

# 1091

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**Submission date:** 13-Dec-2020 09:33PM (UTC+1030)

**Submission ID:** 1473628221

**File name:** 1091-3770-1-ED.doc (114.5K)

**Word count:** 5819

**Character count:** 30458

## Characteristics of Notary Deeds for Transactions Through Electronic Media

### Abstract:

These technological advances have caused enormous changes to business people who will indirectly use modern technological advances. This development will certainly bring changes to the implementation of the duties and authorities of the Notary as public official authorized to make authentic deeds. There is a new dynamic of changes in society due to globalization and developments in information technology that require Notary services in carrying out existing legal actions, facilitated by current information technology, but Notaries are still hampered by the absence of legal instruments that protect and regulate Notaries in carrying out these actions. This is a challenge for the Notary profession in responding to globalization in the world of information technology, meaning that the notary's duties as public officials develop along with the times. This research is a normative research with a statutory approach. The results obtained from this research are that the Notary Public must involve a third party called the Certification Authority, to secure and legitimize documents into electronic transactions, so that the Notary deed to be used remains an authentic deed and has perfect evidentiary power, but if the process does not involve the party, then the Notary deed is classified as an underhand deed, and has the power of proof as the deed under hand, even though it is made and signed either directly or digitally by the Notary.

**Keywords:** Notary, Electronic Transaction, Notary Deeds

### INTRODUCTION

In this era of globalization, technology is growing rapidly, so that it seems as if there are no more boundaries between space and time that can separate someone who is able to separate someone from being in another place. This development is also in line with the development of a traditional society into a modern one, then automatically this development demands that the community move towards globalization.

These technological advances have caused enormous changes to business people who will indirectly use these modern technological advances. In Indonesia, there is already Law no. 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law), as a response to the changing dynamics of society or business actors with globalization, especially in the field of

information technology. However, some business people do not know that business activities carried out through online media should require a legal umbrella that protects these activities, so in order to be safe a transaction in online media should require a form of agreement which is usually called a Notary deed.<sup>1</sup>

The arrangement regarding the position of a Notary is contained in Law No. 2<sup>17</sup> of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notary (hereinafter referred to as the New UUJN). Based on the authority of the Notary as regulated in Article 15 UUJN and the evidentiary power of the Notary deed, there are 2 (two) things that can be understood, namely:

1. Notary in his duties or positions formulate the wishes / actions of the parties into an authentic deed with due observance of the applicable legal rules;
2. The Notary Deed<sup>10</sup> as an authentic deed has perfect evidentiary power, so it does not need to be proven or added with other evidence.

The Special Authority of Notaries can be assessed in article 15 of the UUJN which regulates the special authority of Notaries to carry out certain legal actions such as:

1. Ratify the signature and determine the date certainty of the letter under the signature<sup>3</sup> by registering it in a special book;
2. To record letters under hand by registering in a special book;
3. Make original copies of the letters under the hands of similar copies containing the rules of description as written and described in the letter concerned;<sup>3</sup>
4. To validate the compatibility between the photocopy and the original letter;
5. Provide legal education in connection with the deed maker;
6. Making deeds relating to land, or<sup>3</sup>
7. Prepare a deed of auction minutes

<sup>12</sup>Desi Minarsih, 2012, *Tinjauan Yuridis Terhadap Perjanjian E-Commerce dari Aspek Kenotariatan*, Thesis Magister Kenotariatan, Universitas Gadjah Mada, h. 8

In connection with these developments, the presence of information technology, of course through the internet media, gave birth to a legal phenomenon in the form of electronic contracts, namely agreements of the parties made through electronic media, as well as electronic contracts in the form of legal actions carried out using computers or computer networks and / or media. other electronics. With this information technology, business transactions are no longer carried out in a face-to-face manner between parties, such as sellers and buyers, but can be carried out through the use of information technology developments where the parties do not meet directly or physically.

This development will certainly bring changes <sup>2</sup> to the implementation of the duties and authorities <sup>3</sup> of the Notary as public official authorized to make authentic deeds. In connection with other contracts / agreements or deeds that are not related to land, shifting from the conventional system by way of face to face or face to face with the parties, shifting to Cyber Notary based on electronic systems in cyberspace.

<sup>8</sup> Notaries as public officials who carry out part of the State's duties in the civil sector have benefited a lot from the development of information technology. The implementation of the use of information technology by Notaries includes online registration of companies (legal entities) through SABH Director General AHU Depkumham RI, use of email for sending data from clients, and other matters related to the use of information technology.<sup>2</sup>

The ITE Law contains arrangements for electronic transactions with the support of Electronic Certificates, Electronic Signatures, and Electronic Systems. With Electronic Certificates and Electronic Signatures, the parties transacting with each other can be authenticated as to who is the signatory, and the status of the signed documents / electronic information is known. The development of business and commerce has now entered the realm of electronic transactions, not conventionally.

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<sup>2</sup>Habib Adjie, 2004, Penggerogotan Wewenang Notaris Sebagai Pejabat Umum, Renvoi, Jakarta (selanjutnya disebut Habib Adjie 2), h.32.

Technological advances have made it possible to hold electronic transactions using media and technological devices, including the internet.<sup>3</sup>

Electronic transactions are a new form in the world of commerce which is a promising business alternative because it <sup>23</sup> provides a lot of convenience for both parties, both from the seller and from the buyer to carry out trade transactions effectively and quickly where the buyer simply accesses the website of the company that advertises its products and agrees to the terms and provisions from the seller through internet media.

Business actors <sup>13</sup> offering products through electronic systems must provide complete and correct information regarding the terms of the contract, the manufacturer, and the products being offered. The parties who carry out electronic transactions certainly want security and legal certainty with the agreement they make.<sup>4</sup>

The ITE Law has also accommodated electronic documents as valid evidence, but this does not apply to all things, because the ITE Law itself limits their use. This can be seen in Article 5 paragraph (4), which determines <sup>4</sup> that the provisions regarding electronic information and / or electronic documents as referred to in paragraph (1) do not apply to:

1. A letter which according to the law must be in writing
2. Securities and documents according to the law must be in the form of a notary deed or a deed drawn up by the deed-making official.

With the existence of this article, the <sup>24</sup> Notary as a public official who has the authority to legitimize a certain title has no opportunity in electronic transactions.

Until now there has been no legal instrument regulating the legalization of electronic deeds or contracts by notaries because the signing and ratification of electronic signatures requires special rules and the role of a Notary in this case in

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<sup>3</sup> Ibid.

<sup>4</sup> Desi Minarsih, *Loc.cit.*

Indonesia is carried out by a CA (Certification Authority) institution or an electronic certification organization, namely an institution that certifies the digital signature as an independent third party that has the authority to issue a digital certificate containing the identity of the user.<sup>5</sup>

Starting from some of the phenomena above, it can be seen that there are new dynamics of changes in society due to globalization and developments in information technology that require the services of notaries in carrying out existing legal actions, with the current information technology facilitation, but notaries are still hampered because there are no legal instruments that protect and arrange the Notary in doing the act. This is a challenge for the Notary profession in responding to globalization in the world of information technology, meaning that the notary's duties as public officials develop along with the times. Therefore, it is necessary to discuss the extent to which the notary may play a role in issuing certificates.

## PROBLEM FORMULATION

<sup>26</sup>Based on the brief description in the above-mentioned background, the problem in this study is the **Characteristics of Notary Deeds for Transactions Through Electronic Media**

## RESEARCH METHOD

This research is a normative study, which means that this research examines the side of the legislation itself, not examining social symptoms due to existing legislation. The <sup>2</sup>approach method used in this research is a statutory approach (statue approach). This approach is used because the discussion in this study will refer to the Law.

## DISCUSSION

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<sup>5</sup> Habib Adjie, *Loc.cit*



Notary is a Public Official who <sup>3</sup> has the authority to make Authentic Deeds regarding all actions, agreements, and regulations required by laws and regulations and / or that those with an interest want <sup>1</sup> to be stated in an authentic deed, guarantees the certainty of the date of making the deed, keeps the deed, provides grosee, copies and excerpts of deeds, <sup>1</sup> all of which as long as the making of the deeds is not assigned or excluded to other officials or other persons stipulated by law.

Notaries act as public servants because they are appointed by the government to serve the needs of the community for valid legal documents. In carrying out daily duties, notaries are officials who act passively in the sense that they wait for the public to come to them to be served. The duties and powers of a notary, among others:

1. Make a deed of establishment / articles of association: business entities, social agencies (foundations), cooperatives, etc.;
2. Making a will deed;
3. Making a Fiduciary deed;
4. Legalizing (validating the suitability of photocopies of letters);
5. Preparing and registering / marking / warning the letters under hand, etc;
6. Preparing and legalizing (legalizing) documents under hand, such as power of attorney, statement letter, letter of approval;
7. Making agreement deeds.

<sup>6</sup> Electronic commerce or e-commerce (English: Electronic commerce, also e-commerce) is the distribution, buying, selling, marketing of goods and services through electronic systems such as the internet or television, www, or other computer networks. E-commerce can involve electronic fund transfers, electronic data exchange, automated inventory management systems, and automated data collection systems. Based on Article 1 paragraph 2 of the ITE Law, the meaning of Electronic Transactions is a legal act that is carried out using computers, computer networks, and / or other electronic media. In the industrial era followed by the

advancement of trade, both at the national, regional and international levels, it has been followed by trade laws regulating trade transactions at the national and global levels. Trade law regulates how a trade agreement is legally made so that it is obeyed by the parties making it.

### Notary Authority

Authority (or often written as Authority) is a legal action which is regulated and given a position based on the prevailing laws and regulations. Thus every authority has its limits, as stated in the statutory regulations governing it. Likewise, the authority of a notary is limited, as <sup>1</sup> in the laws and regulations governing the <sup>11</sup> position, namely in accordance with Law No.2 of 2014 concerning amendments to Law No. 30 of 2004 concerning the Position of Notary.<sup>6</sup>

<sup>1</sup> Notary as a position (not a professional or professional position), and any position in this country has its own authority. Every authority must have a legal basis, so that the authority of any official must be clear and strictly limited in the laws and regulations governing the official or position.

The source of authority obtained from a position can be traced, namely by Attribution, Delegation or Mandate. Delegation of authority is the transfer / transfer of existing authority based on statutory regulations or legal rules. And the mandate is not actually a transfer or transfer of authority, but because the competent person is absent.<sup>7</sup>

So that if an official commits an action beyond the authority as determined and limited by law, the dressing is an illegal act in that context it can be categorized as an action outside of authority or acting arbitrarily.

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<sup>5</sup>Habib Adjie, 2008, *Hukum Notaris Indonesia, Tafsir Tematik Terhadap UUU No.30 Tahun 2004 Tentang Jabatan Notaris*, Rafika Aditama, Bandung, h. 72

<sup>7</sup>Ibid.



Notary <sup>1</sup> as regulated in Article 15 of Law Number 2 of 2014 in conjunction with Law No. 30 of 2004 concerning the Position of Notary Public whose authority is divided into 3 (three) namely:<sup>8</sup>

1. Notary Public Authority (Article 15 paragraph (1) of the New UUJN);
2. Special Authority of Notary (Article 15 paragraph (2) of the New UUJN);
3. Notary Authorities to be Determined Later (Article 15 paragraph (3) of the New UUJN).

### **Urgency of Notary Engagement in Electronic Transactions**

The existence of a Notary in legal transactions in Indonesia has been recognized for its role and position and is respected as appropriate as the presence of the State in legal relationship transactions because as a third party trusted by the State through law to use the stamp of the Garuda State symbol so that the public has full trust in the notary.

Notary is an official or legal professional who is sworn to act in accordance with the law properly, so it can be said that the role of the Notary is very necessary to maintain the certainty and legality of legal actions, as well as to prevent and avoid any illegal acts.<sup>9</sup>

Qualification and criteria as a Notary are based on high ethics and a level of trust, acting honestly under the applicable law. Unlike lawyers, notaries are considered to have a role and act neutral because they do not act in the interests of clients, but act on the law that should apply. Therefore, for each activity and its act, the Notary can be said to be fully responsible, so that the quality of the document is categorized as an authentic deed and has executorial power.<sup>10</sup>

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<sup>5</sup> Tan Thong Kie, 2007, *Studi Notariat & Serba Serbi Praktek Notaris*, PT Ichtiar Baru van hoeve, Jakarta, h.503

<sup>9</sup> Edmon makarim, 2013, *Notaris & Transaksi elektronik*, RajaGrafindo, Jakarta, h.7

<sup>10</sup> *Ibid*

The development of business and commerce has now entered the realm of electronic transactions, it is no longer common to use conventional methods. The current ITE Law contains arrangements for electronic transactions with the support of Electronic Certificates, Electronic Signatures, and Electronic Systems. With Electronic Certificate and Electronic Signature, the parties that transact with each other can be authenticated as to who the signatory is, and the status of the signed electronic document / information is known. Technological advances have made it possible to hold electronic transactions using media and technological devices including the internet. Electronic transactions are a new form of commerce which is a promising business alternative, because it provides many conveniences for the parties.<sup>11</sup>

The aspect of protection in general is a need for everyone to get assurance that any transaction that is carried out obtains and requires legal protection for every legal relationship transaction that will be or is being carried out, including what is done electronically.

This legal protection is not only in the form of recognition of the evidentiary value of an electronic information but also of ensuring the fulfillment of the subjective elements of the conditions of the contractual relationship which determines the legality of a transaction. This subjective element will be fulfilled if there is clarity about the legal identity of the parties and their legal capacity. To ensure this, the existence of a Notary is to prevent possible fraud in electronic transactions.

By involving a notary in electronic transactions, the transacting party can find out the legal certainty in the transaction, as well as for law enforcers, it can make it easier to explain the validity and strength of evidence from digital or electronic evidence. This is because the power of proof of information and electronic

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<sup>11</sup>Didik M. Arif Mansur dan Elisatris Gultom, 2009, *Cyber Law, Aspek Hukum Teknologi Informasi*. Bandung, Refika Aditama, h.122

transactions often has weak evidentiary value. By involving a notary, the position of the transaction and its parties will be stronger, because it can be perceived as an authentic deed, and of course this will increase public trust and security in electronic transactions.<sup>12</sup>

Actually, the opportunity for a Notary to play a role electronically is not seen in the New UUJN, but the application of this is actually still very relevant to <sup>25</sup> the provisions of Article 15 paragraph (2) point (a) and paragraph (3) of the New UUJN which gives the Notary another authority as long as it is appropriate. with laws and regulations. Article 15 paragraph (3) of the New UUJN, confirms that Notaries also have other powers regulated in statutory regulations. Elucidation of Article 15 paragraph (3) of the New UUJN, explains that the other powers referred to are also the authority to certify transactions carried out electronically or cyber notary. Based on this, actually this authority is not very appropriate when referred to as certification, because the intended meaning is actually "strengthening" or "strengthening" the electronic transaction, so that it can be considered legally valid (legally). One form of electronic strengthening or legalization is in the form of a time stamp, or legalizing the occurrence of a transaction at a certain time which is carried out between the parties. Conventional forms of legalization include the legalization of signatures in a document, which is also regulated as one of the notary authorities based on UUJN.

Regarding the digital printed signature, it has actually been implemented in terms of the formation of a Limited Liability Company, namely <sup>2</sup> in the Decree of the Minister of Law and Human Rights (KEMENKUMHAM). If this is implemented by a Notary Public, it can become a problem regarding the strength of proof on a digitally printed signature, even though as described above, one of the things that stands out from a Notary deed is a strong power of evidence. Therefore, the notary at least has a

reference to a procedure or system that can guarantee the creation, storage, or use of public documents that they have created or legalized, so that they can be considered authentic, as authentic as written certificates.<sup>13</sup>

The implementation of the legalization of information or documents electronically is as stated in Article 16 letter C of the New UUJN, which is obligatory for tappers to attach letters and documents and fingerprints on the Minuta Deed. Thus, the authenticity of the deed by using an electronic signature can be doubted because there is no fingerprint of the intended person.<sup>14</sup>

### **Notary Position in Electronic Transactions**

Notaries cannot work properly to provide strong legal legitimacy if they only work alone in implementing Cyber Notary through an electronic system. The position and role of a Notary is highly expected to be involved in electronic transactions to give strong legitimacy to ongoing electronic transactions, namely identifying electronic signatures and signers, and verifying signed electronic documents / information.

In the implementation of Cyber Notary, the Notary must be assisted and collaborated with a third party as an Electronic Certificate Operator. These third parties are entrusted with the authority to maintain and secure electronic contracts, by providing and auditing Electronic Certifications. So that the notary's position is to give legitimacy, while the Electronic Certification Operator is to guarantee the safety of electronic contracts.

The role of a notary in electronic transactions is inseparable from the readiness of the legal infrastructure, and by what method the parties want the electronic

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<sup>13</sup> Arsyad Sanusi, 2004, *Teknologi informasi*, Terjemahan bebas dari penulis, Jakarta h. 14

<sup>14</sup>*Ibid*

transaction to be carried out. Several alternatives to the role of a notary in electronic transactions are as follows:<sup>15</sup>

1. The parties make an offer (offer) and accept the offer (acception) through electronic media, then sign the agreement electronically and after that put the agreement in a notary deed conventionally. To make a deed contact the Notary of electronic media;
2. The agreement of the parties is carried out electronically. The notary affixes an electronic signature on the deed and then the deed is printed as evidence of an agreement;
3. Preparation of Notary deeds is carried out electronically without being followed by printing of deeds.

Habib Adjie explained, with regard to electronic transactions involving Notaries, the notary's position in electronic transactions is as follows:<sup>16</sup>

1. Notary position in electronic transactions together with Certificate Authority (CA) as a trusted third party in securing and legitimizing electronic transactions. Certificate Authority is the party that issues Electronic Certificate which contains the identity of the certificate owner, public key and private key used in electronic transactions to create electronic signatures, authenticate the signer and verify the signed documents;
2. The notary acts to authenticate parties who carry out electronic transactions or authenticate parties who sign documents / electronic information, verify documents / electronic information signed by the parties, safeguard the storage of information in the form of signatures and signed documents, assist CA in Electronic Certificate issuance in particular identifies the parties requesting the issuance of Electronic Certificates, and finally becomes an

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<sup>15</sup> Murifatul Maulida, 2011, *Peran Cybernotary dan Implikasi Hukum Terhadap Jabatan*, Tesis, Sekolah Pasca Sarjana Universitas Gadjah Mada-Yogyakarta, h.9

<sup>16</sup>Habib Adjie, 2008, *Hukum Notaris Indonesia, Tafsir Tematik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris*, Rafika Aditama, Bandung, h. 73.

intermediary for electronic transactions where the electronic documents and signatures are sent by the Recipient to the Notary, then the Notary performs authentication and verification first of the signers and the electronic documents / information that are signed , then forwarded to the recipient;

3. The notary checks the signature used, the sender's identity and the signed electronic documents / information. If this inspection is complete, the notary can send the checking result information to the sender. If there is no problem, then the notary sends the electronic document / information to the recipient. The Receiving Party submits information to the Notary that the document / electronic information has been received. The notification is followed up by the notary by sending information / reports to the sender that the recipient has received a signed electronic document / information.

Notaries are expected to be able to play a role in making electronic deeds, but until now there is no law that allows for an electronic Notary deed making system, because the New UUJN and the ITE Law have not regulated the system.

Making authentic deeds related to electronic documents in e-commerce, can be done in the presence or by a notary public, and must also pay attention to the authenticity requirements of a deed so that electronic documents and digital signatures in them can be used as valid and perfect evidence. Regarding the authenticity of electronic documents and digital signatures, an institution needs to be established to carry out a Certification Authority that involves a Notary in it, under the supervision of the Certification Authority Supervisory Body.<sup>17</sup> In this regard, Makarim Edmon added that apart from that, various normative and technical improvements are still needed, by making amendments to the Notary Position Law and the ITE Law relating to the office area of a Notary, namely a Notary having an office area in all provinces where his / her domicile is located. and giving authority to Notaries in the cyber world as certification authority by observing the basic principles

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<sup>17</sup>*Ibid.*



of the validity of authentic deeds. For this reason, if necessary it is necessary to establish firmer laws and regulations to support the role of the Notary in the electronic deed-making system.

Based on the elaboration above,<sup>15</sup> in accordance with Article 15 paragraph (1) of the New UUJN concerning the authority of Notaries, that the Notary is<sup>21</sup> authorized to make authentic deeds regarding all actions, agreements, and stipulations required by the regulations<sup>1</sup> to be stated in authentic deeds, guarantee the certainty of the date of making the deed, keep the deed, provide grosse, a copy and an excerpt of the deed, all of which as long as the deed is made, it is not<sup>3</sup> assigned or excluded to other officials or other people as stipulated by law.

In connection with the involvement of a notary in electronic transactions, a notary is needed for making deeds so that they have perfect evidentiary power, as authentic deeds made by notaries in general. However, the character of electronic transactions in fact only involves interested parties, and is carried out digitally, so it requires a digital signature too. So that the presence of a Notary as a party who can support the power of perfect proof, if the deed is made by or in the presence of a Notary, meanwhile the electronic transaction is digitally signed so that according to Habib Adji<sup>2</sup> it does not have perfect proof power.<sup>18</sup>

In the practice of transactions via electronic media to obtain perfect evidentiary power as in the form of deeds made by and before a Notary Public, improving the power of proof of Notary deeds made digitally requires the involvement of a third party in the form of a trusted certificate authority (CA). in securing and legitimizing documents into electronic transactions.

The institution also issues Electronic Certificates containing the identity of the owner, public keys and private keys used in electronic transactions to create electronic signatures, authenticate the signer and verify the signed documents, then the Notary acts to authenticate the parties conducting electronic transactions or

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<sup>18</sup>Habib Adji, *op.cit*, h74

authentication of parties signing documents / electronic information, verifying documents / electronic information signed by the parties, securing information storage in the form of signatures and signed documents.<sup>19</sup>

So that notaries are expected to have a role in electronic transactions, but their position cannot act independently but must be accompanied by a certificate authority which of course results in slower performance of the notary. This means that at least there are laws that further regulate the role of a Notary in electronic transactions so that their performance can be maximized and various electronic transactions that require more legal protection, can be facilitated with an electronic Notary deed.<sup>20</sup>

### **Strength of Proof of Notary Deed in Electronic Transactions**

In the development of the use of electronic means in various transactions, besides providing positive benefits, namely the ease of transactions, it also provides enormous benefits for document storage as a result of business activities carried out. However, the rapid development of electronic means and the increasing number of users of electronic advice, there are also weaknesses or weaknesses when faced with problems of evidence before the court.<sup>21</sup> In this case, the legal position of proof as usual will be in a dilemma. On the one hand, so that the law can always acknowledge the times and technology, it is necessary to have legal recognition of various types of digital technology developments to function as court evidence, while on the other hand there is a tendency to manipulate the use of digital evidence by irresponsible parties.

The provisions referred to in Article 5 paragraph (4) letter b of the ITE Law: -  
 "Provisions regarding Electronic Information and / or Electronic Documents as referred to in paragraph (1) do not apply to:

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<sup>19</sup> Emma Nurita, 2012, *Cyber Notary, pemahaman awal dalam konsep pemikiran*, Refika Aditama, Bandung, h.25

<sup>20</sup> *ibid*

<sup>21</sup> *Ibid.*

1. A letter <sup>2</sup> which according to the law must be in writing; and
2. Letters and documents which according to the law must be made in the form of notary deeds or deeds drawn up by the deed-making official.

The ITE Law provides a position on electronic documents with digital signatures as evidence, because electronic data has not been accommodated in the Evidence Law and Procedural Law system in Indonesia. This is an extension of evidence based on the Law of Evidence in Indonesia, which only recognizes 5 (five) types of evidence and BW determines that written evidence consists of personal data and data to run the company. Electronic information as evidence in civil evidence originates from the idea that the essence of e-commerce lies in electronic information and electronic signatures as the key to securing it.

The laws related to letters and documents <sup>4</sup> as referred to in Article 5 paragraph (4) of the ITE Law include BW, Law Number 25 of 1992 concerning Cooperatives (Cooperative Law), Law Number 16 of 1985 concerning Flats (RS Law), <sup>20</sup> Law Number 40 of 2007 concerning Limited Liability Companies (PT Law), Law Number 4 of 1996 concerning Land Mortgage Rights and Land-related Objects (HT Law), Law Number 42 1999 concerning Fiduciary Guarantee (Fiduciary Law), Law Number 16 Year 2001 as amended by <sup>2</sup> Law Number 28 Year 2004 concerning Foundations (Foundation Law), and Law Number 30 Year 2004 concerning Notary Position (JN Law) . In addition to the deeds in several of these laws, the provisions of the ITE Law may apply.<sup>22</sup>

Electronic documents and digital signatures born from e-commerce need to be reviewed in relation to authentic deeds, because the birth of the ITE Law raises questions among notaries whether electronic transactions or electronic documents can be equated with authentic deeds. Apart from having to pay attention to the requirements for the authenticity of a document, the document authenticity process

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<sup>16</sup>  
<sup>22</sup> Adjie, Habib. 2008, Hukum Notaris Indonesia, Tafsir Tematik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris, Bandung: Rafika Aditama, h. 38

and electronic information can be obtained in the event of a legal dispute. Legal disputes regarding electronic documents in electronic transactions can be resolved by litigation. The settlement of this dispute is subject to civil procedural law and its proof system which adopts a positive proof system. The parties in an electronic transaction must prove, while the judge only shares and charges the party to submit evidence, in order to corroborate the arguments or events presented. This is in accordance with the general principle in Article 163 HIR / 283 RBG / 1865 BW.<sup>23</sup>

<sup>29</sup> Based on Article 5 paragraph (4) of the ITE Law, electronic documents cannot be equated with <sup>3</sup> an authentic deed made by or before a notary because the authenticity of notary deeds is based on the Law on Notary Position, therefore the power of proof of electronic documents can be equalized with a deed under hand but must meets the basic requirements so that a document has value as an underhand deed. The basic requirement is that the letter or writing is signed; the content described in it is related to legal actions (rechtshandeling) or legal relations (recht bettrekking); and deliberately made to be used as evidence of the legal action mentioned in it. In addition, electronic documents in order to function as valid evidence must also meet the requirements stipulated in the ITE Law.<sup>24</sup>

The notary deed and the underhand deed have differences in proof. The proof of an underhand deed is much weaker than an authentic deed, so that if there is a change from an authentic deed to an underhand deed, the parties will suffer the most loss. Underhand deeds made for the benefit of the parties in proving to a third party, without the help of an official, have evidentiary value as long as the parties acknowledge it and there is no denial from either party. If there is denial, the burden of proof is left to the party who denies it and the assessment of the denial of the evidence is submitted to the judge. This is in accordance with the Civil Procedural Law evidentiary system.

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid, h. 240.

It is different from an authentic deed which has perfection as evidence, so that the deed must be seen as it is and does not need to be interpreted differently from what is written in the deed. This means that the <sup>7</sup>power of proof of deeds under hand, is not as extensive and as high as the degree of authentic deeds, because authentic deeds have physical, formal and material evidentiary power while deeds under hand do not have physical evidentiary power but are <sup>7</sup>only limited to the strength of formal and material proof with weight, which is much lower than the authentic deed.<sup>25</sup>

Legal recognition of the power of proof of electronic signatures is something that cannot be avoided. The development of technology has been so advanced. The law, including the law of proof, should be able to anticipate these developments. Laws are made so that they can reach the future, not always compromise with current conditions. Laws must be futuristic. Electronic signatures are a daily reality in banking activities. What is needed is a legal attachment or footing that recognizes an electronic signature as legally valid evidence. Habib Adjie based on the need for a third party (Certification Authority) when a notary is used to have the power of proof, saying that the power of proof of electronic documents can be the same as an authentic deed, because <sup>27</sup>of an electronic information and / or electronic document that has been signed electronically means that the information and / or documents have been verified and authenticated. This is different from BW which only recognizes a signed letter as binding evidence, while a letter without a signature is only preliminary evidence that is not binding.<sup>26</sup>

The legal relationship between a notary, the ITE Law, and the meaning of a signature, can be stated in an adage that all electronic transactions with electronic signatures can be considered as deeds, even the power of proof is the same as an authentic deed. This legal relationship has implications for the burden of proof of an electronic signature. This electronic sign can be applied in Indonesia, but not for

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<sup>25</sup> Adjie, Habib. 2004, Penggerogotan Wewenang Notaris Sebagai Pejabat Umum, Jakarta: Renvoi, h. 66

<sup>26</sup> Ibid, h.70.



electronic documents which may be authentic because the authentication of deeds related to the legalization process cannot convert electronic documents as underhand deeds into authentic deeds. If the electronic document or deed is used as written evidence as required by Article 164 HIR, the document must fulfill the terms of the agreement based on BW.<sup>27</sup>

<sup>4</sup> Based on the description above, it can be concluded that the notary deed used in a sale and purchase transaction through electronic media, especially buying and selling on a large scale, in order to provide more protection to the parties, it turns out that the power of proof is equivalent to a deed under hand, however if the Notary deed also involves a third party (Certification Authority), the Notary deed can have the power of proof just like an authentic deed. Regarding the process of proof, proof in procedural law has a juridical meaning, meaning it only applies to parties in litigation or who has obtained rights from them and the purpose of this evidence is to provide certainty to the Judge about the existence of certain events depending on the parties at trial to be able to strengthen the evidence presented.<sup>28</sup>

## CLOSING

### Conclusion

In connection with the involvement of a notary in electronic transactions, the Notary can not work independently as usual, but the Notary must involve a third party called the Certification Authority, to secure and legitimize documents into electronic transactions, <sup>2</sup> so that the Notary deed to be used remains an authentic deed and has perfect evidentiary power, but if the action does not involve the party, then <sup>10</sup> the Notary deed is classified as an underhand deed, and has the power of proof as

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<sup>27</sup> Adjie, Habib. 2008, Hukum Notaris Indonesia, Tafsir Tematik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris, Bandung: Rafika Aditama, h. 78

<sup>28</sup> Tan Thong Kie, 2007, Studi Notariat & Serba Serbi Praktek Notaris, PT Ichtiar Baru van hoeve, Jakarta , h.503



under hand deed, even though it is made and signed either directly or digitally by a Notary Public.

**Recommendation**

Notaries cannot act independently because they must be accompanied by a third party (CA). Therefore, at least a new arrangement has been formed which confirms and makes the position and independence of the Notary well manifested, without the need for third party intermediaries.

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