

## THE LEGAL STRENGTH OF THE MEMORANDUM OF UNDERSTANDING AS A COOPERATION FRAMEWORK IN AN AGREEMENT

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### ABSTRACT

*Memorandum of Understanding is a statement of indirect approval of its relationship with other agreements, either verbally or in writing. Memorandum of Understanding is a document that contains mutual understanding of the parties before the agreement is made where the provisions reached in the Memorandum of Understanding will be parts of a legal engagement that will be included in the agreement which will be agreed later. In the Memorandum of understanding, confusion often results in the use of it in practice. Not a few business people use the term or the title of the standing memorandum of the agreements agreed upon with their business partners, even though they actually expect that the agreement will have consequences if one of the parties to the agreement defaults.*

*Keywords:* Memorandum of Understanding, Cooperation, Agreement

### INTRODUCTION

Law as a system that contains various rules related to human behavior in community groups, in principle, aims to create order, order of life in that society. This is in accordance with the adage: "Ubi Societas Ubi Ius" which means that where there is a community there is law. The need for law is getting higher and higher in line with the development of the times which have an impact on the various interests and needs of each individual for their existence in the life of society, nation and state. Between one individual and another, of course, have different interests. That humans have unlimited needs and humans will not be satisfied with those desires. By nature, apart from being an individual human being, it is also a social creature which in fulfilling their needs cannot live alone without the help of other individuals. This condition will then give rise to agreements between the wills of one another as an effort to fulfill their needs in all aspects of life. The agreement of the will in everyday life is known as an agreement, both oral and written, which in the context of civil law is referred to as contract law.

The existence of an agreement which is currently commonly known as contract law. It is inseparable from the fulfillment of the conditions regarding the validity of an agreement as stipulated in Article 1320 of the Civil Code, including an agreement of will, the ability to make an agreement, a certain matter, and a lawful cause. By fulfilling the four valid conditions of the agreement, an agreement becomes valid and legally remembers the parties making it.

Legal problems will arise if before the agreement is valid and binding on the parties, namely in the preliminary negotiation process, one of the parties has committed legal actions such as borrowing money, buying land, even though no final agreement has been reached between them regarding the business contract being negotiated. This happens because one of the parties really trusts and places expectations on the promises given by his business partner. If in the end the negotiations are deadlocked and no agreement is reached, for example an agreement is not reached on fees, royalties, or a period of time, then there can be no claim for compensation for all costs, investments that have been spent on his business partners. Because according to the classical contract theory there is no contract yet considering the amount of fee, royalty and the term of the agreement are essential things in an agreement.

Modern contract theory tends to eliminate the formal conditions for legal certainty and place more emphasis on the fulfillment of a sense of justice. As a consequence, the party that resigns from the negotiations without a reasonable reason is responsible for the losses suffered by the other party, if the latter has disclosed trade secrets, incurred costs or invested money, because they believed and had hope in the promises made in the process negotiation.

In developed countries that adhere to civil law systems, such as France, the Netherlands, and Germany, the courts apply the principle of good faith not only in the contract signing and implementation stage, but also in the negotiation stage (in negotiation of the duty of good faith) so that promises are made. a pre-contractual promise has legal consequences and damages can be sued if the promise is broken. However, some court decisions in Indonesia do not apply good faith in the negotiation process, because they adhere to the classical theory if an agreement has not yet been established which has legal consequences for the parties, as a result the party who is injured because he believes in the promises of the other party is not protected and cannot claim compensation.

In countries with common law systems, such as in the United States, courts apply the doctrine of promissory estoppels to provide legal protection to an injured party who believes and reasonably relied on promises made by his opponent in the preliminary negotiation.

Memorandum of understanding is a legal product in countries that adhere to the common law system. This concept then develops in practice in Indonesia in almost every form of cooperation, whether carried out by the government or by the private sector. It can be ascertained that the legal product is no longer foreign or new. However, some circles still have doubts about the binding strength of the memorandum of understanding itself in its implementation. This ambiguous and uncertain impression creates a polemic, but

there are also some groups who do not consider this a problem at all. Therefore, it is not uncommon to find the terms memorandum of understanding, memorandum of understanding, memorandum of understanding, collective agreement and so on.

Polemic arose about the binding strength of the memorandum of understanding, so that the question was a trigger for various other questions. As if there is no binding strength why the memorandum of understanding was made. Given that Indonesia adheres to the Continental European system, namely by using dogmatic patterns, in which a transaction can be immediately made the formulation of the will of the parties in an agreement. In other words, it is not necessary to have an intermediate vehicle before the will of the parties is formulated before the agreement is made. This is because everything that has not been or is not regulated in the agreement will be returned to how the provisions of the higher laws and regulations, especially the events that have occurred, have not been formally regulated in the agreement made by the parties concerned.

Unlike the common law system where an agreement must have detailed everything that will be arranged, including all the possibilities that will occur as a result of the signing of an agreement. On the basis of such thoughts, it is necessary to have a memorandum of understanding that facilitates the parties in formulating the main points regarding the cooperation framework that will be built to be formulated more comprehensively in an agreement.

Currently the memorandum of understanding has become a common trend in Indonesia, however, various interpretations have emerged, especially those related to the understanding of someone or anyone about the memorandum of understanding itself. Is the position merely an initial commitment (preliminary engagement) or has it been considered as an alternative form of the engagement or has even been considered as a form of engagement. Thus, it is necessary to have an explanation which is not only adequate, but also aims to reinforce the position of the memorandum of understanding.

Not explicitly stipulating the memorandum of understanding in Indonesian positive law, it causes many problems in practice, for example whether the memorandum of understanding is in accordance with positive law regulations in Indonesia, or whether a memorandum of understanding can be categorized at the same level as an agreement specified in the Book of Law. Civil Law and who is responsible if there is a denial in an agreement like this is also the most extreme is that there are those who question whether a memorandum of understanding is a contract, considering that a memorandum of understanding is only a memorandum of understanding besides how often a memorandum of understanding is made. The parties did not follow up on understanding and did not even implement what was stated in the memorandum of understanding.

## **LITERATURE REVIEW**

### **DEFINITION OF MEMORANDUM OF UNDERSTANDING**

The term memorandum of understanding comes from two words, namely memorandum and understanding. Grammatically, a memorandum of understanding is defined as a memorandum of understanding. In the Black's Law Dictionary, the memorandum means "Is to serve as the bass of future formal contract or deed", which means a statement of agreement indirectly with respect to its relationship with other agreements, either verbally or in writing. From the translation, the meaning of a memorandum or understanding can be formulated, which is the basis for drafting a future contract based on the agreement between the parties, both in writing and orally.

Munir Fuady, interpreted the memorandum or understanding as "a preliminary agreement in the sense that it will be followed by and spelled out in another agreement that regulates it in detail. Therefore, the memorandum of understanding contains only the main things. As for other aspects of the memorandum of understanding, it is relatively the same as other agreements". The same thing was explained by Erman Rajagukguk, who described that a memorandum of understanding was a document that contained mutual understanding of the parties before the agreement was made, where the provisions reached in the memorandum of understanding would be parts of the legal engagement included in the agreement that will be agreed later. Furthermore, I Nyoman Sudana, defines a memorandum or understanding as a preliminary agreement, in the sense that other agreements will be followed, so that the elements contained in this definition are:

1. Memorandum or understanding as a preliminary agreement
2. The contents of the memorandum of understanding are about the main things and
3. The contents of the memorandum of understanding are included in the contract.

Of the three definitions, the focus is on the nature of the memorandum of understanding, namely as a preliminary agreement, and does not formulate the relationship between the parties and the substance of the memorandum of understanding. It is undeniable that the term memorandum of understanding often creates confusion in its intended use in practice. Not a few business actors use the term or title of a memorandum of understanding on the agreements agreed upon with their business partners, even though they actually expect that the agreement will have legal consequences if one of the parties to the agreement defaults.

In essence, the substance of the memorandum of understanding, for example, contains cooperation in various fields of life, in the fields of economics, education, health, defense and security, or defense, finance, expertise and others. Each memorandum of understanding also states the time period. The period of validity of the memorandum of understanding is related to the length of time the cooperation will take place.

## **TYPES OF MEMORANDUM OF UNDERSTANDING**

The memorandum of understanding can be divided according to the country that made it and according to the wishes of the parties. According to the country that made it, the memorandum of understanding can be divided into two types, namely:

1. Memorandum of understanding which is national in nature, is a memorandum of understanding in which both parties are Indonesian citizens or legal entities.
2. An international memorandum of understanding, is a memorandum of understanding made between the Indonesian government and foreign governments and / or between Indonesian legal entities and foreign legal entities.

## **PURPOSE OF CREATING MEMORANDUM OF UNDERSTANDING**

In principle, every memorandum of understanding made by the parties, of course, has a specific purpose. Munir Fuady stated that the objectives of the memorandum of understanding are:

1. To avoid difficulties in canceling an agreement later, in the event that the business prospects are not yet clear, meaning that it is not yet certain whether the cooperation agreement will be followed up, so that a memorandum of understanding is drawn up that is easily canceled.
2. The signing of the contract is still long because the agreement is still being negotiated a lot. Therefore, instead of having nothing to do before the contract is signed, a memorandum of understanding will be drawn up which will be valid for a while.
3. There are doubts from the parties and it still takes time to think about the signing of a contract, so that a memorandum of understanding is temporarily drawn up.
4. A memorandum of understanding is drawn up and signed by the executive of a company, so that a more detailed agreement must be drafted and negotiated specifically by staff who are lesser but more technically proficient.

The characteristics of a memorandum of understanding are as follows:

1. The content is concise, often one page even
2. Contains only the main things
3. Preliminary in nature, which will be followed by other, more detailed agreements
4. Has a period of time for example one month, six months or a year. If within that time period is not followed up with a more detailed agreement, a more detailed agreement, the agreement will be canceled, unless extended by the parties.
5. Usually made in the form of an agreement under the hand and
6. Usually there is no compelling obligation for the parties to make a more detailed agreement after the signing of the memorandum of understanding because reasonably both parties may have obstacles in making and signing such a detailed agreement.

## **THE PARTIES AND THE OBJECTS OF THE MEMORANDUM OF UNDERSTANDING**

Memorandums of understanding are not only made by private legal entities, but also by public legal entities. Likewise, the memorandum of understanding does not only apply nationally. Based on this statement, the parties to the memorandum of understanding that apply nationally are:

1. Indonesian private legal entities with other Indonesian private legal entities
2. Indonesian private legal entities with the Provincial, Regency / City governments
3. Indonesian private legal entities with law enforcement
4. Public legal entities with other public legal entities.

The object in the memorandum or understanding is cooperation in various fields of life, such as economics, trade, forestry and so on.

## **ARRANGEMENT OF A MEMORANDUM OF UNDERSTANDING**

In various laws and regulations, there are no specific provisions regulating the Memorandum of Understanding. The substance of the memorandum of understanding contains the parties' agreement on general matters. The provisions governing the agreement are specified in Article 1320 of the Civil Code. Article 1320 of the Civil Code regulates the terms of the validity of the agreement. One of the conditions for the validity of the agreement is an agreement between the parties making the agreement. In addition, what can be used as a legal basis for making a memorandum of understanding is Article 1338 of the Civil Code stipulates that all agreements made legally are valid as laws for those who make them. The principle of freedom of contract is a principle that gives the parties the freedom to:

1. Make or not make an agreement
2. Enter into an agreement with anyone
3. Determine the contents of the agreement, its implementation, and requirements and
4. Determine the form of the agreement, namely written or oral.

The principle of freedom of contract is a very important principle in making a memorandum of understanding. Because this principle allows the parties whether it is a legal entity or an individual to carry out or make a memorandum of understanding according to the wishes of the parties.

Apart from the principle of freedom of contract, the validity of the memorandum of understanding in Indonesia is also based on legal customs. Legal practice implies that an agreement is not only binding for what is expressly regulated, but also for things that are generally followed.

Internationally, the legal basis for the existence of a memorandum or understanding is Law Number 24 of 2000 concerning International Treaties. In Article 1 letter a of the Treaty Law, the definition of international agreement is stated, namely "Agreement in a certain form and name that is regulated in international law which is made in writing and creates rights and obligations in the field of public law."

Furthermore, in the explanation of the international treaty law, it is stated that the international agreement referred to in this law is that every agreement in the field of public law is governed by international law and made by the government with other countries, international organizations, or international legal subjects. .

In practice, international agreements can be compared to treaty, convention, agreement, memorandum of understanding, protocol, charter, declaration, final act, arrangement, exchange of notes, agreed minutes, summary records, verbal process, *vivendi mode*, and letter of intent.

In general, the form and name of the agreement indicate that the material regulated by the agreement has only different levels of work weight. However, legally these differences do not reduce the rights and obligations of the parties contained in an international agreement. The use of a particular form and name for international treaties basically shows the wishes and intentions of the parties involved and the political impact on them. If seen from the names, then the memorandum of understanding made between two or more countries is included in the category of international agreements so that in its implementation international principles apply.

## **FORM AND STRUCTURE OF A MEMORANDUM OF UNDERSTANDING**

The form of a memorandum of understanding made between the parties is written. The substance of the memorandum of understanding has been determined by both parties. Structure and or composition of a memorandum of understanding. Before formulating a structure regarding the memorandum or understanding, what must be seen in the substance of the memorandum of understanding made by the parties. Based on the substance of the memorandum of understanding, a structure for the memorandum of understanding can be formulated. The structure of the memorandum of understanding consists of:

1. Title from memorandum of understanding
2. Opening a memorandum of understanding
3. Parties making a memorandum or understanding
4. The contents or substance of the memorandum of understanding agreement
5. Closing and
6. Signature of the parties.

Thus, a memorandum of understanding is a form of agreement that can be categorized as a pre-contract or preliminary agreement which will later be followed and spelled out in another agreement that regulates it in detail.

The main characteristic of a memorandum of understanding is as a basis for making contracts in the future, the contents are short and have a certain period of time.

## **DURATION OF MEMORANDUM OF UNDERSTANDING**

The memorandum of understanding made by the parties has determined the time period for the memorandum of understanding to be valid, depending on the agreement of the parties. Some have set a period of six months and some have set a period of time for a memorandum of understanding to be valid for one year and that period can be extended.

## **LEGAL STRENGTH MEMORANDUM OF UNDERSTANDING**

Various views emerged in the practice of addressing the existence of the memorandum of understanding. On the one hand, there are those of the view that the memorandum of understanding is legally binding, but on the other hand, there are those who are of the view that the memorandum of understanding is not binding because of its pre-agreement nature. Memorandum of Understanding as a gentlemen agreement, a memorandum of understanding is not legally binding and the party that denies the memorandum of understanding cannot be sued in court. As a moral bond, if there are parties who deny the memorandum of understanding, their reputation will fall among the business community. The binding strength of a memorandum of understanding as a gentlemen agreement cannot be aligned with an agreement in general even though a memorandum of understanding is made in the strongest form such as even a notary deed. From a formal juridical aspect, the Memorandum of Understanding does not have a special position in an agreement. This means that the Memorandum of Understanding is not a formal requirement that determines the validity of the agreement. Even a memorandum of understanding is considered as an alternative to collaborating with a separate position from the agreement itself. It is said to be an alternative because in the Memorandum of understanding certain

characteristics are considered different from the agreement so that it is able to provide a breakthrough to foster cooperation without having to risk. In fact, many parties can easily make agreements without a memorandum of understanding. Usually, parties who go this way are those who already know each other or at least trust each other. However, under certain conditions, there are also many parties who feel the need to make a memorandum of understanding before they make an agreement. So, in this case the memorandum of understanding has its own function in an agreement. To make an agreement, a stage is needed where each party needs to know each other, understand, and create cooperation with one another. The attitude of knowing each other and understanding each other is a stage that must be passed before someone cooperates, meaning that all parties who want to work together must go through these stages. It's just that what distinguishes them is how they express the stages whether manifested in a formal form or not. It is said to be formal because it is made in writing and signed by the parties to serve as a memorandum of understanding (Memorandum of understanding).

Some argue that to find out the position of the memorandum of understanding requires an observation of the substance contained in the memorandum of understanding, namely whether the meter contains elements of financial loss, if achievement is not fulfilled so that it can be subject to sanctions or not. If it creates a financial loss that can be subject to sanctions for the parties who deny it, the memorandum of understanding is already positioned as a contract of agreement based on Article 1338 of the Civil Code regarding freedom of contract, that means even though the memorandum of understanding is not explicitly stated as a contract, it will but based on the de facto theory, the existence of the agreement causes a memorandum of understanding to be categorized as a contract. However, if the memorandum of understanding contains only something that is not final in nature, so that another agreement is needed to support it, in this case the position of the memorandum of understanding does not have any effect on the legal strength of an agreement.

Memorandum of understanding as an agreement means when an agreement has been made, whatever its form, whether oral or written, short or long. Complete or only regulate matters of a basic nature, it is still an agreement and therefore has a binding force like an agreement. In this case all the provisions of the articles concerning the contract law can be applied to him. Or if an agreement is only valid for a certain period of time, then binding it only for that specified period of time. And although the parties cannot be forced to make a more detailed agreement as a follow-up to the memorandum of understanding, as long as the memorandum of understanding is still valid, the parties that made the memorandum of understanding are still bound.

In addition, the memorandum of understanding has a very close relationship with the principles of the agreement, including the principle of consensualism, the principle of freedom of contra, the principle of trust, the principle of pacta sunt servanda, and the principle of good faith. Likewise, a memorandum of understanding that already has binding legal force, it has a very close relationship with the principles of the agreement. Basically, the principles of the agreement are not separate from one another, but in various ways they complement and complement each other

#### **LEGAL CONSEQUENCES IF ONE OF THE PARTIES DENIES THE CLAUSES IN THE MEMORANDUM OF UNDERSTANDING**

The denial that occurs in the substance of the memorandum of understanding can be categorized into two parts, namely:

1. Denial of the substance of the memorandum of understanding that does not serve as an agreement
2. Denial of the substance of the memorandum of understanding which has the status of an agreement or default.

For a memorandum or understanding that is not an examination, there will be no sanction for the party who denies it except for moral sanctions. Efforts to solve this problem are more on deliberation to find a solution. There is a moral sanction in this case, for example a party who denies a memorandum of understanding only gets a bad stamp one day if he enters into an agreement again with another party, it is possible that he will no longer be trusted and no one will do business cooperation with him again.

As an agreement is an agreement, if one of the parties denies the clauses in the memorandum of understanding, the other party can file a legal action to the court with a suit of default. Default is a condition where an achievement is not carried out due to an error from one of the parties either due to intent or negligence. The legal basis is Article 1243 of the Civil Code. The forms of default include:

1. Did not perform at all
2. Carry out achievements but not right
3. Carry out achievements but it is too late and
4. Carry out something that is prohibited in the agreement.

Default in an agreement made by one party may give rise to sue for the other party. The right to sue is an effort to enforce the contractual rights of the injured party. This is as stipulated in Article 1267 of the Civil Code that the party to whom the engagement is not fulfilled can choose whether he, if it can still be done, will force the other party to fulfill the agreement, or will he demand the cancellation of the agreement, accompanied by compensation for losses and interest. In the event of default, the agreement is not null and void but must be requested to the judge, on the grounds that even though one of the parties has defaulted, the judge is still authorized to give him the opportunity to fulfill the agreement.

Matters that can be sued in the event of default by one of the parties include:

1. Can request fulfillment of achievements
2. Can only ask for compensation, namely losses suffered because the agreement was not implemented or was late or
3. Implemented but not properly can demand fulfillment of achievements accompanied by compensation for losses suffered as a result of default can request cancellation of the agreement.

If in a contract there are provisions or provisions of articles that determine the amount of compensation to be paid by the debtor if the debtor is in default, then the compensation payment is only the amount stipulated in the agreement, it may not be exceeded or reduced as specified in Article 1249 of the Book of Law. -The Civil Law Law. So it means that there must be a balanced fulfillment of achievements in the agreement. However, if the amount of losses mentioned in the contract is too large, very burdensome and even unreasonable, of course it does not make sense if such a huge amount must be paid by the debtor as a fulfillment of achievement even though he has been proven to have defaulted.

## CONCLUSION

The legal strength of the memorandum of understanding in terms of agreement law is that with the freedom to contract and the fulfillment of Article 1320 of the Civil Code, the legal power of the memorandum of understanding is equivalent to an agreement and can also bind the parties as appropriate to the position and law. The legal consequence is that if one of the parties denies the clauses in the memorandum of understanding, he can be sued with a lawsuit for default and on the other hand, the memorandum of understanding does not have the legal standing and strength of the memorandum of understanding like an agreement, then in the event that the memorandum is being denied of understanding cannot be filed a default lawsuit. A memorandum of understanding is an agreement whose binding strength depends on the matters required by the parties in it.

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