

Implication of Supreme Court Circular Letter Number 3 Year 2023 Towards Foreign Language Contract

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Article Info

Received: 2024-08-08

Revised: 2024-09-10

Accepted: 2024-11-20

Keywords: Null and Void,
Cancellation, Contract, Foreign
Language Contract

Abstract

The obligation to use the Indonesian language in contracts involving Indonesian private institutions and Indonesian citizens, as stipulated in Article 31 of Law No. 24 of 2009 on the Flag, Language, and State Emblem, and the National Anthem, in conjunction with Presidential Regulation No. 63 of 2019 on the Use of the Indonesian Language, has sparked various implementation issues. Several court cases have declared contracts made in a foreign language without an Indonesian translation null and void, while others have been upheld. In response to these issues, the Supreme Court of the Republic of Indonesia issued Supreme Court Circular No. 3 of 2003, which essentially states that contracts drafted in a foreign language without an accompanying Indonesian translation cannot be grounds for annulment unless it can be proven that the absence of an Indonesian translation was due to bad faith by one of the parties. This research examines the regulation and status of a Supreme Court Circular within the Indonesian legal system and the legal implications arising from the issuance of SEMA No. 3/2023 on contracts involving foreign parties that are made without an Indonesian translation. This study employs doctrinal research methods, using document studies with secondary data, and utilizes descriptive-analytical research specifications, analyzed through qualitative methods. The findings show that SEMA No. 3/2023 is not a piece of legislation within the hierarchy of laws but is an internal policy regulation (beleidsregel) that applies

only within the internal scope of the judiciary, serving as a guideline for judges and justices in court rulings. The presence of SEMA No. 3/2023 creates legal uncertainty as it conflicts with Article 31 of Law No. 24/2009 and Article 26 of Presidential Regulation No. 63/2019, rendering contracts involving Indonesian private institutions and Indonesian citizens made without an Indonesian translation null and void.

1. Introduction

The obligation to use Indonesian in contracts involving Indonesian citizens raises pros and cons in its application. It is not uncommon that a contract, especially a contract involving foreign citizens and Indonesian citizens, is made only in a foreign language without being followed by Indonesian translation. This is certainly related to the increasing implementation of foreign investment in Indonesia. Based on statistics from the Ministry of Investment, the contribution of foreign investment in the third quarter of 2023 reached Rp 196.2 Trillion or 52.4%, which grew 16.2% compared to the same period in the previous year.¹ The data shows that there is an increase in transnational relations taking place in Indonesia. The contribution of foreign investment in Indonesia is inseparable from the most important source that gives birth to a business engagement, namely a contract. A contract is an event in which one party promises to another party or the two parties promise each other to carry out a matter.² In relation to an investment transaction or other business activities, in order to achieve legal certainty to guarantee the purposes and objectives, interests of the parties, rights and obligations of the parties, it is necessary to set forth in a contract.

The choice of language is one of the important elements in an international contract. In the event that the language used is unclear or inappropriate, it can certainly cause problems in the future. In practice, it is not uncommon for business activities in which one of the parties involves a foreign party to begin with the signing of a contract made in a foreign language, this is in order to speed up the process of completing the contract, because the language used is more understandable and understood by foreign parties.³ This is a challenge in

¹ Kementerian Investasi/Badan Koordinasi Penanaman Modal, "Hilirisasi Berikan Kontribusi Positif pada Capaian Realisasi Investasi Triwulan III 2023," BKPM.go.id, available at <https://www.bkpm.go.id/id/info/siaran-pers/hilirisasi-berikan-kontribusi-positif-pada-capaian-realisasi-investasi-triwulan-iii-2023>, accessed on 23 February 2024.

² Subekti, *Hukum Perjanjian*, Cet. 6, (Jakarta: PT Intermasa, 2005), 1.

³ Hamalatul Qur'ani, "Perpres Penggunaan Bahasa Indonesia Dinilai Hambat Investasi," Hukumonline.com, available at <https://www.hukumonline.com/berita/a/perpres-penggunaan-bahasa-indonesia-dinilai-hambat-investasi-lt5dd5b821f2d5e/#!>, accessed on 23 February 2024.

international business relations where contracts are made between parties with different mother tongues. Although it cannot be interpreted that contracts made with foreign parties are always made in a foreign language only, there are cases where contracts are only made in a foreign language without being followed by an Indonesian translation.

The use of Bahasa Indonesia has an important role, namely as one of the pillars of maintaining the sovereignty and honor of the Indonesian nation, as stated in the preamble of Law No. 24/2009 concerning Flags, Language, and State Emblems, and National Anthem ("Law No. 24/2009"), which states that language is one of the means of unifying identity, and a form of national existence that symbolizes the sovereignty and honor of the Indonesian state. Furthermore, Article 31 of Law No. 24/2009 basically regulates the obligation to use Bahasa Indonesia in the event of a memorandum of understanding or contract in which it involves state institutions, government agencies of the Republic of Indonesia, Indonesian private institutions or individual Indonesian citizens.⁴ In the event that the memorandum of understanding or contract also involves foreign parties, it is also required to be written in the national language of the foreign party and/or English. This arrangement is reaffirmed in Article 26 of Presidential Regulation No. 63/2019 on the Use of Indonesian Language ("Perpres No. 63/2019") which also emphasizes the obligation to use Indonesian as stipulated in Article 31 of Law No. 24/2009.

The existence of laws and regulations governing the obligation to use Indonesian language has caused multiple interpretations in the community, especially among entrepreneurs and legal practitioners, due to the absence of provisions regarding sanctions if the provisions are violated. The existence of provisions governing the obligation to use the Indonesian language in a contract or contract made by parties, one of which is an Indonesian party and the other party is a foreign party, often causes a dispute due to a violation of the provisions of Article 31 of Law No. 24/2009. Violation of Article 31 of Law No. 24/2009 is often the legal basis used by one of the parties to the contract to submit the cancellation of the contract to the court, on the grounds that there has been a violation of lawful causation, which is an objective requirement for the validity of a contract, as stipulated in Article 1320 of the Civil Code ("KUHPERDATA"). In addition, the reason for the violation of the *halal causa* requirement is often used as a basis by one party who has bad faith intentions, with the aim of avoiding the implementation of its obligations contained in the contract.

The argument for the violation of Article 31 of Law No. 24/2009 in the contract can be found in several cases that have occurred in Indonesia, one of

⁴ Law concerning Flags, Language, and State Emblems, and National Anthem, Law No. 24/2009, LN Year 2009 No. 5035, Article 31.



which is the case between Nine AM Ltd and PT Bangun Karya Pratama Lestari as contained in Decision Number 451/Pdt.G/2012/PN. Jkt.Brt. The case is an example of a reflection of the gap between *das sein* and *das sollen*, where normatively Article 31 of Law No. 24/2009 is very strict in requiring the use of Indonesian in contracts where one of the parties is a foreign party. However, in practice, there are parties with bad faith intentions who take advantage of the absence of Indonesian translation in the contract that binds them to submit a cancellation of the contract, with the intention of avoiding the fulfillment of their obligations to other parties.

Seeing the problems in the level of legal practice as well as foreign investors' concerns about cases of cancellation of contracts on the basis of violations of Article 31 of Law No. 24/2009, finally on December 29, 2023, the Chief Justice of the Supreme Court of the Republic of Indonesia issued Supreme Court Circular Letter Number 3 of 2023 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 as Guidelines for the Implementation of Duties for the Courts ("SEMA No. 3/2023"). SEMA No. 3/2023 explains that Indonesian private institutions and/or individuals who make contracts with foreign parties in a foreign language, without an Indonesian translation, cannot be canceled.⁵ The exception applies if it can be proven that one of the parties acted in bad faith in deliberately omitting the Indonesian translation of the contract. The existence of SEMA No. 3/2023 can be said to be an effort or solution from the Supreme Court of the Republic of Indonesia to answer legal problems related to the cancellation of a contract on the basis of a violation of Article 31 of Law No. 24/2009.

The issuance of SEMA No. 3/2023 in fact does not necessarily solve the existing problems, but on the contrary, the existence of SEMA No. 3/2023 raises new legal problems. This is because SEMA No. 3/2023 is essentially not a statutory regulation, and is not even included in the hierarchy of statutory regulations stipulated in Article 7 paragraph (1) of Law No. 12/2011 on the Establishment of Legislation ("Law No. 12/2011"). Therefore, it is interesting to see how the arrangement and position of the Circular Letter of the Supreme Court of the Republic of Indonesia in the system of laws and regulations in Indonesia, as well as how the legal consequences arising from the issuance of SEMA No. 3/2023 on a contract, which involves foreign parties, but is made and prepared without an Indonesian translation.

2. Research Method

⁵ Supreme Court Circular Letter Number 3 of 2023 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 as Guidelines for the Implementation of Duties for the Courts.



The research method used in this research is doctrinal research method, which is a research that summarizes rules, principles, norms, interpretation guidelines and values by identifying the legal sources studied and followed by interpretation and analysis of the legal sources.⁶ The research method is conducted through literature study to review, analyze, and trace secondary data related to this research. This research uses a statutory approach, namely by analyzing laws and regulations related to the formulation of the problem. The type of data used in this research is secondary data. Secondary data is collected using document study data collection techniques. After the data is collected, the data processing in this research is carried out using a qualitative descriptive method, namely by analyzing in depth, providing descriptions, so that it can be used as a basis for consideration in providing innovation and appropriate solutions.⁷

3. Results And Discussion

3.1. Overview of the Law of Treaties and Foreign Language Contracts in Indonesia

3.1.1. Definition and Legal Requirements of a Contract

A contract is an event in which one party promises to another party or in which the two parties promise each other to carry out a matter.⁸ So that one of the sources of an obligation is a contract because there is a legal relationship between the parties who make the . The definition of a contract can also be found in Article 1313 of the Civil Code which states that a contract is an event in which one or more parties bind themselves to one or more other parties. The definition in Article 1311 of the Civil Code is considered too broad and incomplete because there are weaknesses, namely only related to unilateral contracts, without consensus, too broad and without mentioning objectives.

The parties entering into a contract are free to determine the scope and conditions of the contract, provided that the contract does not conflict with mandatory legal provisions, public order, or morality.⁹ Although the principle of freedom of contract grants parties the liberty to create a contract, it is crucial to adhere to the requirements for the validity of a contract. The validity of a contract is governed by four conditions as stipulated in Article 1320 of the Indonesian Civil Code (KUHPerdata).

⁶ Muhamad Muhdar, *Penelitian Doctrinal dan Non-Doctrinal Pendekatan Aplikatif Dalam Penelitian Hukum*, (Samarinda: Mulawarman University Press, 2019), 9.

⁷ I Made Wiratha, *Pedoman Penulisan Usulan Penelitian Skripsi, dan Tesis*, (Yogyakarta: Andi, 2006), hlm. 155.

⁸ Subekti, *Hukum Perjanjian...*, 1.

⁹ Herlien Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan*, (Bandung: PT Citra Aditya Bakti, 2019), 3.

These conditions include mutual consent between the parties to be bound, legal capacity of the parties to enter into a contract, a specific subject matter, and a lawful cause.¹⁰ These four requirements are categorized into subjective and objective conditions. All four conditions must be collectively fulfilled for a contract to be deemed valid. Mutual consent and legal capacity are subjective conditions, whereas a specific subject matter and a lawful cause are objective conditions.

3.1.2. Obligation to Use Bahasa Indonesia for Contracts under Indonesian Law

The use of foreign languages is one element that is closely related to the formality of making contracts in a country. In the preamble of Law No. 24/2009, it is stated that language is one of the means of unifying identity, and a form of national existence that is a symbol of the sovereignty and honor of the Indonesian state. This shows that the use of Indonesian is a sign of the sovereignty of the Indonesian state so that the use of Indonesian is an obligation. The obligation to use Indonesian in a contract is regulated in Article 31 of Law No. 24/2009. Article 31 of Law No. 24/2009 basically states the obligation to use Indonesian in the event that a memorandum of understanding or is made in which it involves state institutions, government agencies of the Republic of Indonesia, Indonesian private institutions or individual Indonesian citizens.¹¹ In the event that the memorandum of understanding or involves a foreign party, it must be written in the national language of the foreign party and/or English. Based on the provisions in Article 31 of Law No. 24/2009, it is implied that the use of Indonesian is mandatory and the use of foreign languages is additional to the use of Indonesian.

After the issuance of Law No. 24/2009, the Ministry of Law and Human Rights issued Letter of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH.UM.01.01-35 of 2009 concerning Request for Clarification on the Implications and Implementation of Law No. 24/2009 dated December 28, 2009. The letter basically states that private business contracts made in foreign languages, especially English, cannot be canceled or null and void and remain valid because the implementation of Article 31 of Law No. 24/2009 is still awaiting the issuance of a Presidential Regulation to further regulate the matter.¹² In addition, the letter also states

¹⁰ *Kitab Undang-Undang Hukum Perdata, [Burgerlijke Wetboek]*, diterjemahkan oleh R. Soebekti dan R. Tjitrosudibio, Pasal 1320.

¹² Letter of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH.UM.01.01-35 of 2009 concerning Request for Clarification on the Implications and Implementation of Law No. 24/2009 dated December 28, 2009.

that the parties making the can make the in two languages and further regulates in the event of a difference in interpretation, which language will apply. The issuance of the letter appears to be an action from the government to provide a clearer explanation for foreign business actors regarding the application of Article 31 of Law No. 24/2009 by allowing the use of foreign languages other than Bahasa Indonesia to be used in a contract.¹³ Until now the letter has not been revoked, but in the period after the issuance of Law No. 24/2009 and the letter, there have been court decisions that are inconsistent in applying Article 31 of Law No. 24/2009 as will be explained in the next section.

A Presidential Regulation that further regulates the implementation of Article 31 of Law No. 24/2009 has yet to be issued. However, there are several other regulations that regulate provisions related to the obligation to use Indonesian in contracts. One of them, namely Article 26 of Presidential Regulation No. 63/2019, also emphasizes the obligation to use the Indonesian language as stipulated in Article 31 of Law No. 24/2009. The existence of the Presidential Regulation further emphasizes that there is an obligation to use Indonesian in a contract involving state institutions, government agencies of the Republic of Indonesia, Indonesian private institutions, or individual Indonesian citizens. The presidential regulation is consistent with Article 31 of Law No. 24/2009 and does not further regulate the consequences of the use of language in the .

Furthermore, referring to Article 43 paragraph (1) of Law Number 30 of 2004 concerning Notary , which basically also states that the deed is made in Indonesian also indicates that a contract must be made in Indonesian.¹⁴ However, there is an exception that if the confronter does not understand the language used in the deed, the notary is obliged to translate or explain the contents of the deed in the language understood by the confronter. If the parties intend to make the deed in a foreign language, there is still an obligation for the notary to translate it into Indonesian. Therefore, based on all the provisions mentioned above, the making of a contract must be written in Indonesian, in the case of involving foreign parties, the can be made in a foreign language along with an Indonesian translation or in other words, it must be made bilingually.

3.1.3. Problems with the Use of Foreign Language without Indonesian Translation in

¹³ Nadirsyah Hosen, Jeremy J. Kingsley, dan Tim Lindsey, "Lost in Translation: Indonesian Language Requirements and The Validity of Contracts," University of Queensland Law Journal, Vol. 40 (3), 534.

As described in the background section, the rise of foreign investors who invest in Indonesia also includes the birth of business contracts made between foreign investors and their business opponents from Indonesia, either individuals or private legal entities. At the practical level, the use of foreign languages in business contracts is a common thing to be made and used, this is so that foreign parties can more easily understand the contents of the contracts they make. The legal problem that exists in practice is that often the parties to the neglect to translate the foreign language into Indonesian even though the use of Indonesian in a contract is an absolute requirement as stipulated in Article 31 of Law No. 24/2009 jo. Article 4 paragraph (1) and paragraph (2) of Presidential Regulation No. 63/2019. The construction of the norms regulated in the two regulations makes the Indonesian language in a contract in which there are foreign parties clear, firm, absolute, and imperative.

The obligation to use Bahasa Indonesia in contracts involving Indonesian private institutions or individual Indonesian citizens with foreign parties certainly raises problems at the practical level. The obligation to use Indonesian does not mean negating the use of foreign languages in a contract, this can be referred to in Article 31 paragraph (2) of Law No. 24/2009, which essentially regulates that a contract made in Indonesian is also written in the national language of the foreign party or can be in English. Upon close examination, in essence, the regime of Law No. 24/2009 seeks to accommodate legal certainty for parties making contracts, especially foreign parties, where in order to avoid multiple interpretations caused by language differences that exist between the parties, Article 31 paragraph (2) of Law No. 24/2009 is present as a manifestation to avoid legal uncertainty and disputes over the interpretation of clauses in the .

At the practical level, it is often found that a contract is only prepared using 1 (one) language, namely the national language of the foreign party or English. Of course this is a form of violation of Article 31 of Law No. 24/2009. This violation is then used to request the cancellation of a contract that is only prepared in a foreign language, with the aim that the party can avoid the obligation to carry out its obligations in the . This argument is supported by cases that have been decided by the courts in Indonesia. There is one well-known case, *Nine AM Ltd v. PT Bangun Karya Pratama Lestari*, which is a landmark decision of judges in deciding cases related to foreign language contracts.

In West Jakarta District Court Decision Number 451/Pdt.G/2012/PN. Jkt.Brt, the Panel of Judges considered that the loan contract between the Plaintiff and the Defendant was null and void because

it violated Article 31 of Law No. 24/2009 as it was made in English and there was no Indonesian translation.¹⁵ Furthermore, the decision was upheld by the Decision of the DKI Jakarta High Court Number 48/PDT/2014/PT DKI and the Decision of the Supreme Court of the Republic of Indonesia Number 1572 K/Pdt/2015. The Nine AM Ltd verdict against PT Bangun Karya Pratama Lestari was then also used as the basis for consideration in the Central Jakarta District Court Decision Number 590/Pdt.G/2018/PN Jkt. Pst in the case between Kokos Jiang, et al against Reliance Coal Resources, et al, which basically argued that the made violated Article 31 of Law No. 24/2009 and based on the Nine AM Ltd verdict against PT Bangun Karya Pratama Lestari. The Panel of Judges then stated that the in the case was null and void and there was no appeal against the decision.¹⁶

There is another case, namely the case contained in the Amlapura District Court Decision Number 254/Pdt.G/2019/PN Amp between Alexander William Ford, as the Plaintiff against Man Lee Ford Cheung, as the Defendant.¹⁷ In the decision, the Plaintiff argued that there was a Debt and Credit made between the Plaintiff and the Defendant where the was only made in English without Indonesian translation. The Plaintiff argued that the violation of Article 31 of Law No. 24/2009 resulted in the becoming null and void in accordance with the provisions of Article 1335 Jo. 1337 of the Civil Code. In its reasoning, the Panel of Judges of the Amlapura District Court stated that the Defendant made a good faith effort to perform its obligations under the . Furthermore, in relation to the Panel of Judges' consideration of the argument that there was a violation of Article 31 of Law No. 24/2009, the Panel of Judges was of the opinion that the violation of Article 31 of Law No. 24/2009 was not a violation of the objective validity of the as referred to in Article 1320 of the Civil Code.

Additionally, there is also the case of Dendy Kurniawan versus PT Kone Indo Elevator in the Central Jakarta District Court Decision Number 407/Pdt.G/2017/PN.Jkt.Pst, in which the Plaintiff argued that the absence of an Indonesian translation of the contract rendered the contract invalid under Law No. 24/2009. However, the Panel of Judges completely disregarded this argument. Moreover, the Jakarta High Court also did not

¹⁵ West Jakarta District Court Decision Number 451/Pdt.G/2012/PN. Jkt.Br, *Nine AM Ltd vs PT Bangun Karya Pratama Lestari*, (2012).

¹⁶ Central Jakarta District Court Decision Number 590/Pdt.G/2018/PN. Jkt Pst, *Kokos Jiang, et. al., vs Reliance Coal Resources Private Limited, dkk*, (2018).

¹⁷ Amlapura District Dourt Decision Number 254/Pdt.G/2019/PN Amp., *Alexander William Ford vs Man Lee Ford Cheung*, (2019).

provide any consideration regarding the use of language in the contract and upheld the first-instance court's decision.

The considerations of the Panel of Judges in the Amlapura District Court Decision and the Central Jakarta District Court Decision illustrate an alternative perspective, stating that violations of Article 31 of Law No. 24/2009 do not constitute a violation of the objective requirements of a contract. Based on this argument, it can be understood that Supreme Court Circular Letter (SEMA) No. 3/2023 added the requirement to prove bad faith as a condition for the annulment of a foreign-language contract that lacks an Indonesian translation. This rationale underpins the additional condition for the annulment of a foreign-language contract without an accompanying Indonesian translation in SEMA No. 3/2023, ensuring that such annulment is not solely based on a violation of Article 31 of Law No. 24/2009, considering that these decisions were issued prior to the existence of SEMA No. 3/2023.

The decisions described above indicate various judicial perspectives in resolving cases involving foreign-language contracts without an accompanying Indonesian translation. There are differing opinions or inconsistencies between one decision and another, including discrepancies between rulings at the District Court, High Court, and Supreme Court levels. This highlights the issue of legal certainty regarding foreign-language contracts that are not accompanied by an Indonesian translation.

3.1.4. Invalidity of a Contract

Violations of the conditions for the validity of a contract can result in the contract being voidable or null and void. A contract is voidable if the subjective conditions of the contract are not fulfilled, namely the consent and legal capacity of the parties. If these subjective conditions are not met, one party has the right to petition the court to annul the contract. Consequently, the contract remains binding on the parties until it is annulled through a court ruling. On the other hand, if the objective conditions are not fulfilled, such as involving a specific subject matter and a lawful cause, the contract becomes null and void (*batal demi hukum*). Being null and void means the contract is considered as if it was never made or as if it never existed.¹⁸

The phrases voidable and null and void have significantly different meanings. A contract is voidable when its invalidation requires a request by

¹⁸ Hoyrinissa Mayra dan Dian Puji N. Simatupang, "Akta Dinyatakan Batal Demi Hukum Oleh Pengadilan: Bagaimana Tanggungjawab Notaris?," *Jurnal Kertha Semaya* 10 No. 1 (2021), hlm. 170.

one party to annul the contract.¹⁹ The term "voidable" indicates a condition where the invalidation does not occur automatically but must be requested or petitioned to be annulled. This means that annulment can be sought, including the annulment of a contract. Conversely, the term null and void indicates that something is deemed invalid or unenforceable automatically under the law once the conditions for nullity are met.

In relation to this research, the author specifically refers to one ground for nullity, namely the failure to meet the objective condition of a lawful cause. The condition of a lawful cause, as one of the objective conditions for the validity of a contract stipulated in Article 1320 of the Indonesian Civil Code (KUHPERDATA), is crucial. The violation of this condition results in the contract becoming null and void.²⁰ The legal implication of a null and void contract is that the contract is considered to have never existed, meaning all obligations arising from its performance must be restored to the state prior to the contract.²¹ Furthermore, the legal consequence of a contract being declared null and void is that the parties cannot sue each other in court regarding disputes over the performance of the contract.

The fundamental question is: what constitutes a lawful cause? A lawful cause is generally understood by legal experts as the content or basis of the contract that is not invalidated or made unlawful by law.²² Article 1355 of the Indonesian Civil Code explicitly states that a contract without a cause, or made with a false or prohibited cause, has no legal force. Article 1337 of the Civil Code further elaborates on prohibited causes, essentially stating that a cause is prohibited if it is forbidden by law, contrary to morality, or public order. Although a contract that is null and void is considered as if it never existed or occurred, in practical terms, to ensure legal certainty, its nullity must be based on a court decision with permanent legal force. This requirement has led to numerous court disputes over the annulment of contracts on the grounds of violations of a lawful cause.

3.1.1. The Position of Supreme Court Circular Letters in Indonesian Legislation

¹⁹ Elly Irawati dan Herlien Budiono, *Penjelasan Hukum tentang Kebatalan Perjanjian*, (Jakarta: PT Gramedia, 2010), 4.

²⁰ Subekti, *Hukum Perjanjian*, Cet.23, (Jakarta: Intermasa, 2010), hlm. 20.

²¹ *Ibid*, see also Indi Milatul Aula and Akhmad Rudi Cahyono, "Pembatalan Perjanjian Secara Sepihak Akibat Wanprestasi (Studi Putusan-Putusan Pengadilan dan Perbandingan di Negara-Negara Civil Law)", *Lex Patrimonium* 2 no.2 (2023): 4, <https://scholarhub.ui.ac.id/lexpatri/vol2/iss2/11>.

²² Basuki Rekso Wibowo, "Perjanjian Batal Demi Hukum Karena Melanggar Undang-Undang Bahasa," *Juris and Society: Jurnal Ilmiah Sosial dan Humaniora*, Vol. 3 No. 1 (2023), 8.

Circular letters are instruments of government or state administration that represent a form of policy regulation (beleidsregel).²³ Policy regulations, also known as quasi-legislation, according to Prajudi, are the creation of legal rules by administrative officials authorized to issue guidelines for implementing policies based on statutory provisions, but they are published broadly.²⁴ In practice, circular letters are part of internal documents regulated within each government agency. Frequently, when there is a legal vacuum or unclear regulation in legislation, government institutions issue other legal products to fill this gap, one of which is a circular letter.

One of the judicial institutions with the authority to further regulate matters not explicitly governed by laws is the Supreme Court. According to Article 24A(1) of the 1945 Constitution, the Supreme Court has the authority to hear cases at the cassation level, review regulations subordinate to laws against laws, and exercise other authorities granted by law. Furthermore, Article 79 of Law No. 14 of 1985 on the Supreme Court, as last amended by Law No. 3 of 2009 on the Second Amendment to Law No. 14 of 1985 on the Supreme Court ("Law No. 14/1985"), provides that to ensure smooth judicial processes, the Supreme Court has the authority to regulate matters insufficiently addressed in the law. Moreover, under Article 4 of Law No. 30 of 2014 on Government Administration, all activities conducted by government bodies and/or officials in performing their judicial functions fall within the scope of government administration, meaning legal products issued by the Supreme Court can also be categorized as administrative decisions of the state, particularly by the Chief Justice of the Supreme Court, to enhance the judicial system in Indonesia.

One such legal product is the Supreme Court Circular Letter (Surat Edaran Mahkamah Agung or "SEMA"). SEMA is a form of directive from the leadership of the Supreme Court to the judiciary, encompassing administrative guidelines for court operations.²⁵ This indicates that SEMA is binding only on internal parties within the judiciary in Indonesia, including judges, registrars, and other judicial officers. Since SEMA is internal in nature, its issuance must align with and comply with prevailing laws and regulations. This also implies that circular letters, as policy regulations, serve as operational tools for implementing governance and

²³ Fitriani Ahlan Sjarif dan Efraim Jordi Kastanya, "Surat Edaran Sebagai Instrumen Administrasi Negara di Masa Pandemi COVID-19," *Jurnal Hukum & Pembangunan*, Vol. 51, No. 3 (2021), 790

²⁴ Prajudi Atmosudirjo, *Hukum Administrasi Negara*, (Jakarta: Ghalia Indonesia, 1995), hlm. 103.

²⁵ Henry P. Panggabean, *Fungsi Mahkamah Agung dalam Praktik Sehari-Hari*, (Jakarta: Sinar Harapan, 2001), hlm. 144.

must not deviate from or violate existing laws. Additionally, SEMA, aimed at addressing deficiencies and gaps, forms only a part of procedural law.

As a form of policy regulation, circular letters are not included in the hierarchy of laws and regulations and lack clear binding force, as stipulated in Article 7(1) and Article 8(1) of Law No. 12 of 2011.²⁶ Furthermore, Articles 8(1) and 8(2) of Law No. 12 of 2011 state that certain regulations issued by the Supreme Court are recognized and have binding legal force when mandated by higher laws or established under lawful authority. Although the law does not explicitly clarify the application of the legislative hierarchy, legal practitioners in Indonesia generally agree that lower-level regulations must not contradict those higher up in the hierarchy.²⁷

It is important to note that the regulations referred to in Articles 8(1) and 8(2) of Law No. 12 of 2011 pertain to Supreme Court Regulations (Peraturan Mahkamah Agung or “PERMA”), not SEMA, which is a policy regulation product (beleidsregel). However, SEMA remains legally relevant in practice, often serving as a guide or reference for judicial officers during court proceedings. Litigants frequently refer to SEMA in their arguments.

It should be noted that not all SEMAs qualify as policy regulations. One example is SEMA No. 3 of 1963, which proposed disregarding the Burgerlijk Wetboek (Civil Code) as law, effectively repealing several articles of the Civil Code. Moreover, since SEMAs are not imperative but rather serve as guidelines, it is not uncommon for judges to disregard SEMA in examining cases.²⁸ For instance, in the Tanjungkarang District Court Decision No. 886/Pid.Sus/2023/PN Tjk dated January 18, 2024, affirmed by Decision No. 29/Pid.Sus/2023/PT Tjk, the judges disregarded SEMA No. 4 of 2010 concerning the placement of drug addicts or victims in rehabilitation centers. The appellate judges concurred with the lower court’s reasoning, affirming the district court’s decision. Therefore, the purpose of SEMA as a policy regulation is solely to provide guidance to bodies or officials under the issuing authority. However, its presence also indirectly impacts society. In practice, SEMA is sometimes perceived as legislation²⁹, potentially causing legal uncertainty when a SEMA conflicts with higher regulations.

²⁶ Fitriani Ahlan Sjarif dan Efraim Jordi Kastanya, “Surat Edaran....”, 90.

²⁷ Nadirsyah Hosen, Jeremy J. Kingsley, dan Tim Lindsey, “Lost in Translation.....”, 535.

²⁸ Basuki Rekso Wibowo, “Masalah Bahasa dalam SEMA No. 3 Tahun 2023,” Hukumonline.com, 11 Januari 2024, available at <https://www.hukumonline.com/berita/a/masalah-bahasa-dalam-sema-no3-tahun-2023-lt659f1c6ecf993/?page=1>, accessed on 11 March 2024.

²⁹ Normand Edwin Elnizar, “STHI Jentera: SEMA Bukan Peraturan Perundang-Undangan, Tidak Akuntabel,” Hukumonline.com, 20 September 2023, available at <https://www.hukumonline.com/berita/a/sthi-jentera--sema-bukan-peraturan-perundang-undangan--tidak-akuntabel-lt650a81534a11a/>, accessed on 11 March 2024.

3.2. Implications of Supreme Court Circular Letter Number 3 of 2023 on the Annulment of Foreign-Language Contracts

Before the issuance of Supreme Court Circular No. 3/2023 (SEMA No. 3/2023), there were inconsistencies in court rulings, as previously discussed, and debates regarding the mandatory use of the Indonesian language in contracts. The issuance of SEMA No. 3/2023 by the Supreme Court aims to resolve the issue of the validity of foreign-language contracts created without accompanying Indonesian translations. It is worth questioning whether SEMA No. 3/2023 adequately resolves the controversy surrounding foreign-language contracts. The implications of SEMA No. 3/2023 can be analyzed using parameters set forth in Article 31 of Law No. 24/2009 in conjunction with Article 26 of Presidential Regulation No. 63/2019, as related to the validity of contracts, jurisprudence, and the status of SEMA within Indonesia's regulatory framework.

First, the validity requirements of a contract as stipulated in Article 1320 of the Indonesian Civil Code are cumulative, meaning all these requirements must be fulfilled. Specifically, in this context, the requirement for a lawful cause (*causa*) must also adhere to Articles 1335 and 1337 of the Civil Code, which essentially state that a contract must not conflict with laws, public order, or morality. If the requirement for a lawful cause is violated, the contract is null and void by law, rendering it unenforceable. Article 31 of Law No. 24/2009 in conjunction with Article 26 of Presidential Regulation No. 63/2019 mandates the use of the Indonesian language in contracts involving state institutions, Indonesian government agencies, private Indonesian entities, or Indonesian individuals. While these provisions are ambiguous due to the absence of explicit sanctions for violations, referring back to Articles 1335 and 1337 of the Civil Code, a contract cannot be considered valid if it violates or conflicts with the law. Consequently, contracts that breach Article 31 of Law No. 24/2009 and Article 26 of Presidential Regulation No. 63/2019 are invalid and null and void by law.³⁰

Second, there are court rulings that could serve as landmark decisions or jurisprudence, declaring contracts null and void due to the absence of an Indonesian translation. However, other rulings have declared contracts without an Indonesian translation as valid and binding. In practice, judges are free to decide cases in a way that deviates from established jurisprudence, even though jurisprudence is one of the sources of law.³¹ This inconsistency in applying the law to cases related to foreign-language contracts underscores the need for a resolution to this legal controversy.

³⁰ Nadirsyah Hosen, Jeremy J. Kingsley, dan Tim Lindsey, "Lost in Translation.....", hlm 533.

³¹ *Ibid.*, 546.

Third, SEMA is a form of policy regulation (*beleidsregel*) that is internal in nature and applies solely within the judiciary, serving as a guideline for judges and Supreme Court justices in adjudicating cases. SEMA is not a statutory regulation with general binding legal force. It is not included in the hierarchy of laws and regulations as outlined in Article 7(1) of Law No. 12/2011 or other forms of statutory regulations stipulated in Article 8(1) of the same law. The issuance of SEMA stems from the provisions of Article 79 of Law No. 14/1985, which authorizes the Supreme Court to further regulate matters insufficiently addressed in laws to ensure the smooth operation of the judiciary. There is debate in Indonesia as to whether SEMA is mandatory or can be disregarded.³²

Based on the analysis parameters above, it appears that the issuance of SEMA No. 3/2023 is an effort to close loopholes for bad-faith parties seeking to annul contracts drafted solely in a foreign language. From this perspective, SEMA No. 3/2023 has legal utility. However, from the standpoint of legal certainty, SEMA No. 3/2023 contradicts Article 31 of Law No. 24/2009 in conjunction with Article 26 of Presidential Regulation No. 63/2019. This is because SEMA No. 3/2023 introduces an additional norm: “unless it can be proven that the absence of an Indonesian translation was due to bad faith by one party,” which was not previously stipulated in Article 31 of Law No. 24/2009 or Article 26 of Presidential Regulation No. 63/2019. The additional norm in SEMA No. 3/2023 also conflicts with Articles 1335 and 1337 of the Civil Code, which state that a contract is null and void if it conflicts with the law. Therefore, normatively, the invalidity of a contract should not solely depend on the presence or absence of bad faith from one party.

The issuance of SEMA No. 3/2023 as an additional norm is inappropriate because new norms should be incorporated into statutory regulations within the established legal hierarchy. SEMA No. 3/2023 is a form of policy regulation not included in the hierarchy of laws and regulations and lacks clear binding authority as stipulated in Articles 7(1) and 8(1) of Law No. 12/2011. To avoid legal uncertainty, amendments to Law No. 24/2009 and Presidential Regulation No. 63/2019 should be made instead of issuing regulations or circulars as legal instruments without binding legal force due to their exclusion from the hierarchy of laws in Indonesia.³³ Amending Article 31 of Law No. 24/2009 and Presidential Regulation No. 63/2019 would undoubtedly resolve the controversy surrounding the creation of international contracts.

³² *Ibid.*

³³ Nadirsyah Hosen, Jeremy J. Kingsley, dan Tim Lindsey, “Lost in Translation:..., 552.

The normative conflict created by SEMA No. 3/2023 clearly cannot be justified within Indonesia's legal system. This is due to the strict legal principle of "*lex superior derogat legi inferior*," meaning higher laws override lower laws, or lower laws must not conflict with higher laws.³⁴ As previously outlined, SEMA No. 3/2023 does not fall within the hierarchy of laws and regulations, making its additional norm clearly inappropriate and contradictory to legal principles.

Additionally, the interpretation of bad faith as a basis for annulling contracts under SEMA No. 3/2023 must be further examined. In Indonesian law, there is no definitive parameter for measuring good faith as proof of whether one party to a contract acted in bad faith. Consequently, judicial interpretation varies depending on each case. The principle of good faith is fundamental in civil relations. According to Article 1338(3) of the Civil Code, contracts must be executed in good faith³⁵. In theory, the principle of good faith can be divided into two types: subjective good faith, requiring honesty before the execution of a contract, and objective good faith, requiring the contract's execution to align with propriety or fairness.³⁶ Good faith is presumed to exist, while bad faith must be proven, as referenced in Article 1965 of the Civil Code. This indicates that no definite criteria exist for interpreting good faith and identifying bad faith.

Regarding bad faith, Professor Robert Summers, a legal scholar, categorized bad faith into four types in 1968: bad faith in negotiating and drafting contracts, in executing contracts, in creating and resolving issues in contracts, and in taking corrective actions.³⁷ He further explained that bad faith includes negotiating without a serious intent to reach a contract, abusing privileges to disrupt negotiations, entering contracts without intent to execute them, failing to disclose material facts, and exploiting the weaker bargaining position of another party in a contract.³⁸ Bad faith contrasts with good faith and encompasses acts that serve as the basis for unlawful actions that harm others.

Under SEMA No. 3/2023, bad faith as a condition for annulling foreign-language contracts without an Indonesian translation implies that one

³⁴ Universitas Padjadjaran dan Biro Pengkajian Setjen MPR, Naskah Akademik Rancangan Undang-Undang tentang Majelis Permusyawaratan Rakyat, Cet. 1, (Badan Pengkajian MPR RI: Jakarta, 2018), 106.

³⁵ Civil Code [*Burgerlijke Wetboek*], translated by R. Soebekti and R. Tjitrosudibio, Article 1338 ayat (3).

³⁶ Antari Innaka, Sa'ida Rusdiana, dan Sularto, "Penerapan Asas Itikad Baik Tahap Prakontraktual pada Perjanjian Jual Beli Perumahan," *Mimbar Hukum* 24, No. 3, (2012), 505.

³⁷ Emily Houh, "The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?", *Faculti Articles and Other Publications* 103, (2005), 6.

³⁸ *Ibid.*

party intentionally omitted an Indonesian translation from the outset with malicious intent. As a result, any claim for annulment must prove the other party's bad faith. It must be demonstrated that the absence of an Indonesian translation was due to bad faith for the contract to be annulled.

In addressing SEMA as a guideline for judges in resolving cases, it becomes problematic if judges must refer to SEMA provisions that conflict with higher laws, such as SEMA No. 3/2023. Article 5 of Law No. 48/2009 on Judicial Power implies that judges must consider and understand legal principles and justice values in society. Judges may refer to statutory regulations while considering sociological aspects. Therefore, given the contradiction between SEMA No. 3/2023 and Article 31 of Law No. 24/2009 in conjunction with Article 26 of Presidential Regulation No. 63/2019, judges should rely on these statutory provisions rather than SEMA No. 3/2023. Thus, SEMA No. 3/2023 cannot yet be considered a solution to the controversy over annulling foreign-language contracts lacking an Indonesian translation.

4. Conclusion

The research concluded that SEMA is not included in the hierarchy of laws and regulations as stipulated in Article 7 paragraph (1) and Article 8 paragraph (1) of Law No. 12/2011. SEMA only has the status and position of a policy regulation (*beleidsregel*) that can only apply internally and serve as a guideline for court officials, especially judges who examine and hear a case in court. The issuance of a SEMA is essentially a manifestation of Article 79 of Law No. 14/1985, which in essence is for the smooth implementation of justice, the Supreme Court has the authority to further regulate other matters that are not sufficiently regulated in the law to support the trial process. Therefore, the addition of legal norms related to the cancellation of contracts included in SEMA No. 3/2023 is clearly inappropriate and contrary to legal principles, because SEMA No. 3/2023 is not included in the hierarchy of laws and regulations and contradicts Article 31 of Law No. 24/2009 jo. Article 26 of Presidential Regulation No. 63/2019.

A SEMA cannot be used as a guideline that applies immediately to judges who examine and decide a case, this is because based on Article 5 paragraph (1) of Law No. 48/2009, in addition to understanding the sense of justice that lives in society, in deciding a case, judges must also be based on applicable legal values. This means that the judge in deciding a case must be in accordance with the provisions of the applicable laws and regulations. In relation to the use of Indonesian language in a contract, the provisions in Article 31 of Law No. 24/2009 jo. Article 26 of Presidential Regulation No. 63/2019 is an absolute requirement for the parties making the . If these conditions are not met, the consequence is that the is null and void and has no binding legal force, so that the is considered to have

never existed. Based on this, the legal implications or consequences arising from the existence of SEMA No. 3/2023 actually create uncertainty for judges in deciding a case, especially with regard to the cancellation of a contract caused by the not using or not accompanied by an Indonesian translation. SEMA No. 3/2023 creates legal uncertainty for the parties in a contract so that with the presence of SEMA No. 3/2023, it has not become a solution to the polemic of canceling foreign language contracts that are not followed by an Indonesian translation. SEMA No. 3/2023 creates legal uncertainty for the parties in a contract so that with the presence of SEMA No. 3/2023, it has not become a solution to the polemic over the cancellation of foreign language contracts that are not followed by Indonesian translation and if the mandatory requirement to use Indonesian is not followed, the becomes null and void.

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