

The Legal Certainty of Notary Deeds in Indonesia Used in Countries Not Joining the Apostille Convention

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Abstract. *This study aims to find out and analyze legal certainty over the legal status of authentic deeds of Indonesian notaries that are used outside the territory of Indonesia and to find out and analyze the steps that must be taken by notaries so that authentic deeds of notaries in Indonesia can be used outside the territory of Indonesia which not yet a member of the Apostille convention. This research uses Normative Research Methods, with a Conceptual approach and Legislation. The data source used is secondary data in the form of primary, secondary and tertiary legal materials. Data collection techniques using the Library Studies method. With the method of data analysis using Perspective analysis. The results of the study show that: First, the legal status of the Authentic Deeds of Notaries in Indonesia that are applied for through the Legalization process through Diplomatic or Consular channels and the Legalization of Apostille are equally valid. outside the territory of Indonesia that have not joined the Apostille Convention by fulfilling the elements of the validity of an Authentic Deed based on statutory regulations, taking into account the general principles and principles of National Civil Law, National Civil Law of Destination Countries, and International Law. The register Notary specimens at the Directorate General of General Legal Administration, as well as carry out the document legalization process.*

Keywords: Apostille; Authentic; Legalization.

1. Introduction

The government in an effort to facilitate international cooperation, especially to cut the lengthy bureaucratic process of legalizing public documents so that

documents issued by Indonesia and from outside Indonesia can be used in destination countries easily, quickly and efficiently. The government issued Presidential Regulation Number 2 of 2021 concerning Ratification of the Convention on the Elimination of Legalization Requirements for Foreign Public Documents). The ratification of this Convention can provide a large investment opportunity for Indonesia so that international cooperation will be easier to achieve. Legalization of Apostille according to the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 6 of 2022 concerning Apostille Legalization Services in Public Documents is an action to certify the signature of an official, endorsement of a stamp, and/or official seal in the documents requested based on verification. The document is a public document in the form of a written or printed letter signed by the authorized official as proof of statement and/or affixed with an official stamp and/or seal.

After the ratification of the Apostille Convention Indonesia agreed to abolish the legalization process through Diplomatic or consular channels, but the problem is that not all countries are members of the Apostille convention, and not all countries have Diplomatic or consular representatives so Cooperation between these countries requires legal certainty for documents made in Indonesia so that it can be used outside the territory of Indonesia which has not joined the Apostille convention.

In international relations practice, prior to the Apostille Convention the delivery of cross-border public documents was carried out through diplomatic relations, namely based on the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations by functioning diplomatic or consular representatives in each country concerned. while in Indonesia International Agreements are regulated in Act No. 24 of 2000 concerning International Agreements. Other problems arise because not all countries have diplomatic or consular representatives in each destination country.

Previous research in the Journal of USM Law Review Vol.5 Number 1 of 2022 which discussed "Responsibility of Notaries in the Legalization of Documents of Foreign Citizens According to the Apostille Convention" conducted by Reza Ria Nanda, and Rouli Anita Valentina aims to analyze the policy of the Apostille Convention in Indonesia and Notary responsibilities in the document legalization process. This research focuses on the legalization of foreign public documents in Indonesia after the Apostille Convention came into effect and the legal responsibilities of notaries in the document legalization process after the Apostille Convention came into effect.¹

¹Reza Ria Nanda, Rouli Anita Valentina. (2022). "Tanggung Jawab Notaris Dalam Legalisasi Dokumen Warga Negara Asing Menurut Konvensi Apostille". Jurnal USM Law Review Vol.5 No. 1

Presidential Regulation Number 2 of 2021 concerning Ratification of the Convention on the Elimination of Legalization Requirements for Foreign Public Documents) issued on 5 January 2021 and on 5 October 2021 The Government submitted the Accession Charter to the Dutch Ministry of Foreign Affairs (Depository) and presented the appointment of a Competen Authority. The accession is effective on June 4, 2022, the convention binds the Government and the Ministry of Human Rights as Competen Authorities.²In order to receive Apostille Legalization, documents must be issued and confirmed by an Institution that is authorized to issue Apostille certificates called the Competent Authority.³

In Article 1 of the Apostille Convention, one of the documents that are the object of the Apostille Convention is a document issued by a Notary. based on the Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH-01.AH.03.01 of 2022 concerning List of Types of Apostille Legalization Service Documents in Apostille Legalization Service Documents in Public Documents, which are included in the List of Types of Apostille Legalization Service Documents in public documents in the category of "others" mentioned in point 1 are Notary Documents.

From these provisions, an authentic deed made by a Notary is also included in the category that can be carried out by the Apostille legalization process, so that it can be used outside the territory of Indonesia. Legal certainty from documents issued by Indonesian notaries so that they can be used outside the territory of Indonesia that have not yet joined the Apostille convention is very important to realize because a deed made by a notary can become a legal basis for the status of a person's property, rights and obligations. Mistakes on a notarial deed can cause someone's rights to be revoked or someone or an obligation to be burdened.⁴

The objectives to be achieved from this research are to identify and analyze legal certainty regarding the legal status of authentic deeds and the steps that must be taken by a notary so that an authentic deed by a notary in Indonesia can be used outside the territory of the State of Indonesia which has not yet joined the Apostille Convention. This research is important to do to find out the legal status

Tahun 2022, url <https://journals.usm.ac.id/index.php/julr/article/view/4920> accessed on June 23, 2023, at 12:02 WIB.

²V Hesti Dewayani. (2022). "*Hak dan Kewajiban Republik Indonesia (Convention on Abolishing the Requirement of Legalization for Foreign Public Documents, 5 October 1961 ("Apostille Convention"))*". Denpasar: Direktur Hukum dan Perjanjian Sosial Budaya, p. 3.

³David Tan. (2021). "*Apostille Convention and Its Ramification Following The Accession of The Indonesian Legal Practices*". in Padjajaran Journal of Law Vol.8 No.3.

⁴Ihdina Nida Marbun, Dinda Anwar dan Deliska Anwar. (2009). "*Jurnal Tanggung Jawab Notaris*". Magister Kenotariatan Universitas Sumatera Utara, hal. 1.. url <https://mkn.usu.ac.id/images/17.pdf>, accessed on April 17, 2022 pkl. 20.22 WIB.

and steps that must be taken by a notary so that the authentic deed of a notary in Indonesia is used outside the territory of the State of Indonesia which has not yet joined the Apostille convention to create legal certainty for parties to agreements in international traffic.

2. Research Methods

The type of research used in this research is normative research. Method The approach used in this study is a conceptual approach (Conceptual Approach). The researcher refers to the general principles taken from the international legal systems of each country which are taken from the national system to regulate the same activities within the framework of international law.⁵ Apart from that, the researcher also uses a statutory approach which is carried out by examining all the legislation concerned with the problems in this study. The data used in this study uses secondary data, which consists of primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data collection method uses data collection methods through library research, and uses data analysis methods that are prescriptive.

3. Results and Discussion

The large number of foreign nationals investing in Indonesia currently opens opportunities for foreign public documents to enter and leave Indonesian territory, these documents are administrative in nature in the form of marriage certificates, diplomas, as well as documents issued by a Notary in the form of authentic deed, *waarmerking*, legalization, or legalization of documents carried out by a Notary. This of course requires verification from the Competent Authority beforehand so that it can be accepted by destination countries including Indonesia. Interactions or relations between people and countries are easier to do to support agreements and goals to be found.⁶ The association of the international community has led to the meeting of the legal systems of countries in the world that are equal in position.⁷

If we look back at the history of International Law based on the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations by functioning diplomatic or consular representatives in each country concerned, while in Indonesia International Agreements are regulated in Act No. 24 of 2000 concerning International Agreements. Apart from that, the

⁵Irwansyah. (2021). *"Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel Edisi Revisi"*. Yogyakarta : Mirra Buana Media. p.98

⁶Efan Setiadi. (2015). "Pengaruh Globalisasi Dalam Hubungan Internasional". *Jurnal International & Diplomacy USN Vol.1 No.1. Hal. 1.* url <https://jurnalhiusni.org/index.php/idu/article/view/2>, accessed on June 23, 2023, at. 12:29 WIB.

⁷Yulia. (2016). *"Hukum Perdata Internasional"*. Lhokseumawe : Unimal Press. p.35-36.

process of legalizing foreign public documents was previously regulated in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 19 of 2020 concerning Services for Official Signature Legalization on Documents at the Ministry of Law and Human Rights.

Thus after the ratification of the Presidential Regulation of the Republic of Indonesia Number 2 of 2021 concerning the Apostille Convention, the document legalization process in Indonesia has become simpler, but not all countries participate in this convention, and the Apostille legalization process can only be used for countries that have joined the this convention. This is the reason Indonesia recognizes 2 types of Public Document legalization processes both for documents inside and outside the territory of Indonesia, namely: Through a legalization process through diplomatic or consular channels, hereinafter referred to as "legalization" (for countries that have not joined the Apostille convention and documents excluded in the Apostille Convention) and Legalization of the Apostille, hereinafter referred to as the Apostille,⁸

Apostille legalization also has several advantages and disadvantages that must be considered before an authentic notarial deed in Indonesia will be used outside the territory of the State of Indonesia. The advantage of Apostille Legalization is that it makes the legalization procedure simpler because based on the Apostille Convention it will only take one step to legalize public documents originating from abroad and help increase investors to Indonesia.⁹ While the weakness of this Convention is that the Apostille Convention must regulate more strictly the Competent Authority policy standards.¹⁰ Another thing that needs to be underlined is that in the Apostille convention there is no provision in the Apostille to translate foreign documents. Documents issued in foreign languages need to be translated so that the receiving country can follow the substance.¹¹ However, this has been regulated in Indonesian National Law so that agreements containing foreign elements are translated into a language understood by the parties. In the Apostille Convention it is only to prove the authenticity of the

⁸Haryo Adil Wicaksono. (2022). *“Consular Handbook Series : Legalisation & Apostille, Directorate General of Protocol And Consular Affairs”*. Ministry Of Foreign Affairs Indonesia, p.9

⁹Mutiara Hikmah. (2021). *“Indonesia dan Konvensi Apostille”*. Humas FH Universitas Indonesia. url <https://law.ui.ac.id/indonesia-dan-konvensi-apostille-oleh-dr-mutiara-hikmah/> accessed on April 4 2023, at 11:59 WIB.

¹⁰Steven M. Anderson. (1995). *“Reforming International Institutions to Improve Global Environmental Relation, Agreement, and Treaty Enforcement”*. Hastings International and Comparative Law Review Vol. 18 No. 4. p. 780

¹¹Stefan SchlauB. (2020). *“The EU Regulation on Public Document”*. ERA Forum, Vol 21. No. 1. p. 118.

signature, the authority of the acting Official to sign the document, and the existing seal or stamp.¹²

Based on the theory of authority, namely the power to carry out public legal actions, for example the authority to sign, or issue permits from an official on behalf of the Minister, while the authority remains in the hands of the Minister (delegation of authority).¹³ Based on this understanding, laws and regulations have given authority to the Ministry of Law and Human Rights and the Ministry of Foreign Affairs to carry out legalization through an application for the Diplomatic or consular route, documents legalized through the Diplomatic or Consular route, the "legal status" of the legalization process is valid, the same as such as the application for Legalization of the Apostille.

The Apostille Convention actually does not eliminate all existing legalization methods, it's just that the Apostille convention introduces the "certificate" model of "Apostille" so that the legalization process is easier and more efficient, however based on national law it can stipulate to terminate the Apostille.¹⁴

In *Consular Handbook Series Legalization & Apostille* presented by Haryo Adil Wicaksono as Deputy Director For Flight And Sail Clearances, and Legalization at Directorate General of Protocol and Consular Affairs Ministry of Foreign Affairs– Indonesia, explaining that based on the authority of Notary Article 15 UUN Notary documents that can be applied for are Notary Deeds, namely authentic Deeds made by or before a Notary according to the form and procedure stipulated in the Law, Legalization, namely validating signatures and establishing date certainty private letter by registering in a special book, *Waarmerking* namely recording private letters by registering in a special book, and CTC, namely verifying the compatibility of photocopies with the original letters.¹⁵

Authentic deed of notary must fulfill the elements of the authenticity of a deed in order to have perfect evidentiary power. In the opinion of Philipus M. Hadjon quoted by Habib Adji, the conditions for an authentic deed are: in the form determined by law (standard form) and made by and before a public official.¹⁶

¹²Marian Nash Leich. (1982). *"The Hague Convention Abolishing The Requirement of Legalization for Foreign Public Documents"*. American Journal of International Law, Vol. 76. No. 1. p. 182.

¹³Ahmad Djauhari. (2006). *"Arbitrase Syari'ah di Indonesia, Basyarnas,"*. Jakarta, p. 22

¹⁴Philip W. Amran. (1974). *"Towards Easier Legalization of Foreign Public Documents"*, American Bar Association Jurnal, Vol.60 No.3 p. 311.

¹⁵Haryo Adil Wicaksono. Op. Cit. p. 5.

¹⁶Habib Adji. (2008). *"Hukum Notaris Indonesia (Tafsir Tematik Terhadap UU No. 30 Tahun 2004 Tentang Jabatan Notaris)*. Bandung : PT. Refika Aditama. p. 126.

Whereas underhand agreements with authentic Notary Deeds have differences in terms of the strength of the proof.¹⁷

There are 3 essential elements so that the formal requirements of an authentic deed are fulfilled, namely as follows: In the form determined by law, Made by and before a Public Official, Deed made by or before a public official who is authorized to do so and at the place where the deed was made.¹⁸In addition, the authenticity of a notarial deed must meet the requirements in UUJN to avoid the degradation of an authentic notarial deed to a private deed.

Authentic notarial deed consists of partij deed and relaas deed. For a partij deed, especially an agreement made by agreement of the parties, it must fulfill the elements of the legal terms of the agreement as referred to in Article 1320, for the validity of an agreement, four conditions are required, namely: the agreement of those who bind themselves, the ability to make an agreement, a thing certain, a lawful cause. The legal terms of the agreement are also known in international law practice, including: The principle of consensuality (*the principles of free consent*),The principle of good faith (*good faith*)in Article 2 paragraph (2) of the preamble to the UN Charter, the Principle of Pacta sunt servanda(Article 26 of the Vienna Convention Article 4 paragraph (1) UUPI)¹⁹

Agreements in which there are foreign elements in them have fulfilled the requirements of the enactment of international law. Sudargo Gautama stated that international contracts are international contracts that contain foreign elements or foreign elements.²⁰ The foreign elements by Hannu Honka are detailed as follows:²¹different nationalities, the parties have legal domiciles in different countries; law agreed upon by foreign law (including international contract principles and rules for the contract), the object of the contract is abroad, the execution of the contract is abroad, the settlement of the contract is carried out abroad, the language used in the contract is foreign language, foreign

¹⁷Mariah Kamelia dan Anis Mashdurohatun. (2017). "Peran Notaris Dalam Pembuatan Akta Perjanjian Kredit Dalam Perspektif Hukum Positif dan Hukum Islam. Jurnal Akta Vol. 4 No. 4. Hal. 579-580. url <http://jurnal.unissula.ac.id/index.php/akta/article/view/2500/1864> , accessed on April 2, 2023, at 13:30 WIB.

¹⁸Herlien Soerodjo. (2003). "Kepastian Hukum Hak Atas Tanah di Indonesia". Surabaya : Arkola. p.148

¹⁹R.Moch. Ramadhan Putra S. (2017). "Implikasi Hukum Pemberhentian Berlakunya Agreement Between The Government of The Kingdom of The Netherlands And The Government of The Reublic of Indonesia on Promotion And Protection of Investment 1994 oleh Indonesia". Fakultas Hukum Universitas Pasundan. p. 65-66.

²⁰Huala Adolf. (2010). "Dasar-Dasar Hukum Kontrak Internasional". Bandung : Refika Aditama. p. 4.

²¹Muhammad Syaifuddin. (2012). "Hukum Kontrak Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum (seri pengayaan Hukum Perikatan). Bandung : Mandar Maju. p. 281

currency used in the contract. If it fulfills one of the elements mentioned, it is classified as an international contract. Syaifuddin emphasized that it is important to understand that the definition of an international contract is adopted from the term "the law contract" in the business or commercial field. These international contracts are subject to national and international private laws.²²

An international agreement according to the theoretical explanation from Jurgens Habermans which in essence is a very pluralistic international community places a very large dependence on law as a means of social integration.²³ And only valid legal norms that are agreed upon by all the people concerned as reasonable discourse for the parties.²⁴

In drawing up an agreement, whether the agreement is bilateral and multilateral in nature or agreements within the national, regional and international scope, it must be based on certain legal principles and clauses.²⁵ The principles and clauses in question are:

The principle of freedom of contract, the principle of consensuality, the principle of habit, the principle of risk transfer, the principle of compensation, the principle of compliance, the principle of timeliness, the principle of emergency, the choice of law clause. General principles and principles in international traffic have been mutually agreed upon and accepted internationally. Therefore agreements involving foreign elements must also adopt the general principles and principles of international law, so that the agreement is not only accepted nationally but also internationally.

From the explanation above, all documents issued by a Notary, whether in the form of Authentic Deeds, Underhanded deed which is *Waarmerking*, Legalization by a Notary, can be legalized through diplomatic or consular channels and the Apostille Legalization Path, the legal status of an authentic notary deed either uses Diplomatic and Apostille legalization paths are equally valid. Because each legalization process is carried out by an Institution authorized by the State to become a Competency Authority which has been regulated in laws and regulations.

If the destination country has not joined the Apostille convention and does not have diplomatic or consular representatives, the legalization process can only be

²²*Ibid*

²³Jurgens Habermas. (2013). "Modern Social Theory as Postmetaphysical Natural Law". Journal of Classical Sociology Vol. 13 No. 2. p. 270.

²⁴Raymond Wacks. (2012). "Understanding Jurisprudence : An introduction to Legal Theory". New York : Oxford University Press, p. 191

²⁵Joni Emirzon. (1998). "Dasar-Dasar dan Teknik Penyusunan Kontrak". Universitas Sriwijaya : Inderlaya. p. 19.

carried out by the foreign ministry, or if there are other provisions from the destination country the applicant can submit directly to the foreign ministry as a liaison between the applicant and representatives from country of destination. It's just that because the Legalization does not reach the truth of the contents of the Authentic Notary Deed, there are things that the Notary needs to pay attention to so that the Authentic Notary Deed issued by a Notary in Indonesia can be used outside the territory of Indonesia, both those that have joined the Apostille convention nor has it joined the Apostille convention, namely: The Notary Deed has fulfilled the legal terms of the agreement as referred to in Article 1320 of the Civil Code; The Notary Deed has fulfilled the authenticity of a deed as stipulated in the Law on Notary Office; Does not conflict with the provisions of the principles and general principles of national private law in Indonesia and in the destination country; The Notary Deed is not against the general principles and principles of international law (not against public order and decency); The notary must register the signature specimen, stamp and seal with the Ministry of Law and Human Rights as *Competence Authority*; The Notary Deed must go through the Legalization Process as a form of verification from the Competent Authority as stipulated in the Apostille Convention or through Diplomatic or Consular channels (depending on the destination country's participation in the Apostille Convention) so that the Notary deed can be recognized by the Destination Country. The legalization process is carried out by the applicant either by the parties or their proxies. In certain cases it may be possible to request a court order in the country of destination beforehand.

An Authentic Notary Deed issued by a Notary in Indonesia to be used outside the territory of Indonesia must be drawn up carefully and carefully because the deed has met the foreign element as a requirement for the validity of international law. Therefore, before an authentic notarial deed is used outside the territory of Indonesia and before carrying out the legalization process, to ensure legal certainty for the parties, the notary must pay attention to the general principles and principles of both national law and international law in making the deed.

4. Conclusion

The legal status of an authentic deed of an Indonesian Notary if it is used outside the territory of Indonesia that has not joined the Apostille convention or that has joined the Apostille convention is the same, the only difference is the legalization process. In order to guarantee legal certainty from the parties, authentic notarial deeds issued by a Notary in Indonesia and to be used outside the territory of Indonesia must pay attention to the principles and general principles of national law, national law of the destination country and international law.

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