# LOST IN TRANSLATION: INDONESIAN LANGUAGE REQUIREMENTS AND THE VALIDITY OF CONTRACTS

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*This article investigates Indonesian laws that require contracts to be in the Indonesian language if a party is Indonesian or an Indonesian entity is 'involved'. It identifies the problems this creates for business arrangements in Indonesia, particularly those involving investors from English-speaking backgrounds. The article begins with an account of relevant Indonesian statutes and regulations before exploring a series of judicial decisions regarding language requirements for a valid contract. It finds that the Indonesian courts have been inconsistent in their application of law in this area, and that this has created significant uncertainty. It then examines the implications of this situation for legal practice, showing that it has led to increased risks and costs for foreign and local businesses. It concludes with two alternative proposals for reform.*

## I INTRODUCTION

*'[The] cardinal virtues of drafting — clarity, precision, and good sense'.*[1]

Contracts always contain some degree of ambiguity, but it is a basic assumption of legal practitioners across the globe that careful and intelligible drafting is essential for a contract to be effective[2] — that is, the wording of the document should reflect contractual negotiations and the intentions of the parties as precisely as possible. One of the key elements of these basic expectations about contractual agreements is choice of language and its use. Where language is unclear or imprecise, problems can easily follow.[3] Where the parties to a contract have a poor understanding of one another's languages, drafting takes place in

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1 Vincent A Wellman, 'Essay: The Unfortunate Quest for Magic in Contract Drafting' (2006) 52(3) *Wayne Law Review* 1101, 1101.

2 Cynthia M Adams and Peter K Cramer, *Drafting Contracts in Legal English: Cross-Border Agreements Governed by U.S. Law* (Wolters Kluwer, 2013) 13–14.

3 Ambiguity is a significant problem with the application and enforcement of contractual arrangements: see Olivette E Mencer, 'Unclear Consequences: The Ambient Ambiguity' (1995) 22(2) *Southern University Law Review* 217; Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *The Yale Law Journal* 541; Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5.

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translation, or versions are created in different languages, these problems are magnified. This is a common challenge in international business contexts, where contracts are often made between parties who speak different first languages.

Indonesia is no exception to these challenges.[4] Article 31 of Law No 24 of 2009 on the Flag, Language, State Emblem, and National Anthem (Indonesia) ('2009 Language and Symbols Law') has created ambiguity about how contracts involving Indonesians should be drafted. In particular, there is now uncertainty as to the legal standing of contracts (or versions of contracts) in a language other than Indonesian, and even whether they are valid at all. In response, major Indonesian law firms now usually draft all contracts involving foreign parties bilingually, with one version in Indonesian,[5] but it is not clear whether this practice entirely satisfies the requirements of art 31.

This article investigates art 31 and the problems it creates for business arrangements in Indonesia, particularly those involving investors from English-speaking backgrounds.[6] It begins with an account of Indonesian regulations and judicial decisions regarding language requirements for a valid contract, and then examines their implications for legal practice.

In this article, we argue that art 31 is an impediment to business activities in Indonesia. The major problems are that it leads to uncertainty as to the applicable language for contracts, makes contract enforcement unpredictable, and creates additional work for lawyers who have little choice but to routinely draft bilingually. This is a recipe for contractual uncertainty. We conclude with two alternative recommendations for the amendment of art 31: to clarify the applicable language requirements, and make contractual enforcement more straightforward and predictable. Additionally, we recommend all existing implementing regulations and other non-statutory instruments that relate to art 31 should be rescinded to avoid confusion.

## II Indonesian Language Regulatory Requirements: Agreements

Article 31 of the 2009 Language and Symbols Law states:

> The Indonesian Language must (wajib) be used for memoranda of understanding or agreements that involve (melibatkan) state institutions, agencies of the

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4 Rachmi Dzikrina, 'Subjective and Objective Approaches to Contractual Interpretation in Civil Law and Common Law Countries: Indonesia and Canada' (2017) 5(2) *Juris Gentium Law Review* 53.

5 See Jeremy Kingsley, 'Drafting Inter-Asian Legalities: Jakarta's Transnational Corporate Lawyers' (2021) 42(1) *Adelaide Law Review* 197.

6 This drafting problem has long been of concern to lawyers. See, eg, 'Indonesian Language in Contracts - A Strict Requirement' *HFW Briefings* (Web Page, November 2013) <https://www.hfw.com/Indonesian-language-in-contracts-November-2013>.

> government of the Republic of Indonesia, Indonesian private institutions or individuals of Indonesian nationality.[7]

This requirement also applies to agreements in electronic form. Article 48(1) of Government Regulation 82 of 2012 on Electronic Systems and Transactions (Indonesia) ('2012 Government Regulation') states that 'use of Indonesian is required for electronic contracts and other contracts intended for Indonesian citizens'.[8]

Neither the 2009 Language and Symbols Law nor the 2012 Government Regulation set out the consequences of non-compliance with their provisions. However, art 1335 of Indonesia's Civil Code [*Kitab Undang-Undang Hukum Perdata* or *Burgerlijk Wetboek voor Indonesië*] states that '[a]n agreement without a cause or concluded pursuant to a fraudulent or prohibited cause does not comply with the law and is not valid'. Article 1320 adds that, '[i]n order [for an agreement] to be valid … there must be a permitted cause'. Article 1337 similarly says that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order.' 'Cause' in this context means 'purpose' (the Indonesian term used is *sebab*). A contract that is not in Indonesian language, and to which one of the parties is a state institution or agency of the government of the Republic of Indonesia, an Indonesian private institution or an individual of Indonesian nationality, does not comply with, and is not permitted by, the 2009 Language and Symbols Law or the 2012 Government Regulation. By reason of the operation of the Civil Code, its purpose is prohibited by law and the contact is therefore invalid, and, consequently, unenforceable.

There are two other instruments issued by the Indonesian government that purport to regulate matters covered by the 2009 Law: a ministerial letter and a presidential regulation. We take each in turn.

## A *The Ministerial Circular Letter*

The Minister of Law and Human Rights Circular Letter M.HH.UM.01.01-35 of 2009 on Clarification of the Implications and Implementation of Law 24 of 2009 ('Ministerial Circular Letter') purports to modify the effect of the 2009 Language and Symbols Law but, for the reasons explained below, it has not been effective in doing so. In summary, the Ministerial Circular Letter provides that:

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7 *Pasal 31: Bahasa Indonesia wajib digunakan dalam nota kesepahaman atau perjanjian yang melibatkan lembaga negara, instansi pemerintah Republik Indonesia, lembaga swasta Indonesia atau perseorangan warga negara Indonesia.*

8 Rimba Supriyantna, M Yasin, and Mahinda Arkyasa, 'Government Mandates Some Electronic Contracts to Be Written in Bahasa Indonesia' *Hukumonline* (7 January 2013).

- private commercial contracts prepared 'in foreign languages, particularly English', will not be invalid simply because they are not in Indonesian;[9] and
- contracting parties may prepare contracts in dual languages. They may then choose which language version prevails if a dispute or difference in interpretation arises, or in the event of inconsistency between them. The Ministerial Circular Letter even suggests a form of words by which the parties can prefer English terms over Indonesian ones.[10]

The Ministerial Circular Letter also states that, because the 2009 Language and Symbols Law does not have retrospective effect, contracts made before 2009 will not be affected by the requirement that relevant contracts be in Indonesian.[11]

The Ministerial Circular Letter was clearly an attempt to provide greater clarity for foreign businesses regarding the application of the 2009 Language and Symbols Law by allowing them to continue to use languages other than Indonesian to document commercial agreements. However, it has been unable to achieve this because of Indonesia's so-called 'hierarchy of laws', stipulated in art 7(1) of Law 12 of 2011 on the Making of Laws (Indonesia) ('2011 Lawmaking Law'). The effect of the hierarchy is that the authority of a ministerial letter is too weak for these purposes, as we now explain.

The hierarchy sets out a formal order of priority or ranking of Indonesia's many regulatory sources of law. The following table summarises the hierarchy, with laws listed in the order in which they are ranked on it.[12]

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9 The Ministerial Circular Letter is in the form of text without numbered paragraphs. The relevant passages, summarised above, read: '*penandatanganan perjanjian privat komersial (private commercial agreement) dalam bahasa Inggris tanpa disertai versi bahasa Indonesia tidak melanggar persyaratan kewajiban sebagaimana ditentukan dalam Undang-Undang tersebut.*' [The English is in the original].

10 The relevant passages, summarised above, read '*para pihak pada dasarnya secara formal bebas menyatakan apakah bahasa yang digunakan dalam kontrak adalah bahasa Indonesia atau bahasa Inggris atau keduanya … maka para pihak juga bebas menyatakan bahwa jika terdapat perbedaan penafsiran terhadap kata, frase, atau kalimat dalam perjanjian, maka para pihak babas memilih bahasa mana yang dipilih untuk mengartikan kata, frase, atau kalimat yang menimbulkan penafsiran dimaksud. Klausula yang lazim digunakan dalam perjanjian, misalnya, "dalam hal terjadi perbedaan penafsiran terhadap kata, frase, atau kalimat dalam bahasa lnggris dan bahasa Indonesia dalam perjanjian ini, maka yang digunakan dalam menafsirkan kata, frase, atau kalimat dimaksud adalah versi bahasa Inggris*".'

11 The relevant passages, summarised above, read: '*Selain itu, sesuai dengan asas peraturan perundang-undangan yang berlaku, setiap peraturan perundang-undangan yang disahkan atau ditetapkan dan kemudian diundangkan, maka peraturan perundang-undangan tersebut berlaku setelah diundangkan sampai peraturan tersebut dicabut.*'

12 Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 37. Reproduced with the permission of the authors.

*Table 1: Indonesia's Hierarchy of Laws*

| English | Indonesian | Abbreviation | Lawmaking Law Article |
|---|---|---|---|
| 1945 Constitution | *Undang-Undang Dasar* 1945 | UUD 1945 | 7(1)(a) |
| People's Consultative Assembly Decision | *Ketetapan Majelis Permusyawaratan Rakyat* | KepMPR | 7(1)(b) |
| Statute/legislation (produced by the national legislature, the DPR) | *Undang-undang* | UU | 7(1)(c) |
| Interim Emergency Law (literally, 'Government regulation in lieu of Law') | *Peraturan Pemerintah Pengganti Undang-undang* | PerPPU/PerPu | 7(1)(c) |
| Government regulation | *Peratran Pemerintah* | PP | 7(1)(d) |
| Presidential regulation | *Peraturan Presiden* | PerPres | 7(1)(e) |
| Provincial regulation | *Peraturan Daerah Provinsi* | Perda Provinsi | 7(1)(f) |
| County/city regulation | *Peraturan Daerah Kabupaten/Kota* | Perda Kabupaten/ Kota | 7(1)(g) |

Ministerial circular letters do not appear in this hierarchy. That the hierarchy is incomplete is acknowledged in art 8(1) of the 2011 Lawmaking Law, which refers to types of laws not referred to in art 7(1) but widely used in the Indonesian legal system. These include, among others, regulations (*peraturan*) stipulated by state agencies, but the term 'law' can sometimes also be understood to include many bureaucratic instruments, including (but not limited to) decisions (*keputusan*) or letters (*surat*) produced at ministerial level or below, such as the Ministerial Circular Letter. Under art 8(2) of the 2011 Lawmaking Law, these unlisted types of laws may be recognised and have binding legal force if they are required by higher-level laws or are otherwise issued under 'legitimate authority' — that is, authority provided by law to perform particular functions of government.[13]

Although the 2011 Lawmaking Law does not explain in any detail how the hierarchy works, it is generally agreed by Indonesian jurists that a lower-level law may not conflict with a higher-level law. For example, a government regulation may not contradict the 1945 Constitution, which sits at the pinnacle of the hierarchy, or a statute (*undang-undang*) produced by Indonesia's national legislature, *Dewan Perwakilan Rakyat* ('DPR').[14] However, a government

[13] For example, government regulations are usually issued in response to a statutory provision that directs the government to issue a government regulation to explain a matter only mentioned briefly or covered generally in the statute. See ibid 36, 51–5.

[14] *Dewan Perwakilan Rakyat*, People's Representative Assembly.

regulation will prevail over a presidential regulation in the event of any inconsistency.[15]

For these reasons, most Indonesian lawyers would agree that a ministerial letter, such as the Ministerial Circular Letter — a form of instrument that does not appear in the hierarchy — cannot override a government regulation, such as the 2012 Government Regulation, let alone a DPR statute such as the 2009 Language and Symbols Law.

Unfortunately, the Ministerial Circular Letter contradicts both the 2012 Regulation and the 2009 Language and Symbols Law, and therefore also the Civil Code (which is a statute). Specifically, the Ministerial Circular Letter purports to save private commercial contracts prepared 'in foreign languages, particularly English' from invalidity, even though that contradicts the provisions of:

- the 2009 Language and Symbols Law, which make Indonesian language mandatory for any contract involving an Indonesian entity (art 31);
- the 2012 Government Regulation, which makes Indonesian language mandatory for any contract intended for an Indonesian citizen (art 48(1)); and
- the Civil Code, which provides that a contract that does not comply with the law (in this case, the Law and the Regulation) is not valid.

The Ministerial Circular Letter is therefore ineffective to the extent of these contradictions, although any provisions of the Letter that do not contradict these higher instruments are probably valid. For example, the Letter states that contracting parties may prepare contracts in dual languages. This is not at odds with the higher instruments, so long as one of the versions is in *bahasa Indonesia*.

As mentioned, the Ministerial Circular Letter also states that the 2009 Language and Symbols Law will not apply retrospectively, so contracts made in a language other than Indonesian before that Law came into force will remain valid despite the introduction of that Law. The 2009 Language and Symbols Law itself is silent on the question of retrospectivity, but art 155 of the Appendix (*Lampiran*) to the 2011 Lawmaking Law states that 'the coming into force of a law or regulation cannot be stipulated earlier than the moment of enactment'. The Ministerial Circular Letter is consistent with this, and so there is statutory authority for its restriction of the application of the 2009 Language and Symbols Law to contracts made after 2009, although this has not been tested in court.

[15] Butt and Lindsey (n 12) 36–51.

### B *The 2019 Presidential Regulation*

By contrast to the 2009 Ministerial Circular Letter, Presidential Regulation 63 of 2019 ('2019 Presidential Regulation') was issued under the authority of the 2009 Language and Symbols Law, specifically in order to implement the law. Further, unlike circular letters, presidential regulations are named in the hierarchy. For both reasons, therefore, the 2019 Presidential Regulation has much clearer authority than the 2009 Ministerial Circular Letter. It is generally consistent with the Law and was likely a response to the shortcomings of the Circular Letter.[16] In any case, this instrument modifies the application of the 2009 Language and Symbols Law in one significant way, as we now explain.

Article 26(1) begins by restating the provisions in art 31(2) of the parent legislation. It then states in art 26(2) that, where there is a foreign party to the contract, a version may be prepared in English or any other language of that party.

Article 26 adds:

> (3): The national language of the foreign party and/or the English language … is used as an equivalent (*padanan*) or translation (*terjemahan*) of the Indonesian language to align understanding of the memorandum of understanding or agreement with the foreign party.17
>
> (4): In the event there is a difference in interpretation of the equivalent or translation referred to in paragraph (3), *the language used shall be the language agreed in the memorandum of understanding or agreement*.[18]

The effect of this is that, while contracts involving Indonesian entities must be in Indonesian, a version in another language (most commonly, English, the international language of business) can also be prepared that is equal in standing and, just as the Ministerial Circular Letter stipulated, the parties may choose which version prevails in the event of dispute over interpretation.

The 2019 Presidential Regulation is a useful compromise for foreign investors, but its effectiveness is subject to dual-language contracts including a provision identifying the parties' preferred language.

Likewise, two documents in different languages are a recipe for accidental (or even purposefully crafted) ambiguity. As mentioned, drafting 'clarity' and 'precision' are essential for contract law efficacy.[19] If a preferred language clause is omitted from a contract involving an Indonesian person or institution that is

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16 We note that the 2009 Ministerial Circular expressly anticipated that a presidential regulation would eventually be issued to implement the 2009 Language and Symbols Law.

17 Pasal 26(3): *Bahasa nasional pihak asing dan/atau bahasa Inggris sebagaimana dimaksud pada ayat (2) digunakan sebagai padanan atau terjemahan Bahasa Indonesia untuk menyamakan pemahaman nota kesepahaman atau perjanjian dengan pihak asing.*

18 Pasal 26(4): *Dalam hal terjadi perbedaan penafsiran terhadap padanan atau terjemahan sebagaimana dimaksud pada ayat (3), bahasa yang digunakan ialah bahasa yang disepakati dalam nota kesepahaman atau perjanjian* (emphasis added).

19 Wellman (n 1) 1101.

prepared in two versions, then the 2019 Presidential Regulation creates a significant margin of risk regarding its interpretation, particularly for foreign investors who are not fluent in Indonesian. This is because if the parties become involved in a dispute that involves contractual interpretation, and there is no preferred language provision and they cannot agree which version to use, it is not clear which version of the agreement will prevail. However, in our view, an Indonesian domestic court is more likely to choose the Indonesian language version because the Regulation states the non-Indonesian version is merely an 'equivalent' or 'translation' used to 'align understanding' for the foreign party.

## III Indonesian Language Regulatory Requirements: Notarial Deeds

The requirement that Indonesian language be used to record agreements is not limited to contracts; it extends also to notarial deeds. Of course, a notarised agreement, just like one that is not notarised, will be subject to art 31 of the 2009 Language and Symbols Law. However, art 43(1) of Law 30 of 2004 on Notaries (Indonesia) ('2004 Notaries Law') expands the ambit of the rule — it has the effect that any document, whether or not it is an agreement, must be in Indonesian if it is notarised.

The consequences of non-compliance are, again, spelt out in the Civil Code, in this case, art 1877, which provides that a deed that does not fulfil the criteria for a valid notarial deed (*akta otentik*) will be deemed a mere 'deed under hand' (*akta di bawah tangan*). The distinction between these two kinds of deeds matters a great deal in the Indonesian legal system, for two reasons. First, as in many other European-origin legal systems, notaries play a far more important role in validating transactions in Indonesia than they do in the common law systems with which most English-speaking investors will be more familiar, where notaries play a relatively small role. In Indonesia, a wide range of agreements and other commercial documents must be formalised in writing and prepared as a formal deed (*akta notaris*) to be valid. These include:

- certain dispute resolution agreements (for example, to settle disputes by arbitration, or if parties cannot sign in person: art 9(2) of Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesia);
- certain corporate transactions (for example, changes to company articles of association and deeds of mergers and acquisitions: arts 21 and 128 of Law No 40 of 2007 on Limited Liability Companies (Indonesia);
- marriages (art 147 of the Civil Code) and marriage-related agreements (such as pre-nuptial agreements, donations, or gifts to fiancés prior to marriage: art 176 of the Civil Code);

- real estate transactions (including land purchase and transfer agreements: art 16 of Law No 4 of 1992 on Housing and Residential Areas (Indonesia));
- mortgage certificates: Law No 4 of 1996 on Mortgages on Land and Land-Related Objects (Indonesia)); and
- fiduciary security agreements: art 5 of Law No 42 of 1999 on Fiduciary Securities (Indonesia).[20]

Many other kinds of document are also routinely notarised, such as wills, gifts and loans.

Second, a compliant notarial deed (*akta otentik*) constitutes absolute proof of its contents and binds the parties unless fraud can be proven in relation to its formation.[21] This is because of the 'notary's obligation to work independently without any influence from other parties'.[22] By contrast, the authenticity and substance of a deed 'under hand' may be challenged, very significantly weakening its evidentiary weight in litigation.[23]

Article 43(1) of the 2004 Notaries Law has become problematic in recent years because transnational transactions involving Indonesians have significantly increased. Such deals typically involve the notarising of an agreement between the parties, and often this is in English. In response to this, art 43(3)–(6) was inserted into the 2004 Notaries Law in 2014.[24] Article 43(3) permits deeds to be made in a language other than Indonesian, unless another law requires Indonesian to be used. This is problematic because it contradicts art 43(1), which was unaffected by the amendments, and, as mentioned, makes the use of Indonesian mandatory. This would seem to render art 43(3) ineffective but, to the best of our knowledge, this issue has not been tested, so uncertainty remains as to whether a notarial deed that is only in a language other than Indonesian is valid.

Article 46(3) of the 2004 Notaries Law adds a requirement that, where a foreign language is used, the notary must ensure the parties understand the meaning of that version of the deed. This means the notary must either understand the other language himself or herself, or use a translator to explain the foreign language version. This is also problematic, because if a dispute arises it may be difficult to prove that a party that speaks only Indonesian did, in fact, fully understand the content of a foreign language deed.

In any case, art 46(6) says that, if a dispute arises about different language versions of a deed, the Indonesian version prevails. The effect of this is that a non-

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20 Butt and Lindsey (n 12) 314.
21 Arts 1870, 1871, Civil Code.
22 Adha Dia Agustin, 'The Independence of Notary in the Civil Partnership of Notary' (2014) 1(2) *Rechtsidee* 131146, 131.
23 Butt and Lindsey (n 12) 120.
24 Law No 2 of 2014 on the Amendment of Law No 30 of 2004 on Notaries.

Indonesian version of a notarised deed can really only be relied on as a guide for non-Indonesian speaking parties and is not conclusive as to its contents.

## IV Indonesian Language Requirements in the Courts

### A *The Bangun Karya Pratama v Nine AM Case*

We were unable to locate any judicial decisions dealing directly with the language requirements of the 2004 Notaries Law, however, the courts have considered the application of art 31(1) of the 2009 Languages and Symbols Law in a number of cases, which we now summarise.[25]

In a landmark 2013 decision, *PT Bangun Karya Pratama Lestari v Nine AM Ltd* ('*Bangun Karya Pratama Lestari*'),[26] the West Jakarta District Court decided that a loan agreement between an Indonesian company borrower and a US-based lender involving a fiduciary security was void because the contract was not executed in Indonesian.

The Indonesian plaintiff sought to escape liability under the loan agreement on the grounds that it was in English and there was no Indonesian language version. The Court reasoned that, because Indonesian was mandatory under art 31(1) of the 2009 Language and Symbols Law, the contract was invalid by reason of the operation of arts 1335 and 1337 of the Indonesian Civil Code (discussed above). The Court noted the stipulation in the Ministerial Circular Letter that contracts prepared in English will not be invalid simply because they are not in Indonesian, but said that because ministerial letters are not included in the hierarchy of Indonesian laws and regulations, discussed above, it would give the Circular Letter no weight.

The Court added, somewhat glibly, that if a party did not agree with the word 'must' (*wajib*) in relation to the obligation to use Indonesian language in contracts per art 31(1) of the statute, the correct procedure was not to ignore it, but to challenge that provision in the Constitutional Court. That court has the exclusive power to decide challenges to the constitutionality of national legislation brought by citizens and various legal entities. If the Constitutional Court decides that a statute under review violates the *1945 Constitution*, it can

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[25] These cases were located through a search of the Indonesian Supreme Court's database of judicial decisions (https://putusan3.mahkamahagung.go.id/). This database is neither complete, reliable nor consistent in its listings, which are subject not only to addition of decisions, but also unexplained removal of decisions and technical problems such as the failure of links to cases or corruption of text and so on. We therefore do not claim that the cases discussed in this article are the only the relevant cases that have been decided, only that these are the only relevant cases we could access at the time of our search.

[26] Indonesian decisions do not use the name of the parties. They are usually referred to only by a decision number. Here we use the parties' names for convenience. The correct reference for this case is Decision 451/Pdt.G/2012/PN.Jkt.Bar. of 20 June 2013, 61.

invalidate that statute, or a provision of it, and declare it no longer binding. However, this was cold comfort for the US lender defendant, as foreigners lack standing to bring constitutional challenges in Indonesia.[27]

In any case, the West Jakarta District Court decision was affirmed on appeal by the Jakarta High Court and, on cassation,[28] by the Supreme Court.[29] The position has not been altered by the subsequent issue of the 2019 Presidential Regulation, and the option to use dual language contracts with a preferred language provision that it created, as an Indonesian language version is still required for the contract to be valid.

## B *Other Cases*

The interpretation of the 2009 Language and Symbols Law established by the Supreme Court in *Bangun Karya Pratama Lestari* has been the subject of further litigation since 2015. We now briefly describe the resulting judicial decisions in chronological order, before comparing them and analysing their effect in the next section. All the cases discussed involved agreements written in English, without an Indonesian version.

*August 2017: Buxani v Vatvani (Central Jakarta District Court) ('Buxani')*[30]

The agreement in this case contained a clause stating that any dispute arising under it was to be resolved by arbitration.

Article 3 of Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesia ('1999 Arbitration Law') states that the 'District Court does not have authority to decide a dispute between parties bound by an arbitration agreement',[31] and art 11(1) provides that 'the existence of a written arbitration agreement eliminates the parties' rights to seek resolution of a dispute or difference of opinion as to the contents of the agreement by the District Court'.[32] The effect of these provisions is that, once a District Court becomes aware that an agreement before it contains such a clause, it may not decide any dispute regarding the agreement and must dismiss the claim. Because all civil matters are

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27 In Constitutional Court Decision 2-3/PUU-V/2007, for example, Scott Rush, an Australian prisoner on death row, was denied standing to challenge the statute under which he was sentenced to death, Law 35 of 2009 on Narcotics, because he was not an Indonesian citizen.

28 Cassation is an appeal to the Indonesian Supreme Court from a provincial level High Court on a point of law. For further discussion, see Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell University Press, 2005) 228–37.

29 See Jakarta High Court Decision 48/Pdt/2014/PT.DKI of 7 May 2014; Indonesian Supreme Court Decisions 601/K/Pdt/2015 of 31 August 2015; 1572 K/Pdt/2015 of 23 October 2015.

30 Central Jakarta District Court Decision 472/Pdt.G/2015/PN.Jkt.Pst, 28 August 2017.

31 *Pengadilan Negeri tidak berwenang untuk mengadili sengketa para pihak yang telah terikat dalam perjanjian arbitrase.*

32 *Adanya suatu perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termuat dalam perjanjiannya ke Pengadilan Negeri.*

heard at first instance in the District Court, this provision is an effective ban on the judicial determination of any dispute regarding an agreement with an arbitration clause.

The Central Jakarta District Court therefore held that it lacked authority to hear this case by reason of the operation of the 1999 Arbitration Law. In dismissing the case, the Court said the dispute between the parties could only be decided by arbitration. The Jakarta High Court affirmed this decision.[33]

*March 2018: Gatari Air Services vs Jasa Angkasa Semesta Tbk (South Jakarta District Court)* ('*Gatari Air Services*')[34]

The salient facts of this case were essentially the same as in *Buxani*, but here the Court asserted that it did have jurisdiction to decide the matter and held the agreement to be invalid by reason of the operation of the 2009 Language and Symbols Law. It did not explain why it did not apply arts 3 and 11 of the 1999 Arbitration Law to dismiss the case.

The matter went on appeal to the Jakarta High Court, which upheld the original decision.[35] That decision was then taken on cassation to the Supreme Court, but no decision is yet available.

*July 2018: PT Catur Jaya v Hotels Asia Pacific Limited (Central Jakarta District Court)* ('*Catur Jaya*')[36]

In this case, the plaintiff asked the Court to declare invalid three 'hotel development services agreements' for The Park Inn by Radisson in Makassar. However, the defendant argued that the court had no jurisdiction because the agreements contained a clause referring any dispute under the agreement to the Singapore International Arbitration Centre ('SIAC').

The Court agreed and dismissed the case, stating that it lacked authority to hear the case by reason of the 1999 Arbitration Law, and that the dispute should instead be decided by SIAC. This decision was affirmed on appeal to the Jakarta High Court and then on cassation by the Supreme Court.

*July 2018: Dendy Kurniawan v PT Kone Indo Elevator (Central Jakarta District Court) ('Kurniawan')*[37]

The Court in this case found for the plaintiff and enforced a contract that was not in Indonesian. In its judgment, the Court entirely ignored the defendant's submissions that the fact that there was no Indonesian language version of the agreement made it invalid under the 2009 Language and Symbols Law.

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33 Jakarta High Court Decision 794/PDT/2018/PT DKI, 31 January 2019.
34 South Jakarta District Court Decision 617/Pdt.G/2017/ PN.Jkt.Sel, 14 March 2018.
35 Jakarta High Court Decision 408/PDT/2018/PT DKI, 7 September 2018.
36 Central Jakarta District Court Decision 461/PDT.G/2017/PN.JKT.PST, 10 July 2018.
37 Central Jakarta District Court Decision 407/Pdt.G/2017/PN.Jkt.Pst, 25 July 2018.

The defendant appealed to the Jakarta High Court, again submitting that the agreement was invalid because the only version of it was in English. The High Court dismissed the appeal, affirming the District Court decision and likewise making no comment on the language issue.[38]

*September 2018: PT Multi Spunindo Jaya v PT Asuransi Astra Buana (Central Jakarta District Court) ('Multi Spunindo Jaya')*[39]

The Court in this case found that the agreement contained a clause stating that disputes under the agreement must be dealt with by SIAC arbitration. It held that it therefore did not have jurisdiction to decide the case. There was no appeal.

*October 2018: Ivan Chrisna vs Hilton Bandung (Bandung District Court) ('Chrisna')*[40]

The plaintiff in this case relied on the Supreme Court decision in *Bangun Karya Pratama Lestari* to argue that the agreement should be invalidated. The defendant argued that *Bangun Karya Pratama Lestari* was not binding because Indonesia follows the European Civil Law legal system, and so has no system of precedent. The Court disagreed that this meant the 2009 Language and Symbols Law could not be applied and declared the agreement invalid. However, the agreement contained an arbitration clause that stated:

> 20(2): Arbitration of disputes arising out of or in connection with this agreement shall be resolved in the jurisdiction in which the hotel is located under the rules of Arbitration of [sic] ... the arbitration shall be conducted in English and this agreement will governed by and interpreted pursuant to the law of the jurisdiction in which the hotel is located.

On appeal, the Bandung High Court held that this clause meant the Indonesian courts had no jurisdiction to hear a dispute arising under the agreement,[41] finding that it should instead be decided by the Bandung branch of the Badan Arbitrase Nasional Indonesia [National Arbitration Board] ('BANI').

The matter then went on cassation to the Supreme Court, but no decision is yet available.

*January 2019: PT UOB Property v PT Millenium Penata Futures and PT Starpeak Equity Futures (Central Jakarta District Court) ('UOB Property')*[42]

In this case, the Court declared the agreement to be valid, offering two arguments to justify its decision. The first was that, because the plaintiff and defendant were both domestic Indonesian companies, use of English in the Agreement was

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38 Jakarta High Court Decision 21/PDT/2019/PT.DKI, 9 April 2019.
39 Central Jakarta District Court Decision 472/PDT.G/2017/PN.JKT.PST., 19 September 2018.
40 Bandung District Court Decision 61/PDT.G/2018/PN.BDG, 10 October 2018.
41 Bandung High Court Decision 73/PDT/2019/PT BDG, 12 June 2019.
42 Central Jakarta District Court Decision 222/Pdt.G/2018/PN Jkt.Pst, 30 January 2019.

permitted. In other words, according to the Court, the terms of the 2009 Language and Symbols Law apply to invalidate an agreement solely in English only if a foreign company is involved.

In taking this view, the Court distinguished *Bangun Karya Pratama Lestari* on the basis that it involved a foreign company. It did not explain why the distinction between a foreign company and a domestic company was significant however, and it is hard to understand the Court's reasoning: the 2009 Language and Symbols Law does not differentiate between foreign and domestic companies, and, in any case, a foreign company is more likely than a domestic company to use English, which is the international language of business. It makes little sense for a foreign company to be prohibited from using English in its agreements, while domestic companies, which are less likely to have staff fluent in legal English, are allowed to.

Second, the Court found that the argument that the agreement was invalid because it was only in English was raised because the defendant wished to escape obligations under the agreement. However, the 2009 Language and Symbols Law simply declares agreements only in English to be invalid; it is not concerned with the motives of parties seeking to enforce this rule. Further, it is inevitable that parties will be released from obligations under an agreement if it is invalidated. On the Court's logic, contracts could rarely ever be invalidated, which would defeat the purpose of the 2009 Language and Symbols Law.

There was no appeal.

*April 2019: Ford v Ford Cheung (Amlapura District Court) ('Ford')*[43]

This case related to a married couple living in Bali. The plaintiff, who was a British citizen, and the defendant, who was a Chinese citizen, jointly owed an Indonesian company, PT Alba Indah. Upon divorce, they entered into a written agreement to divide their joint marital assets, including their interests in the company. The agreement was in English with no Indonesian translation. The plaintiff sought invalidation of the agreement for failure to comply with art 31 of the 2009 Language and Symbols Law. It is not stated in the decision on what basis the plaintiff claimed this Law applied to the agreement (presumably it was that the agreement involved an Indonesian company, a 'private institution' for the purposes of art 31) but the Court nevertheless appears to have accepted that it did.

The Amlapura District Court held that failure to comply with art 31 did not render an agreement invalid pursuant to art 1320 and 1337 of the Civil Code, which require agreements to have a 'permitted cause' (discussed above). The Court found that, so long as the purpose of the agreement was not fraudulent, prohibited by law, or contrary to moral standards and public order, it will be permitted. The Court appears to have taken the view that, because the 2009

[43] Amlapura District Court Decision 254/Pdt.G/2019/PN Amp, 1 April 2019.

Language and Symbols Law did not articulate the consequences of non-compliance with art 3, such non-compliance was not prohibited, and so the agreement could not be considered to have a non-permitted purpose. In this case, the Court was at odds with the Court in *Bangun Karya Pratama*, which found exactly the opposite, namely that failure to comply with art 31 meant the agreement lacked a permitted purpose under the Civil Code and so was void.

It is difficult to understand the Court's reasoning in *Ford*. Article 31 of the 2009 Language and Symbols Law uses the term *wajib* (mandatory) when imposing the Indonesian language requirement and the court itself held that this made Indonesian language a 'necessity' (*suatu keharusan*) for contracts involving Indonesian persons and institutions. If the statute makes Indonesian language compulsory for a particular kind contract, it therefore prohibits such contracts being made solely in another language. Accordingly, the contract in this case should have been held to be for a purpose prohibited by law and so invalid under the Civil Code for lacking a permitted purpose, like the contract in *Bangun Karya Pratama Lestari*.[44] This decision was not appealed.

*April 2020: Hyun International Co Ltd v PT Kwanglime Yh Indah (Subang District Court) ('Hyun International')*[45]

In this case, strangely, no argument was made at first instance that the contract was invalid because the only version was in English, so the Court accepted it as valid evidence (*barang bukti yang sah*).

This decision was then appealed to the Bandung High Court,[46] where submissions this time included the argument that the contract should be declared invalid because it was written only in English. However, the High Court dismissed the appeal, entirely ignoring this argument in its judgment.

*June 2020: Jiang v Reliance Coal Resources and Others (Central Jakarta District Court) ('Jiang')*[47]

The agreements in dispute in this case were notarised, but not in Indonesian language. The plaintiffs argued that the agreements were invalid as they were in breach of the 2009 Language and Symbols Law, relying on the Supreme Court

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44 As mentioned, art 1335 of Indonesia's Civil Code states that '[a]n agreement without a cause or concluded pursuant to a fraudulent or prohibited cause does not comply with the law and is not valid' (Pasal 1335: *Suatu persetujuan tanpa sebab, atau dibuat berdasarkan suatu sebab yang palsu atau yang terlarang, tidaklah mempunyai kekuatan*). Article 1320 states that '[i]n order to be valid … there must be a non prohibited cause' (Pasal 1320: Supaya terjadi persetujuan yang sah … suatu sebab yang tidak terlarang). Article 1337 states that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order' (Pasal 1337: *Suatu sebab adalah terlarang, jika sebab itu dilarang oleh undang-undang atau bila sebab itu bertentangan dengan kesusilaan atau dengan ketertiban umum*).

45 Subang District Court Decision 46/Pdt.G/2019/PN Sng., 9 April 2020.

46 Bandung High Court Decision 378/PDT/2020/PT BDG.

47 Central Jakarta District Court Decision 590/Pdt.G/2018/PN Jkt.Pst, 23 June 2020.

decision in *Bangun Karya Pratama Lestari* decision.[48] The Court agreed and declared the agreements invalid. There was no appeal.

## V Analysis of Cases

There is significant inconsistency in the decisions described above. This is not unusual in Indonesia. As one of the parties argued in *Chrisna*, the adoption of a colonial form of the civil law system from the Dutch means there is no formal system of precedent or independent body of judge-made law.[49] Accordingly, an Indonesian judge may follow a previous decision from a higher-level or equal-level court, but is not usually required to do so. Formally, Indonesian court decisions bind only the parties involved in the case relating to that decision.[50]

Despite this situation, Indonesian judges do generally consider selected, prominent decisions of the Supreme Court (*yurisprudensi* or 'jurisprudence', which is occasionally collected and published in hard copy or online by the Court) to be highly persuasive, and so are often reluctant to depart from a line of consistent Supreme Court decisions on a particular point of law.[51] This is especially true if the Supreme Court has stated that a particular decision should be followed, as it sometimes does in practice notes, known as 'circular letters' (*surat edaran*). However, opinions differ in Indonesia as to whether judges *must* follow Supreme Court decisions and even whether *yurisprudensi* is an official source of law. Many judges claim absolute freedom to depart from such decisions.[52] This means the cases we examine in this article, even those decided by the Supreme Court, can only be considered examples of how the law has been applied, not binding precedent.

With this in mind, we return now to the decisions. In only two cases did the courts follow *Bangun Karya Pratama Lestari* and invalidate the agreement. In *Jiang*, the Central Jakarta District Court simply applied the 2009 Language and Symbols Law to do so. In *Gatari Air Services*, the South Jakarta District Court did the same thing, but first rejected the argument that it was deprived of jurisdiction because the agreement contained an arbitration clause. In doing so, the Court was at odds with the courts in four other decisions made around the same time: the Central Jakarta District Court in *Buxani v Vatvani*, *Catur Jaya*, and *Multi Spunindo*, and the Bandung District Court in *Chrisna*. In each of these decisions, the courts held that the existence of an arbitration clause meant it had no jurisdiction over any dispute

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48 Indonesian Supreme Court Decision 1572 K/Pdt/2015, 23 October 2015.

49 This paragraph draws on Simon Butt and Tim Lindsey, 'Liability for the Death of Aircraft Passengers in Indonesia' (2020) 85(4) *Journal of Air Law and Commerce* 573.

50 Mohamad Isnaini (1971) *Hakim Dan Undang-Undang* 13.

51 Paulus Effendie Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum* (Badan Pembinaan Hukum Nasional, 1997).

52 E Utrecht and Moh Saleh Djindang, *Pengantar Dalam Hukum Indonesia* (Ichtiar Baru, 10th ed, 1983) 204.

arising under the agreement, and this was confirmed by the Supreme Court in its cassation decision in *Catur Jaya*.

These cases suggest a trend of Indonesian courts refusing to hear a case under the 2009 Language and Symbols Law, involving the invalidation of an agreement not written in Indonesian if it contains an arbitration clause, on the grounds that disputes about such an agreement can only be dealt with by arbitration. The courts have been consistent in this approach in every case involving an arbitration clause, except *Gatari Air Services*, and that case has gone to the Supreme Court for cassation. If the Supreme Court follows its own decision in *Catur Jaya* and overturns the District Court and High Court decisions in *Gatari Air Services*, that would further confirm the trend. The same would be true if the Supreme Court upholds the District Court and High Court decisions in *Chrisna*, which applied the 1999 Arbitration Law.

It is more difficult to draw any clear conclusion from the remaining four cases. *UOB Property* is perhaps best considered an outlier, for two reasons. First, in no other decision has a court used the two arguments the Central Jakarta District Court relied on in this case — that the 2009 Language and Symbols Law does not apply to agreements involving a foreign company, and that it cannot be applied to assist a party to avoid contractual obligations. Second, as we have explained, the reasoning used by the Court to support these arguments was entirely unconvincing.

In two other cases, *Kurniawan* and *Hyun International*, the court simply ignored submissions about the application of the 2009 Language and Symbols Law, as did the High Courts to which each of these decisions were appealed. There is no legal basis for the courts to ignore a clearly relevant law without giving any reason for doing so, although this is not uncommon in Indonesia. While judges are required by art 50(1) of Law 48 of 2009 on Judicial Power (Indonesia) to give reasons for their decisions, they often simply briefly repeat the submissions of one of the parties, ignoring alternative arguments. This, of course, facilitates improper decision-making. We do not know whether these two decisions were the result of improper influence — for example, a bribe (which is common in Indonesian courts, as senior judges and a series of Indonesian presidents have publicly acknowledged) — but that is always a possibility.[53]

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[53] On the problem of widespread corruption in Indonesian courts and the so-called 'judicial mafia', see World Bank, *Combating Corruption in Indonesia: Enhancing Accountability for Development* (Report No 27246-IND, 12 November 2003) 81; Indonesia Corruption Watch, *Menyingkap Tabir Mafia Peradilan* (Indonesia Corruption Watch, 2001). See also Gary Goodpaster, 'Reflections on Corruption in Indonesia' in Tim Lindsey and Howard Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (Federation Press, 2002) 87–108; Satuan Tugas Pemberantasan Mafia Hukum, *Mafia Hukum: Modus Operandi, Akar Permasalahan dan Strategi Penanggulangan* (Pemberantasan Mafia Hukum, 2011) 4; Febrina Ayu Scottiati, 'Titik-titik Permainan Mafia Hukum di Pengadilan', *Detik News* (online, 22 December 2010) <https://news.detik.com/berita/d-1530929/--titik-titik-permainan-mafia-hukum-di-pengadilan>; Butt and Lindsey (n 12) 299–303. On Indonesian judicial decision-making, see Butt and Lindsey (n 12) 73–82.

In the final case, *Ford*, the Court, as mentioned, took the exact opposite view to the court in *Bangun Karya Pratama Lestari* regarding the relationship between art 31 of the 2009 Language and Symbols Law and arts 1320 and 1337 of the Civil Code. However, the reasons it gave for doing so are, in our view, incoherent and unconvincing. We also note that this is a decision of a District Court, while *Bangun Karya Pratama Lestari* was approved by the Supreme Court and so would be viewed by most Indonesian judges as carrying more weight.

In summary, the cases decided in the wake of *Bangun Karya Pratama Lestari* have done little to clarify the status of foreign language contracts under Indonesian law, save to establish that the courts, while somewhat unpredictable in their approach to the 2009 Language and Symbols Law, are generally likely to refuse to hear any claim for invalidation of an agreement for breach of that Law if the agreement contains a clause referring any dispute arising under it to arbitration. In such a case, the matter will usually be sent to arbitration in accordance with the terms of the relevant clause.

Of course, it remains possible that an arbitration might still result in the agreement being invalidated under the 2009 Language and Symbols Law. We have only been able to locate one arbitral decision where this argument was raised, which we now discuss.

*22 August 2017: PT Kerui Indonesia v Badan Arbitrase Nasional Indonesia and PT Agung Glory Cargotama AGC ('BANI')*

In this case, the agreement, which was only in English, contained an arbitration clause. At arbitration by BANI, it was submitted that the agreement was unenforceable because there was no Indonesian language version. In its decision,[54] BANI dismissed this argument, simply saying that 'the use of English language in the agreement was not contrary to morals and does not contravene public order'.[55] This was presumably a reference to the terms of art 1337 of the Civil Code, discussed above, although BANI failed to mention that another ground for invalidity under this provision is 'prohibition by law'. This was relevant because the agreement was clearly prohibited by law as it was only in English, contrary to the 2009 Language and Symbols Law.[56] In fact, the arbitrators did not explain why they made these findings and why they did not consider the provisions of the 2009 Language and Symbols Law at all.

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54 BANI Decision 809/III/ARB-BANI/2016, of 24 February 2017.

55 BANI Decision 809/III/ARB-BANI/2016, of 24 February 2017, cited in South Jakarta District Court Decision No 244/PDT.G.ARB/2017/PN.JKT.SEL, at 71.

56 '*[P]enggunaan Bahasa Inggris dalam perjanjian a quo tidak berlawanan dengan kesusilaan dan tidak melanggar ketertiban umum.*' Article 1337 of the Civil Code says that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order.' (*Pasal 1337: Suatu sebab adalah terlarang, jika sebab itu dilarang oleh undang-undang atau bila sebab itu bertentangan dengan kesusilaan atau dengan ketertiban umum*).

The defendants appealed the arbitral award to the South Jakarta District Court,[57] relying on, among other things, the 2009 Language and Symbols Law. However, the District Court found that its power to annul an arbitral award was confined to the grounds in art 70 of the 1999 Arbitration Law, all of which grounds relate to fraud or deceit by a party and do not include the language of the contract.[58] The Court therefore dismissed the application to annul the award.

The matter then went on cassation to the Supreme Court,[59] but that Court dismissed the application without considering the substance of the dispute, finding that a District Court decision to dismiss an application to annul an arbitral award cannot be appealed.[60]

The decisions in this case emphasise the value of including arbitration clauses in commercial agreements in Indonesia, as Indonesian courts will generally decline jurisdiction and leave the disputes about such an agreement to the arbitrator. However, this does not necessarily create certainty because of the absence of a system of binding precedent. Where an agreement is only in English, it is still possible that a court might declare such an agreement invalid under the 2009 Language and Symbols Law regardless of whether it includes an arbitral clause.

Most contracting parties involved in major commercial transactions in Indonesia want certainty and so their lawyers elect to abide by the Indonesian language requirement in the 2009 Language and Symbols Law. They do this by drafting documents bilingually with a clause specifying Indonesian as the operational language, the so-called 'trumping language' provision.[61] This cautious approach is followed by most major Indonesian law firms, which take the view that any practice other than this would be imprudent.[62] In the next section,

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57 South Jakarta District Court Decision No 244/PDT.G.ARB/2017/PN.JKT.SEL.

58 Article 70: An application to annul an arbitration award may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are founded which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute (*Pasal 70: Terhadap putusan arbitrase para pihak dapat mengajukan permohonan pembatalan apabila putusan tersebut diduga mengandung unsur-unsur sebagai berikut: (a). surat atau dokumen yang diajukan dalam pemeriksaan, setelah putusan dijatuhkan, diakui palsu atau dinyatakan palsu; (b). setelah putusan diambil ditemukan dokumen yang bersifat menentukan, yang disembunyikan oleh pihak lawan; atau (c). putusan diambil dari hasil tipu muslihat yang dilakukan oleh salah satu pihak dalam pemeriksaan sengketa).*

59 Supreme Court Decision 8 B/Pdt.Sus-Arbt/2018 of 22 August 2017.

60 The Supreme Court found, however, that a District Court decision to *uphold* an application to annul an arbitral award *can* be appealed: *Putusan pengadilan negeri yang menolak permohonan pembatalan putusan arbitrase nasional tidak dapat diajukan upaya hukum banding ke Mahkamah Agung. Permohonan banding ke Mahkamah Agung atas putusan pengadilan negeri yang menolak permohonan pembatalan putusanarbitrase harus dinyatakan tidak dapat diterima.*

61 Choice of language clauses are standard form in most bilingually-drafted contracts. See Marshall Morris (ed), *Translation and the Law* (John Benjamin Publishing, 1995) 160.

62 'New Regulation on Mandatory Use of Bahasa Indonesia Falls Short of Expectation', *Assegaf Hamzah and Partners* (Blog Post, 2019) <https://www.ahp.id/client-update-11-october-2019>.

we consider some of the practical challenges that this practice creates for contract drafters.

## VI Drafting Indonesian Language Contracts: In Practice

Bilingual drafting is not a complete solution — it has its own problems. The most obvious is that linguistic double-handling adds costs to commercial transactions. These can be significant if parties hire their own translators to review versions drafted by the other party, as experienced and reliable translators with expertise in both Indonesia's legal system and the relevant foreign legal system are very rare and can be expensive. It is particularly difficult to find appropriately skilled translators who are not Indonesian nationals. For example, in Australia, where Indonesian language was once widely offered in schools, Indonesian language capacity is fast evaporating. In 2009, there were as few as 1,167 Australian students enrolled in Year 12 Indonesian. Victoria, the state with the highest number of Indonesian programs, made up 351 of the total number in 2009. However, by 2018, the number of Victorian students who studied Indonesian in Year 12 had dropped to just 249, amid a general perception that Indonesian language was not worth pursuing. This is a miniscule number given that there were 61,394 Victorian students enrolled in Year 12 that year.[63]

Even if a skilled translator is located, clearly ascertaining the intent of the contracting parties can be difficult if negotiations have occurred in different languages and then translated into Indonesian, or vice versa.[64] This is because subtle, but pivotal, terms can have nuanced definitions, which can be lost in translation when words have similar but not identical meanings or intricate concepts are overly simplified by the exigencies of transition to a different grammatical structure.[65]

Moreover, translation between Indonesian and English is particularly difficult when legal terminology is involved. This is chiefly because the Indonesian legal system is a member of the 'Civil Law' or 'Continental Law' group of systems found in European countries such as France, Germany and Holland and their former colonies or client states,[66] as opposed to the Anglophone 'Common Law' systems such as those of the United Kingdom and its former colonies or clients, including the United States and Australia. The many differences between these systems gives rise to different understandings of how law operates that

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63 This paragraph draws on Melinda Heap and Jeremy Kingsley, 'The Indonesia–Australia Comprehensive Economic Partnership Agreement: Consequential Legal Document?' (2020) 21(2) *Australian Journal of Asian Law* 131, 136.

64 Muhammad F Muttaqin, 'A Self-Reflective Study: Strategies in Translating Shipbuilding Contracts in PT PAL Indonesia' (Honours Thesis, Universitas Airlangga, 2019).

65 Morris (n 61) 160–4.

66 See John H Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 2nd ed, 1985).

create significant challenges for translators working between English and Indonesian.

For example, in English, 'common law' can refer to a form of legal system derived from English traditions or the body of laws based on judicial precedent (*stare decisis*). However, Indonesia, as mentioned above, has no system of *stare decisis*, and so no body of 'common law' in that sense. Largely as a result of this, it also has no system of 'tort' law and no body of jurisprudence on 'negligence' (in the common law sense), to give two examples chosen from many. In fact, there is no word for 'tort' and *kelalaian* (negligence, carelessness) does not convey the complex meaning attached to the tort of negligence in common law systems. These terms therefore cannot be translated into Indonesian in a way that preserves their English meaning without a good deal of detailed explanation of a kind that would not usually be appropriate for a commercial contract.

For similar reasons, Indonesia has no equivalent of 'equity', in the sense of a body of judge-made legal principles intended to temper the application of regulations. Although 'equity' in the sense of 'equality' has Indonesian equivalents (*persamaan*, *kesetaran*, *kewajaran*, etc), 'equity' can also mean 'shareholding' or 'financial interest' in English, and it requires a degree of expertise in English language legal terminology for an interpreter to pick the right meaning from these four options.

Likewise, in Indonesian criminal law, the notion of declaring a person a 'suspect' (*terdakwa*) is, in fact, more similar to charging a person in a common law criminal system, although formal 'charging' does not actually happen in the Indonesian system until charges are read out in court.[67] It would be incorrect to describe this process as 'charging a person', but it would also not convey the correct meaning to literally translate it as 'declaring a person suspect'.

These few examples suffice to demonstrate that, unless a highly skilled expert interpreter is used, the likelihood of inaccuracy in contract translation between English and Indonesian is high. As this suggests, it is easy for the intricacies of complex commercial arrangements involving foreign investors to become clouded by the requirement that primary documents be in the Indonesian language.[68]

## VII Conclusion and Proposals for Reform

There are two alternative reforms that Indonesian lawmakers could introduce to resolve the problems identified in this article and remove ambiguity about the rules governing the applicable language of Indonesian contracts. To remove the

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67 Butt and Lindsey (n 12) 219.

68 Ashley Lee, 'How to Contract with Indonesian Counterparties' *International Financial Law Review* (Article, 29 April 2015) <https://www.iflr.com/article/b1lsqgx8x7tw8j/how-to-contract-with-indonesian-counterparties>.

uncertainty created by competing lower-level regulations, this should be done by amending the relevant statutes — the 2009 Language and Symbols Law and the 2004 Notaries Law — and not by introducing a regulation, ministerial circular letter or other lower-level instrument of uncertain status and effect. Although the alternative reforms we propose are polar opposites, either would reduce some of the uncertainty about contract-making and enforcement underpinning the commercial risk matrix for foreign investment in Indonesia. They could therefore also help give life to trade agreements intended to attract foreign investors to Indonesia, like the *Indonesia-Australia Comprehensive Economic Partnership Agreement*.[69]

The first option would be to remove flexibility and make it absolutely unambiguous that all commercial agreements involving Indonesians must be in the Indonesian language. A contract or deed could be bilingually drafted but the English (or any other) language version of the contract would only be for the non-Indonesian party's reference and would not be legally binding: only the Indonesian language version would be enforceable in court. This option would deliver certainty about the rules but would still leave foreign investors with the burden of obtaining translations of Indonesian language versions for guidance during negotiations and afterwards, with no certainty that these versions are entirely accurate.

The alternative approach would be to maximise flexibility, by making it clear that choice of language clauses are enforceable in Indonesian courts. The parties to a contract or deed would have unfettered ability to select the official language of a contract and courts would then enforce that choice. Of course, that still leaves unanswered the question of how a court would deal with a foreign language contract, given that few Indonesian judges would be able to fully understand its nuances. Most likely the court would have to rely on competing and disputed translations into Indonesian provided by the parties.

While neither of these reforms fully resolve all the difficulties, and both still leave parties the task of managing the problems of legal translation, either would be an improvement on the current situation. If neither option is adopted, lawyers handling transnational transactions in Indonesia will keep drafting bilingually and will also have to continue to carefully advise their clients that Indonesian courts might only recognise the *bahasa Indonesia* version, regardless of whether it contains an arbitration or choice of language clause.

Avoiding reform would mean that the problems of added expense and complexity in the formation of agreements, and uncertainty of interpretation in their application, will continue to be among the factors contributing to

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[69] *Indonesia-Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019, [2020] ATS 9 (entered into force 5 July 2020).

Indonesia's poor reputation for contract enforcement[70] — and, therefore, its difficulties in attracting the foreign capital it needs to support economic growth and, in particular, service its pressing infrastructure needs.[71]

[70] See Ross H McLeod, 'Doing Business in Indonesia: Legal and Bureaucratic Constraints' (Working Paper, Research School of Pacific and Asian Studies — Australian National University, October 2006) <https://devpolicy.crawford.anu.edu.au/acde/publications/publish/papers/wp2006/wp-econ-2006-12.pdf>; Butt and Lindsey (n 12) 312.

[71] Heap and Kingsley (n 63) 4.