

CHAPTER I: INTRODUCTION

1.1 Research Background

The world, as well as the technology development went rapidly, people around the world currently able to connect in various only in a matter of seconds, which conveys the possibility on a dispute coming from two or more different countries. Alongside with everything the future provides to the present time, represents how everything is no longer limited by space and time, trading eventually become an essential need, which gives chances to undertaker, particularly consumer and buyer to conduct business activities without any restriction, such as shipping services, countries distance, payment method, and currency conversion.

In the case of private international law dispute, private international law shall be applied before the parties, to distinguish whether a case is considered as a private international law case, the qualification theory will be used as a preliminary stage into a private international law case dispute settlement. The most essential qualification on private international case is the existence of a foreign element within the case, which later will be discussed and analyzed in this research. According to Djasadin Saragih on foreign element within a private international law case, it is a common rule that if the act committed in a no-man's land area, then the law that must be applied is the law of the country of the person who caused the injury or the loss.¹ Van Brakel on his book *Grondslagen en Beginselen van*

¹ Djasadin Saragih. 1974. "*Dasar-Dasar Hukum Perdata Internasional*". Penerbit Alumni: Bandung, 1974, p. 8.

Nederlands Internationaal Privaatrecht, stated that private international law is a national law made for international legal relations matters.² Alongside with the International business activities, International trade is the sale and purchase of goods and services across international borders and is governed by a vast set of rules, codified in treaties and trade contracts.³

In spite the fact that private international law is a national law, there is no separate private international law codification. Due to the fact that private international law's provisions improved gradually, fragment by fragment, which allocated in various laws.⁴

Sudargo Gautama defines Private International Law as a law or a whole set of regulations and legal decisions that indicate which legal system applies, in particular whereas the law considered as a law itself as well as whether the relation or matters occurred between citizens in an event had a point of connection to a legal rules of two or more countries with different jurisdictions, personal.⁵

Law, by its nature, is the most essential things, a set of rules made by humans, on the grounds of the people itself to maintain balance in life, to a large extent, to perpetuate public interest for the most part, relationship between individuals. Some countries might proscribe a certain rule whereas the government

²Sunaryati Hartono, *Pokok-Pokok Hukum Perdata Internasional*, Binacipta, Bandung, 1976, p.8.

³ The American University of Iraq Sulaimani, *Introduction to the Laws of Kurdistan, Iraq International Trade Law*: Stanford Law School (2016) p. 3.

⁴ Djasadin Saragih, , *op. cit*, p.9

⁵ Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, Badan Pembinaan Hukum Nasional – Binacipta, Bandung, 1987, p.21.

considered a certain conduct as illegal or dangerous for the people, on the other side, countries might legalize or even oblige the people to do or to have something, this explains how the legal enforcement shall be applied differently depends on the customs and rules.

Aforesaid shows the possibility that one law or rule sometimes cannot be applied to other country without any examination and research on the background of the law making, the fundamental cause for the diversity lies in the reasoning and background of the society itself. Comparatively on many factors influencing the law making, custom and habit shall be the key of the final law and regulations applied to the society. In the context of world development, the law applies to the country itself also shall adjust to fit with the current situation. Ever since the global pandemic hits in 2019, it has affected so many elements of daily life, people's health, people's welfare, economic situation and many more. The pandemic could not stop the world from evolving, including the development of the business activities.

Contracts is an important part in international business transactions, therefore naturally the laws and regulations relating to trade have long been a concern. The diversity of national regulations of each country provides a need for a regulation that is universal and international. Existing different rules in each country will hinder the implementation of international business transactions that demand speed and certainty.⁶ Establishment of an international convention

⁶ Huala Adolf, *Dasar-Dasar Hukum Kontrak Internasional*, Bandung, Refika Aditama, (2008). p. 29.

basically aims to create a harmonization of laws or regulations in international trade. Such law enforcement is especially required within an International business transaction that involve more than one country based private sector or a foreign element included in one business or trade activity. In compliance with the international business, the insurance following to protect both parties are inseparable, The Insurance law is one of the most fundamental things in the case of International Trading activities, the insurance law plays a huge role in the International Contract, especially in the case of trading contract that involves more than one country.

In a case where one shall decide which law has the right to settle a dispute, the doctrine of choice of law should be applied in order to decide the undecided choice of law. Occasionally, the contract included the choice of law and choice of forum in case a dispute arises, however, there are also plenty cases, in which within the case involves two or more countries in the matter of choosing a law that has no choice of law chosen written beforehand. This research's aim is to analyze over Indonesian court and European court on the similar matter proceedings.

This research will be analyzing the role on choice of law and choice of forum on international contract clauses using case study on two cases, which the first one is the case of Indonesian company, PT Asuransi Harta Aman Pratama (PT AHAP) against PT Pelayaran Manalagi arose in 2010 when one of PT. Pelayaran Manalagi ship, KM Bayu Prima that was waiting to across the sea in Batu Ampar Harbor. After several hours of waiting, turns out the ship was to be found to be irreparably damaged that a smoke came out of the ship, knowing the situation, navy

military around the area tried to put out the fire. The harbor master of the Batu Ampar Harbor, who is in charge of giving instruction to every ship that is going to sail across from the Harbor instructed that the KM Bayu Prima should just be burnt at a nearby the harbor, which caused loss to PT Pelayaran Manalagi.

In the AHAP Case Contract, it is stated that the clause “According to English Law and the Law Practice according to English Law.”. Denoting that the insurance policy should be based on both the formal law and material law, additionally, if there is any dispute arises between the parties, based on the law, which in this case is English Law, therefore, as what stated in the contract, the dispute shall be settled based on English Law, as the consequence of the applicable law means regulate on both Material and Formal Law”.⁷

The case was first brought to Jakarta Pusat District Court under the District Court Decision No. 52/Pdt.G/2010/Pn.Jkt.Pst to the last cassation on Supreme Court under the decision No. 1935K/Pdt/2012, the main issue of this case is that both of the District Court and Appellate Court agreed on solving the dispute between two parties using Indonesian Law and according to Indonesian Private Procedural Law while using English Law as the base of the contract, meanwhile the Supreme Court has a comprehensively different judgment. The Supreme Court considered that as the contract and the provisions within it are referring to English Law, the court or the jurisdiction of the court shall be governed by the English law and English court, signifying that the proceedings also shall be done in the United Kingdom.

⁷ Indonesian Supreme Court Decision No. 1935K/Pdt/2012.

The case of Assen Havn and Navigation Management arises when the Assen Havn, a carrier company from Sweden chartered a tugboat from a company in Norway, the Assen Havn, was about to carry sugar beet and many other plants with the tugboat to deliver the plants to Nykoebing Falster, Denmark. As Assen Havn was going to the Denmark, an irreparably damage was caused to the port installations at the Assen Havn. The Assen Havn signed an insurance as they chartered the tugboat through a Swedish Insurance broker and the cover was provided by Lloyd's of London.

The case of Assen Havn and PT AHAP has similarities in the term of the insurance signed. The Swedish Insurance broker and the Assen Havn are both Swedish that signed under an English law-based contract. The disputed contract clause is also what PT AHAP and PT Pelayaran Manalagi were disputing about. The Marine Insurance Act 1906 that is signed between the companies, implied the term that the insurance shall be governed by and construed in accordance with English law and practice. Even though the Insurance broker company Assen Havn signed the contract to are covered and provided by Lloyd's of London, the fact that both of the companies Sweden as well this rises question as what occurred with PT AHAP and PT Pelayaran Manalagi. Both of the cases also went through the supposed proceeding, hence, the judgement of the supreme court of Sweden and Indonesian Supreme Court are contradictory each other. This will later be analyzed on the Chapter III.

1.2 Problem Statements of the Research

1. Validity of Choice of Law and Choice of Forum clause within International Commercial Contracts in Indonesian Private International Law.
2. Ratio decidendi analysis on Court's decision regarding PT AHAP against PT Pelayaran Manalagi and the Assens Havn vs Navigators Management Case

1.3 Objective of the Research

1. The purpose of this study is to analyze the validity of choice of law and choice of forum chosen within International Commercial Contracts in Indonesian Private International Law.
2. The purpose of this study is to analyze the Ratio decidendi on Court's decision regarding PT AHAP against PT Pelayaran Manalagi and the Assens Havn vs Navigators Management Case.

1.4 Significance Purpose of the Study

1.4.1 The purpose of this study is to analyze legal certainty and the validity of the contract that binds both parties, in the case that the parties related are in fact Indonesian and having business activities in Indonesia but the contract signed by both are based on English Law with comparison to a foreign case. The purpose of this study is to give a broader explanation on the essentiality of the choice of law principle in the theoretical aspect as there is not much study that discusses this particular matter.

1.4.2 The purpose of this study is to analyze the importance of the concept of choice of law under the dispute of foreign law-based contract that has not decided the dispute settlement on the choice of law and choice of forum with comparative methods.

1.5 Research Method

1.5.1 Research Type

This research is a normative legal research, which aims to explain and define the theory of the choice of law and the validity of the contract within the dispute which occurs on PT AHAP vs PT Pelayaran Manalagi and the Assens Havn vs Navigators Management Case.

1.5.2 Research Approach

The approaches used in this research are: Statute Approach, Conceptual Approach, through Case Approach and Comparative Approach.⁸, conceptual

⁸ Peter Marzuki, *Penelitian Hukum*, (Surabaya, Pranamedia, 2005), p.137.

approach that will be discussing on related court decision using the current legislation and regulation⁹, case approach, which will consider on judge's ratio decidendi on the following case dispute¹⁰ and comparative doctrinal legal research that will compare law applied in two states.¹¹ In this case Indonesia and English Law case that within its process are using Statute Approach through Legal Materials study that is related to Contract Validity and the concept of Choice of Law in International Private Law and Indonesian Private Law.

1.5.3 Legal Resources

As this research is using legal study method, the primary regulation that is used within the research is Indonesian Regulation that is applied within contract for the case, such as;

1. *Burgerlijk wetboek*
2. *Algemene Bepalingen van Wetgeving voor Indonesische (AB)*
3. *Herzien Inlandsch Reglement*
4. Indonesian Insurance Law: Law No 40 of 2014 on Insurance Law based on State Gazette LN.2014/No. 337, TLN No. 5618, LL SETNEG.
5. District Court decision: The District Court Decision No. 52/Pdt.G/2010/Pn.Jkt.Pst.
6. High Court decision: 297/Pdt/2011/PT.DKI
7. The Supreme Court Decision No. 1935K/Pdt/2012

⁹*ibid.* p.177

¹⁰*ibid.* p.158

¹¹*ibid.* p.173

8. Marine Insurance Act 1906
9. UNIDROIT Principles International of Contracts 2016
10. European Court of Justice Decision C-358/16
11. EU Brussels I Regulation
12. Convention on the Law Applicable to Contractual Obligations 1980
13. Danish Law of the Insurance Contracts Act
14. EC Regulation No. 44/2001

With the secondary legal sources using book references, scholar's opinion and law journal on International Commercial Contract Law.

1.5.4 Legal Material Assortment Procedures

The assorting procedures of the legal material within this research is through the literature study method or literature by on of laws and regulations listing inventory as primary legal materials. With a proceed on the inventory of additional literature in the form of books, journals, and other reading sources that come from internet pages but can be accounted for its reliability and credibility.

1.5.5 Analysis on Legal Resources

This research is using prescriptive legal material analysis method. With the main purpose to give recommendation and suggestion to the analyzed legal case. The legal materials that have been collected will be processed and analyzed systematically and gradually in order to produce an analysis or study of the formulation of the problem initiated in this research.

1.5.6 Outline of the Research

In this research the chapters are divided by:

Chapter I: Introduction. In the first chapter, it will discuss the background of the case, the formulation of the problem, objective of the study, significance of the study, research method including research type, research approach and the legal sources of the study. The first part of Chapter I which discusses the Background of the case will explain how the case arises and how the dispute is being settled and the legal problems that appear upon the dispute settlement. In the Formulation of The Problem, this part will discuss what are the legal issues that arise upon the case that has been explained in the previous chapter and in this chapter will be focusing on 2 (two) legal issues that will be explained in this research. The third part of the First Chapter is about Objective of the study which describes the brief answer on the legal issues. The fourth part of Chapter I is discussing the significance of the study which describes the purpose of this research. The last part of the Chapter which discusses the Research Method which explains on research type, on what type of research is used. The research approach and the legal sources.

Chapter II: The second chapter of this research will be answering the second statement of the research which is the concept of Choice of Law and the implementation of Indonesian Law and Practice according to Indonesian Private Procedural. As in the PT AHAP and PT Manalagi case above, despite on both parties are Indonesian, the contract agreed by both parties is English Law based contract which one of the contract stated that the contract is based on English Law

and Practice, despite on both parties are Indonesian, and had a deal to sign on English Law based contract which further one of the parties stated that it is in accordance with the concept of Freedom of Contract as stated in Article 1338 of Indonesian Private Law but this case also should be referred to International Private Law since the contract is considered as a Foreign elements but neither of the parties are comply with the “foreign element” concept within Private International Law.

Chapter III: The third chapter of this research will be conferring with the second statement of the research in analyzing over the court’s decision on the case of PT AHAP and PT Pelayaran Manalagi and the Assens Havn vs Navigators Management Case.

Chapter IV: The last chapter will be explaining about the conclusion and recommendation of the cases and, in order to reach the decision by considering on comparative approach on the cases.