

The Importance of Authentic Deeds in Contracts Keeping Company Secrets

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ABSTRACT

This study aims to review;

1. What aspects need attention in making agreements to keep company secrets?;
2. What is the significance of an authentic Deed in making an agreement keeping company secrets?.

The research method used is evaluative descriptive research. Evaluative research is basically centered on final recommendations that affirm that an object of evaluation can be maintained, improved, improved or even dismissed in line with the data obtained.

The results showed that;

1. The most that companies do to keep company secrets is done by making written agreements between the company and employees within the company and outside parties with an interest in the company.
2. The tendency to choose the Company's form of protection is at least based on two reasons, including the following: First, because often the substance that is desired to get protection is something that cannot be patented, such as the company's customer list, financial data, business notes and others. Secondly, it is also possible that what wants to be protected is actually possible to be granted a patent, but inventors prefer this form of trade secret protection for various reasons such as unlimited protection periods, more guaranteed confidentiality values, high fees at patent offices and complicated registration formalities

Keywords: Significance, Authentic Deed of Contract, Keeping, Company, Secrets.

INTRODUCTION

Background

In Indonesia in 2000, the government promulgated Law N0. 30 of 2000 which regulates Trade Secrets. The title of the Act is about trade secrets and not about company secrets. However, if you look deeper, the object of the regulation is about everything related to company secrets and not state secrets or personal secrets of a person. The object of regulation is information in business or technological activities, so it is closely related to company secrets.

In the company's daily activities, there are many kinds of information that fall into the category of company secrets, from simple information related to pricing to formulas, which certainly should not fall into the hands of business competitors. However, it is not uncommon because of ignorance or negligence of the company, there is a situation where information that should be kept secret by the company falls or leaks into the hands of other unauthorized parties, which often results in losses to the company. Of the

many ways the company leaks confidential information to other unauthorized parties, one of them is a former employee of the company. Former company employees are often figures who know a lot of confidential company information. When former company employees move to other places, it is very potential for confidential information to leak to the new company, especially the new company is engaged in the same field as the old company where the former employee worked. Thus it is not impossible that the actions of former employees of the company who move to the place of the new company, which is a competitor of the company, cause losses to the old company and give benefits to the new company where the former employees work. Under such conditions, for employees who know a lot of information classified as company confidential, it is necessary to make security by making a contract to maintain company secrets between the company and company employees, which is internal. However, in general, contracts to maintain company secrets can also be made between companies and parties outside the company, as is the case with agents, distributors, notaries, lawyers, appraisal companies, accountants, of course, as long as these parties know enough information classified as company confidential.

In every company activity, it can be ascertained that there is a lot of information that is classified as confidential, meaning that the information is very valuable to be used as a means of competing in its activities. The Trade Secrets Act has provided a juridical basis for how information classified as corporate secrets should be treated. The most important aspect of all matters relating to confidential company information is how to protect it, since there is no need for registration or registration to get legal protection. Theoretically there are two ways to protect company secrets, namely with physical measures and *written measures*. Thus, both physical steps and written steps, all are intended as evidentiary aids in the future if there is a dispute that leads to the leak of classified confidential information. In the study of contract theory, maintaining company secrets made between the company and employees within the company is known as the *Confidentiality Agreement*, while the contact maintaining company secrets made between the company and parties outside the company is known as the Non disclosure Agreement.

In practice, contracts to keep company secrets are often made in the form of deeds under hand, meaning they are made in written form between the company and employees within the company or made between the company and parties outside the company. In fact, a contract to keep company secrets is very likely to be made before an official appointed by law, in this case a Notary General Officer in the form of an authentic deed.

In the field of Civil Law, 2 (two) types of deeds are known, namely authentic deeds and deeds under hand.¹ This is stated in Article 1867 of the Civil Code (KUHPer) which states:

"Proof by writing is done with authentic writings as well as with writings under the hand."

Based on this article, authentic deeds and deeds under hand have the same function, namely as evidence in the form of writings. However, in its application, authentic deeds and deeds under this hand have differences. This difference is related to the way of manufacture, form, and strength of proof which will be discussed in this paper.

¹ Position and Function of Deed Under Hand Legalized Notary, Ghita Aprillia Tulenan, *Lex Administratum*, Volume II – Number 2, April – June 2014, page 122.

In Article 1868 of the Indonesian Civil Code, it is stated that:

"An authentic deed is a deed made in the form prescribed by law by or before the public officers authorized therefor, at the place where it was made."

Based on this article, an authentic deed is a deed whose form is determined by law or formed by or before a public officer authorized for it. The official entitled to form an authentic deed is not only a notary, but all certain officials who are given the authority and duty to record the deed.² Examples are Religious Affairs Office Officials (KUA) or Civil Registration Service Officials who are in charge of forming marriage certificates and Land Deed Making Officials (PPAT) who are in charge of forming land sale and purchase deeds. This is because authentic deeds are formed by certain officials who have authority so that authentic deeds have strong evidentiary power in court. If the deed is formed by an unauthorized official, then the deed cannot be enforced as an authentic deed. This is based on Article 1869 of the Indonesian Civil Code which reads:

"A deed which cannot be treated as an authentic deed, either because of the incompetence or incompetence of the general officer concerned or because of a defect in its form, has the force of writing under the hands when signed by the parties."

Therefore, if a deed is formed by an unauthorized official, then the deed still has the force of writing under hand if signed by the parties. Meanwhile, deeds under hand based on Article 1874 of the Indonesian Civil Code are deeds signed under the hands, letters, registers, household affairs letters and other writings made without the intermediary of a general official. This underhand deed is usually used in a sale and purchase agreement, lease, etc. signed by the parties without the intermediary of a general official.³ The evidentiary power of a deed under hand is not as perfect as an authentic deed.⁴ The difference in this regard, authentic deeds have perfect evidentiary power outwardly both formally and materially.⁵ Therefore, the judge no longer needs to test its correctness, unless there is opposing evidence proving otherwise from the deed. However, it is different from the deed under hand which is free evidence so that the judge is free to determine whether the evidence is admissible or not. However, a deed under hand can have formal and material evidentiary power if both parties to the deed have acknowledged its truth.

Thus it can be said that both authentic deeds and deeds under hand are evidence in the form of writing. However, there are differences in the involvement of general officials in its creation. In addition, there are differences regarding the strength of proof in court of authentic deeds with deeds under hand.

Problem Statement

1. What aspects need attention in making agreements to keep company secrets?;
2. What is the significance of an authentic Deed in making an agreement keeping company secrets?

² *Ibid.*, page 123.

³ The Power of Deed Under Hand as Evidence in Court, Richard Cisanto Palit, *Lex Privatum*, Volume 3 – Number 2, April – June 2015, page 137.

⁴ *Ibid.*, page 141.

⁵ The Power of Proof of Deeds Made by Notaries as General Officials According to the Civil Procedure Law in Indonesia, Dedy Pramono, *Lex Jurnalica*, Volume 12 – Number 3, December 2015, page 251.

THEORETICAL FRAMEWORK

The main theory or *Grand Theory* that is the basis of the analysis knife in this study is the Theory of Banking Law. The definition of a bank according to Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning banking is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and/or other forms in order to improve the standard of living of many people.⁶

And explained in Law Number 21 of 2008 which states that banks with conventional principles are banks that carry out their business activities conventionally whose activities provide services in payment traffic. In carrying out its activities, conventional commercial banks apply two methods, namely setting interest on selling prices and purchase prices on their products or known as spread based, and applying fees in other services known as fee based.⁷

Furthermore, *Middle Theory* in this study uses the Hierarchy Theory of Legislation. Hans Kelsen in the "General Theori of Law and State" translation of the general theory of law and⁸ state elaborated by Jimly Assihiddiqie⁹ under the title Hans Kelsen's theory of law among other things that legal analysis, which reveals the dynamic character of the system of norms and the functions of basic norms, also reveals a further peculiarity of law: law governs its own formation because one legal norm determines the way to create another legal norm, and also to some degree, determine the content of the other norms. Because, one legal norm is valid because it is made in a way determined by another legal norm, and this other legal norm is the basis for the validity of the first legal norm.

Legal protection is all efforts that can ensure legal certainty, so as to provide legal protection to the parties concerned or who take legal action.¹⁰ Legal protection is a protection given to legal subjects in the form of legal instruments both preventive and repressive, both written and unwritten. In other words, legal protection as an illustration of the function of law, namely the concept where law can provide justice, order, certainty, expediency and peace.¹¹

Legal protection aims to integrate and coordinate various interests in society because in a traffic of interests, protection of certain interests can only be done by limiting various interests on the other hand. Legal interests are concerned with human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected. Legal protection is born from a legal provision and all legal regulations provided by the community which is basically an agreement of the

⁶ Cashmere *Business Feasibility Study (Revised Edition)* (Jakarta: Prenada Media Group, 2015), p. 32.

⁷ D. Hardianti and M. Saifi, "Comparative Analysis of Financial Performance of Conventional Commercial Banks and Sharia Commercial Banks Based on Bank Financial Ratios: A Study on Conventional Commercial Banks and Sharia Commercial Banks Registered and Supervised by the Financial Services Authority (OJK) for the 2013-2016 Period.," *Journal of Business Administration* 60, no. 2 (2018): 10–18.

⁸ Hans Kelsen, *General Theory of Law and State The original title (Theory of Law and State) was translated by Muttakin Apostle* (Bandung: Nusamedia, 2010), p. 179.

⁹ Jimly Assihiddiqie, *Hans Kelsen's Theory of Law* (Jakarta: Press Constitution, 2009).

¹⁰ Koentjaraningrat Koentjaraningrat, "Legal Anthropology," *Indonesian Anthropology*, 2014, <https://doi.org/10.7454/ai.v0i47.3271>.

¹¹ Satjipto Rahardjo, *Legal Studies* (Bandung: Citra Aditya Bakti, 2000), p. 121.

community to regulate behavioral relations between members of the community and between individuals and the government that are considered to represent the interests of the community.¹²

Legal protection for every Indonesian citizen without exception, can be found in the Constitution of the Republic of Indonesia Year 1945 (UUDNRI 1945), for that every product produced by the legislature must always be able to provide legal protection guarantees for everyone, even must be able to capture the aspirations of law and justice that develop in society. This can be seen from the provisions governing the existence of equal legal position for every citizen.¹³

Certainty is an inseparable feature of the law, especially for written legal norms. Laws without certainty value will lose meaning because they can no longer be used as a code of conduct for everyone. Certainty itself is referred to as one of the goals of the law. Historically, the discussion of legal certainty is a conversation that has arisen since the idea of separation of powers from Montesquieu.

The order of society is closely related to certainty in law, because order is at the core of certainty itself. Regularity causes people to live with certainty so that they can carry out activities needed in community life.

RESEARCH METHODOLOGY

1. Types of Research

This study was prepared using an evaluative descriptive research type. Descriptive research, is a systematic, factual and accurate picture or painting of phenomena or relationships between the phenomena investigated. The approach used in the study is an evaluative approach, where the author intends to collect data on electronic certificates as evidence of land tenure. Evaluative research in its course is centered on final recommendations that affirm that an object of evaluation can be maintained, improved, improved or even dismissed in line with the data obtained. This research was carried out to obtain data and produce conclusions in the field¹⁴

2. Research Data Sources

Data sources in this study are divided into two parts, namely primary data sources and secondary data sources. A primary data source is a data source that directly provides data to the data collector; While secondary data sources are data sources obtained by reading, studying and understanding through other media sourced from literature, books, and documents"¹⁵.

The primary data sources in this study were interviews and observations. The results of interviews with informants that have been specified in the research plan have been carried out at the time of the study.

Secondary data sources are: from scientific journals and books to support the research process.

¹² *Ibid*, p. 35.

¹³ Philip M. Hadjon, *Protection of the People for the People in Indonesia (a study of its principles, its handling by the courts within the general judiciary and the establishment of the State Administrative Court)* (Surabaya: PT. Bina Ilmu, 1987), p. 38.

¹⁴ Peter Mahmud Marzuki, *Legal Research*, Cet.2, (Jakarta : Kencana, 2008). p. 29 .

¹⁵ Sugiyono. *Combination Research Methods (Mix Methods)*. Bandung: Alfabeta. 2015, p 137.

3. Data Collection Techniques

This data collection method with literature research or commonly called literature study, this method is carried out to obtain secondary data both in the form of primary legal material and secondary legal material. After the inventory, a review is carried out to make the essence of each regulation concerned. Data is collected by studying literature sources in the form of literature books, laws and regulations, and collecting existing data in the form of data that is directly related to the research conducted.¹⁶

4. Data Analysis

The research technique in this study is descriptive analytical, where the analysis is carried out critically. The data collected in this study will be analyzed descriptively with a *qualitative approach*, namely by providing a thorough and in-depth explanation and explanation (*holistic / verstelen*).¹⁷

RESEARCH RESULTS

What aspects need attention in making agreements to keep company secrets

Article 1 Paragraph (1) of Law Number 8 of 1997 concerning Company Documents explains, what is meant by a company is any form of business that carries out activities regularly and continuously with the aim of obtaining profits and / or profits, whether organized by individuals or business entities in the form of legal entities or non-legal entities, which are established and domiciled in the territory of the Republic of Indonesia.¹⁸

The Company in an effort to manage and develop its business, always strives to produce products in the form of goods and services that are attractive, unique, different and have added value for its consumers. For this reason, company management companies always try to maintain trade secrets from their business, so that it is not easy to copy or steal information because company secrets or trade secrets have a very high selling value, for the Company.

Company secrets are translations of the terms "undisclosed information", "trade secret", or "know how". Company secrets should not be known to the public, because in addition to having technological value, it also has economic value that is useful in business activities and is kept confidential by the owner.¹⁹

Broadly speaking, trade secrets can be classified into 2 (two) parts, the first includes information in the field of trade and investment that is non-technical in nature such as information on company management matters which includes bookkeeping data, accounting data, commercial methods and techniques, marketing concepts, customer name lists, advertising slogans and methods, information about quotas of shares traded, secrets in buying and selling companies. The second includes information related to technological capabilities and skills such as industrial know how, chemical formulas, production

¹⁶ S. Nasution and M. Thomas, *Guidebook for Making Thesis, Thesis, Dissertation and Papers*, Jemmars, Bandung, 1988, p. 58.

¹⁷ Sugiyono, "Quantitative, Qualitative and R&D Research Methods," *26th* (Bandung: Cv. Alfabeta, 2018), p. 34.

¹⁸ R.V. Antariksa, *Trade Secret Protection in Companies*, Faculty of Law UII, Yogyakarta, 2012, p. 14

¹⁹ Susanti Adi Nugroho, *Business Competition Law in Indonesia*, In *Theory & Practice and Application of Law*, Kencana, Jakarta, 2012, p. 303

techniques and processes and invoicing, processes in biotechnology. This second aspect is very closely related to the issue of patents, because often the information in question is the object of the patent.²⁰

To ensure that trade secrets in a company remain confidential, companies can take steps to protect their company's trade secrets. These steps, among others, can be described as follows:²¹

1) Physical measures, among others, can be:

- a) put the words "other than employees are prohibited from entering", "Staff only", "No trespassing"
- b) put a warning sign "No taking pictures", "No shooting"
- c) If there are many secrets in the computer data base, the computer is installed password
- d) Confidential documents written and stored in folders or others are marked clearly with the words "confidential", "It is forbidden to copy without written permission from the owner of the company."
- e) If it is confidential information that is oral in nature, the sentence "this is confidential" should be said clearly,
- f) Do not copy important documents in any photocopying place
- g) should have your own photocopier to copy important Company documents
- h) burn or destroy important documents that are no longer used.
- i) Permanently delete important files from your computer when you no longer use them
- j) Installing alarms, security systems, security personnel
- k) Restrict physical access to areas where trade secrets are stored or used.
- l) Consistent enforcement of company-formulated specific rules relating to trade secret information.

2) Steps for making written agreements

Ways to make a written agreement, can be done by, among others, the following²²:

a) Agreement not to compete with the old company

Is an agreement that contains a promise from employees not to compete with former employers or carry out businesses that compete with former employers for a certain period of time after termination of employment (layoff), usually the agreement not to compete is part of a more complete agreement signed by the employee-wan. This agreement minimizes the risk of trade secrets being disclosed or trade secrets being used by former employees. Agreements that restrict the rights of former employees are often difficult to prove and enforce in district courts (hereinafter referred to as PN). Some civil servants tend to dislike this contract which limits the former employee's right to his livelihood. Employees with a high level and have a large level of responsibility are usually the targets of this contract. Those with few ordinary responsibilities are exempt from this contractual restriction.²³

b) Agreement not to compete by business people

As a condition of selling a business, the owner, officer or director is usually required to sign an agreement not to compete with the buyer of the company for some time. This promise indicates that in the

²⁰ A.M. Ramli, H.A.K.I : Basic Theory of Trade Secret Protection, Mandar Maju, Bandung, 2000, p. 111

²¹ Novelinda S. G. Sembel, Atie Olii, Toar N. Palilingan, 2018. Violation of Trade Secret Disclosure According to Law No. 30 of 2000 on Trade Secrets. Lex Privatum Vol. VI/No. 1/JanMar/2018. Retrieved October 20, 2018

²² A. Setyawicaksana, Trade Secrets and Measures to Protect Them. Legal Forum No. 6/V/2000, Janabrada University Yogyakarta, 2000, pp. 97-98.

²³ Setiono, Rule of Law, Master of Law Postgraduate Program at Sebelas Maret University, Surakarta, 2004. p 44

transaction there is a trade secret as part of the purchase of a company. If the old owner, both officers, directors, are allowed to use this information in business agreements, then of course the buyer of the company will not be able to income. For this reason, courts usually have a willingness to enforce this agreement.

In addition, the most companies do to maintain company secrets is done by making written agreements between the company and employees within the company and outside parties interested in the company, namely²⁴

1. Bind potential employees to leak important company information by signing a statement to maintain company secrets or often known as a confidentiality agreement (CA).²⁵

Confidentially agreement is a contract between an employee and the owner of a company in which the employee agrees to keep secret all trade secrets, both men and women who study the trade secrets in the course of their work. If the owner of the company or employer then prevents an employee from using the information considered a trade secret, the Confidentially Agreement can prove that the worker acknowledges his obligations within the company have gone to great lengths to safeguard it. Business competitors who attempt to study and find out trade secrets through former employees who violate their obligations may be prevented from using the information for commercial purposes, even if they do not know that the former employee has reneged on its obligation to keep confidential.

Confidentially agreements can also help ensure that a business creates special information that qualifies as a trade secret, information that is needed for legal protection. Job confidentiality is a duty of trust between employer and employee so usually the court does not need to consider the existence of a Confidentially Agreement in writing. An example of a Confidentially Agreement is an agreement between a company and programmers, internal accountants, and pharmacologists.

2. Making an agreement to keep company secrets with parties outside the company who have the potential to leak company trade secrets, this contract is known as a non-disclosure agreement (NA), for example between the company and agents, distributors, notaries, legal consultants, and appraisal companies.²⁶

The Importance of Authentic Deeds in Making Agreements Keeping Company Secrets

The tendency to choose the Company's form of protection is at least based on two reasons, including the following²⁷: First, because often the substance desired to get protection is something that cannot be patented, such as the company's customer list, financial data, business notes and others. Secondly, it is also possible that what wants to be protected is actually possible to be granted a patent, but inventors prefer this form of trade secret protection for various reasons such as unlimited protection periods, more guaranteed confidentiality values, high costs at patent offices and complicated registration

²⁴ C.C. Priapantja, Indonesian Legal Culture Facing Globalization : Trade Secret Protection, Chandra Pratama, Jakarta, 2005, p. 168

²⁵ Hadi Setia Tunggal (Ed), Company Document Law, Harvarindo, Jakarta, 1997. p 55

²⁶ Purwosutjipto H.M.N, Basic Understanding of Commercial Law on Company Forms, Volume II, Djambatan, Jakarta, 1985, p. 103

²⁷ Best Arthur, Tort Law Course Outline, Aspen Law and Business, 1997. p 37

formalities. For more details, the following are presented the advantages and disadvantages of the company's secret protection system.²⁸

1) The importance of protecting company secrets with a trade secret system

- a) Compared to the period of patent protection in Indonesia for the last 20 years, protection through trade secrets is more advantageous because the period is indefinite. For inventions and formulas in the field of trade production, this period of time becomes so important because if protected by patents, after the expiration of that period of time, the information will become public domain and everyone can access it without fear of being declared an IPR violator, while the information itself is one of the strategic potentials that should be firmly held to be able to compete with competitors. Through a trade secret protection system, the information can be protected forever and its rights remain attached to the owner. Trade secrets are often not eligible if they have to be registered in the patent system, because they do not meet patent requirements. In addition, it is also necessary to meet conditions such as there must be an element of novelty, and can be applied in industry
- b) Through a trade secret protection system, all important company information will be kept confidential, because the information remains undisclosed, this is very important considering that the disclosure of information can be used by competitors to make the same product
- c) In the patent law system only the first inventor can register his patent, but in trade secrets this is not regulated meaning that at all times people can keep their trade secrets and preserve their rights from interference by others, without having to think about whether others also have similar information, provided that the information is not public information or public property
- d) In terms of cost, protection of inventions through trade secrets is relatively cheaper than patents, because there is no need to incur annual fees and costs associated with registration formalities as is the case with patents. This is one of the factors considered by inventors.
- e) Factually there are things that cannot be protected by patents, but can instead be protected by trade secrets, including customer lists, forms. Business information is often not eligible for patent protection, for several reasons such as not containing inventive steps, possible similarities with other inventors, and so on.

CONCLUSION

Based on the results of research and discussion, several things can be concluded as follows:

1. The most that companies do to maintain company secrets is done by making a written agreement between the company and employees within the company and outside parties who are interested in the company
2. The tendency to choose the Company's form of protection is at least based on two reasons, including the following: First, because often the substance desired to get protection is something that cannot be patented, such as the company's customer list, financial data, business notes and others. Secondly, it is also possible that what wants to be protected is actually possible to be granted a patent, but inventors prefer this form of trade secret protection for various reasons such as unlimited protection periods, more guaranteed confidentiality values, high costs at patent offices and complicated registration formalities.

²⁸ Abdurrachman, Various Legal and Development Issues in Indonesia, Alumni, Bandung, 1991. p 71

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