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Review Of "Facing" At The Beginning Of Notary Action For The General Meeting Of Shareholders (Gms) Electronically

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ABSTRAK

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Article 77 of the Limited Liability Company Law (UUPT) states that the General Meeting of Shareholders (GMS) can be carried out under the hands or circularly or conducted in front of a Notary conducted electronically. In this regard, it will try to provide a new interpretation regarding facing the Notary Public not directly but through other media or other media (devices) that help electronically. Traditionally, facing the Notary Public is done and interpreted physically (face to face), namely "The Viewer sees the Notary and the Witness, then the Notary and the Witness see the Facilitator without other media". The meaning of facing like that has been done hundreds of years until now, with the existence of Article 77 of the Company Law, it is connected with Article 90 of the Company Law, namely if the GMS can be held before a Notary Public or before a Notary electronically. The substance of the article has changed the meaning of facing a notary public in the traditional (physical) sense. Henceforth, in the era of information technology, the meaning of facing must be adjusted to the current situation, which can be done electronically.

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1. Introduction

In Indonesian Notary Law the term "Facing" is known before a Notary, which means that those who make the deed physically must be in the presence of the Notary without being facilitated by other media or it could also be interpreted as "I (notary), the witnesses saw you (the tappers), and the witnesses saw me, and the witnesses came face to face without any media in one place (assembly), including in the reading and signing."

The act of facing is of course based on Article 1868 BW is a source for the authenticity of a Notary deed as well as the legality of the existence of a Notary deed, with the following conditions:

1. the deed must be drawn by (door) or in the presence (ten overstaan) of an official General.
2. the deed must be made in the form prescribed by law.
3. Public Officials by - or before whom the deed is drawn up, must have the authority to make the deed.

In that article there is the word "facing" then also several articles in the Law on Notary Position (UUJN - Amend) which also states the word "facing or facing" in Article 1 points 7 and 8:

7. Notary Deed, hereinafter referred to as Deed, is an authentic deed made by or before a Notary according to the form and procedure stipulated in this Law.
8. Minuta Deed is the original Deed containing the signatures of the parties, witnesses and Notaries, which kept as part of the Notary Protocol.

Whereas Article 1868 of the Civil Code, if since it was enacted in Indonesia (from the Dutch East Indies era) until now, is 172 years old. So during that time the meaning of appearing must be interpreted physically in the drafting of a notary deed. This is only natural because at that time physical evidence was still needed as mentioned in various types of evidence in Civil Law (Procedure) (Article 164 HIR and Article 1866 BW) valid evidence or recognized by law, consisting of :

- a. written evidence;
- b. evidence with witnesses;



- c. prejudices;
- d. recognition;
- e. oath

Evidence by writing is done in authentic writing or by handwriting . Authentic writings in the form of authentic deeds, which are made in the form prescribed by law, drawn up before officials (general employees) who are given the authority and at the place where the deed was drawn up . Not only can an authentic deed be made by a notary, but also by the official land deed maker (PPAT) Auction Officials and Civil Registry Officers.

According to George Whitecross Patton Evidence can be in the form of oral (words spoken by a witness in court) and documentary (the production of a admissible documents) or material (the production of a physical res other than a document). Evidence, which is valid or accepted in a (civil) case, basically consists of utterances in the form of testimony of witnesses, confessions, oaths and written writings which have evidentiary value. In the current development of evidence (for criminal as well as civil cases) electronic evidence has also been received or that is recorded or stored electronically as valid evidence in court proceedings. .

The meaning of "facing" can change if it is related to the provisions of Article 77 and Article 90 of the Limited Liability Company Law (UUPT). In simple terms, this concept can be used in the implementation of the General Meeting of Shareholders (GMS), namely in Article 77 paragraph (1) and Article 90 of the Company Law, although in this case technically there is no legal basis, but this is limited only to the media with one viewpoint. However, in the presence of the GMS of a limited liability company, it has not fully illustrated the form of the Mayantara Notary Concept.

The provisions of Articles 77 and 90 of the Company Law, specifically to conduct a PT GMS, have opened a new interpretation of the meaning of attending, also to take into account the legal aspects that may occur with the PT GMS by teleconference or video conference (vicon), in particular the PT GMS which is attended by a Notary for report on the Minutes of Meeting (BAR) from the GMS of the relevant PT.

Formulation of the problem :

1. Is there a need for a new interpretation facing to conform to the provisions of Articles 77 and 90 of the Company Law?
2. Is the legal position of the electronic GMS deed from the law of evidence?

2. Research Metodology

This research uses a qualitative approach with the method of empirical study, empirical study is a method with legal studies that aims to see the law from the perspective of society. Data collection is carried out based on facts in society. This study looks at how the implementation of the Overview of Facing the initial action of the notary general meeting of shareholders (RUPS) electronically.

3. Results

3.1 New Interpretations facing to adjust The Provisions of Articles 77 and 90 of The Company Law

In making a Notary deed, 3 (three) aspects must be considered in order to fulfill the requirements for the notarial deed, namely:

1. Procedure, is a series of deed-making procedures that must be carried out by a notary in accordance with UUJN - P.
2. Authority, is a limitation that must be done by a notary in article 15 UUJN - P.
3. Substance, relating to content which is the will of the parties and to ensure the actions / legal actions of the parties before a Notary.

7 These three aspects must be related to the Notary's Obligations as mentioned in:

Article 16 paragraph (1) letter m UUJN - P: read out the Deed in front of the audience in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for the making of the will under hand, and signed on the spot by the witnesses, witnesses and notaries. In the explanation of the letter it is emphasized that the Notary must be present in a manner physically and signed the deed before the audience and witnesses. Article 39 paragraph (2) and (3) UUJN - P:



2) Tappers must be recognized by the Notary or introduced to him by 2 (two) identifying witnesses who are at least 18 (eighteen) years of age or married and capable of taking legal actions or introduced by 2 (two) other tappers

3) The introduction as referred to in paragraph (2) shall be clearly stated in the deed.

Article 40 paragraph (3) and (4) UUJN - P:

3). Witnesses as referred to in paragraph (1) must be recognized by the Notary or introduced to the Notary or explained about their identity and authority to the Notary by the tappers.

4). The introduction or statement of the witness's identity and authority is clearly stated in the deed.

The substance of these articles is good for tappers, witnesses and notaries must be recognized by the Notary based on their identities shown to the Notary Public, and be at the same place at the same time and be physically present, both tappers, witnesses and Notaries. For Notaries who violate the provisions of Articles 3 and 40 UUJN - P may be subject to sanctions as stated in Article 41 UUJN - P, namely resulting in the Deed only having the power of proof as an underhand deed.

So that the meaning of facing in the making of the Notary deed so far is based on the articles mentioned above, namely "I (the notary), the witnesses saw you (the tappers), and the witnesses saw me, and the witnesses came face to face without any media in one place (assembly), including in the reading and signing".

The provisions of these articles will also be in substance contradictory if they are linked to Articles 77 and 90 of the Company Law, namely:

Article 77:

(1) Apart from organizing a GMS as referred to in Article 76, a GMS can also be conducted through Teleconference Media, Conference Video, Or Other Electronic Media Means that allow all GMS participants to see and hear one another directly and participate in meetings.

(2) Quorum requirements and decision-making requirements are requirements as regulated in this law and / or as stipulated in the Company's articles of association.

(3) (2) The requirements as referred to in paragraph (2) shall be calculated based on the participation of the GMS participants as referred to in paragraph (1).

(4) (2) Minutes of meeting shall be made for every GMS as referred to in paragraph (1), which shall be approved and signed by all GMS participants.

Elucidation to paragraph (4): What is meant by "approved and signed" is being approved and signed physically or electronically.

Article 90:

(1) Every time a GMS is held, minutes of the GMS must be drawn up and signed by the chairman of the meeting and at least 2 (one) shareholder appointed from and by the GMS participants.

(2) (2) The signature as referred to in paragraph (1) is not required if the minutes of the GMS are made with a notarial deed.

In general, in making a Notary deed must comply with and follow the rules that have been determined in the UUJN / UUJN-P as a requirement for notary deed autensity, but when making a special Nortaris deed in the making of the Minutes of Meeting (BAR), the PT GMS from the procedure side was not in accordance with UUJN / UUJN-P, which was related to appearing, because in accordance with Article 77 paragraph (1) and Article 90 UUPT does not have to be the parties (meeting participants in the GMS) to appear physically in front of a Notary, but it can be done by TELECONFERENCE MEDIA, CONFERENCE VIDEO, OR OTHER ELECTRONIC MEDIA MEANS.

Whereas in order to avoid conflicts in practice in the procedure for making BAR deeds in the GMS of PT from a procedural point of view, especially those related to appearing before a Notary Public, it is necessary to provide a clear interpretation so that it does not become a legal problem in the future by using the principle of Legal Preference.

The principle of preference is the principle of law which designates which law takes precedence (to be enforced), if in an event (law) is related or violated by several regulations. one of the Principles of Legal Preference, namely *lex specialis derogat legi generali* namely "provisions of a specific nature, overriding general provisions"

By using the *lex specialis derogat legi generali* principle, the provisions Article 16 paragraph (1) letter m UUJN - P and Article 39 paragraph (2) and (3) UUJN - P and Article 40 paragraph (3) and (4) UUJN - P can be placed as a generally accepted provision (*lex generali*) which means for all Notary deeds drafting. And



the provisions of Articles 77 and 90 of the Company Law can be placed as provisions that apply specifically (lex specialis) in the preparation of a special Notary deed for making BAR in the GMS attended by a Notary. By using this principle, it has changed the meaning of appearing to a Notary (before a Notary) specifically for or in making BAR for the AGM of PT.

So specifically for the manufacture of BAR for the AGM of PT Attended by a Notary, the meaning or meaning of facing changes to be as follows: "You (the viewers) see me and the witnesses through a monitor (TV or computer or cellphone screen or other forms through the screen simultaneously in / at different places, on the same time, and I, the witnesses saw the parties through the monitor (tv or computer or cellphone screen or other form through the screen (screen) simultaneously in / in different places, at the same time".

3.2 Legal Notice of the Minutes of The AGMS Meeting (BAR) Electronically from The Law of evidence.

The output of the GMS held electronically (or by tele conference or video conference) physically and in writing remains in the form of "deed" or there is no physical evidence (deed) or not in other forms (non-physical) . In this case, what distinguishes it is the BAR procedure of the GMS which is carried out by tele conference or video conference, namely that the Notary sees and listens and is present at the GMS.

The presence of a Notary at such a GMS can be done in several ways:

1. Notaries and witnesses attend the meeting room that has been determined with several meeting participants, and meeting participants attend the online meeting (at another place) and show their faces or activities following the GMS as proof of their attendance. So in this case physically, there are participants who face the notary with witnesses (in the same room) and other participants in another room / place who attend / attend by tele conference or video conference.
2. The notary and the witnesses are present / in the same room (physically), while the meeting participants attend or attend the meeting in a different room or place (in their respective places), and the meeting procedures are connected by tele conference or video conference through a specific platform. So in this case no one faces the Notary physically as a meeting participant, the participants are in different places which are only connected by certain tele-conference or video conference media.

In the implementation of making BAR for the AGM of PT by tele conference or video conference, there should be a host / co-host or moderator (who is appointed or appointed by the Board of Directors of the Company) who will assist and arrange the platform to be used. The appointment of the host / co-host or moderator is for the smoothness and convenience of meeting participants, and the existence of the host / co-host or moderator is stated on / in the deed concerned.

The existence of the GMS BAR deed originating from the GMS by tele conference or video conference will remain in accordance with the provisions Law Number 11 of 2008 concerning Electronic Information and Transactions (UU ITE) Article 5 paragraph (4), namely:

Article 5:

(4) Provisions regarding Electronic Information and / or Electronic Documents as intended in paragraph (1) do not apply to:

- a. a letter which according to the law must be in writing; and
- b. a letter and its documents which according to the law must be made in the form of a notary deed or a deed prepared by the deed-making official

In the elucidation of the article, it is emphasized that the requirement for making deeds in the form of documents is in accordance with the form of deeds that are authentic and in accordance with the provisions imposed in this law which are written and contained in the form of a notary deed.

In this connection, it is necessary to pay attention when the deed is drawn up, in the Initial Deed, in particular the Comparison section, it must be explained that in the GMS there are meeting participants who are physically present (partly) in front of a notary or all meeting participants are present through a certain platform, then it must also be stated there is a platform used (for example Zoom) by mentioning the Host / Co-Host or Moderator as well as the Meeting ID and Passcode.

The BAR Deed of the AGMS of PT still has perfect evidentiary power as long as 3 (three) aspects are met, namely. :

- a. procedure,
- b. authority, and
- c. substance.



10
 An authentic deed made by a notary is a frame of legal action that is in the realm of civil law carried out by the community, which in the future the deed can be used as perfect evidence as long as it cannot be proven otherwise based on a court decision that has permanent legal force, as previously stated. stipulated in Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary Public. Only in this case it is necessary to also pay attention to the Notary, which is obliged to request and to be kept as part of the Minuta in the form the records of the GMS electronically, may also be used as additional evidence if one day there is a legal problem (in court or outside the court) from the GMS, then the records can be used as evidence for electronic documents.

4. Conclusions

1. The meaning or limitation of facing which generally applies in making a Notary deed, namely physically having to face the Notary (who is attended by witnesses) simultaneously without being facilitated by any other means or media. The meaning or limitation of facing is different or interpreted differently in the framework of making a Notary Deed in the form of Minutes of Meeting (BAR) of the GMS of PT, that attending to a Notary does not have to be physically, but can be facilitated by other means or media (tele conference or video conference) at / in different places.
2. The GMS of PT based on Articles 77 and 90 of the Company Law is a special procedure (*lex specialis*), which results are then formally translated into Minutes of Meeting (BAR) of the PT GMS which are still made physically, namely there are Minutes and Copies. The deed of BAR for the GMS of PT which is based on the GMS electronically still has perfect evidentiary power as long as it cannot be proven otherwise based on a court decision which has permanent legal force, and this can be supported by recording the RPUS as electronic evidence.

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