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UPDATE ON INDONESIAN LANGUAGE REQUIREMENTS FOR CONTRACTS WITH INDONESIAN PARTIES

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Legal Briefings – By **Teguh Arwiko, Iril Hiswara, David Dawborn and Stephanie**

In this artilce, we look at how the introduction of Presidential Regulation No. 63 of 2019 on the Use of Bahasa Indonesia ("**PR 63**") dated 30 September 2019, which is the long-awaited implementing regulation of Law No. 24 of 2009 on the National Flag, Language, Emblem and Anthem ("**Law 24**"), may affect current practice when entering into a foreign language agreement with an Indonesian party.

PR 63 attempts to clarify appropriate market practice by stating that the parties can agree on the prevailing language in case of a difference in interpretation. However, certain issues are still unclear, including the extent to which the prevailing language clause in an agreement can be relied on, and whether a foreign investment (PMA) company is considered an Indonesian or foreign party.

WHAT THE NEW REGULATION SAYS ABOUT THE LANGUAGE OF AGREEMENTS

PR 63 confirms the main principles of Law 24 and certain practices that have developed in response to it. However, some of the wording in PR 63 raises the question of when an Indonesian language version of a contract with an Indonesian party should be put in place.

On the requirement to use Bahasa Indonesia for agreements involving an Indonesian party, Article 26 of PR 63 first restates the provisions in Article 31 of Law 24 and then introduces two new paragraphs, which read as follows:

> **Article 26(3):** *Bahasa nasional pihak asing dan/atau bahasa Inggris sebagaimana dimaksud pada ayat (2) digunakan sebagai padanan atau terjemahan Bahasa Indonesia untuk menyamakan pemahaman nota kesepahaman atau perjanjian dengan pihak asing.*
> Translation: "The national language of the foreign party and/or the English language referred to in paragraph (2) shall be used as an equivalent (*padanan*) or translation (*terjemahan*) of the Indonesian language to align understanding of the memorandum of understanding or agreement with the foreign party."

> **Article 26(4):** *Dalam hal terjadi perbedaan penafsiran terhadap padanan atau terjemahan sebagaimana dimaksud pada ayat (3), bahasa yang digunakan ialah bahasa yang disepakati dalam nota kesepahaman atau perjanjian.*
> Translation: "In case of a difference in interpretation of the equivalent or translation referred to in paragraph (3), the language used shall be the language agreed in the memorandum of understanding or agreement."

Our views on the interpretation and impact of Article 26 paragraphs (3) and (4), and our recommended approach, follow.

SIGNING DUAL LANGUAGE CONTRACTS WITH INDONESIAN PARTIES

The words "a translation (*terjemahan*) of the Indonesian language" in Article 26(3) may give rise to an interpretation that either (i) an Indonesian language version must first exist, and then be translated into a foreign language, or (ii) that the Indonesian and foreign language versions must be prepared simultaneously.

However, the use of the language "equivalent (*padanan*) or" in Article 26(3) of PR 63 offers a strong argument that the Indonesian and English versions can have equivalent standing. This view is supported by the official elucidation of Article 31(2) of Law 24, which states in part: "…all of those texts [i.e. Indonesian and foreign language versions] shall be equally authentic."

So, the foreign language version does not necessarily have to be prepared based on the Indonesian version, and both the Indonesian and foreign language versions (once prepared) will have equivalent status. We think this is a better interpretation, since Law 24 is of higher legal standing than the new regulation, PR 63.

Notwithstanding the above, in our view the risk-free approach before and after the introduction of PR 63 essentially remains the same. Wherever possible, it is best to execute the Indonesian and foreign language versions of an agreement simultaneously. Where the parties have chosen the English language version to prevail in case of inconsistency, it may be appropriate to use modern translation technology to prepare an Indonesian language version of the agreed foreign language text of the contract in short order, which can be reviewed fairly quickly before signing.

Prior to PR 63, where the Indonesian and foreign language versions could not be signed simultaneously, common practice was for the agreement to be first entered into in the foreign language. The Indonesian version would then be prepared and signed within an agreed period. With this practical approach, the parties accepted the risk that the validity of the foreign language version (especially where the agreement was governed by Indonesian law) could be challenged during the period between the signing of the foreign language and Indonesian versions. That risk remains following the introduction of PR 63.

As noted earlier, the use of the word “translation” in Article 26(3) of PR 63 creates some scope to question the validity of a foreign language contract signed prior to the Indonesian language version.

Recommended approach. Following the introduction of PR 63, our recommended approach to mitigate this risk is that once the Indonesian version is ready to be signed, the document should be prepared and signed in a side-by-side bilingual format, and the parties should expressly state that (i) the bilingual document reflects their agreement with effect from the date on which the foreign language version was signed, and (ii) the two versions are of equal standing. The foreign language version in this bilingual document will be identical to the foreign language version first signed.

Using this approach, the parties will have one bilingual document containing both the Indonesian and foreign language versions that have been signed at the same time. In practice, the only difference with this new recommended approach is that when the Indonesian language version is signed, it will be signed in a bilingual version (rather than only in Indonesian, which is now common practice).

INCONSISTENCIES BETWEEN INDONESIAN AND FOREIGN LANGUAGE VERSIONS

The use of the word “translation” in Article 26(3) of PR 63 may also create an issue in case of a major inconsistency (rather than just a difference in interpretation) between the Indonesian and foreign language texts. An example of this could be a clause in the Indonesian text that is missing from the foreign language version. In that situation, it could be argued that the Indonesian version should prevail – even if the parties have agreed that the foreign language version should apply, which is permitted under Article 26(4) of PR 63 – on the basis that this is not a difference in interpretation but an error in the translation of the foreign language version.

Recommended approach. In light of the elucidation of Article 31(2) of Law 24, our position remains that the better interpretation is that the Indonesian and foreign language versions should have equivalent standing. We recommend, however, that extra care should be taken in preparing the Indonesian version to make sure there are no substantial differences between the two versions.

WHERE A SIGNATORY IS A FOREIGN INVESTMENT (PMA) COMPANY

One last unresolved question following the issuance of PR 63 is whether a foreign language can be used for an agreement which is entered into by an Indonesian incorporated foreign investment company ("**PT PMA**"). A PT PMA, which is an Indonesian legal entity, typically has foreign persons who are directors or on the senior management team, as well as having at least one foreign shareholder. This would make it difficult for them to negotiate and agree a document prepared only in the Indonesian language, particularly where the document is complex.

In essence, Law 24 and PR 63 both state that a foreign language can only be used if the agreement involves (*melibatkan*) a foreign party. It is unclear (i) whether a PT PMA can be considered a "foreign party" for the purposes of Law 24, and (ii) whether "involvement of a foreign party" can be broadly interpreted to cover a scenario where a foreign person is involved in the negotiation and preparation of the agreement (for instance, as president director of the PT PMA) but is not a contracting party.

Recommended approach. We recommend conducting a case-by-case risk assessment to determine the best approach to dealing with this issue, by looking at the particular circumstances of the case at hand.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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