

CHAPTER II

THE DESCRIPTION OF THE TOPIC

2.1 Definition of Contract

According to Steven L Emanuel on *Hukum Kontrak* by DR. Muhammad Syaifuddin, SH., M.Hum. contract can be define as: “*an agreement that law will enforce in some way. A contract must contain at least on promise, i.e. a commitment to do something in the future*” (Emanuel on Syaifuddin, 2012: 16)

Furthermore, he explained that:

The term contract is often used to refer to a written document which embodies an agreement. But for legal purpose, an agreement may be binding and enforceable contract in most circumstances even though it is oral” (Emanuel on Syaifuddin, 2012:16)

From the quote above, it can be understood that contract is a written document pertaining of an agreement.

2.2 Data Analysis

According to “*ketentuan umum*” dalam pasal 38 UU No. 30 Tahun 2004 the anatomy of contract is consist of:

1. *Awal Akta atau Kepala Akta*/ head of contract
2. *Badan Akta*/ main body
3. *Akhir atau penutup*/ Closure

However according to *Hukum Kontrak* by DR. Muhammad Syaifuddin, SH., M.Hum. the anatomy or template is then improvised, while still based on *Pasal 38 UU No. 30 Tahun 2004*, into:

1. *Kepala Akta*/Head of contract/opening
2. *Komparisi/Compareo*
3. *Praemisse*
4. *Definisi*/Definition
5. *Isi Akta*/Main body
6. *Penutup Akta*/Closure
7. *Amandemen*/Amendment

2.2.1 Head of Contract

According to *Pasal 38 ayat (2) UU No. 30 Tahun 2004* the head of contract consist of title, number, hour, day, month and year of the contract, and also the position and along with full name of the notary.

In the contract between NEC and PT Inti the title of the contract is *PERJANJIAN KERJASAMA PENGADAAN JASA SPAREPART MANAGEMENT SERVICE ANTARA PT NEC INDONESIA DENGAN PERUSAHAAN PERSEROAN (PERSERO) PT INDUSRI TELEKOMUNIKASI*

INDONESIA. The number of contract is filled, however since it's considered confidential part, it cannot be published. The rest head of contract is fulfilled in fashion of: *Pada hari ini, Rabu, tanggal Sembilan belas, bulan Juni, tahun dua ribu tiga belas bertempat di Jakarta....*

While the contract between Huawei and PT Inti entitled LOGISTIC SERVICE PROVIDER AGREEMENT, the head of contract is as following: THIS LOGISTIC SERVICE PROVIDER AGREEMENT (this "Agreement") is made on this 1st day of February 2013 (the "Effective Date").

Based on the data above we can see that only contract between NEC and PT Inti that used contract number and detail of day and date, and the city where the contract was made, while the contract of Huawei and PT Inti does not include contract number and lack of day and place, only the date of the contract.

2.2.2 Compareo

Next part is *Compareo*. *Compareo* can be defined as:

"Bagian dari sebuah akta yang berupa deskripsi tentang kapasitas comparant, yaitu orang yang menghadap pada atau hadir di hadapan pejabat umum, sehingga dapat diketahui kedudukan, kewenangan, dan kecakapan comparant dalam atau untuk melakukan perbuatan hukum sebagaimana termuat dalam akta yang bersangkutan" (Soepratigna on Syaifuddin, 201:, 182)

According to Sukandar, compareo can be defined as both parties involved in contract or contract law subject. *“Subjek hukum kontrak merupakan PIHAK PERTAMA dan PIHAK KEDUA (komparisi) yang saling berjanji, yang biasanya secara bersama sama disebut PARA PIHAK” (Soekandar:2011, 44)*

Soekandar also explained that the identity of the comparant must be as detail as possible, which at least consist of:

1. Name (The name of the representative/the law subject/ or the company)
2. Occupation (The occupation of the law subject/ company)
3. Address (The address of the law subject/company)
4. ID card no (The number of law subject's ID card or KTP)
5. The subject is representing/on behalf of who/what company
6. Deciding on what both parties should be called or referred in the contract.

However if one or both parties are company (e.g. limited liability company) then the company will stand alone as a lawful company. The one who sign the contract is arranged by *undang-undang*, e.g. Director is allowed to sign since it's arranged in *“UU No.40 Tahun 2007 Tentang Perseroan Terbatas”*

The use of *compareo* in contract between Huawei and PT Inti can be seen in the following:

BY AND BETWEEN:

Perusahaan Perseroan (Persero) PT Industri Telekomunikasi Indonesia, a company duly incorporated under the laws of Indonesia and having its registered address at JL. Moch. Toha No.77 Kelurahan Cigereleng, Kecamatan Regol Kota Bandung, (hereinafter referred to as the “Service Provider”, which expression shall, where the contract permits, mean and includes its administrators and successors-in-interest) of the one part;

AND

PT Huawei Tech Investment a company incorporated in Indonesia and having its registered office at BRI II building 20th floor, Jl Jend. Sudirman kav 44-46, Jakarta 10210, (hereinafter referred to as “Huawei” which expression shall, where the context permits, mean and includes its administrators and successors-in-interest) of the other part.

The service provider and Huawei shall be collectively referred to as the “Parties” and individually referred to as the “Party” as the context may require:

While the compareo in contract between NEC and PT Inti (content is modified by deleting some sensitive parts due to the parts in question are considered confidential) is:

- I. PT NEC INDONESIA, berkedudukan di Summitmas I Lt. 4, Jl. Jend. Sudirman Kav. 61-62, Jakarta 12190, dalam perbuatan hukum ini diwakili secara sah oleh Presiden Direktur, selanjutnya dalam perjanjian ini disebut sebagai “NEC”.
- II. PERUSAHAAN PERSEROAN (PERSERO) PT INDUSTRI TELEKOMUNIKASI INDONESIA, berkedudukan di Jl. Mohammad Toha nomor 77 Bandung, dalam perbuatan hukum ini diwakili secara sah oleh DIREKTUR UTAMA, selanjutnya dalam perjanjian ini disebut sebagai “INTI”.

Untuk selanjutnya NEC dan INTI secara bersama-sama disebut “PARA PIHAK”, dan secara masing-masing disebut “Pihak”.

From the data above we can see that both *compareo* are slightly different. The contract between Huawei and PT Inti only cover the subject, the address, and the reference call of the parties, while the contract between NEC and PT Inti cover almost all the elements mentioned in the theory.

2.2.3 Praemisse

The third part is Praemisse, which can be defined as: “*To say/said something as introduction*” (Adisubroto, *Prent on syaifuddin*, 2012: 198)

Praemisse can also be defined as part of contract which contain information about background and objectives of both parties.

In Contract between NEC and PT Inti, praemisse (some parts are modified by deleting the sensitive parts) is used as follow:

...dengan terlebih dahulu mempertimbangkan hal-hal sebagai berikut :

- a. Bahwa NEC berkehendak untuk mengadakan Pekerjaan Spare Part Management Service dengan cara Pemilihan Langsung;*
- b. Bahwa INTI telah mengirimkan penawaran administrasi dan Teknis kepada NEC dan setelah diadakan evaluasi klarifikasi NEC menilai INTI mempunyai kemampuan, sumber daya dan kesanggupan untuk melaksanakan pekerjaan Spare Part Management Service sesuai dengan spesifikasi teknis yang dipersyaratkan NEC;*
- c. Bahwa NEC telah menetapkan INTI sebagai pelaksana Pekerjaan Sparepart Management Service;*
- d. Bahwa INTI telah menyatakan kesanggupan untuk melaksanakan Pekerjaan Spare Part Management Service;*

Berdasarkan pertimbangan tersebut di atas, PARA PIHAK sepakat untuk mengikatkan diri satu sama lain untuk mengadakan Perjanjian Pengadaan Jasa Spare Part Management Service, dengan ketentuan dan syarat-syarat sebagai berikut :

The use of praemisse in contract between Huawei and PT Inti can be seen as follow:

Whereas:

- A. Huawei is the manufacturer and supplier of telecommunication equipment and services worldwide;
- B. The Service Provider possesses the requisite capabilities and experience in providing spare parts logistic services worldwide;
- C. Huawei desires to engage the Service Provider and Service Provider desires to accept the appointment as one of Huawei's spare parts logistics services related to handling, delivery and distribution of spare parts including, but not restricted to, collection, purchase, storage, stock management, other handling, preparing for shipment, invoicing in respect of the goods as well as related documentation exchange in accordance with the terms and conditions set out herein.

NOW THEREFORE, in consideration of the promises, covenants hereinafter contained and to be performed by the Parties hereto, and for other good and valuable consideration the adequacy of which is hereby acknowledged by the Parties and the mutual benefits to be derived there from, the representations and warranties, covenants, conditions, and promises contained herein below and intending to be legally bound, the Parties hereby agree as follows:

The data show us that there's not much differences between the two praemise, and both contain background and objectives of the parties regarding the agreement.

2.2.4 Definition

Definition is the next part. According to *Hukum Kontrak*, definition is a part of contract that explained about/the meaning of the specific terms which are contained or used in the contract. It also explained that definition does not always exist in contract, depend on the complexity of contract material. That mean, if the contract made by the parties involved is simple enough, the definition is not necessary.

The contract between Huawei and PT Inti is considered as simple contract by both parties, thus the definition part does not exist in the contract. While the contract between NEC and PT Inti make use of definition, to make it as detail as possible. The definition part of contract between NEX and PT Inti can be seen as followed:

PASAL 1

DEFINISI

- a. *“Perjanjian” adalah perjanjian tertulis tentang Perjanjian Pengadaan Jasa Spare Part Management Service beserta lampiran-lampirannya termasuk perubahannya jika ada, yang telah disepakati PARA PIHAK dan mengatur hubungan hukum serta menegaskan ketentuan dan syarat-syarat yang mengikat PARA PIHAK. Perjanjian ini berisi*

tentang Ketentuan-Ketentuan dan Syarat-Syarat Umum, dimana perubahan dari isi Perjanjian ini hanya dapat dilakukan dalam bentuk amandemen. Ketentuan-ketentuan dan syarat-syarat Umum akan berlaku untuk semua Pekerjaan yang diberikan oleh NEC kepada INTI berdasarkan Perjanjian ini kecuali ada pengecualian yang diatur dalam masing masing Purchase Order.

- b. "Purchase Order (PO)" adalah dokumen yang wajib diterbitkan oleh NEC sebagai dasar pemesanan Pekerjaan dan/atau jasa-jasa dan/atau pekerjaan lainnya kepada INTI berdasarkan Pasal 5 Perjanjian ini yang mengatur kondisi khusus yang hanya berlaku untuk masing masing PO tersebut saja. Adapun kondisi-kondisi lain yang tidak diatur dalam PO maka yang berlaku adalah kondisi yang dicantumkan dalam Perjanjian.*
- c. "Spare Part Management Service" adalah suatu sistem total solusi dalam jasa penyimpanan, manajemen, pelaporan dan Pengangkutan atas Perangkat yang diserahkan dari NEC kepada INTI untuk dipergunakan NEC dengan pedoman pada Standard Operating Procedure dan Key Performance Indicator yang terdapat dalam lampiran 1 Perjanjian ini.*
- d. "Pekerjaan" adalah Penyediaan Jasa Spare Part Management Service termasuk namun tidak terbatas atas jasa transportasi, pergudangan, pengiriman, pengepakan, penyediaan ruang muatan, dan/atau*

kepabeanan dalam negeri untuk angkutan multimoda dalam negeri sebagaimana ditetapkan dalam Perjanjian ini;

- e. *“Perangkat” adalah setiap barang-barang/produk-produk milik NEC baik secara sendiri-sendiri atau bersama sama yang berupa perangkat radio microwave, dengan nama dan spesifikasi teknis sebagaimana tersebut pada Lampiran 4 yang merupakan objek Perjanjian yang diserahkan oleh NEC kepada INTI;*
- f. *“Berita Acara Pemeriksaan dan Penerimaan Barang” adalah Berita Acara yang menyatakan bahwa NEC atau INTI telah menyerahkan atau menerima barang bagus atau rusak dan dinyatakan oleh NEC atau INTI, Berita Acara ini diterbitkan oleh NEC atau INTI dan ditandatangani bersama oleh NEC atau INTI.*
- g. *“Spare Part (SPMS) Form” adalah Berita acara yang menyatakan bahwa INTI atau END USER telah menyerahkan dan atau menerima barang bagus atau rusak dan dinyatakan oleh INTI atau END USER. Spare Part (SPMS) Form ditandatangani oleh INTI atau END USER yang melakukan serah terima barang. Spare Part (SPMS) Form sebagaimana terlampir di Lampiran 7.*
- h. *“END USER” adalah customer atau penerima jasa Spare Part Management Service dari NEC berdasarkan Perjanjian ini.*
- i. *“Berita Acara Rekonsiliasi” adalah Berita Acara hasil perhitungan nilai akhir pelaksanaan Pekerjaan (kecuali pergudangan) untuk akhir triwulan berjalan yang telah diterima oleh NEC, Berita Acara ini*

ditandatangani oleh NEC c.q Senior Manager Customer Service dan INTI c.q Kepala Bagian Implementasi Proyek – 1.;

- j. “Berita Acara Serah Terima (BAST)” adalah dokumen yang menyatakan bahwa Pekerjaan yang dilakukan oleh INTI pada setiap akhir triwulan berjalan telah diterima dan dinyatakan baik oleh NEC berdasarkan Berita Acara Rekonsiliasi, BAST diterbitkan oleh NEC dan ditandatangani bersama dengan INTI;*
- k. “Hari Kalender” adalah hari kalender berdasarkan perhitungan kalender Masehi.*

2.2.5 Main body

The main body of contract is a part that outlines the legal norms and terms of the agreement of the contract as a clear, concrete, and detail contract substance in accordance with the agreement of the parties involved in the contract. According to *Hukum Kontrak*, the points that should be covered in the main body of contract are:

“Perumusan isi akta kontrak sebenarnya merupakan pemilihan norma-norma hukum individual dan konkrit dalam aturan hukum positif (peraturan perundang-undangan yang berlaku) yang mendasari atau berlaku terhadap seluruh fakta, relasi, dan peristiwa hukum yang dikehendaki atau yang tidak dikehendaki oleh para pihak yang membuat kontrak. Sebaliknya, perumusan isi akta kontrak juga dipahami sebagai penyesuaian antara kehendak para pihak yang membuat kontrak dengan norma-norma hukum individual dan

konkrit dalam aturan hukum positif dan mengakomodasi serta memfasilitasi kehendak para pihak yang membuat kontrak tersebut. (Syaifuddin, 2012:193)

Substantively, the main body outline must meet three requirements, as stated in *Hukum Kontrak*, which are *essensialia*, *naturalia*, and *aksidental*.

1. *Essensialia* is the essential mean of the contract that depends on the type of contract. For example, in purchase agreement, it is essential to put a part about the goods and the price. In contract between NEC and PT INTI, the writer conclude that most of *essensialia* are covered in:

1. *PASAL 3 LINGKUP PEKERJAAN* or Scope or work, which cover about the main conduct of the agreement. Generally it outlines the detail about the work in the agreement.
2. *PASAL 4 SYARAT PELAKSANAAN*. It cover about the specific term required to be fulfilled by one of the parties when conducting the work stated in the agreement.
3. *PASAL 5 PROSES PURCHASE ORDER (PO)*. It outlines about purchase order which released by NEC to PT INTI regarding the service/work in the agreement.
4. *PASAL 7 JANGKA WAKTU*. It outlines about the duration of the agreement.
5. *PASAL 8 HARGA PEKERJAAN*. It outlines about the price of the work/service.
6. *PASAL 22 PEMBATALAN PERJANJIAN*. It outlines about the detail of termination of the agreement.

As for agreement between Huawei and PT INTI, most of the *essensialia* are covered in:

1. Scope of Work and Services (1st clause). It outlines about the detail of the work/service in the agreement.
2. Duration of the Agreement (2nd clause). It outlines about the duration of the agreement.
3. Price of the Agreement (6th clause) It outline about the price and the payment of the service.

2. *Naturalia* is provisions of the law which can be included on the contract. If both parties do not include the term in the contract, the contract itself still legitimate and using the provisions from *undang-undang* as the reference. In other word, If the parties involved in the contract did not include some term in *Naturalia* element, then it will be complemented by *Undang undang*. In agreement between NEC and PT INTI, most of the *Naturalia* element are covered in:

1. *PASAL 9 CARA PEMBAYARAN*. It outlines about the detail of payment of the work/service.
2. *PASAL 16 PENGANGKUTAN DAN GUDANG*. It outlines the detail regarding transport and storage/warehouse.
3. *PASAL 18 KERUSAKAN DAN/ATAU KERUGIAN*. It outlines the detail about the loss or damage of the goods.

4. *PASAL 19 SERAH TERIMA PERANGKAT*. It outlines the detail of how the goods will be handover to the client after the work is done.
5. *PASAL 22 PEMBATALAN PERJANJIAN*. It outlines the detail of termination of the agreement before the duration of the agreement completed.

Naturalia element in the agreement between Huawei and PT INTI is covered in:

1. Liquidated Damages, Liability and Indemnity (4th clause). It outlines the detail of liability and indemnity of one party or both parties including the detail regarding the damage, goods, warehouse and the transport.
2. Termination of the Agreement (5th clause). It outlines how the agreement can be terminated halfway along with the consequence.
3. *Aksidentalialia* element is conditions that should not exist in the contract, but may be included as there are interests of one or both parties. In other word, it's a complement which is included in the contract because of interest of one or both parties. Example of clauses in the agreement between NEC and PT INTI that cover the *aksidentalialia* element are :
 1. *PASAL 15 LAPORAN*. It outlines about the weekly and monthly report that must be made by PT INTI to NEC during the valid duration of the agreement.

2. *PASAL 20 PERHITUNGAN AKHIR PEKERJAAN (REKONSILIASI) DAN SERAH TERIMA PEKERJAAN*. It outlines about the reconciliation over the price of the agreement quarterly.
3. *PASAL 24 PERAIHAN HAK MILIK*. It outlines about the property rights.

As for *Aksidental* element in the agreement between Huawei and PT INTI, it covered in:

1. Intellectual Property Rights (10th clause). It outlines about the property rights
2. Assignments and Sub-Contracting (11th clause) It outlines regarding sub-contracting other as the third parties who work for service provider.

2.2.6 Closure

Closure is the last part of the contract which outlines that the contract is given the seal and signed by both parties that involved in the contract. According to *Hukum Kontrak*, there are four elements of the closure in the contract:

1. *Tempat pembuatan akta* or the place where the contract is made. It must be stated the city or village name where the contract is made if it's not stated in the head of contract.

2. *Penanggalan akta* or the date of contract. It must be stated correctly when the contract is made if it's not stated in the head of contract.
3. *Identitas saksi* or witness identity. The witness, according to *Pasal 1905 KUH Perdata*, *Pasal 169 HIR* and *Pasal 308 RBg* need to be at least 2 person, and according to *Pasal 40 ayat (2) UU No.30 Tahun 2004*, witness required to:
 1. At least 18 years old or married.
 2. Proficient in legal acts.
 3. Understand the language used in the contract.
 4. Able to sign.
 5. Do not have a blood or marriage relationship with the notary or both parties involved in the agreement

It is not necessary to have witness however if it's an underhand agreement, or an agreement that made without the notary present as stated in *Pasal 1874 ayat (2) KUH Perdata*.

4. *Pemateraian Akta* or contract sealing. It's important to have the contract sealed by using *materai* as if a document is without *materai*, legally, it's not legitimate. It's based on:

"...pembuatan dokumen yang tidak disertai pelunasan bea materai, berakibat hukum para pejabat dilarang memperhatikan, mempertimbangkan, melekatkan pada aktanya atau putusannya,

menyebut, mengutip, menyalin, atau memberi catatan di atasnya”
(Soemitro on Syaifuddin, 2012: 200)

5. *Tanda tangan* or sign. It is to give a sign or name which is used by the signer.

In the agreement between the NEC and PT INTI, the closure or closing of contract is as followed:

Demikian Perjanjian ini dibuat dengan itikad baik untuk dipatuhi dan dilaksanakan oleh PARA PIHAK.

Signed and stamped by both party and sealed with *materai* worth of 6000 Rupiahs.

While on the agreement between Huawei and PT INTI, the closure is as followed:

IN WITNESS WHEREOF, The Parties hereto have caused this Agreement to be duly executed by their respective officers or representatives on this 1st day of February 2013.

From PT INTI part, signed by President Director for and on behalf of PT INDUSTRI TELEKOMUNIKASI INDONESIA in the presence of Marketing Director. For Huawei part, signed by Head of Indonesia Procurement Dept. for and behalf of PT HUAWEI TECH INVESTMENT in the presence of CEG. Signed, stamped, and sealed with *materai* worth of 6000 Rupiahs.

From data above, we can see that on the agreement between NEC and PT INTI, it lack of the date, the place and witness. The date and the place is absent since it already stated in the head of contract/opening, thus it still acceptable. Regarding the absent of witness part, it's already stated that the presence of witness is not necessary if it's an underhand contract or contract without the presence of notary. While the contract between Huawei and PT INTI filled all criteria for the closure.

2.2.7 Amendments

According to *Hukum Kontrak*, the definition of amendments is:

“Perubahan syarat-syarat dan norma-norma hukum dalam akta kontrak disebut amandemen atau addendum, maksudnya perubahan dalam arti penambahan, penyempurnaan, pengurangan atau penghapusan terhadap syarat-syarat dan norma-norma hukum dalam akta kontrak yang telah ditandatangani dan mengikat secara yuridikal bagi para pihak yang membuat kontrak” (Syaifuddin, 2012: 205)

In other word, it is to change something in the signed contract with the consent of both parties.

Regarding amendments, the agreement between NEC and PT INTI is using:

PASAL 32

LAIN LAIN

- 1) *Setiap perubahan isi Perjanjian ini termasuk lampirannya akan mengikat apabila dinyatakan secara tertulis dan disetujui oleh PARA PIHAK dengan jalan membuat dan menandatangani Amandemen terhadap Perjanjian ini, amandemen tersebut merupakan bagian yang tidak dapat dipisahkan dan mempunyai kekuatan hukum yang sama dengan Perjanjian ini.*
- 2) *Segala ketentuan dan syarat-syarat dalam Perjanjian ini berlaku serta mengikat bagi pihak-pihak yang menandatangani, pengganti-penggantinya dan mereka yang memperoleh keuntungan dari padanya.*
- 3) *Perjanjian ini dibuat dalam rangkap 2 (dua) asli masing-masing sama bunyinya di atas kertas bermaterai cukup serta mempunyai kekuatan hukum yang sama setelah ditandatangani dan dibubuhi cap perusahaan PARA PIHAK.*

As for the agreement between Huawei and PT INTI, regarding the amendments is covered in:

21. Amendments

21.1 No changes, alterations, amendments, variation or modifications hereto shall be effective unless made in writing and executed by the authorized representatives of both Parties.

From the data above we can see that in both agreements amendments can be made if any change is inevitable by the consent of both parties involved in the agreement. The different between both agreements is only that in the agreement between NEC and PT INTI, the outlines about amendments is in others clause/ *Pasal 32 Lain-lain* while the agreement between Huawei and PT INTI the clause regarding amendments is on their own. Regardless the position of the clause, as long as there's an outline regarding the amendments, it's legitimate.