Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.151, 2026

The Choice of Law and Choice of Forum in Private International Law in Indonesia

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Abstract

International relation in economy have been modern reality, where this reality have begun to arrive in the world since years before the arrive of the modern world. The silk route that span from China to Europe have bring forth the international relation. This connection also leave legacy, among them is the name of tea in various nation that is touch by the silk route. To the nation of that majority been touch to the land route of the silk rout the name of the tea, is largely pronounce the same as the original name in China, which is cha. On the hand for the nation that receive their goods over the sea of silk road, mainly pronounce it as the or its variation, in this case the English language pronounce it as tea. This lasting international relation, also leave its legacy in the Indonesia, where it was operational area of Dutch East India Company, mainly known as VOC, then after the company cease to exist, it become part of Netherlands East Indies. The legacy largely, is set the norm through continental, of which the civil law is being regulate by civil code. The need of party then, where in international party, will become subject to various legal jurisdiction,need to be made clear in the area of dispute settlement. The clear clause in the dispute settlement will enable party to focus on the dispute and possibilities to found solution, rather than to focus of type of dispute and the law. One of the tools made available of this, is the selection of the forum and law, regarding the dispute. Indonesia as strive to be friendly to the international relation, have not turn blind eye to the need to have clear dispute settlement for party.

Keywords: party autonomy, effective dispute settlement, freedom of contract, foreign law

DOI: 10.7176/JLPG/151-04
Publication date: March 28th 2026

1. Introduction

Indonesia legal system have followed the continental legal system, that it inherit from the previous colonizer, The Netherlands. This revelation is not entirely unique to Indonesia, as it is noted after world two, when the world begin to witness the fall of colonization, much of the former colony retain the legal system it inherit form the former colonizer (Schmidhauser, 1992). In the area of civil law, Indonesia still using the Civil Code, otherwise known as Burgerlijk Wetboek (BW) as one of the material source of slaw, and in term of civil procedural law, it still use Het Herziene Indonesisch Reglement 1941 (Revised Indonesian Regulation or "HIR") for island of Java and Madura, Rechtsreglement Buitengewesten 1927 (RBg) for islands outside of Java and Madura, so the latter will apply to the majority of the area in Indonesia. Both of this procedural law was originally intended for the use of indigenous people in the Nederlandsch-Indië (former name of Indonesia during colonial era). As these design for the indigenous population, the law maker did not equip it with the some of the "contemporary" practice of civil case during that time, such as the use of attorney as representative in the court, so to complement the civil procedure, the court have been using Reglement op de Burgerlijke Rechtsvordering 1847 (RV), that was intended as the civil procedural law for the european and foreigners. Private international law in Indonesia, have been relying in this acts as this is the principal act in the civil law.

The realization of dispute resolution that is effective, will be beneficial to the growth of economy (Burbank, 2006). With the globalization then come the economic relation between party that subject to difference legal rule. With the economic relation the possibility of conflict between different subject that adhere to different legal rule is a possibility that have been realize to be in the global economic relation. The study of private international law in Indonesia have been trying to keep up with the current development that the country is being. The signing of Regional Comprehensive Economic Partnership (RCEP) and entry of it into force, as one example, have made it more and more likely to have case with foreign party in private law. To alleviated this condition, the government have pushed the drafting of the Private International Law, where it have made in the legislation list for 2020-2024 drafting, which at the time of this writing, have not pass as an act.

The existence of foreign party in private contract are have been long in existence of Indonesia. As the principal principle in the contract is regulated in the article 1338 BW, which said "the legally concluded agreements constitute a law for those who entered the agreements. Such agreements are irrevocable unless by mutual consent, or by the reasons stipulated by the law. They must be executed in good faith". From this article, the foundation of party autonomy principle from where parties can design their contract from. The freedom of contract as Sutan Remy Sjahdeni, means freedom to enter agreement, freedom to choose clauses, freedom to choose the subject of agreement, freedom to adhere or deviate from standard law/norm (Susanti, 2019). One the possibilities in formulating contract, is by designing dispute settlement in which parties have choose specific way when dealing with dispute arises from the contract.

2. Party Autonomy as Gateway

In keeping with party autonomy some of the contract have introduced the clause of regulating law and forum selection for dispute. These practices have been observed in the court room. One of the possibilities in the forum selection is, parties can choose arbitration as their forum for dispute settlement. Arbitration itself is known in RV, but it is being regulated now in Act Number 30 Year 1999 regarding Arbitration and Alternative Dispute Resolution (Arbitration and ADR Act). In that act, it acknowledge the jurisdiction of arbitration once the parties have agree on arbitration as their forum of dispute settlement (Art. 3 Arbitration and ADR Act stipulate the District Court has no authority to adjudicate disputes between parties who have been bound in the arbitration agreement). The forum selection clause also exist in the Act Number 11 Year 2008 then revised with Act Number 19 Year 2016, on Information and Electronic Transaction (Information and Electronic Transaction Act), where it gave the freedom for the parties to do forum selection in their contract (Art. 18 subparagraph 4 Arbitration and ADR Act stipulate the parties have the authority to determine the forum court, arbitration, or dispute resolution institution other alternative authority to handle disputes which may arise from Electronic Transactions international that he made).

Another way of implementing of party autonomy is in the selection is through clause on regulating law, where parties have the freedom to choose law that will regulate their relation in the contract. The existence of the clause also can be found in Arbitration and ADR Act, as it give the freedom for the parties to choose their governing law (Art. 56 Subparagraph 2 Arbitration and ADR Act stipulate the parties have the right to determine the choice of law that will apply to the resolution of disputes that may or have arisen between the parties). The choice of law in the Arbitration and ADR Act only apply to situation where party have choose arbitration as their forum. On the choice of law, the Information and Electronic Transaction Act give the ability to the parties to choose the governing law. This freedom of choosing the governing law under the Information and Electronic Transaction Act (as Art 18 Subparagraph 2 stipulate the parties have the authority to choose the law that applies to the international Electronic Transactions they make), only in the condition that the contract is having foreign element, which mean if the contract only between Indonesian national, then the choice of law is not allowed. The act also stressed on the importance of private international law as guiding principle where parties with foreign element enter the relation of contract. The existence of choice of law principle also can be found in Act Number 1 Year 2009 on Aviation, where it gave the freedom of the parties to choose the regulating law for their contract, regardless the connection of the parties to the law of their choosing. This can be seen in Art. 72 and the explanation of the Aviation Act have broad understating regarding choice of law, where it does not [need the connection to the law they choose, but this option only available only where the contract in an international contract, so this option is not available where the parties is strictly Indonesian].

The party autonomy that exist in civil law, does not make it party is at freedom to do just about anything in their agreement. The are limitation on the civil code that one can construct an agreement, where according to article 1320 requirement for agreement are:

1. An agreement;
2. Ability to enter an agreement;
3. The agreement is on certain subject/matter;
4. The agreement is no violating any law.

The requirement of any contract to be to be according to the law, does make it mean that the party autonomy will be restricted on certain matter. This will translate when considering the contract of sale of land in Indonesia. The freedom of contract can not violate the land law in Indonesia, even though the aspect of freedom of contract still exist. In this example the sale of land, meaning the transfer of land ownership can not be done between Indonesia citizen and foreign citizen, because the land law limit the ownership of land in Indonesia only available to state or Indonesia citizen. The freedom of contract can exist in other thing that is limited define by law, like when payment need to be done. This being said, because there is more rigid requirement one can not define freedom of

contract in choice of law, because using other country law to govern Indonesia will be in violation of the law in Indonesia, thus make it the choice of law is unavailable in land law.

The various object of agreement can lead to multitude of type of agreement. The possibility of clash arrive when right in *rem* of when goods being transaction. When the right in rem is on the sale of land, is as explain above, the right in *rem* is regulated by the place of where is located, the *lex loci rei sitae* principle. This principle can be found in Article 17 Algemene Bepalingen (AB) that put the law of where the object located shall prevail. Algemene Bepalingen is regulation on rule making, enacted during the colonial era, where part of the act still enforce while other have been replace by other act. When dealing in international transaction of consignment , the right in *rem* does not have to follow particular law, in this instance civil code of Indonesia, rather parties are at liberties to decide which law should be follow. This understanding can be found in the Minister of Trade, Regulation Number 24 Year 2021, where to each party that need to register the consignment agreement, need to clearly address which law the parties decide to follow.

This choice have receive great interest form the party of an agreement. As the freedom of the contract guarantee party to form their own set of agreement to become their law (party law). This also influence the dispute settlement agreement. As one study find that, even though there is a clear definition of the type of forum available to the certain case, party still find it an important feature fro the party to choose the seat of that forum is (Nyarko, 2021).

3. Dispute Selection as right

The right in *rem* in movable object that need registration, will follow the principle of *lex loci rae sitae*. The principle can be exercise in intellectual property law, for instance in the registration of trademark. The use of trademark in world trade have been exploit extensively, where it not bring benefit to the producer of the product and services, but also toward the consumer. When the right holder, either the owner or the party that have gain the right to use the right, need beforehand to register the trademark first in the Directorate General of Intellectual Property. This is useful as with registration comes the protection of the trademark against illegal use of other party. The need to register is also exist for the foreign trademark that have done registration in their home country. The meaning of where it is located in the principle carries weight as if the register trademark is not being used in trade within Indonesia, then another party can ask for expunge of the trademark. Where this object in the agreement then the party will not have the liberty to choose their law.

As the freedom to choose their dispute settlement is one of the focal point, party must realize the aim of this are to provide predictability, exercising party autonomy, thus it come to certainty for party over the contract it enter. As this rights exist, and in the real world, most the contract relation is involving multiple contracts, parties must take dully noted of the choice in each on the contract so with the relation between contract still follow the aim of the party autonomy. To this end then parties must fully aware of the danger in fragmented litigation and forum shopping (Donnelly, 2020).

In investment law, the procedure of choosing the forum for dispute settlement, is clearly state, where to settlement to court ruling is not available when investor is a foreign party. This approach is a different one, where as if the party is domestic party, court settlement is still viable option for party to choose from. Moreover, the case of foreign investment that will be against the host country (the government) is not only mandated to be adjudicated in arbitration, but it must use international arbitration. Currently it is not very clear on the meaning of international arbitration, as the Act Number 25 Year 2007 regarding Capital Investment did not specify on the definition of international. One could argue if the center located in Jakarta and involve foreign arbitrator, does it make it international arbitration. The definition of international arbitration also is not define in Act Number 30 Year 1999 on arbitration and alternative dispute resolution (ADR), but nonetheless a shade of definition can be derived on meaning of international arbitration award which stipulate in the act. The international arbitration award is define as an award by arbitration center that have seat outside the territory of Indonesia. With that definition then it can be deduced an international arbitration is arbitration that have it's seat outside the territory of Indonesia.

Clause regarding choice of law, in the practice of the court have different interpretation, through one can have understanding on private international law in Indonesia. In the case of PT Pelayaran Manalagi v PT Asuransi Harta Aman Pratama, Tbk. (the abbreviation of PT is referring to perseroan terbatas, which meant as limited liability company, where company have this abbreviation, then it is consider to be legal person, while Tbk. denote the stock status of the company is tradable in stock market), where the parties is having dispute on insurance where the Plaintiff (PT Pelayaran Manalagi) who lost it ship have been denied claimed by the

Defendant/ insurer (PT Asuransi Harta Aman Pratama, Tbk.) of which the Plaintiff insist that is a breach in their marine insurance agreement. Their insurance contract clause, have the made it clear that the parties choose English law as their regulating law. To settle their dispute, the plaintiff have filled their case in Central Jakarta General District Court.

Before diving more to the above case, as mention previously, because there is no specific act that dealt with private international law, this condition does not necessarily make Indonesia legal system is without the basic principle in dealing the private international case. The understanding of principle mandatory rule exist in the legal system, is one of the basis in applying private international law. In applying mandatory rule one country can not blatantly formulate rule that deter subject matter not to be decide by party autonomy principle. In Rome Convention on the law applicable to contractual obligations (Rome I)/ The Regulation of EC Number 593/2008, in article 9 have set about the guide line where one country can establish overriding mandatory principle, this principle can be establish where one country consider that the contract have enter are of sensitive nature that is crucial on the very existence of the country it self. The convention have set the principle is for safeguarding of its public interest, as such as its political, social or economic organisation. The set of guidance for the application of the law, where on of them is UNDROIT, which is design as soft law, to guide the legislator and the court in applying that is not currently clear in the national legal system. This guidance have the objective to improve access to justice, ensure fairness and efficiency, strengthen inter juridical procedure (Stürner, 2022). The UNDROIT 2016 have set the guide line of any commercial contract should follow on the mandatory rule that being set by the national, where Art. 3.3.1UNDROIT Principal on Commercial Contract set the condition of any contract that violate mandatory rule will have the effect of the said mandatory rule, if the effect is not clear then party can seek remedies. Currently Indonesia have ratified UNDROIT through President regulation Number 59 Year 2008.

Indonesia is signatory country to New York Convention On The Recognition And Enforcement of Foreign Arbitral Award in Indonesia. Indonesia have signed the convention in 1981 October 7, while it declare Pursuant to the provision of article I (3) of the Convention, the Government of the Republic of Indonesia declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State, and that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Indonesian Law. This is stated in https://www.newyorkconvention.org/list+ of+contracting+states, accessed at 2023 December 4. If foreign arbitration award want to be enforce in Indonesia, the award must be first apply to Central Jakarta General District Court. After receiving the application, the court have the power to set aside the award base on the ground that award have violated public order principle. This power is based on the Article 66 of Arbitration and ADR Act, where it stipulate before an award be enforce in Indonesia, it must not violate the principle of public order. On the basic principle of the contract is set in Civil Code, where it set the foundation that all contract made by the party shall meet the legality standard. This means that party can not enter contract that is in violation of rule in Indonesia. Art. 1320 of Civil Code set the condition of valid contract, which are the, the agreement, the ability to enter contract, the contract is about certain thing, the contract must not in violation of any regulations. So an international arbitration award can not be exercise in Indonesia, if it's in violation of public interest, like land ownership that involve foreigner.

The categorization what make it an international contract or contract of international nature which in contrary an Indonesian contract it is not being clearly define. Choice of law exist in both of the continental legal system and the common law legal system. The idea first begin to be evidence in the legal system, are known to be in the continental legal system. Where then after push from legal scholar, weighing the merit to find solution of the conflicting legal regime surrounding the case, the principle begin to appear in the court decision. It is noted the main factor of the use of choice of law is legal scholar as they acted as the system builder of the legal system (Ian F. G. Baxter, 1987).

To decide on the type of contract in term of what is the governing law, if by using *lex loci contraactus* and *lex loci solutionis.* The *lex loci contra actus* is the theory to look at the governing law by looking at where the contract is made, while the *lex loci solutionis* is by looking at the where the contract is perform. Both of the theory may fund difficulties of the key factor is not very clear, then one theory to seed light of what this contract are, can be seen in the characteristic of contract, where Guliano and Lagarde state the concept of characteristic performance essentially links the contract to the social and economic environment of which it will from a part. This characteristic contract theory is not to limit the freedom of contract but to indicate the applicable law in absence of choice (Kincaid, 1993).

The choice of law can be found in the legal relation, by using this theories:

1. Express, can be view when parties express it in the agreement;
2. Implied, can be view by looking at the parties behavior toward certain law;
3. Assumed, where the parties without express it before have taken stand to be the subject of different law. The assumed theories is important ones as Indonesia apply variety of law regarding the economic relation, such as Islamic law, the civil code law, the indigenous law.;
4. Hypothetical, where the parties lean toward but not yet show clear gravitation toward the selection of certain law (Susanti, 2019).

Another thing to consider is when viewing the choice of law, one should care the type of law the agreement is about, the are:

1. Optional rule, where the rule are not explicitly made it into contract, they are there to govern if the party have not made any comment on the subject in the clause.
2. Compulsory rule, where the principle of contract can is set by civil code.
3. Mandatory rule, where as the subject of law will be strictly govern by law (Kincaid, 1993).

The choice of law and choice of court is widely use in contract, especially contract that involve foreign element. Principles on choice of law in international commercial contracts, as set in Hague Conference on Private International Law, have given clear distinction on the these principles (https://www.hcch.net/en/instruments/conventions/full-text/?cid=135, accessed at 2025 January 12). As set in principles 1.7 “Choice of law agreements should also be distinguished from “jurisdiction clauses” (or agreements), “forum selection clauses” (or agreements) or “choice of court clauses” (or agreements), all of which are synonyms for the parties agreement on the forum (usually a court) that will decide their dispute. Choice of law agreements should also be distinguished from “arbitration clauses” (or agreements), that denote the parties’ agreement to submit their dispute to an arbitral tribunal. While these clauses or agreements (collectively referred to as “dispute resolution agreements”) are often combined in practice with choice of law agreements, they serve different purposes. The Principles deal only with choice of law agreements and not with dispute resolution agreements or other matters commonly considered to be procedural issues”. This principle is currently just guiding norm for the member of Hague conference, where Indonesia is yet to join the conference.

The case of PT Pelayaran Manalagi v PT Asuransi Harta Aman Pratama, Tbk., where both parties have agreed on the choice of law in using the English law, the district court have found it it is within the jusridiction of the court to apply the choice of law according to the selection of law the party have chosen, that is English law. In the appeal, the high court also found the condition that the party have agreed to choose on using English law, that it would be the English law that is going to be the governing law. The Supreme Court decide on the matter when the defendant filled cassation, where Supreme Court fund because the governing law is the English law, then it have to be view that Indonesia court does not have jurisdiction over the case (Supreme Court Decision Number 1935 K/Pdt/2012). This view also can be seen previously in the case of PT Merck Indonesia vs Bernhard, this case involve on termination of employment of Bernhard by PT Merck Indonesia, where before both parties have signed contract of employment, of which the parties agreed to use Switzerland law as their choice of law. Supreme court view that because the law that govern the contract is Switzerland, therefore Indonesia Court does not have jurisdiction on the matter (Supreme Court Decision Number 1537 K/Pdt/1985).

The problem with applying the theories when involve foreign element, also happen in other judiciaries, for examples in China, where in case between Xie and Shan （谢某与山某民间借贷纠纷上诉案）, disputing loan agreement which a Japanese person has sued Chinese person for loan that have not been repay. The loan was made in Yen (¥/Japanese currency), the agreement title was made in Japanese language, the Bank in use was a Japanese bank, the loan agreement was made in Japan, and repayment can be done in cash or transfer, give option that the agreement does give option to exclude Chinese bank. With this fact of closest connection is Japan, but the High People’s Court in Hainan Province, made the decision that because the party does not made express choice of law, then it is the opinion of the court that China law should be the law that govern the agreement (Tsang, 2022).

Another theory that Indonesia follow is the traditional vested rights, where the country have the right to set the law that going to regulate it’s territory. This principle is being applied to the embassy and representative of Indonesai in foreign country. The Vienna convention on diplomatic relation, where the country is guarantee on the protection and the exercise of rights regarding consular duties. To support the consular duties, Indonesia have hired local staff, where it exercise the right to regulate the contract agreement of local hires. This rights can be found manifested in the guide line from Labour Department and Foreign Affairs Department, that have set the requirement for requirement of staff to be hire, for instance working time should be establish in accordance with Indonesia labor regulation, as seen in guideline Labor and Transmigration Ministry No. B.385/DPHI/VI/2003

date 24 June 2003 and Depart. of Foreign Affairs RI Note No. 41/2003/67 date 11 May 2003.

It is worthy to note that an international side of the dispute resolution, need multi factor approach, as seen in the reality of China. This multi factors among other are international trust, political legitimacy, enforcement credibility, real politics dynamic. As this factors going to effect the preferred party toward the national legal system (Erie, 2022). The mandatory subject law that negate the choice of party, will in effect force out the choice, but one must count on the numbers of other subject that create contract relation of which party autonomy still exist.

4. Conclusion

The legal system that prevail in Indonesia have follow the continental legal system, where the prevailing law will be on law enacted in the national legal system, as appose to the jurisprudence based legal system. Currently, Indonesia have open their door to the possibilities of the dispute settlement in the out of court. This dispute sepolttlement for the out of court type, is not limited to the domestic made one. The foreign dispute settlement, for the forum of arbitration, is honor in Indonesia through the participation of Indonesia with the New York Convention. Through the convention, Indonesia have made available the foreign award to be effective within it's jurisdiction. As the foreign award can be made effective in the legal system, provision is in place to filter award that is potentially bring harm to the legal system and the nation in large. This filter system was mainly based on the public order, where the award must pass the test before it become an affective award within it's jurisdiction.

Where as the forum selection, that include foreign forum, to selected type of forum is made available in the Indonesia jurisdiction, another type of the selection involving the dispute clause is typically involve governing law. Choice of law clause have been observed as part of the reality in general broad doctrine of party autonomy. Court have been observing the choice made by the party to govern by selective law, where the mainly involving foreign jurisprudence. Application this doctrine for the Indonesia point of view will be dependence of the contract being brought forth. As currently Indonesia, have still in the process of drafting the private international law within the legal system, in the meantime application of choice of law will dependence of civil code and court practice.

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