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Legal Certainty Analysis of Notarial Deeds Containing ESG (Environmental, Social, and Governance) Clauses in Business Agreements

***Yan Hartawan**
Universitas Pelita Harapan, Indonesia

Bryant Jeremia
Universitas Pelita Harapan, Indonesia

***Corresponding author:**
Yan Hartawan, Universitas Pelita Harapan, Indonesia.✉01656250080@student.uph.edu

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Abstract

Background: Indonesia's fragmented Environmental, Social, and Governance (ESG) regulatory framework raises questions regarding the enforceability and legal certainty of ESG clauses incorporated into notarial deeds.
Objective: This study analyzes the legal status of ESG clauses under Indonesian contract law and examines the role and limitations of notaries in ensuring their legal certainty.
Methods: This study employs normative legal research using statutory, conceptual, analytical, and functional-comparative approaches to the design of sustainability clauses. Primary legal materials include the Indonesian Civil Code, the Notary Office Law, the Company Law, environmental and investment legislation, and sustainable finance regulations; secondary materials comprise more than twenty national and international journal articles.
Results: The study finds that an ESG clause is not a new type of contract but rather an element of contractual performance that is valid when it satisfies the requirements of Article 1320 of the Indonesian Civil Code, does not violate mandatory law, morality, or public order, and is sufficiently determinate. Under Article 1338, a voluntary ESG commitment becomes an enforceable contractual obligation once agreed upon by the parties. The authenticity of a notarial deed strengthens evidentiary certainty but cannot cure substantive invalidity. Notaries perform a preventive role by reviewing the parties' authority, identifying applicable mandatory norms, providing legal counseling related to the deed, formulating measurable performance indicators and verification mechanisms, and specifying the consequences of breach.
Conclusion: This study proposes a Layered Legal Certainty Model for ESG Clauses comprising normative, drafting, and evidentiary certainty. A notary is not an ESG auditor but must conduct reasonable legal scrutiny and refer matters requiring technical verification to qualified independent experts.

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INTRODUCTION

The novelty of the Layered Legal Certainty Model lies in integrating three dimensions that previous Indonesian studies have generally addressed separately: substantive validity under contract law, operational certainty in drafting, and the evidentiary consequences of notarial form. International scholarship on sustainable-contract clauses provides drafting mechanisms, while Indonesian notarial scholarship focuses primarily on deed validity and professional duties. The present model connects these strands into a sequential test that can be applied before the execution of an ESG clause.

The shift in corporate orientation from shareholder primacy toward sustainable value creation has increasingly translated Environmental, Social, and Governance (ESG) considerations into contractual relationships. In financing, procurement, investment, joint-operation, merger and acquisition, and supply-chain transactions, parties have begun to incorporate obligations relating to emissions reduction, waste management, respect for workers' rights, corruption prevention, data transparency, and risk governance as elements of contractual performance. This development demonstrates that ESG is no longer confined to sustainability reports or internal corporate policies but is moving toward a process of "contractualization," in which ethical commitments and corporate policies are converted into promises whose performance can be assessed.

Indonesia does not yet regulate ESG through a single comprehensive statute. Environmental elements are found in legislation on environmental protection and management; social elements are dispersed across labor law, human rights, investment law, and corporate social and environmental responsibility; while governance elements are embedded in company law, capital-market regulation, anti-corruption law, and sustainable-finance rules. Manuella, et al. (2025) argue that ESG principles correspond with transparency, accountability, responsibility, independence, and fairness, although regulatory integration remains weak. Ariapramuda (2026) likewise demonstrates that Indonesia's ESG regulation remains partial, creating a risk that implementation becomes merely formalistic. Such fragmentation creates room for freedom of contract while simultaneously generating uncertainty: is an ESG clause merely an aspirational statement, a public-law obligation restated in a contract, or an enforceable private-law obligation?

The issue becomes more complex when an agreement is executed in the form of a notarial deed. An authentic deed carries full evidentiary force with respect to matters formally stated in and performed before a public official, provided that it is drawn up within the official's authority and in accordance with statutory procedures. Klau (2024) emphasize that a notarial deed has complete evidentiary force until its inaccuracy is proven. Evidentiary force, however, is not identical to substantive validity. A clause with an indeterminate object, an unlawful cause, or content contrary to mandatory rules remains vulnerable to nullity even when recorded in authentic form. Conversely, a formal defect in the execution of a deed may reduce its evidentiary status without necessarily extinguishing the parties' underlying substantive legal relationship. This distinction is essential to prevent authenticity from being misunderstood as a "seal of validity" for the entire ESG substance of the agreement.

Previous studies have examined separate aspects of this problem. Rahmi et al. (2019), as well as Dari (2023), analyze the construction of social and environmental responsibility clauses in corporate deeds. Dewi (2025) discuss the notary's preventive and educational role in the implementation of corporate social responsibility (CSR). Purboni et al. (2025) situate ESG within freedom of contract, good faith, and civil liability. Suherman et al. (2025) examine the implications of ESG for corporate responsibility, while Siddiq and Sumaragatha (2025) assess ESG integration into business licensing. These studies enrich the legal foundations of ESG but have not specifically constructed an analytical relationship among (i) the validity of ESG clauses; (ii) their binding force and the consequences of breach; (iii) the evidentiary force of authentic deeds; and (iv) the standard of conduct expected of notaries when formulating measurable clauses.

This research gap has practical consequences. A clause stating that "the parties commit to implementing the best ESG practices" does not identify the applicable standard, the obligated party, the deadline, evidentiary data, audit mechanism, cure period, or consequences of noncompliance. Such a clause may serve a reputational narrative but is difficult to enforce. Uysal (2024) shows that the central challenge of sustainability clauses is connecting policy objectives with sufficiently specific contractual obligations. In supply chains, Snyder and Maslow (2018), and Snyder et al. (2021), demonstrate the importance of allocating responsibility, conducting due diligence, notifying breaches, preparing remediation plans, providing cure rights, and applying proportionate remedies. These lessons are relevant to Indonesia: ESG legal certainty cannot be established merely by mentioning the term ESG but requires an architecture of clauses that can be performed and proven.

Within notarial practice, responsibility for designing such an architecture does not mean that a notary guarantees technical environmental achievements or an ESG score. A notary is a public official and legal professional, not an emissions auditor, occupational-safety expert, or rating agency. Nevertheless, the duties to act in a trustworthy, honest, careful, independent, and impartial manner, together with the authority to provide legal counseling in connection with deed preparation, place the notary in an important position to prevent legal defects. Manuaba et al. (2018) stress the importance of the precautionary principle in preventing the use of false documents or statements. Arsy et al. (2021), as well as Darmayenti (2024), show that procedural violations and notarial negligence may give rise to civil, administrative, ethical, and, in certain circumstances, criminal liability.

This study proposes a novel Layered Legal Certainty Model for ESG Clauses, which separates and connects three dimensions. First, normative certainty: a clause must satisfy the requirements for a valid contract and conform to the relevant body of public-law norms. Second, drafting certainty: obligations, metrics, verification, and remedies must be formulated with sufficient determinacy. Third, evidentiary certainty: the deed must comply with the formalities of the Notary Office Law and be supported by traceable technical documentation. The model also clarifies the limits of notarial responsibility: a notary is responsible for legal and formal quality, not for technical facts that lie beyond the notary's professional competence.

On that basis, this study addresses two research questions: (1) what is the legal status of ESG clauses in notarial deeds under Indonesian contract law; and (2) what role does a notary play in providing legal certainty for ESG clauses? The objective is to develop a doctrinal construction explaining the binding force of such clauses, the consequences of substantive and formal defects, and drafting guidance applicable to notarial practice and business transactions.

METHOD

Legal materials were selected purposively for their direct relevance to contract validity, notarial authority, corporate obligations, environmental governance, and sustainable finance. Primary materials were prioritized according to the legal hierarchy, followed by authoritative implementing regulations and official regulatory materials; secondary scholarship was used to interpret doctrine and compare sustainability-clause design. The analysis proceeded through four stages: identification of applicable norms, synchronization of mandatory and voluntary standards, doctrinal interpretation of contractual and notarial consequences, and synthesis into the Layered Legal Certainty Model. Functional comparison was limited to model sustainability clauses and international scholarship whose contractual functions could be translated into Indonesian doctrine; it was not used to import foreign law as binding authority.

This is normative legal research that treats law as a system of norms, principles, doctrines, and legal argumentation. It applied statutory, conceptual, analytical, and functional-comparative approaches. The statutory approach inventoried the relationship among the Indonesian Civil Code; Law No. 30 of 2004, as amended by Law No. 2 of 2014, on the Notarial Office (Notary Office Law); Law No. 40 of 2007 on Limited Liability Companies, as amended under the Job Creation legislative regime; the Investment Law; the Environmental Protection and Management Law; Government Regulation No. 47 of 2012; Financial Services Authority Regulation No. 51/POJK.03/2017; and Law No. 4 of 2023 on Financial Sector Development and Strengthening, as amended by Law No. 4 of 2026.

The conceptual approach was used to examine legal certainty, freedom of contract, good faith, a determinate object, lawful cause, authentic deeds, formal truth, notarial prudence, and contractual sustainability. The analytical approach separated defects in the underlying agreement from defects in the form of the deed. The comparative exercise was functional rather than a legal transplant: international scholarship on sustainability clauses and supply-chain model contracts was used to identify clause functions, including indicators, audits, remediation, and allocation of responsibility, that could be adapted to Indonesian contract-law principles.

Primary legal materials consisted of legislation and sector-specific regulatory provisions. Secondary legal materials comprised the articles supplied by the authors and more than fifteen additional journal articles on ESG, CSR, company law, sustainable contract design, authentic deeds, and notarial liability. The materials were analyzed qualitatively and prescriptively through norm inventory, systematic and teleological interpretation, identification of normative conflicts and gaps, classification of clause types, and construction of drafting recommendations. The validity of the argument was tested by assessing consistency among the normative premises, the characteristics of a party deed (*akta partij*), and the legal consequences derived from them.

RESULTS AND DISCUSSION

Results

The Normative Map of ESG in Indonesian Law

In Indonesia, ESG is more accurately understood as an umbrella concept that organizes obligations drawn from several fields of law, rather than as a single, self-contained private-law regime. The environmental component includes duties to prevent pollution, comply with environmental approvals, manage waste, and remediate environmental impacts. The social component includes worker protection, occupational health and safety, respect for human rights, community relations, and corporate social and environmental responsibility. The governance component includes transparency, accountability of corporate organs, anti-corruption measures, internal controls, management of conflicts of interest, and sustainability reporting. Suherman et al. (2025) state that ESG has moved from a voluntary instrument toward a normative framework influencing corporate responsibility, although the degree of its legal binding force differs according to the subject, sector, and applicable legal rules.

Differences in the degree of binding force must be the starting point for contract drafting. Article 74 of the Company Law and Government Regulation No. 47 of 2012 require corporate social and environmental responsibility for companies conducting business in and/or related to natural resources. Article 15(b) of the Investment Law requires every investor to implement corporate social responsibility. For financial services institutions, issuers, and public companies, Financial Services Authority Regulation No. 51/POJK.03/2017 governs sustainable-finance principles, action plans for financial services institutions, sustainability reports, social and environmental responsibility, and administrative sanctions. The Financial Sector Development and Strengthening Law subsequently provides a statutory foundation for sustainable finance. In environmental law, the Environmental Protection and Management Law contains mandatory duties and prohibitions. Contractual clauses therefore may not reduce these mandatory standards. POJK No. 51/POJK.03/2017 currently applies to financial services institutions, issuers, and public companies and addresses, among other matters, sustainable-finance principles, sustainable-finance action plans, sustainability reports, social and environmental responsibility, and sanctions.

Not every company and transaction, however, is subject to identical obligations. A non-natural-resource private company, for example, is not automatically subject to every sustainability-reporting duty applicable to issuers. Parties may nevertheless voluntarily select higher standards, such as emissions-reduction targets, anti-deforestation policies, supplier audits, or particular reporting standards. Once such voluntary standards are expressed as contractual performance obligations, the source of their binding force shifts: it is no longer solely public regulation, but also Article 1338 of the Indonesian Civil Code. This explains the dual character of an ESG clause as a meeting point between public norms and private autonomy.

Regulatory fragmentation creates two risks. First, under-inclusion: a clause refers to ESG only in general terms and omits mandatory norms that are actually relevant. Second, over-claiming: a party asserts ESG compliance without a metric-based foundation, potentially giving rise to misrepresentation or greenwashing. Imanuel (2024) demonstrates that the structure and consistency of disclosure affect the quality of ESG information, although extensive disclosure does not automatically produce a low ESG-risk rating. Siddiq and Sumaragatha (2025) also identify regulatory disharmony, weak supervisory institutions, and limited business awareness as implementation challenges. Contracts should therefore map the applicable norms by reference to the legal subject, activity, location, financing source, and corporate status.

Regulatory developments indicate a move toward higher-quality data. In February 2026, the Financial Services Authority consulted on amendments to Regulation No. 51/2017 to align disclosure requirements with newer sustainability and climate standards. Although a draft cannot be treated as applicable law, the process signals that metrics, targets, governance, and risk management will become increasingly important. Long-term contracts should anticipate such developments through change-in-law clauses, standard-adjustment mechanisms, and duties to cooperate in updating indicators without allowing one party unilaterally to disturb the commercial balance. The February 2026 consultation concerned draft amendments to POJK No. 51/2017 and proposed, among other matters, stronger sustainability-related disclosure, alignment with international sustainability and climate disclosure standards, and strengthened governance, risk management, strategy, metrics, and targets.

At the research cut-off date, the 2026 OJK amendment discussed here was still a consultation or draft instrument and is therefore treated as *lex ferenda*, not positive law. Any binding conclusion in this article rests only on regulations already in force at that date.

Table 1
Layers of ESG Norms and Their Contractual Implications

Dimension	Principal sources of norms	Implications for the clause	Risk if not properly drafted
Environmental	Environmental Protection and Management Law, environmental permits/approvals, waste management, sectoral standards	Compliance obligations, targets, baseline, emissions/waste data, remediation, and change in law	Indeterminate object, violation of mandatory rules, unverifiable data
Social	Company Law/Government Regulation No. 47/2012, Investment Law, labor law, occupational health and safety, human rights, and the National Strategy for Business and Human Rights	Workers' rights, safety, communities, grievance mechanisms, and supply-chain responsibility	Unilateral transfer of burdens, rights violations, termination without remediation
Governance	Company Law, capital-market regulation, anti-corruption law, Financial Services Authority Regulation No. 51/2017, and internal governance	Representations and warranties, reporting, audit, conflicts of interest, anti-bribery, and access to information	Misrepresentation, greenwashing, and conflict over the authority of corporate organs
Contractual	Indonesian Civil Code, Articles 1320, 1335, 1337, 1338, 1339, 1347, and 1365	Determines validity, binding force, good faith, reasonableness and fairness, breach, and liability	Void or unenforceable clauses, or disproportionate remedies
Notarial	Notary Office Law, Articles 15, 16, 38, 44, 48, and 51; Indonesian Civil Code, Articles 1868 and 1870	Authority, legal counselling, deed structure and reading, and authentic evidence	Degradation of evidentiary force, notarial liability, and formal disputes

Source: Prepared by the authors based on legislation and the research literature.

ESG Clauses as Elements of Contractual Performance, Not a New Type of Contract

Under Indonesian contract law, an ESG clause need not be classified as a new nominate contract. It is one or more provisions forming part of the performance under the principal agreement: to deliver something, to do something, or to refrain from doing something. For example, a seller may be required to supply products free from specified substances; a borrower may be required to provide emissions data; an investor may be entitled to conduct a compliance audit; a contractor may be prohibited from using forced labor; or a company may be required to adopt an anti-bribery policy. This classification is important because the general framework of the Indonesian Civil Code remains applicable, while sectoral obligations operate as minimum legal limits.

Article 1320 of the Indonesian Civil Code establishes four requirements. Consent and legal capacity are subjective requirements; a determinate subject matter and a lawful cause are objective requirements. With ESG clauses, the most frequent problem concerns the determinacy of the subject matter. Expressions such as “best practice,” “environmentally friendly,” or “high ESG standards” may serve an interpretative function, but are insufficient as the sole measure of breach unless accompanied by definitions and an assessment mechanism. The object need not be quantified to the last digit when the contract is signed, but it must at least be capable of determination through a standard, formula, schedule, or objective procedure.

A lawful cause limits the parties’ contractual freedom. A clause permitting waste disposal below statutory standards, excluding liability for non-waivable violations of workers’ rights, or concealing material information would conflict with law, morality, or public order. Articles 1335 and 1337 of the Indonesian Civil Code provide, respectively, that an agreement without a cause or with a false cause has no legal force and that a prohibited cause is one prohibited by law or contrary to morality or public order. A notary therefore may not assume that the parties’ consent is sufficient to justify every allocation of ESG risk.

Purboni et al. (2025) situate ESG within a shift in private law from protecting individual interests toward accommodating social and environmental interests. That argument is persuasive so long as it does not obscure the source of binding force. Social and ecological interests may enter a contractual relationship through mandatory rules, good faith, propriety, trade usages, or contractual promises. Accordingly, any assertion that ESG is “binding” must always answer four questions: binding upon whom, by virtue of which rule, in what transaction, and according to which indicator?

Freedom of Contract, Good Faith, and Binding Force

Article 1338(1) of the Indonesian Civil Code gives binding force to agreements validly concluded. Consequently, an ESG commitment that initially exists as a voluntary policy may become a legal obligation between the parties once incorporated into a contract. This transformation does not depend on whether legislation prescribes the exact target chosen by the parties. They may select standards higher than the legal minimum, provided that the clause does not violate the law or eliminate non-waivable rights.

Freedom of contract, however, is not absolute. Article 1338(3) requires agreements to be performed in good faith; Article 1339 extends contractual consequences to matters required by propriety, custom, and law; and Article 1347 deems customary terms to be included even if not expressly stated. In an ESG clause, good faith performs a dual function. First, it prevents a party from using sustainability language as a promotional device without an intention to perform. Second, it prevents the other party from opportunistically relying on a minor breach or incomplete data to terminate an otherwise beneficial contract.

Binding obligations must be accompanied by proportionate remedies. Not every ESG deviation should trigger immediate termination. A remediable administrative breach differs from forced labor, bribery, data falsification, or serious pollution. Snyder et al. (2021) recommend a sequence of notice, investigation, remediation plan, cure right, and remedy, with immediate termination reserved for severe circumstances. This graduated approach is consistent with good faith and reduces the risk that an ESG clause becomes merely a device for transferring risk to suppliers with weaker bargaining power.

Where a clause contains a statement of existing fact—for example, that the company holds specified environmental permits, is not subject to sanctions, or has prepared an ESG report under a stated standard—its falsity may constitute a breach of a representation and warranty. Where the clause contains a future undertaking—for example, to achieve an emissions target by a particular year—breach is assessed as nonperformance after the due date and in accordance with the agreed measurement mechanism. The distinctions among representations, warranties, and covenants should be explained through Indonesian legal concepts so that their consequences do not depend on ambiguous foreign terminology.

Article 1365 of the Indonesian Civil Code may apply where ESG-related conduct causes harm outside the contractual relationship or infringes the rights of third parties. A contract, however, does not automatically confer rights upon communities or workers who are not parties unless it creates a third-party stipulation or another mechanism recognized by law. A notary must therefore exercise care where a clause identifies a community, a supplier's employees, or a particular organization as a beneficiary; legal standing, enforcement rights, and the complaints procedure should be clearly defined.

Typology of ESG Clauses and Their Enforceability

Based on the source of the obligation and the quality of drafting, ESG clauses may be classified into four categories. This classification assists in determining the appropriate intensity of notarial scrutiny and the legal consequences of breach.

Table 2

Typology of ESG Clauses in Business Agreements

Type of clause	Characteristics	Example	Principal legal consequence
Contractualized mandatory norm	Restates or operationalizes a public-law obligation applicable to the party or transaction.	Compliance with environmental permits; prohibition of forced labor; sustainability reports for legally required entities.	May not reduce the statutory standard; breach may trigger public sanctions and contractual liability.
Voluntary commitment made binding	Sets a standard above the legal minimum, selected through party autonomy.	Thirty-percent emissions target; supplier audit; ISO certification; responsible-purchasing policy.	Binding under Article 1338 if lawful and sufficiently objective; remedies follow the contract and the Indonesian Civil Code.
Aspirational/declaratory statement	Goal-oriented language without an identified obligor, indicator, deadline, or consequence.	"The parties support ESG and the highest sustainability standards."	Useful for interpretation but weak as an enforcement basis; may create a risk of misleading claims.
Mixed clause	Combines obligations, targets, statements of fact, audit procedures, and remedies.	Permit representations; targets; quarterly reporting; remediation; damages or termination.	Most enforceable when each component is distinguished and the relationship among remedies is clear.

Source: Constructed by the authors based on Articles 1320 and 1338 of the Indonesian Civil Code and the literature on sustainability clauses.

An aspirational clause is not necessarily without value. It may function as a recital, a statement of the purpose of cooperation, or an interpretative guide. The problem arises when a party markets such wording as a performance guarantee or uses it to impose sanctions that were never agreed. A document should therefore distinguish "objectives" from "obligations." Objectives may use terms such as "endeavor" or "promote," whereas obligations should identify verifiable actions, dates, and standards.

A mixed clause is generally the most suitable form for a complex transaction. A debtor may, for example, represent that all environmental permits are valid on the signing date; covenant to maintain them throughout the financing term; provide emissions data every six months; notify a material incident within two days; and receive a thirty-day cure period except in cases of fraud or serious damage. This structure distinguishes present facts, continuing obligations, information duties, and events of default.

Any incorporation of external standards must address version control and accessibility. References to the "latest GRI" or "applicable international standards" may change unilaterally and create uncertainty. It is safer to identify a specific edition, establish an updating mechanism, allocate adjustment costs, and state how conflicts with Indonesian law will be resolved. A technical schedule should be declared an integral part of the deed and signed or initialed in accordance with the applicable procedure.

Notarial Deeds: Evidentiary Certainty Is Not a Guarantee of Substantive Validity

A business agreement executed before a notary generally takes the form of a party deed (*akta partij*), which records the intentions and statements of the appearers. The notary verifies identity, authority, formalities, reading, signature, date, and preservation of the original deed. The truth primarily guaranteed is formal truth: that the parties appeared, made the stated declarations, and signed as recorded. The notary does not automatically guarantee the material truth of every business fact, emissions datum, factory condition, or supplier-compliance statement.

The force of an authentic deed encompasses external, formal, and material evidentiary aspects within the limits recognized by the law of evidence. Article 1868 of the Indonesian Civil Code requires the deed to be executed in the form prescribed by law, by or before an authorized public official, and within the territory of that official's authority. Article 1870 grants the deed full evidentiary force between the parties and their heirs concerning the matters contained in it. Nasution (2024), and Zaini (2025), describe the notary as an instrument of dispute prevention because authenticity clarifies the date, identity, and content of the parties' agreement.

Two axes of validity must nevertheless be separated. The substantive axis evaluates the agreement under Article 1320 and sectoral rules. Defects in consent or capacity may render an agreement voidable; an indeterminate object or unlawful cause may result in nullity. The formal axis evaluates the deed under the Notary Office Law. Certain violations relating to form, attendance, reading, signature, amendments, or corrections (*renvoi*) may reduce the deed to the evidentiary status of a private document or create notarial liability. Suba et al. (2024) show that a unilateral correction may destroy the deed's authentic evidentiary force. A defect on one axis must therefore not be projected automatically onto the other without a legal basis.

For ESG clauses, this distinction produces four possibilities. First, the substance and the formal deed are both valid: the agreement is binding and supported by authentic evidence. Second, the substance is valid but the deed is formally defective: the contractual relationship may remain in existence, but its evidentiary quality may decline in accordance with the law. Third, the substance is defective but the deed is formally valid: the deed proves that the statement was made, but does not legalize an unlawful obligation. Fourth, both substance and form are defective: the parties face nullity or avoidance, evidentiary difficulties, and potential notarial liability.

An authentic deed also does not eliminate disputes concerning the interpretation of ESG indicators. Disagreement may arise over measurement methodology, materiality, data quality, or the cause of target failure. The deed's evidentiary force is most effective when the document reduces ambiguity through definitions, schedules, verification standards, and a hierarchy of dispute-resolution procedures. The quality of authenticity must therefore be supported by the quality of drafting; the two are complementary, but neither substitutes for the other.

Review of Legality and the Parties' Authority

The notary's first role is to conduct reasonable legal scrutiny. The review begins with identity, legal capacity, and authority to act. For a legal entity, the notary should examine the articles of association, composition of management, limits on directors' authority, approval of the board of commissioners or general meeting of shareholders where required, restrictions in financing agreements, and potential conflicts of interest. An ESG clause requiring substantial investment, a change in business activity, the provision of security, or material sanctions may fall outside ordinary management and therefore require corporate approval.

"Reasonable legal scrutiny" is used here as a bounded professional standard: the notary verifies identity, legal capacity, authority, deed formalities, and manifest consistency with mandatory law; requests supporting documents where the transaction requires them; and refuses a deed where the unlawful purpose or lack of authority is apparent. Technical ESG performance, scientific measurements, and assurance conclusions remain matters for qualified experts unless the notary has specific knowledge of falsity or inconsistency.

The next stage is to map mandatory norms. A notary is not required to audit the entire operation, but should identify the characteristics of the transaction: business sector, project location, issuer or public-company status, relationship to natural resources, financing from financial institutions, labor issues, personal data, and cross-border supply chains. This map identifies which norms cannot be excluded. Rahmi et al. (2019) caution that notarial deeds should not become "merely ceremonial." The proposition that a corporate deed can create space for environmental awareness is relevant, but the inclusion of an ESG clause should not be described as mandatory for every company without differentiating its legal basis.

A notary must refuse to draw up a deed whose substance is manifestly contrary to law or intended for an unlawful purpose. The standard of prudence, however, must not be transformed into an unlimited investigative duty. Technical documents—permits, certificates, audit reports, and measurement results—may be reviewed for their existence and formal consistency, while scientific truth should be left to qualified experts. This allocation preserves the notary's function without transferring every business and technical risk to the deed-drafting official.

Legal Counseling and Translation of ESG Objectives into Contractual Performance

Article 15(2)(e) of the Notary Office Law authorizes a notary to provide legal counseling in connection with the preparation of a deed. Such counseling is not unlimited general advice, but the explanation necessary for the parties to understand the legal consequences of the chosen formulation. Dewi (2025) regard notaries as performing preventive and educational functions by helping companies understand CSR obligations, while responsibility for implementation remains with the company. The same principle applies to ESG: the notary explains the distinction among objectives, representations, obligations, conditions precedent, and events of default.

The counseling function is therefore confined to legal explanation connected with deed-making, including the legal consequences of clause structure and formal requirements. It should not be interpreted as authority to provide unrestricted commercial, environmental, engineering, or investment advice.

Legal counseling must also preserve impartiality. In supply-chain contracts, a large buyer may transfer all ESG costs to suppliers while its pricing and delivery policies themselves encourage violations. Snyder et al. (2021) emphasize reciprocal responsibility and responsible purchasing practices. A notary does not determine commercial pricing, but may warn that impossible, unbalanced obligations or unilateral discretion may be inconsistent with good faith and invite disputes.

Translation of an ESG objective into contractual language should begin with operational questions: what impact is to be prevented or achieved; who controls the risk; what data are available; who will verify them; when does the obligation commence; and what happens if the standard changes? The answers should then be converted into definitions, scope, indicators, reporting mechanisms, audit access, notification duties, remediation, and remedies. In this manner, the notary assists the parties in converting reputational language into the language of contractual performance.

Minimum Drafting Elements of an ESG Clause

Drafting certainty can be assessed through the following minimum elements. They need not be contained in a single article, but together must form a coherent system.

Table 3

Minimum Elements of an Enforceable ESG Clause

Element	Legal function	Illustrative drafting formula
Definitions and scope	Prevents ESG terminology from becoming overbroad; identifies covered activities, facilities, affiliates, or suppliers.	"Environmental Performance" means the indicators in Schedule A for Facility X, excluding indirect emissions unless expressly stated.
Legal basis and standards	Connects the obligation with applicable law and the selected voluntary standard.	Compliance with applicable law and Standard Y, edition/year specified; Indonesian law prevails in the event of conflict.
Baseline, KPI, and deadline	Makes the object determinable and distinguishes annual targets from the final target.	Reduce emissions intensity by 20% from the verified 2025 baseline no later than 31 December 2029.
Data, reporting, and verification	Specifies format, frequency, data source, auditor, access, cost, and confidentiality.	Semi-annual reports; verification by an agreed independent party; a reasonable right to request supporting data.
Incident notification	Ensures timely receipt of material information.	Written notice within two business days after becoming aware of a material breach, fatal accident, bribery, or pollution incident.
Remediation and cure rights	Promotes actual remediation and prevents opportunistic termination.	Corrective-action plan within ten days and a thirty-day cure period, except for serious violations or fraud.
Remedies and allocation of risk	Determines damages, price adjustment, suspension, indemnity, or proportionate termination.	Graduated remedies; proven direct loss; liability cap with exceptions for wilful misconduct.
Change in law/standard	Keeps a long-term contract capable of performance.	Good-faith consultation and adjustment; no unilateral amendment; expert mechanism if agreement cannot be reached.
Dispute resolution	Identifies the forum and the need for experts in technical disputes.	Negotiation, expert determination for technical data, and mediation/arbitration or court proceedings for legal issues.
Severability and survival	Prevents one defective clause from defeating the entire contract and preserves selected obligations.	An invalid provision is severed to the extent the principal commercial purpose remains achievable; audit and indemnity obligations survive termination.

Source: Adapted from Uysal (2024), Snyder and Maslow (2018), and Snyder et al. (2021)

Indicators must reflect control and attribution. A party should not be deemed in breach for an outcome wholly beyond its control unless the clause imposes an appropriate efforts-based duty. Conversely, "best efforts" should be supplemented by process benchmarks, such as budget allocation, policies, training, audits, and follow-up. Target-based contracts may distinguish an absolute obligation, reasonable endeavors, and a duty to cooperate.

Verification should be independent but proportionate. A small transaction does not always require an expensive audit; a self-declaration combined with a risk-based audit right may suffice. Material targets may require an expert report or limited/reasonable assurance. The notary should ensure that the parties understand that an expert report supplies the factual basis, while the deed records their agreement on the legal consequences.

A severability clause is important, but cannot preserve the entire contract where the unlawful provision constitutes its inseparable principal cause. The severability formula should therefore consider whether the commercial balance can remain intact. Likewise, a limitation-of-liability clause may not be used to exclude liability that the law treats as non-waivable.

Documentation and Evidentiary Certainty

The evidentiary layer requires document traceability. The original deed and its copies should clearly identify every schedule forming part of the agreement: permit lists, baselines, methodologies, audit reports, supplier codes of conduct, or transition plans. The version, date, page count, and approving party should be stated. Where documents are stored electronically or updated periodically, the contract should specify the repository, access rights, version control, and evidence of receipt.

A notary must safeguard the formalities governing amendments and corrections. Indicators, figures, or schedules may not be altered unilaterally after signing. The experience analyzed by Suba et al. (2024) shows that changes made without the required consent and initials can undermine evidentiary force. For a dynamic ESG contract, an amendment mechanism should be designed from the outset, for example through a notarial addendum, a joint-committee decision within defined limits, or a duly signed update to a schedule.

Evidentiary certainty also includes an audit trail. Incident notices, data requests, remediation plans, audit findings, and acceptance of corrective action should be transmitted through specified channels. Without such evidence, the dispute may shift from ESG performance to whether an obligation was invoked, an opportunity to cure was provided, or a right was waived. A notary may assist in designing the notice procedure, but implementation and preservation of evidence remain the parties' responsibility.

Discussion

Limits of the Notary's Role and Potential Liability

The limits of notarial responsibility must be defined so that legal certainty does not generate mistaken expectations. A notary does not guarantee future ESG performance and is not liable for a company's failure to fulfill a promise merely because the agreement was executed before the notary. Dewi (2025) correctly locate responsibility for CSR implementation in the company as a legal entity; a notary may be held liable only upon violation of the Notary Office Law, the professional code of ethics, or applicable professional duties.

Notarial liability may arise where there is an unlawful act or breach of professional duty, fault, loss, and causation. Examples include drafting a clause known to conflict with legislation; ignoring an evident limitation on directors' authority; intentionally incorporating false statements; failing to observe deed formalities; altering text without consent; or stating that a certification has been examined when it was never produced. Arsy et al. (2021), as well as Darmayenti (2024), show that defects resulting from violations of the Notary Office Law may give rise to claims for costs, damages, and interest, as well as administrative or ethical sanctions.

Conversely, a notary should not bear liability for technical data reasonably entrusted to experts where no apparent irregularity exists. The precautionary principle described by Manuaba et al. (2018) requires diligence, not absolute certainty. The appropriate standard is whether the notary acted as a reasonable professional would in similar circumstances: requesting relevant documents, questioning visible inconsistencies, explaining legal risks, recording reliance on experts, and refusing the deed where an unlawful purpose is manifest.

Advice provided by a notary must also be distinguished from advice provided by each party's transaction counsel. In a high-value transaction, the parties should obtain their own legal, tax, environmental, labor, and financial advisers. The notary remains independent and impartial. The deed may record that the parties were given an opportunity to obtain advice and understand that technical verification is not a notarial function. Such a statement does not exempt the notary from liability for violating the Notary Office Law, but clarifies the scope of service and reduces misunderstanding.

The Layered Legal Certainty Model for ESG Clauses

Based on the foregoing analysis, legal certainty cannot be understood merely as the existence of an authentic deed. Legal certainty for an ESG clause must be constructed through three interdependent layers.

1. Normative certainty. The notary and the parties identify the legal subjects, transaction, mandatory norms, validity requirements, authority of corporate organs, and limits of contractual freedom. The result is a clause with a lawful cause that does not reduce statutory standards.
2. Drafting certainty. ESG objectives are translated into determinable performance: definitions, baselines, key performance indicators, deadlines, data, verification, notice, remediation, remedies, and change-in-law mechanisms. The result is an enforceable clause rather than a slogan.
3. Evidentiary certainty. The deed is drawn up in accordance with the Notary Office Law; schedules are identified; amendments follow the prescribed procedure; and implementation documents maintain an audit trail. The result is strong evidence in the event of a dispute.

This sequence is logical. A formally flawless deed is of little value if the promised performance is unlawful. A normatively valid clause remains weak if its indicators cannot be determined. A valid and measurable clause is still difficult to enforce if evidence of performance is not preserved. A notary should therefore use a three-layer checklist before signing.

The model also allocates responsibility. The parties are responsible for selecting objectives and delivering performance; advisers and technical experts are responsible for methodologies and findings within the scope of their engagement; and the notary is responsible for reasonable legality review, legal drafting, formalities, and authenticity. This allocation is more realistic than treating the notary as the sole gatekeeper of ESG.

Operationally, the responsibility matrix is as follows: contracting parties select the ESG objective and bear primary performance obligations; technical advisers or independent experts validate methodologies, baselines, and performance data; and the notary verifies legal capacity, authority, mandatory-law compliance, deed formalities, and the determinacy of the parties' expressed obligations. Each actor remains responsible within the legal scope of its function, preventing technical verification from being transferred to the notary.

From the perspective of legal certainty, the ideal result is not the elimination of every dispute, but the availability of clear rules, conduct capable of adjustment, verification mechanisms, and remedial forums. The theory of legal certainty employed by Suba et al. (2024) emphasizes clarity, consistency, accessibility, and predictable application. The layered model operationalizes these elements at the contractual level.

CONCLUSION

The Layered Legal Certainty Model provides a practical doctrinal framework for ESG clauses by establishing a sequential process: ensuring normative validity, translating ESG commitments into determinable contractual obligations, and securing evidentiary certainty through proper notarial form. The findings demonstrate that an ESG clause in a notarial deed is an element of contractual performance rather than a new type of contract. Its validity depends on compliance with Article 1320 of the Indonesian Civil Code, a lawful cause, applicable mandatory regulations, good faith, fairness, and sufficient determinacy of the contractual object. While voluntary ESG commitments become legally binding once incorporated into agreements under Article 1338, aspirational clauses have limited enforceability. The authenticity of a notarial deed strengthens evidentiary certainty but cannot rectify substantive defects. Therefore, substantive validity, evidentiary strength, and notarial liability must be assessed as interconnected yet legally distinct elements.

The study further concludes that notaries contribute to ESG legal certainty through preventive functions, including verifying identity, authority, corporate approval, mandatory legal compliance, providing legal counseling, and assisting in the formulation of measurable ESG obligations, evidentiary mechanisms, and remedies. However, notaries do not act as ESG auditors or guarantors of technical performance, as such verification remains the responsibility of independent experts. Effective ESG governance requires the fulfillment of three cumulative layers: normative certainty, drafting certainty, and evidentiary certainty. Accordingly, the Indonesian Notary Association should develop ESG clause-drafting guidelines, regulators should harmonize ESG terminology and reporting standards without expanding notarial responsibilities into auditing functions, and contracting parties should adopt multidisciplinary approaches involving relevant experts. Future studies should empirically examine ESG clauses in Indonesian business transactions and analyze emerging judicial or arbitral disputes related to ESG performance.

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AUTHOR CONTRIBUTION STATEMENT

Author 1 (Yan Hartawan): Conceptualization, development of the research framework, legal analysis, methodology design, literature review, drafting of the manuscript, and final approval of the submitted version.
Author 2 (Bryant Jeremia): Data collection of legal materials, supporting literature analysis, review and editing of the manuscript, refinement of legal arguments, and final approval of the submitted version.

All authors contributed to the interpretation of the findings, critically reviewed the manuscript, and approved the final version for publication.

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