

CONSTITUTIONAL COURT DECISION ON FIXED TERM EMPLOYMENT CONTRACTS UNDER OUTSOURCING

The Constitutional Court in Decision No. 27/PUU-IX/2011 (“**Decision**”) declared articles 65(7) and 66(2)(b) of Law No. 13 of 2003 (“**Manpower Law**“) conditionally unconstitutional where fixed-term employment contracts used in outsourcing arrangements do not provide a clause protecting the rights of existing workers when the principal company (work provider) switches outsourcing company or labour provider but the same work continues. The Constitutional Court upheld the outsourcing arrangements in the Manpower Law generally and the challenged articles remain effective but must be implemented in a certain manner, i.e. contracts between the nominal employer (the outsourcing company or labour provider) and the employee must contain a clause on the transfer of the protection of rights of the outsourced employees (described as a Transfer of Undertaking Protection of Employment (“**TUPE**“)). The TUPE is designed to ensure the new outsourcing company employs the old employees with existing seniority, thereby removing one manner in which outsourcing arrangements are said to be abused in Indonesia – i.e. the use of temporary labour for jobs which are essentially ongoing or permanent in nature. The Ministry of Manpower and Transmigration issued a circular letter regarding the Decision – No. B.31/PHIJSK/I/2012 (“**MoM Circular**“). The MoM Circular clarifies that in the Ministry’s view, existing arrangements remain valid until expiry.

The Decision requires the TUPE clause to appear in the employment agreement between the labour provider or outsourcing company and the employee. However, it is worth noting that the obligation to have a TUPE-type clause has existed since 2004, as article 4(c) of Minister of Manpower and Transmigration Decree No. KEP.101/MEN/VI/2004 on the Procedure for Granting Licenses to Manpower Services Provider Companies (“**Decree 101**“) stipulates that an outsourcing agreement must be drawn up in writing and contain a clause confirming that the new outsourcing company is willing to employ the outsourced employees from a former outsourcing company for work that continues in the user company, in the event the outsourcing company changes. Decree 101 requires this clause to be included in the agreement between the work provider company and the labour provider. The agreement

should be registered or the labour provider may have its license revoked.

The Decision adds to the complexity of the current Indonesian outsourcing and fixed-term contract regime, which in some cases can see fixed-term workers deemed to be permanent employees or have their employment deemed to transfer from an outsourcing company to a principal (work provider).