The Mandatory Use of National Language in Indonesia and Belgium: An Obstacle to International Contracting?

Priskila Pratita Penasthika

School of Law, Erasmus University

Penasthika, P.P. (2017). The Mandatory Use of National Language in Indonesia and Belgium: An Obstacle to International Contracting?. *INDONESIA Law Review* 9(2): 83–132
http://dx.doi.org/10.15742/ilrev.v9n2.537

ABSTRACT

Law Number 24 of 2009 on the 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 the Nine AM v. PT Bangun Karya Pratama Lestari judgment, annulled a loan agreement because it was considered in violation of the language requirement. Although this judgment claims to strengthen the use of the Indonesian language in contracts, it underscores the potential risk of voidance foreign parties face when they enter into agreements drafted in foreign languages with Indonesian counterparties. 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's attention to the obligation to use Dutch in employment contracts and company documents as imposed in the Dutch-speaking region of Belgium. Despite Indonesia and Belgium being geographically far from each other, the abovementioned judgments underline the phenomenon that national language still influences cross-border legal relationships. This article seeks to explore the legal impact of the obligation to use a national language in contracts on the contracting parties' freedom. It further argues that this obligation impedes international contracting.

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

ABSTRAK

Undang-undang Nomor 24 Tahun 2009 tentang Bendera, Bahasa, dan Lambang Negara, serta Lagu Kebangsaan mensyaratkan bahwa setiap kontrak yang melibatkan pihak Indonesia wajib ditulis dalam bahasa Indonesia. Dalam menerapkan undang-undang ini, Mahkamah Agung Republik Indonesia dalam putusannya untuk kasus Nine AM melawan PT Bangun Karta Pratama Lestari, membatalkan perjanjian kredit yang disepakati para pihak karena perjanjian tersebut dianggap melanggar persyaratan berbahasa Indonesia. Meskipun alasannya adalah untuk memperkuat penggunaan bahasa Indonesia dalam kontrak, putusan ini menunjukkan potensi risiko pembatalan kontrak yang disepakati dalam bahasa asing oleh pihak asing dan pihak Indonesia. Di belahan bumi lain, dalam kasus Anton Las melawan PSA Antwerp NV dan New Valmar BVBA melawan Global Pharmacies Partner Health Srl, Pengadilan Uni Eropa menarik perhatian publik karena memutus persoalan kewajiban penggunaan bahasa Belanda dalam kontrak tenaga kerja dan dokumen perusahaan yang diterapkan di wilayah berbahasa Belanda di Belgia. Meskipun Indonesia dan Belgia terpisah oleh jarak geografis yang jauh,

kedua putusan tersebut menunjukkan fenomena bahwa bahasa nasional masih memainkan peran yang penting dalam mempengaruhi hubungan hukum lintas-batas negara. Artikel ini mengeksplorasi dampak hukum dari kewajiban untuk menggunakan bahasa nasional dalam kontrak sehubungan dengan kebebasan para pihak dalam berkontrak. Lebih lanjut artikel ini berpendapat bahwa kewajiban ini menghambat kontrak-kontrak internasional.

Keywords: bahasa, kontrak internasional, transaksi lintas-batas, Indonesia, Belgia

I. INTRODUCTION[1]

84 Language is intertwined with law because language is the medium of writing laws, whether for legislation, court decisions, or contracts. Our understanding of law is rooted in the fact that rules and norms must be expressed in language,[2] whether spoken or written. This relationship is complicated because the use of legal language is very particular.[3] Each nation's laws have their own rules of classification, underlying conceptual notions, sources of law, and terminological apparatus; legal terms vary among countries[4] and also according to field of law.[5] Therefore, legal texts must be drawn up carefully to avoid ambiguity in the provisions of law.[6]

Language plays a significant role as the medium for representing a nation's identity because its vital character is in its power to generate imagined communities and establish particular solidarities.[7] Language is an instrument by which it is possible to bond groups with unlimited numbers of individuals. Thus, control over how language is used provides the speaker or writer to mold and govern large groups of people.[8] This is why many countries regulate the use of language in their national legislation. Approximately 125 of the world's constitutions govern policies on language use, and approximately 100 of them designate one or more official languages with special privileges of use.[9]

Indonesia and Belgium have vigorously used language as a tool to build and maintain their countries' solidarity hand-in-hand with their struggle for independence and self-determination. Initially, the Indonesian people used the language as a way to declare their separate identity during colonialism, when Dutch was used as the official language.[10] Since then, Indonesian developed into a method of communication that expresses not only Indonesian nationalism but also its

1. This article is a revised version of a paper presented at the 2018 Asia Pacific Colloquium on Private International Law on 11 December 2018 in Doshisha University, Kyoto-Japan. The author would like to thank Prof. Xandra Kramer, Prof. Wouter Werner, dr. Jos Hoevenaars, dr. Alina Onţanu, Yu Un Oppusunggu Ph.D., and Georgia Antonopoulou for their comments and thoughts on earlier drafts of this article. Errors and omissions are the author's own responsibility.
2. Peter M. Tiersma and Lawrence M. Solan, *eds.*, *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012), p. 3.
3. Peter M. Tiersma, "A History of the Languages of Law," in Peter M. Tiersma and Lawrence M. Solan (eds), (Oxford: Oxford University Press, 2012), p.13.
4. Susan Šarčević, "Challenges to the Legal Translator" in *The Oxford Handbook of Language and Law*, edited by Peter M. Tiersma and Lawrence M. Solan, (Oxford: Oxford University Press, 2012), p. 194.
5. For example: '*connecting factors*' and '*ordré 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.
6. Lon L. Fuller, *The Morality of Law, rev.ed.* (New Haven: Yale University Press, 1969), pp. 63-65.
7. Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism, rev. ed* (London: Verso, 2016), p. 133.
8. Tomasz D.I. Kamusella, "Language as an Instrument of Nationalism in Central Europe," *Nations and Nationalism 7, No. 2* (2001), p. 236.
9. Bernard Spolsky, *Language Policy* (New York: Cambridge University Press, 2004), pp. 11-12.
10. Anderson, *op.cit.*, pp. 132-133.

aspirations and traditions.[11] In Belgium, the Flemish community used Dutch[12] to represent their separate identity 85 from the aristocracy and bourgeoisie of the French-speaking community.[13] It is interesting to see how Indonesia and Belgium specify their legal policies with respect to language use.

The 1945 Constitution of the Republic of Indonesia (**1945 Indonesian Constitution**) stipulates that the national language of Indonesia shall be Indonesian (*Bahasa Indonesia*).[14] The 1945 Constitution further specifies that all language provisions shall be regulated by law (*undang-undang*).[15] Based on these provisions, the government of the Republic of Indonesia enacted Law Number 24 of 2009 on the National Flag, Language, Emblem, and Anthem of Indonesia in July 2009 (**Law 24/2009**).[16] The Preamble of Law 24/2009 sets out that language is one means of unifying the country and manifesting its identity and sovereignty in international relations.[17] Article 31 (1) of Law 24/2009 requires that Indonesian be used in memoranda of understanding or agreements that involve state institutions, government agencies of the Republic of Indonesia, Indonesian private institutions, and by individuals of Indonesian nationality.[18] Nevertheless, this law does not specify any legal consequences for those who do not comply with this obligation.

As for Belgium, according to De Belgische Grondwet 1993 (**1993 Belgian Constitution**),[19] the country is comprised of four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual Brussels-Capital region, and the German-speaking region.[20] The Royal Decree of 18 July 1966 on the Use of

11. Benedict R. O'G. Anderson, *Language and Power Exploring Political Cultures in Indonesia*, (Ithaca: Cornell University Press, 1990), p. 124.
12. 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. Read: Stefaan van der Jeught, "Territoriality and Freedom of Language: The Case of Belgium", *Current Issues in Language Planning 18, No. 2* (2017), accessed 6 September 2018, doi: https://doi.org/10.1080/14664208.2016.1243883.
13. Piet van den Craen, "What, if Anything, Is a Belgian," *Yale French Studies 102* (2002): 26. Louis Pierard, "Belgium's Language Question: French v. Flemish," *Foreign Affairs 8, No. 4* (1930): 644.
14. The 1945 Constitution of the Republic of Indonesia, as lastly amended in 2002 (**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.
15. *Ibid*.
16. Indonesia, *Undang-Undang tentang Bendera, Bahasa, dan Lambang Negara, serta Lagu Kebangsaan (Law regarding National Flag and Language, State Symbols and the National Anthem)*, UU No. 24 Tahun 2009, LN No. 109 Year 2009 (Law Number 24 Year 2009, SG No. 109 Year 2009), art. 31 (1).
17. *Ibid*., General Elucidation.
18. *Ibid*., art. 31 (1).
19. The Belgian Constitution as lastly amended on 8 May 1993 (**1993 Belgian Constitution**) to recognize the division of the country into three administrative regions: Flanders, Wallonia, and Brussels.
20. *Ibid*., art. 4 (1).

Languages in Administrative Matters (**1966 Belgian Language Law**)[21] requires all legal and regulatory acts and documents intended for personnel, private industrial, commercial or financial companies to use the language of the area in which their place of business is located. For 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**)[22] requires the use of Dutch for employer and employee relations in the Dutch-language region of Belgium. The 1973 Flemish Decree prescribes that noncompliance with this 86 language requirement results in the nullity of the contracts, documents or acts, without prejudice to the employee or to the third party's rights. The nullity shall be determined ex officio by a judge.[23]

Against this background, this article aims to explore the legal impact of the obligation to use a national language in cross-border contractual transactions, as enforced in Indonesia and Belgium. Section II provides an explanation of the power of language on law. A brief historical background of language regulations in Indonesia and Belgium is discussed in the first part of Section II outline 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 contracts in Indonesia and Belgium by discussing Indonesian court judgments in *Nine AM Ltd v. PT Bangun Karya Pratama Lestari* (**Nine AM**),[24]*Randolph Nicholas Bolton Carpenter v. Neil Allan Tate and Bati Anjani* (**Randolph Carpenter**),[25]*Osmar Siahaan v. PT Inti Brunel Teknindo* (**Osmar Siahaan**),[26] and the Court of Justice of the European Union judgments[27] in *Elefanten Schuh GmBH v. Pierre Jacqmain* (**Elefanten Schuh**),[28]*Anton Las v. PSA Antwerp NV* (**Anton Las**),[29] and *New Valmar BVBA v. Global Pharmacies Partner Health Srl* (**New Valmar**).[30] In Section III, the problems with these judgments are used as the basis to argue that this obligation encumbers international contracting, before drawing a conclusion in Section IV.

21. K.B. Wetten van 18 juli 1966 op het gebruik van de talen in bestuurszaken, B.S., 2 August 1966, (**1966 Belgian Language Law**).
22. 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**).
23. *Ibid*., art. 10.
24. Supreme Court of Republic of Indonesia, "Decision Number 1572/K/Pdt/2015," judgment.
25. Supreme Court of Republic of Indonesia, "Decision Number 35/PDT.G/2010/PN.PRA," judgment.
26. Supreme Court of Republic of Indonesia, "Decision Number 254/K/Pdt.Sus-PHI/2013," judgment.
27. 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. Seee Court of Justice of the European Union, "Overview," https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#composition, accessed 7 August 2018).
28. ECJ, Judgment of 27 June 1981, *Elefanten Schuch v. Pierre Jacqmain*, C-150/80, ECLI:EU:C:1981:148.
29. ECJ, Judgment of 16 April 2013, *Anton Las v. PSA Antwerp NV*, C-202/11, ECLI:EU:C:2013:239.
30. ECJ, Judgment of 21 June 2016, *New Valmar BVBA v. Global Pharmacies Partner Health Srl*, C-15/15, ECLI:EU:C:2016:464.

II. THE POWER OF LANGUAGE ON LAW

A. A Brief Historical Setting

As the most basic instrument of communication among human beings, language is indispensable to the existence of cultures, civilizations, religions, and society in general.[31] Language enables the human mind to perceive and comprehend the world.[32] Furthermore, law reflects the power of language to comprehend. Therefore, positive law is bound to language because its legal notions exist only in and through language. Meanwhile, customary law is not bound to language as it expresses itself in course of conduct rather than in language.[33]

Law and language are both bound by place and time.[34] Accordingly, language has 87 created one of the main challenges of legal relationships in the globalized era. The challenge not only concerns the interaction between language and law in an attempt to attach ordinary meaning to legal terms, but also the congruity of legal terms with each legal language.[35] This means there is a growing need for legal translation work. However, legal translation can be problematic because legal terms in one language do not always translate precisely into another.[36] That is, legal terms often derive their meanings from particular legal systems that develop certain linguistic features according to individual culture.[37]

On the other hand, the notion of a globalized world means that cross-border transactions should not be impeded by the fact that the parties do not speak in the same language or share the same legal concepts.[38] Notwithstanding the emerging attempt to harmonize law in a convergence of national legal systems, law remains first and foremost individual according to its national characteristics.[39] Belgium and Indonesia are the epitomes of this phenomenon, especially with respect to the use of contract language. Therefore, we must take both countries' historical national backgrounds into account to understand this phenomenon.

1. Indonesia

By the 1920s, an Indonesian language had arrived into self-conscious existence. The evolution of the Indonesian language had much in common with its struggle

31. Kamusella, *op.cit.*, p. 236.
32. Bernhard Grossfeld, "Language and the Law," *Journal of Air Law and Commerce 50* (1985): 795-797.
33. Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968), p. 44.
34. Sutan Takdir Alisjahbana, *Bahasa Hukum - Beberapa Sumbangan Fikiran Menuju ke Arah Pembentukan dan Pemakaian Bahasa yang Baik [Legal Language - Some Contribution of Thoughts towards the Direction of Formation and Good Use of Language]*, BPHN-Simposium Bahasa dan Hukum, 1974, p. 21.
35. Šarčević, *op.cit.*, p. 187.
36. Tiersma and Solan, *op.cit.*, p. 25.
37. Mattila, *op.cit.*, pp. 28-29.
38. Tiersma, *op.cit.*, p. 7.
39. Shaunnagh Dorsett and Shaun McVeigh, "Questions of Jurisdiction," in *Jurisprudence of Jurisdiction*, edited by Shaun McVeigh, (New York: Routledge-Cavendish, 2007), p. 3.

for freedom and equality as an independent nation.[40] The Indonesian language originates from the Malay language, which was spoken in the regions around the Malaka straits but which gradually scattered throughout Malaya and Indonesia's coastal areas.[41] Given the diversity of local languages,[42] emerging trade and communication, Malay was used as the *lingua franca* in the Indonesian archipelago, formerly known as the Dutch East Indies.[43]

88 At the beginning of the 20th century, along with the increasing awareness of national unity and the desire for independence, attention was drawn to the need for a single national language for the residents of the archipelago. This was manifested in the resolution on 28 October 1928 by the Congress of Indonesian Youth, which pledged the concept of: "*One Nation, Indonesia; One People, the Indonesian people; and One Language, the Indonesian language (Bahasa Indonesia).*"[44] Using the term "Indonesian language" instead of "Malay language" represented a momentous decision because it established the idea of an Indonesian national unity.[45]

When Indonesia proclaimed its independence on 17 August 1945, the 1945 Indonesian Constitution specified the Indonesian language as the country's official language.[46] While people in the area still used the local languages, such as Javanese, Batak, and Balinese, Indonesian has become commonly known and used as the *lingua franca* throughout Indonesia.[47] It is worth mentioning that Indonesia

40. Takdir Alisjahbana, "The Indonesian Language-by-product of Nationalism," *Pacific Affairs 22 No. 4* (1949): 388 https://www.jstor.org/stable/2751562.
41. 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. sEE Bernard H.M. Vlekke, *Nusantara: A History of Indonesia, revised ed.* (The Hague: W. van Hoeve Ltd, 1959), p. 6; David Bourchier, "*Lineages of Organicist Political Thought in Indonesia"* (Doctoral diss., Monash University Melbourne, 1996), p. 31.
42. 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/, accessed 1 September 2018; Hilman Hadikusuma, *Bahasa Hukum Indonesia [Indonesian Legal Language]* (Bandung: Alumni, 1984), p. 1.
43. R. Nugroho, "The Origins and Development of Bahasa Indonesia," *PMLA 72, No. 2* (1958): 24.
44. *Ibid*, p. 26.
45. Alisjahbana, *op.cit.*, p. 389. It was followed by the Congress held by Taman Siswa in October 1941 which acknowledged the Malaya language as the Indonesian language, the language that unified the people in the Indonesian archipelago..
46. The 1945 Indonesian Constitution. The language provision was stipulated in Article 36 of the 1945 Indonesian Constitution prior to its amendment.
47. Nugroho, *op.cit.*, p. 27.

inherited its 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 in the colonial era, is still mainly used to govern civil relations.[48] Accordingly, Dutch legal terms contained therein are common and still in use in Indonesia to date.[49]

2. Belgium

Belgium's culture sits at the crossroads of Latin and Germanic cultures. Between the 11th and 12th centuries, the county of Flanders was a domain of France. For this reason, French replaced Latin as its official language.[50] Meanwhile, Dutch was used in Brussels and Antwerp, which were part of the Duchy of Brabant and belonged to the Holy Roman Empire, and the Dukes were opposed to using French.[51] In the 15th century, French was spoken mostly by nobles and wealthy citizens. On the other hand, Dutch was the dominant language in public life and was used by the administration, by notaries, and even as the language of instruction and literature.[52]

As confirmed by the 1839 Treaty of London,[53] Belgium proclaimed its independence in October 1830, and stipulated in its Constitution[54] that: "*The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the* 89 *public authorities and for judicial affairs.*"[55] That is, although the freedom of language favored the use of French in public life, Dutch was not banned. Two milestones on the use of the Dutch language occurred around the last quarter of the 19th century. In 1873, a measure permitting the use of Dutch in the courts became law, while in 1898, the legislation stipulating that all laws would be published in both Dutch and French was enacted.[56]

In this regard, bear in mind that the language issue in Belgium also had an important social component: French had long been the country's main cultural language and was already dominant in the cities and among the country's elite groups. French was also strongly represented by the army's upper echelon, the courts, and

48. 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.
49. Examples: *onrechtmatige daad* (unlawful act), *geoorloofde oorzaak* (illegitimate cause), *dwangsom* (penalty)
50. van der Jeught, *op.cit.*, p. 182.
51. Léon van der Essen, *A Short History of Belgium* (Chicago: The University of Chicago Press, 1916), pp. 50-51
52. van der Jeught, *op.cit.*, p. 182.
53. van der Essen, *op.cit.,* pp. 154 and 162.
54. The Constitution was drafted in French only, the official Dutch version was adopted in 1967. van der Jeught, *op.cit.*, p. 184.
55. 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.
56. Pierard, *op.cit.,* p. 646; van der Jeught, *op.cit.*, p. 184.

the civil service. Speaking French formed an important barrier between social classes, and social promotion was only possible if one had a thorough knowledge of the French language.[57] In addition, because the Treaty of Versailles handed the Eupen-Malmédy region over to Belgium after the First World War, one consequence was the inclusion of German speakers in the Kingdom of Belgium.[58]

The principles of territoriality and freedom of language enshrined in the Belgian Constitution form the bedrock of interaction among Belgium's languages.[59] The territoriality principle is a set of rules established by an authority to create an official language regime to be used in the public domain within a given territory. The territoriality principle excludes the use of official language for private communication,[60] which is known as the individual freedom of language in Belgium.

B. Obligation to Use National Language

1. *Indonesian Law on Language*

The provision concerning contract language 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.[61] Article 31 (2) of Law 24/2009 further specifies that "*The memoranda of understanding or agreements and referred to in paragraph 1 which involve a foreign party shall also be drawn up in the language of that foreign party and/or in English*."

However, Law 24/2009 sets neither sanctions nor legal consequences for 90
noncompliance with this obligation.[62] To add to the confusion, it also remains silent as to the validity of existing contracts not drafted in Indonesian. The law prescribes that a presidential regulation will implement further regulation on this provision;[63]3 however, such presidential regulation has not been issued up until now.

57. van der Jeught, *op.cit.*, pp. 184-185.
58. 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, art. 32-38.
59. Spolsky, *op.cit.*, pp. 164-165.
60. Phillippe van Parijs, "On Linguistic Territoriality and Belgium's Linguistic Future" in *Belgium: Quo Vadis? Waarheen na de zesde staatshervorming?*, edited by Patricia Popelier *et al.* (Antwerp: Intersentia, 2000), pp. 36-37.
61. 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 Indonesia, *Peraturan Pemerintah tentang Waralaba (Government Regulation regarding Franchising)*, PP No. 42 Tahun 2007, LN No. 90 Tahun 2007 (Government Regulation No. 42 of 2007 (Government Regulation No. 42 Year 2007, SG No. 90 Year 2007).
62. For the role and concept of legal sanctions, see Anthony Kronman, "Hart Austin, and the Concept of Legal Sanctions," *Faculty Scholarship Series 1077* (1975), pp. 584-607.
63. Indonesia (60), *op.cit.,* art. 40. See: Indonesia, *Undang-Undang tentang Pembentukan Peraturan Perundang-undangan (Law regarding Establishment of Laws and Regulations)*, UU No. 12 Tahun 2011, LN No. 82 Tahun 2011 (Law No. 12 Year 2011, SG No. 82 Year 2011), art. 1 (6). Establishment of Laws

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) attempts to clarify this 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.*"[64] However, this elucidation does not satisfyingly answer the question of whether concluded agreements for private and commercial matters are subject to this provision. For this reason, several lawyers requested a clarification from the Ministry of Law and Human Rights (**MOLHR**) in 2009.[65] In response, MOLHR issued a letter (**MOLHR Letter**),[66] indicating that, subject to the issuance of implementing regulations as provided in Article 40 of Law 24/2009:

a. 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 of using bilingual contracts continued to develop in Indonesia, typically drafted in both Indonesian and English or another agreed-upon language. Because the MOLHR Letter specified the parties' freedom to determine the prevailing language, the English version is always chosen to prevail in bilingual contracts.[67] However, it should be noted that the MOLHR Letter was not a binding law or legislation 91 in the Indonesian legislation system. The regulations that are included in the hierarchy of Indonesian legislation include the Constitution

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.*"

64. Indonesia (15), *op.cit.*, elucidation of art. 31 (1).
65. Hukumonline, "Menhukham: Perjanjian Berbahasa Inggris Tetap Sah," http://www.hukumonline.com/berita/baca/lt4b6a1df8b9cbf/menkumham-perjanjian-berbahasa-inggris-tetap-sah, accessed 15 February 2018.
66. 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.
67. 1 Hadiputranto, Hadinoto & Partners, "Client Alert on Latest Update on Court Decision regarding Application of Language Law in Private Commercial Agreements," https://www.bakermckenzie.com/-/media/files/insight/publications/2014/09/latest-update-on-court-decision-regarding-applic__/files/readpublication/fileattachment/al_jakarta_applicationoflanguagelaw_sep14.pdf, accessed 15 February 2018.

of the Republic of Indonesia 1945, the Decree of People's Consultative Assembly, the Law/Government Regulation In Lieu of Law, the Government Regulation, the Presidential Regulation, the Provincial Regulation, and the Regency/Municipality Regulation.[68] As set forth in the MOLHR Letter, the clarification only temporarily relieved parties' anxiety regarding contracts drafted in non-Indonesian languages.

Indeed, the Supreme Court of the Republic of Indonesia ended this relief by its decision in the 2015 Nine AM case.[69] The case disputed a loan agreement agreed to 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 lower court's[70] decision, which had annulled the loan agreement as it was not drawn up in Indonesian, thus violating the obligation specified in Article 31 (1) of Law 24/2009. The panel of judges pointed out that the clarification provided in the MOLHR Letter should not be considered because it is not included in the hierarchy of law and legislation in Indonesia according to Law 12/2011.[71] The panel further stated that the MOLHR Letter could not diminish the obligatory nature of Article 31 (1) of Law 24/2009.[72]

The subsequent problem concerns whether a verbal contract completed by an Indonesian entity and a foreign entity is subjected 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; that is, where written evidence of the contract or promise is not expressly required, such contract is valid, even if it is only verbal.[73] Indonesian law does not require an agreement to be made only in written form. Article 1313 of the Indonesian Civil Code provides that an agreement is an act pursuant to which one or more individuals bind themselves to one another.[74] It is understood that a verbal contract constitutes an agreement provided that the parties agree to bind themselves to it. Unfortunately, Article 31 (1) of Law 24/2009 is silent regarding verbal contracts.

68. Indonesia (62), *op.cit.,* art. 7.
69. Supreme Court of Republic of Indonesia (23), *loc.cit.*
70. Country Court of West Jakarta, "Decision No. 451/Pdt.G/2012/PN.Jkt.Bar." judgment; High Court of Jakarta, "Decision No. 48/PDT/2014/PT.DKI," judgment. 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 *judex facti*, whereas the Supreme Court is called judex iuri. See Indonesia, *Undang-Undang tentang Kekuasaan Kehakiman (Law regarding Judiciary Power)*, UU No. 48 Tahun 2009, LN No. 157 Tahun 2009 (Law No. 48 Year 2009, SG No. 157 Year 2009), art. 20; Indonesia, *Undang-Undang tentang Perubahan Kedua atas Undang-Undang Nomor 2 Tahun 1986 Tentang Peradilan Umum (Law regarding the Second Amendment of Law No. 2 Year 1986 regarding General Court)*, UU No. 49 Tahun 2009, LN No. 157 Tahun 2009 (Law No. 49 Year 2009, SG No. 157 Year 2009), art. 3.
71. Indonesia (62), *loc.cit.*
72. Country Court of West Jakarta, *op.cit.*, pp. 60-61.
73. Joseph Chitty *et al.*, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon* (Springfield: George and Charles Merriam, 1860), p. 66.
74. S 1847-23, *op.cit.,* art. 1331.

It is also important 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 concerning Indonesian nationality.[75] However, this begs the question: what if a person who holds Indonesian nationality does not speak nor understand Indonesian?[76] To 92 comply with this provision, should their contract be written in Indonesian even if it is incomprehensible to them? A further question regarding the term "Indonesian national" is what if they are Indonesian, but have been residing abroad and are about to enter into a contract to be performed in their residing country? Should such a contract be drafted in Indonesian? These questions lead us to the notion of freedom of contract. To constitute a binding agreement, the parties must mutually assent to certain act being done or omitted. But one cannot be said to assent to being bound by a contract unless endowed with such degree of reason and judgment enabling comprehension of the subject of negotiation.[77] How can someone understand the subject of their contract, if they do not speak the language in which the contract is written?

The lack of clarity on the scope of this provision results in inconsistent judgments on the issue of the obligation to use Indonesian in a contract. The *Randolph Carpenter* case concerns a sale and purchase contract made between a foreign company and an Indonesian company for land located in Indonesia in 2010. Both companies were represented by their directors, both of whom are foreigners and do not speak Indonesian, so the contract was drafted in English. The judges declared that the claimant exaggerated the request to nullify the contract based on its non-use of the Indonesian language. In their decision, the judges referred to a clause in the contract in which the parties agreed to use English as the contract language, negating any claim of violation of the language requirement.[78]

This inconsistency is also exposed in the *Osmar Siahaan* case. This case disputed a specified-period employment contract. Based on Article 31 (1) of Law 24/2009, the plaintiff requested that the court annul the contract because it was not written in Indonesian.[79] It is important to emphasize that Article 57 of Law Number 13 of 2003 on Manpower (**Law 13/2003**) obliges the specified-period employment contract to be written 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 a foreign language, such contract is to

75. Indonesia, *Undang-Undang tentang Kewarganegaraan Republik Indonesia (Law regarding Indonesian Nationality)*, UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law No. 12 Year 2006, SG No. 63 Year 2006).
76. This scenario is possible since Indonesia applies the nationality principle based on *ius sanguinis*. So, an Indonesian might be born abroad and not be familiar with Indonesian. See *Ibid*., art. 4.
77. Chitty *et al*., *op.cit.*, p. 148. See S 1847-23, *op.cit.,* art. 1320 and Subekti, *Pokok-pokok Hukum Perdata [Principles of Civil Law], 28th ed* (Jakarta: Intermasa, 1996), pp. 134-135 for the requirement of consent in concluding a contract under Indonesian law.
78. Country Court Judgment 35/2010, op.cit., p. 68.
79. Supreme Court of Republic of Indonesia (25), *op.cit.*, p. 18.

be considered an unspecified-period employment contract.[80] 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.

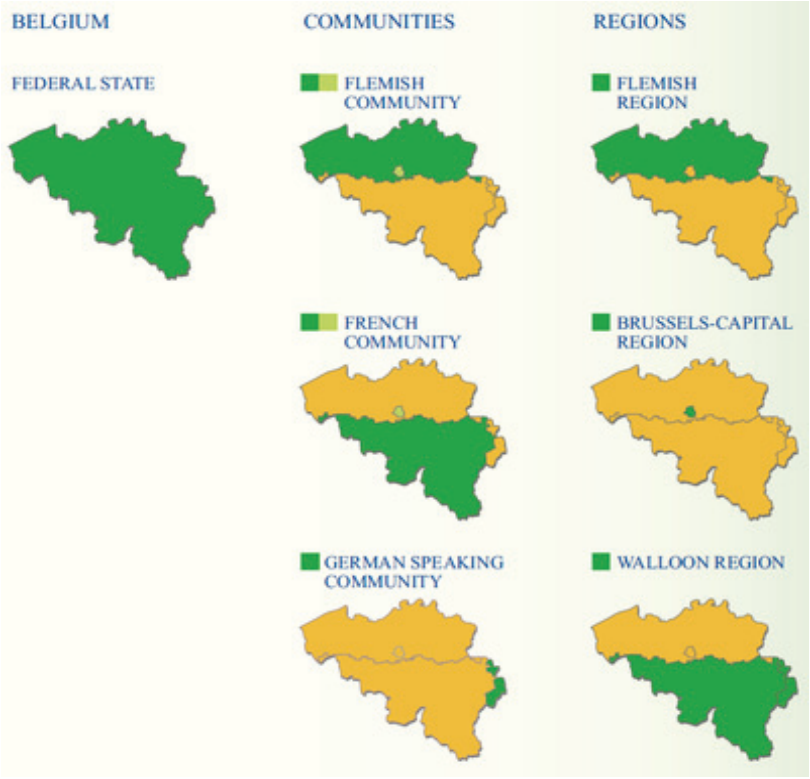
3. *Belgian Law on Language*

People often call Belgium a complex nation with two different cultures, confusing institutions and governments. The north of the country is called Flanders or Flemish and the southern part is known as Wallonia. According to the 1993 Belgian Constitution, Belgium is comprised of three communities: the Flemish community, the French community, and the German-speaking community.[81] In addition, Belgium is comprised of three regions: the Flemish Region in the north, where the Dutch-speaking community resides; the Walloon Region in the south, where the French- 93 and German-speaking communities reside; and the Brussels-Capital region in the country's geographical heart.[82]

Belgium also contains four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual Brussels-Capital region, and the Germanspeaking region.[83] The provision concerning linguistic region manifests the territoriality principle in language within Belgium. That is, the Constitutional Court guarantees the primacy of a single language among the three monolingual and one bilingual regimes in the Brussels-Capital region.[84]

94 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 for judicial affairs." This provision establishes the limitation that the use of language must be regulated by law. Furthermore, it establishes that such language regulation only concerns acts by public authorities and in court proceedings.[85] In conjunction with this provision, Article 129 (1) of the constitution gives the French and Flemish Community parliaments the authority to regulate, both 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 for company acts and documents required by law and regulation.[86]

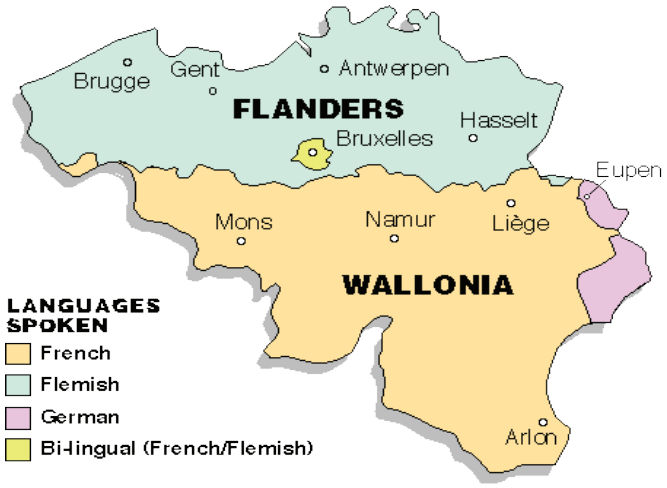
80. Indonesia, *Undang-Undang Ketenagakerjaan (Law regarding Manpower)*, UU No. 13 Tahun 2003, LN No. 39 Tahun 2003 (Law No. 13 Year 2003, SG No. 39 Year 2003), art. 57.
81. The 1993 Belgian Constitution, *op.cit.,* art. 2.
82. *Ibid.*, art. 3. The official languages in Brussels-Capital Regions are Dutch and French.
83. The 1993 Belgian Constitution, *op.cit.,* art. 4 (1).
84. Judgment of the Constitutional Court no 17 of 26 March 1986, M.B./B.S. of 14.4.1986, 5116. Read: van der Jeught, "Territoriality and Freedom of Language: The Case of Belgium", *op.cit.*, p. 186.
85. van der Jeught, *loc.cit.*
86. The 1993 Belgian Constitution, *op.cit.,* art. 129 (1).



Picture 1 Region and Community Map of Belgium[87]

According to the abovementioned provisions, Article 52 (1) of the 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."[88] This means that if a company's place of business is located in the Dutch-speaking region, Dutch shall always be used.[89] 95 However, pursuant to paragraph 2 of Article 52, the company may attach one or more translations to such documents.

87. European Environment Agency, "Figure 1: The Regions and Communities of Belgium ," https://www.eea.europa.eu/soer/countries/be/country-profile-distinguishing-factors-belgium/country-profile-distinguishing-factors-belgium-2/figure-1-the-regions-and/view, accessed 7 June 2019.
88. 1966 Belgian Language Law, op.cit., art. 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.
89. 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



Picture 2 Linguistic Region Map of Belgium[90]

The 1973 Flemish Decree requires the use of Dutch for employer and employee relations, as well as for company acts and documents required by law in the Dutch-language region. This decree only applies in the Dutch-speaking region, which consists of the 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 applies to natural and legal persons who have a place of business in the Dutch-speaking region of Belgium.[91]

As laid out in the decree, the term *place of business* (*exploitatiezetel*) refers to any establishment, business premises, or some permanent structure where worker are employed. For example, the place where they receive instructions or any forms of notification; where their contracts are concluded, and irrespective of their habitual residence or living place at the time.[92] The term *employment relations* is understood to describe verbal and written contracts between employers and employees to perform services for and under the direction of employers in return for which employees receive remuneration for a certain period of time.[93] As prescribed in Article 10 of the decree, noncompliance with this language requirement will result in the nullity of the contracts, documents, or acts, without prejudice to the

they are intended for French-speaking staff.

90. Asperia, "Belgium Language Map," http://asperia.org/belgium-language-map-2/, accessed 17 August 2018.
91. The 1973 Flemish Decree, *op.cit.*, art. 1.
92. Partena, "The Use of Languages in Employment Relations," *Memento of the Employer* 5 (May 2014): 3.
93. Armin Cuyvers, "Free Movement of Persons in the EU," in *The East African Community Law*, edited by Emmanuel Ugirashebuja *et al.* (Leiden: Brill Nijhoff, 2017), p. 356.

employee or to the rights of the third party. The nullity shall be determined ex officio by the judge.[94]

4. Problems Concerning Belgian Law on Language

The requirement to use Dutch in employment contracts caused some jurisdictional problems. This was the case in *Elefanten Schuh,* which was brought before the European Court of Justice (**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,[95] 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[96] 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 agreed that the court at Kleve, Germany would have exclusive jurisdiction in the event of a dispute.

When Jacqmain was dismissed without notice in 1975, he brought an action before *Arbeidsrechtbank Antwerpen* (Antwerp 96 Labour Tribunal)[97] seeking damages from his employer. Elefanten Schuh GmBH invoked the choice of court clause in the employment contract to challenge the Antwerp Labour Tribunal's jurisdiction. The judges rejected the jurisdiction plea by arguing that Jacqmain pursued his occupation within its territorial jurisdiction, so that therefore it had competence over the claim submitted by Jacqmain.[98] In its appeal judgment, *Arbeidshof Antwerpen* (Antwerp Labour Court)[99] upheld the Antwerp Labour Tribunal judgment, stating that pursuant to the 1966 Belgian Language Law and the 1973 Flemish Decree, the employment contract agreed to 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 contained therein conferring exclusive jurisdiction was invalid.[100]

In another appeal,[101] *Hof van Cassatie* (the Supreme Court of Belgium) requested a preliminary ruling from ECJ concerning the jurisdictional matter in the case. ECJ ruled that Member States are not free to implement formal requirements other than those contained in the 1968 Brussels Convention on Jurisdiction and

94. The 1973 Flemish Decree, *op.cit.,* art.10.
95. Formerly known as G. Hoffman GmBH,
96. These three provinces are located in the Dutch-speaking region.
97. The court of first instance for employment dispute in Belgium.
98. ECJ, C-150/80, *op.cit.*, para 4.
99. The court of appeal for employment dispute in Belgium.
100. *Ibid.,* para. 5.
101. 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.

the Enforcement of Judgments in Civil and Commercial Matters.[102] ECJ also ruled that a Contracting State may not allow parties to call the validity of an agreement into question solely on the grounds that the language used was not prescribed by its legislation.[103]

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 instead of German. Instead, of citing the jurisdiction clause in the parties' agreed-upon contract, the judges of *Arbeidsrechtbank Antwerpen* and *Arbeidshof Antwerpen* invoked Article 627 of the Belgian Judicial Code, which prescribes that the court of the place where the occupation is pursued has jurisdiction. This case shows the difficulty resulting from the requirement to draw up a cross-border contract in a particular nation's language. The parties could not execute what they had agreed to regarding jurisdiction because it was nullified by the language requirement. However, the ECJ's ruling in this case played a significant role because it enforced a limit that impacted the European Union's (**EU**) language requirement for contracts; no longer could national law be used to invalidate an agreement conferring jurisdiction mentioned in a contract.

More than 30 years later, the obligation to use Dutch in an employment contract was disputed again in the 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.[104] 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 severance he received, he sought a higher amount according to Belgian employment law by bringing 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.[105] The Antwerp Labour Tribunal requested a preliminary ruling from the ECJ to determine whether the 1973 Flemish Decree violated workers' freedom of movement as enshrined in Article 45 of the Treaty on the Functioning of the European 97 Union (**TFEU**).[106] According to the ECJ, the 1973 Flemish Decree obliging the sole use of Dutch in employment relationship constituted a restriction on workers' freedom of movement as it is liable

102. *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, Brussels, 27 September 1968, *United Nations Treaty Series*, Vol. 153, No. 1262.
103. ECJ, C-150/80, *op.cit.*, para. 25-27.
104. ECJ, C-202/11, *op.cit.*, para. 9.
105. *Ibid.*, para. 10-11. See Opinion of Advocate General (AG) Jääskinen delivered on 12 July 2012 C-202/11, *Anton Las v. PSA Antwerp NV*, para. 16.
106. ECJ, C-202/11, *op.cit.*, para. 15; European Union, "Consolidated version of the Treaty on the Functioning of the European Union," http://www.refworld.org/docid/52303e8d4.html, accessed 3 October 2018.

to have a dissuasive effect on non-Dutch-speaking employees and employers from other EU member states.[107]

In this case, PSA Antwerp challenged the obligation to use a national language for an employment contract in Belgium, saying it went against the workers' free movement principle established by the EU. Free movement of workers is a fundamental principle in the EU; it entitles 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 regarding access to employment, working conditions, and all other social and tax advantages.[108] If the parties had complied with the 1973 Flemish Decree, it would have benefited Las, since he understands Dutch. However, by requiring the parties to agree to an employment contract drafted in Dutch, Belgium created an obstacle for EU citizens who are unfamiliar 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 wouldn't have sufficient knowledge of the contract's content. Moreover, this obligation forces employers established in the Dutch-language region of Belgium to only recruit employees who understand Dutch. Whereas internationally active companies like PSA Antwerp belong to a multinational group of companies registered in Singapore that typically use English as their working language. They need to adjust the employment contract, which encumbers them with additional costs for translation and to hire Dutch-speaking lawyers to assist them.[109]

Following the judgment of Anton Las, the 1973 Flemish Decree was amended by the Decree of 14 March 2014 on to amend Articles 1, 2, 4, 5, 12, and 16 of the 1973 Flemish Decree (**2014 Amended Flemish Decree**).[110] Even though the 2014 Amended Flemish Decree retains the obligation to use Dutch in employment relations, it now allows, under certain conditions, the use of another language known by all parties for employment contracts. The alternative language is:[111]

a. an official language of the EU;[112] or

107. ECJ, C-202/11, *op.cit.*, para 22. Opinion of AG Jääskinen in C-202/11, *op.cit.*, para. 30.
108. European Commission, "Free Movement - EU Nationals," http://ec.europa.eu/social/main.jsp?catId=457&langId=en, accessed 14 August 2018.
109. Opinion of AG Jääskinen in C-202/11, *op.cit.*, para. 34.
110. 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**).
111. 2014 Amended Flemish Decree, *op.cit.*, Article 5 (1).
112. 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. See European Union, "Multilingualism," https://europa.eu/european-union/topics/multilingualism_en, accessed 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.[113]

98 The above provision only applies if the employee meets one of the following:[114]

a. he is domiciled in the territory of one of the other EU or EEA Member States;
b. he is domiciled in 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 a discrepancy between the Dutch and the second official version of an individual employment contract, the Dutch version shall prevail.[115]

The obligation to use national language as imposed in Belgium was disputed again in the 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 would be Italian law and that the dispute settlement forum would be the courts in Ghent, Belgium.[116] The dispute mainly concerned the invoices to be paid by GPPH that were drafted in Italian. For this reason, GPPH claimed that the invoices should be declared null and void.[117]

Ghent Commercial Court requested a preliminary ruling from the ECJ to determine whether the 1966 Belgian Language Law and the 1973 Flemish Decree constituted measures having an equivalent effect as quantitative restrictions on exports as stipulated in Article 35 of the TFEU.[118] The ECJ determined that even if the language legislation only concerns the language of the invoice and not the content of the underlying contractual relationship, it still creates restrictive effects

113. 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. See European Environment Agency, "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 1 September 2018.
114. Amended Flemish Decree, *op.cit.,* art. 5 (2).
115. *Ibid.*, art. 5 (4).
116. ECJ, C-15/15, *op.cit.,* para. 12-13.
117. *Ibid*, para. 18. On 14 January 2014, New Valmar supplied to GPPH a translation into Dutch of the relevant invoices.
118. 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.

which are likely to deter the initiation or continuation of a contractual relationship with a company established in the Dutch-speaking region of Belgium.[119] The ECJ ruled that the 1966 Belgian Language Law and the 1973 Flemish Decree constituted a restriction and fell within the scope of Article 35 of the TFEU.[120]

There are two differences between Anton Las and New Valmar. First, in New Valmar, the obligation to use Dutch in Belgium challenged the free movement of goods within the EU. Second, the disputed object in the New Valmar case was not the Concession Agreement itself, but the invoices issued in respect to the Concession Agreement. According to the 1973 Flemish Decree, the invoices were categorized as 99 "acts and documents required by the law and by regulations." The main shortcoming of requiring the parties to draw up the invoices in a certain language, in this case Dutch, is that the invoice recipients will likely have difficulty understanding them. This creates the risk of non-payment disputes, since the invoice recipients could claim their inability to understand the invoices' content as a reason to refuse payment. This obligation also likely deters the initiation or continuation of contractual relationships with companies located in the Dutch-speaking region of Belgium.

III. CREATING CONSTRAINTS IN INTERNATIONAL CONTRACTING?

A. Freedom of Contract

The first concern with respect to the requirement to draft a contract in certain national language pertains to the issue of freedom of contract. Freedom of contract means that the parties are allowed to bind themselves by mutual agreement and free to stipulate their contract terms provided that the contract adheres to laws, morality, and/or public order.[121] In exercising their freedom, the parties must possess sufficient knowledge about their contract's content to enable them to assent to the contract.[122] If the contract is drafted in a certain national language with which one or more of the parties are not familiar, one or more parties may hesitate to consent for fear of not understanding the commitment.

As for Belgium, the obligation to use Dutch in contracts is in fact a discriminatory measure because employers who fall within the scope of the 1973 Flemish Decree may logically show preference for Dutch-speaking candidates instead of using more general recruitment criteria, which recruiters might prefer if such legislation did not exist. On the contrary, this obligation means that only employees

119. ECJ, C-15/15, *op.cit.*, para. 42.
120. *Ibid.*, para. 57.
121. F.H. Buckley, *ed.*, *Fall and Rise of Freedom of Contract* (Durham: Duke University Press, 1999), pp. 4-7.
122. 1 Chitty *et al.*, *op.cit.*, pp. 8-11.

who speak Dutch, who are mainly from the Netherlands and Belgium, can enter the labor market in the Dutch-speaking region of Belgium. This contradicts the EU's principle of the free movement of workers within the EU.

As for Indonesia, given the unclear scope of the provision and judgment of the Supreme Court in the Nine AM case, foreign parties will plausibly be more reluctant to conclude agreements with Indonesian entities. For the Indonesians, this obligation impedes their ability to close contracts. For example, consider an Indonesian student who plans to study in the Netherlands and receives a scholarship to do so. To accept the scholarship, the student signs an English-language contract. Does Article 31 of Law 24/2009 allow the contract to be nullified, thus annulling the scholarship and delaying the student's plan?

B. Choice of Law and Jurisdiction

According to the notion of freedom of contract, contracting parties are also allowed to choose the applicable law to construe their contractual terms in advance, within certain parameters and limitations.[123] The obligation to use certain national 100
language in international contracts encumbers contractual relations if the parties agree to choose foreign law as the governing law for their contract. In Indonesia, if the applicable law for a contract is English law, but the contract is written in Indonesian, the problem of the discrepancy between the Indonesian legal contract terms and the applicable English-language laws needs to be solved.

Furthermore, whether the obligation to use a national language constitutes mandatory rules or public order in international contracting could also be an issue.[124] Advocate General Øe addressed this in his opinion in the New Valmar case,[125] as the parties agreed to apply Italian law for their contract.[126] As a matter of principle, the parties' chosen law should determine all aspects of the contract.[127] Thus, the question becomes whether the obligation to use a national language is a mandatory rule that sets aside the application of the law chosen by the parties or if it only affects the formal validity of the contract.

The requirement to use a national language in a contract is also problematic if the parties choose to settle their contract dispute in a foreign forum. This issue was raised in Elefanten Schuh when the exclusive jurisdiction of the Kleve court was nullified by the obligation to use Dutch in the employment contract. However, in this case ECJ ruled that the choice of jurisdiction according to the 1968 Brussels

123. Symeon C. Symeonides, *Codifying Choice of Law Around the World - An International Comparative Analysis* (New York: Oxford University Press, 2015), pp. 110-111; Fleur Johns, "Performing Party Autonomy," *Law and Contemporary Problems 17, No. 3* (2008), p. 249.
124. F.C. von Savigny, *A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* (London: Steven and Sons, 1869), pp. 33-36.
125. Opinion of AG Saugmandsgaard Øe delivered on 21 April 2016, C-15/15, para. 25-29.
126. ECJ, C-15/15, *op.cit.*, para. 13
127. Peter Nygh, *Autonomy in International Contracts* (New York: Oxford University Press, 1999), pp. 265-267.

Convention could not be nullified by national provisions that require additional compliance as to the formal contract validity.[128] Moreover, it is not practical to draft a contract in a certain national language if the chosen dispute settlement forum does not speak the language in which the contract is written.

C. Online Contracts

The requirement to draft contracts in a certain national language is problematic for online transactions, and this issue is relevant for Indonesia. Law Number 11 of 2008 on Electronic Information and Transactions regulates transactions that are conducted online.[129] The practice shows that online contracts are usually not in Indonesian. For example, an Indonesian buyer orders a book through Amazon.com, and the book will be shipped from Kuala Lumpur. The Indonesian must agree to the sale and purchase contract on Amazon's website, which is in English. In all probability, the Indonesian language version of such a contract is not available. Given the fact that hundreds of online contracts involving Indonesian entities are concluded on a daily basis, are those contracts still considered invalid according to Law 24/2009?

D. Translation Work

Translating the contract might be a solution for the aforementioned problems. 101 However, it is also possible that translation could complicate the problems instead of resolving them. Legal texts usually derive their meaning from a particular legal system; that is, they typically do not have a single agreed-upon meaning.[130] This undeniably affects the translatability of contracts as finding the precise equivalent legal terms between different languages is extraordinarily challenging. Therefore, the quality of translated documents could influence the understanding and interpretation of the original contracts on which they are based. Moreover, translation adds extra cost for the parties, which constitutes a burden on business and would not be necessary if there was no requirement to use a certain national language in a contract. This is even more burdensome if there are many long documents to be translated, because it surely delays the negotiation process and the cross-border transaction.

IV. CONCLUSION

Law and language are inextricably linked with each other because language is the main medium of the expression of law. Since it is bound to a specific legal

128. ECJ, C-150/80, *loc.cit.*
129. Indonesia, *Undang-Undang tentang Informasi dan Transaksi Elektronik (Law regarding Information and Electronic Transaction)*, UU No. 11 Tahun 2008, LN No. 58 Tahun 2008 (Law No. 11 Year 2008, SG No. 58 Year 2008).
130. Šarčević, *op.cit.*, p. 193.

system, legal language differs from ordinary language; legal language has its own lexicon that showcases its own complexity and particularity. For this reason, legal terms greatly vary, 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 contracts involving Indonesian entities concerns the scope of the provision itself. First, it demands further clarification from the government on the preconditions of applying this provision. Thus, an implementing regulation mandated as 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 for Belgium, the doctrine of supremacy in EU law plays a significant role with respect to the provisions requiring the use of Dutch in the Dutch-speaking region of Belgium. Because the goal 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 because it was considered impeding the application of the free movement of workers principle as prescribed in the TFEU. The 2014 Amended Flemish Decree establishes the use of EU and EEA official languages for employment contracts agreed upon between an employer established in the Flemish region and an EU or EEA employee. However, the problem is not yet solved for employment contracts agreed to by Flemish-based employers and non-EU or EEA employees who do not know any official EU or EEA languages.

The aforementioned explanation addresses how the requirement to write contracts in certain national languages impedes the international contracting process. Given the complexity of cross-border transactions, the parties should be allowed to execute the language of their contracts freely and by using the language of their choice.

BIBLIOGRAPHY

Legal Documents

102 Burgerlijk Wetboek voor Indonesië, S 1847-23.

Constitution du Royaume de Belgique, adoptée le 7 février 1831.

Country Court of Praya. "Decision No. 35/PDT.G/2010/PN.PRA."

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Brussels, 27 September 1968. *United Nations Treaty Series*. Vol. 153. No. 1262.

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.

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.

Indonesia. *Undang-Undang tentang Bendera, Bahasa, dan Lambang Negara, serta Lagu Kebangsaan (Law regarding National Flag and Language, State Symbols and the National Anthem)*. UU No. 24 Tahun 2009, LN No. 109 Year 2009 (Law Number 24 Year 2009, SG No. 109 Year 2009).

Indonesia. *Undang-Undang tentang Informasi dan Transaksi Elektronik (Law regarding Information and Electronic Transaction)*. UU No. 11 Tahun 2008, LN No. 58 Tahun 2008 (Law No. 11 Year 2008, SG No. 58 Year 2008).

Indonesia. *Undang-Undang tentang Kekuasaan Kehakiman (Law regarding Judiciary Power)*. UU No. 48 Tahun 2009, LN No. 157 Tahun 2009 (Law No. 48 Year 2009, SG No. 157 Year 2009).

Indonesia. *Undang-Undang tentang Kewarganegaraan Republik Indonesia (Law regarding Indonesian Nationality)*. UU No. 12 Tahun 2006, LN No. 63 Tahun 2006 (Law No. 12 Year 2006, SG No. 63 Year 2006).

Indonesia. *Undang-Undang tentang Pembentukan Peraturan Perundang-undangan (Law regarding Establishment of Laws and Regulations)*. UU No. 12 Tahun 2011, LN No. 82 Tahun 2011 (Law No. 12 Year 2011, SG No. 82 Year 2011).

Indonesia. *Undang-Undang tentang Perubahan Kedua atas Undang-Undang Nomor 2 Tahun 1986 Tentang Peradilan Umum (Law regarding the Second Amendment of Law No. 2 Year 1986 regarding General Court)*. UU No. 49 Tahun 2009, LN No. 157 Tahun 2009 (Law No. 49 Year 2009, SG No. 157 Year 2009).

Judgment of the Constitutional Court no 17 of 26 March 1986, *M.B./B.S.* of 14.4.1986, 5116.

Judgment of 27 June 1981, *Elefanten Schuch v. Pierre Jacqmain*, C-150/80, ECLI:EU:C:1981:148.

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

Judgment of 21 June 2016, *New Valmar BVBA* v. *Global Pharmacies Partner Health Srl*, C-15/15, ECLI:EU:C:2016:464.

K.B. Wetten van 18 juli 1966 op het gebruik van de talen in bestuurszaken, B.S., 2 August 1966.

Letter of Ministry of Law and Human Rights 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.

103 Opinion of Advocate General Jääskinen delivered on 12 July 2012 C–202/11, *Anton Las v. PSA Antwerp NV*.

Opinion of AG Saugmandsgaard Øe delivered on 21 April 2016, C-15/15, *New Valmar BVBA* v. *Global Pharmacies Partner Health Srl*.

Supreme Court of Republic of Indonesia. "Decision No. 1572 K/Pdt/2015."

Supreme Court of Republic of Indonesia. "Decision No. 254 K/Pdt.Sus-PHI/2013."

The 1945 Constitution of the Republic of Indonesia, as lastly amended in 2002.

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.

Books

Anderson, Benedict R. O'G. *Language and Power Exploring Political Cultures in Indonesia*. Ithaca: Cornell University Press, 1990.

Anderson, Benedict R. O'G. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. London: Verso, 2016.

Buckley, F.H. *ed*. *Fall and Rise of Freedom of Contract*. Durham: Duke University Press, 1999.

Chitty, Joseph. *et al*. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon*. Springfield: George and Charles Merriam, 1860.

Cuyvers, Armin. "Free Movement of Persons in the EU" in *The East African Community Law*. Edited by Emmanuel Ugirashebuja. *et al*. Leiden: Brill Nijhoff, 2017.

Dorsett, Shaunnagh and Shaun McVeigh. "Questions of Jurisdiction" in *Jurisprudence of Jurisdiction*. Edited by Shaun McVeigh. New York: Routledge-Cavendish, 2007.

Fuller, Lon L. *The Morality of Law*. New Haven: Yale University Press, 1969.

Fuller, Lon L. *Anatomy of the Law*, New York: Praeger, 1968.

Hadikusuma, Hilman. *Bahasa Hukum Indonesia*. Bandung: Alumni, 1984.

Nygh, Peter. *Autonomy in International Contracts*. New York: Oxford University Press, 1999.

Subekti. *Pokok-pokok Hukum Perdata*. Jakarta: Intermasa, 1996.

Symeonides, Symeon C. *Codifying Choice of Law Around the World - An International Comparative Analysis*. New York: Oxford University Press, 2015.

Tiersma, Peter M. and Lawrence M. Solan. *eds*. *The Oxford Handbook of Language and Law*. Oxford: Oxford University Press, 2012.

van Parijs, Phillippe. "On Linguistic Territoriality and Belgium's Linguistic Future" in *Belgium: Quo Vadis? Waarheen na de zesde staatshervorming?*. Edited by Patricia Popelier. *et al*. Antwerp: Intersentia, 2000.

Vlekke, Bernard H.M. *Nusantara: A History of Indonesia*. The Hague: W. van Hoeve Ltd, 1959.

von Savigny, Friedrich C. *A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time*. London: Stevens and Sons, 1869.

Articles

Alisjahbana, Takdir. "The Indonesian Language-by-product of Nationalism." *Pacific Affairs* 22 No. 4 (1949): 388-392.

Alisjahbana, Takdir. *Bahasa Hukum - Beberapa Sumbangan Fikiran Menuju ke Arah Pembentukan dan Pemakaian Bahasa yang Baik*. BPHN-Simposium Bahasa dan Hukum, 1974.

104 Bourchier, David. *"Lineages of Organicist Political Thought in Indonesia."* Doctoral diss., Monash University Melbourne, 1996.

Grossfeld, Bernhard. "Language and the Law." *Journal of Air Law and Commerce* 50 (1985): 793-803.

Johns, Fleur. "Performing Party Autonomy." *Law and Contemporary Problems* 17, No. 3 (2008): 243-271

Kamusella, Tomasz D.I. "Language as an Instrument of Nationalism in Central Europe." *Nations and Nationalism* 7, No. 2 (2001): 235-251.

Kronman, Anthony. "Hart Austin, and the Concept of Legal Sanctions." *Faculty Scholarship Series* 1077 (1975): 584-607.

Liberty Magazine. "Pikiran Redaksi." *Liberty Magazine*, 25 November 1941.

Nugroho, R. "The Origins and Development of Bahasa Indonesia" *PMLA* 72, No. 2 (1958): 23-28.

Partena. "The Use of Languages in Employment Relations." *Memento of the Employer* 5 (May 2014): 1-14.

Pierard, Louis. "Belgium's Language Question: French v. Flemish." *Foreign Affairs* 8, No. 4 (1930): 641-651.

van den Craen, Piet. "What, if Anything, Is a Belgian." *Yale French Studies* 102 (2002): 24-33.

van der Jeught,Stefaan. "Territoriality and Freedom of Language: The Case of Belgium." *Current Issues in Language Planning* 18, No. 2 (2017) https://doi.org/10.1080/14664208.2016.1243883: 181-198.

Websites

Badan Pembinaan dan Pengembangan Bahasa. *"Bahasa dan Peta Bahasa di Indonesia."* http://118.98.223.79/petabahasa/. Accessed 1 September 2018.

European Commission. *"Free Movement–EU Nationals."* http://ec.europa.eu/social/main.jsp?catId=457&langId=en. Accessed 14 August 2018.

European Environment Agency. *"Figure 1: The Regions and Communities of Belgium ."* https://www.eea.europa.eu/soer/countries/be/country-profiledistinguishing-factors-belgium/country-profile-distinguishing-factors-belgium-2/figure-1-the-regions-and/view. Accessed 7 June 2019.

European Environment Agency. *"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 1 September 2018.

Hadiputranto, Hadinoto & Partners. *"Client Alert on Latest Update on Court Decision regarding Application of Language Law in Private Commercial Agreements."* https://www.bakermckenzie.com/-/media/files/insight/publications/2014/09/latest-update-on-court-decision-regarding-applic__/files/readpublication/fileattachment/al_jakarta_applicationoflanguagelaw_sep14.pdf. Accessed 15 February 2018.

Hukumonline. *"Menhukham: Perjanjian Berbahasa Inggris Tetap Sah."* http://www.hukumonline.com/berita/baca/lt4b6a1df8b9cbf/menkumham-perjanjianberbahasa-inggris-tetap-sah. Accessed 15 February 2018.

European Union. *"Multilingualism."* https://europa.eu/european-union/topics/multilingualism_en. Accessed 1 September 2018.

Refword. *"Consolidated Version of the Treaty on the Functioning of the European Union."* http://www.refworld.org/docid/52303e8d4.html. Accessed 3 October 2018.

PUBLICATION HISTORY

Received: 13 June 2019
Revised: 26 July 2019
Accepted: 26 July 2019