THE MANDATORY USE OF NATIONAL LANGUAGE IN INDONESIA AND BELGIUM: AN OBSTACLE TO INTERNATIONAL CONTRACTING?*

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Abstract

Law Number 24 of 2009 on National Flag, Language, Emblem, and Anthem of Indonesia requires that any contract involving an Indonesian party must be drafted in Indonesian. In applying this law, the Supreme Court of the Republic of Indonesia, in Nine AM v. PT Bangun Karya Pratama Lestari judgment, annulled a loan agreement because it was considered to violate the language requirement. Although claiming to strengthen the use of Indonesian language in a contract, this judgment underscores a potential risk of voidance a foreign party face in entering into an agreement drafted in a foreign language when contracting with an Indonesian counter-party. On the other side of the hemisphere, the Court of Justice of the European Union in Anton Las v. PSA Antwerp NV and New Valmar BVBA v. Global Pharmacies Partner Health Srl drew the public attention to the obligation to use Dutch in employment contract and company documents as imposed in the Dutch-speaking region of Belgium. Despite Indonesia and Belgium being geographically far from each other, the above-mentioned judgments underline the phenomenon that national language still plays an important role in influencing cross-border legal relations. This article seeks to explore the legal impacts of the obligation to use national language in contracts has on freedom of parties to contracting. It further argues that this obligation impedes international contracting.

Keywords: language, international contracting, cross-border transactions, Indonesia, Belgium.

Abstrak


Kata kunci: bahasa, kontrak internasional, transaksi lintas-batas, Indonesia, Belgia.
I. INTRODUCTION

Language and law are intertwined as language is the medium to draw up laws, whether in legislation, court decisions, or contracts. Our understanding of law is rooted in the notion that rules and norms can be expressed in language, be it spoken or written. Nevertheless, this relationship is rather complicated as the use of language in the legal field is very particular. Since each national law has its own rules of classification, underlying conceptual notion, sources of law, and terminological apparatus; legal terms vary among countries and also according to the field of law. Therefore, a legal text must be drawn up carefully to avoid ending up with an ambiguous provision of law.

Language also plays a significant role as a medium to represent the identity of a nation because the vital character of language is its power to generate imagined communities, especially in establishing particular solidarities. Language is the instrument by which it is possible to bond groups with an unlimited number of individuals. Thus, control over language or its use provides the possibilities of moulding and governing large groups of humans. For this reason, many countries regulate the use of language in their national legislation. There are approximately 125 of the world’s constitutions govern policy on language use, and approximately 100 of them designate one or more official language with a special privilege of use.

In Indonesia and Belgium, language has been vigorously used as a tool to build and maintain the solidarity of the society, as it goes hand in hand with the struggle for independence and self-determination. Indonesian was initially used as a medium to declare the identity of Indonesian people during colonialism which Dutch was used as the official language. Since then, Indonesian has developed into a means of communication that can express not only Indonesian nationalism but also its

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4 For example: ‘connecting factors’ and ‘ordre public’ are popular in private international law field; ‘bond’ and ‘merger’ are terms popular in the field of company law; ‘hot pursuit’ and ‘innocent passage’ are common terms in the field of law of the sea.


aspirations and traditions.\textsuperscript{10} As to Belgium, Dutch\textsuperscript{11} was used by the Flemish community to represent their identity against the aristocracy and bourgeoisie of French-speakers community in Belgium.\textsuperscript{12} Therefore, it is interesting to see how Indonesia and Belgium specify their policy with respect to language use.

The 1945 Constitution of the Republic of Indonesia (\textbf{1945 Indonesian Constitution}) stipulates that the national language of Indonesia shall be Indonesian (\textit{Bahasa Indonesia}).\textsuperscript{13} The 1945 Constitution specifies that further provisions concerning language shall be regulated by law (\textit{undang-undang}).\textsuperscript{14} According to this provision, the Government of the Republic of Indonesia enacted Law Number 24 of 2009 on National Flag, Language, Emblem, and Anthem in July 2009 (\textbf{Law 24/2009}).\textsuperscript{15} The Preamble of Law 24/2009 sets out that language is one of the means to unify and manifest the country’s identity and sovereignty in international relations.\textsuperscript{16} Article 31 (1) of Law 24/2009 requires that Indonesian shall be used in memoranda of understanding or agreements that involve state institutions, agencies of the government of the Republic of Indonesia, Indonesian private institutions or individual of Indonesian nationality.\textsuperscript{17} Nevertheless, this law does not specify any legal consequences if this obligation is not complied with.

As to Belgium, according to De Belgische Grondwet 1993 (\textbf{1993 Belgian Constitution}),\textsuperscript{18} it comprises four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region.\textsuperscript{19} The Royal Decree of 18 July 1966 on the Use of Languages in Administrative Matters (\textbf{1966 Belgian Language Law})\textsuperscript{20} requires all acts and documents that are prescribed by the laws and regulations and for those intended for


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\textsuperscript{13} The 1945 Constitution of the Republic of Indonesia, as lastly amended in 2002 (\textbf{1945 Indonesian Constitution}). Prior to the four amendments, the language provision was regulated in Article 36 of the (original) 1945 Constitution. As a result of the fourth amendment in 2002, this article has been renumbered as Article 36C.

\textsuperscript{14} \textit{Ibid.}

\textsuperscript{15} Law Number 24 of 2009 on National Flag and Language, State Symbols and the National Anthem (SGRI 2009-109, SSGRI 5035), (Law 24/2009), Article 31 (1). The following abbreviations have been used in the footnotes: Staatsblad/State Gazette of the Dutch East Indies (S); State Gazette of the Republic of Indonesia (SGRI) and Supplementary State Gazette of the Republic of Indonesia (SSGRI).

\textsuperscript{16} \textit{Ibid.}, General Elucidation.

\textsuperscript{17} \textit{Ibid.}, Article 31 (1).

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\textsuperscript{19} \textit{Ibid.}, Article 4 (1).

\textsuperscript{20} K.B. Wetten van 18 juli 1966 op het gebruik van de talen in bestuurszaken, B.S., 2 August 1966, (\textbf{1966 Belgian Language Law}).
their personnel, the private industrial, commercial or finance companies shall use the language of the area where their place of business is located. For the employment relations, the Flemish Decree of 19 July 1973 on the Use of Languages in Social Relations between Employers and Employees, as well as for Company Documents and Papers (1973 Flemish Decree) provides the requirement to use Dutch for relations between employers and employees in the Dutch-language region of Belgium. The 1973 Flemish Decree prescribes that any noncompliance with this language requirement result in the nullity of the contracts, documents or acts, without prejudice to the employee or to the rights of the third party. The nullity shall be determined ex officio by the judge.

Against this background, this article aims to explore the legal impacts caused by the obligation to use national language, as enforced in Indonesia and Belgium, in cross-border contractual transactions. Section II will provide an explanation about the power of language on law. A brief historical background of the language regulations in Indonesia and Belgium is discussed in the first part of Section II to draw the outlines of the process that led to the current situation. The second part of Section II presents the problems caused by the obligation to use national language in contract in Indonesia and Belgium by discussing Indonesian court judgments in Nine AM Ltd v. PT Bangun Karya Pratama Lestari (Nine AM), Randolph Nicholas Bolton Carpenter v. Neil Allan Tate and Bati Anjani case (Randolph Carpenter), Osman Siahaan v. PT Inti Brunel Teknindo (Osman Siahaan), and the Court of Justice of the European Union judgments in Elefanten Schuh GmbH v. Pierre Jacqmain (Elefanten Schuh), Anton Las v. PSA Antwerp NV (Anton Las), and New Valmar BVBA v. Global Pharmacies Partner Health Srl (New Valmar). The problems are used as the basis to argue that this obligation encumbers international contracting in Section III, before drawing a conclusion in Section IV.

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21 Decreet van 19 juli 1973 tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers, alsmede van de voor de wet en de verordeningen voorgeschreven akten en bescheiden van de ondernemingen, B.S., 6 September 1973, (1973 Flemish Decree).

22 Ibid., Article 10.

23 Judgment of the Indonesian Supreme Court Number 1572 K/Pdt/2015, 23 October 2015, (Supreme Court Judgment 1572/2015).


26 The Court of Justice of the European Union (CJEU) comprises 2 courts, Court of Justice and General Court. The term “European Court of Justice (ECJ)” is used in this article to show that all the CJEU cases as referred to in this article were ruled by the Court of Justice, not by the General Court. Read: Court of Justice of the European Union, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#composition, (accessed on 7 August 2018).


28 ECJ, Judgment of 16 April 2013, Anton Las v. PSA Antwerp NV, C-202/11, ECLI:EU:C:2013:239.


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Language also plays a significant role as a medium to represent the identity of a nation because the vital character of language is its power to generate imagined communities, especially in establishing particular solidarities.\(^{35}\) Language is the instrument by which it is possible to bond groups with an unlimited number of individuals. Thus, control over language or its use provides the possibilities of moulding and governing large groups of humans.\(^{36}\) For this reason, many countries regulate the use of language in their national legislation. There are approximately 125 of the world’s constitutions govern policy on language use, and approximately 100 of them designate one or more official language with a special privilege of use.\(^{37}\)

In Indonesia and Belgium, language has been vigorously used as a tool to build and maintain the solidarity of the society, as it goes hand in hand with the struggle for independence and self-determination. Indonesian was initially used as a medium to declare the identity of Indonesian people during colonialism which Dutch was used as the official language.\(^{38}\) Since then, Indonesian has developed into a means of communication that can express not only Indonesian nationalism but also its aspirations and traditions.\(^{39}\) As to Belgium, Dutch\(^{40}\) was used by the Flemish community to represent their identity against the aristocracy and bourgeoisie of French-speakers community in Belgium.\(^{41}\) Therefore, it is interesting to see how Indonesia and Belgium specify their policy with respect to language use.

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33 For example: ‘connecting factors’ and ‘ordre public’ are popular in private international law field; ‘bond’ and ‘merger’ are terms popular in the field of company law; ‘hot pursuit’ and ‘innocent passage’ are common terms in the field of law of the sea.
38 Anderson, op.cit., pp. 132-133.
40 There is considerable confusion between the terms “Dutch”, “Flemish” and “Vlaams”. It is only a matter of dialects, but they all actually indicate the same language. The only legally correct name for the language which is used in the northern half of Belgium (and the Netherlands) is “Dutch” (“Nederlands”, “néerlandais”). Belgium and the Netherlands signed a Treaty concerning the Dutch Language Union (Nederlandse Taalunie) on 9 September 1980, which created an intergovernmental institution to set policy for the Dutch language use (http://taalunie.org/nederlandse-taalunie). Read: Stefaan van der Jeught, “Territoriality and Freedom of Language: The Case of Belgium”, Current Issues in Language Planning 18, no. 2 (2017), footnote 3 https://doi.org/10.1080/14664208.2016.1243883 (accessed 6 September 2018).
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43 Ibid.

44 Law Number 24 of 2009 on National Flag and Language, State Symbols and the National Anthem (SGRI 2009-109, SSGRI 5035), (Law 24/2009), Article 31 (1). The following abbreviations have been used in the footnotes: Staatsblad/State Gazette of the Dutch East Indies (S); State Gazette of the Republic of Indonesia (SGRI) and Supplementary State Gazette of the Republic of Indonesia (SSGRI).

45 Ibid., General Elucidation.

46 Ibid., Article 31 (1).

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48 Ibid., Article 4 (1).


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II. The POWER OF LANGUAGE ON LAW

A. A Brief Historical Setting

Language is the basic instrument of communication among human beings and indispensable for the existence of cultures, civilizations, religions, and society in general.59 It enables the human mind to perceive and comprehend the world.60 The comprehending power of language is reflected in law. Therefore, positive law is bound to language because its legal notions exist only in language and through language. Nevertheless, customary law is not bound to language as it does not always express itself in words, but also in a course of conduct.61

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52 Judgment of the Indonesian Supreme Court Number 1572 K/Pdt/2015, 23 October 2015, *(Supreme Court Judgment 1572/2015)*.


54 Judgment of the Supreme Court of the Republic of Indonesia Number 254 K/Pdt.Sus-PHI/2013, 29 May 2013 *(Supreme Court Judgment 254/2013)*.

55 The Court of Justice of the European Union (CJEU) comprises 2 courts, Court of Justice and General Court. The term “European Court of Justice (ECJ)” is used in this article to show that all the CJEU cases as referred to in this article were ruled by the Court of Justice, not by the General Court. Read: Court of Justice of the European Union, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#composition](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#composition), (accessed on 7 August 2018).


Law and language are both bound by place and time. According to David Bourchier, "Indonesia" has been one of the main challenges for legal relationships in the globalized era. The challenge does not only concern the interaction between language and law in an attempt to put ordinary meaning into legal terms but also the congruity of legal terms among legal languages themselves. This situation invites the growing need for legal translation work. However, legal translation can be problematic as legal terms in one language cannot always be translated precisely into another language. The reason is that legal terms derive their meaning from particular a legal system which develops certain linguistic features according to its culture.

On the other hand, the notion of a globalized world is cross-border transactions are not to be impeded by the facts that the parties do not speak in the same language or even do not share the same legal concepts. Notwithstanding the emerging attempt to harmonize law toward convergence of national legal systems, law remains first and foremost a national phenomenon. Belgium and Indonesia are the epitomes of this phenomenon, especially with respect to the use of language in a contract. Therefore, taking the historical national background of both countries into account is necessary to comprehend this phenomenon.

1. Indonesia

By the 1920s, 'Indonesian language' had come into self-conscious existence. The evolution of the Indonesian language has had much in common with the struggle for freedom and equality as an independent nation. The Indonesian language is originated from the Malay language, which initially spoken in the regions around the Malaka straits but was gradually scattered over Malaya and the coastal areas of Indonesia. Given the diversity of local languages, emerging trade and

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63 Šarčević, “Challenges to the Legal Translator”, *op.cit.*, p. 187.

64 Tiersma and Solan, *op.cit.*, p. 25


69 The name 'Indonesia', which means, 'The Islands of India' was given to the archipelago by a German ethnologist, and has been in use since 1884. Originally, it was a geographical name indicating all the islands between Australia and Asia, including the Philippines. In 1922, it was the students of adat (customary) law in Leiden University who suggested the term "Indonesia" to address themselves and their land, which at that time was known as the Dutch East Indies. Read: Bernard H.M. Vlekke, *Nusantara: A History of Indonesia*, revised ed., (The Hague: W. van Hoeve Ltd, 1959), p. 6. David Bouchier, *Lineages of Organicist Political Thought in Indonesia* (doctoral dissertation), Department of Politics: Monash University Melbourne, 1996, p. 31.

70 As to the longitudinal extent, the territory of Indonesia would cover the United States from coast to coast or Europe from Ireland to the Caspian Sea. Because of this, Indonesia is divided into numerous geographical units, separated from each other by deep and vast seas, mountain ridges, swamps, and forests. There are hundreds of dialects and local languages used throughout Indonesia, which are mutually incomprehensible. The major local languages, among others are Javanese, Sundanese, Manadonese, Bugisnese. This has been the situation in Indonesia to date. According to the research carried out by the Language Development and Fostering Agency in 2017, there are 733 local languages in Indonesia. Badan Pembinaan dan Pengembangan Bahasa, “Bahasa dan Peta Bahasa di Indonesia [Language and the Map of Languages in Indonesia]”, [http://118.98.223.79/petabahasa/](http://118.98.223.79/petabahasa/) (accessed 1 September 2018). Hilman Hadikusuma, *Bahasa Hukum Indonesia [Indonesian Legal Language]*, (Bandung: Alumni, 1984), p. 1.
communication, Malay was used as the *lingua franca* in the Indonesian archipelago or formerly addressed as the Dutch East Indies.\(^{71}\)

At the beginning of the 20\(^{th}\) century, along with the increasing awareness of national unity and desire for independence, attention was also drawn out to the need of a single national language for the people in the archipelago. This was manifested in the resolution on 28 October 1928 by the Congress of Indonesian Youth pledging the concept of: “One Nation, Indonesia; One People, the Indonesian people; and One Language, the Indonesian language *(Bahasa Indonesia)*”.\(^{72}\) The term “Indonesian language” was used instead of “Malay language”. It was a momentous decision because it represented the idea of national unity of Indonesia.\(^{73}\)

When Indonesia proclaimed its independence on 17 August 1945, the 1945 Indonesian Constitution specified that the Indonesian language is the official language of the country.\(^{74}\) While the local languages, such as Javanese, Batak, and Balinese are still used among people of the same area, Indonesian has been commonly known and used as the *lingua franca* throughout Indonesia.\(^{75}\) It is worth mentioning that Indonesia inherited civil law tradition from the Dutch East Indies, thus a substantial part of Indonesian law is of colonial origin. For example, *Burgerlijk Wetboek voor Indonesië* *(Indonesian Civil Code)*, which originated from the colonial era is still mainly used to govern civil relations.\(^{76}\) Accordingly, Dutch legal terms contained therein are common and still in use to date in Indonesia.\(^{77}\)

2. Belgium

Belgium is located at the crossroads of Latin and Germanic cultures. Between the 11\(^{th}\) and 12\(^{th}\) centuries, the county of Flanders was a domain of France. For this reason, Latin was replaced by French as the official language.\(^{78}\) Meanwhile, Dutch was used in Brussels and Antwerp, which were part of the Duchy of Brabant and belonged to the Holy Roman Empire, as the Dukes opposed to using French.\(^{79}\) In the 15\(^{th}\) century, French was mostly spoken by the nobles and the wealthy citizens. On the other hand, Dutch was the dominant language in public life and used in the administration, by notaries and even as the language of instruction and literature.\(^{80}\)

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\(^{73}\) Alisjahbana, “The Indonesian Language-by-product of Nationalism*, op.cit.*, p. 389. It was followed by the Congress held by Taman Siswa in October 1941 which acknowledged the Malay language as the Indonesian language, the language that unified the people in the Indonesian archipelago. Read: Liberty Magazine, Pikiran Redaksi, 25 November 1941.

\(^{74}\) The 1945 Indonesian Constitution. The language provision was stipulated in Article 36 of the 1945 Indonesian Constitution prior to its amendment.

\(^{75}\) R. Nugroho, “The Origins and Development of Bahasa Indonesia”, *op.cit.*, p. 27.

\(^{76}\) Burgerlijk Wetboek voor Indonesië, S 1847-23. According to Article 2 para. 1 Transitional Provisions of the 1945 Indonesian Constitution, the legislation promulgated during Dutch East Indies era remains valid, provided that it has not been replaced by the new legislation under this Constitution.

\(^{77}\) Examples: *onrechtmatige daad* (unlawful act), *geoorloofde oorzaak* (illegitimate cause), *dwangsom* (penalty)

\(^{78}\) van der Jeught, “Territoriality and Freedom of Language: The Case of Belgium”, *op.cit.*, p. 182.


\(^{80}\) van der Jeught, “Territoriality and Freedom of Language: The Case of Belgium”, *op.cit.*, p. 182.
As Belgium proclaimed its independence in October 1830, as confirmed by the Treaty of London 1839, its Constitution stipulated that: “The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and judicial affairs.” Although the freedom of language favoured the use of French in public life, Dutch was not banned. Two milestones on the use of Dutch occurred around the last quarter of the 19th century. In 1873, a measure permitting the use of Dutch in the courts became law, and the legislation which stipulated that all laws would be published in both Dutch and French was enacted in 1898.

It should be borne in mind in this regard that there was also an important social component to the language issue in Belgium: French had long been the main cultural language in the country and was already the dominant language in the cities and among elite groups in the whole country. Therefore, French was also strongly represented in the upper echelon of the army, the courts, and the civil service. French was an important barrier between social classes, and social promotion was possible only through knowledge of the French language. In addition, a consequence of the First World War was the inclusion of German-speakers in the Kingdom of Belgium for the Treaty of Versailles handed the region of Eupen-Malmédy over to Belgium.

The principles of territoriality and freedom of language enshrined in the Belgian Constitution have been used as the bedrock of interaction among the languages in Belgium. Territoriality principle in languages is understood as a set of rules established by the authority to set up an official language regime to be used for the public domain within their given territory. Territoriality principle excludes the use of official language for private communication. This is then known as the individual freedom of language in Belgium.

B. Obligation to Use National Language

1. Indonesian Law on Language

The provision concerning language in contract in Indonesia is specified in Article 31 (1) of Law 24/2009: “Indonesian shall be used in memoranda of understanding or agreements that involve state institutions, agencies of the government of the Republic of Indonesia, Indonesian private institutions or individual of Indonesian nationality.” The term ‘shall’ makes this provision obligatory. Article 31 (2) of Law 24/2009 further specifies that “The memoranda of understanding or agreements and referred to in

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81 van der Essen, op.cit., pp. 154 and 162.
82 The Constitution was drafted in French only, the official Dutch version was adopted in 1967. van der Jeught, “Territoriality and Freedom of Language: The Case of Belgium”, op.cit., p. 184.
83 Constitution du Royaume de Belgique, adoptée le 7 février 1831 (The Constitution of the Kingdom of Belgium, adopted on 7 February 1831, Article 23. This provision later became art. 30 the 1993 Belgian Constitution.
86 Treaty of Peace between the United States of America, the British Empire, France, Italy and Japan and Poland, 28 June 1919, League of Nations Treaty series no. 36, Article 32-38.
87 Spolsky, Language Policy, op.cit., pp. 164-165.
89 In respect of this obligation, it is important to note concerning franchise agreement that a non-Indonesian language franchise agreement shall be translated into Indonesian. See: Government Regulation Number 42 of 2007 on Franchise (SGRI 2007-90, SSGRI 54742).
paragraph 1 which involve a foreign party shall also be drawn up in the language of that foreign party and/or in English."

Law 24/2009 does not set out any sanctions nor legal consequences for noncompliance with this obligation.\textsuperscript{90} To add to the confusion, it also remains silent as to the validity of the existing ongoing contracts not drafted in Indonesian. The law prescribes that this provision will be further regulated by an implementing regulation in the form of presidential regulation.\textsuperscript{91} However, such presidential regulation has not been issued up to now.

2. Problems concerning Indonesian Law on Language

The very first problem resulting from this provision concerns its scope of application. What does the term "agreement" in Article 31 (1) of Law 24/2009 encompass? The elucidation of Article 31 (1) attempted to clarify by stating that "The phrase 'agreements' includes international agreements in the field of public law that are governed by international law and concluded by the government and state, international organization or any other international legal subject. Those international agreements are to be written in Indonesian, foreign language, and/or English."\textsuperscript{92} However, this elucidation is not clear concerning the agreement concluded for private and commercial matters; whether such agreement subjects to this provision. For this reason, several lawyers requested a clarification from the Ministry of Law and Human Rights (MOLHR) in 2009.\textsuperscript{93} The MOLHR issued a letter (MOLHR Letter)\textsuperscript{94} which indicated that subject to the issuance of implementing regulations as provided in Article 40 of Law 24/2009,:

a. the existing foreign-language private commercial agreements do not violate the obligation as stipulated in Law 24/2009 as this law applies non-retroactively. Thus, such agreements remain valid and are not voidable or obliged to conform to this obligation.

b. The parties to private commercial agreements have the freedom to determine the language for their agreements. In addition, if the implementing regulation later stipulates that the bilingual version should be used in agreements, the parties are also free to choose which language would prevail.

Following the enactment of Law 24/2009 and the issuance of the MOLHR Letter in 2009, the practice in Indonesia developed towards the use of bilingual contracts, drafted both in Indonesian and in English or another language as agreed. As the MOLHR Letter defined that the parties have the freedom to determine the prevailing language,

\textsuperscript{90} For the role and concept of legal sanctions, Read: Anthony Kronman, "Hart Austin, and the Concept of Legal Sanctions", Faculty Scholarship Series 1077 (1975), pp. 584-607.

\textsuperscript{91} \textit{Ibid}, Article 40. See: Law Number 12 of 2011 on Establishment of Laws and Regulations (SGRI 2011-82, SSGRI 5234), (Law 12/2011). Article 1 (6): "Presidential Regulation is the legislation which is set out by the President to implement the mandate from the higher legislation or in order to conduct governmental power."

\textsuperscript{92} Law 24/2009, \textit{op. cit.}, Elucidation of Article 31 (1).


\textsuperscript{94} Letter of MOLHR Number M.HH.UM.01.01-35 on the Clarification Request concerning the Implication and Implementation of Law Number 24 of 2009, 28 December 2009.
the English version is always chosen to prevail in bilingual contracts.\textsuperscript{95} However, it should be borne in mind that MOLHR Letter did not have binding force as law or legislation in the Indonesian legislation system. The law instruments that are included in the hierarchy of legislation in Indonesia are Constitution of the Republic of Indonesia 1945, Decree of People's Consultative Assembly, Law/Government Regulation In lieu of Law, Government Regulation, Presidential Regulation, Provincial Regulation; and Regency/Municipality Regulation.\textsuperscript{96} The clarification as set forth in that letter only temporarily relieved the anxiety of the parties to non-Indonesian language drafted contracts.

This relief was indeed put to an end by the Supreme Court of the Republic of Indonesia in the 2015 Nine AM case.\textsuperscript{97} The case disputed a loan agreement agreed in April 2010 by a Texas company as the lender and an Indonesian company as the borrower. In its judgment, the Supreme Court upheld the decision of the lower courts\textsuperscript{98} that annulled the loan agreement agreed as it was not drawn up in Indonesian, hence it violated the obligation specified in Article 31 (1) of Law 24/2009. The panel of the judges pointed out that the clarification provided in MOLHR Letter should not be taken into account as it is left out of the hierarchy of law and legislation in Indonesia according to Law 12/2011.\textsuperscript{99} It further stated that the MOLHR Letter cannot diminish the obligatory nature of Article 31 (1) of Law 24/2009.\textsuperscript{100}

The subsequent problem concerns whether verbal contract concluded by an Indonesian entity with a foreign entity subjects to this provision. It is a general rule that a contract need not be reduced into writing. Where the law makes no special provision to the contrary – where written evidence of the contract or promise is not expressly required – such contract is valid, though it is verbal only.\textsuperscript{101} Indonesian law does not require that an agreement shall be made only in written form. Article 1313 Indonesian Civil Code provides that an agreement is an act pursuant to which one or more individual bind themselves to one another.\textsuperscript{102} It is understood that a verbal contract constitutes an agreement, provided that the parties agree to bind themselves. Unfortunately, Article 31 (1) of Law 24/2009 is silent in regard to a verbal contract.

It is also vital to draw attention to the term “Indonesian national” in Article 31 (1) of Law 24/2009. This term should be read according to Law Number 12 of 2006


\textsuperscript{96} Law 12/2011, \textit{op.cit.}, Article 7.

\textsuperscript{97} Supreme Court Judgment 1572/2015.

\textsuperscript{98} Judgment of Country Court of West Jakarta Number 451/Pdt.G/2012/PN.Jkt.Bar, 21 March 2013 (\textit{Country Court Judgment 451/2012}) and Judgment of the High Court of Jakarta Number 48/PDT/2014/PT.DKI, 7 May 2014 (\textit{High Court Judgment 48/2014}). The judiciary system in Indonesia has a three-tier court system and two-stage process. The Country Court (pengadilan negeri) as the court of first instance, the High Court (pengadilan tinggi) as the court of appeal, and the Supreme Court as the court of review (cassation/kasasi). The Country Court and the High Court are called \textit{judex facti}, whereas the Supreme Court is called \textit{judex iuri}. See: Law Number 48 of 2009 on Judiciary Power (SGRI 2009-157, SSGRI 5076), (\textbf{Law 48/2009}), Article 20. See also: Law Number 2 of 1986 on General Court (SGRI 1987-20, SSGRI 3327), as lastly amended by Law Number 49 on 2009 (SGRI 2009-157, SSGRI 5076), Article 3.

\textsuperscript{99} Law 12/2011, \textit{op.cit.}.

\textsuperscript{100} Country Court Decision 451/2012, \textit{op.cit.}, pp. 60-61.

\textsuperscript{101} Joseph Chitty, et al., \textit{A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon}, (Springfield: George and Charles Merriam, 1860), p. 66.

\textsuperscript{102} S 1847-23, \textit{op.cit.}, Article 1331.
concerning Indonesian nationality. However, this leaves the question: what if a person who holds Indonesian nationality does not speak Indonesian and he does not understand Indonesian? To comply with this provision, should his or her contract also be drawn up in Indonesian, albeit incomprehensible for him/her? A further question in regard term "Indonesian national" is what if he or she is an Indonesian, but has been residing abroad and is about to enter into a contract and such contract is to be performed in his or her residing country? Should such contract be drafted in Indonesian? These questions lead us to the notion of freedom of contract. An agreement is deemed binding if there is mutual consent of the parties that a particular act shall be done or omitted. However, one cannot be said to assent that she will be bound unless she is endowed with such degree of reason and judgments that will enable him to comprehend the subject of negotiation. How can she understand the subject of his contract, if she does not speak the language in which the contract is written?

The lack of clarity on the scope of this provision results in the inconsistency of judgments in addressing the issue of obligation to use Indonesian in a contract. Randolph Carpenter case concerns a sale and purchase contract over land located in Indonesia that was agreed between a foreign company and an Indonesian company in 2010. Both companies are represented by their directors who are foreigners and do not speak Indonesian, hence the contract was drafted in English. The judges declared that the claimant exaggerated the request to nullify the contract based on the absence of the Indonesian language. The judges referred to a clause of the contract in which the parties agreed to use English as the language of the contract so that the use of English in their contract was not considered as a violation of the language requirement.

The inconsistency is also exposed in Osmar Siahaan case. This case disputed a specified-period employment contract. Based on Article 31 (1) of Law 24/2009, the plaintiff requested the court to annul the contract as it was not written in Indonesian. It is important to underline that Article 57 of Law Number 13 of 2003 on Manpower (Law 13/2003) obliges the specified-period employment contract to be made in the Indonesian language. In the case of a bilingual contract, the Indonesian version shall prevail. In the case that a specified-period employment contract is drawn up in foreign language, such contract should be considered as an unspecified-period employment contract. Nevertheless, in this case, the judges did not address the claimant’s argument concerning the obligation to use Indonesian in the specified-period employment contract based on Law 24/2009 and Law 13/2003.

3. **Belgian Law on Language**

People often call Belgium a complex nation with two different cultures, confusing institutions and governments. The north of the country is called Flanders or

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103 Law Number 12 of 2006 on Indonesian Nationality (SGRI 2006-63, SSGRI 4634).

104 This scenario is possible since Indonesia applies the nationality principle based on *ius sanguinis*. So, an Indonesian might be born abroad and is not familiar with Indonesian. *Ibid.*, Article 4.


108 Law Number 13 of 2003 on Manpower (SGRI 2003-39, SSGRI 4279), Article 57: “An employment agreement for a specified period shall be made in writing and must be written in the Indonesian language with Latin alphabets.”
Flemish and the southern part is known as Wallonia. According to the 1993 Belgian Constitution, Belgium comprises three communities: the Flemish community, the French community, and the German-speaking community. In addition, Belgium comprises three Regions: the Flemish Region in the north where the Dutch-speaking community resides, the Walloon Region in the south where the French-speaking and the German-speaking communities reside, and the Brussels-Capital Region in the country’s geographical heart.

Belgium also consists of four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region. The provision concerning linguistic region manifests the territoriality principle in language within Belgium. The Constitutional Court has guaranteed the primacy of a single language in the three essentially monolingual regions and a bilingual regime in the region of Brussels-Capital.

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109 The 1993 Belgian Constitution, Article 2.
110 Ibid., Article 3. The official languages in Brussels-Capital Regions are Dutch and French.
112 The 1993 Belgian Constitution, Article 4 (1).

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Article 30 of the 1993 Belgian Constitution specifies that “The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and judicial affairs.” This provision establishes a limitation that the use of language must be regulated by law. Furthermore, such language regulation only concerns acts of the public authorities and court proceedings. In conjunction with this provision, Article 129 (1) of the constitution gives the French Community and Flemish Community parliaments the authority to regulate, by decree and within their separate spheres of jurisdiction, the use of languages for (i) administrative matters, (ii) education in the establishments created, subsidized or recognized by the public authorities, and (iii) social relations between employers and their personnel, as well as company acts and documents required by the law and by regulations.

According to the above-mentioned provisions, Article 52 (1) 1966 Belgian Language Law stipulates “For acts and documents that are prescribed by the laws and regulations and for those intended for their personnel, the private industrial, commercial or finance companies use the language of the area where their place of business or separate places of business are located.” It means that if the company has its place of business located in the Dutch-speaking region, Dutch shall always be used. However, pursuant to paragraph 2 of Article 52, the company may attach a translation into one or more languages of such documents.

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116 The 1993 Belgian Constitution, Article 129 (1).
117 1966 Belgian Language Law, op.cit., Article 52 (1), “Voor de akten en bescheiden, die voorgeschreven zijn bij de wetten en reglementen en voor die welke bestemd zijn voor hun personeel, gebruiken de private nijverheids-, handels- of financiebedrijven de taal van het gebied waar hun exploitatiezetel of onderscheiden exploitatiezetels gevestigd zijn.” (For acts and documents that are prescribed by the laws and regulations and for those intended for their personnel, the private industrial, commercial or finance companies use the language of the area where their operating headquarter, or separate operating headquarters are located.) Translated by the Author.
118 In Brussels Capital region, where both Dutch and French are the official languages, the companies submit documents in Dutch, when they are intended for Dutch-speaking staff and in French when they are intended for French-speaking staff.
The 1973 Flemish Decree requires the use of Dutch for relations between employers and employees, as well as for company acts and documents required by law in the Dutch-language region. This decree applies only in the Dutch-speaking region, which consists of Antwerp, Limburg, East Flanders, West Flanders, and Flemish Brabant provinces. The obligation to use Dutch in an employment contract as specified by the 1973 Flemish Decree is applicable to a natural and legal person having a place of business in the Dutch-speaking region of Belgium.\textsuperscript{119}

The term ‘place of business’ (\textit{exploitatiezetel}) as laid out in the decree referred to any establishment or business premises or some permanence where the worker is employed, for example the place where he received instructions or any form of notifications, where his contract is concluded; irrespective of his habitual resident or living place at the time.\textsuperscript{120} The term ‘employment relations’ is understood as the verbal and written contracts between employee to perform services for and under the direction of employers in return for which he receives remuneration for a certain period of time.\textsuperscript{121} As prescribed in Article 10 of the decree, noncompliance with this language requirement results in the nullity of the contracts, documents or acts, without prejudice to the employee or to the rights of the third party. The nullity shall be determined ex officio by the judge.\textsuperscript{122}

4. Problems concerning Belgian Law on Language

A jurisdictional issue in the contract was one of the problems due to the requirement to use Dutch in an employment contract. This was the case in \textit{Elefanten Schuh} which brought before the European Court of Justice (\textit{ECJ}) in 1981. The dispute concerned an employment contract drawn up in German, concluded in 1970 by Pierre Jacqmain, a resident of Antwerp province, and Elefanten Schuh GmBH\textsuperscript{123} which had its registered office at Kleve in the Federal Republic of Germany. Jacqmain was employed as a sales agent in Antwerp, Brabant and Limburg\textsuperscript{124} and worked for the Belgian subsidiary of Elefanten Schuh, Elefant NV whose registered office was at Genk-Zwartberg in Belgium, from whom he received instructions. The parties consented that the court at Kleve, Germany has exclusive jurisdiction in the event of a dispute.

Jacqmain brought an action before \textit{Arbeidsrechtbank Antwerpen} (Antwerp Labour Tribunal)\textsuperscript{125} seeking damages from his employer as he was dismissed without notice in 1975. Elefanten Schuh GmBH invoked the choice of court clause in the employment contract to challenge the jurisdiction of the Antwerp Labour Tribunal. The judges rejected the plea as to jurisdiction by arguing that Jacqmain pursued his occupation within its territorial jurisdiction, thus it had the competence over the claim submitted by Jacqmain.\textsuperscript{126} In its appeal judgment, \textit{Arbeidshof Antwerpen} (Antwerp Labour Tribunal)\textsuperscript{126}...

\begin{itemize}
  \item[\textsuperscript{119}] The 1973 Flemish Decree, Article 1.
  \item[\textsuperscript{120}] Partena, “The Use of Languages in Employment Relations”, \textit{Memento of the Employer} 5, May 2014, 3.
  \item[\textsuperscript{122}] The 1973 Flemish Decree, Article 10.
  \item[\textsuperscript{123}] Formerly known as G. Hoffman GmBH,
  \item[\textsuperscript{124}] These three provinces are located in the Dutch-speaking region.
  \item[\textsuperscript{125}] The court of first instance for employment dispute in Belgium.
  \item[\textsuperscript{126}] ECJ, C-150/80, \textit{op.cit.}, para 4.
\end{itemize}
Court)\textsuperscript{127} upheld the Antwerp Labour Tribunal judgment stating that pursuant to 1966 Belgian Language Law and 1973 Flemish Decree, the employment contract agreed by the parties should have been drawn up in Dutch. Referring to Article 10 of the 1973 Flemish Decree, the employment contract was declared null and void. Consequently, the clause conferring exclusive jurisdiction contained therein was invalid.\textsuperscript{128}

In an appeal brought before it,\textsuperscript{129} Hof van Cassatie (Supreme Court of Belgium) requested a preliminary ruling from ECJ concerning the jurisdictional matter in this case. ECJ ruled that the Member States are not free to lay down formal requirements other than those contained in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.\textsuperscript{130} ECJ also ruled that a Contracting State may not allow calling into question the validity of an agreement solely on the ground that the language used is not that prescribed by its legislation.\textsuperscript{131}

In this case, the parties’ consent to confer exclusive jurisdiction to the court at Kleve was invalidated because it should have been drawn up in Dutch, not in German. Instead of referring to the jurisdiction clause in the contract agreed by the parties, the judges of Arbeidsrechtbank Antwerpen and Arbeidshof Antwerpen invoked Article 627 of Belgian Judicial Code which prescribes the court of the place where the occupation is pursued to have jurisdiction. This case showed the difficulty resulted by the requirement to draw up a cross-border contract in a particular national language. The parties could not execute what they had agreed in regard to jurisdiction because it was nullified by the language requirement. However, the ECJ ruling played a significant role in this case as it laid down a limit that in the context of European Union (EU), language requirement for a contract as regulated in national law could not be used to invalidate an agreement conferring jurisdiction contained in a contract.

More than 30 years later, the obligation to use Dutch in an employment contract was disputed again in Anton Las case. Anton Las, a Dutch national was employed as Chief Financial Officer by a company established in Antwerp, PSA Antwerp. The employment contract was concluded on 10 July 2004 and drafted in English.\textsuperscript{132} PSA Antwerp was part of a multinational group operating port terminals whose registered office was located in Singapore. Las carried out his work principally in Belgium. In September 2009, Las was discharged by PSA Antwerp. Unsatisfied with the amount of allowance he received and sought for a higher allowance according to the Belgian employment law, Las brought an action before the Antwerp Labour Tribunal in December 2009 claiming that the employment contract was null and void because it violated the 1973 Flemish Decree.\textsuperscript{133} The Antwerp Labour Tribunal requested a preliminary ruling from the ECJ to determine whether the 1973 Flemish Decree violates the freedom of movement for workers as enshrined in Article 45 the Treaty on

\textsuperscript{127} The court of appeal for employment dispute in Belgium.

\textsuperscript{128} Ibid., para 5.

\textsuperscript{129} The appeal in cassation submitted by Elefanten Schuh GmBH concerned the validity of an agreement conferring exclusive jurisdiction. Elefanten NV also lodged an appeal in cassation, but it was rejected for being out of time.

\textsuperscript{130} Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels) of 27 September 1968, 1262 UNTS 153; 8 ILM 229 (1969). This case mainly concerned about the prorogation of jurisdiction under the Brussels Convention.

\textsuperscript{131} ECJ, C-150/80, \textit{op.cit.}, para. 25-27.

\textsuperscript{132} ECJ, C-202/11, \textit{op.cit.}, para 9.

the Functioning of the European Union (TFEU). According to the ECJ, the 1973 Flemish Decree which obliges the use of solely Dutch in employment relationship constitutes a restriction on freedom of movement for workers as it is liable to have a dissuasive effect on non-Dutch-speaking employees and employers from other member states of the EU.

In this case, PSA Antwerp challenged the obligation to use national language for an employment contract in Belgium against the free movement of workers principle within the EU. Free movement of workers is a fundamental principle in the EU which entitles the EU citizens to, *inter alia*: look for a job in another EU country, work in another EU country without needing a work permit, and enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages. If the 1973 Flemish Decree had been complied with, it would have benefited Las since he understands Dutch. However, by requiring the parties to an employment contract to draft their contract in Dutch, Belgium creates an obstacle for the EU citizens who are not familiar with Dutch to exercise their right to work in its jurisdiction. It is plausible that a worker unfamiliar with Dutch would hesitate to sign a contract drafted in Dutch as he does not have sufficient knowledge on the content of the contract. Moreover, the employers established in the Dutch-language region of Belgium, either those from the other EU countries or internationally active companies, this obligation forces them only to recruit employees who understand Dutch. Whereas the internationally active companies, like PSA Antwerp that belongs to multinational group companies registered in Singapore, usually use English as their working language. They need to adjust the employment contract, which encumbers them with additional cost as to translate the contract or to hire Dutch-speaking lawyers to assist them.

Following the judgment of Anton Las, the 1973 Flemish Decree was amended by Decree of 14 March 2014 on amending Articles 1, 2, 4, 5, 12 and 16 of the 1973 Flemish Decree (2014 Amended Flemish Decree). Even though the 2014 Amended Flemish Decree retains the obligation to use Dutch in employment, it allows, under certain conditions, the use of another language known by all parties for employment contracts. The alternative language is:

a. an official language of the EU; or

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137 Opinion of AG Jääskinen in C–202/11, *op. cit.*, para. 34.

138 Decreet van 14 Maart 2014 tot wijziging van artikel 1, 2, 4, 5, 12 en 16 van het decreet van 19 juli 1973 tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers, alsmede van de door de wet en de verordeningen voorgeschreven akten en bescheiden van de ondernemingen, B.S. 22 April 2014 (2014 Amended Flemish Decree).

139 2014 Amended Flemish Decree, Article 5 (1).

140 There are 24 official languages of the EU: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish. “Multilingualism”, https://europa.eu/european-union/topics/multilingualism_en, (accessed on 1 September 2018).
b. an official language of one of the member countries of the European Economic Area (EEA), who are not members of the EU.\textsuperscript{141}

The above provision only applies if the employee is in one of the following cases:\textsuperscript{142}

a. he is domiciled in the territory of one of the other Member States of the EU or one of the Member States of the EEA;

b. he is domiciled on the Belgian territory and has made use of his right to free movement of workers or freedom of establishment, such as guaranteed by Articles 45 and 49 of TFEU and by Regulation (EU) No 492/2011 of the European Parliament and the Council of 5 April 2011 on the free movement of workers within the Union;

c. he falls under the free movement of employees on the basis of an international or supranational treaty.

In case of discrepancy between the Dutch and the second official version of the individual employment contract, the Dutch version shall prevail.\textsuperscript{143}

The obligation to use national language as imposed in Belgium was disputed again in New Valmar case. New Valmar is a company incorporated in Evergem, Belgium. In 2010, New Valmar concluded an agreement with Global Pharmacies Partner Health Srl (GPPH), a company incorporated in Milan, which appointed GPPH as its exclusive concession-holder in Italy for the distribution of children’s articles (Concession Agreement). The parties agreed that the governing law of the agreement is Italian law and the dispute settlement forum is the courts in Ghent, Belgium.\textsuperscript{144} The dispute mainly concerned the invoices to be paid by GPPH, which were drafted in Italian. For this reason, GPPH claimed that the invoices should be declared null and void.\textsuperscript{145}

Ghent Commercial Court requested a preliminary ruling from the ECJ to determine whether the 1966 Belgian Language Law and 1973 Flemish Decree constitute measures having equivalent effect as quantitative restrictions on exports as stipulated in Article 35 TFEU.\textsuperscript{146} The ECJ deliberated that even if the language legislation only concerns the language of invoice – not the content of the underlying contractual relationship, it still creates restrictive effects which are likely to deter the initiation or continuation of the contractual relationship with a company established in the Dutch-speaking region of Belgium.\textsuperscript{147} The ECJ ruled that 1966 Belgian Language Law and 1973 Flemish Decree constitute a restriction falling within the scope of Article 35 TFEU.\textsuperscript{148}

141 European Economic Area comprises EU member states and 3 non-EU countries namely, Iceland, Liechtenstein, and Norway. Their official languages respectively are Icelandic, German, and Norwegian. “Languages used by EEA member countries” https://www.eea.europa.eu/data-and-maps/daviz/sds/languages-used-by-eea-member-countries-1/download.table, (accessed on 1 September 2018).

142 Amended Flemish Decree, Article 5 (2).

143 Amended Flemish Decree, Article 5 (4).


146 Initially, the Claimant submitted that the Belgian Language Legislation is contrary to Article 45 TFEU which specifies the guarantee for freedom of movement of workers within the EU. However, New Valmar case does not fall within the scope of Article 45 TFEU, but of Article 35 TFEU. According to Article 267 TFEU, the ECJ has the authority to reformulate the questions referred to it in order to provide a useful answer for the referring court.

147 ECJ, C-15/15, \textit{op.cit.} para. 42.

148 \textit{Ibid.}, para. 57.
There are two differences between Anton Las and New Valmar. Firstly, in New Valmar the obligation to use Dutch in Belgium was challenged against the free movement of goods within the EU. Second, the disputed object in New Valmar case is not the Concession Agreement itself, but the invoices issued in respect to the Concession Agreement. The invoice is categorized as ‘acts and documents required by the law and by regulations’ within the meaning of the 1973 Flemish Decree. The main shortcoming of requiring the parties to draw up the invoices in a specific language, in this case Dutch, is the recipients of such invoices will have difficulties in understanding them quickly. Thus, there are risks of non-payment disputes, since the recipients of those invoices could rely on their inability to understand the invoices’ content in order to refuse to pay them. This obligation is also potentially deterring the initiation or continuation of contractual relationships with a company whose place of business is in the Dutch-speaking region of Belgium.

III. Creating Constraint in International Contracting?

A. Freedom of Contract

The first concern in respect to the requirement to draft a contract in specific national language pertains to the issue of freedom of contract. The notion of freedom of contract is the parties are allowed to bind themselves by mutual agreement and free to stipulate terms in their contract, provided that the contract adheres to laws, morality and/or public order. In exercising their freedom, the parties must possess sufficient knowledge on the content of their contract to enable them assenting to the contract. If the contract were drafted in certain national language which the parties or one of them is not familiar with, she would hesitate to give her consent for fear of not understanding what she is committing herself to.

As to Belgium, the obligation to use Dutch in contract leads to a discriminatory measure as employers falling within the scope of the 1973 Flemish Decree may logically give preference to a Dutch-speaking candidate rather than use the recruitment criteria which the recruiters might have preferred if such legislation did not exist. On the contrary, only the employees who speak Dutch, mainly those who are from the Netherlands and Belgium who can enter the labour market in the Dutch-speaking region of Belgium. This contradicts the free movement of workers principle within the EU.

As to Indonesia, given the unclear scope of the provision and judgment of the Supreme Court in the Nine AM case, foreign parties plausibly are more reluctant to conclude an agreement with an Indonesian entity. For the Indonesians themselves, this obligation impedes them to contract. As an example, to conduct her study in the Netherlands, an Indonesian student should sign an English-language contract concerning the scholarship awarded to her. Taking into account Article 31 of Law 24/2009, does it mean that the contract can be nullified, thus annul her scholarship and delay her study?

B. Choice of Law and Choice of Jurisdiction

Following the notion of freedom of contract, contracting parties are also allowed to choose in advance the applicable law to construe their contractual terms within

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150 Chitty, et al., op.cit., pp. 8-11.
certain parameters and limitations. The obligation to use certain national language in international contract encumbers the contractual relations if the parties agree to choose foreign law as the governing law for their contract. As to Indonesia, if the applicable law to contract is English law, while the contract shall be written in Indonesian, the discrepancy between the Indonesian legal terms used in the contract and English as the language of the applicable law is the problem that needs to be solved.

Furthermore, whether the obligation to use national language constitutes mandatory rules or public order in international contracting could also be drawn into our attention. Advocate General Øe addressed this issue in his opinion for New Valmar case as the parties agreed to apply Italian law for their contract. As a matter of principle, the chosen law by the parties should determine all aspects of the contract. Thus, it leads to a question whether the obligation to use national language is a mandatory rule or public order that would set aside the application of the chosen law by the parties or it merely concerns the formal validity of the contract.

The requirement to use national language in a contract is also problematic if the parties choose a foreign forum to settle their contract dispute. This issue was raised in Elefanten Schuh when the exclusive jurisdiction of Kleve court was nullified by the obligation to use Dutch in the employment contract. However, ECJ ruled in this case that the choice of jurisdiction which concluded according to the 1968 Brussels Convention cannot be nullified by national provisions which require additional compliance as to formal validity of a contract. Moreover, it also does not seem practical to draft the contract in a certain national language, if the chosen dispute settlement forum does not speak the language of the contract.

C. Online Contracts

The requirement to draft contracts in a specific national language is problematic for online transactions. This is relevant for Indonesia. Law Number 11 of 2008 on Electronic Information and Transactions regulates transactions that are conducted online. The practice shows that online contract usually is not in Indonesian. For example, an Indonesian buyer orders a book through Amazon.com, and the book will be shipped from Kuala Lumpur. The sale and purchase contract to be agreed by the Indonesian on Amazon’s website is in English and the Indonesian language version of such contract is, in all probability, not available. Given the fact that hundreds of online contracts involving Indonesian entities are concluded on a daily basis, are those contracts still considered not valid according to Law 24/2009?

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154 ECJ, C-15/15, op.cit., para. 13


156 ECJ, C-150/80, op.cit.

D. Translation Work

Translating the contract might be the solution for the aforementioned problems. However, it should also be borne in mind that translation might complicate the problems, instead of resolving them. Legal texts do not have a single agreed meaning but usually, derive their meaning from a particular legal system. This undeniably affects the translatability of the contracts as finding the precise equivalent legal terms between different languages is extraordinarily challenging. Thus, the quality of the translated documents could influence the understanding and interpretation of the contracts. Moreover, translation adds extra cost for the parties that constitutes a burden on business and would not have been necessary if there was no requirement to use a specific national language in a contract. This even worse, especially if there are many and long documents to be translated because it presumably delays the negotiation process and proceeding of cross-border transactions.

IV. CONCLUSION

Law and language are inextricably linked to each other as language is the main medium of expression of law. Since it is bound to a specific legal system, legal language differs from ordinary language, hence legal language has its own lexicon that shows its complexity and particularity. For this reason, legal terms are greatly varied and the choice of language in cross-border legal relations is extremely problematic.

The main issue regarding the provision obliging the use of Indonesian in a contract involving Indonesian entity concerns the scope of the provision itself. It demands further clarification from the government on the preconditions to apply this provision. Thus, an implementing regulation as mandated Law 24/2009 on the use of language is highly expected. However, it is also worth noting that as the civil law relationship in Indonesia is mainly regulated under the Indonesian Civil Code, it is not clear yet whether Article 31 of Law 24/2009 acts as lex specialis to the provisions of the contract as stipulated in the Indonesian Civil Code.

As to Belgium, the doctrine of supremacy of EU law plays a significant role with respect to the provisions requiring the use of Dutch in the Dutch-speaking region of Belgium. As the aim of creating a uniform common market within the EU should not be undermined, any norm of EU law takes precedence over any provision of national law. In 2014 Belgium amended the 1973 Flemish Decree for it was considered impeding the application of a free movement of workers principle as prescribed in TFEU. The 2014 Amended Flemish Decree lays down the use of official languages of EU and EEA countries for employment contracts agreed between an employer established in the Flemish region and EU or EEA employees. However, problems are not yet solved in the case of employment contracts agreed between Flemish-based employers and non-EU or EEA employees who do not have knowledge on any of the official languages of EU or EEA countries.

The aforementioned explanation addresses that the requirement to draw up a contract in a specific national language impedes international contracting. Given the complexity of cross-border transactions itself, the parties should be facilitated to execute their freedom with regard to the language of their contract by using the language they understand.

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158 Šarčević, “Challenges to the Legal Translator”, op.cit., 193.
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