ADVISORY

MAKARIM & TAIRA S.
COUNSELLORS AT LAW

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Law No. 24 of 2009 on the National Flag, Language, Emblem and Anthem

Summary

Law No. 24/2009 is having an unsettling effect on business in Indonesia. Despite the fact that no implementing regulations have been issued and there is a general consensus the failure to conclude an Indonesian version of an agreement should not invalidate it, risk averse parties and parties who in a position to push translation costs onto a counter-party are requiring the production of Indonesian translations of a wide range of legal documents. Businesses should address this matter clearly at the beginning of a transaction and communicate with counterparts, as the position taken on whether translations will be required can materially affect costs and timeframes. It is hoped that certainty on the legal effects of Law No. 24/2009 can be established shortly.

Makarim & Taira S.
Summitmas I, 16th & 17th Fls.
Jl. Jend. Sudirman Kav. 61-62
Jakarta 12190
Indonesia
P: (62-21) 252 1272, 520 0001
F: (62-21) 252 2750, 252 2751
E: makarim&tairas@makarim.com
www.makarim.com

Law No. 24 of 2009 on the National Flag, Language, Emblem and Anthem ("**Law No. 24/2009**") was enacted on 9 July 2009 as an implementation of Article 36 C of the Second Amendment to the Constitution of the Republic of Indonesia of the Year 1945 which states that provisions on the national flag, language, emblem and anthem are to be regulated in a law.

From an everyday legal perspective, the provisions in Law No. 24/2009 in relation to the use of the Indonesian language as the official national language used in Indonesia will be of the most relevance and importance to both foreign and local businessmen. Law No. 24/2009 states that the Indonesian language functions as an official language for transactions and commercial documents. It includes, among others, the following provisions regarding the use of the Indonesian language:

a. State official documents such as, among others, decision letters, commercial papers, statement letters, identity cards, sale and purchase deeds, agreements and court decisions must be in the Indonesian language.

b. The Indonesian language shall be used in all educational institutions, excluding international educational institutions where there are foreign students enrolled. For educational purposes, a foreign language is allowed to be used in these educational institutions.

c. The Indonesian language shall be used in a memorandum of understanding or an agreement (including agreements in international public law) which involve a state institution, a government institution, a private Indonesian entity or an Indonesian citizen. If a memorandum of understanding or an agreement involves foreign parties, it should also be drafted in the national language of the foreign parties and/or English.

d. The Indonesian language shall be used in an international or national forum in Indonesia. However, there is no obligation to use the Indonesian language in an international forum.

e. The Indonesian language must also be used in government or private working environments as the official language. Private working environments include Indonesian or foreign companies carrying out their activities in Indonesia. Moreover, Law No. 24/2009 obliges employees who do not have the ability to speak and/or write in Indonesian language to learn Indonesian.

f. An individual or a company which submits any reports to Government Institutions shall use the Indonesian language.

g. The names of buildings, streets, apartments or houses, offices, trading complexes, trademarks, business institutions, education institutions, organization established or owned by an Indonesian citizen or Indonesian legal entity must all be in the Indonesian language. If the name has a historical, cultural and/or religious value, the name can be in a foreign language.

h. The Indonesian language must also be used for information provided through the mass media and for information regarding local or imported goods and services distributed in Indonesia. However, for some purposes, a foreign language can be added to such information.

Interestingly, Law No. 24/2009 (unlike its draft bill) does not provide any sanctions for violations of the obligation to use the Indonesian language as described above. However, it is stated that an implementing regulation of Law No. 24/2009 (in the form of a Presidential Regulation) shall be introduced within 2 (two) years as of the enactment of Law No. 24/2009, ie by 9 July 2011. Such implementing regulation may or may not stipulate sanctions for violations of the obligations contained in Law No. 24/2009.

Discussions have been held among practitioners and governmental authorities on the national language requirements and these will certainly continue, but many issues remain unclear or lacking in certainty. These include, among others:

a. The legal impact of having an agreement to which an Indonesian entity is a party and which is executed only in the English language. Will failure to have such agreement in Indonesian language affect the validity and/or the enforceability of the agreement?

b. Which language should prevail if an agreement is drawn up in dual language and can the prevailing language be selected by the parties?

Despite the lack of clarity regarding the implementation of the language requirements, it appears that a number of leading commercial lawyers are of the view that:

a. Failure to meet the requirement to use the Indonesian language in an agreement entered into by an Indonesian party is more a failure to meet the formal aspects of the agreement and therefore should not affect the validity of the agreement as long as the contract satisfies the primary substantive requirements for contract validity (namely, consent, capacity, specific subject matter and a legal cause) as provided in Article 1320 of the Indonesian Civil Code (the "**ICC**").

b. Law No. 24/2009 does not have retrospective effect and so existing contracts and agreements entered into prior to the date of enactment will not be affected by the requirements of the new law.

c. The validity of an agreement to which an Indonesian individual/entity is a party and which is drawn up only in the English language will eventually be challenged. It is expected that litigators will invoke applicable laws including provisions of the Indonesian Civil Code) and/or public policy principles to challenge the validity of an agreement that is not drawn up in the Indonesian language. However, as Indonesian law does not recognize the doctrine of precedent, if a particular court accepts the argument it is not necessary for other courts in later cases to follow earlier decisions.

d. Unless by law the agreement must be in Indonesian, it should be possible for contracting parties to agree that the English version of the agreement will prevail in the event of a dispute, particularly if it is the version negotiated by the parties. It is advisable that a clause clearly confirming the parties' agreement on this be inserted.

One further development has been the issuance of a letter dated 28 December 2009 by the Indonesian Ministry of Law and Human Rights (the "**MOLHR Letter**") in which the Ministry clarified that in their view, at least until the implementing regulations have been issued, contracts in the English language only should continue to be valid and not void or voidable and that the implementing regulations for Law No. 24/2009, when issued, will not be retroactive. Although the views set out in the MOLHR Letter would not be binding on a court, it does give some comfort to people contracting with Indonesian entities in the English language only. We would add one caveat that some specific types of contracts (eg franchise agreements, articles of association) must be in the Indonesian language according to applicable laws or regulations. THE MOLHR Letter also reinforced the ability of contracting parties to choose the prevailing language in the event of conflict between the different versions.

Complying with Law 24/2009 may also create difficulties in specific areas, for example with electronic transactions. A query on the enforceability of Law 24/2009 to online contracts between Indonesian buyers and offshore sellers where the contract is not in the Indonesian language may reasonably be raised.

Another issue on the implementation of Law 24/2009 concerns the translation of legal documents, especially where the documents are voluminous. This may delay the closing of international or local transactions. Furthermore, poor quality translations of legal documents may cause problems at a later date.

In conclusion, the prevailing practice at the moment, so far as this can be determined, appears to be as follows:

(i) in important transactions and/or for critical documents, parties such as banks and financial institutions will likely require agreements to be translated into Indonesian prior to execution;

(ii) pending clarity from the implementing regulation(s), and taking into account the fact that that the risks of non-compliance are still unclear, Indonesian law firms may well qualify their legal opinions and advices if documents are not translated into Indonesian in accordance with the provisions of Law No. 24/2009;

(iii) many parties will take a commercial attitude and will not translate agreements and contracts unless and until more certainty is forthcoming. In such cases, they will likely insert relevant provisions into the agreement or contract to allow for future translation if required by the implementing regulation(s), etc.

(iv) other parties will make a case by case decision on translation taking into account risk management principles, weighing the costs of translation, the contents of the MOLHR Letter and possible delays in finalizing a transaction against the risks of an unfavourable judgment or a legal challenge.

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