GOVERNING LAW AND JURISDICTION CLAUSE[1] IN TRANSNATIONAL CONTRACT DISPUTES IN INDONESIAN COURT

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Abstract

In today's business world, the odds that one's company or self becomes involved in a dispute containing international repercussions are higher than before. Typically, businesses are initiated with a contract, and if such contract contains foreign or international elements, then it is known as the international contract, and shall be handled quite differently compared to its national counterparts. Some international contracts contain a governing law and jurisdiction clause in the event of dispute for the sake of legal certainty. The determination of governing law and jurisdiction is connected to the principle of freedom of the parties alongside *pacta sunt servanda*. Article 1388 of the Indonesian Civil Code recognizes both principles, intending judges and third parties to honor a legally signed and executed agreement as one would honor law. However, in practice, deviations are bound to happen. This paper attempts to discuss the principle of Private International Law in Indonesia, specifically how the

[1] The term 'governing law and jurisdiction clause' refers to the clause(s) in which the parties in an agreement express the law that will apply in case of a dispute (hence the term 'governing law'), and which court of a country would take jurisdiction over, or have the right to hear, any disputes that may arise from the agreement (hence the term 'governing jurisdiction')

[*] This article is the author's personal view and does not reflect the firm's opinion.

governing law and jurisdiction clause in transnational business contracts involving one or more Indonesian party is regarded in Indonesian Courts.

Keywords: Private International Law, Conflict of Laws, International Business Transactions, Choice of Law, Choice of Forum

1. Overview

Globalization plays a significant role in pushing relations between countries to improve in a rapid pace. Not a single country in the world is capable of surviving all by itself, without any alliance with other countries, either directly or indirectly. Such partnerships arise because of, among others, the uneven distribution of natural resources and industrial development in the world. Aside from countries, international partnership may also arise due to reasons such as expanding one's business in different parts of the world, or advancing an otherwise underdeveloped field of business.[2]

Transactions that have crossed state boundaries carried out by economic actors are known as international business transactions.[3] One of the most common economic actors are companies, and the contract arising from them is commonly dubbed as transnational company contract. Companies and other economic actors will be associated with national laws from two or more countries, depending on the business transaction.[4] International business transactions also lead to the need for rules that protect the interests of foreign parties.[5] Such transnational transactions are governed by a field of law commonly known as Private International Law or Conflict of Laws.

While people, goods, services, money, ideas, and many other things readily cross borders, the transnational legal system, if such a system can be said to exist, is highly decentralized. Legal authority is still organized primarily by national territory, and law differs considerably across nations, reflecting nations diverse policies and values about how to govern human

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[2] Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional* (PT Alumni 2003) 12

[3] Rafiqul Islam, *International Trade Law* (LBC Information Services 1999) 1

[4] Hikmahanto Juwana, *Transaksi Bisnis Internasional dan Hukum Kepailitan* (Majalah Hukum Nasional 2002) 77

[5] Joseph Henry Beale, *A Treatise on the Conflict of Laws* (1st edn, Harvard University Press 1916) 5

activity.[6] As a result, cases often arise due to parties disagreeing over which law applies in the dispute of a contract without a preemptive clause regarding the governing law and jurisdiction. This proves that the existence of a clause in which the parties agreed on which state law to use is crucial.[7]

This statement is in accordance with the Preambule of International Institute for the Unification of Private Law (hereinafter referred to as "UNIDROIT")'s Principles of International Commercial Contracts, published in 1994, which stated that:

> *"…The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate.*
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> *"…The situation may be different if the parties agree to submit disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law."*

Preselection of governing law and jurisdiction provide reasonable predictability of the law that will be applied in the event of a dispute. In modern-day drafting, rights and obligations are typically specified within the written agreement, yet, the need for a choice of law clause still persists. The chosen law will determine their validity and effect and the forum selected by the parties will ensure that their choice of law is upheld and applied. Forum as used here includes Courts and arbitral tribunals or processes even

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[6] Christopher A. Whytock, 'Conflict of Laws, Global Governance, and Transnational Legal Order' (2016) Vol.1 Journal of International, Transnational, and Comparative Law, 117

[7] Chairul Anwar, *Hukum Perdagangan Internasional* (Novindo Pustaka Mandiri 1999) 93

though the arbitration clause is in effect a specialized kind of choice of forum clause.[8]

However, even if the parties have agreed on a governing law and jurisdiction, the potential for disputes over the authority to adjudicate still remains. This paper attempts to address the application of governing law and jurisdiction clause in a transnational transaction involving one or more parties from Indonesia, and is equipped with an analysis of case decisions as comparation.

2. The Definition of Private International Law

The Private International Law or Conflict of Laws is a branch of legal science which seeks to determine the application of law when a dispute involves two or more systems of law.[9] Some might argue that both "Private International Law" and "Conflict of Laws" do not accurately describe its own purpose, but they have become too widely accepted to be replaced even in favor of some other scientifically accurate term.[10]

Cheshire, an English scholar, stated that Private International Law comes into operation whenever the Court is faced with a claim that contains a foreign element and functions only when this element is present. It is the part of law which comes into play when the issue before the Court

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[8] *Scherk v. Alberto-Culver Co.,* [1974] 417 U.S. 506, 519

[9] Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (The Macmillan Co. 1937) 1

[10] ibid,

In the United States, the term is more commonly known as "Conflict of Laws", while "Private International Law" is somewhat of a less popular alternative. Several English authors, such as Phillimore, Foote, Westlake, and Chesire used the term "Private International Law" without alternating with "Conflict of Laws", as opposed to American authors such as Wharton, Minorm and Beale who employed "Private International Law" as an alternative. Among French authors, the term *Droit international privé* is a comprehensive term, whereas *Conflits de lois* is used to describe the vast problems in which the application of foreign law is indicated for reasons other than the status of a person or a party.

affects some fact, event, or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system.[11]

Stevenson defined Private International Law as a field of study consisting of norms to be applied in international[12] cases to determine the judicial jurisdiction[13] of a State, the choice of the particular system or systems of law to be applied in reaching a judicial decision, and the effect to be given to a foreign judgement.[14] This is in line with Whytock's definition of Conflict of Laws: as a body of law that governs multijurisdictional legal problems,[15] typically with three branches: jurisdiction, choice of law, and recognition and enforcement of foreign judgements. Jurisdictional rules determine the authority of Courts to adjudicate disputes arising out of transnational activities; choice-of-law rules determine which nation's laws apply to transnational activity; and recognition-and-enforcement rules

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[11] Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu* (3rd edn, PT. Citra Aditya Bakti 2001) 6

[12] John R. Stevenson, *The Relationship of Private International Law to Public International Law* (Columbia Law Review 1952) 561

Stevenson used "international" in the broadest sense of the word, meaning to include all cases in which some important elements are foreign to the forum, such as the nationality of the parties, the place where the contract was made and entered, or the location of the object. It is also noted that private international law should probably be limited to situations in which international – as opposed to interstate jurisdiction – choice of law, or foreign judgement questions are present. However, the limitation does not apply to problems involving the law of a state and some foreign country, or even the law of two states from different countries.

[13] ibid, 562

"Judicial jurisdiction" means the power of a State to empower one of its governmental instrumentalities to hear a particular dispute and give judgement in the premises.

[14] ibid

[15] Christopher Whytock (n 6) 119

govern whether a nation will recognize and enforce another nation's Courts.[16]

Sudargo Gautama also provides a summary on four scopes of Private International Law, namely:

a. Private International Law as *rechtstoepassingsrecht:* this opinion is adopted by the Dutch legal framework. In this concept, Private International Law is limited only to the issue of conflict of laws (Sudargo Gautama was more inclined to use "choice of law")[17] because no actual dispute regarding legal systems exists, but merely a question of which legal system would work the best for the current predicament? The issues discussed are only related to the question of the choice of law between legal systems that happen to intersect due to the existence of a foreign element, and do not concern matters like the competence of judges or citizenship issues, even though they are included in other States' definition of Private International Law. Hence the term *rechtstoepassingsrecht*.
b. Private International Law that consists of choice of law and choice of jurisdiction issues: this concept is a tad broader than the first one, and is adopted by the Anglo-Saxon legal framework. Private International Law is not limited to conflict of laws, but also involves the choice of jurisdiction and the competence of judges. In fact, English scholars agreed that instead, questions regarding *jurisdictie* must be solved first before moving on to the applicable law.[18]

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[16] Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, *Conflict of Laws* (5th edn, West Academic Publishing 2010) 1-4

[17] Arthur K. Kuhn (n 9)

Paraphrased from Kuhn, "a choice between two or more systems of law."

[18] Sudargo Gautama, 'Apa Saja yang Termasuk Hukum Perdata Internasional?' (1997) 7(2) Jurnal Hukum dan Pembangunan Universitas Indonesia <http://jhp.ui.ac.id/index.php/home/article/view/652/580> accessed on 30 July 2019

c. Private International Law that consists of choice of law, choice of jurisdiction, and *condition des etrangers* issues*:* the third conception is widely accepted among Latin countries, such as Italy, Spain, and Southern America, and is related to choice of law, choice of jurisdiction and status or nationality of foreigners/aliens. The issues discussed within its scope are, among others, whether foreigners are allowed to work in a country, certain restrictions on land ownership to aliens, limitation in trade practice, industry, *et cetera.*
d. Private International Law that consists of choice of law, choice of jurisdiction, *condition des etrangers* and nationality issues: this is the broadest concept out of all, with the same content as the previous concept but with an addition of nationality issue, such as the how one gains and losses their nationality. This concept, among others, is widely practiced in France. Sudargo Gautama also sees this concept as the most ideal scope of Private International Law.

Most of the definitions above suit Sudargo Gautama's second scope of Private International Law, which mostly discuss about choice of law and choice of jurisdiction.

3. The Governing Law and Jurisdiction of Transnational Contracts

A contract or an agreement is a consensus between 2 (two) or more people that contains rights and obligations that are reciprocated and recognized under the law, or which implementation is recognized as a legal obligation. Based on such definition, the essential things that define a contract are consensus and the rights and obligations to perform something (contractual rights and obligations).

In Private International Law, contracts are among the source of conflicts. It is essential to note that Private International Law only applies to contracts containing international/foreign elements, which will be referred to as Transnational Contracts for the purpose of this paper.

The common misconception regarding governing law and jurisdiction is that both are often seen as one identical problem or even mixed up, but

are actually two separate issues.[19] Choosing a governing law means that the forum overseeing the case with international/foreign element shall employ the chosen law in the judgement process[20] while choosing a jurisdiction means appointing a judicial institution or other institution that will adjudicate the parties' dispute shall it arises in the future.[21]

3.1 Definition of Governing Law and Jurisdiction

The jurisdiction of a forum in Private International Law means the power and authority of a forum to examine and adjudicate a problem that is presented to it regarding a case involving at least one relevant element of foreign law. To carry out internationally recognized jurisdiction, a forum must have certain links with the agreement and parties. Typically, a transnational contract contains the jurisdiction clause, also known as choice of forum, in which a forum is agreed on by the parties to oversee any dispute arising from the contract.

A choice of forum can be exclusive or non-exclusive. An exclusive jurisdiction clause means that only the Court(s) in a jurisdiction is considered competent to judge the case; it limits disputes to the Courts of one jurisdiction, thus offering greater protection since it is less likely for another country to accept the case if faced with an exclusive choice of forum clause. Non-exclusive jurisdiction clause, on the other hand, means the disputes shall be heard in the Courts of a particular jurisdiction but without

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[19] Jay Lawrence, 'Extraterritoriality, Conflict of Law, and the Regulation of Transnational Business' (1988) Texas International Law Journal, 154

Just because a State's national law becomes the governing law on a dispute does not necessarily mean their court has jurisdiction over it, and vice versa.

[20] Sudargo Gautama, *Hukum Perdata Internasional; Hukum yang Hidup*, (Alumni 1983) 52

[21] ibid, 53

prejudice to the right of one or other parties to take such dispute to the Courts of other jurisdiction if it is deemed appropriate.[22]

Meanwhile, there are several theories regarding what is the governing law in a contract. Just like the choice of forum, typically parties chose what law should govern the contract, and it is usually stated inside of the contract. If the choice of law is clearly stated, then it shall be applied, but if no governing law clause exists, then other theories can be used. Some suggest that the governing law should depend on where the contract is signed and entered (the *lex loci contractus* theory);[23] where the contract is executed (the *lex loci solutionis* theory);[24] what is the most relevant legal system to the contract (the proper law of the contract theory); or depending on which party has the most significant contribution (the most characteristic connection theory).[25] Ultimately, the governing law and jurisdiction clause, which depend on the parties' agreement, follow how the appointed judges choose to handle the dispute.

3.2 Examining Private International Law Disputes Arising from Transnational Contracts

Sunaryati Hartono, an Indonesian scholar, provides four stages in examining Private International Law disputes.[26]

In the first stage, one must determine whether a dispute incorporates Private International Law elements or not. When a dispute

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[22] Dave Lau, 'Non-Exclusive Jurisdiction Clauses – effect in Hong Kong Law' (*Lexology*, Hongkong, White & Case LLP, 7 January 2009) 2 <https://www.lexology.com/library/detail.aspx?g=fdbc7539-eb57-458e-be94-aed610654823> accessed 25 October 2019

[23] Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid III Bagian II* (8th edn, Alumni 2002) 12

[24] ibid, 16

[25] ibid, 32

[26] Sunaryati Hartono, *Pokok-Pokok Hukum Perdata Intemasional* (Putra A. Bardin 2001) 13-14

arises, there are legal issues in the form of a set of legal facts. In order to be recognized as a Private International Law matter, the legal facts, circumstances or factors of a dispute must contain foreign elements— they shall create a relation between two or more legal systems, and are commonly called "distingushing link points".[27] Consequently, Private International Law shall apply, and the parties must decide which jurisdiction is authorized to adjudicate the dispute. This is where the choice of forum clause is enforced.

Secondly, the parties shall determine the legal issue of said dispute. The qualification of facts follows the law of the forum or *lex fori*.[28] If a case is submitted in Indonesia, then the qualification of facts shall follow the law used by Indonesian Courts; for example, a failure to perform certain obligations in a contract shall be categorized as a breach of contract as regulated in the Indonesian Civil Code.

The third attempt is to find out the governing law or *lex causae*. In practice, sometimes the governing law is also the law of the forum. Other times it may be determined by where the contract was signed, or where the contract is executed, and other factors. The choice of law clause is enforced in this stage.

The fourth and final stage is adjudicating the dispute in accordance with the governing law. However, the governing law may not be used in two occasions: (i) if the judicial process based on *lex causae* threatens to disrupt public order and (ii) if no provision in *lex causae* regulates the prevailing matter. In either case, *lex fori* shall apply instead.

4. Indonesian Court Authority

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[27] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (Binacipta 1987)

[28] Bayu Seto, (n 11) 10

Lex fori is the legal system from the jurisdiction where the legal issues are submitted as cases. In other words, lex fori is the law of the forum where the case is adjudicated.

In determining whether an Indonesian Court has the authority to adjudicate a dispute or not, then one must first look at the Indonesian civil procedural law. The relevant procedural codes in this matter are the *Het Herziene Indonesisch Reglement* (the Revised Indonesian Regulation; hereinafter referred to as HIR), *Reglement op de Rechtvordering* (Rules of Procedure; hereinafter referred to as RV).

HIR is the procedural law that applies in Indonesia today, but it does not regulate the proceeding of cases containing foreign elements. However, Article 118 HIR contains provisions regarding the procedure for commencing litigation in first degree hearing in District Court:

(1) The civil lawsuit in first degree hearing is the jurisdiction of the District Court, and shall be submitted with a letter of claim (lawsuit) signed by the plaintiff, or by their representative, in accordance with article 123, to the Chairman of the District Court in where the defendant lives or resides, or if his residence is not known, to the Chairman of the District Court in his actual place of residence.

(2) If there is more than one defendant, and they do not live in the same jurisdiction of the same District Court, the lawsuit is filed with the Chairman of the District Court in one of the defendants' residences, chosen by the plaintiff. If the defendant is a principal debtor and a holder thereof, without prejudice to the provisions of Article 6 paragraph (2) of "The Judicial and Prosecution Regulation in Indonesia", the lawsuit is filed with the Chairman of the District Court in the principal debtor or one of the principal debtors' residence.

(3) If neither the defendant's address nor actual residence is known, or if the person is not known, the lawsuit is filed with the Chairman of the District Court in the plaintiff or one of the plaintiffs' residence, or if the lawsuit concerns immovable goods, to the District Court within where the property is located.

(4) If a place of residence is selected with a deed, the plaintiff may, if they wish, file the lawsuit to the Chairman of the District Court whose jurisdiction is within the elected residence.

Article 118 paragraph (1) and (2) of HIR stipulates that a lawsuit shall be filed to the District Court is in the defendant's address or actual domicile, a principle universally known as *Actor Sequitor Forum Rei.* The exception to this principle is then stated in paragraph (3), which stipulates that if the defendant's address or himself is unknown, then the lawsuit can be filed in the plaintiff's District Court or where the immovable goods reside instead, and in paragraph (4) where the plaintiff can file the lawsuit to a whole different Court as elected in a deed or contract.

Article 118 paragraph (3) of HIR makes it possible for the foreign defendants, who does not have a known place of residence, be sued before the forum of the District Court of the plaintiff's residence (*forum actoris*). Meanwhile Article 118 paragraph (4) acknowledges the parties' freedom to choose a jurisdiction. For example, even though the defendant lives in London and the plaintiff lives in Bogor, they may agree to choose the Central Jakarta District Court as the forum.

Thus, the status between foreign legal subjects and the subject of Indonesian law is not differentiated before the Court, because foreign parties can also sue the Indonesian side before an Indonesian Court, as long as the subject of the foreign country is related with Indonesian legal subjects. The opposite of this is found in Article 100 RV, which states that foreign parties can be sued before an Indonesian Court, if they have trade contracts with Indonesian legal subjects. Article 100 RV adheres to the principle of protection of the interests of the subjects of Indonesian law by extending the authority of the Court to accept claims against foreign parties.

5. Indonesian Court Decisions on Governing Law and Jurisdiction Clause: Inconsistency in Landmark Decisions

When analyzing how Indonesian Courts see governing law and jurisdiction clause, two cases come to mind: Mitomo Shoji v. Bali Energi, *et. al.* and PT. Pelayaran Manalagi v. PT. Asuransi Harta Aman Pratama, Tbk. Both cases involved the execution of a contract, with existing choice of law and choice of forum overseas, but the lawsuits were filed in the District

Court of Central Jakarta. The Mitomo Shoji case have yet to be declared *inkracht* since an appeal to the Supreme Court is still possible. However, the case may become a notable example to see how the judges in Indonesia perceive or treat the governing law and jurisdiction clause in a contract.

First, Interlocutory Decision No. 359/Pdt.G/2011/PN.Jkt.Pst. and Decision No. 186/PDT/2014/PT.DKI, respectively, are the District Court and High Court decision regarding the dispute between Mitomo Shoji (Plaintiff) against Aim Holding (Defendant 1), Koji Matsumo (Defendant 2), Matsuo Watabe (Defendant 3) and Bali Energi Ltd. (Defendant 4). The dispute concerning implementation of a contract made by and among the Plaintiff (as the investor) with Defendant 1 and Defendant 2 (as shareholders in Defendant 4) and Defendant 3 (as guarantor). The Contract, dated 27th of October 2010, contains provisions regarding the financing of Defendant 4, the planned sale of 70% of the shares, and distribution of profit from the sale of shares between the parties.

In regards to the governing law and jurisdiction clause in this case, the parties have agreed and subjected themselves to the District Court of Tokyo and Japanese Law should any dispute in connection with the implementation of the contract arise. This was shown in Article 11 of the contract, which stated that:

> *"11. The First Party and the Second Party shall agree that the governing law in regards to this matter shall be Japanese law unless other circumstances arise, and also agree that the court competent jurisdiction shall be Tokyo District Court.*
> *The First Party AIM Holding Co., Ltd.*
> *Representative Director Shu Hirano*
> *The Second Party Koji Matsumoto*
> *39-16, Oyama-cho, Shibuya-ku, Tokyo*
> *The Third Party Watabe Matsuo*
> *1-5-14-301, Jinnan, Shibuya-ku, Tokyo*

Abovementioned articles from 1 through 11 are all confirmed and approved."

Despite the abovementioned clause, the Plaintiff still decided to file his lawsuit to the District Court of Central Jakarta. The Defendants argued that the Plaintiff deliberately involved Defendant 4, who happens to be located in Indonesia, into the lawsuit to deviate from the appropriate Court, which is the District Court of Tokyo.

The judges in the District Court of Central Jakarta decided that since the Defendants reside in different addresses, the Article 188 paragraph (2) HIR became applicable. The aforementioned Article stated that:

(1) If there is more than one defendant, and they do not live in the same jurisdiction of the same District Court, the lawsuit is filed with the Chairman of the District Court in one of the defendants' residences, chosen by the plaintiff. If the defendant is a principal debtor and a holder thereof, without prejudice to the provisions of Article 6 paragraph (2) of "The Judicial and Prosecution Regulation in Indonesia", the lawsuit is filed with the Chairman of the District Court in the principal debtor or one of the principal debtors' residence.

The judges found that since Bali Energi Ltd. is located in the 4th Floor of STC Senayan Building, Suite 71, Jl. Asia Afrika, Central Jakarta, the District Court of Central Jakarta had the necessary jurisdiction to adjudicate the matter. In the interlocutory decision, it was declared that the District Court of Central Jakarta is appropriately suited to hear the dispute, thus the parties shall proceed to the hearing of the merits of the case. Defendant 4 later brought the interlocutory decision to the High Court of Jakarta. However, in Decision No. 186/PDT/2014/PT.DKI, the High Court reinforced the previous interlocutory decision, giving full jurisdiction to the District Court of Jakarta to judge the case regardless of the parties' choice of law and forum.

As comparison, let us revisit the second case: Supreme Court of Indonesia Decision No. 1935 K/Pdt/2012, which was preceded by 52/Pdt.G/2010/PN.Jkt.Pst and 297/PDT/2011/PT.DKI of the District Court and

High Court, respectively. The parties to this case were PT. Pelayaran Manalagi as the Plaintiff and PT. Asuransi Harta Aman Pratama, Tbk. as the Defendant. Both were Indonesian companies, bound to Marine Hull and Machinery Policy Insurance Agreement No. 03.08.05.10.827.00025, signed and enforced in Indonesia, with the Plaintiff as the Insuree and the Defendant as the Insurer. The object to this contract was a motor vessel called KM. Bayu Prima, registered in Indonesia, owned, and operated by the Plaintiff. One day, the vessel caught fire. To ensure the safety of everyone involved, the Harbormaster ordered the crew to leave and beached the vessel. In accordance with the Marine Hull and Machinery Policy, the Insuree filed a Notice of Abandonment, claiming the total loss suffered from the accident. However, the claim was declined due to several reasons. Later, the Plaintiff filed a lawsuit against the Defendant on the ground of unlawful declination of insurance claim.

In regards to governing law and jurisdiction, the insurance agreement contained a clause stating that "[the insurance] is subject to English law and practice", but the lawsuit was filed in the District Court of Central Jakarta. Similar to the Japan case discussed above, the Defendant *a quo* argued that the District Court of Central Jakarta had no jurisdiction over the case since the parties had agreed to subject themselves to English law. The argument was rejected by the Court, stating that choice of law and choice of jurisdiction are two different issues, and that even though the insurance agreement was subject to English law, no choice of forum was present in the agreement. Since the Defendant resided in Central Jakarta, according to HIR the lawsuit became the District Court of Central Jakarta's jurisdiction. Another significant fact is that the District Court Judges acknowledged the Private International Law aspects of the case, citing the Marine Insurance Act 1906 as part of the English Law which the parties have subjected themselves to.

The Defendant later filed an appeal to the High Court, and the District Court's decision was later reinforced by the High Court of Jakarta.

However, the Indonesian Supreme Court decided otherwise. Article 1338 of the Indonesian Civil Code was used as the legal consideration, stating that: "All legally executed agreements shall bind the individuals[29] who have concluded them by law. They cannot be revoked otherwise than by mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith." Since the insurance agreement was legally executed, the provisions in it should be respected, including the governing law and jurisdiction clause. The Supreme Court declared that the District Court of Central Jakarta had no jurisdiction over the case, and cancelled the preceding Court decisions.

In the Mitomo Shoji v. Bali Energi, *et. al.* case, although both parties have agreed to subject themselves to Japanese Law and chose the Tokyo District Law as the appropriate forum, the judges ignored that and simply cited Article 118 paragraph (2) HIR to rule themselves competent over the case. Meanwhile, in the PT. Pelayaran Manalagi v. PT. Asuransi Harta Aman Pratama, Tbk. case, the District Court and High Court judges have done the right thing by separating choice of law from the choice of forum issue, only to be jeopardized by the Supreme Court decision. From these examples, it is clear that how judges in the Indonesian Courts perceive governing law and jurisdiction clause may greatly differ between one judge and the another.

6. Conclusion

Due to the presence of foreign elements or facts in disputes involving international business contracts, judges must first determine whether the forum has jurisdictional competence to adjudicate such dispute. In determining the jurisdiction, judges shall adhere to the rules and principles of Private International Law as part of the *lex fori* system, on which States determine whether a Court has competency to claim

[29] Subekti, *Pokok-Pokok Hukum Perdata* (P.T. Intermasa 2010) 19–21

The term 'individual' in Indonesian law refers to two legal subjects, namely a person (*natuurlijkpersoon*) and a legal entity (*rechtpersoon*).

jurisdiction over the case in question or not. After ensuring that a forum does have jurisdiction over the dispute, only the judges then determine which law shall apply to the case; making clear that choice of law and choice of forum are two different, albeit intertwining, issues.

As a civil law country, the difference between one Court decision and another is what to be expected. However, inconsistency is also a present problem. In both case studies presented above, judges gave no explanation on why they chose to acknowledge certain principles and ignore the others. In adjudicating civil cases that have foreign elements, judges shall adhere to the principles of international civil procedural law that are developed and used internationally by foreign Court judges.

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