AHFP LAW FIRM

Client Update
7 February 2024

CIRCULAR LETTER OF THE SUPREME COURT No.3 YEAR 2023

Guidelines: Specific Discussion on Civil Law Chamber

On December 29 2023, the Supreme Court announced Circular Letter of the Supreme Court No. 3 of 2023 ("**SEMA No. 3/2023**") which in essence sets out a number of guidelines, as follows; (i) The execution of using Indonesian Language in the agreements with foreign parties, (ii) Legal Certainty related to the Creditor in the Bankruptcy and Postponement of Debt Payment Obligations Cases in Indonesia; and (iii) matter with regards to the Disputes in Industrial Relations in particular on the Work Termination.

To navigate clients with the information stipulated in the SEMA No.3/2023, we have pointed out essential information in connection with the abovementioned guidelines, as follows:

1. *Guidelines related to the inconsistency in the implementation of the Law No.24 of 2009 on Flag, Language, National Emblem, and National Anthem **("Language Law")** and Presidential Regulation No.63 year 2019 of the Use of Indonesia Language **("Presidential Regulation"):***

   In essence, SEMA No. 3/2023 provides certainty to tackle an issue that was arose under the implementation of Language Law and Presidential Regulation[1], regarding the validity of agreements using foreign language that are not translated into Indonesian, as there are precedents of the judges that decide that those agreements are null and void by operation of law and others considering that such agreements remain valid.

   In the effort to address such issue, SEMA No.3/2023 regulates that parties engaging in the agreements with civil institution, Indonesian citizens, or foreign parties using a foreign language unaccompanied by Indonesian translation, cannot by itself determine as a ground to annul the contract. There is a condition to this rule; such agreement may be annulled if it can be proven that the reason for the absence of the Indonesian translation is due to the bad faith of one of the parties.

   In addition, the term "bad faith" is not defined in the SEMA No.3/2024, hence provision regulated under the Language Law and Presidential Regulation which deviates from the principle of freedom of contract in Article 1338 will serve a significant role to

[1] Discussing the Flags, Language, and National Emblem, as well as National Anthem stipulates that the Indonesian language must be used in a memorandum of understanding or agreements involving state institutions, government agencies of the Republic of Indonesia, Private Indonesian institutions, or individual Indonesian citizens that involving foreign parties shall also be written in the national language of the foreign party and/or the English language.

determine the "bad faith" [2]. Although we might refer to the interpretation of article 1338 in determining "bad faith" in the agreement, it remains to be seen how much of a role Article 1338 and its precedents will play in the execution to determine "bad faith" under this SEMA No.3/2023.

However, SEMA No.3/2023 specifically refers to the agreement between Indonesian parties and foreign parties. Hence, it is still to be seen whether or not agreements between Indonesian parties only are also subjected to this SEMA No.3/2023.

The introduction of SEMA Number 3 of 2023 may provide a welcomed respite for business actors engaged in agreements involving foreign language within Indonesia. This new set of guidelines aims to harmonize the judicial stance on the validity of foreign language agreements also can facilitate the making of agreements with domestic and foreign parties using one agreed language regardless of the filing of a lawsuit to cancel the agreement by one of the parties by only paying attention to its own interests, which is not based on the contents of an agreement, but only aims to leave its contractual responsibilities. With this SEMA No. 3/2023, the absence of Indonesia language in the agreement will not directly determine that such agreement null and void.

2. *Guidelines to the judges under the Commercial Court with regards to the implementation of Bank's Foreclosed Assets (AYDA) and case handle against petitions for the Apartment and/or Condominium Developers*

2.1. **Bank's Foreclosed Assets (AYDA)**

The regulation regarding AYDA as one of the ways to settle loans and nonperforming loans is stipulated in Article 12A Paragraph (1) Law No.4/2023 and Financial Services Authority Regulations (POJK)[3]. SEMA No.3/2023 strengthen the position of Creditors with regards to the handling of AYDA in the event of bankruptcy or debt suspension, as follows:

(i) AYDA is not considered as a sale and purchase of the collateral, but rather as the voluntary submission of the collateral to the bank for either at or outside an auction to settle the debt;

(ii) The Bank retains the status of separatist creditor as long as AYDA remains unsold. In the event where AYDA is sold and there are outstanding receivables, the bank holds the status of a concurrent creditor;

(iii) The Supervisory Judge relies on the Financial Information Services System (SLIK) to determine the debtor's status.

[2] Article 1338 of the Indonesian Civil Code provides general explanation of good faith (and condition that can be considered to go against good faith principle) which has been applied in several precedents.

[3] In essence, AYDA is the mechanism provided to the Bank to acquire a portion or the entirety of the collateral, whether through auction, contingent upon the collateral owner's voluntary surrender or authorization to sell outside of auction in situations where the debtor customer fails to fulfill obligations to the bank.

In connection with the abovementioned guidelines, it clarifies the positions of debtors and creditors concerning AYDA and offers legal basis to creditors in the event of bankruptcy or non-performing loans to take legal actions against AYDA objects. It also emphasizes that the legal considerations will refer to updated data from the bank to determine the debtor's status available in the Financial Information Services System (SLIK) at the Financial Services Authority (OJK).

2.2. Bankruptcy or PKPU Petitions of Apartment and/or Condominium

In practice, bankruptcy or Postponement of Debt Payment Obligations (PKPU) Petitions of apartment and/or condominium development businesses cases often end up in the Commercial Court. According to Law Number 37 of 2004, the requirements for filing bankruptcy and/or PKPU are two or more creditors, an unpaid past due debt, and can be proven with simple evidence.[4] Article 8 paragraph (4) of Law No. 37/2004 regulates bankruptcy petitions will be granted if proven simply and meet the requirements stated in Article 2 paragraph (1).[5] However, in practice, the bankruptcy and/or PKPU petitions of Apartment and/or Condominium often need *extra effort* to examine those cases. As a result, under SEMA No.3/2023 regulates that such cases shall not be considered as a case that fulfilled requirements for simple evidentiary as regulated above. Consequently, it won't be easy to file a petition against an apartment and/or condominium developer.

Moreover, it is important to note that such provision may not only impact Creditors (Bank and Consumers), but also Debtors as they will no longer be able to voluntarily file bankruptcy and PKPU petitions to the Commercial Court. Therefore, clarity in the legal process for handling these cases is crucial to protect the rights of the stakeholders.

2.3 **Industrial Relations Dispute: Work Termination**

SEMA No. 3/2023 discusses the problem of Indonesian fixed-term employees that are terminated before their contract ends. Termination of employment has been previously regulated in Article 62 of Law Number 13 of 2003 and Article 17 Government Regulation Number 35 of 2021. This SEMA is intended to strengthen the position of workers/laborers, in order to provide equal legal protection for workers/laborers who experience layoffs. Article 62 of Law No. 13/2023 explains that if the employer terminates employment relationship before the period Fixed-Term Employment Agreement (PKWT) ends, or the termination of the employment relationship is not due to the provisions in Article 61 paragraph (1), then the employer must be paid the balance of the contract pay to workers/laborers Article 61 paragraph

[4]Article 222 paragraph (1) and paragraph (2) in conjunction with Article 8 paragraph (4) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

[5] Simple evidence, as related to Article 2 paragraph (1) and Article 8 paragraph (4) of Law No. 37/2004, occurs when the debtor has two or more creditors, there are overdue debts, and they remain unpaid regardless of the amount of the debt.

(1) explains that there are 4 (four) circumstances in which a work agreement can end, namely;

(i) The employee passes away;
(ii) The terms of the employment agreement expire or upon completion of a certain work;
(iii) upon a court decision and/or decision by the Labor Court or Supreme Court that is final and binding; and
(iv) Upon a certain occurrence or situation as stated in the employment agreement, company regulation, or collective labor agreement that results in the termination of the employment relationship.

The regulation regarding termination of employment is also regulated in Article 17 Government Regulation Number 35 of 2021, which explains if the employer terminates the employment relationship before the PKWT period, the employer is obliged to provide compensation pay, the amount of which is calculated based on the PKWT period that has been completed by the workers/laborers.

Under SEMA No.3/2023 provides legal certainty that strengthen the position of the workers/laborers who work based on PKWT, where it regulates that such workers might still receive the balance of the contract and compensation pay in the event that those workers are being terminated before the end of their contract. Whereas, in the previous regulation, workers/laborers were only entitled to one of the balances of the contract pay or compensation pay. With the existence of SEMA No.3/2023, it will guide the relevant Judges to consider such changes in examining work termination disputes, allowing employees to have profitable positions.

KEY TAKEAWAYS

There are several important points that need to be considered from the above discussion. *First*, parties entered into an agreement shall receive benefit as the absence of Indonesian language cannot be used as a reason to determine that such agreement is null and void, enabling the parties to make an agreement more easily using a language that has been mutually agreed upon. This prevents the parties from canceling the agreement only for personal interest with the reason of the difference in interpretation of its meaning. However, Indonesian parties shall be prudent in preparing an agreement since SEMA No.3/2024 only mentions foreign individuals or companies.

Second, with the existence of AYDA provisions, debtors must pay more attention to the guarantee because Creditors can still take legal action as Secured Creditor or as a Concurrent Creditor. Arrangements relating to this AYDA also offer legal grounds to creditors in the event of bankruptcy or non-performing loans to take legal actions against AYDA objects. *Third*, SEMA No.3/2024 determines that petitions of bankruptcy or PKPU against the developer of apartments and/or condominium shall not fulfill the criteria of case bankruptcy and/or PKPU cases. With this approach, related parties shall be prepared with

other mechanism to handle such issues, where those mechanism might be time consume and costly compared to the bankruptcy and/or PKPU settlement.

Fourth, this regulation seeks to protect the interests of the workers/laborers who were terminated with the PKWT period expires, by requiring employers to pay balances from the contract and compensation to workers/ laborers. Therefore, employers must be more careful in dismissing and must pay more attention when recruiting workers with PKWT status so that companies do not suffer any losses from the termination of this employment regulation.

All in all, SEMA No. 3/2023 does not have a higher position or equivalent to the law, nor can it abolish the law. SEMA is only binding in the judicial environment and may become the basis for the judge's decision in resolving court issues. We see that this SEMA gives firmness to the issues that often arise in the event of public civil up to the specificity which in this case provides clarity and detailed guidance regarding the use of language in the formulation of agreements, bankruptcy and PKPU processes, and the process of termination of employment. Therefore, it is important for stakeholders to pay attention to the provisions in this SEMA and to understand its implications. SEMA can be used as a reference in carrying out legal actions in order to maintain compliance with prevailing regulations and prevent unwanted legal disputes.

Best Regards,

AHFP Law Firm

Have any questions related to this issue? Please get in touch with our team to guide you to overcome such an issue.