LEGAL POSITION OF MEMORANDUM OF UNDERSTANDING IN CONTRACT LAW IN INDONESIA

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Abstract

This paper aims to determine the basic understanding of the MoU and the legal position of the MoU in contract law in Indonesia. The research method used normative legal research, with a statutory approach. Normative research is legal research conducted by researching and reviewing library materials or secondary data. Secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials or non-legal materials, all the collected materials are then analyzed qualitatively, in accordance with the study of the basic understanding of the MoU and the legal position of the MoU in treaty law in Indonesia in this paper. The results of the study indicate that the MoU is a legal document in which it explains the preliminary agreement between the two parties and is the basis for drafting future contracts. In general, MoU are made as the first step in making a cooperation contract or a more binding agreement between two parties. The binding force between the MoU and the agreement is the same, because the MoU is made based on the agreement of the parties who will bind themselves to the contents of the MoU, and is made by fulfilling the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code. The legal basis used in the practice of making and implementing MoUs in Indonesia is based on the principle of freedom of contract in Article 1338 of the Civil Code. The MoU is an indirect statement of approval of its relationship with other agreements, both verbally and in writing. It also shows that the MoU is an engagement because based on Article 1233 of the Civil Code, each engagement is born good because of the agreement.

Keywords: ***contract law, legal standing, MoU.***

INTRODUCTION

In Indonesian law, agreements fall within the scope of civil law review. Agreements in the business world are usually made in writing, both agreements made notarized before a notary, as well as underhand agreements made by the parties. Agreements in the Indonesian Civil Code are regulated in Book III Concerning Engagement, Article 1233 to Article 1864. Business development in Indonesia in making agreements is influenced by the Common Law legal system, so that the parties in a business relationship usually make contracts. The parties in making a contract are usually preceded by a Memorandum of Understanding (MoU). The MoU in the Common Law legal system is not yet a contract, it has not created rights and obligations for the parties. The Indonesian Civil Code does not recognize and does not regulate a Memorandum of Understanding (MoU). MoU is an initial agreement in a contract made under the Common Law legal system. The contract made has a nature that is no different from an agreement, namely a bond that has legal consequences. A contract is an agreement between the parties that has legal consequences that are binding on the parties as a law.

In theory the MoU is not a contract because it is still a pre-contract activity.[1] MoU or also called pre-contract, is a legal action from one party (legal subject) to state his intention to another party about something that is offered or owned. In other words, the MoU is a preliminary agreement that regulates and provides an opportunity for the parties to conduct a feasibility study first before

[1] Munir Fuady, *Hukum Kontrak (Dari Sudut Pndang Hukum Bisnis)*, Bandung: PT Citra Aditya, 2001, p. 38

making a more detailed and binding agreement in the future. The term MoU contains the wishes of each party as well as a grace period for reaching an agreement for the occurrence of a contract.[2] The MoU is made by the parties who are subject to contract law in Indonesia, where in practice one of the parties does not carry out its obligations as specified in the MoU, which results in the consequence that the agreement (contract) cannot be signed by the parties. An agreement (contract) that cannot be signed by the parties because one of the parties does not carry out its obligations properly, causes losses and hampers the business of the parties.

The term MoU by experts is called a 'Memorandum of Understanding' or 'Initial Contract'. Basically a contract starts from a difference or dissimilarity of interest between the parties. So that the formulation of the contractual relationship generally always begins with a negotiation process between the parties. After there is an understanding or agreement on the will to enter into a contract, the parties will usually make an MoU that contains the wishes of each party as well as a grace period for reaching an agreement for the contract to occur.[3] Grammatically a Memorandum of Understanding (MoU) is defined as a memorandum of understanding. It can be formulated that the understanding of the MoU is the basis for the preparation of future contracts based on the consensus of the parties, both in writing and orally.[4] There are three stages in making an agreement, according to the new theory, namely:[5]

1. Pre-contractual stage, namely the existence of an offer and acceptance;
2. The contractual stage, namely the conformity of the statement of will between the parties:
3. The post-contractual stage, namely the implementation of the agreement

MoU is the basis for drafting future contracts based on the agreement of the parties, both in writing and verbally.[6] According to M. Prawiro,[7] we can identify a memorandum of understanding by looking at its characteristics. Referring to the meaning of the MoU above, the characteristics of the MoU are as follows (1) generally the contents of the MoU are made in a concise manner, often only one page is made, (2) the contents in the MoU are basic or general matters. , (3) The MoU is preliminary, which will be followed by another agreement whose contents are more detailed, (4) the term MoU has a fairly short period of time, for example a month to one year. If there is no follow-up with a more detailed agreement from both parties, then the memorandum of understanding is canceled, (5) Generally, the memorandum of understanding is made in the form of an underhand agreement, and (6) the MoU is used as the basis for making agreements for the benefit of many parties. , for example investors, creditors, shareholders, governments, and others. Furthermore, he explained that basically the MoU/Memorandum of Understanding was made by parties who had certain objectives. According to Munir Fuady, the objectives of the MoU are (1) to facilitate the process of canceling an agreement. In the case of business prospects that are not yet clear, there is still the possibility of cancellation of the agreement. In this case, the MoU is made because there is no certainty regarding the cooperation agreement but both parties need to feel the need to follow up on the possibility of such cooperation, (2) as a Temporary Bond. The process of agreement and contract signing usually takes quite a lot of time and negotiation. So the MoU is made and valid temporarily so that both parties have a bond before signing the cooperation contract, (3) as a consideration in the agreement. Not infrequently the parties who want to cooperate are still hesitant and need time to think about the signing of the cooperation that will be carried out. So for the time being a Memorandum of Understanding is made, and (4) as a Big Picture Agreement. A memorandum of understanding is drawn up and signed by an executive officer of a company whose content is more general. Meanwhile, the more detailed contents of the agreement will be drawn up and negotiated by staff who are familiar with technical matters.

In simple terms, it can be said that the implementation of the MoU in Indonesia is based on the principle of freedom of contract as contained in Article 1338 of the Civil Code, and the MoU also includes an engagement because it is based on Article 1233 of the Civil Code. According to Erman Rajagukguk, a Memorandum of Understanding is a document that contains mutual understanding between the parties before the agreement is made. The contents of the MoU must be included in the

[2] Huala Adolf, *Dasar-Dasar Hukum Kontrak Internasional*, Bandung: Refika Aditama, 2008, p. 29
[3] Fuad Lutfi, *Implemenetasi Yuridis tentang Kedudukan Memorandum of Understanding (MoU) dalam Sistem Hukum Perjanjian Indonesia*, Jurnal Syariah: Jurnal Ilmu Hukum dan Pemikiran, Vol. 17, No. 2 December 2017, p. 181
[4] Salim HS, et.al., *Perancangan Kontrak & Memorandum of Understanding (MoU)*, Jakarta: Sinar Grafika, 2011, p. 46
[5] Salim HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika, 2017, p. 26
[6] Salim HS, et.al. (2011), *Op.Cit.*
[7] M. Prawiro, *Arti MoU (Memorandum of Understanding): Pengertian, Tujuan, Manfaat, dan Jenisnya*, 2018.

contract, so that it has binding force. Salim, et al provide the understanding of the MoU "a memorandum of understanding made between one legal subject and another legal subject, both within one country and between countries to cooperate in various aspects of life and a certain period of time". We know that legislation is one of the important things in the life of the nation and state, moreover it has been emphasized that in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia that Indonesia is a state of law. In Indonesia, the regulation regarding the formation of laws and regulations is currently regulated in Law of the Republic of Indonesia No. 12 Year 2011 concerning the Establishment of Legislation which was later amended by Law of the Republic of Indonesia No. 15 Year 2019, which outlines the principles of formation, content, process, and even regulates the hierarchy of the laws and regulations. However, in practice in Indonesia, many legal subjects/individuals misinterpret the MoU itself, causing questions and debates in the wider community, both in terms of substance, definition or basic understanding as well as in terms of implementation, one example is the MoU between the Attorney General of the Republic of Indonesia (Kejaksaan Agung/Kejagung), the Indonesian National Police (Kepolisian Republik Indonesia/Polri), the Corruption Eradication Commission of the Republic of Indonesia (Komisi Pemberantasan Korupsi/KPK). Therefore, this paper aims to find out the basic understanding of the MoU and the legal position of the MoU in contract law in Indonesia.

METHOD

The research method used normative legal research,[8] with a statutory approach. Normative research is legal research conducted by researching and reviewing library materials or secondary data.[9] Secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials or non-legal materials, all materials collected are then analyzed qualitatively,[10] in accordance with the study of the basic understanding of the MoU and the legal position of the MoU in treaty law in Indonesia in this paper.

RESULTS AND DISCUSSION

Basic Understanding of Memorandum of Understanding

The term MoU comes from two words, namely memorandum and understanding. Grammatically, the MoU is defined as a memorandum of understanding. In Black's Law Dictionary,[11] the meaning of the memorandum is “is to serve as the basis of future formal contract”. While understanding is defined as “an implied agreement resulting from the express terms of another agreement, whether written or oral, atau a valid contract engagement of a somewhat informal character; atau a loose and ambiguous terms, unless it is accompanied by some expression that it is constituted a meeting of the minds of parties upon something respecting which they intended to be bound”.

The MoU is a legal document in which it explains the preliminary agreement between the two parties and is the basis for drafting future contracts. In general, MoUs are made as the first step in making a cooperation contract or a more binding agreement between two parties. However, the contents of the MoU are more of an offer, consideration, acceptance, and intention to be legally bound. The term Memorandum of Understanding (MoU) consists of two words, namely:[12]

1. Memorandum, which is a summary statement in writing, which explains the terms of an agreement or transaction.
2. Understanding, which is a statement of indirect agreement on other agreements that are informal or loose requirements.

Agreements (contracts) are part of the business transaction process, both domestic and international business transactions. The function of the agreement (contract) is very important in ensuring that all rights and obligations of the parties can be implemented and fulfilled. The parties who are unable to carry out their rights and obligations as specified in the agreement (contract) or in the event of a violation, give rise to rights to the parties to claim the fulfillment of their obligations and can even claim compensation. The law of agreement (contract) guarantees the legal certainty of the

[8] Kadarudin, *Penelitian di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)*, Semarang: Formaci Press, 2021, p. 223

[9] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Raja Grafindo Persada, Jakarta, 1995, p.13

[10] Kadarudin, *Mengenal Riset dalam Bidang Ilmu Hukum, Tipologi, Metodologi, dan Kerangka*, Ponorogo: Uwais Inspirasi Indonesia, 2020, p. 151

[11] Bryan A. Gardner (ed.), *Black's Law Dictionary* (5th Edition), New York: West Publising Co., 1979, p. 888

[12] M. Prawiro (2018), *Loc.Cit.*

parties in carrying out the agreement (contract) as it should in good faith. Agreement law (contract) is a legal instrument that functions to ensure the implementation of the agreement (contract). Business transactions are usually preceded by initial negotiations. Negotiation is a process of trying to reach an agreement with other parties. Negotiation is an instrument that can bridge the various interests of business actors in formulating their rights and obligations. Negotiation is a process of bargaining between the parties in determining their rights and obligations. The next stage after the negotiation process is the making of an MoU. The MoU is the recording or documentation of the results of the initial negotiations in written form. The MoU is very important as a guide for further use in making agreements (contracts).

Basically the contract starts from the difference of interest between the parties. The formulation of the contractual relationship generally always begins with a negotiation process between the parties. Through negotiations, the parties try to create forms of agreement to bring together what they want again.[13] Understanding Memorandum of Understanding can refer to the opinions of several experts. Erman Rajagukguk argues that the meaning of the MoU is a document containing mutual understanding between the parties before the agreement is made. The contents of the Memorandum of Understanding must be included in the contract, so that it has binding force. Meanwhile, Munir Fuady stated that the meaning of the MoU is a preliminary agreement, in the sense that it will be followed and explained in another agreement that regulates it in detail, therefore, the memorandum of understanding contains only the main things. As for other aspects of the MoU, it is relatively the same as other agreements. From this explanation, it can be concluded that the MoU is not a contract and is still a pre-contract. Therefore, the MoU usually includes the "intention to create legal relations" by the two parties. There is also an MoU that has legal consequences for those who violate it. Why are legal consequences added to the MoU? There are three considerations to add to the legal consequences, namely:[14]

1. So that both parties avoid being serious about one of the parties making the MoU, for example canceling the agreement unilaterally for no apparent reason.
2. So that both parties avoid various losses, both financial and non-financial that have been issued by these parties.
3. To maintain the confidentiality of the information/data provided during pre-contract activities.

Legal Position of Memorandum of Understanding in Indonesia

The formation of a good rule must be based on philosophical, sociological, juridical, political and administrative aspects and its application must also be reflected philosophically, sociologically, juridically and philosophically.[15] MoU are actually unknown in conventional law in Indonesia, especially in contract law in Indonesia. In the Indonesian laws and regulations, there are no provisions that specifically regulate the MoU.[16] The basis for the entry into force of the MoU in Indonesia is based on the principle of freedom of contract, as regulated in Article 1338 of the Civil Code, which reads:

1. All agreements made in accordance with the law, apply as law to those who make them.
2. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law.
3. Approval must be carried out in good faith.

The agreement (contract) is based on the principles regulated in Book III of the Perdada Code on Engagement. The principle underlying the agreement (contract) is the principle of binding the contract (pacta sunt servanda) where this principle explains that everyone who makes a contract is binding on the parties as per the law. The agreement (contract) is guided by the principle of freedom of contract which is regulated in Article 1338 paragraph (1) of the Civil Code, which states that: "All agreements (contracts) that are made legally apply as law for those who make them". Freedom of contract means that a person is free to enter into an agreement, is free about what is agreed, and is

[13] Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Jakarta: Kencana, 2011, p. 1
[14] M. Prawiro (2018), *Loc.Cit.*
[15] Jimly Asshiddiqie, *Perihal Undang-Undang*, Jakarta: Konstitusi Press, 2006, p. 243
[16] Devi Setiyaningsih and Ambar Budhisulistyawati, *Kedudukan dan Kekuatan Hukum Memorandum of Understanding (MoU) Sebagai Tahap Prakontrak (Kajian dari Sisi Hukum Perikatan)*, Jurnal Privat Law, Vol. VIII, No. 2 July-December 2020, p. 175

free to determine the form of the contract.[17] MoU has benefits for parties who want to make an agreement. In accordance with the meaning of the MoU, there are two benefits of the MoU, namely the juridical benefit is the existence of legal certainty for both parties who make the agreement. In addition, the MoU can act as a law for any party who makes it, and the Economic benefit is the movement of resource ownership rights which initially had a low use value to become higher after the MoU.

According to Devi Setiyaningsih and Ambar Budhisulistyawati,[18] an MoU that is legally made has a full legal bond in accordance with the principle of Pacta Sunt Servanda (the promise is binding on the parties). Thus, the entry into force of the MoU can be equated with a law that has binding and coercive power, but only concerns and is limited to the main things contained in the MoU. It can also be concluded that the binding force between the MoU and the agreement is the same, because the MoU is made based on the agreement of the parties who will bind themselves to the contents of the MoU, and is made by fulfilling the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code, and its legal force will be binding. parties who violate the provisions of default as regulated in the Civil Code. Until now, Indonesia's positive law has not specifically regulated the entry into force of the MoU. However, considering that the MoU is a preliminary agreement, its arrangement is subject to the provisions on engagement in the Civil Code which basically adheres to an open system. An open system means that everyone is free to enter into agreements, both those that have been regulated in the law and those that have not been regulated in the law. The legal basis used in the practice of making and implementing MoUs in Indonesia is based on the principle of freedom of contract in Article 1338 of the Civil Code. The MoU is an indirect statement of approval of its relationship with other agreements, both verbally and in writing. This also shows that the MoU is an engagement because based on Article 1233 of the Civil Code each engagement is born good because of approval. In addition, the MoU involves two or more people such as only the parties to the engagement consisting of parties who are obliged on the one hand, and parties who are entitled to the fulfillment of these obligations on the other. And it can be concluded that the MoU is not contractual and adheres to the Getelment Agreement theory. For the MoU which is not a contract, it only has moral sanctions.

Talking about the will of the parties, the MoU can be divided into MoUs that are moral in nature, generally made by the parties concerned with the aim of fostering a “moral bond” only, and there is no juridical binding between them. A Memorandum of Understanding like this usually emphasizes that the MoU is only evidence of the parties' intention to negotiate at a later date to conclude a contract. MoUs that are intended to bind themselves in a contract are usually carried out by the parties concerned but are still in the stage of arranging various general agreements. The details will be made in the full contract at a later date. MoU where the parties intend to bind themselves in a contract, but cannot be ascertained due to certain uncertain situations and conditions.

There are fundamental problems related to public understanding of an MoU, as written by Zayanti Mandasari,[19] that a few years ago there was a 'chaotic' between state institutions and state commissions related to their authority, such as the KPK and the National Police who were fighting over the handling of cases of alleged SIM simulator corruption in Korlantas. This feud occurred because in 2012 a mutual agreement or what is often referred to as a Memorandum of Understanding (MoU) between the Attorney General of the Republic of Indonesia, the Indonesian National Police (Polri), and the Corruption Eradication Commission of the Republic of Indonesia was made. Number: KEP-049/A/J.A/03/ 2012, Number: B/23/III/2012, and Number: SP3-39/01/03/2012 concerning Optimization of Corruption Eradication. The National Police is adamant that it will continue to handle cases of alleged corruption in the SIM simulator at the Korlantas Polri, which at that time had also been handled by the KPK. The police argued that they could handle the case because of the MoU between the KPK, the National Police and the Attorney General's Office. But on the other hand, the KPK argues otherwise, in the MoU there are actually several articles that strengthen the KPK as the party that should handle the case. The agreement of these three institutions is actually not commonly regulated in the MoU because the MoU is only 'morally' binding on the parties who made it. In fact, the purpose of making an agreement between them is to optimize the work of eradicating corruption. In addition, generally understood by the public, the MoU is not a statutory regulation, so that if in the future a problem arises between the institutions that made it or a conflict arises with the legislation, how to resolve it, and which rules should be used.

[17] Abdul R. Salimin, *Hukum Bisnis Untuk Perusahaan (Teori Dan Contoh Kasus)*, Jakarta, Kencana Prenada Media Group, 2010, p. 46

[18] Devi Setiyaningsih and Ambar Budhisulistyawati (2020), p. 177-178

[19] Zayanti Mandasari, *Kedudukan Memorandum of Understanding dan Surat Keputusan Bersama Ditinjau dari Teori Perundang-Undangan*, Jurnal Hukum Ius Quiaiustum, No. 2, Vol. 20, April 2013, p. 280-281

To answer this problem, we can actually refer to the opinion of Munir Fuady[20] yang menjelaskan bahwa terdapat dua pandangan yang membahas tentang kekuatan mengikat dari MoU, yaitu:

1. Memorandum of Understanding (MoU) as a Gentlement agreement
   The first view argues that the Memorandum of Understanding is only a gentlement agreement. This means that the MoU is not the same as an ordinary agreement, even though the MoU is made in the strongest form, such as with a notary deed. In addition, the MoU binds only to a mere moral bond, in the sense that it is not legally binding. As a moral bond, if there are parties who renege on the MoU, it is considered immoral and their reputation will fall in the business community.
2. Memorandum of Understanding (MoU) as an Agreement is agreement
   The second view argues that once an agreement is made, whatever its form, oral or written, short or long, complete or only regulates basic matters, it is still an agreement and therefore has binding power like an agreement, so that all the provisions of the Articles the article on contract law has been applied to him. More formally, if an agreement only regulates basic matters, then it binds it only to those main things. Or if an agreement is only valid for a certain period of time, then it is binding only for that certain period of time. The parties cannot be forced to make a more detailed agreement as a follow-up to the MoU. During the term of the agreement, the parties cannot make the same agreement with other parties.

Thus, in accordance with the second view which states that once an agreement is made, regardless of its form, oral or written, short or long, complete or only regulates matters of a basic nature, it is still an agreement and therefore has binding force as befits an agreement. agreement, so that all the provisions of the articles concerning the law of the agreement can be applied to him. More formally, if an agreement only regulates basic matters, then it binds it only to those main things. Or if an agreement is only valid for a certain period of time, then it is binding only for that certain period of time. The parties cannot be forced to make a more detailed agreement as a follow-up to the MoU. As long as the agreement is still in progress, the parties cannot make the same agreement with other parties, so there is a 'chaotic' between state institutions and state commissions related to their authority, such as the KPK and the National Police who are fighting over the handling of cases of alleged SIM simulator corruption in Korlantas. This feud occurred because in 2012 a mutual agreement or what is often referred to as a Memorandum of Understanding between the Attorney General of the Republic of Indonesia, the Indonesian National Police (Polri), and the Corruption Eradication Commission of the Republic of Indonesia was made. Number: KEP-049/A/J.A/03/ 2012, Number: B/23/III/2012, and Number: SP3-39/01/03/2012 concerning Optimization of the Eradication of Corruption Crimes does not need to occur.

CONCLUSION

The MoU is a legal document in which it explains the preliminary agreement between the two parties and is the basis for drafting future contracts. In general, MoUs are made as the first step in making a cooperation contract or a more binding agreement between two parties. The binding force between the MoU and the agreement is the same, because the MoU is made based on the agreement of the parties who will bind themselves to the contents of the MoU, and is made by fulfilling the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code. The legal basis used in the practice of making and implementing MoUs in Indonesia is based on the principle of freedom of contract in Article 1338 of the Civil Code. The MoU is an indirect statement of approval of its relationship with other agreements, both verbally and in writing. It also shows that the MoU is an engagement because based on Article 1233 of the Civil Code, each engagement is born good because of the agreement.

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