



Legal Aspects of Memorandum of Understanding from the Legal Perspective of Contract Law in the Civil Code

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Article Info	Abstract
Article History Received: 2025-08-05 Revised: 2025-08-06 Published: 2025-09-10 Keywords: memorandum of understanding, law of engagement, preliminary agreement	<p><i>Memorandum of understanding (MoU) or memorandum of understanding is an instrument frequently used in business relations and institutional cooperation in Indonesia, both by private and public legal entities. However, until now the Civil Code has not explicitly regulated the term MoU, thus giving rise to debate regarding its status and binding force from the perspective of contract law. On the one hand, MoUs are often positioned merely as moral bonds or gentlemen's agreements that do not give rise to legal consequences of contract. On the other hand, the view is growing that MoUs that have fulfilled the essential elements of an agreement can actually be treated as binding agreements as agreements under the Civil Code.</i></p> <p><i>This study aims to analyze the legal aspects of the MoU from the perspective of the law of obligations in the Civil Code, specifically in relation to Article 1313, Article 1320, and Article 1338 of the Civil Code, and examine whether the MoU can be qualified as an agreement or only a preliminary agreement. The method used is normative juridical with a statutory and conceptual approach through a literature study of classical and contemporary literature on the law of obligations and the MoU. The results of the study indicate that the position of the MoU is largely determined by the content and intentions of the parties. If the MoU only contains the main points of global cooperation, without any concrete obligations, the MoU tends to be understood as a morally binding pre-contract. However, if the MoU contains essential clauses of the agreement and meets the requirements for a valid agreement, then the MoU can be qualified as an agreement that gives rise to an obligation and is therefore subject to the regime of default and civil liability. Thus, the certainty of the position of the MoU requires careful formulation of the content, as well as the affirmation of the parties' objectives from the beginning of its preparation.</i></p>

I. INTRODUCTION

In the practice of civil legal relations in Indonesia, the use of memorandums of understanding (MoUs) is increasingly prominent as an initial instrument preceding the drafting of a main contract. MoUs are used in business, education, health, investment, and even government-institutional relationships. The flexibility of their form and language makes MoUs considered more flexible, faster, and more practical for documenting the parties'

understanding before being formalized in a more detailed contract (Salim HS, 2011).

However, the Civil Code does not recognize the term MoU. Book III of the Civil Code only regulates general obligations and agreements. Article 1233 of the Civil Code emphasizes that obligations arise from agreements or laws, while Article 1313 of the Civil Code defines an agreement as an act by which one or more persons bind themselves to one or more other persons. This definition positions an agreement as a legal relationship that creates rights and obligations in

the realm of property (Subekti, 2005; Abdulkadir Muhammad, 2004).

From a doctrinal perspective, civil law scholars explain that an agreement is a legal relationship in the field of assets between two or more parties, where one party has the right to performance and the other party is obliged to fulfill that performance (Satrio, 2001; Ahmadi Miru, 2009). Agreements are the main source of agreements, while the form and type of agreement are very open because Book III of the Civil Code adheres to an open system (*aanvullend recht*). This allows the birth of various types of new contracts, including MoUs, as long as they do not conflict with the law, public order, and morality (Abdulkadir Muhammad, 1986; Salim HS, 2007).

Amidst this reality, a conceptual issue arises. Is the MoU merely a morally binding pre-contract with no civil legal consequences, or can it be positioned as an agreement that gives rise to a contract if it meets the valid requirements of an agreement as stipulated in Article 1320 of the Civil Code. Some authors view the MoU as merely a document recording the results of initial negotiations that is only morally binding as a gentleman's agreement (Luthfi, 2017; Mabhan, 2019). This view emphasizes the lack of explicit regulations regarding the MoU, thus considering its binding force limited.

Conversely, there is a school of thought that positions an MoU as a preliminary agreement that, under certain conditions, can be legally binding. If the MoU contains agreement on the main points of cooperation, the parties are competent, the specific objectives are clear, and the reasons are lawful, then the MoU substantially meets the requirements for a valid agreement and can be treated as a contract within the meaning of Articles 1320 and 1338 of the Civil Code (Sudaryati, 2022; Setiyaningsih, 2020; Jamil, 2022). [Research+3Ejournal+3Ejournal+3](#)

Recent research shows that disputes related to MoUs are often triggered by the unclear nature of the MoU itself. On the one hand, the parties outline their obligations and implementation deadlines in the MoU, but on the other hand, when a breach occurs, one party argues that the MoU is merely moral. This uncertainty has the potential to create injustice and disrupt the certainty of business relationships (Yuanitasari, 2020; Mutiara and Suryono, 2024).

In practice, there is also a view that positions the MoU as a form of letter of intent, namely a statement of the parties' intention to enter into a future contract without intending to

create full legal obligations. However, MoUs often contain very detailed clauses, covering the timeframe, division of rights and obligations, and dispute resolution mechanisms. Here, there is an overlap between the MoU's function as a pre-contract and as a contract itself (Makmur, 2023; Sanjaya, 2023).

Based on this background, this paper focuses on two main issues. First, the legal status of MoUs from the perspective of contract law under the Civil Code. Second, the binding force and legal consequences of MoUs are related to the valid conditions of agreements and important principles of contract law. This study is expected to provide theoretical contributions to the development of contract law, while also providing practical guidance for contract drafters and parties frequently using MoUs in civil cooperation.

II. RESEARCH METHODS

This research is a normative juridical legal research that places law as a norm written in legislation, court decisions, doctrines, and agreements. Normative legal research is understood as a process to discover legal rules, legal principles, and legal doctrines to answer the legal issues faced (Marzuki, 2005). The approach used is a statutory approach and a conceptual approach by examining the provisions of the Civil Code, especially Articles 1233, 1313, 1320, and 1338, as well as literature on contract law and MoUs. Secondary legal materials were collected through a literature study of relevant Indonesian civil law books and journals (Soekanto, 2006). The analysis was conducted qualitatively with deductive reasoning to draw normative conclusions regarding the position and binding force of MoUs in contract law.

III. RESULTS AND DISCUSSION

A. The Position of a Memorandum of Understanding in the Civil Code Contract Law System

Terminologically, the term MoU or memorandum of understanding is not found in the formulation of articles of the Civil Code. However, the existence of an MoU can be traced through the general principles and provisions regarding obligations and agreements. Article

1233 of the Civil Code stipulates that obligations arise from agreements or laws. Article 1313 of the Civil Code defines an agreement as an act by which one or more persons bind themselves to one or more other persons. This formulation, although often criticized as too broad, provides room for any agreement that creates a legal relationship in the field of wealth can be qualified as an agreement, regardless of the name used (Subekti, 2005; Abdulkadir Muhammad, 2004).

Several authors of contract law, such as Satrio and Ahmadi Miru, emphasize that in the open system of Book III of the Civil Code, the types of contracts are not strictly limited. In addition to named agreements, there are also unnamed agreements that arise from practice, including various forms of preliminary agreements such as Memorandums of Understanding (MoUs) (Satrio, 2001; Miru, 2009). Thus, even though the term MoU is not explicitly mentioned, conceptually, MoUs can be placed as one form of agreement in the broad sense.

Recent literature on MoUs demonstrates two major schools of thought. First, the school views MoUs as merely morally binding documents. This view is often expressed in writings that position MoUs as gentlemen's agreements not intended to create legal consequences. MoUs merely document the outcome of negotiations and the intention to collaborate, while a truly binding contract emerges later in the form of a master agreement (Luthfi, 2017; Mabhan, 2019; Putri, 2024).

Second, there's the school of thought that views an MoU as a preliminary agreement that can be legally binding, provided it meets the requirements for a valid agreement. Several authors argue that in business practice, an MoU is often used as a preliminary agreement that already outlines the essentials, so that, in substance, the MoU is no longer merely a record of intentions but also includes concrete rights and obligations (Yuanitasari, 2020; Abhyatama, 2025).

Sudaryati, for example, points out that the legal aspects of an MoU from a contractual law perspective can be understood from two perspectives. The first perspective positions the MoU as a moral bond that does not yet give rise to civil legal consequences. The second perspective equates the MoU with an agreement, thus applying the contractual law provisions of the Civil Code, as long as the MoU meets the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code (Sudaryati, 2022).

Article 1320 of the Civil Code itself requires four elements for a valid agreement: agreement between the parties, the capacity of the parties, a specific matter, and a lawful cause. The first two conditions are subjective, while the other two are objective. If an MoU only contains a general statement regarding the intention to cooperate without clarity regarding the object, amount, timeframe, and obligations of each party, the elements of a specific matter and a lawful cause cannot be adequately assessed, so its status is more appropriately understood as a morally binding pre-contract. Conversely, if an MoU contains a detailed description of the object of cooperation, rights and obligations, timeframe, and sanctions, then the MoU is materially no different from a regular contract and has fulfilled the objective requirements of an agreement (Mutiara and Suryono, 2024; Jamil, 2022).

The principle of freedom of contract in Article 1338 paragraph (1) of the Civil Code confirms that the parties have the right to make any agreement they wish, in any form and name, as long as it does not conflict with the law, public order, and morality. This principle is the legal basis for the birth of the MoU as an agreement that is not specifically regulated, but is valid as long as it meets the general requirements. On the other hand, the principle of good faith in Article 1338 paragraph (3) of the Civil Code also binds the parties from the pre-contractual stage, so that even though the MoU is positioned as a pre-contract, the parties are still obliged to act in good faith throughout the negotiation process (Khairandy, 2003; Mutiara and Suryono, 2024).

From a comparative legal perspective, studies of MoUs demonstrate that civil law and common law systems differ in their views on pre-contractual agreements. However, the contemporary trend is to recognize liability at the pre-contractual stage if parties act contrary to good faith, for example, by unilaterally terminating negotiations without justification after the other party has incurred significant costs (Mutiara and Suryono, 2024). This supports the view that even if an MoU is positioned as a pre-contract, it does not mean it is completely free from legal consequences.

Thus, it can be said that from the perspective of Civil Code contract law, an MoU is a form of agreement or at least a preliminary agreement whose existence is valid based on the principle of freedom of contract. Its position as a binding agreement or simply a moral bond is determined by the content and intentions of the parties as

reflected in the formulation of the MoU clause itself.

B. Binding Power and Legal Consequences of Memorandums of Understanding from the Perspective of the Civil Code

A key issue that frequently arises in practice is whether an MoU can create a legally enforceable obligation. The answer depends on whether the valid conditions of the agreement are met and the nature of the clauses contained within the MoU.

Several studies have concluded that an MoU, which only contains a general agreement on the direction of cooperation without specifying concrete achievements, a timeframe, or legal consequences in the event of a breach, is more appropriately positioned as a morally binding letter of intent. In this context, if one party does not proceed to the contract stage, the other party is, in principle, difficult to sue for breach of contract, as there is no sufficiently definite obligation (Mabhan, 2019; Makmur, 2023; Dongoran, 2024).

However, the situation is different if the MoU explicitly regulates the object of the cooperation, the distribution of contributions from each party, deadlines, and even sanctions or compensation if one party violates the agreement. Such an MoU substantially fulfills the elements of an agreement as stipulated in Article 1320 of the Civil Code and reflects a mature consensus. In this situation, the MoU can be considered a binding contract between the parties, so that violations can give rise to liability for breach of contract under Article 1243 of the Civil Code (Sudaryati, 2022; Setiyaningsih, 2020; Sanjaya, 2023).

This position is in line with the view that contract law is not limited to the title or name of a document, but rather to its content and intent. As long as it contains a promise to do or not do something related to assets and the promise can be enforced, then the relationship is considered an agreement within the meaning of civil law (Subekti, 2005; Abdulkadir Muhammad, 2004).

From the perspective of the principle of freedom of contract, parties are free to name their documents as MoUs, memorandums of understanding, or other terms. However, this freedom is limited by the principle of good faith. If the MoU has detailed rights and obligations, and then one party then argues that the MoU is not legally binding simply because it is called an MoU, then such a stance can be deemed contrary to good faith. In such situations, the judge has the authority to go beyond the formality of the MoU's

name and assess its substance to determine whether or not there is a contract (Khairandy, 2003; Mutiara and Suryono, 2024).

Other research also highlights the legal certainty of MoUs under certain circumstances, such as during the Covid-19 pandemic, when many business cooperation MoUs failed to materialize as planned. In this context, Jamil concluded that MoUs that meet the requirements for a valid agreement remain legally binding, so unilateral cancellation without a valid basis can be classified as a breach of contract, unless relevant force majeure can be proven (Jamil, 2022).

From the perspective of protecting the weaker party, especially in MoUs involving businesses and economically smaller parties, the consumer protection doctrine and the principle of balance are worthy of attention. Miru and Yodo emphasize the importance of the principles of balance and fairness in every agreement, so that clauses that are very detrimental to one party can be set aside or declared invalid even if agreed (Miru and Yodo, 2017). This principle is relevant to apply to MoUs containing excessive exoneration clauses or disproportionate risk sharing.

On the other hand, there is a view that maintains that MoUs are non-legally binding gentlemen's agreements, even when their substance is quite detailed. This view stems from classical contract theory, which clearly separates morality from law. Therefore, as long as the parties initially intended the MoU to be merely a record of their intentions, the court should not impose the legal consequences of the agreement on it (Makmur, 2023; Luthfi, 2017).

However, the trend in the development of judicial doctrine and practice, including the influence of principles in both civil law and common law, leads to the recognition of liability at the pre-contractual stage and in documents such as MoUs, especially when one party reasonably believes the other party's promise and has suffered losses due to that trust (Mutiara and Suryono, 2024; Abhytama, 2025).

Thus, the binding force of an MoU is essentially a spectrum. At one end, an MoU is only morally binding if it is merely a general statement of intent without any concrete obligations. At the other end, an MoU can be fully treated as a contract if it contains the essential elements of an agreement and meets the requirements for a valid agreement. Between these two ends lies the possibility of pre-contractual liability based on the

principle of good faith, even if the MoU does not qualify as a primary contract.

For future practice, the implication is the importance of clarity in the formulation of the MoU. If the parties intend the MoU to be non-binding, this must be stated explicitly and consistently with the clauses. Conversely, if the parties intend the MoU to be a binding agreement, the elements of the agreement must be clearly included and formulated. Ambiguity will only lead to disputes, reduce legal certainty, and ultimately harm both parties.

IV. CONCLUSIONS AND RECOMMENDATIONS

First, from the perspective of legal obligations under the Civil Code, a memorandum of understanding (MoU) can be considered a form of agreement, or at least a preliminary agreement, whose existence is valid based on the principle of freedom of contract. Although not explicitly regulated in the Civil Code, the MoU gains legitimacy from the open system of Book III of the Civil Code, which allows for anonymous agreements to be created, as long as they meet the requirements for a valid agreement under Article 1320 of the Civil Code and do not conflict with public order and morality.

Second, the binding force of an MoU is largely determined by the content and intentions of the parties. An MoU that contains only a general statement regarding the planned cooperation is essentially more appropriately understood as a pre-contract or letter of intent that is morally binding, making it difficult to use as the basis for a claim for breach of contract. However, if the MoU contains the essential elements of an agreement, such as a specific object, concrete rights and obligations, a timeframe, and a sanction mechanism, then the MoU can substantially qualify as an agreement that creates a bond and is subject to a civil liability regime. Therefore, for the sake of legal certainty and fairness, the parties and the contract drafters need to carefully formulate and confirm from the outset whether the MoU is intended only as a preliminary understanding or as a fully legally binding agreement.

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