M Fauzan, *Kaidah Penemuan Hukum Yurisprudensi Bidang Perdata*, Prenada Media Group, 2014, h. 102.

legal uncertainty (*rechtsonzekerheid*) or uncertainty in-laws and regulations in the community, which have implications for the emergence of legal chaos (*rechtsverwerking*).

One of the efforts that can be made to fill the void is by making legal discoveries. Jazim Hamid said that legal discovery has a comprehensive scope of legal work because anyone can make legal findings, whether individuals, scientists, legal researchers, judges, prosecutors, police, advocates, lecturers, notaries, and others.¹¹ Sources of legal discovery or places to find Law are statutory regulations, customary Law, judges' decisions, and doctrines. The source of legal discovery is a hierarchy. If you want to seek or find the Law, the first thing you have to look for is legislation. If the statutory regulations do not provide the answer, it can be sought in customary Law, and if there are no provisions, then it can be sought in court decisions and so on.

The covernote, a certificate issued by a notary, creates liability for the legal consequences caused by the covernote issued by it. A Notary whose negligence in administering a covernote causes harm to certain parties may be prosecuted civilly for committing an unlawful act under Article 1365 and/or 1366 of the Civil Code. In terms of legal responsibility, the concept related to legal obligation is the concept of legal responsibility itself. That a person is legally responsible for a particular act or that he bears legal responsibility. Legal liability in civil law is in the form of a person's responsibility for unlawful acts or defaults.

Regarding the responsibilities of a Notary as a public official, a Notary, must be responsible for the deed he made if there are reasons as follows:

1. In matters that are expressly determined by the Notary Position Regulations.
2. If a deed does not meet the requirements regarding its form (*gebrek in the vorm*), it is canceled before the court or is considered only valid as a private deed.
3. In all cases, where according to the provisions contained in Article 1365 regarding responsibility with an element of error (intentional and negligence), Article 1366 regarding responsibility with an aspect of error, especially failure, and Article 1367 of the Civil Code regarding absolute liability (without error). There is an obligation to pay compensation, meaning that all things must be passed through a balanced verification process.

The legal consequences for the Notary and the parties, if the Notary is unable or fails to complete the covernote, is that the party who will be harmed later is the creditor. In contrast, the debtor who has received a credit loan from the Bank, if the guarantee turns out to be unable to be used as a mortgage, must be responsible for the security it provides. In contrast, for the Notary himself, the covernote only binds him morally because it was issued at the parties' request.

Although covernotes can be categorized as legal discovery efforts, it does not mean that the existence of legal findings can be used as a reason for the Notary concerned to get out of his responsibility for the covernote he issues, because the lawful discovery of making a covernote which is the initiative of a notary must be analyzed further. The extent to which the covernote made is helpful for the parties requesting it. For the protection of the notary himself, as explained earlier, the principle of etiquette is the first basis that the notary must consider in making the covernote. This etiquette will later determine the final result of the notary's actions against the covernote he issued, whether the act can be indicated to be an unlawful act in the future or not.

As a form of legal protection for Notaries in issuing covernotes issued by Notaries when associated with the principles mentioned above, the direction of accuracy, the focus of giving reasons, prohibition of acting arbitrarily are essential principles to be followed. Before a Notary makes a covernote, he will be faced with a position to do a deed related to the parties' interests or assist in the

¹¹Jazim Hamidi, *Hermeneutika Hukum, Teori Penemuan Hukum Baru Dengan Interpretasi Teks*, UII Press, Yogyakarta, 2005, h. 55

management that is not under his authority. Such things that a Notary must analyze are the information of the appearers who come to him related to the purposes and objectives of the appearers and ask to be shown all the documentary evidence required by the Notary to complete all documents to do a deed.

Suppose a Notary is appointed to perform an act to assist in the management. In that case, the Notary must also carefully examine the management's intent and request that documents be provided to assist the administration. This accuracy is at least the basis of protection for Notaries in issuing covernotes related to making a deed or doing an act to help parties outside their authority. Suppose the Notary feels that the information and documentary evidence provided by the parties is incomplete. In that case, the Notary must expressly refuse by giving reasons with legal considerations to the appeared. If the Notary accepts it for granted and acts arbitrarily without regard to the legal risks that the parties will face, parties and the Notary himself, in the end, the covernote can potentially cause legal consequences in the future

In line with the development of society's life, which is increasingly complex in this modern era, various risks are also developing, which have a more significant potential to become a threat to the parties to realize the expectations of the transactions they carry out. This fact raises the need for the parties to obtain legal protection against the legitimate expectations to be achieved through the trades they make (the safety of the legitimate expectations of the parties), especially in anticipating the occurrence of risks that can hinder these efforts.¹²

The emergence of the covernote is due to a very urgent need from the Bank as creditor and debtor whose deed is in the process of making a certificate. Lack of proof of collateral required in the credit application process forces the Bank to request evidence of collateral from a notary, which is classified in the form of an agreement that the notary must be able to complete the management of the debtor's deed in accordance with the period specified in the covernote.

The existence of a covernote currently exists and is urgent where a covernote issued by a notary will provide information to make the creditor/bank confident that even if the Bank realizes the credit requested by the debtor whose collateral is still in the legal process, it will still be obtained and controlled by the Bank. Moreover, the one who carries out the process is a notary in a very trusted position. However, the covernote is not collateral. At the same time, the terms of bank credit require the existence of collateral provided by the debtor as an application of the prudential principle by the Bank.

The conditions described above show that notaries get high trust from the public and financial institutions in practice. All management related to the legal actions of the public and financial institutions is entrusted to a notary. For notaries in carrying out their functions, they must pay attention to and maintain the good name and nobility of the position of a notary.

In general, there are no standard rules or stipulations regarding the form or procedure for writing a covernote issued by a Notary. Usually, a covernote is made and written with a Notary's letterhead on it. Next, include the information and promises of the Notary concerned, which are the core or subject of the substance of the covernote. The essence of this covernote is tentative; that is, it adjusts to the correctness of the process being taken care of. Finally, at the bottom of the covernote, the signature and stamp of the Notary himself are affixed.¹³

Legal uncertainty will cause chaos in people's lives, and every community member will do what they want and act on their own. Existence like this makes life in an atmosphere of social chaos. Therefore, in the preamble to the Law on the Position of Notary, it is determined that the Republic of Indonesia as a legal state based on Pancasila and the 1945 Constitution guarantees certainty, order, and legal protection, which is based on truth and justice. To ensure confidence, demand, and legal protection, authentic written evidence is needed regarding legal conditions, events, or actions carried out through certain positions.

¹² Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Ham Ri, "Naskah Akademik Rancangan Undang Undang Hukum Kontrak", 2013, h. 1

¹³ Endang Prasetyawati, 'Perlindungan Hukum Terhadap Para Pihak Dalam Pembiayaan Konsumen', *DiH: Jurnal Ilmu Hukum*, 2012 <<https://doi.org/10.30996/dih.v8i16.267>>.

Legal certainty must be of value for every party in the life aspect, outside the State's role in the application of legislation and judicial Law. Everyone is not allowed to act arbitrarily. In connection with this, a Notary in carrying out his duties of office must be guided normatively to the rule of law relating to all actions taken in carrying out his office.

Most of the laws and regulations are complied with, and some laws are not adhered to. The legal system will collapse if everyone does not obey the Law, and of course, the Law will lose its meaning. The ineffectiveness of the Law tends to affect the timing and quantity of non-compliance and has a natural effect on legal behavior, including the conduct of lawbreakers. This condition will affect law enforcers who guarantee certainty and justice in society. While certainty because of the Law is meant that because of the Law itself, there is a certainty; for example, the Law determines the existence of an expired institution, with time, a person will gain rights or lose rights. This means that the Law can guarantee certainty for someone with an expired institution to get a specific right or lose a specific right.

The role of the covernote becomes essential even though it does not have binding power. Covernote as supporting evidence at the beginning of the contract disbursement verification process. Covernotes are not evidence of contract disbursement. Hence the covernote has no legal force. Covernote only functions as a media of information stating the truth of ongoing transactions and the process of legal actions being carried out by the Notary. When all transaction processes and legal actions are completed, the Notary will submit it to the interested parties.

The absence of laws and regulations governing covernotes causes many problems involving Notaries because there are no standard guidelines for Notaries in making covernotes. Moreover, there is no precise formulation regarding aspects of Notary accountability for the covernotes they make. Such conditions further emphasize a need for laws and regulations that strictly regulate the guidelines for making covernotes by Notaries and the limits of their liability.

Conclusion

Covernote was born based on customary law that applies in the banking world to implement the prudential banking principle in credit disbursement. Therefore, the role of the covernote becomes essential even though it does not have binding power. Covernote as supporting evidence at the beginning of the contract disbursement verification process. The function of a covernote issued by a Notary in the context of disbursing credit is so that credit can be paid immediately because a Notary is a trusted public official so that the certificate issued by a Notary is considered to be accurate and can be accounted for by the Notary so that the parties feel calm and safe for further credit can be disbursed.

Suggestion

Based on the conclusions that have been obtained, it is further suggested that a Covernote by a Notary is very necessary to support the activities of banking institutions so that it needs to be normalized in legal regulation. Furthermore, the existence of the covernote needs to be emphasized in the laws and regulations relating to the credit disbursement process so that it has a solid legal basis and it becomes clear who is responsible and accountable if the things written in the covernote are not completed on time.

References

- Bukit, Jonneri, Made Warka, and Krisnadi Nasution, 'Eksistensi Asas Keseimbangan Pada Kontrak Konsumen Di Indonesia', *DiH: Jurnal Ilmu Hukum*, 2018 <<https://doi.org/10.30996/dih.v0i0.1788>>
- Utomo, Hatta Isnaini Wahyu . 'The Position of Honorary Council of Notary in Coaching Indonesian Notaries', *Journal of Law, Policy and Globalization*, 92 (2019) <<https://doi.org/10.7176/jlpg/92-12>>

- Hidayat, Mas Rachmat, Krisnadi Nasution, and Sri Setyadji, 'Kekuatan Hukum Pengikat Hak Tanggungan Atas Jaminan Kredit', *Jurnal Akrab Juara*, 2020 <<https://doi.org/10.11693/hyhz20181000233>>
- Isnaini, H, and W Utomo, 'The Existence of the Notary and Notarial Deeds within Private Procedural Law in the Industrial Revolution Era 4.0', *International Journal of Innovation, Creativity and Change*, 2019 <<http://www.scopus.com/inward/record.url?eid=2-s2.0-85079637568&partnerID=MN8TOARS>>
- Kurniasari, Christina Tri, Krisnadi Nasution, and Sri Setyadji, 'Dasar Hukum Pelaksanaan Mitigasi Resiko Kredit Pada Sektor Perbankan Di Indonesia', *Jurnal Akbar Juara*, 2020 <<https://doi.org/10.1016/j.solener.2019.02.027>>
- Prasetyawati, Endang, 'Perlindungan Hukum Terhadap Para Pihak Dalam Pembiayaan Konsumen', *DiH: Jurnal Ilmu Hukum*, 2012 <<https://doi.org/10.30996/dih.v8i16.267>>
- Pribadi, Agung Sakti, Made Warka, and Slamet Suhartono, 'Laws of Authority and Uncertain Law On the Beach Reclamation Activities in The Gulf Coast of Jakarta', *International Journal of Scientific and Research Publications (IJSRP)*, 2019 <<https://doi.org/10.29322/ijsrp.9.12.2019.p9654>>
- Utomo, Hatta Isnaini Wahyu . 'The Position of Honorary Council of Notary in Coaching Indonesian Notaries', *Journal of Law, Policy and Globalization*, 92 (2019) <<https://doi.org/10.7176/jlpg/92-12>>
- Wibisono, Hari, H. Moch. Isnaeni, and Endang Prasetyawati, 'Authorization Entities (Legal Guarantee Review)', *International Journal of Multicultural and Multireligious Understanding*, 2019 <<https://doi.org/10.18415/ijmmu.v6i6.1210>>

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).