Commercial

November 2013

# INDONESIAN LANGUAGE IN CONTRACTS - A STRICT REQUIREMENT

## Indonesian Court declares that a contract that is not drafted in the Indonesian language is null and void.

### Overview

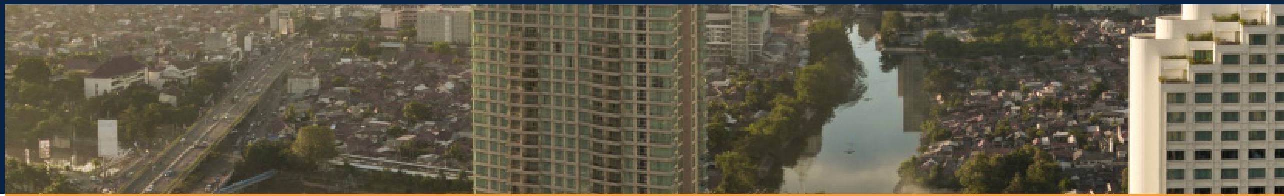
In June 2013, the West Jakarta District Court issued a decision which declared that a contract not drafted in the Indonesian language was null and void[1]. The Court found that the absence of an Indonesian language version of the contract had violated Paragraph 1 of Article 31 of Law 24 of 2009 on National Flag, Language, Emblem and Anthem.

The contract in dispute was a loan contract entered into in 2010, involving an Indonesian borrower and a US lender. Under the contract, the lender agreed to advance certain loan facilities to the borrower. In order to secure the lender's interest, the borrower secured certain moveable assets under *fiducia* security.

### Indonesian language requirement in a contract

As a matter of background, Law 24, which was released in 2009, requires Indonesian language to be used in a memorandum, agreement or contract which involves Indonesian government institutions, Indonesian private entities or Indonesian citizens. This means that any contract with any governing law, as long as it involves an Indonesian party, must be drafted in the Indonesian language, in addition to the foreign language. Law 24 further provides that the implementation of the law will be further stipulated by an implementing regulation, which will be issued within two years after the release of Law 24. We understand that, to date, this implementing regulation has not been released. It is also important to note that Law 24 does not impose any sanctions nor does it stipulate any legal consequences in the event that an Indonesian language version of a contract is not available.

1. The West Jakarta District Court Decision No. 451/Pdt.G/2012/PN. Jkt.Bar dated 10 July 2013.



Shortly after the release of Law 24, the Minister of Law and Human Rights of Indonesia at the time circulated two letters clarifying that the absence of an Indonesian language version of a contract *would not affect the contract's validity*. In issuing this clarification, the Minister made reference to the principle of freedom of contract[2] pursuant to which parties are free to determine the provisions of their contract, including selecting the language. Although the objective of this clarification was to give certain comfort to legal practitioners as well as foreign investors, it remains a question for legal experts as to what extent this clarification can be enforced given it does not serve as law or any form of legislation.

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### The Court's argument

The Court clearly disregarded the clarification and, instead, looked at three main considerations when rendering its decision. Firstly, the Court was of the view that the contract had failed to satisfy one of the elements needed to constitute a valid contract as provided under the Indonesian Civil Code (the ICC).

The ICC requires a valid contract to satisfy the following elements[3]:

1. The parties must consent to enter into a contract.
2. The parties must be capable of entering into a contract.
3. There must be a particular object.
4. There must be a legal cause.

The Court was of the opinion that the absence of the Indonesian version of the contract violated Article 31 of Law 24, which resulted in the contract having an illegal cause. Many legal experts disagree with the Court's approach as, in their opinion, to determine whether a contract contains an illegal cause one must assess the parties' purpose in entering into the contract. In this case, the lender and the borrower entered into the contract so that the lender could advance certain loan facilities and/or provide certain financial assistance to the borrower. The ICC validates such a financing arrangement and therefore, the purpose of the contract should be considered valid.

Secondly, by referring to the illegal cause argument, the Court also declared the contract to be null and void by considering the following:

1. Article 1335 of the ICC, which provides that an agreement without reason, or which has been made on a false or forbidden reason, shall have no effect.
2. Article 1337 of the ICC, which provides that a cause is forbidden, if it is forbidden by the law, or if it is contrary to good morals or public order.

Thirdly, in accordance with Indonesian civil law, the Court considered that the *fiducia* security agreement, or for that matter any type of security agreement, was an accessory to a loan agreement.

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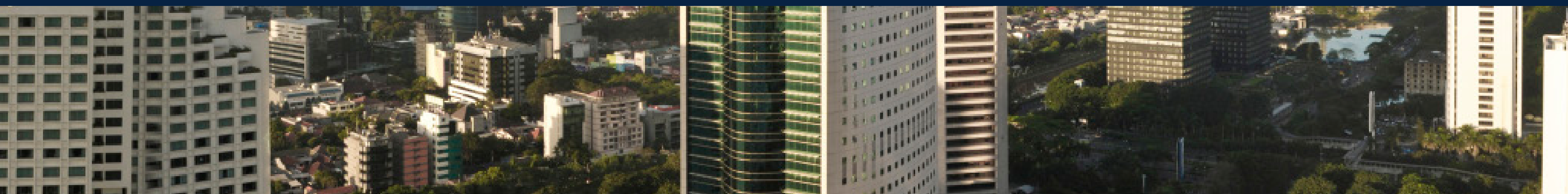
In light of this, the Court then declared that the *fiducia* security agreement was also null and void.

### What should you do?

We expect that the ambiguity regarding the Indonesian language requirement in a contract will persist at least until the Indonesian Government issues another law or legislation which clarifies, or even repeals, the Indonesian language requirement under Law 24. Therefore, it is important for foreign entities, which plan to enter into a contract with an Indonesian party to have the Indonesian draft of the agreement ready prior to signing.

We also appreciate that in certain transactions where the timeline is very short, the practice is that both the foreign and Indonesian parties undertake in writing that they will sign the Indonesian language version of the agreement within a certain timeline. We are of the view that this approach should no longer be considered by foreign parties, especially for high value transactions, as it will open a window of opportunity to the Indonesian party to claim that the agreement is invalid in the absence of the Indonesian language version of the agreement.

2. The principle of freedom of contract is stipulated under Article 1338 of the ICC (as defined).
3. Article 1320 of the ICC (as defined).



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In order to avoid this problem and to ensure the transaction is watertight, the Indonesian version of the agreement should be signed at the same time as the foreign language version. The parties may then of course choose the prevailing language of the agreement in the event that there are any discrepancies between the Indonesian language version and the foreign language version.

Law 24 is silent as to the validity of existing agreements that do not have an Indonesian version, but in light of the Court's recent decision, we would strongly recommend that Indonesian versions of all existing contracts are prepared and signed at the earliest opportunity.

## How can HFW help?

HFW is able to assist with both the drafting and translating of the full range of commercial contracts, whether in Indonesian language or English. One of our team is registered as a sworn translator in Indonesia.

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