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THE IDEA OF IMPLEMENTING SPILIADA PRINCIPLE FOR INDONESIAN COURT IN HEARING PRIVATE INTERNATIONAL LAW CASES

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Abstract

Indonesia and Singapore, both members of ASEAN, are ready to welcome the implementation of the ASEAN Economic Community (AEC). AEC itself has been established so that countries that are within ASEAN membership can face the problems of trade and economic activities on a large and global basis. This will certainly increase the number of cross-border transactions and investments between these two nations and other members of the ASEAN community. In reality, the cross-border transactions and investments also involve the Legal Entities and Natural Person outside ASEAN members. Along the way, in performing business activities, disputes between parties inevitably happened that would later create private international law (PIL) cases. Indonesia is considered among the Civil Law system countries, while Singapore is applying the Common Law system. In hearing private international law cases, Singapore court would apply the Spiliada principle in determining whether it is the Natural Forum or not to hear the case. A different approach is taken by the Indonesian court because it doesn't have the application of the Spiliada principle. The idea of implementation of Spiliada principle by the Indonesian judiciary is proposed as a harmonizing way of approach to determining the Natural Forum both in Indonesia and Singapore jurisdiction, as well as if it is possible for other jurisdictions in the ASEAN community. With Indonesia not applying the Spiliada principle in International Private Law cases, there are differences in the main connecting factors which Indonesia must adapt adaptively to apply the Spiliada principle according to Indonesian national principles.

Keywords: Private International Law, Spiliada, District Court
GAGASAN PENERAPAN PRINSIP SPILIADA
PENGADILAN INDONESIA DALAM PEMERIKSAAN KASUS HUKUM PERDATA INTERNASIONAL

Abstrak

Indonesia dan Singapura termasuk anggota ASEAN dan sedang bersiap menyambut pelaksanaan Masyarakat Ekonomi ASEAN. Masyarakat Ekonomi ASEAN sendiri sudah direncanakan sejak lama dan tujuan dibentuknya Masyarakat Ekonomi ASEAN adalah agar negara-negara yang tergabung dalam keanggotaan ASEAN dapat menghadapi persoalan perdagangan dan kegiatan ekonomi secara besar dan mendunia. Hal ini pastinya akan meningkatkan jumlah transaksi dan investasi lintas batas di antara kedua negara dan dengan anggota lain dari komunitas ASEAN. Pada kenyataannya, transaksi dan investasi lintas batas juga mengikutsertakan badan hukum dan orang pribadi di luar negara-negara anggota ASEAN. Seiring berjalan waktu, di dalam menjalankan kegiatan bisnisnya tidak dapat dihindari terjadi sengketa di antara para pihak yang diantaranya menimbulkan kasus-kasus Hukum Perdata Internasional. Indonesia termasuk di dalam sistem Hukum Civil Law, sedangkan Singapura menerapkan sistem Hukum Common Law. Di dalam mengadili perkara Hukum Perdata Internasional, Pengadilan Singapura akan menerapkan prinsip Spiliada untuk menentukan apakah sebagai forum yang berwenang atau tidak untuk mengadili perkara tersebut. Pendekatan yang berbeda ditempuh oleh Pengadilan Indonesia, karena tidak menerapkan prinsip Spiliada. Ide untuk menerapkan prinsip Spiliada oleh Peradilan di Indonesia menjadi usulan sebagai jalan mengharmonisasikan pendekatan untuk menentukan Natural Forum (Forum atau Pengadilan yang berwenang) pada Yurisdiksi Indonesia dan Singapura, dan jikalau memungkinkan untuk diterapkan pada yurisdiksi-yurisdiksi pada komunitas negara-negara ASEAN. Dengan Indonesia yang tidak menerapkan prinsip Spiliada dalam kasus-kasus Hukum Perdata Internasional, maka terdapat perbedaan faktor penghubung pokok dimana Indonesia harus menyusuiakan secara adaptif untuk penerapan prinsip Spiliada sesuai asas kebangsaan Indonesia.

Kata Kunci: Hukum Perdata Internasional, Spiliada, Pengadilan Negeri

I. INTRODUCTION

Indonesia and Singapore, members of the Association of South East Asian Nations (herein referred to as the “ASEAN”), are welcoming the implementation of the ASEAN Economic Community. This relationship will certainly increase the number of cross-border transactions and investments between these two nations and other members of the ASEAN community. In reality, the cross-border
transactions and investments also involve the Legal Entities and Natural Persons outside ASEAN members. While performing business activities, disputes between parties have happened inevitably that would later create Private International Law cases. In fact, other than cross-border economic activities, other issues may also arise, like mixed marriage and the possibility of dispute because of divorce. Indonesia is considered among Civil Law system countries, while Singapore applies the Common Law system. In hearing PIL cases, the Singapore court would apply the Spiliada principle in determining whether or not it is the Natural Forum to hear the case. A different approach is taken by Indonesian courts because Indonesia does not have the application of the Spiliada principle. The test of forum conveniens can be seen in the judgment Yordi Purnomo v Shelvy Meliani Guntoro Indonesian Supreme Court Judgment Number 1544 K/Pdt/2015. In these judgments, there were foreign elements and parallel litigation with another foreign jurisdiction. At the moment, Indonesia does not have a Lis Pendens statutory provision in its system of law. This article offers the idea of implementing the Spiliada principle by Indonesian courts to harmonize approaches to determine the Natural Forum both in Indonesia and Singapore jurisdictions. If it is possible, this could also be used for other jurisdictions in the ASEAN community.
II. THE EXISTENCE AND EXERCISE OF THE INDONESIAN COURT IN HEARING THE PRIVATE INTERNATIONAL LAW CASES

A. Brief Introduction to Indonesian Private International Law

Indonesia is considered among civil law nations and it has its own PIL in dealing with conflict of laws cases. Tiurma M. P. Allagan has briefly explained the basic principles of Indonesian PIL:

The principles of PIL of the Republic of Indonesia are contained in Art. 16, 17, 18 Algeimene Bepalingen van Wetgeving von Nederlands Indie (General Legislative Provisions for the Dutch East Indies), State Gazette 1847 No. 23 (herein referred to as, the AB).

Art. 16 AB is regarding the applicable law of personal status that the status and personal authority remain binding for residents of the Dutch East Indies whenever they are abroad.

Art. 17 AB is regarding the applicable law of goods or lex rei sitae that Real property is subject to the law of the country where the property is located.

Art 18 AB 1 is regarding the applicable law of legal form or lex loci actus that the form of every transaction is determined by the laws of the country or the place where the transaction takes place.

With the application of the current as well as the previous article, consideration should be given to the differences between Europeans and natives as provided in the legislation.

After more than a century after promulgation, these articles remain effective in RI based on Art. 1 of the Transitional Provision of the Indonesian Constitution 1945.

[Emphasis added]"

Substantively, when discussing PIL, we will refer to AB, which the Republic of Indonesia (herein referred to as the “RI”) inherited from the Netherlands, ever since the colonial era until the present. While discussing the procedural law, PIL will refer to a matter of jurisdiction or “Kompetensi,” in Indonesian terminology. This is according to Het Herziene Indonesisch Reglement (herein referred to as HIR)/ Recht Reglement voor de Buitengewesten (herein referred to as RBG) which is the same source of laws left by the former Dutch colony. Sudargo Gautama referred to this as “choice of jurisdiction.” He briefly explains the essence of jurisdiction in PIL: “The problem in PIL is the limitation of authority on either the Indonesian judge or the foreign judge.”

In the course of Indonesian history, as globalization takes place, the present Indonesian PIL provision in the former-Dutch-colonial law is found to be out of date and it is not sufficient to regulate the present complex legal problems. Basuki Rekso Wibowo opined about this:

The National Law Development Agency of Indonesian Minister of Law and Human Rights, in the year 2014 has produced a Bill regarding PIL. The drafting team came from academic profiles who have experience and expertise in this field. The Bill is meant to replace the former colonial PIL, that is the provision of Section 16, 17 and 18 AB Staatsblad 1847 No. 23 which is considered not in accordance with the current necessities respectively to the growing globalization of trade.

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3 Ibid, 8.
Therefore, the enactment of the Bill of PIL is crucially important in Indonesian legal development. Some factors have become the substantial issues behind this bill:

The idea of codification of Indonesian PIL provisions remains significant for several reasons. The influence of globalization, particularly regional cooperation within ASEAN, and the ease of making contact and relationships with someone or any third party outside the territory of Indonesia were some of the main reasons to initiate the discussion of the Academic Draft. This is intended to legislate on the cross-border activities of Indonesian citizens whose activities involve foreign elements.

B. Indonesian Court in Hearing the Private International Law Cases

The Indonesian court is a branch of power that reserves its power from the Constitution, particularly in Article 24. This provision is further elaborated in Judicial Power Act 2009 (Number 48 of 2009) (Indonesia) Article 18 that states:

Judicial power is performed by one Supreme Court and Judicial bodies subordinated to it in the scope of General court system, Religious court system, Military court system, Administrative court system, and by one Constitutional Court.

Also, from section 25 (2) of this Law, the General court system has its jurisdiction to hear the PIL cases because these cases are part of Civil Cases in particular. In hearing PIL cases, the court in the General court system will initially examine its

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8 Ibid, Art. 25 (2)
jurisdiction. Charlene Fortuna Tania describes the importance of this process:

The emergence of these disputes in respect to the existence of civil judiciary creates the problem of power to adjudicate which is called jurisdiction or competence or the right to adjudicate, that is the legitimate court has the right to hear particular case according to the law set by statutory provisions. The classification of jurisdiction based on division of judicial power has created the Absolut Competence or Jurisdiction for each division of judicial power thus called *attributive competence* (sic), attributive jurisdiction. Beside these divisions in the judicial power, there is also the existence of specific jurisdiction attributed by law to some extrajudicial bodies, *e.g.*, the Arbitration or the Maritime Tribunal. The problem of jurisdiction in one court system may arise because of geographical factors (locality). This is to constrain the power of each judiciary inside the boundary of the legal territory or the specific legal area and thus called relative competence or distributive jurisdiction. The question of jurisdiction is the formal requisite of validity of a claim. The main point of discussing jurisdiction or competence to hear the case is to explain the proper court that has the right to adjudicate the dispute or the coming case, and to present the case before the court correctly.

From that perspective, we can specifically point to the matter of jurisdiction in presenting the case before the Indonesian court, that is to focus on the absolute competence and relative competence of the court.

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Relative Competence (*Kompetensi Relatif*) is one important element for the Indonesian Court to examine the formality of a claim, before deciding the merits of the case. The Indonesian Court will refer to some principles in examining this type of jurisdiction as follows:

1. **Actor Sequitur Forum Rei**

   This principle is based on Section 118 (1) of *Herzien Inlandsch Reglement* (“HIR”) which provides that jurisdiction belongs to the District Court where the Defendant resides. There is also the principle of the *Actor Sequitur Forum Rei with optional right*, as regulated in Section 118 (2) HIR. This regulates for more than one defendant, of which they do not live in it (*sec*), the claim is to be pleaded to the chief judge of district court of one of the defendants which is opted by the Claimant.

   A different implementation of this principle is *Actor Sequitur Forum Rei* without optional right but based on the Principal Debtor resident. In the second sentence of Section 118 (2) HIR and Section 99 (6) Rv (*Reglement op de burgerlijke rechtsverordening*), it regulates that if the claim goes to one primary debtor and his or her guarantor, then it proceeds to the chief judge of the district court where the primary debtor resides. To deal with relative competence in respect to the dispute between creditor and debtor with the guarantor, the Statute has maintained the position of the surety *vis-à-vis* the nature of the guarantee agreement to determine the relative

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11 Charlene, 9, 96.
13 *Ibid*. 

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competence of the district court in settling the dispute, it absolutely will point to the Principal resident.

2. **District Court in the jurisdiction where the Claimant Resides**

Pursuant to Section 118 (3) HIR/142 (3) RBG, the claimant is entitled to commence proceedings at the district court where the claimant resides or one of the claimants, in the case that the defendant’s residence is not identified. But this statutory provision needs to be carefully addressed to prevent the abuse of process by the claimant. So, the claim must be also accompanied by an official letter from the authority that informs about the unknown place of the defendant’s resident. If there are some claimants that exist, and they reside in some jurisdictions of different court districts, all the claimants may opt for the district court which is the most effective and efficient.

3. **Forum Rei Sitae**

Pursuant to section 118 (3) HIR, especially in the final sentence that provides for the claim against the immovable property, the claim must be commenced to the district court in the jurisdiction where the immovable property is located.

4. **Relative Competence Based on Choice of Domicile**

Section 118 (4) HIR provides that all the parties are able to make an agreement (deed) to consent to a choice of domicile, but this choice of domicile is not absolute. Thus, the claimant may commence proceedings at the district court which is the chosen domicile, but this is not to close the possibility if the claimant wants to commence proceedings at the district court of

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14 Charlene, 9, 99.
defendant’s resident or the district court where one of the defendants reside...(Emphasis added).\textsuperscript{16}

For divorce cases in family law, the jurisdiction will refer to the specific provision based on the Government Regulation Number 9 of 1975 concerning Implementing Rule of Marriage Act 1974, especially referring to section 20 to 21 that basically the claim for divorce can be submitted by the husband or wife or their legal counsel in the District Court (in particular, for non-Muslims) with jurisdiction over the defendant’s residence. If the defendant’s residence is unknown or is outside of Indonesia, or the defendant has left the claimant for two consecutive years without consent and without legitimate reason, the claim for divorce can be submitted to the District Court with jurisdiction over the claimant’s residence.\textsuperscript{17}

Besides hearing general civil cases, the General court system has jurisdiction in hearing PIL cases. When hearing the case, the Indonesian court will initially refer to HIR/RBG to examine either it has the relative competence or distributive jurisdiction or not. Jurisdiction of Indonesian court to hear civil cases with foreign elements is not specifically regulated in the HIR, which is the Indonesian positive procedural law, but courts may refer to section 118 HIR or section 142 RBG Jo section 99 Rv.\textsuperscript{18}

Reglement op de burgerlijke rechtsverordening (Rv) is still applicable because of its necessity in practice. Astrid Pratiwi \textquote{in

\textsuperscript{16} Ibid.


\textsuperscript{18} Charlene, supra n 9, 100.
quoting Sudargo Gautama,"describes the importance of this regulation to fill the vacancy in the law:\(^{19}\):

Rv (Staatsblad No. 63 year 1849) was the civil procedural law especially applied to Europeans and those from equalized groups to hear the dispute before the Raad Van Justicie and Hooggerechtshof ... in practice Rv can still be used although it is expired. This is because Rv can be used as a guidance when there is some lack of provisions in HIR to be implemented as substantive law.

In hearing PIL cases, judges from the General court system must carefully hold the principles in the PIL. Charlene describes this as follows:\(^{20}\)

Judges must hold the principles in International Civil Procedural Law which are valid and part of the PIL system *lex fori*, based on which court of a State holds the existence of jurisdiction for the dispute. Pursuant to section 100 Rv, the exercise of Indonesian jurisdiction is not limited only toward Indonesian citizens, but it also includes the foreigner and the foreign citizen who does not reside in Indonesia. He or She can be held as the defendant before the Indonesian court under the condition that the dispute arose from the obligation performed in Indonesia, as well as if the obligation was performed anywhere with an Indonesian citizen.

### III. SINGAPORE COURT IN HEARING PRIVATE INTERNATIONAL LAW CASES

#### A. The Brief History of Spiliada Principle

The Spiliada principle has been used as a test of jurisdiction in the Common Law countries, in particular Singapore. Prof Yeo Tiong Min briefly described this:\(^{21}\)

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\(^{20}\) Charlene, *supra* n 9, 108.

...In the Absence of any international instrument, the common law court developed an *ad hoc* system for the allocation of jurisdiction in international civil disputes: the natural forum doctrine. The seminal decision of the House of Lords in the *Spiliada* in 1986 has been followed in many common law jurisdictions, including Singapore. While the fundamental principle has received widespread acceptance, there are variations in detail across different jurisdictions.

It is then very interesting to discuss the brief history of the *Spiliada* Principle, that has been applied in many common law jurisdictions. Ruth Hayward has briefly described the genesis of the Spiliada principle:22

The doctrine of *forum non conveniens*, whilst it had been applied in Scotland and the USA for a number of years, was accepted in England much later. In fact, it was once vehemently rejected by English judges and a stay of proceedings was confined only to cases of vexation and oppression for instance in *St Pierre v South American Stores Ltd* (1936) 1 KB 382 ... A stay would only be granted if the claimant set out deliberately to harass the defendant by litigating in England. It was not until the House of Lords decision in the *Atlantic Star* (1974) *AC* 436, that a sharp movement towards a broader test was signaled. This decision is considered as the raw material from which the doctrine of *forum non conveniens* has evolved.

The process of liberalization continued with the subsequent decision of the House of the Lords in *MacShanon v Rockware Glass Ltd* (1978) *AC* 795 which effectively repudiated the old vocabulary and acknowledged a new test, hard to distinguish from *forum non conveniens* ...

Final express acceptance of the application of the doctrine *forum non conveniens* in cases of stay came in the House of Lords decision in *The Abidin Daver* (1984) *AC* 398, where Lord Diplock was able to declare that ‘judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly (that the test applicable to stay is distinguishable

from the Scottish legal doctrine of *forum non conveniens*).
However, the law was exhaustively re-examined and restated by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*, which landmarked the modern law of stays of action. Notwithstanding that this case was concerned with the exercise of the discretion to serve a writ out of the jurisdiction under the old RSC Ord 11 r 1(1), the House of the Lords set out a number of principles, on the basis of which the discretion with regard to stay should be exercised ...
(Emphasis added)"

Morris also confirmed the influence of the Scottish court and the court of the United States before, the English court adopted this in the Spiliada test. He also described the general principles as follows:23

a. The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interest of all the parties and the ends of justice. The defendant must show that another forum is “available”. This means that the claimant must be able to begin proceeding against the defendant in the other forum as of right, either because the case falls within the jurisdiction regularly exercised by the court of that country or as a result of the jurisdiction clause. It is not sufficient that an action could be brought in the named country on the basis of an undertaking proffered by the defendant to submit to its jurisdiction.

b. The burden of proof is on the defendant to show not only that England is not the natural or appropriate forum, but also that there is another available forum which is clearly or distinctly more appropriate than the English forum.

c. In deciding whether there is another forum clearly more appropriate, the court will seek to identify the natural forum, meaning that with which the action has

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the most real and substantial connection, and will examine not only factors affecting convenience or expense (such as availability of witnesses) but also such matters as the law governing the transaction, and the places where the parties reside or carry on business...

d. If there is another forum which is prima facie clearly more appropriate, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted; for example, that for some reason the claimant could not obtain justice in the foreign country.

e. The mere fact that the claimant has a legitimate personal or juridical advantage in proceeding in England cannot be decisive.

It is also interesting to discuss one factor in the first stage, which usually comes in the form of parallel litigation, that is Lis Alibi Pendens. Clarkson and Hill briefly describe the implementation of the Spiliada Principle where there is the element of Lis Pendens:24

Where proceedings between the same parties arising out of the same dispute are also pending in a foreign court (lis alibi pendens) the English court will often be a less appropriate forum than it would have been in the absence of the foreign proceedings. The additional inconvenience and expense which result from allowing two sets of proceedings to be pursued concurrently in two different countries - where the same facts are in issue and the testimony of the witnesses are required – adds weight to the argument that the foreign court is the appropriate forum. The court must also bear in mind the danger that the parallel proceedings in two countries may lead to conflicting judgments.

Unlike article 27 of the Brussels Regulation, the traditional rules do not endorse a simple ‘first come, first served’ approach. Where proceedings in the foreign court have been started only a few days before the commencement of English proceedings, the existence of lis alibi pendens is of little or less significance. Where, however, the foreign proceedings are well advanced, and

judgment is imminent the argument that the foreign court is the appropriate forum is a very strong one.

Another argument also emphasizes the opinion above, where the court may consider stay of proceedings, as this is derived from the history of English court:

Although intervention on the ground of *lis alibi pendens* has a much longer history in English law than *forum non conveniens*, it came to be treated as a sub-set of the latter (and many of the leading cases in which that latter doctrine was developed rested also on *lis alibi pendens*).

The court may be asked to stay an action in England, or to enjoin an action abroad, where the same claimant sues the same defendant in England or abroad or where the roles of claimant and defendant are reserved in the two countries ... At common law, the English court might stay the English proceedings, or restraints the foreign proceedings by injunction, or require the claimant to elect which proceedings to pursue.

B. The Existence and Exercise of Jurisdiction in Singapore Court in Hearing Private International Law Cases

When discussing Jurisdiction in the Singapore system of law, there are three regimes, and these are the Common Law regime, the Hague Convention on Choice of Court agreement (HCCCA) regime and The SICC (Singapore International Commercial Court). This article will focus only on Jurisdiction within the Common Law Regime.

The Singapore PIL has a specific meaning concerning jurisdiction. Yeo Tiong Min has described the essence of *In personam* Jurisdiction:

Jurisdiction has many different meanings in the law. In PIL, jurisdiction has the specialized meaning of the legal

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25 Morris, 23, 127.
authority to make a binding decision. *In personam* jurisdiction refers to the authority of the court to make an order that will bind the parties in the proceedings before it. *In rem* jurisdiction refers to the legal authority of the court to make an order that will bind everyone, (whether party of the proceeding or not) in respect of thing (or the status of a person)

The common law idea of *in personam* jurisdiction encompasses three important ideas.

First, there must be a *nexus*, or a connection between the parties and/or the case with the forum, which forms the legal basis of law for the court to justify assumption of jurisdiction.

Secondly, there is a question whether, if the *nexus* exists, the jurisdiction to be exercised. Once a *Nexus* is established, the court can exercise jurisdiction; whether it would do so is a different question.

In the past 30 years or so, much of international commercial litigation in the common law world has focused on the question of exercise of jurisdiction.

Thirdly, the court needs to be seized of jurisdiction, so that its administrative machinery is engaged, and it is able to make the necessary orders in with the justice of the case. This is normally expressed through service of the process of the party, though this may not be necessary if the party is already within the jurisdiction of the court for another purpose, *e.g.*, by commencing proceedings.

Proceedings do not necessarily follow this order chronologically, but all three conditions must be satisfied before the court will adjudicate the case.

Adeline Chong and Man Yip also elaborate on the essence of *in personam* jurisdiction in Singapore PIL, when discussing about jurisdiction prior to the SICC rules:

The basis of the jurisdiction of the Singapore High Court is found in the Supreme Court Judicature Act (SJCA) where civil *in personam* jurisdiction of the High Court is concerned, the key provisions are sections 16 and 17 of the SJCA. Section 16, encapsulating the English Common Law approach provides that the Singapore High Court has

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jurisdiction over the defendant if the defendant has been served with the originating process in Singapore, has submitted to the jurisdiction of the court, or has been served with the originating process outside of Singapore in accordance with the Rules of Court. This traditional regime reflects the common law view that the service of legal process not only performs the function of notification of proceedings, it also creates jurisdiction. Section 17 further provides that jurisdiction of the High Court includes jurisdiction conferred by other written laws.

Conceptually, under Singapore Law, it is crucial to distinguish between territorial personal jurisdiction and extra-territorial personal jurisdiction, as well as between existence and exercise of jurisdiction ... Territorial jurisdiction is established as of right. Extra territorial jurisdiction, on the other hand, is discretionary. Singapore’s approach towards service out of jurisdiction is generally consistent with the English approach for cases that fall within Article 6 (1) of the Brussels Ia Regulation and Article 4 (1) of the Lugano convention. The requirements for obtaining leave from the Singapore High Court to serve out of jurisdiction are as follows:

a. The plaintiff’s claim must be shown on the standard of “a good arguable case” that falls within one of the head of jurisdiction seat out under Order 11 rule 1 of the Rules of Court;

b. There must be a serious issue to be tried on the merit of the claim; and

c. Singapore must be the proper forum for the trial of the claim, determined according to the principles enunciated in Spiliada Maritime Corp v Cansulex Ltd (the Spiliada test).

(Emphasis added).”

In other words, when Plaintiff wants to commence proceedings by leave out of jurisdiction, the plaintiff also needs to show that Singapore is the Natural Forum, in deciding the most appropriate court to exercise its jurisdiction. This test is
also applied in service within jurisdiction. Yeo Tiong Min explains this, as he describes the existence of jurisdiction:\(^{28}\)

It is also necessary, in order to show a “proper” case, for the plaintiff to convince the court that Singapore is the natural forum to try the case. The legal burden is on the plaintiff at both the ex parte and inter parte stages of the proceedings. Subject to differences in the burden of proof, the same principles of natural forum apply in cases of service within and service out of jurisdiction.

It is also very important for the plaintiff to heed the essence of the following explanation when making the application to leave for service out of jurisdiction:\(^{29}\)

Unlike service within jurisdiction which can be affected as of right, O 11 r 1 spells out the grounds and conditions for the court to grant leave to serve out of jurisdiction. The court has to be particularly mindful of considerations of international comity before ordering a foreign defendant to appear before it. What goes out of the jurisdiction is not a command to attend court but a notice that a legal proceeding has been commenced against the defendant in Singapore. Although this type of jurisdiction continues to be described as an “exorbitant” exercise of legal authority beyond the territorial reach of the court, the jurisdiction when exercised properly is regarded as consistent with international comity. It has often been said that leave will be refused unless the case falls within the letter and spirit of the relevant rule, and that any doubt should be resolved in favour of the defendant. Whether these expressions merely amount to lip service is another question altogether. Modern authorities have generally been more liberal in the interpretation of order 11 r 1 grounds for two reasons. The first is the increasing mobility of the persons and assets across borders with the result that more parties need to be served outside jurisdiction. The second is the developed sophistication in the natural forum test that mitigates any overreaching. Nevertheless, the Court of Appeal has cautioned against relaxing established legal principles in O 11 application to favour the plaintiff.

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\(^{28}\) Yeo Tiong Min, supra, 21 (85).
\(^{29}\) Ibid, 39.
After examining the existence of jurisdiction, the court then will examine, that the disputed parties need also heed, the exercise of jurisdiction. This step is even more important respectively to the natural forum test of the court. Yip Man confirms this as follows:30

Exercise of jurisdiction refers to the issue of whether the court should hear the case, this is determined according to the forum convenience doctrine. The version of natural forum doctrine adopted by the Singapore law is the most appropriate forum test enunciated by the house of the Lord in the Spiliada. The eponymous Spiliada test has been accepted to varying degrees, with different modifications, across the Commonwealth. In Singapore, English cases on its interpretation and application remain persuasive. Broadly speaking, the Spiliada test determines forum appropriateness by reference to the interest of all the parties and the ends of justice, in two stages. In stage one, the court examines the connecting factors of the case with the competing fora. At this stage, the concept of ‘appropriateness’ is examined primarily from the perspective of minimization of expense and inconvenience.

The connecting factors can be broadly and non-exhaustively classified into five different types: (1) personal connections; (2) connection to events and transactions; (3) governing law; (4) other proceedings; and (5) shape of litigation. The stage one exercise is not merely a quantitative one: some connections are ascribed more weight while others might have no or little bearing on the dispute, depending on the nature of the dispute, and the issue it raises.

Stage two of the Spiliada test is concerned with the broader question of whether substantial justice can be obtained in the prima facie natural forum for the dispute as determined in stage one. All circumstances of the case will be canvassed, including considerations of access to practical justice, although the court will be cautious not to make judgment on the distinction between different legal

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systems. The Spiliada test thus embodies a fine balance between private justice and international comity. The same Spiliada test applies in cases both where jurisdiction is obtained by service within the jurisdiction and where jurisdiction is obtained by service outside Singapore. In a service-in case, the defendant bears the burden of proving Singapore is not the most appropriate forum and successful, the Singapore proceedings are stayed. In a service out case, from a procedural perspective, arguments on forum appropriateness can be made either by way of an application to set aside the service on jurisdictional grounds or in a separate application for a stay of proceedings, subject to any argument on estoppel.

Given that the test is ‘essentially similar’ in the two types of application and the same timelines apply, the Singapore Court of Appeal helpfully highlighted in *Zoom communications Ltd v Broadcast Pte Ltd* that ‘it is wholly unnecessary and likely counter-productive…to make both a jurisdictional challenge and a stay application’ on the same grounds based on forum inappropriateness. Indeed, a foreign defendant who contends that Singapore is not the appropriate forum to hear the case should raise the arguments in an application to set aside the service of process, as the burden of proof will then remain with the plaintiff.

In hearing PIL cases, Singapore High court has some particular power as attributed by the Law, pursuant to section 18 (2) of SJCA, the High Court shall have the powers set out in the First Schedule, and one of these powers is provided in First Schedule para 9 - the Singapore High Court has the additional power to dismiss or stay proceedings, where by the matter in question is in *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or by reason of a court in Singapore not being the appropriate forum and the proceeding ought not to be continued.

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31 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), 18(2).
C. Singapore Court’s Implementation of Spiliada Principle in Hearing PIL Cases

The test of Spiliada principle in exercising jurisdiction is vital in deciding that the Singapore court is the most appropriate forum to hear one particular PIL case. Yeo Tiong Min describes the importance of Singaporean Court implementing the Spiliada Principle while comparing the application of a different approach by Australian Court:33

It is notable that the Singapore Court of Appeal has twice affirmed the common law “most appropriate forum” test and not followed the alternative test of “clearly inappropriate forum” test adopted by the courts in Australia. In the latter approach, the focus is not on which forum is more appropriate than the other, but on whether the local forum is clearly unsuitable to hear the case. Although conceptually a different approach, the court nevertheless takes foreign connections into considerations, and it is thought that the cases where the two tests would produce different results are probably marginal. The Singapore courts have preferred the “most appropriate forum” test as being more aligned with considerations of international comity.

The Spiliada Principle has been consistently applied by the Singapore High Court in hearing the PIL cases. Some cases can also be referred to here. Joel Lee, has briefly described the implementation of the Spiliada Principle in the case Ang Ming Chuan vs Singapore Airlines Ltd (Civil Aeronautics Administration, third party) as follows:34

The case arose out of the unfortunate accident involving Singapore Airlines flight SQ006 at Chiang Kai-Shek International Airport in Taiwan. In response to an action commenced by the Plaintiff, the defendant Singapore

34 Joel Lee, Private International Law in The Singapore Courts (Singapore Year book of International Law and Contributors, 2005): 244.
Airlines joined the Civil Aeronautics Administration (CAA) as a third party in the action seeking indemnity or contribution. The Defendants subsequently commenced an action in Taiwan against CAA in respect of the same accident claiming a wider scope of relief than its Singapore action. CAA applied for the stay of the Singapore action on the grounds of multiplicity of proceedings and forum non conveniens.

On the ground of multiplicity of proceedings, Woo J opined that where it is shown that there is duplicity of proceedings commenced by the same plaintiff against the defendant in different jurisdictions, the plaintiff can be compelled to make an election as to which set of proceedings it wishes to pursue unless it can show “very unusual circumstances”.

On the facts, duplicity of proceedings was established by CAA and the court held that Singapore Airlines did not know that “very unusual circumstances” existed. Ordinarily, this would mean that Singapore Airlines would be put to an election. However, the court opined that on the facts, because the second action in Taiwan was claiming a wider scope of relief than that in the Singapore action, Singapore Airlines could be taken to have elected to proceed with the action in Taiwan. As such, the court concluded that it was no longer necessary to put Singapore Airlines to an election and that the action in Singapore should be dismissed or stayed on the ground of lis alibi pendens.

Another application of the Spiliada Principle can also be seen in the Divorce judgment re. AZS and another v AZR (2013) SGHC 102, and Elsa Goh has briefly described the facts of the case as follows:35

The appellant husband (“the husband”) and the respondent wife (“the wife”) were married in France in 2008. Prior to their marriage, the parties signed a prenuptial agreement in France that made numerous references to the French Civil Code. They relocated to Singapore in 2006 after having lived in various countries due to the husband’s work. A son was born to them in

Singapore in 2010; the parties and the son are all French nationals. The husband currently held an employment pass in Singapore while the wife and the son held dependant passes. They had no immovable property in Singapore and only possessed immovable properties in France and China.

The Husband commenced proceedings in France in April 2012. The wife filled divorce in Singapore in June 2012. Interim orders on maintenance and custody arrangements were made by the Singapore courts pending the ancillary matters of hearing. The District Court dismissed the Husband’s application for a stay of the Singapore proceedings on the ground of forum non conveniens. The Husband appealed.

After carefully considering the facts of the case and especially in taking consideration the parallel litigation on the account of forum non conveniens doctrine, the appellate court held as follows:36

a. The main subject matter in dispute was the pre-nuptial agreement. The Husband stated that he had asked the French court to “mirror” the Singapore interim orders and not to take jurisdiction over the son, leaving only the division of matrimonial assets to be adjudicated in France. The French court hearing the divorce had issued a non-reconciliation order (“the French NRO”), stating that the Singapore interim order on maintenance would be provisionally upheld and that the French court would not take jurisdiction over custody and maintenance issues vis-a-vis the son. While the parties were mostly in agreement on the custody arrangement, the wife was contesting the validity and voluntariness of the pre-nuptial agreement: at [7], [8] and [17] to [19].

36 Ibid, at 700-701.
b. Looking at the various factors in totality, France was clearly the more appropriate forum. Although the parties’ residence in Singapore favored the hearing of custody and maintenance matters in Singapore, the other factors in favor of France as the appropriate forum were overwhelming. Adjudication on the pre-nuptial agreement would require proof of French law and the calling of witnesses in France. The parties had immovable property in France but not Singapore. The wife had also apparently submitted to the jurisdiction of the French court and its application of French law to the divorce in the French NRO. Proceedings. The doctrine of *lis alibi pendens* thus came into play as another factor in favor of a stay the wife seemed to be pursuing concurrent divorce proceedings in both France and Singapore. [20] to [23].

c. There were no special circumstances warranting refusal of stay. As stated by the Husband, the Wife was not prejudiced by the divorce proceedings taking place in France given that she was represented by French counsel, had the benefit of translation services and also given the Husband’s undertaking to bear part of her litigation expenses; at [26] and [27].

Thus, it is very certain that the Spiliada principle has been applied consistently by the Singapore court, in the PIL disputes respectively to the law of obligation and family law as clearly seen in the two judgments above.
IV. THE IDEA OF IMPLEMENTING SPILIADA PRINCIPLE FOR INDONESIAN COURT IN HEARING PIL CASES

Supreme Court of Republic of Indonesia has decided many judgments and one particularly helpful one in respect to PIL - the case Yordi Purnomo v Shelvy Meliani Guntoro Judgment number 1544 K/Pdt/2015.37 This article will only emphasize the test of jurisdiction by applying the Spiliada test of exercise of jurisdiction in this respective judgment.

In the Judgment number 1544 K/Pdt/2015, the case can be summarised as follows:

1. The Facts:

YP, The Petitioner of Cassation formerly the Respondent of appeal, and formerly the defendants of the case, according to the national ID, resides at Jalan Darmo Permai 13/10 Surabaya, Indonesia, currently domiciles at Jalan Kedungdoro 80 A (UD Buana Motor) Surabaya, Indonesia and/or 8364 N, Washakie Way, Tucson,Az, 85741 United States of America, which is represented by P. Andri Wijaya, Legal attorney at Jalan Manyar IX/4 Surabaya; versus

SMG, the Respondent of Cassation, formerly the Petitioner of Appeal, and formerly the Plaintiff of the case, according to the national ID, resides at Jalan Darmo Permai 13/10 Surabaya Indonesia, currently resides at 5516 N Morning Spring Ave, Tucson, Arizona, United States of America.

The Plaintiff has commenced proceedings against the Defendant that the District Court of Surabaya basically will grant

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37 Indonesian Supreme Court Judgment, Number 1544 K/Pdt/2015, Yordi Purnomo v Shelvy Meliani Guntoro.
divorce on their marriage and the maintenance of their son, named BIP, who was born in Northwest Medical Centre, Tucson, Arizona, United States of America, will be granted to the Plaintiff.

At the court proceedings at Surabaya District of Court, the Defendant has argued some objections to respond the Plaintiff's claim as follows:38

a. *Declinatoire Exceptie*, that the forum has no jurisdiction because according to the *Actor Sequitur Forum Rei*. And according to Section 20 (1) Government Regulation Number 9 Year 1975, the divorce claim is to be commenced by either husband or wife or the attorney to the Court in the jurisdiction where the Defendant resides. In this case, both the Plaintiff and the Defendant reside at Tucson, Arizona, United States of America.

b. *Exceptio Litis Pendentis*, the Defendant argued, that based on the evidence, there is an ongoing divorce proceeding at Arizona Superior Court with reference case Number D-20130772, becoming the reason that there is a similarity of divorce proceeding between the Plaintiff and the Defendant which has been proceeded by another Court (under Judicial Consideration).

After hearing the case, the Panel of Judge at Surabaya District of Court then judged as follows:39

a. To accept the Defendant’s objection;

b. To declare that the Surabaya District of Court has no jurisdiction to hear the case.

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38 *Ibid*, 4-5.

39 *Supra* n 37, 10.
Following the judgment from the First Instance Court, the Plaintiff then became the petitioner of appeal and appealed to the Surabaya High Court, at which the Panel of Judge has accepted the Plaintiff’s appeal and judged the case as follows:\(^\text{40}\)

a. To declare that the Surabaya District of Court has the jurisdiction to hear the case;

b. To order the Surabaya District of Court to re-open the case and to hear and decide the case.

Following the appeal decision, the Defendant, then became the petitioner of The Cassation process and then applied for the Cassation process. The petitioner of the Cassation/the Defendant has challenged the appeal decision with these arguments:\(^\text{41}\)

a. The Defendant again has raised the argument from the early District Court judgment, that “because it has been proved that both the Defendant and the Plaintiff, factually reside in foreign country that is Tucson, Arizona, United States, then pursuant to Section 118 (1) HIR, Section 20 (1) and (3), and Section 22 (1) Government Regulation Number 9 Year 1975 as the implementing rule on the Law Number 1 Year 1974 concerning Marriage, that the Panel of Judge has decided that the District Court of Surabaya has no jurisdiction to hear this case. ...”

b. The High Court of Surabaya has falsely considered that the principle of Actor Sequitur Forum Rei contains the Nationality Principle (Section 16 AB) and

\(^{40}\) \textit{Ibid.}

\(^{41}\) \textit{Supra n 37, 15.}
Choice of Law as argued by the Respondent of Cassation in their appeal letter. The argument was that it is based on an Identity Card from Surabaya, according to the Respondent of Cassation, that the Surabaya District Court has jurisdiction to hear the case. But in the case, there is no evidence of an identity card from Surabaya that belongs to the Respondent which was still applicable when the court proceeding was being commenced.

c. Related to the problem of choice of jurisdiction or choice of court in relation to *Forum Non Conveniens*, the principle means to provide autonomy to choose which court can proceed the case ... the application of Choice of Court or Inconvenient Forum is the extension of the Court’s relative competence. It caters to cases where the service of law enforcement and justice is considered better and more appropriate in other courts rather than at this court that is located in one particular place. In such a situation, the court which accepts the case may decline and declare no jurisdiction to hear the case based on the reason that the dispute is out of its jurisdiction if there are some conditions or factors that favors (most appropriate or most favorable) the case to be heard by other courts.

d. The problem of relative competence is based on the doctrine of Choice of Court or *Inconvenient Forum* that arises if there are at least two courts which are considered to have jurisdiction to settle the dispute. The forum courts which have the competence are located in two more countries or more. e.g., the
Indonesian court with the Singaporean court or Japan (in this case the Indonesian court and the American court). Then, deciding which country’s court is considered to be the most appropriate will depend on some connecting factors.

e. In order to decide the most appropriate court must start from the most real and substantial connection with the disputes. Substantial or not, the connection with one particular court must start from the connecting factors themselves. In theory and practice, the relevant connecting factors consist of:

   i. Convenience and expenses;
   ii. Availability of witnesses and documents;
   iii. The place where the parties reside;
   iv. The place where they carry on business;
   v. Governing laws.

After considering all the evidence, and the Defendant/the Petitioner of Cassation’s argument about *Forum Non Conveniens*, the Supreme Court panel has overruled the earlier decision from the Surabaya High Court based on this obiter:\textsuperscript{42}

a. Regarding to the residence according to Section 20 (1) Government Regulation Number 9 Year 1975, the relevant place is the place where someone performs his/her daily activities, it is not the place as stated or mentioned in the ID card;

b. According to all the facts in the court hearing, it is proven that the Defendant/ the Petitioner of Cassation in his daily activities concentrates his activities in another residence, which is at Pima County, Arizona,

\textsuperscript{42} Ibid, 26-27.
United States of America, then it is correct that the Surabaya District of Court has no jurisdiction to hear the case, because the Defendant/ the Petitioner of Cassation resides at United States of America, therefore the claim should be filed at the Court of Arizona, in the United States of America.

c. Referring to the correct and right obiter from the Surabaya District Court, the Supreme Court has taken as its own obiter.

The Republic of Indonesia Supreme Court in Case Number 1544K/Pdt/2015 held as follows:\textsuperscript{43}

a. Accepting the petition of Cassation from the Petitioner;

b. Overruling the Court Decision from Surabaya High Court Number 274/PDT/2014/PT.SBY dated 17 July 2014 which overruled the court decision from Surabaya District of Court Number 446/Pdt.G/2013/PN.Sby dated 8 October 2013.

In rendering its own judgment:

i. Accepting the Defendant’s objection;

ii. Declaring that the Surabaya District Court has no jurisdiction to hear the case.

From the judgement above we can infer that the Panel of Justice in hearing the case, based on the Indonesian HIR, has examined the existence of the jurisdiction, that the Plaintiff and the Defendant have Indonesian nationality. This has become one example of an Indonesian PIL case because it has some foreign elements as follows:

\textsuperscript{43} Supra n 37, 27.
a. Both the plaintiff and the defendant are Indonesian Nationals, and both have domiciled at Surabaya City, Indonesia but the Plaintiff currently resides at Arizona, United States of America and initially performed their marriage in Indonesia and registered their marriage in Indonesia prior moving to America.

b. The parties have a son, named Bentley Ian Purnomo, who was born in Northwest Medical Centre, Tucson, Arizona, United States of America.

c. While the Plaintiff commenced proceedings within the Indonesian jurisdiction, previously the Defendant has already commenced proceedings within the American jurisdiction. So the Indonesian court heard the cases, while the American court was already in the middle of its court hearing.

From these foreign elements, when referring to Indonesian PIL Section 16 AB, the Indonesian court will apply Indonesian substantive and procedural law, because of the principle of Nationality in Indonesian PIL. As Tiurma Allagan describes:

Art. 16 AB states that the prevailing law and regulation in RI concerning personal authority or the rights and title of a person remains valid and effective for RI’s nationals wherever they go. Therefore, the applicable law to RI’s nationals, in relation to their capacity and competence, is the RI’s law. It remains to bind them wherever they go, it has extraterritorial scope. This provision is interpreted analogously vis-a-vis any foreigners who are within the territory of RI. The law of the state where they become the citizen will be applicable law to them in determining their capacity and authority. It is clear that RI is implementing the principle of Nationality, instead of the principle of Domicile.

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44 Tiurma, supra n 1, 383.
The panel of Justice has also considered the exercise of jurisdiction from Indonesian Law, it is only from Absolut competence that the General court system has the jurisdiction, but in terms of Relative Competence, the Surabaya District Court as the first instance court has no jurisdiction to hear the case.

The Defendant argued that based on the evidence, there is an ongoing divorce proceeding at Arizona Superior Court with reference case Number D-20130772. This means there is a similarity of divorce proceedings between the Plaintiff and the Defendant which has been preceded by another Court (under Judicial Consideration).

If the Spiliada principle was applied, then the Supreme Court would have held differently. When Defendant argued on the principle *Litis Pendentis* the court may consider this following process:45

The basic principle in an application for stay of proceedings is that it will only be granted on the basis of natural forum (*forum non conveniens*) where the court is satisfied that there is some other available forum having competent jurisdiction which is clearly more appropriate forum to hear the case (i.e., in the interest of all parties and for the ends if justice). The focus at this point is the identification of the court that can hear the case at the least cost and inconvenience to all the parties (the prima facie natural forum). Because the plaintiff has already invoked the jurisdiction of the court, the legal burden is on the defendant to convince the court that there is such a forum elsewhere. This is often referred to as Stage One of the Spiliada inquiry.

If the defendant cannot discharge the burden, then ordinarily a stay will be granted, unless the plaintiff can show that there are circumstances by reason of which justice requires that the court should nevertheless not grant the stay. This is commonly referred to as Stage Two of the Spiliada inquiry; the focus shifts to questions of

45 Yeo Tiong Min, *supra* n 21, 15.
substantial justice...at this point the plaintiff bears the legal burden of proof. In principle, the court may still grant a stay even if the defendant has failed to show an available and clearly more appropriate forum elsewhere, if the defendant could convince the court (stage two) that he would be denied substantial justice if the case were to be tried in the forum, a very difficult – some say impossible-burden to discharge.

From all the arguments above, at stage one of the application of the Spiliada principle, if the Defendant argues that there is another forum having competent jurisdiction and that forum is already hearing the case creating parallel litigation, the court in Indonesia should declare stay of proceedings. When the Spiliada Principle is used as the exercise of jurisdiction test in the given case, the judgment will have a different result. From the facts given, the Court may grant a stay of proceedings because there is an ongoing proceeding taking place in another jurisdiction. This will also grant justice to all the parties, as the Plaintiff will not suffered by the Res Judicata principle, and the Defendant is also ensured, that the court will always consider the judgment from another foreign court which first seised the dispute. The objection of Litis Pendentis or stay of proceedings raised by the Defendant, is basically also applied in the Civil Law countries. The Defendant/the Petitioner of the cassation argued that the trial Judge should dismiss the case based on Litis Pendentis.\footnote{Supra n 37 at 5.} The Spiliada principle has been implemented consistently by Singapore courts and the courts held stay of proceedings in considering the parallel litigation in other courts outside Singapore jurisdiction, like in \textit{Ang Min Chuan} v
Singapore Airlines Ltd (Civil Aeronautics Administration, third party)47 and AZS and another v AZR (2013) SGHC 102.48

In the current Indonesian Civil Procedural Law, there is no provision about *Lis Pendens*. Hence, it is very important to regulate the stay of proceedings in the coming Bill of Indonesian Civil Procedural Law. This is evidently necessary because *Lis Pendens* is also provided in most civil law jurisdictions. Gilles Cuniberti briefly describes the importance of this:49

The issue of parallel litigation has traditionally been handled very differently in the civil law and in the common law traditions. The traditional tool to address the issue of parallel litigation in the civil law tradition is the doctrine of *lis alibi pendens*, Under this doctrine, the issue of parallel litigation is resolved through the application of mere chronology. Factor: the court seised first is preferred, and the court seised second must decline jurisdiction once it becomes clear that the first court will exercise jurisdiction.

*Lis Pendens* only applies where the two courts are seised of the same dispute. In most civil law jurisdictions, a dispute will be considered as being the same if it is identical in three respects (triple identity): the parties to the proceedings before each court should be the same, the legal ground of the action should be the same, and the remedies sought should be the same. In most civil law jurisdictions, the doctrine of *lis pendens* also applies to international parallel litigation. This has a number of consequences. The most obvious one is that a civil law court may only decline jurisdiction on the ground that proceedings were also brought before a foreign court if the foreign court seised was first. Another important consequence is that both courts must be seised of the dispute. This means that proceedings must be pending in both courts. The *lis pendens* doctrine is designed to resolve actual conflicts of proceedings. It does not apply at earlier stages. It is thus not possible to

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47 Supreme Court, Ang Ming Chuang v Singapore Airlines Ltd, Civil Aeronautics Administration, Third Party, 2004, SGHC 263.
48 Supreme Court, “AZS and another v AZR,” 2013, SGHC 102.
challenge the international jurisdiction of a civil law court on the ground that a foreign court, if seised, would be a more appropriate forum: as long as a second court has not been seized, there is no ‘lis pendens’ situation’ and thus no problem to address.

Common Law jurisdictions are based on the Territoriality principle, but Indonesia PIL Law is based on the Nationality principle. So, it will be difficult to apply the Spiliada principle in the same way as common law jurisdictions. Weizuo Chen and Gerald Goldstein describe the difference in principal connecting factors between Indonesia and Singapore’s PIL:50

The private international law of seven APPIL-jurisdictions (Japan, the Republic of Korea, Taiwan, Vietnam, Indonesia, the Philippines and Thailand) employ nationality as the principal connecting factor. Influenced by the English common law, Hong Kong has continued to employ domicile as the principal connecting factor in its private international law since 1 July 1997, the date of the founding of the special administrative region. The same applies to Singaporean private international law, which also employs domicile as the principal connecting factor.

Because of the difference in principal connecting factors, the Spiliada principle can only be applied in an adaptive manner on the account of the Indonesian principle of nationality. This article may only suggest Indonesia's present lacuna in the law vis-à-vis parallel litigation in PIL cases. Therein, the Indonesian court may apply the Spiliada principle, to decide the stay of proceedings, just like a common law jurisdiction in particular to a Singapore Court's judgment.

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The application of the Nationality principle in Indonesia, will be different from the application of the Territoriality Principle in a Common Law country like Singapore. Nevertheless, the idea of implementing the Spiliada Principle from common law becomes relevant as supported by the following arguments.

1. The Indonesian Judge has the right to conduct the Legal Finding

Based on the Indonesian constitution, particularly on section 24 (1)\(^{51}\) “The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice”. In his or her independency, judges may find the law, and this is objectively addressed by Harifin Tumpa, the former Indonesia Chief Justice, as follows:\(^{52}\)

the justice that the Judge seek to apply must have legal ground. To uphold justice without sound legal ground may result in judicial arbitrariness. On this occasion, the judge’s rule is to decide the law *in concrito*. In simple cases, judges only need to apply the law according to the provision of the law, without any difficult rationality, but still have to interpret substantively by applying *Silogisme*. In difficult cases, Judges sometimes have to apply every tool that will possibly help him to find the law which can support the upholding of justice based on the truth. Legal finding (*rechtsvinding*) by the judge is merely to uphold justice. The legal finding by the judge must be performed carefully, because in a practical sense, this legal finding has been often misused, that is to find the justifiable reason in order to benefit the conflicting parties (against the principle of impartiality).

So, the Indonesian judge may apply the Spiliada principle in hearing the next PIL cases where there is a particular objection in respect to jurisdictional ground, because this involves some level of difficulties with foreign elements. Therefore, the use of the Spiliada principle may benefit the Judge to uphold justice based on the truth.

2. The Idea of Implementing the Spiliada principle may become relevant to improve the coming Bill of Indonesian Civil Procedural Law

Since Indonesia and the Netherlands have a similar connecting factor in PIL\textsuperscript{53}, \textit{i.e.} the principle of nationality, the Indonesian law makers may consider the provision in Article 12 from the Dutch code of civil procedure:\textsuperscript{54}

If a civil action first brought to a foreign court, which proceedings might result in a judgment that could be recognized and, where appropriate, enforced in the Netherlands, then the Dutch court, secondly seized to consider the same cause of action between the same parties, may stay its proceedings until the first seized foreign court has given its judgment. If this judgment indeed can be recognized and, where appropriate enforced in the Netherlands, then the Dutch court shall decline jurisdiction. Where it concerns legal proceedings that are to be initiated by a writ of summons, Article 11 shall apply accordingly.

Therefore, there are some relevant reasons to implement the Spiliada Principle in Indonesian law in respect to the rapid development of society, in particular to the cross-border transactions in ASEAN and the ASEAN Economic Community.

\textsuperscript{53} Supra 2, 74
V. CONCLUSION

The idea of implementing the Spiliada principle in Indonesian law as the test for natural forum is possible in an adaptive way since Indonesian PIL’s connecting factor is based on nationality, so that the court may hold stay of proceedings upon parallel litigation. This is important since there is no provision about parallel litigation in the present Indonesian civil procedural law. This idea is supported with several reasons which include the Indonesian Judge having the right to conduct the Legal Finding and the idea becoming relevant to improve the coming Bill of Indonesian Civil Procedural Law and/or the Bill of Indonesian International Private Law.
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