CHAPTER I

INTRODUCTION

1.1 Background

Indonesia was one of the Dutch colonies which adopts the same legal system as the Netherlands, namely civil law system that originally came from the codification of the Roman Empire law during the reign of Emperor Justinian VI century BC.[1] One of the most distinguished characteristic of civil law system is the division of law into private and public realm. Public law is the branch of law that regulates the relationship between the state and its entities or between state and its citizens.[2] On the other hand, private law are series of regulations governing the legal interactions between individuals by referring specifically to the interests of private parties.[3] As a civil law state, Indonesia has its own positive legal system to regulate the conduct of its individuals. The scope of private law in Indonesia includes commercial and civil law, while the scope of public law includes state administrative law, criminal law and international law.

In this era of globalization, the advancement in information and communication technology has made it easier for humans to conduct activities in various fields. It undeniable that this advancement is changing people's lifestyles in interactions, communications, as well as transactions.[4] As a consequence, there

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[1] Dedi Soemardi, *Pengantar Hukum Indonesia,* (Jakarta: Indhillco, 1997), p. 73.
[2] C.S.T. Kansil, *Pengantar Ilmu Hukum,* (Jakarta: Balai Pustaka, 2002), p. 46.
[3] C.S.T. Kansil, *Pengantar ilmu Hukum dan Tata Hukum Indonesia*, (Jakarta: Balai Pustaka, 1986), p. 214.
[4] Diaz Gwi jangge, *Peran TIK Dalam Pembangunan Karakter Bangsa*, (Sulawesi Selatan: Pusat Teknologi Informasi dan Komunikasi Pendidikan Kementerian Pendidikan Nasional, 2011), p. 1.

has been an increase of international relations such as in the field of trade, commerce, and private relationships. Further, economic, social and cultural developments have certainly caused international relations to be unlimited. The examples of this phenomena are the occurrence of marriage between two different citizens, purchasing a real estate in other state, having an offspring in another country or possessing inheritance in several different countries.

It is important to note that the advancement of technology also helped companies to conduct international transactions as national borders are no longer considered obstacles in conducting international trade.[5] Profit-oriented multi-national companies go back and forth across state's territorial boundaries to conduct transactions for the exchange of goods or services, investment, professional services, and so forth.[6] Consequently, business transaction is now more often initiated with an international contract rather than a national one. According to Prof. Mr. Dr. Sudargo Gautama, a former expert of Private International Law (**"PRIL"**), national contracts are those made between two legal subjects in one state without the existence of any foreign element. In contrast, international contracts are those which contain a foreign element.[7] This certainly has resulted in the increase complex and diverse patterns of legal relations between individuals in the international sphere.

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5 Rubab Razvi, *Ikhtisar tentang Undang-Undang yang Mengatur Transaksi Penjualan Internasional*, USC Law School LLM, p. 1.

6 "Principles of International Commercial Contract", <http://www.unidroit.org>, Accessed on 9 September 2019.

7 Sudargo Gautama, *Kontrak Dagang Internasional*, (Bandung: Alumni, 1976), p.7.

As transactions concluded between parties of different nationals are no longer uncommon, this can lead to issues that are not entirely domestic, but rather show a connection with foreign elements.[8] In essence, every state has an exclusive sovereignty and jurisdiction within its own territory. The prevailing rules of every country affect and bind directly all property within its territory, all persons who are resident within it, whether natives or foreigners, as well as contracts made and executed within it. Under ordinary circumstances where a violation of law or dispute occurs between two parties with the same nationality – Indonesian for example, then its settlement or trial would automatically refer to Indonesian laws in an Indonesian court. The existence of foreign elements, however, has the potential to cause problems if there are disputes arising from it, namely in determining what law to apply, where to file the lawsuit and where to execute court decisions. This is because more than one legal systems are involved.

Legal relations which contain elements that transcend state's territorial boundaries are regulated by the field known as PRIL. PRIL is described by Prof. R.H Graveson as:

"The Conflict of Laws, or Private International Law, is that branch of law which deals with cases in which some relevant fact has a connection with another system of law on either territorial or personal grounds, and may, on that account, raise a question as to the application of one's own or the appropriate alternative (usually foreign) law to the determination of the issue, or as to the exercise of jurisdiction by one's own or foreign courts".[9]

[8] Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional*, *Edisi Keempat*, (Bandung: Citra Aditya Bakti, 2006), p.2.
[9] Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu, Edisi Ketiga*, (PT. Citra Aditya Bakti, Bandung, 2001), p. 6.

The United Kingdom (**"UK"**) and other countries such as Canada and Singapore which developed in the common law system do not use the term PRIL, but rather Conflict of Laws. The use of this notion came from the assumption that this legal field seeks to resolve legal issues involving the clash of two or more legal principles.[10] Nevertheless, the definition of Conflict of Laws is similar to PRIL, namely conflict or dissimilarity between the system of laws of different countries regarding the applicable legal rules and principles in a particular matter.[11] Several countries that use the term PRIL are France, Italy, Greece and Indonesia.

PRIL has a broader dimension than the jurisdiction in one country, as it can be considered as a civil law for international relations. Prof. Mr. Dr. Sudargo Gautama states that the meaning of '*international'* in PRIL cannot be interpreted as law of nations or inter-state law, but rather as domestic law dealing with foreign elements.[12] Therefore, every country in the world has its own PRIL regime, such as Indonesian and Dutch PRIL.[13] The main problems in PRIL in its development arose based on the co-existence and connection or relevance to more than one legal system of countries. The issues mostly revolve around jurisdiction, choice of law and recognition of foreign judgements.[14]

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[10] Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu, Edisi Ketiga*, (PT. Citra Aditya Bakti, Bandung, 2001), p. 6.

[11] "Conflict of Laws",< https://www.collinsdictionary.com/dictionary/english/conflict-of-laws>, accessed on 10 October 2019.

[12] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, (Bandung: Binacipta, 1987), p. 21.

[13] Ridwan Khairandy, *Pengantar Hukum Perdata Internasional Indonesia*, Cetakan Pertama, (Yogyakarta: Gama Media, 1999), p. 4.

[14] Ridwan Khairandy, *et.al*, *Pengantar Hukum Perdata Internasional Indonesia*, Cetakan Pertama, (Yogyakarta: Gama Media, 1999), p. 9.

Firstly, jurisdiction deals with the issue of whether the forum court has the power to resolve a particular dispute. Secondly, choice of law regulates on which law to apply to solve disputes containing foreign elements. Lastly, recognition of foreign judgments is the last issue in PRIL, which deals with the issue of how far a court must pay attention and recognize the legal rights or obligations that are issued based on the decision of a foreign judge. To provide for further illustration, these are the examples of PRIL related cases:

1. A European citizen is married to a Singaporean citizen. The marriage took place in Singapore, and because one party turned out to be still tied to another existing marriage, that party was considered to have committed polygamy. The other party filed for divorce in the European Court in Italy.
2. A sale and purchase agreement was made between an export company from Malaysia and an importer company in the UK on goods that must be transported from the Kuala Lumpur to Reading. The agreement was made in Kuala Lumpur. In the contract performance, it turns out the importer did not fulfill his promise to make the payments on time. The Malaysian exporter then filed a default suit and demanded a compensation through an English Court.

In the scope of PRIL, contract law is one of the most complicated and controversial area as it deals with variety of issues, including jurisdiction and applicable law.[15] Several initial concerns when drafting a national or international

[15] Bayu Seto, *Dasar-Dasar Hukum Perdata Internasional, Buku Kesatu, Edisi Ketiga*, (PT. Citra Aditya Bakti, Bandung, 2001), p. 176.

contract is to determine the court or forum to resolve disputes arising from the implementation of such contract, and the applicable law that will govern the validity, interpretation and the performance of the contract.[16] As such, to provide for certainty, private parties have increasingly incorporated both choice of forum and choice of law. This is important to avoid conflict in regard to the venue to resolve a future dispute, or to determine which country's law should be applied, as the place of transaction, parties, and the related legal systems embedded in a contract may vary.[17] Fortunately, parties have the right to include these clauses to their respective contract pursuant to the freedom of contract principle. In Indonesia, this principle is regulated in Articles 1320 and 1338 (1) of *Kitab Undang-Udang Hukum Perdata* or Indonesian Civil Code (**"KUHPer"**).

Until now, PRIL in Indonesia is still regulated in *Algemene Bepalingen* (**"AB"**) as stated in the State Gazette No. 23 of 1847.[18] The main principles are embedded Articles 16, 17, and 18 of AB on the applicable law of personal status, the applicable law of goods and the applicable law of legal action. These provisions are deemed insufficient to resolve PRIL issues, taking into account that these rules have been abandoned by the Dutch themselves, which now has its own codified PRIL rules. With the lack of PRIL legal framework, it is difficult to identify what matters are included in the scope of PRIL, and it also provides uncertainty for both law enforcers and law seekers in handling these cases.

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16 George A. Zaphiriou, *"A Choice of Forum and Choice of Law Clauses in International Commercial Agreements" 3 Md. J. Int'l L. 311,* Vol 3, 1978.
17 Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya,* (Jakarta: Prenadamedia Group, 2015) p. 324-326.
18 Allagan, Tiurma M. P. *"Indonesian Private International Law: the Development After More Than A Century"*, Indonesian Journal of International Law, Vol. 14, No. 3, 2017, p. 381.

In Indonesia, judges' decisions related to choice of forum and choice of law are rarely found as the competence of court and governing law in cases brought to Indonesian courts are seldom questioned by the parties. In regard to choice of law, parties of civil cases usually refer to Indonesian law as the applicable law. These are the examples of PRIL cases in which Indonesia did not take jurisdiction nor continue its analysis to choice of law:

1. Dispute of PT Merck Indonesia

   PT Merck Indonesia, a leading science and technology company in the fields of healthcare, life science and performance materials, unilaterally dismissed their employee, Mr. Berhard. Due to such action, Mr. Berhard filed a lawsuit to the Indonesian Court. At the Cassation level, the Supreme Court argued that since choice of law in the agreement states that Swiss Law is the applicable law and the domicile and the court of competent authority were the Swiss Court, Indonesia cannot retain jurisdiction over the case due to the lack of authority.[19]

2. Dispute of Bareboat Party Charter

   Both parties to the Bareboat Party Charter agreement are subject to the laws of the Republic of Singapore. Furthermore, all differences of opinion agreed in connection with the charter agreement is subject to jurisdiction Republic of Singapore State Court. Referring back to their agreement, the Supreme

[19] Supreme Court Decision Number 1537/K/PDT/1985.

Court decided that Indonesian District Court is not authorized to examine and adjudicate on the grounds of said agreed to bind the parties. [20]

One of the most recent case on choice of forum and choice of law that the Author is interested to analyze is a marine insurance case that has been adjudicated through District Court Decision No. 52/PDT.G/2010/PN.JKT.PST, High Court Decision No. 297/PDT/2011/DKI 24 Nov/11 and Supreme Court Decision No. 1935K/Pdt/2012. Similar to the examples of cases above, Indonesia also refused to establish jurisdiction as the supreme court decision disregarded the relative competence of the district court due to the existence of choice of forum.

In brief, the dispute occurred between two Indonesian legal entities, namely PT Asuransi Harta Aman Persada (**"PT Asuransi"**) and PT Pelayaran Manalagi (**"PT Pelayaran"**) which entered into a Marine Hull and Machinery Policy Insurance Contract (**"Insurance Contract"**). KM Bayu Prima, a cargo ship as the insured object experienced a fire that resulted in losses for PT Pelayaran as the insured. Accordingly, PT Pelayaran submitted an insurance claim to PT Asuransi as the insurer, where PT Asuransi refused to pay as the important information regarding the year of shipbuilding was not informed to them. In response to this, PT Pelayaran filed a default lawsuit to the Central Jakarta District Court. Based on the English policy of their contract, namely Institute Time Clause, both parties had specifically agreed that the insurance contract is subject to English law and practice, which refers to the Marine Insurance Act 1906 and other relevant provisions. It is to be noted that the reference of a marine insurance contract to English law, even if the

[20] Supreme Court Decision Number 1084/K/PDT/1985.

parties or the case is not related to England at all, has been a common practice.[21] The clause on jurisdiction was absent. PT Pelayaran thus referred to Article 118 of *Herzien Inlandsch Reglement* (**"HIR"**) regarding the principle of a*ctor sequitur forum rei* and accordingly filed the case to Central Jakarta District Court.

Central Jakarta District Court and the Central Jakarta High Court held that they have the jurisdiction to adjudicate the marine insurance case with English law. The district court's jurisdiction was established the parties are Indonesian legal entities, the object of coverage was in Indonesia, and the fire occurred in Indonesia. At the cassation level, the supreme court overturned the decision of both the district court and high court as the Institute Time Clause is part of ab English policy form, the New Marine Policy Form (**"MAR91"**) that is subject to the exclusive jurisdiction of the English Courts.[22] As the parties have agreed explicitly on the choice of law and impliedly agreed on the choice of forum, the Central Jakarta District Court therefore does not have jurisdiction over the marine insurance case.

The case between PT Pelayaran and PT Asuransi above is unique to be analyzed as it concerns with the issue of jurisdiction and choice of law. Most of the connecting factors of the case occurred in Indonesia, such as the nationality of the parties, the place where the contract was made and executed, as well as the flag of ship. Nevertheless, due to the existence of a choice of forum which points to the authority of English courts, the supreme court dismissed the district court's jurisdiction and nullified District Court Decision No. 52/PDT.G/2010/PN.JKT.PST

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[21] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, (Bandung: Binacipta, 1987), p. 34.
[22] The New Marine Policy Form.

pursuant to freedom of contract principle. Additionally, the use of foreign law in the district court was not implemented effectively. In this regard, the Author holds that this case highlights different issues and loopholes that exists in Indonesia's current PRIL regime, such as on the issue on the application of foreign law and the recognition of foreign judgements.

Based on this issue, the increase legal international relations and the absence of PRIL legal framework, the author is interested to analyze the application of PRIL regime in Indonesia in this particular case, specifically on the authority of Indonesian courts to assert jurisdiction over a PRIL case and the authority to implement foreign law.

1.2 Formulation of Issue

In regard to the background of this thesis, the Author will be discussing and analyzing these two formulation of issues, namely:

1. Have the judges in Supreme Court Decision No. 1935K/Pdt/2012 dismissed district court's jurisdiction to hear the marine case in accordance PRIL theories?
2. Is the application of English law as the *lex causae* in District Court Decision No. 52/PDT.G/2010/PN.JKT.PST already in accordance with PRIL theories?

1.3 Research Objectives

Based on the description in the previous subsection, the purpose of writing

this research is to answer the formulation of the problem, namely:

1. To analyze the PRIL regime in Indonesia.
2. To find out the implications of the choice of law and choice of forum clause in resolving a PRIL case.
3. To analyze the authority of Indonesian courts to assume jurisdiction over a PRIL case which contains a choice of forum that appoints a particular judicial body.
4. To examine the authority of Indonesian courts to adjudicate PRIL disputes with foreign law.

1.4 Benefits of the Research

1.4.1 Theoretical Benefits

Theoretical benefit is related to the benefits of a legal research to the development of science in the field of law. The Author believes that this research will provide contribution to the development of legal studies in Indonesia regarding PRIL. As there are no codified rules and regulations on this topic and the limited number of cases related to this issue, the Author hopes to contribute to this debate by providing an in-depth analysis on the authority of Indonesian courts to adjudicate PRIL cases. This includes the authority to assume jurisdiction over PRIL case and adjudicate PRIL case with foreign elements.

1.4.2 Practical Benefits

The practical benefit is related to the benefits of a legal research to the problem solving in the field of law or the implementation of certain efforts. In

regard to this benefit, the Author believes that this thesis will provide a better understanding of how PRIL works in Indonesia and to provide assistance to judges in adjudicating similar cases with District Court Decision No. 52/PDT.G/2010/PN.JKT.PST and Supreme Court Decision Number 1935 K/Pdt/2012.

1.5 Systematics of Writing

To ease the reader of this paper, the author will describe the chapters briefly in order to provide a clearer picture of the discussion:

CHAPTER : INTRODUCTION

Chapter I will discuss about the background of the topic, the formulation of issues that will be answered in Chapter IV, research objectives, benefits of the research, and systematics of writing. The background of this thesis revolves around the development of PRIL, especially in regard to the inclusion of choice of forum and choice of law in a contract.

CHAPTER II : LITERATURE REVIEW

Chapter II of this thesis will lay down the relevant laws, regulations and theories as the Author's basis of analysis under Chapter IV. The discussion will be divided into two, namely **(1)** theoretical framework which consists of the general theories of PRIL and **(2)** conceptual framework which discusses about the authority of Indonesian courts to

settle a PRIL case. The Author will start from something common and end with a more specific theory.

CHAPTER III : RESEARCH METHODS

In Chapter III of this thesis, the Author will discuss about the relevant research methods. This consists of, among others, types of research methods, types of research, procedures for obtaining the research materials and legal materials, along with the research technique.

CHAPTER IV : DISCUSSION AND ANALYSIS

In Chapter IV, the Author will analyze and answer the two formulation of issues presented in Chapter I. This will be carried out in accordance with the relevant theories elaborated in Chapter II, research methods described in Chapter III as well as prevailing laws and regulations. Specifically, this chapter will include:

1. Whether or not the dismissal of district court's jurisdiction over the marine insurance case and nullification of District Court Decision No. 52/PDT.G/2010/PN.JKT.PST is already in accordance with PRIL theories, specifically freedom of contract principle; and
2. Whether or not the application of English law as foreign law by the supreme court through Supreme

Court Decision Number 1935 K/Pdt/2012 is implemented in accordance with PRIL theories.

CHAPTER V : CONCLUSION AND RECOMMENDATIONS

In Chapter V, the Author will draw conclusion from the formulation of issues that has been answered in Chapter IV. Further, the Author will also provide recommendations or suggestions based on the relevant issues and the analysis conducted in this research.