



Role of the Shareholders within the Composition of Authentic Deed by the Notary

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<http://dx.doi.org/10.18415/ijmmu.v5i3.428>

Abstract

The legal article provides prescription regarding the role of shareholders within the composition of authentic deed by the Notary. In providing the prescription, the legal article has relied on a normative study with the approach of legal and conceptual research. Then, the source of legal material includes the primary corporation and the secondary corporation. In gathering the data, the library study technique has been implemented. The results of the study show that the legislation provides a role for the shareholders within the composition of authentic deed by the Notary.

Keywords: Shareholders; Authentic Deed

Introduction

In the modern era, all agreements or contracts of a company are always composed in written form both in the national and international level. These agreements or these so-called contracts are the main source of right and obligation as well as the main source of responsibility for the related parties. If there is a dispute with regards to the fulfilment of right and obligation among these parties, then they will solve the dispute in a peaceful manner based on the contracts that have been agreed. However, if a mutual agreement has not been achieved among the related parties then the parties usually agree to solve the dispute through arbitration or general court. Such statement has been strictly formulated within a contract.¹

According to the theory, within the definition of arrangement that has been entrusted to the Board of Directors, an arrangement might be categorized into the act of *beheren* and the act of *beschicking* or also known as the act of *van eigendom*. In the practice, the act of *beheren* is translated into the act of “arrangement” (according to the narrow meaning). On the other hand, the act of *beschicking* or *van eigendom* is generally translated into the act of “possession” (according to the wide meaning). In other words, “possession” might be the literary translation for the act of *van eigendom*.

Actually, the act of arrangement (*beheren*) becomes the pure authority of the Board of Directors and such act is marked by the actions that the Board performs daily (continuously). As long as the actions

¹Abdulkadir Muhammad. (2010). Hukum Perusahaan Indonesia. Fourth Publication, Revised Edition, PT. Citra Aditya Bakti, Bandung, p. 1-4.

are part of the act of arrangement, the Board of Directors has the fully authority to perform the actions. On the contrary, the act of possession (*dader van beschicking/eigendom*) does not belong the daily actions; instead, the act of possession has already become the part of special actions. Therefore, such actions do not belong to the authority of Board of Directors anymore.

In order that the Board of Directors may execute the act of arrangement, the Board should attain the permission from the other organ first. The organ might have to attain permission from the Board of Commissioner first or even from the General Meeting of Shareholders depending on the legislation requirements or the articles of association in a company.

Unfortunately, in the practice it is difficult to draw the line that might divide the two kinds of act. Therefore, within the articles of association the actions that belong to the act of possession (*beschicking/eigendom*) should be formulated. Since the actions that do not belong to the act of arrangement will be categorized as part of the act of possession, the act of arrangement might be defined as the actions that are fully decided and authorized by the Board of Directors.²

Business entity refers to a business organization or a business corporation that serve as the motor of each kind of business activity; business entity might also be termed as corporation entity. In English, business entity might refer to a company, an enterprise, or a corporation. The form of the business entity such as company, joint trust, or legal company is regulated or is admitted by legislation. For example, an auto-bus company (PO, *perusahaan otobus*) and a trading company (PD, *perusahaan dagang*) belongs to a private company. The legal entity of a business company has not been regulated in the legislation; however, the entity develops in accordance to the needs of a business society. In the practice, the regulation of the entity is defined in a written manner before a Notary and the regulation itself takes the form of company establishment deed.

The form of joint trust and corporation has been regulated by the law of firm (Fa, *firma*) and commanding joint trust (CV, *commanditeur vereniging*) through the Legal Code of Law (KUHD, *Kitab Undang-Undang Hukum Dagang*). The regulation for the establishment of a limited liability company is defined by the Law Number 1 Year 1995, the regulation for the establishment of a cooperative is defined by the Law Number 25 Year 1992, and the regulation for the establishment of a public company (*perum, perusahaan umum*) and a joint trust company (*persero*) is defined by the Law Number 9 Year 1969. Furthermore, a firm and a commanding joint trust are not a corporation; on the other hand, a limited liability company, a cooperative, a public company, and a joint trust company are a legal entity. The limited liability company and the cooperative belong to the private corporation while the public company and the joint trust company belong to the state corporation.

Then, business activities refer to any kind of business under the domain of joint trust company and these activities include industry, trade, service, and fund (finance). Business refers to any type of action, deeds, and activity under the domain of economy that has been performed by each businessman in the efforts of gaining benefit and/ or profit. With regards to the statement, businessman refers to individuals, members of a joint trust company, or legal entity that performs business activities. As a result, an activity might be termed as business within the definition of legal entity meaning if the activity meets the following elements:

1. The action falls under the domain of economy
2. The action is performed by a businessman
3. The action is performed under the objective of gaining benefit and/ or profit

² Rudhi Prasetya. (2011). *Perseroan Terbatas Teori dan Praktik*. First Publication, Sinar Grafika Offset, Jakarta, p. 19-20.

If an action is performed by a worker instead of a business, then the action will be termed as occupation instead of business. The legislation regarding the business has also includes the legislation that had been drafted within the era of Dutch East Indies. The legislation that has been in effect up to date is the one that has been based on the transitional regulation within the 1945 Constitution such as the regulation that has been contained within the BW (Burgerlijk Wetboek) and the Legal Code of Law. In addition, there are many Laws that have been drafted based on Pancasila and 1945 Constitution with regards to the establishment of a corporation.

Based on the BW, all kinds of agreements might be identified based on the requirements in the Article 1319 of BW; the article states that all kinds of agreements, both the ones that have been and have not been commonly agreed, subject to the general requirements that have been drafted in the present chapter and the previous chapter and the first chapter referred to in the statement is the chapter that contains the principles of general engagement. The two chapters are contained in the Third Book of BW that regulates the engagement (*verbintenis*). In this case, the BW serves as the law (*lex generalis*).

The requirements in the First Article of the Legal Code of Law states that the Civil Code of Law applies to the agreements that regulate the Code and the Code is not specifically drafted in order not to be bias. With this regard, the Legal Code of Law serves as the special law (*lex specialis*). For example, in the BW there has been the regulation of authorization (*lastgeving*). Similarly, in the Legal Code of Law there has been the regulation of authorization specifically in relation to the securities. Within the relation between the general law and the special law, the principle *lex specialis derogate legi generali* applies; the principle states that the special law is above the general law. In this case, the regulation of authorization within the Legal Code of Law only applies to securities.

In addition to the governing regulation that has been formulated in the BW and the Legal Code of Law, there are also numerous laws that have been drafted and approved by the state officials of the Republic of Indonesia with regards to the company regulation. These laws are related to the domain of:

1. Industrial company
2. Trading company
3. Service company
4. Financing company

General Meeting of Shareholders refers to the organ of limited liability company that has exclusive authority and the authority is not given to the Board of Directors and the Board of Commissioners. The authority, the form, and the coverage of the General Meeting of Shareholders are defined in the Law of Limited Liability Company and the Article of Association. The concrete form of General Meeting of Shareholders is a forum in which the shareholders have the authority to attain information about the joint trust company both from the Board of Directors and the Board of Commissioners. The information then becomes the basis for the shareholders in the General Meeting to make policies and to take strategic actions within the decision-making process as a legal entity.³ Based on the background that has been elaborated above, the problem formulations that might be drawn with regards to the situation are as follows:

1. What is the role of the shareholders in the composition of authentic deed by the Notary?
2. What is the contribution from the composition of authentic deed by a Notary to the shareholders?

³ Citra Widi Widiyawati, Mulyoto. (2018). Notary Deed in the Event of General Meeting of Shareholders through Conference, Journal of Law Notary Graduate Program Sebelas Maret University Surakarta, 2(3): 51.

Methodology

In the study, the method that had been applied was the normative method. The normative method was applied in order to provide prescription regarding the role of the shareholders within the composition of authentic deed by the Notary and the contribution that the shareholders might provide from the composition of authentic deed by the Notary. In addition, the study also relied on the legal approach and the conceptual approach.⁴ Since the objective of the study was related to the prescription, the characteristic of the study was prescriptive. Then, the data were gathered by means of library study.

Discussions

Role of the Shareholders within the Composition of Authentic Draft by the Notary

In the system of Law 2007, there are two terms namely “approval” and “agreement.” The term “approval” refers to the proposal of approval on the articles of association from a limited liability company that will be established. On the other hand, the term “agreement” refers to the change on the article of association after the establishment of the limited liability company has been approved.

According to the Article 21 of Law 2007, not all changes on the article of association demands the approval by the Minister. Furthermore, according to the Article 21 Verse 2 of Law 2007, agreement will only be obligatory if the agreement entails:

- a. The name and the position of the limited liability company;
- b. The business objective, intention, and activity of the limited liability company;
- c. The terms of service of the limited liability company;
- d. The amount of capital of the limited liability company;
- e. The arrangement of allocated and invested fund; and
- f. The change on the state of the limited liability company into the joint trust company or vice versa.

When the agreement has been achieved before the Minister, a Ministerial Decree will be issued.⁵ In other words, up to date the Ministry of Law and Human Rights has been providing assistance with regards to the transitional matters within the article of association that demands ministerial agreement. However, due to the present situation the arrangement on the transitional matters should be immediate, practical, and efficient and should also be avoided from any face-to-face meeting in order that the problems of conclusion and alike shall not occur. The manifestation of such effort is the implementation of Corporation Administration System (SABH, *Sistem Administrasi Badan Hukum*) in which all of the transitional matters are performed electronically through Internet.⁶ In general, the General Meeting of Shareholders in relation to the deed of a Notary might be held in the form of General Meeting of Shareholders event with the representative minute of the Meeting; the minute later will be the basis for the composition of the Deed of Statement on the Meeting Decision. The Notary authority in composing the deed of General Meeting of Shareholders meeting minute might suffer from the conflict of norms within the conference due to the fact that based on the Article the overall content of the meeting minute from the General Meeting of Shareholders is a meeting minute and a statement by the Notary to all of the events that the Notary has witnessed and has listened directly within the time when the Meeting takes place.⁷

⁴ Peter Mahmud Marzuki. (2016). *Penelitian Hukum Edisi Revisi*, Twelfth Publication, PT. Kharisma Putra Utama, Prenada Group, Jakarta, p. 133.

⁵ Rudhy Prasetya, op. Cit, p. 111.

⁶ Mulyoto. (2010). *Pertanggung Jawaban Notaris-PPAT Dalam Menjalankan Tugas Jabatannya*, Cakrawala Media, Yogyakarta, p. 14.

⁷ Citra Widi Widiyawati, Mulyoto, op. Cit., p. 54.

The General Meeting of Shareholders has an authority that should not be delegated to the Board of Directors and the Board of Commissioners within the scope that has been defined in the related legislation and/or the article of association. Within the General Meeting of Shareholders forum, the shareholders have the right to attain information about the company from the directors and/or the commissioners as long as the information is relevant to the items in the meeting and is not against the interest of the company and the information might be the right of the shareholders to learn the list of shareholders, the special list with regards to the shares of the members of the Board of Directors and of the Board of Commissioners, and the special list with regards to the shares of the family members of the Board of Directors and the Board of Commissioners. Then, in the "Others" section of the Meeting the shareholders are not allowed to take decisions except if all of the shareholders have been present and/or have been represented and all of the shareholders agree to add several sections within the Meeting. The decisions or the sections that will be added in the Meeting should be agreed unanimously (Article 75 Law Number 40 Year 2007).⁸

According to the Law Number 40 Year 2007 Regarding Limited Liability Company, in the Article 90 it is stated that:

1. In every General Meeting of Shareholders, a minute is obligatory to be composed and to be signed by the chairman and by at least one shareholder that has been appointed by the participants of the Meeting.
2. The signature as having been intended by Article 1 will not be required if the minute of the Meeting is composed by the deed of a Notary.⁹

The matters that have been discussed, that have taken place, and that have been decided should be recorded. This can be interpreted from the Article 90 Article 1 of Law 2007. The record is not absolutely performed by a Notary. The record might not be performed by a Notary with a deed of minute under the counter. However, the deed might also be made authentic by a Notary. This is the conclusion of the Article 90 Law 2007.¹⁰

The composition of a deed by Notary might be categorized into *partij akte* (deed of party) and *ambtelijke akte* (deed of official). *Partij akte* refers to the deed that has been composed by a Notary based on the will of the given party. In this type of deed, a Notary will only need state the will of the party. The examples of this type of deed are deed of sale and purchase, deed of exchange, deed of rent, deed of Meeting Decision Statement, and deed of General Meeting of Shareholders within a limited liability company.

In relation to the composition of the deed of Meeting Decision Statement or General Meeting of Shareholders within a limited liability company, a Notary may only compose the will of the given party (the authority of General Meetings of Shareholder minute under the counter). As a result, the Notary will not be responsible for the content of the deed; instead, the given party will be responsible for the content of the deed.

On the contrary, the *ambtelijke akte* has different situation because through this type of deed a Notary record the testimony of all the matters that have been witnessed, read, and listened based on the data/ documents that have been prepared before the Notary. As a result, the Notary will be responsible for the content of the deed especially when a flaw occurs due to the mistake of the Notary. The examples of

⁸ Abdulkadir Muhammad, op. Cit., p. 54.

⁹ Law Number 40 Year 2007 Regarding Limited Liability Company, State Gazette of Republic of Indonesia Year 2007 Number 106.

¹⁰ Rudhi Prasetya, op. Cit., p. 60.

this type of deed are the deed of lottery, the meeting minute of General Meeting of Shareholders, and the will of beneficiary.¹¹

The Contribution that the Shareholders Might Provide in the Composition of Authentic Deed by the Notary

The existence of a joint trust company influences the welfare of the employees, the suppliers, the business partners, and the surrounding community. In brief, the existence of a joint trust company influences the “stakeholders.” Therefore, the interest of a joint trust company does not only refer to the interest of the “shareholders” but also to the interest of the “stakeholders.” With such theory, a theory that the position of the three organs, namely Board of Directors, Board of Commissioners, and General Meeting of Shareholders, is not top-to-bottom (*unter geordnet*) but instead is equal (*neben*) comes to the surface. The implication of the theory is that one organ is not above the other. Each organ has specific duty and authority based on the article of association and the legislation. The theory is intended to pursue the check and balance as an assurance that good corporate governance will be manifested. If the Board of Directors decide that the decisions from the General Meeting of Shareholders are against the interest of the joint trust company then the Board of Directors have the right to not subject to the given decisions from the Meeting.¹²

The Law of Limited Liability Company provides limitation upon the responsibility for the Board of Directors. The statement implies that the Board of Directors cannot be immediately held responsible if the Board of Directors do not perform any mistake or have performed their duties well. This matter is very important with regards to the vast authority and the difficult arrangement that each member of the Board of Directors should conduct within a limited liability company.¹³

According to the Law Number 02 Year 2014 Regarding the Amendment on the Law Number 30 Year 2004 Regarding the Position of Notary, Article 1 states that the general official who holds the authority to compose an authentic deed also holds the other authority based on the respective Law or the other Law.¹⁴

The position of a Notary as an official of trust starts when a Notary Candidate takes oath (based on the respective religion) as a Notary. The oath as a Notary entails and subjects to the very deep meaning that should be performed through the daily task during the terms of service. This requirement is confirmed by the Article 4 Verse 2 of Law Number 02 Year 2014 Regarding the Amendment on the Law Number of 30 Year 2004 Regarding the Position of a Notary.¹⁵

Therefore, in the case of authentic deed a Notary subjects to the legislative requirements within the Law and thus a Notary might be held trustworthy due to the requirements. Therefore, the content of the authentic deed might be proven by the deed itself. In other words, an authentic deed is composed based on the reality that a Notary has witnessed until the content of the authentic deed is proven to be incorrect.¹⁶

¹¹ Mulyoto. (2012). *Kriminalisasi Notaris Dalam Pembuatan Akta Perseroan Terbatas (PT)*, Second Publication, Cakrawala Media, Yogyakarta, p. 40.

¹² Rudhy Prasetya, op. Cit., p. 40-41.

¹³ Hari Noor Yasin, Al. Sentot Sudarwanto. (2016). The Existence of Piercing the Corporate Veil Doctrine in the Law Number 40 Year 2007 Regarding Limited Liability toward the Responsibility of the Board of Directors upon the Occurrence of Limited Liability Bankruptcy, *Journal of Law Notary Graduate Program Sebelas Maret University Surakarta*, 2(3): 13.

¹⁴ Law Number 02 Year 2014 Regarding the Amendment on the Law Number 30 Year 2004 Regarding the Position of Notary, *State Gazette of the Republic of Indonesia Year 2014 Number 3*.

¹⁵ Ermin Marikha, Toto Susmoo Hadi, Adi Sulistiyono. (2016). The Effectiveness of Article 20 Law Number 02 Year 2014 Regarding the Amendment on Law Number 30 Year 2014 Regarding the Position of Notary, *Journal of Law Notary Graduate Program*, 2(3): 69.

¹⁶ Sudikno Mertokusumo. (1998). *Hukum Acara Perdata Indonesia*, First Publication, Liberty, Yogyakarta, p. 125.

The duty that a Notary should perform actually belongs to the government. Due to the situation, the job of a Notary has law consequence namely that a Notary will hold the state authority and will exert the authentic and the executorial authority to the deed that the Notary has composed. In order to serve the community, a Notary is not allowed to leave his or her duty under any circumstance unless the Notary proposes the right of taking leave and appoints an Acting Notary as having been regulated in the Article 32 of Law Number 02 Year 2014.¹⁷

The use of teleconference media in the General Meeting of Shareholders within a limited liability company by means of electronic documents as valid evidence should go through the requirements of validity. The minimum requirements that the use of electronic document within the Meeting should go through are contained in the Law of Limited Liability Company and the Law of Electronic Information and Transaction in relation to the requirements of validity for both the conventional and the teleconferenced General Meeting of Shareholders and also in relation to the requirements of electronic signature and electronic documents that are contained in the results from the General Meeting of Shareholders. These requirements should be fulfilled in order that the General Meeting of Shareholders that has been held through a teleconference is valid and has met the minimum requirements of evidence since according the law theory of proof it is mentioned that in order that the evidence within a trial is considered valid as an evidence the validity of the evidence should meet the formal and the material requirements in accordance to the matters that have been regulated within the Law.¹⁸

The Meeting Decision Statement and the meeting minute from the General Meeting of Shareholders belong to the *partij akte*; as a result, a Notary in this situation will only need to input all of the information from the given party (the authority of General Meeting of Shareholders minute under representation) into the Meeting Decision Statement (the authentic deed). Therefore, if one day the meeting minute of the General Meeting of Shareholders contains flaw or is even falsified and thus the meeting minute become detrimental to one party the Notary will not be held responsible. Instead, the one who will be held responsible for the detrimental effect due to the situation is the given party who has asked the results of the meeting minute from the Meeting to be inputted from the Meeting Decision Statement into the authentic deed.¹⁹ The benefits of attaining an authentic evidence are:

- a. If the authentic evidence is denied by the opposing party then the opposing party should be able to prove the flaw within the authentic evidence;
- b. As long as the contrary evidence is absent, all of the authentic evidence that has been contained in an authentic deed should be held true.

Therefore, although the authentic deed might serve as a perfect evidence the authentic deed might be held imperfect by the strong evidence from the opposing party. For example, the falsification of a signature might be proved in an authentic deed.

Proof has minimum requirements that are contrary from one to another. If an evidence that has been proposed is a letter in the form of authentic deed, as long as the authentic deed is not haled by the evidence from the opposing party (*tengen bewijs*), the proposed authentic deed has already met the minimum requirements and has also had the powerful (*voilledig*) and binding (*bindende*) legal stance.

¹⁷ Anik Suryati. (2016). The Role of the Association of Indonesian Notary (INI, Ikatan Notaris Indonesia) in the Performance of Notary Duty in Accordance to the Code of Ethics, Journal of Law Notary Graduate Program Sebelas Maret University Surakarta, 2(3): 18.

¹⁸ Citra Widi Widiyawati, Mulyoto, op. Cit., p.55.

¹⁹ Mulyoto, op. Cit., p.67.

Similar to the deed under the counter, if the content and the signature within the deed are acknowledged by the opposing party then the position of the deed is similar to that of the authentic deed. However, if the content and the signature within the deed are denied by the opposing party then the deed under the counter will fail to serve as preliminary evidence. In order to achieve the minimum requirements of proof, an evidence should be supported at least by another evidence.²⁰

It is under such effort of assuring security that the researcher has observed the approval by the Minister of Law and Human Rights that starts from the Article 36 Verse 2 of the Legal Code of Law. Then, the efforts of assuring security have been formulated into Article 7 Verse 6 and Article 9 of Law 1995. After having been revised, the efforts of assuring security are regulated in the Article 7 of Law 2007.²¹

Conclusion

Role of the Shareholders within the Composition of Authentic Deed by a Notary

The General Meeting of Shareholders has an authority that should not be delegated into the Board of Directors and the Board of Commissioners within the coverage that has been regulated by the Law and/or the Articles of Association. In the forum of the General Meeting of Shareholders, the shareholders have the right to attain information regarding the limited liability company from the Board of Directors and the Board of Commissioners as long as the information is relevant to the section of the Meeting and is not against the interest of the company. The information that might be attained covers namely the rights of the shareholder to see the list of shareholders, the special list on the shares under the possession by each member of the Board of Directors or of the Board of Commissioners, and the special list on the shares under the possession of the family member of the Board of Directors or of the Board of Commissioners. Then, within the "Others" section of the Meeting the shareholders are not allowed to make any decisions except if all of the shareholders are present and/or are represented and the attending shareholders agree to extend the section. The decisions or the extension of the section should be agreed unanimously (Article 75 of Law Number 40 Year 2007).

Contribution from the Composition of the Authentic Deed by a Notary to the Shareholders

Due to the fact that in the case of authentic deed a Notary subjects to the governing requirements that have been formulated in the Law, the subsection serves as an evidence that a Notary might be held trustworthy. Therefore, the content of an authentic deed might be confirmed from the deed itself. In other words, shareholders should consider that the authentic deed is composed based on the reality that a Notary has witnessed until the situation in contradiction to the authentic deed has been proven.

Suggestions

1. The Role of the Shareholders within the Composition of Authentic Draft by the Notary. The Shareholders when connect within Notary have capacity to make for Authentic Draft.
2. The Contribution from the Composition of the Authentic Deed by a Notary to the Shareholders. The Shareholders need authentic for use liability company.

²⁰ Hari Sasangka. (2005). Hukum Pembuktian Dalam Perdata Untuk Mahasiswa Dan Praktisi Hukum, First Publication, Bandung, p.53-54.

²¹ Rudhi Prasetya, op. Cit., p.108.

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