CHAPTER I

INTRODUCTION

1.1 Background

Dura lex, sed lex. This maxim implies that law is harsh, but it is the law, in plain English, the law shall be proclaimed and enforced regardless of the outcome of the said legal decision.[1] Law *per se* is viewed as a rewarding tool which helps the legal objective, which is to change human behaviour, achieving economic efficiency. Which suggests that the society has their role in enforcing the law to the "ideals of law".[2] Additionally, the author acquiesced that it is important to set forth, the Republic of Indonesia as a unitary State[3] and *rechtsstaat*[4], implicating that the State of Indonesia is a State based on the rule of law.[5] Comprehending that Indonesia is a State of law, based on justice and freedom[6] with the sovereignty vested in the people[7]; Pancasila as the source of all sources of State law[8], are the legal standards that is not bargainable which shall protect the whole people of Indonesia in order to advance general prosperity and develop the nation's intellectual life.[9]

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[1] Aaron X. Fellmeth, et.al, Guide to Latin in International Law, (England: Oxford University Press, 2011)
[2] Fajar Sugianto, *Economic Approach to Law,* (Jakarta: Prenada Media, 2017)
[3] Article 1 Paragraph 1 of the 1945 Constitution
[4] Jimly Asshiddiqie, "GAGASAN NEGARA HUKUM INDONESIA", PN-GunungSitoli. https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf
[5] Article 1 Paragraph 3 of the 1945 Constitution
[6] The Preamble of 1945 Constitution
[7] Article 1 Paragraph 2 of the1945 Constitution
[8] Article 2 of Law No. 12 of 2011 concerning Legislation Making (Lembaran Negara Republik Indonesia Tahun 2011 Nomor 82, Tambahan Lembaran Negara Republik Indonesia Nomor 5234)
[9] The Preamble of 1945 Constitution

With the legal standard established above, it is time to introduce the rationale behind legal civilization from the perspective of sociology law. Fundamentally, humans in nature have an egoistic feature viz., "*oto cosmis*" where they prioritize themselves before others with the desire to pursue survival and life goals. However, it is not possible, and their interests will never be fulfilled without them interacting and collaborating with other humans signifying "cooperation". Hence, interaction is a necessity for humans to achieve their interests in life.[10] Which indirectly connects the fact that it is a requirement to have a legal standard set out by the Government of the State of Indonesia to govern and protect the interaction in the society; giving certainty to a safe, peaceful, and orderly civilization, therefore the goal is more securable. These interactions by humans will then lead to business transactions in the form of Contracts which shall be heavily regulated akin with Investment Law because it is a special industry involving monetary that must be regulated by strict policies.

It is a common knowledge that in conducting business transactions, the goal will be to procure win-win, bringing benefits for the constituent parties, therefore contracts are not only useful but important because it will set forth the rights and obligations agreed by the parties resulting a binding effect between the parties. As provided under Article 1338 of the Indonesian Civil Code, "(1)All valid agreements apply to the individuals who have concluded them as law; (2)Such agreements are irrevocable other than by mutual consent, or pursuant to reasons stipulated by the

[10] Roseffendi, "Hubungan Korelatif Hukum dan Masyarakat Ditinjau Dari Perspektif Sosiologi Hukum", Jurnal Pemerintahan dan Politik Islam, Vol. 3, (2018): 191-193. DOI: http://dx.doi.org/10.29300/imr.v3i2.2151

law; (3)They must be executed in good faith." Article 1338 implies that the agreement will become a law to the parties who have concluded them "*pacta sunt Servanda*", the agreement shall be concluded by mutual consent, and shall be conducted in a good faith "*bona fide"* manner.

Proceeding to the validity of an agreement, the terms for an agreement in order to be valid can be referred from Article 1320 of the Indonesian Civil Code which are as follows:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to enter into an obligation;
3. there must be a specific subject matter;
4. there must be a permitted cause.

When one satisfies the following four conditions, then an agreement can be made with another individual or party. What is unique in creating an agreement is the next principium acknowledged by the Indonesian Legal system namely, "freedom of contract" which grants the freedom to choose who one wants to enter into agreement with, the freedom to determine the cause of the agreement, the freedom to determine the object of the agreement, the freedom to determine the form of agreement, and the freedom to accept or deviate from the optional provisions of the law. However, the principium of "freedom of contract" has its limitations in order to give certainty that all of the party bound to the contract is in

an equal position.[11] In short, the notion on freedom of contract implies that it is permissible to make any agreement as long as it is legally made and the agreement will bind those who make it, hence, the Indonesian Civil Code and other applicable laws only apply if it is not contained in the agreement made.

The principium freedom of contract allows the growth of the formation of trade zones up to cross border trade relations which encourages competition meaning promoting economy growth indirectly. For the cross-border trade relations to take place, there are protections namely the *ius constitutum* that provide certainty to both parties. What is meant by certainty is that there is an understanding of the substance of the agreement under the legal relationship that is bound by the agreement made agreed between both parties. This principium is further in line with the purpose that is provided under Article 23 of the 1945 Constitution namely "to achieve maximum prosperity for the people" because it allows cross-border trade relations to take place in other words, foreign investment has the purpose to increase growth in national economy, improve sustainable economic development, and improve public welfare by bringing economic potential where the foreign funds *per se* is able to bring benefit driving the national economy through investment.[12]

In order to protect the national interest namely the Indonesian parties, the Indonesian Government enacted the Law No. 24 of 2009 on the National Flag

[11] Cahyono, Mahkamah Agung Republik Indonesia, Pengadilan Negeri Banda Aceh Kelas IA, "PEMBATASAN ASAS "FREEDOM OF CONTRACT" DALAM PERJANJIAN KOMERSIAL". https://pn-bandaaceh.go.id/pembatasan-asas-freedom-of-contract-dalam-perjanjian-komersial/, accessed on 20 August 2022

[12] Article 3 Point 2 of Law No. 25 of 2007 concerning Investment (Lembaran Negara Republik Indonesia Tahun 2007 Nomor 67, Tambahan Lembaran Negara Republik Indonesia Nomor 4724)

Language, Emblem, and Anthem on 9 July 2009 as mandated by the 1945 Constitution Article 36C where "Further provisions regarding the flag, language, and coat of arms of the State, as well as to the national anthem are to be regulated by law." The use of language is regulated under the second part of the Law No. 24 of 2009, Article 26 to Article 39.

The Indonesian Language, under the Law No. 24 of 2009[13] Article 1 No. 2, Bahasa Indonesia is stated as the official national language throughout the territory of the Unitary State of the Republic of Indonesia. The Law No. 24 of 2009 is enacted to deal with problems related to the practice of determination and procedures for use the flag, language, and coat of arms of the country, as well as the national anthem while being guided by the product legislation Provisional Constitution of 1950. Moreover, the Law on National Flag, Language, State Symbol, and National Anthem is to guarantee the legal certainty, harmony, standardization, and order in the use of the Flag, Language, State Symbol, and National Anthem. In other words, the Law No. 24 of 2009 is governed to regulate the legal use of Flag, Language, State Symbol, and National Anthem.

The Law No. 24 of 2009 on the National Flag Language, Emblem, and Anthem jo. Presidential Decree No. 63 of 2019 concerning the use of Indonesian Language mandates the use of Indonesian Language to conclude an agreement which is an act of precaution by the Indonesian Government. This act of precaution

[13] Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 109, Tambahan Lembaran Negara Republik Indonesia Nomor 5035)

namely measure is taken in order to ensure that the Indonesian Parties fully understand the contents of the perfected agreement (*das sollen*). Therefore, the importance of the Language Law here is to make certain that the Indonesian parties are not misled by the counterparties. However, the practicality (*das sein*) of the Law No. 24 of 2009 is seen as problematic because the regulation is not used as intended, seen in several precedents, where the original purpose of the Law No. 24 of 2009 *per se* is to protect the Indonesian entities. The author notes that the actions conducted by some of the Indonesian parties by misusing the law of language is against the spirit of the law and immoral as it has an unsettling effect on business in Indonesia that involves foreign investment.

PT. BANGUN KARYA PRATAMA LESTARI v. **NINE AM LTD** case is an example to explain the Language Law issue. The author's attempt on this thesis *per se* is to intimately weigh up on a perfected loan agreement between **PT. BANGUN KARYA PRATAMA LESTARI**[14] **("PT BKPL")**, an Indonesian mining Limited Liability Company domiciled in West Jakarta, versus **NINE AM LTD**[15], an American lender Limited Partnership Company domiciled in Texas 77530 USA. Therefore, the author notes that the scope of this thesis would not be a comparative study but instead the author will do thorough case study.

The dispute between these two companies made an indelible impression on the author due to the consequential factors that potentially may potentially be

[14] Bloomberg, "Bangun Karya Pratama Lestari Pt". https://www.bloomberg.com/profile/company/6083214Z:IJ, accessed on 20 August 2022
[15] Opencorporates, "**NINE AM LTD**". https://opencorporates.com/companies/us_tx/0800270092, accessed on 20 August 2022

detrimental to the Indonesian foreign investment regime in the near future. In fact, this case is classified as one of the landmark cases in the Indonesian Supreme Court Website[16] due to the legal significance given that this case concerns a foreign limited liability company that were aggrieved at the outcome of the West Jakarta District Court Decision PUTUSAN NOMOR 450/PDT.G/2012/PN.JKT.BAR affirmed by the High Court Decision PUTUSAN NOMOR 662/PDT/2014/PT DKI and Supreme Court Decision PUTUSAN NOMOR 1572 K/PDT/2015 with the application of the prevailing Law No. 24 of 2009 Article 31 Paragraph 1 concerning National Flag, Language, State Symbol, and National Anthem. For about 13 years, the positive law in Indonesia, Article 31 Paragraph 1, have mandated Indonesian Language to be used in memoranda of understanding or agreements that involve State institutions, government agencies of the Republic of Indonesia, Indonesian private institutions, or individual Indonesian citizens. The scope of the "agreement" refers to every agreement in the field of public law regulated by international law.[17] Therefore, with reference from the court decision above, when entering into an agreement with an Indonesian person or entity, involving foreign parties, the agreement shall be written in both Indonesian Language and English Language.[18] However, in the event of any conflict, the contract written in Indonesian Language shall be used as reference following the Article 4 Paragraph 6 of Presidential Decree

[16] Putusan Pengadilan Negeri Jakarta Barat Nomor: Putusan No. 450/Pdt.G/2012, pg. 1
[17] Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 109, Tambahan Lembaran Negara Republik Indonesia Nomor 5035)
[18] PT MEDCO ENERGI INTERNASIONAL Tbk. "Language of the Transaction Documents". http://www.medcoenergi.com/files/Offering_Circular/USD%20Bonds%20Offering%20Circular%20400mn.pdf, pg. 37, accessed on 25 August 2022

No. 63 of 2019 concerning the use of Indonesian Language. If there are the existence of agreements which violates Article 31 Paragraph 1, it shall not be enforceable under the Indonesian Law No. 24 of 2009.[19]

The requirement of the said International Contract to be written in Indonesian Language implies "that" level of protection given to the Indonesian Parties giving assurance that the Indonesian Parties fully understand what is under the contract and certainly will not be deluded or mislead by the Foreign Parties. However, this is seen as an issue for the foreign parties, and it is unforgiving when precisely on 6 March 2014, the court ruled that the perfected loan agreement is null and void since there was no Bahasa Indonesian Language version of it. Although the author notes that both parties **NINE AM LTD** and **PT BKPL** have agreed to sign the English version of the agreement, with the evidence of the signed Loan Agreement (English version) presented to the court, nonetheless, the court have decided that they will reinstate each other to the same position they would have been in had the agreement not been entered into. Resulting major loss to **NINE AM LTD** after lending the US$ 4,999,500 to **PT BKPL** from July 2010 – March 2014 [20] "3 years and 8 months" long which questions whether the *judex facti* were taken into the consideration on the notion of justice.[21] The inquiry here would be, whether

[19] Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 109, Tambahan Lembaran Negara Republik Indonesia Nomor 5035)

[20] Putusan Pengadilan Negeri Jakarta Barat Nomor: Putusan No. 450/Pdt.G/2012, pg. 12

[21] Pepy Nofriandi, Mahkamah Agung Republik Indonesia, "Pendekatan Hukum Perdata Internasional Dalam Penyelesaian Sengketa Kontrak Komersial Internasional Berbahasa Asing". https://www.mahkamahagung.go.id/id/artikel/4641/pendekatan-hukum-perdata-internasional-dalam-penyelesaian-sengketa-kontrak-komersial-internasional-berbahasa-asing, accessed on 25 August 2022

the use of Indonesian Language bears a heavier weight than the interest of the perfected loan agreement in performing the said agreement. With reference from the Indonesian Civil Code Article 1239, "Every obligation to do something, or not to do something, if the debtor fails to meet his obligations, is settled by way of compensation of costs, damages, and interests."

The Indonesian Supreme Court's decision on not viewing the regulations in a broad manner in order to make a more comprehensive decision has definite consequences. The decision passively has a further impact to the foreign investment regime and potentially may be detrimental to the Indonesian economic regime in the future. In the investment regime, ease of doing business is not the only presiding factor that attracts investors, but regulations and court decisions are seen as a dominant factor in appealing investors.[22]

The author would like to further add that regulations are seen as a catalyst provided by the government as a support according to Michael Porter[23] which is known as national advantage, provided that, there are four major components when it comes to the Porter Diamond namely: Firm Strategy, Structure and Rivalry; Factor Conditions; Demand Conditions; and Related and Supporting Industries with two other supporting components consisting of chance and government. Adjusting our focus on government as the supporting component *per se*, namely the

[22] Saputra, Andi, Detik News, "Kala Putusan MA Indonesian Bikin Sentimen Negatif Investor Jepang". https://news.detik.com/berita/d-3427698/kala-putusan-ma-indonesia-bikin-sentimen-negatif-investor-jepang, accessed on 25 August 2022

[23] Lars de Bruin, "Porter's Diamond Model: Why Some Nations Are Competitive and Others Are Not", Business-to-you". https://www.business-to-you.com/porter-diamond-model/, accessed on 25 August 2022

government being the authoritarian regime, the office which provided by social contract[24], inherited at birth by every citizen. The government holds a salient position to assist the development of the four aforementioned components which push industries to a higher level of healthy competitiveness with the objective to drive the economy up. In short, the government has the responsibility and authority to draft, enact, and enforce the regulations in order to encourage higher level of healthy competitiveness and drive the economy up.

The provisions of the Indonesian law No. 24 of 2009 jo. Presidential Decree No. 63 of 2019 concerning the use of Indonesian Language cannot be disregarded if contracting with an Indonesian counterparty. This is because if a dispute were to arise between the Indonesian counterparty and the assets is located in Indonesia, the provisions of the Indonesian Law No. 24 of 2009 would be a relevant issue. Furthermore, there is no chance for foreign parties to bring the dispute to the foreign courts unless the agreed dispute resolution clause under the agreement that the foreign court will be used as dispute resolution. The author notes that to execute, claiming of the assets that is located in Indonesia, one will still need decision from the Indonesian court which has permanent legal force[25] (*inkracht van gewijsde*) meaning that the Indonesian court will still play a part in claiming the assets and the respective judges are not obligated to follow the ruling of the foreign courts.[26] In short, judgements of non-Indonesian courts such as Arbitrations are not

[24] BCcampus, "Ethics in Law Enforcement". https://opentextbc.ca/ethicsinlawenforcement/chapter/social-contract-theory/, accessed on 25 August 2022

[25] Article 227 Paragraph 1 (*Conservatoir Beslag*), Herzien Inlandsch Reglement (H.I.R) Reglemen Indonesia yang Diperbaharui (R.I.B)

[26] Lectured by David Holme, Foreign Investment, Zoom Meeting, 4 November 2021, at 8.00 WIB

automatically enforceable in the Indonesian courts. Therefore, when the disputed asset is located in Indonesia, the retrial of the said case must be conducted at the relevant Indonesian court following the Indonesian *Ius Constitutum*.

This case is brought over because the author discerns that the court decision may serve as an important resource in the development of Legal Studies knowledge in Indonesia when in terms of audiences, it is for scholars, academics, legal practitioners, or lawyers. For academic, this decision can be studied and used for research materials, lecture materials, and legal development. For legal practitioners, this decision can be used as a source of notion because practitioners can see the trend of sentencing in a particular case that is relevant for the future case he or she is handling. For scholars, this decision may be used as a spectacle to see the nature and application of the law namely *das sollen* & *das sein*.[27]

The author acknowledges that there is fair share of discussion and exchange of thoughts delegated through the law forums, but the author will contend that it is not adequate considering that this is a major issue. Notably, the Article 31 of Law No, 24 of 2009 jo. Presidential Decree No. 63 of 2019 has the potential to be misused in the future considering it heavily relies on the amount of awareness in the international regime. For the Law No. 24 of 2009 to be in accordance with the vision and mission of the Indonesian State, it is a necessity to evaluate the *das sollen* & *das sein* of the stipulation of the Law No. 24 of 2009, therefore the potential irregularities can be avoided.

[27] Lembaga Kajian & Advokasi Independensi Peradilan, "Dictum Edisi 13: Kajian Putusan Penting". https://leip.or.id/jurnal-dictum-kajian-putusan-penting/, accessed on 25 August 2022

With the given opportunity at hand, the author has the intention to namely increase public awareness about the legal impact of the Law No. 24 of 2009 which may potentially cause losses to the foreign counter parties when misused by the irresponsible parties and the author will bring up the possible solution to the current legal problem by suggesting approaches that may be taken by the Indonesian Government to solve the legal issue.

1.2 Formulation of issues

Based on the background provided above, the author would like to conduct this thesis to answer the following two problems:

1) What is the limitation in terms of the validity of Loan Agreement that is not made in Indonesian Language according to Law No. 24 of 2009 jo. Presidential Decree No. 63 of 2019 in the Case Putusan Nomor 1572 K/Pdt/2015 jo. Putusan Nomor 662/PDT/2014/PT DKI jo. Putusan Nomor 450/Pdt.G/2012/PN.Jkt.Bar?
2) What is the existing legal protection to **NINE AM LTD** in the Case Putusan Nomor 1572 K/Pdt/2015 jo. Putusan Nomor 662/PDT/2014/PT DKI jo. Putusan Nomor 450/Pdt.G/2012/PN.Jkt.Bar?

1.3 Purposes of research

Along with the explanation given in the background and the formulation of issues above, the aims and uses of this case study is to solve the legal issue and also to increase public awareness about the *das sollen* and *das sein* of Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem

with reference from **PT BKPL** v. **NINE AM LTD** Case Putusan Nomor 1572 K/Pdt/2015 jo. Putusan Nomor 662/PDT/2014/PT DKI jo. Putusan Nomor 450/Pdt.G/2012/PN.Jkt.Bar because the law *per se* is consequential and therefore cannot be disregarded if contracting with an Indonesian counterparty.

1.4 Benefits of research

Based on the background and formulation of issues, the potential benefits that will be obtained are:

1.4.1 Theoretical benefits

The author believes that with this research, it will help foreign direct investments in Indonesia given through the implementation of *das sollen* and *das sein* after the case study and also increase the awareness globally on the Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem. The author further hopes that this research can mitigate the legal issue and become the vessel for further development of legal study.

1.4.2 Practical benefits

1. For the Foreign Investors, creating a better Contractual enforcement environment in Indonesia that not only protects the Indonesian nationals but also must be beneficial for the foreign parties in the form of legal protection and legal certainty.

2. For the Author, the research becoming a vessel for implementing the author's and supervisor's core knowledge on Foreign Investors Legal

Protection, Indonesian Contract Law Enforcement, Loan Agreement, and Law No. 24 of 2009.

3. For the Future Academic Researchers, a contribution in development of legal study knowing that the court decision can be studied and used for research materials, lecture materials, and legal development.

1.5 Systematics of writing

The systematics of writing implemented in this thesis which contains a short description of Chapter I to Chapter V:

CHAPTER I: INTRODUCTION

Chapter one will serve as an introductory exposure into the *das sein* in the Indonesian Contract Law Enforcement regarding the use of Language in Loan Agreement namely Law No. 24 of 2009 concerning National Flag, Language, State Symbol, and National Anthem provided with a case example. This chapter will address the legal issues within the Law of Language where it has the potential to be misused by irresponsible parties and will cause losses to the counterparties. Hence, the author has his own hypothesis for this case study namely the current practice of the positive law has negatively impacted the foreign investors in a silent manner and this displeasing practice has the potential to carry on if there is no action taken by the authoritarian regime. Furthermore, the purpose of the research, and the benefits of this thesis will be provided therein.

CHAPTER II: LITERATURE REVIEW

This chapter will provide the theoretical and conceptual legal framework in regard to the legal issue raised in the thesis. Some of the theories include the formulation of Law No. 24 of 2009, the purpose or intent of the enactment of Law No. 24 of 2009 jo. Presidential Decree No. 63 of 2019, the principles of contract law. This chapter will include opinions from experts with regards to the benefit and drawback of the practice of the enacted Language Law.

CHAPTER III: RESEARCH METHODOLOGY

This chapter will establish on the methods of legal research relied on by the author in the analysing of issues. The methods utilized are the type of research, type of data, data analysis technique, research approach, and data analysis intending to analyse the issues raised in the thesis.

CHAPTER IV: RESEARCH FINDINGS & ANALYSIS

This chapter will be utilized by the author to attempt to resolve the issues brought at hand. The primary data with the use to support the secondary data, is accumulated from the interviews and infer from the data presented in the previous chapter. From these deductions, the author's intention is to bring attention towards the practice of Law No. 24 of 2009 which is giving Indonesian business actors chances to exploit the law and cause losses to the contracted counterparty. This chapter will also address on the consequences of contract, interpretation of contract, obligations arising from law, and breach of contract claim in the view of Indonesia Contract Law enforcement.

CHAPTER V: CONCLUSION & RECOMMENDATION

The final chapter will conclude the findings of the previous chapters. In other words, this chapter will give a summary on the limitation and the existing legal protection to **NINE AM LTD** according to Law No. 24 of 2009 jo. Presidential Decree No. 63 of 2019 in the Case Putusan Nomor 1572 K/Pdt/2015 jo. Putusan Nomor 662/PDT/2014/PT DKI jo. Putusan Nomor 450/Pdt.G/2012/PN.Jkt.Bar which creates an indirect cause towards the investment climate.