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Freedom of Contract: The Indonesian Court's Decisions on Internasional Bussiness Disputes

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ABSTRACT: The presence of free trade zone and the increase in cross-border trade, have led to a significant increase in transnational legal relations. As a result, international contracts have become more common, and the principles of freedom of contract, including the freedom to choose the law and forum, have become increasingly important. Freedom of contract is a universal principle. Almost all countries in the world recognize it as a fundamental principle in contracts, including in international business contracts. This principle recognizes that contracts made by the parties act as laws for those compiling them. However, there is still a lack in consistency among Indonesian judges in their interpretation of the choices of law and forum in international contracts. This study examined the *raison d' etre* of different views and decisions of Indonesian judges in interpreting the choice of law and the choice of forum, and its implication on the principle of legal certainty in international business disputes. Through the normative legal research elaborated through a case study, this research finds that the views of some Indonesian court judges deviate from the principle of freedom of contract where the law chosen by the parties is based on the considerations of the principle of effectiveness besides focusing on the nature of the case handled. Thus the decision can be executable. The court may need to balance the principle of freedom of contract with other important considerations in order to arrive at a fair decision.

KEYWORDS: freedom of contract, interpretation, choice of law and forum, international business disputes.

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I. INTRODUCTION

The continous increase of the formation of free trade zones and cross-border trade has encouraged the enhancement of transnational legal relations.[1] To reunite the interests of the parties, to come to a shared understanding of the substance of the agreement, the legal relationship is bound by an agreement in a cross-border context.[2] Contracts or agreements are one of human rights.[3] Contracts or agreements are one of the embodiments of the principle of freedom of contract. Atiyah referred to freedom of contract as "(it) is one of the most fundamental features of the law of contract".[4]

Freedom to contract according to Sutan Remi Sjahdeini. is a freedom to make or not make agreements, freedom to choose which party to contract with, freedom to determine or choose the cause of the agreement, freedom to determine the object of the agreement, freedom to use the form of the agreement, free to accept or deviate from statutory provisions that are optional (aanvullend, optional).[5] Huala Adolf stated that the freedom to contract covers a wide range of aspects including the freedom to choose the resolution of disputes that occur, choose the forum (choice of forum) for resolving business disputes and determine the law used in the agreement to be made (choice of law).[6]

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1 Anayochukwu Basil Chukwu, Tobechi Agbanike & Lasbrey Anochiwa, "African Continental Free Trade Area (AfCFTA) Agreement and the Mega-Regional Trade Agreements (MRTAs): what are the underlying challenges and prospects for Africa-South-South trade?" (2021) 9:5 JES 414

2 Huala Adolf, Hukum Transaksi Bisnis Transnasional (Bandung: Keni Media, 2020) at 2.

3 P J Aronstam, Consumer Protection, freedom of contract, and the law (Cape Town: Juta, 1979) at 1.

4 P S Atiyah, Law and modern society, 2nd ed ed (Oxford ; New York: Oxford University Press, 1995) at 7.

5 Sutan Remy Sjahdeini, Kebebasan berkontrak dan perlindungan yang seimbang bagi para pihak dalam perjanjian kredit bank di Indonesia, cet. 1 ed (Jakarta: Grafiti, 2009) at 54.

6 Huala Adolf, Hukum Perdagangan Internasional, Prinsip Prinsip dan Konsepsi Dasar (Bandung: Rajawali Press, 2004) at 43.

In the current era of globalization, contractual relations do not only occur between domestic parties but also often occur between domestic and foreign parties. In other words, the freedom to choose with whom to contract is not only limited to parties within one country, but also those originated from abroad with different nationalities. Legal relations between legal subjects between countries cannot be avoided along with the development of the globalization era.[7] Globalization causes the dynamics of law which enables the convergence of the legal order (legal order) or legal system.[8]

Contracts where one of the parties is foreign or of a different nationality are, referred to as International Contract.[9] Contracts with an international dimension occur mainly in business contracts. Contracts in which one of the parties has differences in nationality are of course included in contracts that contain foreign elements or elements. It is possible to use the law of the country of one of the parties' origin.[10] Naturally, this kind of contract can raise legal issues over the law chosen by the parties (choice of law) as well as related to the dispute resolution forum (choice of forum). [11]

The occurrence of legal relations in international business contracts is a manifestation of the dynamics of a global society. Such globalization

7 Misbahul Ilham, Bhim Prakoso & Ermanto Fahamsyah, "Compensation Arrangements in Expropriating Goods and Equipment: An Indonesian Experience" (2020) 1:2 Indonesian Journal of Law and Society 199–218.

8 Saeid Rabiei Majd, "Globalization Impact on the States Sovereignty and the Development of International law On Petroleum Contracts" (2017) 66 Journal of Law, Politic and Globalization 187.

9 Bing Yusuf & Liliana Tedjosaputro, "Dispute Resolution For International Contract To Achieve Legal Certainty" (2017) 14:5 International Journal of Business, Economics and Law 169.

10 Cindy G Buys, "The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration" (2005) 79:1 St John's Law Review 65.

11 Rizky Amaliaa & Fairuz Zahirah Zihni Hamdanb, "The Limitation in Choice of Law and Choice of Forum Within International Business Contract" (2023) 6:3 International Journal of Social Science Research and Review 147.

must be balanced with the dynamics of the legal aspects that govern it. According to Atiyah's legal dynamics occurred due to 3 (three) conditions, namely, a. It Is necessary in order to keep pace with rapid social, economic and technological changes; b. it is important to mitigate changes in value systems within society; and c. legal construction makes law has a constant need that allows it to be continuously developed, improved and adjusted.[12] For legal experts who adhere to comparative functionalism, they argue that the concept of unification and harmonization of law is something desirable and inevitable in a legal order.

Freedom of contract of the parties has become a common law principle that recognizes the right of individuals and businesses to enter into contracts freely.[13] Freedom of contract is also recognized in most legal systems around the world, namely the common law system, civil law, and socialist countries, and has been adopted as fundamental principle of private law. In trading practices, business people make the contractual freedom of the parties to determine business rules that apply as a principle that has crystallized into habits, giving rise to the lex mercatoria doctrine.[14]

Lex mercatoria is a doctrine which recognizes that international trade often involves parties from different countries with different legal systems, and that the rules of law that emerge from international business practices can serve as a source of authority in resolving international business disputes.[15] However, the lex mercatoria is not

12 Atiyah, supra note 3 at 171–177.

13 Tedoradze Irakli, "The Principle of Freedom of Contract, Pre-Contractual Obligations Legal Review English, EU and US Law" (2017) 13:4 ESJ 62.

14 Sixto Sánchez Lorenzo, "Choice Of Law And Overriding Mandatory Rules In International Contracts After Rome I" in Petar Sarcevic et al, eds, Yearbook of Private International Law (Sellier – de Gruyter, 2011) 67.

15 Deli Bunga Saravistha, "Eksistensi Lex Mercatoria Dalam Praktik Kontraktual Dan Penyelesaian Sengketa Lintas Negara Anggota Pbb" (2022) 5:1 Jurnal Ilmiah Raad Kertha 64–75.

a formal legal system with its own courts and enforcement mechanisms. Rather, it is a set of informal rules and practices that have developed through the commercial interactions and agreements of parties engaged in cross-border trade. The principle of good faith and freedom of contract has become a universal business principle sourced from the doctrine of Lex mercatoria.

Several international conventions that produce model law, both hard and soft law, tend to accept the principle of freedom of contract of the parties, among others: a. The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), b. UNIDROIT Principles of International Commercial Contracts (UPICC) 2010 and c. UNCITRAL Model Law on International Commercial Arbitration 1985.[16]

The freedom to contract in choosing the law and choosing the forum for dispute resolution has become a general and universal principle. However,.at the implementation level when a conflict occurs between the parties and is submitted to the court, there are different views from the judge hearing the case. Indonesian court judges often have different views in deciding cases.[17] This difference of opinion revolves around the views of judges at the court of first instance and appellate level (Judex Factie) as well as at the cassation level (Judex Juris) in determining the authority to adjudicate a case filed as a result of a dispute based on a contract or international agreement which contains clauses on the choice of law and choice of law forum.

In a case where there is a choice of law clause which stipulates foreign law, but the Indonesian court judge declares that they accepts the case

16 Moh Ali & Agus Yudha Hernoko, "Characteristics of Party autonomy in a Transnational Electronic Consumer Contract" (2019) 35:1 Yuridika 55.

17 Agung Sujati Winata, "Ketidakpastian Hukum Dalam Penyelesaian Sengketa Bisnis Internasional Melalui Arbitrase Internasional Di Indonesia" (2023) 3:1 ILR 89–98.

filed and is authorized to adjudicate. On the other hand, several Indonesian judges are still guided by the fact that the applicable law is the law that has been chosen by the parties in accordance with the clauses in the contracts made. In addition, there are judges who argue that the choice of law is different from the choice of forum. However,there are those who argue that the choice of law automatically determines the choice of forum.

The implication of the different views of Indonesian court judges in deciding this case has resulted in legal uncertainty in law enforcement in many cases, especially in the international business law traffic. This is certainly counter-productive in interpreting the application of the principle of freedom of contract which is upheld as stated in the provisions of Article 1338 BW that agreements made by the parties apply as laws for the parties who make them. Article 1338 BW, which is part of Book III of BW, adheres to an open system, meaning that it gives freedom to the parties to regulate their own patterns of legal relations.[18]

Based on the background above, research related to the views of judges in Indonesia in deciding cases and interpreting the freedom of contracts of the parties in making choices and choosing forums remains merit furher study. Therefore in this study is guided by the following research question: "why do Indonesian judges have different views on the application of the principle of freedom of contract even though the parties have firmly determined the choice of law and the choice of the forum within the contract?"

18 Agus Yudha Hernoko, Hukum Perjanjian, Asas Proporsionalitas Dalam Kontrak Komersial (Yogyakarta: Laksbang Grafika, 2008) at 94.

II. METHODS

The research method used in this study is normative legal research, a study that focuses on authoritative legislation and court decisions regarding the views of Indonesian judges in addressing international agreements that contain clauses on the choice of law or choice of forum. The approach used in this study is the statutory regulation approach, where it does not depart from the rule of law regarding the use of legal options and the choice of forum in contracts. The concept approach is inseparable from the analysis of the use of concepts, doctrines, the principle of freedom of contract, the principle of independence of judges in deciding, and the concept used as customary law in international trade. While the case approach is used to examine the judge's considerations (ratio decidendi) to arrive at a decision. The theory used as an analytical knife is the theory of legal certainty. The theory of legal certainty has also become a fundamental principle in international trade law that requires laws and legal rules to be clear, precise, and predictable, and that individuals and businesses should be able to rely on the law to guide their conduct, make informed decisions, and resolve disputes.[19] Practically, this theory is used as a touchstone for examining the decisions of Indonesian judges in adjudicating cases in which there are international agreements.

19 Elina Paunio, "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order" (2009) 10:11 German Law Journal at 1472.

III. FREEDOM OF CONTRACT AS A FUNDAMENTAL PRINCIPLE

Freedom of contract as a basic principle[20] and fundamental in contractual relations that have an international dimension has implications for the issue of freedom in choosing the law and the freedom to choose the forum for resolving disputes. Choice of law is a national law of a particular country chosen by the parties to the contract they make.[21] The choice of law usually occurs between legal subjects from different countries. The parties to a cross-border transaction may choose a specific law[22] to govern their relationship in order to ensure that their legal rights and obligations[23] are clearly defined and recognized under a particular legal system. This can help to reduce uncertainty and promote consistency in the interpretation and enforcement of the contract.[24]

Legal relations are established in business activities with a foreign element.[25] Mathilde Sumampouw uses the term choice of law as a point of connection. This term is considered more appropriate because it shows the content or substance of the relationship point, namely the parties are given the power to choose a certain law that will govern the contract they are entering into.[26] Meanwhile,

20 Ghansam Anand, "Prinsip Kebebasan Berkontrak Dalam Penyusunan Kontrak" (2011) 26:2 Yuridika 91–101 at 92.

21 Marnia Rani, "The Choice of Law Issues in Marine Insurance Disputes Resolution in Indonesia" (2018) 11:2 FIAT JUSTISIA 98.

22 Brooke Marshall, "The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law†" (2018) 66:1 The American Journal of Comparative Law 175.

23 Arif Rahman et al, "Contract Law and Its Impact on Indonesian Contract Law" (2022) 5:4 Budapest International Research and Critics Institute Journal (BIRCI-Journal) 31605.

24 Laras Susanti, "The Comparison Between Recognition to Choice of Law in International Contracts by Courts and Arbitration in Indonesia" (2019) 41:3 Kertha Patrika 173.

25 Moch Isnaeni, Perkembangan hukum perdata di Indonesia, cetakan i ed (Sleman, Yogyakarta: Laksbang Grafika, 2013) at 20.

26 Sumampouw Mathilde, Pilihan Hukum Sebagai Titik Pertalian Dalam Hukum Perdjanjian, disertasi ed (Jakarta: Universitas Indonesia, Fakultas Hukum, Program Pascasarjana, 1968) at 22.

Kusumadara said that these provisions in English are termed Choice of Law Rules or Conflict of Laws Rules, which are rules that must be followed by courts or authorized officials in selecting laws that must be applied to a civil case that has foreign elements.[27]

According to the doctrine of experts and the general view of judges regarding the law that applies and is used by judges (applicable law) in their legal considerations is the law chosen by the parties to the contract and used by the judge in deciding his case as a reflection of the principle of freedom of contract. As Gerald Cooke's opinion, choice of law acts as a law that will be used by forums or judicial bodies, both courts and arbitrations, to ; a. determine the validity of a business contract; b. interpreting an agreement in the contract; c. determining whether or not an achievement has been implemented (implementation of a trade contract); and d. determine the legal consequences of a breach of the contract.[28]

According to Cooke, this does not mean that a country's state judiciary is automatically authorized to resolve disputes. This is what distinguishes the choice of law from the choice of forum, meaning that the choice of law is not the same as the choice of forum.[29] Even though both are based on the spirit of freedom of contract, Choice of Law is not the same as Choice of Forum, or also known as Choice of Jurisdiction.[30] That is, if a law that applies to a contract has been chosen by the parties, the court or forum from the country whose law is chosen does not automatically become the only forum authorized to adjudicate contract-related disputes. Vice versa, if the jurisdiction

27 Afifah Kusumadara, "Pemakaian Hukum Asing Dalam Hukum Perdata Internasional: Kewajiban Dan Pelaksanaannya Di Pengadilan Indonesia" (2022) 15:3 AH 443–470.

28 Gerald Cooke, Disputes Resolution in International Trading (London: Kogan Page, 1997) at 195.

29 Ibid.

30 Margaret L Moses, The Principles and Practice of International Commercial Arbitration: Third Edition, 3d ed (Cambridge University Press, 2017).

of a country has been chosen as a contract dispute settlement forum, it does not necessarily mean that the material law of that country applies to contracts.[31] Considered different because choice of law focuses on using the choice of substantive law governing the contract by subjecting oneself to the law of a particular country which is deliberately chosen in the contract (governing law).

Choice of forum is a forum or institution chosen to resolve disputes expressly stated by the parties in international agreements made such as clauses that are given the title dispute settlement.[32] This title usually mentions the forum that will adjudicate if a dispute occurs between the parties at a later date.[33] The choice of forum focuses more on using the choice of forum or dispute resolution institution. The principles of business dispute resolution often choose an arbitration institution as an alternative settlement besides state courts, which is also inseparable from the use of the lex mercatoria in the world of international trade.[34]

This dispute resolution forum is related to not only court institutions in a country such as arbitration with court institutions, but also means court forums in a country with courts in other countries. It is not certain that the choice of law determined by the parties to the contract is automatically the same as the choice of forum to choose in resolving disputes. However, there are certain countries that adhere to the

31 P Penasthika Priskila, "Berlakukah Hukum Asing untuk Sengketa Kontrak Internasional di Indonesia?", (26 April 2019), online: Fakultas Hukum Universitas Indonesia <https://law.ui.ac.id/v3/berlakukah-hukum-asing-untuk-sengketa-kontrak-internasional-di-indonesia-oleh-priskila-p-penasthika/>.

32 Peter Mankowski, "Just how free is a free choice of law in contract in the EU?" (2017) 13:2 Journal of Private International Law 231–258.

33 Alexander Hellgardt, "Das Verbot der kollisionsrechtlichen Wahl nichtstaatlichen Rechts und das Unionsgrundrecht der Privatautonomie" (2018) 82:3 Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 654–696.

34 Mert Elcin, "Lex Mercatoria in International Arbitration Theory and Practice" (2012) 1 European University Institute Department of Law.

similarity between the choice of law and the choice of forum. The law chosen by the parties to the contract is also the forum for resolving disputes. Countries that equate choice of law and choice of forum include England and Wales. The selection of a particular law, in this case the law of the country, requires the jurisdiction of the court to adjudicate a dispute. The rationale for this is that the parties are deemed to have tacitly chosen jurisdiction by selecting the laws of England or the laws of Wales to govern the contract.[35]

IV. THE JUDGES' VIEWS ON THE CHOICE OF LAW AND THE SELECTION OF THE FORUM

The views of Indonesian judges in examining and deciding cases related to the choice of law and choice of jurisdiction do not have the same stance. These unequal positions occur for various reasons or the decisions handed down are unclear and not accompanied by clear reasons.[36] The decisions are even diametrically opposed to each other, giving rise to legal uncertainty.

Some of the decisions of Indonesian court judges regarding cases where there is a choice of law include cases that were examined by the Central Jakarta District Court which examined and decided on disputes Number: 410/Pdt. G/2011/ Jkt. Pst between the Plaintiff PT. Fega Indotama, domiciled in Jakarta, sued Lvmh Fragrances & Cosmetics Pte. Ltd, domiciled in Singapore. The position of the case in the case is as follows ;

35 Huala Adolf, Dasar Dasar Hukum Kontrak Internasional (Bandung: Refika Aditama, 2008) at 138.

36 YD Latip, Pilihan hukum dan pilihan forum dalam kontrak internasional: studi mengenai hukum yang berlaku dalam perjanjian patungan di Indonesia (Universitas Indonesia, Fakultas Hukum, Program Pascasarjana, 2002) at 160.

The Plaintiff is the legal rights holder as a Distributor who receives the sole and exclusive right to import, distribute and sell feminine and masculine perfume products, types of make-up and skin care products under the LVMH Fragrances & Cosmetics Brand and Parfums Christian Dior, for all Indonesian Territory. The plaintiff as the sole agent also obtained the rights according to the agreement including developing/increasing the sales volume of Perfumes Christian Dior products, occupying the best selling space for Perfumes Christian Dior products in leading malls and Department Stores, increasing the area of the average sales space. With an increase of average from 20 m2 to 25 - 30 m2 in all leading malls and department stores. Establishing cooperative relationships with leading malls and Department Stores that are just about to operate, in order to get the most strategic sales space for Parfums of Christian Dior products.

Whereas without clear justifiable reasons, the Defendant unilaterally without the consent of the Plaintiff has terminated the Exclusive Distribution Agreement. The Defendant is deemed to have committed an unlawful act (onrechtmatige daad) which has caused loss to the Plaintiff both materially and immaterially. Whereas with the unilateral termination of the Exclusive Distribution Agreement by the Defendant, the Plaintiff suffered enormous loss both materially and immaterially. Therefore the Plaintiff requests that the Defendant pay compensation costs as compensation to the Plaintiff in the amount of USD 10,000,000.- (ten million United States Dollars).

The Defendant submitted an exception that the South Jakarta District Court did not have the authority to examine and adjudicate this case (Absolute Competence) based on the provisions of Article XX of the distribution agreement, the Arbitration Law and the New York Convention which had been ratified by the Government of Indonesia

through Presidential Decree Number 34 of 1981. Article XX of the Distribution Agreement requires the Parties to resolve all disputes regarding the implementation or termination of the Distribution Agreement through arbitration in Singapore "Any disputes or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of Singapore International Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference to this clause".

Furthermore, according to Artcle II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which was ratified by the Government of Indonesia through presidential decree when receiving a Claim where the Parties have made an agreement in accordance with the intent of this article, must be at the request of one of the Parties, order the Parties to resolve their dispute to arbitration, except in the event that the agreement is null and void or unenforceable.

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution [37] Article 3 states that the District Court is not authorized to adjudicate disputes between parties who are bound by an arbitration agreement. Furthermore, Article 11 paragraph (1) of Law Number 30 of 1999 states that the existence of a written arbitration agreement negates the right of the parties to submit dispute resolution or differences of opinion contained in the agreement to the District Court. Article 11 Paragraph (2) The District Court is obliged to refuse and will not intervene in a settlement of a

37 Undang Undang Nomor 30 Tahun 1999 tentang Arbitrase dan ADR (Lembaran Negara Tahun 1999 Nomor 138, Tambahan Lembaran Negara 138 Nomor 3872)

dispute that has been determined through arbitration, except in certain matters stipulated in this Law.

The debate in response to this case between the Plaintiff and the Defendant is the issue of the existence of an Unlawful Act (PMH) that the Plaintiff argued against the Defendant. The plaintiff is of the opinion that even though there is an agreement clause regarding the use of Singapore Arbitration law it does not mean that this lawsuit must be filed at the Singapore Arbitration because the title of the lawsuit is Unlawful Act (PMH) which is the absolute competence of the Indonesian Court in this case the Central Jakarta District Court. The Supreme Court in various jurisdictions has also repeatedly determined that arbitration jurisdiction based on arbitration agreements is absolute, and the general courts as a whole have no authority to adjudicate any disputes that are subject to or arise from agreements containing arbitration agreements.

Several Supreme Court Decisions guided by this principle include Supreme Court Decision No. 1034K/Pdt/2009 dated 7 December 2009, jungto No. 790K/Pdt/2006 dated 5 February 2007, jungto No. 1084K/Pdt/2009 dated 21 July 2010 and jungto No. 317PK/Pdt/2009 dated 31 December 2010. In the Handbook of the Judicial Technical Development Project for the Supreme Court of the Republic of Indonesia, Finding Law and Solving Legal Issues, Reader III Volume II of 1991 states that the highest judicial body of the Indonesian state adheres to the stance that in the case of an agreement between the Parties to resolve their dispute through arbitration, the court has no power (authority) to examine and adjudicate them. The Supreme Court deals with technical judicial issues which were formulated at the Supreme Court National Work Meeting in Denpasar on 18-22 September 2005 resulting in a formulation which among other things states that the District/General Court is not authorized to adjudicate

a case in which the parties are bound by an arbitration agreement, even though this was based on a lawsuit against the law (PMH).

Harahap stated that since 1980, constant jurisprudence in Indonesia has abandoned the "niet public order" arbitration clause. This understanding is the principle of "freedom to contract" as formulated in Article 1338 of the Civil Code. Hance, on the principle of freedom of contract, jurisprudence emphasizes, among other things[38]:

Since the Parties agree to include an arbitration clause in the agreement, they are absolutely bound to resolve the dispute to arbitration;

by itself this clause has manifested absolute authority for arbitration to decide on reciprocal dispute resolution between the Parties;

the absolute authority of arbitration will only fall if the Parties expressly agree, withdraw the arbitration clause.

Harahap who was also presented at this trial as an expert expressed his opinion regarding Article XX of the Exclusive Distribution Agreement, dated 10 July 2009 made by the parties. According to the expert in the formulation of the clause, first it says that the governing law agreed upon is Singapore law and paragraph (2) is all there. There, if all and there experts see no exceptions; hence,it means that all disputes arising from the agreement, the parties who made the agreement have agreed that the settlement is obeyed by the full authority of the Arbitration and there are no exceptions to be given authority to the district court;

Another opinion was conveyed by Hatta who gave a different opinion that if a company subject to Indonesian law feels aggrieved in the agreement or contract and files a lawsuit in the territory of the

38 M Yahya Harahap, "Penyelesaian Sengketa Dagang Melalui Arbitrase" Majalah Hukum Varia Peradilan (1993).

Republic of Indonesia, does the Indonesian court have the right to try and decide on the case? According to the expert, in this case they have the right, because the Indonesian state is a legal sovereign country, therefore it is obligatory to protect all nations and citizens everywhere, both within the country and abroad. The existence of the Fundamental Principle of Supremacy is that the Indonesian state is obliged to protect all citizens with Indonesian legislation which is a source of state law of the Republic of Indonesia, for law enforcement and providing justice for certainty to Indonesian citizens.

The panel of judges turned out to be more inclined to the majority opinion and rejected the view of expert Sri Gambir Melati Hatta. Based on the consideration of the various regulations above, the Central Jakarta District Court finally ruled that it was not authorized to examine and adjudicate this case. The court's decision follows the general view of most as well as Law Number 30 of 1999 concerning Arbitration and ADR which has expressly stated.

V. DIFFERENT VIEWS OF INDONESIAN JUDGES

The mainstream states that the principle of freedom of contract is a fundamental building block in contracts. The agreement made by the parties applies as law for the party that made it.[39] The freedom to contract as described above includes, but is not limited to, contracts in which there are clauses agreed upon by selecting certain laws or certain forums. The implication of adopting this mainstream is that if there is a dispute over the agreement made by the parties it is returned to the agreed agreement.[40] This also applies to the principle

39 Mosgan Situmorang, "The Power of Pacta Sunt Servanda Principle in Arbitration Agreement" (2021) 21:4 Jurnal Penelitian Hukum De Jure 447.

40 Tarmizi, "The Principle of Consensualism and Freedom of Contract as a Reflection of Morality and Legal Certainty of Contract Laws in Indonesia" (2020) 17:2 WEB 338.

of Pacta Sunt Servanda. However, several Indonesian court decisions have been recorded as having issued controversial decisions on the same case, namely international treaty cases with foreign elements in which there are clauses on choice of law and choice of forum. In fact, the court stated that it had the authority to examine and adjudicate a case even though it was clear that the agreement included clauses on choice of law and choice of forum.

The District Court stated that it had the authority to examine and try cases, precisely because the basis for the Cassation Appellant's lawsuit was Unlawful Acts, Article 23 AB which states that no action or agreement can eliminate the force of law relating to public order (public order) and good faith morals. Thus the court should have ignored the arbitration clause in the Belli Sale Contract as proven in several jurisprudence in Supreme Court Decision No. 1851 K/Pdt/1984 dated 24 December 1985 Jungto Supreme Court Decision No. 1205 K/Pdt/1990 dated December 14, 1991, Jungto South Jakarta District Court Interlocutory Decision No. 454/Pdt.G/1999/PN.Jak.Sel. January 25, 2000 in the case of PT Perusahaan Dagang Tempo (PT Tempo) against PT Roche Indonesia.

Even more interesting is the West Jakarta District Court Decision Number 206/Pdt. G/1987/Jkt. Bar dated June 14, 1988 in a case between Bank Societe Generale Singapore who sued Hadi Raharja Cs domiciled in West Jakarta. Based on the guarantee agreement, the Defendants are the guarantors of all the debts of Star Prospekty Pte.Ltd Singapore which failed to pay and did not fulfill their debt obligations to the Plaintiff.

The Defendant filed an exception stating that the West Jakarta District Court was not competent to adjudicate because based on the provisions of Article 6 of the Guarantee Agreement the agreement referred to and was subject to Singapore law. The West Jakarta

District Court is of the opinion that it is the Singapore court that has the authority to adjudicate because there are criteria for determining presumed intention in the form of: a. the domicile of both parties is in Singapore, b. the currency used is US Dollars, b. using a certain standard formulier, c. use English, and refer to Singapore law. The most characterised connection is the Singapore court. Hence, the West Jakarta District Court stated that it had no authority to try this case. According to Latip, the West Jakarta District Court actually has the authority to try this case[41]because there is a provision in the contract which states that the parties have the option to file a lawsuit in another court other than Singapore as stated in Article 6 letter d of the Guarantee Agreement.

Based on Article 1338 BW which contains the principle of freedom of contract, the parties must obey it because the agreement made by the parties applies as law for the parties who make it. The principle of freedom of contract originates from Articles 1320 and 1338 paragraph (1) Burgerlijke Wetboek voor Indonesia (BW)[42] or Indonesian Civil Code which respectively emphasize agreement as one of the conditions for the validity of a contract and the freedom of the parties to the contract. On the basis of this contractual freedom, the parties to the contract also have the freedom to choose the law that applies to the contract agreed upon.

The opinion of the court which states that the most characteristic connection of the Singapore court is inappropriate because this kind of connection point is only needed if there is no express choice of law

41 Latip, supra note 26 at 164.

42 Burgerlijke Wetboek (BW), also known as the Civil Code, is a civil law code that serves as the primary source of private law in Indonesia. It was first introduced in Indonesia during the Dutch colonial period and has been updated and revised over time. The code covers a wide range of legal topics, including property law, contract law, tort law, and family law, among others.

determined by the parties. The most characteristic connection is not related to the jurisdictional forum, but only related to applicable law, in this case the West Jakarta District Court should have the authority to adjudicate by referring to the material substance of Singapore law.[43] In other words, the West Jakarta District Court still has the authority to examine and adjudicate this parkara (case) using the substantive law of Singapore.

This was proven at the level of appeal the decision of the district court was annulled by the High Court. The High Court is of the opinion that because there is a provision in the contract which states that the parties have the option to file a lawsuit in another court besides Singapore. The points of connection that have become juridical facts in the form of domicile of both parties are in Singapore, the currency used is US Dollars, uses certain standard forms, uses English, and refers to Singapore law. It is clear that this case contains foreign elements, so competence must be determined first. court to try this case. Based on the provisions of Article 18 Paragraph 1 AB, because the territory of the defendant is in Indonesia, it is closer to the place of residence of the appellant, namely the West Jakarta District Court.

It is interesting that if it is analyzed with the general principles adopted in Indonesia which are based on the principle of freedom of contract contained in Article 1338 BW and the universal principles adopted by most legal systems in the world, the court that has the authority to try is the chosen court, namely the Singapore court. However, it turns out that the ratio decidendi judge of the Jakarta High District Court considered the provisions of Article 18 Paragraph 1 Algemeene Bepalingen van wetgeving voor Indonesie (AB).

43 Ibid.

AB is a rule related to International Civil Law that belongs to Indonesia, currently Indonesia is still relying on the arrangement of the inheritance of the Dutch East Indies in Algemene Bepalingen van Wetgeving voor Indonesie (Staatblad 1847 No. 23) abbreviated as AB, where this provision aims to protect the legal activities of Indonesian citizens who come into contact with WNA namely in Article 16, Article 17 and Article 18 AB. The AB provisions are still valid as long as they have not yet been enacted according to the 1945 Constitution of the Republic of Indonesia (Article 1 of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia).

The High Court is based on Article 18 Paragraph 1 AB because the dispute between the parties in the realm of private relations is not the realm of public law. Therefore, it is subject to the procedural law in force in Indonesia in accordance with the principles of International Private Law (lex regit actum principle). In addition, the consideration is based on the provisions of Article 118 paragraph 1 HIR that a claim should be filed at the residence of the defendant (actor sequitur forum rei).

In the view of the High Court, starting from the provisions of Article 18 Paragraph 1 AB regarding the procedure for carrying out an act it was also carried out because the Defendants were in Indonesian territory, so the filing of a case by both parties was strictly procedural law. Hence, they had to comply with the legal provisions of the law (state) itself in accordance with the principle or doctrine of lex fori or locus regit actum. In this case the legal considerations and opinion of the High Court are considered more correct and appropriate, because the interpretation of the choice of law by the parties is not the same or different from the choice of forum or choice of jurisdiction (choice of jurisdiction or choice of court).[44] The view stating that the choice of

44 Ibid at 167.

law is not the same as the choice of forum was also conveyed by Adolf [45] which confirmed the views of his predecessor, namely Gautama, who drew a clear distinction between the choice of law and the choice of forum.

Interestingly, from the judge's opinion, considering the principle of effectiveness, the judge gave a decision that essentially could be implemented in the future (executable and not illusory). However, the Judge at the Court of Appeal does not use Singapore law, even though it has the most characteristic points of affinity with the Singapore court, but still adjudicates by referring to Indonesia's lex fori law.[46] There is a decision that is also interesting to study is the Decision of the Central Jakarta District Court case Number: 52/Pdt.G/2010/PN. JKT. PST. The dispute that occurred between PT Pelayaran Manalagi (PT PM) as the Plaintiff against PT Asuransi Harta Aman Persada (PT AHAP). The plaintiff and the defendant are legal subjects (Rechtpersoon) who were established and domiciled in Indonesia and are within the territory of the Central Jakarta District Court with case register Number 52/Pdt.G/2010/PN. JKT. PST.

The legal relationship between the Plaintiff and the Defendant began with an insurance agreement in the field of shipping in which the insured object was the KM Bayu Prima cargo ship with an insured value of US$1.2 million. For this coverage, PT Pelayaran Manalagi has paid a premium of US$16,778. This coverage includes, among other things, fire, explosion, accidents in loading or unloading cargo or fuel and negligence of the captain, officer, crew or pilot. KM Bayu Prima sailed from Tanjung Perak Port, Surabaya to Batu Ampar Port, Batam and Belawan Port, Medan. Arriving at the Port of Batu Ampar, May 4 2006, KM Bayu Prima experienced a fire which resulted in losses for

45 Adolf, supra note 5 at 138.
46 Latip, supra note 26 at 169.

PT PM, so PT PM submitted a claim to PT AHAP as the insurance guarantor. PT AHAP refused to pay the insurance claim for the reasons, among others, that there was important information regarding the year of the ship's construction which PT PM had not informed PT AHAP earlier. Based on data from the insurance company KM Bayu Prima, it was made in 1973, while the written policy was made in 1979. In addition, the placement of dangerous goods was not in accordance with the recommendations and the amount of cargo transported exceeded Syahbandar's permit. This is what underlies PT PM's lawsuit on the basis of a default lawsuit against PT AHAP which was filed at the Central Jakarta District Court.

In the insurance agreement agreed upon by the parties, there is a clause that reads "This insurance is subject to English law and practice." However, in the agreement there is no choice of forum (jurisdiction) as a measure of anticipation in the event of a dispute between the parties. Defendant PT AHAP argued in court that the insurance agreement applies to English law chosen by the parties both materially and formally. According to PT AHAP, the Central Jakarta District Court has no authority to examine and adjudicate this dispute. Furthermore, according to PT AHAP, this dispute should be submitted to and tried by a British court because English law as the choice of law applies to insurance contracts that have been agreed upon.

Regarding this lawsuit, the panel of judges at the Central Jakarta District Court, which for the first time examined and tried this case, finally decided that the Indonesian court, in this case the Central Jakarta District Court, had the authority to try this dispute with the considerations that: First; the parties to the insurance agreement are Indonesian legal entities. Second; the insured object is in Indonesia,

and Third; ship fire locus delicti occurs in the jurisdiction of Indonesian law. Furthermore, the panel of judges decided that PT AHAP had defaulted, and therefore had to pay insurance claims that were the rights of PT PM including compensation for potential profits that PT PM failed to obtain as a result of defaults committed by PT AHAP. PT Asuransi Harta Aman had to pay a claim amounting to US$843,200. Not only that, the assembly also granted PT Servants Manalagi's request for compensation for a potential profit of IDR 14,306,040,000. For late fees, the Court determines 6 percent of US$843,200 per year, from the time the suit is filed until it is paid. The decision of the Central Jakarta District Court was later upheld by the Jakarta High Court. The Jakarta High Court in its considerations stated that PT AHAP could not distinguish between Choice of Law and Choice of Forum which are two different things. Although English law has been agreed upon as the applicable law for insurance agreements, the parties do not choose a specific forum.

Judex factie courts of first instance and appellate level in their legal considerations refer to the provisions of insurance law applicable in England, namely the Marine Insurance Act 1906, as well as Indonesian legal provisions, namely Government Regulation Number 73 of 1992 concerning the Implementation of Insurance Companies, and BW for determining acts of default and compensation to be paid by PT AHAP.

Based on the judex factie decision, PT AHAP filed an appeal to the Supreme Court of the Republic of Indonesia as the holder of the highest judicial authority with case register Number 1935K/Pdt/2012. The Supreme Court at the cassation level unexpectedly granted PT AHAP's cassation request and canceled the judex factie decisions of the Central Jakarta District Court and the Jakarta High Court. The Panel of Judges at the cassation level decided for themselves that the

Central Jakarta District Court was not authorized to examine and try this dispute and stated that PT PM's lawsuit was unacceptable (Niet Onvankelijke Verklaard).

The consideration of the panel of judges at the cassation level of the Supreme Court stated that the insurance agreement that had been agreed upon was valid as a law for the parties as stipulated in Article 1338 BW. Because the parties have agreed to choose English law in the insurance agreement, the Central Jakarta District Court is not authorized to examine and adjudicate this dispute because the lawsuit should have been filed in the English court..

Some of the analyzes of some of these decisions include:

Why is English law chosen?

The use of English law in the insurance agreement between PT PM and PT AHAP was more due to customary law. Moreover, the object of the agreement is insurance for Motor Ships which is in the shipping sector. English law was chosen as customary law in the field of shipping because British law in the form of the Marine Insurance Act 1906 is the best maritime law and is commonly used in the world of shipping.

If it is associated with the same legal subject, it is an Indonesian legal entity with the use of English law, is this not a problem? In this regard, it is necessary to refer to Sumampouw's opinion regarding the use of customary law and this is normal as long as it is in good faith that the use of choice of law is not intended to smuggle law. In other words, the choice of English law by the parties does not conflict with the applicable laws and regulations.

In addition, according to Sumampouw, the choice of law is an unlawful law. Hence, it is the freedom of the parties to determine which part of the contract applies entirely to the particular law they

make or only part of it applies to some of the contract law they make. However, this must be stated in the contract. Such a situation is known as the Great Cleavage (Grosse Spaltung)[47] namely a division of law that is intentional and that occurs due to the choice of law is said to only apply to the legal consequences of the agreement, whether or not the agreement is legally linked objectively. The occurrence and validity of the agreement is linked to the place where the agreement was made (lex loci contractus) but the legal consequences are linked to the will of the parties. In this case the will of the parties to regulate the legal consequences of agreements made in the field of shipping is subject to English law and this can be justified under international business law.

Even though English law has been chosen as the applicable law for the insurance contract agreed upon by PT PM and PT AHAP, the court which has the authority to adjudicate this case is not automatically the English court. Because there is a clear distinction between the choice of English law and the courts competent to adjudicate this dispute. In this case the judex factie considerations are appropriate and correct because they adhere to the separation between the choice of law and the choice of forum. This means that it is possible that by using the point of reference taught by Sudargo Gautama and M Sumampouw, actually a judex factie can make a decision based on material law or substantive law from the United Kingdom but still has the authority to try this case.

This consideration is also in line with the case decision discussed previously, namely efficiency considerations. Consideration of the principle of effectiveness, that is, the judge gives a decision which in essence can be implemented in the future (executable and not illusory). In addition, the judicial power law also adheres to a very

47 Mathilde, supra note 16.

important principle, namely the creation of a simple, fast and low-cost trial. What happens if a lawsuit is filed in England just because the law chosen is English law, of course there are problems in the implementation of the decision, where all parties, objects, places where the incident occurred are all in Indonesian territory.

The point of connection as part of the legal teaching of the most characteristic connection is very clear and clear in this case in the form of a. the place where the contract was signed, b. legal position of the parties c. legal entity of the parties, both of which are Indonesian legal entities and d. more importantly another link point in formal law which is very thick in the use of the actor squitur forum rei principle, namely the lawsuit filed at the defendant's place of residence has been very adequately applied in this case.

This is in line with the opinion of Friedrich Carl von Savigny48 that civil cases should be governed by the law of the country or place that has the closest link to the case, even though the law is the law of a foreign country. The use of the law of a country that has the closest link point will lead to mutual respect and equality in all civil law systems in the world, without distinguishing between national law and foreign law, between own citizens and foreign nationals.

The selected law does not automatically apply to the selected forum.

Mainstream opinion holds that the choice of law is different from the choice of forum. Judex factie the Central Jakarta District Court and the Jakarta High Court adopted this majority opinion. This opinion also argues that even though the choice of law is not the same as the choice of forum, it does not mean that paradoxically separates the authority to adjudicate the chosen forum. Because in practice, as

48 FK von Savigny & W Guthrie, Private International Law: A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time, Legal classics library (T. & T. Clark, 1869).

happened in this case, it certainly creates endless conflicts. Let's just say that the choice of law is applied Letterlijk in this case it will certainly cause difficulties for British Court Judges, all of whose parties are in Indonesia. Judex factie judge's consideration does not mean that it cannot be unanimous that the judge applies English law in this dispute, because in referring to English law, the judge also seeks compatibility with Indonesian law. the panel of judges at the Central Jakarta District Court and the Jakarta High Court were very careful in applying their law, it was proven that they paid close attention to the aspects of private international law in this dispute and also cited the provisions of English sea transportation law because the parties had chosen English law as the applicable law for disputed insurance contract.[49] Consideration of the judex factie stating that the authority to adjudicate this case has considered the use of the chosen law in this case the English law Marine Insurance Act 1906 as a form of respect for what has been agreed upon by the parties. The Supreme Court's cassation decision, which in the author's view is very letterlijk in applying the principle of freedom of contract without looking at other legal aspects, includes the use of the lex fori law of the parties which is commonly used in international trade law traffic. In addition, as a dispute resolution institution at the plenary level, the views of the cassation judge should be very open and objective casuistically, especially using clear principles, namely the principle of simplicity, speed and low cost. The Supreme Court's cassation ruling which overturned the judgments of the judex factie courts of the Central Jakarta District Court and the Jakarta High Court by declaring the claim unacceptable, rendered efforts to seek justice for both parties futile so that the role of the courts in ending this dispute was truly achieved. Materially, the efforts made from the court of first

49 Lena Farsia & Rafika Taufik, "Penerapan Asas Ketertiban Umum terhadap Putusan Arbitrase Asing di Indonesia" (2018) 20:3 JKanun 439–456.

instance to the cassation level did not resolve the problems experienced by the parties. The implication of imposing an unacceptable decision (Niet Onvankelijke Verklaard) means that the Supreme Court is of the opinion that Indonesian courts do not have the authority to try this case and the parties must resolve the case starting all over again with English courts. Thus there is no other way to file a lawsuit in Indonesian courts because if you make a new lawsuit, it will certainly be hindered by the principle of nebis in idem.[50]

VI. CONCLUSION

The principle of freedom of contract in the international business contracts involves the use of two different legal systems and presents the choice of law or choice of forum. The majority view states that choice of law is not the same as choice of forum. Howevern, some Indonesian court judges disagree. Indonesian judges recognize the applicable law chosen by the parties, but some judges view the choice of law as synonymous with the choice of forum. These differences in opinion create legal uncertainty for justice seekers, especially in business contract disputes. Judges' considerations deviate from the mainstream adherents of freedom of contract, emphasizing limitations and adherence to statutory regulations without violating decency and public order.

50 Elisabeth Nurhaini Butarbutar, "Asas Ne Bis In Idem Dalam Gugatan Perbuatan Melawan Hukum" (2018) 11:1 Jurnal Yudisial 23–39.

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