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SEMA 3/2023: Interpretation on the Validity of a Contract Executed Without an Indonesian Language Version

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One Asia Lawyers Indonesia Office

Koji Umai, Lawyer (Japan)
Mohammad Irham, Lawyer (Indonesia)

1. Introduction

On December 29, 2023, the Supreme Court issued Circular Letter No. 3 of 2023 ("SEMA 3/2023") expressing its opinion on the relationship between the Indonesian language and the validity of contracts involving Indonesian parties. The opinion is as follows:

> *"[The fact that] Indonesian private institutions and/or individuals enter into contracts with foreign parties in foreign language without it being accompanied by its Indonesian translation cannot serve as a ground to cancel the contract, except where it can be proven that the absence of an Indonesian translation was due to a party acting in bad faith."*

This opinion was issued amidst uncertainty about whether a contract is null and void, which began after the West Jakarta District Court ruled in June 2013 that a loan agreement executed only in English without an Indonesian language version was null and void because it violated Article 31(1) of Law No. 24 of 2009 on the National Flag, Language, Emblem and Anthem (the "Language Law"). This decision was made by the Court of Appeal in May 2014 and by the Supreme Court in August 2015.

For reference, Article 31 of Language Law states:

> *"1. Indonesian language must be used in a memorandum of understanding or an agreement involving a state agency, a government institution of the Republic of Indonesia, an Indonesian private entity or an Indonesian individual.*
>
> *2. Memorandum of understanding or agreement referred to in paragraph (1) that involves a foreign party may also be written in the national language of the foreign party or in the English language."*

2. Legal Reasoning

The problem with SEMA 3/2023 is that there is no explanation of how they came to this conclusion, which means that everyone is left to figure out for themselves whether their opinion makes sense or not. However, if we are to try to figure out the Supreme Court's reasoning, we believe it all comes down to the interpretation of Article 1320 of the Indonesian Civil Code, which provides four conditions for a valid contract.

The conditions are:

1. [there is] agreement of the parties to bind themselves;
2. [the parties have the] capacity to enter into an agreement;
3. [there is] a certain subject matter; and
4. [based on] a cause that is not prohibited.

The first two conditions are "subjective" conditions (as they relate to the subjects or parties) which, if a party does not meet one of them, the other party may ask a court to cancel the agreement. The last two conditions are "objective" conditions (as they relate to the objects), and if an agreement fails to meet any of them, the agreement is deemed never to have existed (null and void).

The fourth condition is at issue here. Article 1337 of the Civil Code explains that a cause is prohibited if it is prohibited by law or if it is contrary to morality or public order. But what is the meaning of a "cause"? This is an example of something that is lost in translation. Prominent legal scholars have interpreted "cause", which is a direct translation of *"oorzaak"* in Dutch, to mean the substance of the agreement. In other words, this condition does not concern the form of the contract (i.e., whether an agreement must be in writing, in the form of a deed, in a particular language, and so on). Therefore, a court should not declare an agreement null and void because the agreement does not comply with the formal requirements of the Language Law based on Article 1320(4) of the Civil Code.

This leads us to the ambiguous bad faith exception in the Supreme Court's opinion. Good faith in Indonesian law is a general principle of law. Its meaning is still very unclear, although people do have a sense of what it means. In the context of agreements under the Civil Code, the reference to good faith is limited to Article 1338, which requires agreements to be implemented in good faith. Therefore, the inclusion of the bad faith exception by the Supreme Court is confusing because there is no reference to good faith or bad faith when it comes to determining the validity of an agreement. The only logical assumption is that perhaps the Supreme Court is referring to the interpretation of the first condition of Article 1320. Article 1321 provides that there is no consent if it is given by mistake or obtained by force (duress) or fraud. Perhaps the Supreme Court is concerned about a type of fraud where a foreign party deliberately only prepares a contract in a foreign language to induce an Indonesian party to enter into a contract that the latter does not fully understand. In any case, at this point we cannot know for sure whether this is what the Supreme Court is concerned about or not.

3. Practical Implication

Frankly speaking, SEMA 3/2023 will not change the current position and practice of most foreign companies and law firms operating in Indonesia. Unlike the Language Law, which is legally binding as a positive law, any circular letter of the Supreme Court does not have any binding force because its role is only to provide guidance to all judges within the jurisdiction of the Supreme Court. Even then, it is not binding on those judges. This means that a judge considering a particular case may adopt his or her own interpretation of the language law that completely ignores the opinion in SEMA 3/2023. Even the Supreme Court itself may take a different position from its own previous opinion expressed in a circular letter. Therefore, it is our opinion that an Indonesian version of a contract should be prepared, especially for important contracts.

<Authors>

Koji Umai

One Asia Lawyers Indonesia Office

Lawyer (Japan)

Koji Umai spent more than 7 years working at a law firm in Japan where he was involved in various corporate affairs. He also had previous experiences handling international matters in civil affairs, real-estate, insolvency, and criminal cases.

In 2018, he continued his study at the Singapore Management University, where he obtained his Master's Degree in Law (LL.M) with specialization in Cross-Border Business and Finance Law in Asia. After finishing the study, he spent sometime at a major law firm in Singapore and finally join One Asia Lawyers.

He is currently involved in advising a company expansion strategy based on the latest revisions of regulations and laws, legal follow-up, contracting, labor, legal affairs, various compliances and responding to conflicts after entry into South East Asian jurisdictions especially Indonesian market.

koji.umai@oneasia.legal

Mohammad Irham

One Asia Lawyers Indonesia Office

Lawyer (Indonesia)

Irham has extensive experience advising international clients on mergers and acquisitions, co-investments, greenfield investments, corporate matters and general commercial transactions. He is known for his ability to resolve issues that arise in multi-jurisdictional transactions and to provide pragmatic solutions that meet the needs of his clients.

Prior to joining One Asia, Irham worked as in-house counsel for a prominent Japanese multinational manufacturing company, where he was responsible for mergers and acquisitions projects, responding to ESG-related requirements, compliance with personal data protection laws and requirements, and various commercial transactions globally. He was also previously associated with SSEK, a law firm in Indonesia, where he advised multinational corporations on greenfield investments, co-investments, mergers and acquisitions, energy, mining, general corporate, employment and immigration matters. He is fluent in Japanese, English and Bahasa Indonesia.

mohammad.irham@oneasia.legal