DOI : 10.18843/rwjasc/v10i2/03
DOI URL : http://dx.doi.org/10.18843/rwjasc/v10i2/03

The obligation to use Indonesian Language in the Formation of Contract with Foreign Investor: Problems and the Need to Amend the Indonesian Law No. 24 of 2009

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ABSTRACT

Language in international business contracts is very important. Determination of language is freedom to contract of the parties. The use of Indonesian language in contract is regulated under Law 24/2009 and Law 2/2014. The norms of Article 31 paragraph (1) of Law 24/2009 and Article 43 paragraph (1) of the Law 2/2014 use the word of "mandatory," and do not include any sanctions if Article 31 paragraph (1) of Law 24/2009 and Article 43 paragraph (1) Law 2/2014 is violated. The first problem is, does the obligation to use Indonesian language in making international contracts is a legal rule that can be cancel the contract and how is the obligation to use Indonesian language in contracting related to the principle of freedom of contract and the legal terms of the agreement? The research method is normative legal research which bases its analysis on legislation related to the research problems. The results of the study, first, Article 31 of Law 24/2009 and Article 43 of Law 2/2014 concerning the use of Indonesian language in making international contracts can be categorized into legal rules without sanctions (lex imperfecta). The obligation to use Indonesian language in an international contract is not legal rule that could make the contract null and void. Second, the use of Indonesian in making international contracts both notarial and private made agreement in accordance with Article 1320 of the Civil Code, Law 24/2009, and Law 2/2014. Moreover, the use of language in international contracts becomes the freedom of the parties.

Keywords: Contract; Indonesian Language; Foreign Investor.

INTRODUCTION:

To cope with the growing economic development of Indonesia nowadays, foreign investors receive privilege treatment in order to expand their business in Indonesia. Such privileges include the lowest tax policy and less bureaucracy investment procedures. This policy is deemed to provide the capital and technological inputs needed to strengthen Indonesia's manufacturing capabilities, to modernize its infrastructure, and to provide many jobs for Indonesians (Hornick, Robert, & Nelson, 1987).

Since the enactment of Law Number 24 of 2009 concerning Flags, Languages, National Symbol and National Anthem (article 31), foreign investor will has to make their contract in Indonesian language. This Law used the word "mandatory", but it does not include sanctions for those who violate. This law will surely become main challenges to interact more investment coming in Indonesia.

In regards to the case of language in the contract, there was the case of *Randolph Nicholas Bolton Carpenter v. Neil Allan Tate*, who was registered in case Number 35 / Pdt.G / 2010 / PN.Pra in the Praya District Court, Lombok, West Nusa Tenggara. A land sale and purchase agreement was made in English, between Randolph Nicholas Bolton Carpenter and Neil Allan Tate, both Australian citizens. However, Neil Allan Tate is not the land owner, and the real owner is Bati Anjani. Randolph Nicholas Bolton Carpenter filed a

lawsuit to the Praya District Court, with the basis of the land sale and purchase agreement only made in English, so that it contradicted article 31 paragraph (1) of Law Number 24 of 2009 and beg to declare the agreement is null and void.

Based on the explanation above, the author examines whether the mandatory basis to obligates foreign counterpart to use Indonesian language in their contract with Indonesians. This obligation contradicts with the general principle of freedom of contract. At the same time, it will also raise difficulties for foreign investor to do business in Indonesia. Hence, this paper proposed two problem formulations: does the obligation to use Indonesian in making international contracts would resulted the contract null and void? and does the obligation to use Indonesian in making international contracts contradict with the principle of freedom to contract?

METHODOLOGY:

This research is a normative legal research that bases its analysis on legislation related to the doctrinal approach. Legal materials that used in this study are the Indonesian Civil Code; Law Number 24 of 2009 concerning Flags, Languages and Symbols of the State and National Anthem; Law Number 30 of 2004 concerning Notary Position; Law Number 2 Year 2014 concerning Amendment to Law Number 30 of 2004 concerning Notary Position; United Nations Convention on International Sale of Good 1980; and UNIDROIT Principles of International Commercial Contracts. These legal materials, then will be analyzed using qualitative analysis.

LITERATURE REVIEW:

Contract law is an important legal field in the trade sector and international business transactions. The parties carry out international business transactions based on agreements as outlined in international contracts to ensure legal certainty. The definition of contracts in Black's Law Dictionary (Garner, 2009) defines "an agreement between two or more persons which creates an obligation to do nor not to do a particular thing." In the United Nations Convention on International Sale of Good (hereinafter referred to as CISG), Article 1 paragraph (1), providing a contractual definition specifically for a sale and purchase contract, sale and purchase contract is a contract in which the parties have a place of business in the relevant country. Such contracts may be between states, between state and private party, or exclusively between private parties" (Adolf, 2007). (Gautama, 1976) argues that international contracts are national contracts with foreign elements.

The rapidity of the contract Law is due to the principle of freedom of contract. The principle of freedom of the parties binds themselves (freedom to contract) in the fulfillment of their rights and obligations (party autonomy) (Apeldoorn, 1996). The principle of freedom of contract is a continuation of the principle of equality of the parties as the basis of civil relations and then distinguishes it from public relations that are superior and subordinate (Mufidi, 2008).

Freedom of contract is also adhered to in the principle of UNIDROIT in Article 1.1. UNIDROIT's principle, which confirms the parties' freedom to make contracts, including freedom determines what the parties agree on. The parties are free to enter into a contract and to determine its content (Adolf, 2007). A modern merchant law would be much smaller than current contract law, would truncate broad judicial searches for party's true intention when interpreting their agreement, and would accord parties much more freedom to write their contracts (Schwartz & Scott, 2003).

The use of language in contracts (international), has an important role and part of freedom to contract with the parties. Freedom of contract is the principle or general principle of agreement can only be achieved if the parties involved have a balanced bargaining power.

FINDING AND DISCUSSION:

The Obligation to Use Indonesian Language in Making International Contract is Not A Legal Rule that Makes the Contract Null and Void

In Indonesia, the rules for the obligation to use Indonesian language are contained in Article 31 of Law Number 24 of 2009 and Article 43 of Law Number 2 of 2014. Both notarial deed and private deed must be made in Indonesian and formally must follow the provisions of Article 1320 of Indonesian Civil Code regarding the validity of the agreement.

The word "mandatory" in the Law Number 2 of 2014 can be equated in Article 31 of Law Number 24 of 2009. The word "mandatory" either in Law 2/2014 conjunct to Law Number 24 of 2009, is a legal rule (Purbacaraka, 1993) that contains instructions (*gebod*). The word "mandatory" can be said as a legal rule without sanctions, or *lex imperfecta* (Manan, 2004). Obedience to the legal rule is not solely based on coercive sanctions, but because it is encouraged by reasons of decency or trust. Not all violations of the legal rule can be imposed. However, the rule of imperative Law without being followed by legal norms of sanctions can be said to be a legal rule that is "toothless".

Obligations that are not accompanied by sanctions should be facultative, not imperative. The provisions of the word "mandatory", but if it exclude the sanctions, it interpreted to be "might" (Manalu, 2016). It means that, if violated, it will not have any legal consequences for the parties to the contract. Article 31 paragraph (1) of Law 24/2009 does not need to be collided with Article 1320 of the Civil Code paragraph (4) concerning the terms of the halal clause. The original intent or *memori van toelichting* of the Law 24/2009 did not want to regulate language very rigidly.

The word "mandatory" in Article 31 of Law Number 24 of 2009 does not necessarily make the contract null and void. The word "mandatory" here must be translated as the necessity to use Indonesian without the consequences of canceling the contract if there is no Indonesian.

In the dispute between Anto Las and the PSA Antwerp company regarding the use of English in a work contract, even though there are domestic rules that require the use of a particular language, and sanctions if they do not comply with the rules, they must be carried out proportionally. Especially in this case, there is an element of "Cross-Border", that Anton Las, a Dutch citizen who works for a Belgian company, is enjoying his right to get the "freedom of movement" for workers who are subject to European Union Law. Domestic rules of member countries should not only require the use of official national languages in contracts that contain cross-border elements, but also allow the use of other languages that are understood by the parties. This rule is more proportional, win-win solution, the principle of freedom of movement for workers in European Union Law is not violated and on the other hand it can also protect the objectives of the national rules as explained.

The provisions of the Treaty on the Functioning of the European Union (TFEU) guarantee freedom of workers and must be interpreted as "obstructing" national legislation which requires the exclusive use of national official language in "cross border" contracts and resulting in null and void of the contract.

European Union judges stressed that the context of the parties has an element of "Cross-Border", it is not too important to have knowledge of the official language of the country, and parties may create contracts in languages other than the official language of the country.

The Chosen Language by Parties is Part of the Principle of Freedom of Contract:

The principle of freedom of contract in Article 1338 paragraph (1) of the Indonesian Civil Code contains the meaning of all agreements both stipulated in the Civil Code and not regulated in the Civil Code. This freedom is limited to the provisions of Article 1335 of the Civil Code, Article 1337 of the Civil Code, and Article 1338 paragraph (2) of the Civil Code.

Law 24 of 2009 requires the use of Indonesian in the contract but does not declare Indonesian as a language that must be used, if there are differences in meaning between two / more languages of a contract. If there are differences in meaning between two / more languages in the contract, the language must be used / apply based on the agreement of the parties who have the freedom to determine the choice of language that applicable in the contract.

The role of language in international business contracts is very important. Determination of language is freedom to contract of the parties (Heriyanto, 2015). If one party has a higher bargaining position, then that party can determine the language used, while the lower position is 'take it or leave it'. In order to be fair, parties can agree to use the two languages of them. However, if there is a dispute over the use of two languages it cannot be avoided, which language should be "won" (prevail) if there are different interpretations or translations in those languages. The parties must agree on the contract and determine who has the higher bargaining position (Juwana, 2010).

Language in the contract as a formality requirement, and not a valid requirement for the agreement. Language is a tool of communication in interaction, connecting the understanding of one party with the other party and is an agreement of the parties. The "formal" requirements of Article 31 of Law 24 of 2009 are not related to the legal conditions of the agreement of Article 1320 of the Civil Code, related to causal which is not lawful or made in an error.

Article 1320 of the Civil Code prohibits if the substance of the agreement is made contrary to certain Laws. If an agreement, which complies with the provisions in Article 31 of Law Number 24 of 2009, then is not made in Indonesian does not automatically violate the legal terms of the agreement unless the substance is contrary to certain Laws that apply at a certain time, for example the substance of the agreement is to have abortion in which is clearly prohibited by the Criminal Code (KUHP).

CONCLUSIONS:

The norms of Article 31 of Law Number 24 of 2009 and Article 43 Law Number 2 of 2014 are legal rules without sanctions (*lex imperfecta*), and do not necessarily cancel contracts that do not use Indonesian or do so in two languages. The word "mandatory" must be interpreted as having to use Indonesian without canceling the contract if there is no Indonesian, and the obligation to use Indonesian is not a compelling Law that can cancel the contract.

The use of Indonesian in making international contracts both notarial or private deed and binding on the parties in accordance with Article 1320 of the Civil Code conjunct to Law Number 24 of 2009 jo. Law Number 2 of 2014. The use of language in international contracts becomes the freedom of the parties because it is related to the principle of freedom of contract, especially in the case of differences in meaning between the two languages in a bilingual agreement, the applicable language is based on the agreement of the parties. The parties have the freedom to determine the choice of language which applicable in the agreement.

Amendments to Article 31 of Law Number 24 of 2009 and Article 43 Law Number 2 of 2014 are needed in order to reflect the prevailing reality. If not, Article 31 of Law Number 24 of 2009 and Article 43 Law Number 2 of 2014 are merely “toothless norms” or cannot be enforced, remembering that it is legal rules without sanctions. In addition, both Law Number 24 of 2009 and Law Number 2 of 2014 are also required to determine the language that must apply in the event of a conflict or difference in meaning between the two languages in the agreement.

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