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CONFLICTS OF LAWS AND JURISDICTIONS IN INDONESIA-RELATED ARBITRATIONS SEATED IN SINGAPORE – PERSPECTIVES FROM THE TRIBUNAL

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Abstract

This article discusses the issues of conflicts of laws that may arise when the parties, including an Indonesian party, have a contract governed by Indonesian law which includes an arbitration clause that states that the seat of the arbitration is Singapore. After discussing the rules of conflict of laws applicable to the choice of a substantive law governing the contract and the arbitration clause, the article discusses the difficulties that parties and the tribunal often face in an arbitration in which Indonesian law is the governing law. It then discusses conflict rules affecting the validity of the arbitration agreement and the jurisdiction of the tribunal. It finally discusses two other potentially conflictual situations that may arise.

Keywords : Arbitration, conflict of laws, seat of arbitration, governing law, Singapore, Indonesia

Abstract

Artikel ini membahas permasalahan hukum antar tata hukum yang timbul ketika para pihak, termasuk pihak dari Indonesia, memiliki kontrak yang diatur oleh hukum Indonesia yang mengandung klausul arbitrase yang memilih kedudukan arbitrase di Singapura. Setelah mendiskusikan aturan hukum antar tata hukum yang berlaku dalam hukum materiil yang mengatur kontrak dan klausul arbitrase, artikel ini membahas kesulitan yang para pihak dan majelis arbitrase sering hadapi dalam arbitrase ketika hukum Indonesia merupakan hukum yang berlaku. Artikel ini kemudian membicarakan aturan hukum antar tata hukum yang memengaruhi keabsahan dari perjanjian arbitrase dan yurisdiksi dari majelis arbitrase. Pada bagian akhir, artikel ini membahas dua situasi konflik lain yang dapat timbul.

Keywords : arbitrase, hukum antar tata hukum, kedudukan arbitrase, hukum yang berlaku, Singapura, Indonesia

I. INTRODUCTION

Many cases relating to Indonesia¹, often governed by Indonesian law, are arbitrated in Singapore, i.e. the seat or place of arbitration² is in Singapore rather than Indonesia. For example, in 2020, 85 Indonesian parties were involved in new arbitrations administered by the Singapore International Arbitration Centre [SIAC], most of them presumably seated in Singapore.³ The high number of such arbitrations is probably due in part to the fact that many foreign parties insist on arbitration outside Indonesia as they prefer not to rely on the Indonesian Courts to supervise the arbitral process in a fair and neutral manner that does not interfere with the arbitration process.⁴

International arbitrations deal with a multiplicity of laws as well as a multiplicity of rules of conflicts of laws and of jurisdictions that are specific to the field of arbitration. An international arbitration seated in Singapore is governed by Singapore's *International Arbitration Act*⁵ [IAA] which also provides that the arbitration is supervised, if need be, by the Singapore Courts, i.e. if there is a problem with the arbitration (challenge to an arbitrator, setting aside of the award, etc.) the Singapore Courts would have jurisdiction over the matter. With respect to Singapore-seated arbitrations, the Indonesian Courts should only have jurisdiction over the enforcement of the award in Indonesia⁶ and should refuse enforcement only to the extent permitted by the New York Convention⁷ [NYC] to which Indonesia is a party.⁸ If there is a valid agreement

¹ In this article, "cases relating to Indonesia" means cases where a party is Indonesian, or the contract is governed by Indonesian law.

² Article 20 of the 1985 version of the Model Law (United Nations, General Assembly, *UNCITRAL Model Law on International Commercial Arbitration 1985, Resolution 40/72 (11 December 1985)* UN Document A/40/17, annex 1, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf accessed on 27 February 2022) [hereinafter: Model Law] in force in Singapore through S. 3 of Singapore, *International Arbitration Act, Statute of Singapore, Chapter 143A* [hereinafter: IAA], speaks of a **place of arbitration**. See also the 2006 version: *United Nations, General Assembly, UNCITRAL Model Law on International Commercial Arbitration 2006, Resolution 61/33 (4 December 2006)*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed on 27 February 2022.

In the Anglo-Saxon world, however, (even in Singapore notwithstanding its adoption of the Model Law) one usually speaks of **the seat of the arbitration** as the English Arbitration Act does; see England, *Arbitration Act 1996*, <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed on 27 February 2022, s. 3. The Indonesian arbitration law speaks of a "**tempat arbitrase**" or **place of arbitration**. See Indonesia, *Undang-Undang tentang Arbitrase dan Alternatif Penyelesaian Sengketa* (Arbitration and Alternative Dispute Resolution), UU No. 30 Tahun 1999, (Law No. 30 Year 1999) art. 37(2) [hereinafter: Indonesian Arbitration Law].

³ Singapore International Arbitration Centre [SIAC], "Annual Report 2020", p. 17, https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf, accessed on 27 February 2022. Many other Indonesia-related arbitrations must also be taking place in Singapore under other arbitration rules such as the "ICC Rules of Arbitration 2021", <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>, accessed on 27 February 2022.

⁴ It is normal for parties to choose a neutral seat, but it seems that foreign parties are particularly keen to avoid the supervisory jurisdiction of the Indonesian courts over the arbitral process that would come with a seat in Indonesia.

⁵ IAA, s. 5.

⁶ Indonesian Arbitration Law, art. 65-69.

⁷ Art. V, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, *United Nations Treaty Series*. Vol. 330. No. 4739. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed on 27 February 2022 [hereinafter 'NYC'].

⁸ Even though art. 66 of the Indonesian Arbitration Law, has fewer grounds for refusing enforcement than the NYC, these grounds are not said to be exclusive (unlike the grounds stated at art. V of the NYC) and Indonesian Courts, unfortunately in my view, have been unduly creative in their interpretation and seem to have added many grounds for refusing enforcement. See Gatot Soemartono, and Lumbantobing, John,

to arbitrate in Singapore, Indonesian Courts should refuse to hear the case⁹ and refer the case to arbitration in Singapore.¹⁰ There should, therefore, in principle, be no conflict of jurisdictions between, on the one hand, the tribunal and the Singapore Courts and, on the other hand, the Indonesian Courts. Unfortunately, experience has shown that this is not always the case as Indonesian Courts too often have claimed jurisdiction when, in my view and the view of almost all arbitration practitioners, they should not, thus creating conflicts of jurisdictions. Similarly, as we will see, issues of conflict of laws arise in an arbitration seated in Singapore that involves Indonesian parties, especially, but not exclusively, when the contract and the arbitration clause are governed by Indonesian law. This article will look at the conflicts of jurisdictions and of laws that may affect Indonesia-related arbitration cases seated in Singapore.

Conflicts in arbitration are often divided into three types of conflicts: 1. Conflicts of jurisdictions, 2. Conflicts of laws and 3. Recognition of foreign awards. This article however stems from my experience as an arbitrator in Singapore-seated Indonesia-related arbitrations. I wrote it from an arbitrator's point of view. This article will therefore only address the issues of conflicts of laws faced by a tribunal seated in Singapore and will not address the issue of the enforcement of the award in Indonesia or the details of the Indonesian arbitration law, except to the extent that they could affect the Singapore-seated arbitration before the issuance of an award (for example, when the parties ask the tribunal to issue a "power of attorney" so that the parties can enforce the award in Indonesia)¹¹. In other words, this article will not address "3. Recognition of foreign awards". Many articles and comments have been written on the enforcement of foreign awards in Indonesia.¹² This article will also not discuss in detail Law No. 30 of 1999 on *Arbitration and Alternative Dispute Resolutions*¹³ [hereinafter: the Indonesian Arbitration Law] which includes a part on the enforcement of a foreign award, but which, for the most part, applies only to arbitrations seated in Indonesia. Nonetheless, a few provisions of that law will need to be discussed as they may arguably affect Singapore-seated arbitrations.¹⁴

With respect to the conflicts of jurisdictions and conflicts of laws, we will not address them in that order, the reason being that this is not the order in which a tribunal has to look at those issues. To determine whether it has jurisdiction the tribunal must first decide which law applies to the arbitration clause and the contract and its interpretation and then determine whether it has jurisdiction.¹⁵ We will therefore first look at conflict rules determining the law applicable to the arbitration

"Indonesian Arbitration Law and Practice in Light of the UNCITRAL Model Law" in The UNCITRAL Model Law and Asian Arbitration Laws, edited by Gary F Bell (Cambridge: Cambridge University Press, 2018) pp. 262-298.

⁹ Art. 11(2) of the Indonesian Arbitration Law, : "*The District Court must refuse to, and must not, interfere in any dispute settlement which has been determined by arbitration, except in particular cases determined in this Law.*"

¹⁰ NYC, art. II(3).

¹¹ See discussion further below.

¹² See, for example, Tony Budidjaja, *Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia* (Jakarta: Tatanusa, 2002); see also Soemartono, Indonesian Arbitration Law and Practice," 339-345; Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia," *American University International Law Review Year Vol. 20* (2005): 359-402; Huala Adolf, "The Provisions on the Enforcement of Foreign Arbitration Awards in Indonesia (under the New York Convention of 1958)." *Journal of Arbitration Studies* 27, no. 3 (2017): 33-52.

¹³ *Op. cit.*

¹⁴ For a good overview of the Indonesian Arbitration Law, see Soemartono, *See also*, Erman Rajagukguk, *Arbitrase Dalam Putusan Pengadilan* (Jakarta: Chandra Pratama, 2000).

¹⁵ A tribunal seating in Singapore has *compétence-compétence* under art. 16 of the Model Law

agreement, and, second, the difficulties that arise when that law is Indonesian law. We will then look at conflicts of jurisdictions stemming from different interpretations of the validity of the arbitration clause. Finally, we will look at two conflictual issues beyond conflicts of laws and jurisdiction.

II. THE LAW APPLICABLE TO THE CONTRACT AND THE ARBITRATION AGREEMENT

A. The conflicts of legal rules determine the substantive law

An arbitral tribunal has jurisdiction only if there is a valid arbitration agreement between the parties to the arbitration. Two laws apply to the validity of the arbitration agreement.

The formal validity of the agreement (essentially, whether it is in writing) is in part governed by the arbitration law of the seat of the arbitration.¹⁶ Therefore, for the purpose of this article, since we assume that the seat is in Singapore, the writing requirement is found in the IAA which states that the agreement must be in writing.¹⁷ This requirement is easily met as the IAA has a very broad definition of “writing”¹⁸ and, therefore, it would very rarely be the case that an arbitration agreement would not be considered to have been in writing. I will therefore assume that the arbitration agreement is in writing and will not further discuss the formal validity of the arbitration agreement under Singapore’s arbitration law.

The writing requirement is the only formal requirement imposed by Singapore’s arbitration law, but it may be that the law applicable to the contract, including the arbitration clause, in our case, Indonesia law, may have other formal requirements such as the contract having to be in the Indonesian language, as we shall see. Even though this would technically be a formal requirement, we will discuss this as part of the substantive validity as this is governed by the substantive law of the contract and/or the arbitration agreement rather than by the arbitration law.

The substantive validity of the arbitration agreement is determined by the substantive contract law that governs the arbitration agreement. That substantive law will determine “the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause.”¹⁹

In the vast majority of cases, the arbitration agreement is in the form of an arbitration clause in the main contract that is the object of the arbitration. When that main contract has a choice of law clause stating that it is governed by the law of

¹⁶ Although the parties usually choose, in their contract, the seat of the arbitration (also known as the place of arbitration), unfortunately, too many parties fail to do so in which case usually the tribunal (for example art. 20 of the Model Law, or rule 21 of the *Arbitration Rules of the Singapore International Arbitration Centre* [SIAC Rules] 6th Edition, 1 August 2016, https://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, accessed on 27 February 2022) or an arbitral institution (for example, art. 18(1) of the ICC Rules of Arbitration 2021,) will choose the seat.

¹⁷ IAA, s. 2A(3).

¹⁸ IAA, s. 2A(4) states: “An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.”

¹⁹ “Note on the Model Clause of the HKIAC” <https://www.hkiac.org/arbitration/model-clauses#Arbitration%20under%20the%20HKIAC%20Administered%20Arbitration%20Rules> accessed on 27 February 2022.

Indonesia, for example, it is logical to assume that this choice of law also applies to the arbitration agreement that is part of the same contract, something the Singapore Courts have confirmed.²⁰ It is very rare (though possible) that the parties will decide to have a different substantive law applicable to the arbitration agreement or that a court will decide to apply to the arbitration agreement a different law than the law governing the main contract notwithstanding the fact that there was no separate choice of law for the arbitration clause.²¹

There are special rules of private international law or conflicts of laws applicable in arbitrations to determine which substantive law governs the contract and normally also the arbitration clause. The national rules of private international law are generally excluded and specific rules of conflicts of laws are stated either in the arbitration law of the country of the seat or in the arbitration rules chosen by the parties. When the seat is in Singapore, these rules are determined by the arbitration law of Singapore unless the parties have chosen other rules of conflict of laws.

In Singapore, the Model Law establishes the following rule of conflict of laws for the law governing the contract, which as mentioned above, in Singapore is presumed to also apply to an arbitration clause included in such a contract:

“ARTICLE 28 - RULES APPLICABLE TO SUBSTANCE OF DISPUTE

1. *The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*
2. *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”²²*

Often, however, the parties will choose rules of arbitrations that will contain their own rules of conflicts of laws that are different from those found in the Model Law. These rules would prevail over those of the Model Law.²³ For example, when the parties choose an arbitration under the Rules of the Singapore International Arbitration Centre [SIAC], the conflict rules would be as follows:

“The Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate.”²⁴

As can be seen, the SIAC Rules differ from the conflict rules of the Model Law in that, if the parties do not choose a law, the SIAC adopts the *voie directe* approach to determine the applicable law – the tribunal can pick the law most appropriate without referring to any rules of conflicts of laws – whereas the Model Law adopts the *voie indirecte* approach which requires the tribunal to first determine which rules of

²⁰ See the decision of the Singapore High Court in *BCY v BCZ* [2016] SGHC 249.

²¹ This has however happened in the English case of *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 (C.A.). See discussion of this case below.

²² Model Law, Art. 28.

²³ IAA, s. 15A.

²⁴ Rule 31.1 of the *Arbitration Rules of the Singapore International Arbitration Centre [SIAC Rules]* 6th Edition, 1 August 2016, available at https://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, accessed on 27 February 2022 [hereinafter SIAC Rules].

conflict are applicable and then apply them. The *voie directe* gives greater discretion to the tribunal. Also by mentioning “the law or rules of law”, the SIAC Rules make clear that the parties can choose non-national rules of law.

When it comes to the enforcement of an award, NYC has its own rules of conflict. The NYC allows a court to refuse the enforcement of a foreign award if the arbitration agreement ...

“is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”²⁵

Under NYC, if the parties do not choose a law, the law is not determined by *voie directe* (SIAC Rules) or *voie indirecte* (Model Law), but rather, the law of the seat is automatically applied.

The different rules on how to determine the law of the contract and consequentially of the arbitration clause, when the parties do not specifically choose a different law, can seem contradictory and are the object of many debates among practitioners and academics.²⁶ The fact that this is controversial should encourage the parties to always clearly choose the substantive law applicable to the contract and the arbitration clause. This article will not discuss in detail the nature of the debate and will simply assume that the parties have clearly stated that Indonesian law governs the contract and the arbitration clause and that therefore, under Singapore law, Indonesian law governs both the contract and the arbitration clause.²⁷

B. Problems with Indonesian law as the substantive law of the contract and the arbitration clause

Indeed in Indonesia-related arbitrations seated in Singapore, the substantive contract law chosen by the parties to govern their contract including the arbitration clause is often Indonesian law. The words “Indonesian law” in choice of law clauses are understood to refer mainly to the contract law found in the *Burgerlijk Wetboek*, known in Indonesian as the *Kitab Undang-Undang Hukum Perdata*, that is the Indonesian Civil Code, a civil code in the French/Dutch tradition which, to this day, is still in force only in Dutch.²⁸

Having assumed that the parties have clearly chosen Indonesian law as the law governing the contract and the arbitration agreement, there is no issue of conflicts of laws left – pretty much all the rules of conflicts (whether national rules of conflict or rules of conflict found in arbitration laws or rules or the New York Convention)

²⁵ NYC, art. V(1)(a).

²⁶ “The choice of the law applicable to an international commercial arbitration agreement is a complex subject. The topic has given rise to extensive commentary, and almost equally extensive confusion.” Gary B. Born, *International Commercial Arbitration* (3rd ed.) (Alphen aan den Rijn, The Netherlands : Kluwer Law International, 2021) p. 508. For a full account of the debate, see the same book pp. 507-673. See also Darius Chan et al., *Law and Theory of International Commercial Arbitration in Singapore* (Singapore: SAL Academy Publishing, 2022) pp. 101-110.

²⁷ In Singapore, as mentioned above, when the parties choose Indonesian law as the law governing the contract, that law normally also applies to the arbitration clause contained in it. It is even clearer when the parties make that choice by wording their choice of law clause as follows: “this contract, including its arbitration clause, is governed by Indonesian law”.

²⁸ Indonesia, *Burgerlijk Wetboek voor Indonesie* (*Kitab Undang-Undang Hukum Perdata / Indonesian Civil Code*), 30 April 1847, S. 1947 No. 23. When the parties refer to Indonesian law, they usually do not intend to refer to Islamic contract law (Islamic finance) and adat contract law which are also part of Indonesian law.

agree that the tribunal and the Courts have to apply the law chosen by the parties. I should however explain some of the consequences of choosing Indonesian law as the substantive law before moving to other conflicts of laws and of jurisdictions that may arise. The main difficulty with having Indonesian law as the governing law is the uncertainty that it brings.

When it comes to interpreting and applying Indonesian contract law, one faces a lack of doctrine and jurisprudence interpreting and elaborating on the code. Indeed, civil law jurisdictions do not have a doctrine of *stare decisis* which would make the jurisprudence (court decisions) binding. Similarly, the doctrine (the writings of mainly law professors) is also not binding. However, all well-functioning civil law jurisdictions would have stable and predictable jurisprudence debated and, in many instances, approved or disapproved by doctrine. Most civil law jurisdictions rely heavily on jurisprudence and doctrine to provide certainty in the interpretation of their civil codes. This is unfortunately not the case in Indonesia. There are some cases on some topics, but they are often contradicting one another,²⁹ and many times there is simply no case on which one could rely.³⁰ With so few cases one cannot expect a very detailed doctrine and therefore contract law books tend to be rather basic.

There are many explanations for this, one of them being that the civil code is in Dutch, a language the vast majority of Indonesian lawyers, academics, and judges do not understand. The legislators also do not understand that language and amendments to the code in Dutch are politically impossible – whenever a reform of the code is needed, a part of it is repealed and a separate statute in Indonesian is adopted to replace it,³¹ something that has not happened to the part of the code on the law of obligations (including contract law) which, for the most part, has not been amended since its adoption more than 170 years ago. Another explanation for the lack of doctrine and particularly of jurisprudence is that most large commercial disputes do not go to the Indonesian Courts but rather to mediation and arbitration because the business community, especially the foreign business community, does not trust Indonesian Courts. The insufficiency of doctrine and jurisprudence has been well documented in a very comprehensive article by my colleague Adriaan Bedner.³²

²⁹ “[J]udges have to reinvent the wheel from one case to the other and produce quite diverse decisions in similar cases.” Adriaan Bedner, “Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions”, *Hague Journal on the Rule of Law* Year 5 (2013): 257.

³⁰ “This difficulty to access primary sources of law has had serious consequences for the constituent elements of the legal system; the judiciary, the bar, and the law faculties. To start with the judiciary, judges have become unaccustomed to reading and understanding precedents, which has inevitably led to a decline of legal consistency. Only when judgments get much attention in the media are they potentially taken into account in future cases. This has led judges to a singular reliance on legislation, which in turn has caused them to be often accused of an excessively formalist attitude. It also means that the Supreme Court has lost much of its ability to control legal development in Indonesia.” Bedner, “Indonesian Legal Scholarship,” p. 256.

In his book series on the law of obligations, J Satrio S.H. refers mainly to Dutch cases or cases by the Dutch colonial courts in Indonesia before Indonesian independence, which indicates a lack of jurisprudence in modern Indonesia. For example in J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Perjiajian, Buku I* (Bandung, Citra Aditya Bakti, 1995) pp. 369-372, in the list of cases referred to in this book, he refers to some 65 cases by the Dutch or colonial courts and less than 10 by Indonesian courts.

³¹ For example, the law related to immovable property has been removed from the civil code and replaced by *Undang-Undang tentang Peraturan Dasar Pokok Agraria (Law regarding Basic Agrarian Law)*. UU No. 5 Tahun 1960, LN No. 104 Tahun 1960 (*Law Number 5 Year 1960, SG No. 104 Year 1960*).

³² Bedner, pp. 253-273. See also Gary F. Bell, “Codification and Decodification: The State of the Civil and Commercial Codes in Indonesia” in *Codification in East Asia – Selected Papers from the 2nd IACL Thematic Conference*, edited by Wen-Yeu Wang, (Switzerland: Springer, 2014) pp. 39-50.

I have seen non-Indonesian arbitrators, including arbitrators trained in civil law, being incredulous when experts on both sides explained that they could not find any doctrine or jurisprudence that could usefully elaborate on, and clarify, basic articles of the code such as the articles on duress, for example. In a recent case in which I was the arbitrator, the key issue was whether a contract (both its rights and obligations) could be assigned under a contractual clause, earlier agreed by both parties, which provided for such assignments of the contract. Clauses allowing for the assignments of the whole contract (as opposed to a *cessie* in Indonesian law or a *cession de créances* in French law) are common in many types of commercial contracts in many civil law countries around the world and have been the object of debates over decades in both jurisprudence and doctrine, and yet, senior Indonesian law experts on both sides testified that there was no case or doctrine indicating that the assignment of a contract was allowed or disallowed under Indonesian civil law. This would not happen in most civil law jurisdictions – there would be an answer one way or another.

In an Indonesian Court, notwithstanding this lack of certainty in the law because of the deficiency of the doctrine and jurisprudence, at least the judges would be familiar with Indonesian civil law generally. However, likely, most members of arbitral tribunals will not be familiar with Indonesian law – the chair of a three-member tribunal or the sole arbitrator is unlikely to be Indonesian since when one of the parties to the dispute is Indonesian – someone with a neutral nationality will usually be appointed. Therefore, sole arbitrators will almost never be Indonesians and in all likelihood, only one member of a three-member tribunal, the one nominated by the Indonesian party, maybe Indonesian. This situation is not specific to Indonesia – tribunals are often, for the very same reason, not very knowledgeable in the law they have to apply especially when that law is the law of one of the parties.³³ However, when that law itself is very deficient, the task becomes more difficult for arbitrators unfamiliar with that law. Singapore's rules of conflicts found in its arbitration law require the Tribunal to apply the law chosen by the parties,³⁴ but what if that law is unclear and incomplete?

There are ways to deal with the uncertainty of the law. First the parties to the arbitration, to the extent that they have a say, and the appointing authorities should make sure that members of the Tribunal (or at least one or two of them) while neutral, have some expertise in the kind of civil code in force in Indonesia. It could be a foreigner familiar with Indonesian law, or someone trained in the same Dutch/French tradition. The Indonesian civil code in matters of contract law is similar to, and often a translation in Dutch of, the *Code Napoléon* and is, therefore, familiar to many jurists around the world whose codes are similar to the *Code Napoléon*. For example, as far as contract law is concerned, the Dutch had a similar code until the 1990s and the French, until a few years ago. In one of my early cases as an arbitrator, the appointing authority had appointed three common-law trained arbitrators to a dispute between German and Indonesian parties. The parties protested and threaten to bring their case to another institution unless someone with some familiarity with Indonesian law was appointed to the tribunal, and I was thus appointed to replace one of the common law arbitrators.³⁵

³³ The situation would be different if the parties were from Indonesia and Canada, and chose Singapore law as the governing law with the seat of the arbitration in Singapore. It would then be very easy to find three neutral arbitrators in Singapore who know Singapore law very well.

³⁴ Model Law, art. 28.

³⁵ I should note that many of the top arbitrators around the world have been trained in both civil and common law and very many civil-law trained lawyers are top arbitrators, so it should not be very difficult

It remains that with some, or maybe even all, members of the tribunal not being very familiar with Indonesian law (even if they are familiar with the civil law generally), the parties will need to introduce that law to the tribunal usually through expert witnesses. Finding expert witnesses who can explain the law clearly to arbitrators not trained in Indonesian law and often not even trained in civil law, can be a challenge. If some of the arbitrators are only common-law trained, the experts would ideally know both civil and common law to be able to understand where the arbitrators come from and explain to them the difference between the law they know and Indonesian law. Parties should also make sure their counsel can handle Indonesian law – the cross-examination of a civil law expert by a counsel unfamiliar with civil law can sometimes be quite inefficient and unconvincing.³⁶

Another problem is having to explain Indonesian civil law in English, the language of the common law rather than a language of the civil law. Many of the English translations of the Indonesian Civil Code make numerous mistakes including referring to common law concepts to translate civil law concepts that are sometimes significantly different. Such mistakes are sometimes repeated by experts in their opinions and by counsel in their submissions. I gave the following example in an earlier publication:

“For example, one of its most egregious mistakes is the translation of the concept of verbindtenissen³⁷ “in Dutch to the concept of agreements in English, probably in part because the concept of ‘law of obligations’ is rarely used in common law, where one speaks of contracts, torts, or unjust enrichment. The original French concept is les obligations, which is correctly translated in Indonesian by Subekti as perikatan. Book Three of the code translated as ‘Agreements’ almost makes no sense. The book is supposed to be on obligations, which include contractual obligations (i.e. agreements), delictual obligations (i.e. torts), and quasi-contractual obligations (e.g. the return of the thing not due). The latter two (delicts and quasi-contracts) do not stem from agreements and it makes no sense to include them in a book on agreements – the common link is the fact that they are obligations.”³⁸

What if, despite the best efforts of experts and counsel, the Indonesian law is silent on a certain point (or at least that is the impression the tribunal got from what they heard). The Tribunal is still bound to apply Indonesian law, the law chosen by the parties,³⁹ and may not ignore that law and apply general concepts of law as understood in international law or international arbitration. Indonesian law provides that a court (and presumably also an arbitrator) “is prohibited from refusing to examine, hear, and decide a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and adjudicate it.”⁴⁰

One possible solution is for counsel and experts to explain how the provisions of the code have been interpreted in other jurisdictions that have the very same provisions in their codes. These precedents would in no way be binding on the tribunal (again there is no binding precedent in civil law and, surely, Indonesia is not

to appoint a tribunal familiar with the type of civil law in force in Indonesia.

³⁶ On the usefulness of comparative law in international arbitration, see Gary F Bell, “Arbitration and Comparative Law” in *The Cambridge Companion to International Arbitration*, edited by C.L. Lim, (Cambridge University Press, 2021) pp. 61-78.

³⁷ This is the old Dutch spelling found in the Code. Today the word would be spelled *verbintenissen*.

³⁸ Gary F Bell, “The Civil Law, the Common Law, and the English Language – Challenges and Opportunities in Asia,” *Asian Journal of Comparative Law* Year 14 (2019): S40.

³⁹ Model Law, art. 28.

⁴⁰ Indonesia, Undang-Undang Tentang Kekuasaan Kehakiman (Law on Judicial Power), UU No. 48 Tahun 2009 (Law No 48 Year 2009), art. 10(1).

bound by any foreign jurisprudence or doctrine) but it could suggest how most jurists would interpret the code and could in fact, in some instances, be advantageous to Indonesia in making its law consistent with practices of trade observed around the world to the extent they are compatible with Indonesian interests, thus facilitating investment and trade. If this exercise in comparative law does not help, the tribunal would have to apply general principles of Indonesian civil law.

III. THE ARBITRATION AGREEMENT, ITS VALIDITY, AND THE JURISDICTION OF THE TRIBUNAL

A. Who decides whether the tribunal has jurisdiction?

Most, though not all, arbitration laws now recognize the principle of *compétence-compétence* which hold that the arbitration tribunal has jurisdiction to decide its own jurisdiction even though, by deciding that it does not have jurisdiction because the arbitration clause is invalid, the tribunal in fact declares invalid the very clause that purportedly granted it jurisdiction. This principle is found in Article 16(1) of the Model Law:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”⁴¹

On the other hand, the Article II(3) of the NYC confers to courts not at the seat (in our case, the Indonesian Courts for example) the power to review the validity of the arbitration clause:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”⁴²

In some arbitration-friendly jurisdictions, the courts have held that Article II(3) of the NYC⁴³ should only allow the court to look at the matter *prima facie* before referring the matter to arbitration, thus letting the tribunal examine the matter in full to come to its own decision.⁴⁴ It is clear however that NYC does not mandate a *prima facie* approach to article II(3). Singaporean courts, which have adopted a *prima facie* approach, did so in part because the principle of *compétence-compétence* is part of the Singapore arbitration law⁴⁵ and it, therefore, made sense to take the same approach with respect to Article II(3) of the NYC.

So what would a court in Indonesia do if a case is brought to it and the defendant argues that the case should be referred to arbitration in Singapore as provided by the arbitration agreement? Should the court refer the case to arbitration in Singapore

⁴¹ Model Law, art. 16(1).

⁴² NYC, Art. II(3).

⁴³ As well as its equivalent in domestic law such as the Model Law, art. 8(1).

⁴⁴ See for example the decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 para. 28-70.

⁴⁵ Model Law, art. 16(1).

unless “it finds that the said agreement is null and void, inoperative or incapable of being performed”?⁴⁶ And should it decide the issue of validity after a *prima facie* or a full inquiry?

The NYC is not directly applicable to domestic law in Indonesia and the answer to these questions should be found in the Indonesian Arbitration Law which implements the NYC and its interpretation by the courts. The courts are obliged to refer cases to arbitration when there is an arbitration clause⁴⁷ but unfortunately, the principle of *compétence-compétence* is nowhere stated clearly in the Indonesian Arbitration Law,⁴⁸ and it is therefore not clear whether the Indonesian Court should look at the validity of the arbitration agreement in detail, or only *prima facie* to let the tribunal decide first on its own jurisdiction. As colleagues have stated:

“The omission of the kompetenz-kompetenz/compétence-compétence principle in the New Arbitration Law”⁴⁹ “is unfortunate since it means that disputes regarding an arbitrator’s jurisdiction are likely to end up in Indonesian courts. This is a serious impediment for international commercial arbitration in Indonesia.”⁵⁰

Courts in Indonesia have also, sometimes disregarded the arbitration agreement and proceeded to hear cases that should have been referred to arbitration.⁵¹

One could therefore face contradictory decisions of the Indonesian Court and the arbitral tribunal seated in Singapore on the validity of the arbitration agreement and therefore whether the tribunal has jurisdiction. It does happen that Indonesian parties ignore the arbitral proceedings in Singapore, even after the tribunal has issued an anti-suit injunction, and instead pursue the matter in court in Indonesia (which means that the Indonesian Court also ignores the arbitration agreement or holds it to be invalid).⁵² This creates an unresolved conflict of jurisdictions between the tribunal and the Indonesian Court. If the non-Indonesian party secures a favorable award from the tribunal, it might effectively be impossible to enforce such an award in Indonesia, but it could be enforced elsewhere.

B. The requirement that the contract and arbitration clause be in the Indonesian language

Article 31 of Law No 24 of 2009 Concerning the National Flag, Language, Emblem, and Anthem reads as follows:

“(1) Indonesian must be used in memoranda of understanding or agreements that involve state organs, government institutions of the Republic of Indonesia, private Indonesian institutions, or individuals who are citizens of the Republic of Indonesia.

⁴⁶ NYC, Art. II(3).

⁴⁷ Indonesia Arbitration Law, art. 3: “The District Court shall have no jurisdiction to hear disputes of parties bound by an arbitration agreement.”; art. 11(1): “The existence of a written agreement shall exclude the parties’ right to submit their disputes or different opinion contained in the agreement to the District Court.”

⁴⁸ “Unfortunately, the New Arbitration Law does not contain a provision that affirms the *kompetenz-kompetenz/compétence-compétence* principle.” Soemartono, p. 314. The authors of “New Arbitration Law” refer to what we call the Indonesian Arbitration Law, i.e. Law No. 30 of 1999.

⁴⁹ The authors of “New Arbitration Law” refer to what we call the Indonesian Arbitration Law. i.e. *Law No. 30 of 1999*.

⁵⁰ Soemartono, pp. 314-315.

⁵¹ See for example Indonesia, Central Jakarta District Court, *PT Perusahaan Listrik Negara (Persero) v. PT Paiton Energy*, “Interlocutory Decision No. 517/Pdt.G/1999/PN.Jkt.Pst” (13 December 1999).

⁵² See for example the facts in Singapore, *PT Pukaafu Indah v Newmont Indonesia Ltd* [2012] SGHC 187.

“(2) Memoranda of understanding or agreements as specified in paragraph (1) that involve foreign parties may also be written in the national language of the foreign parties and/or English.”⁵³

Typically, the parties will, in their contract, include a choice of law clause that reads “This contract is governed by the laws of Indonesia”,⁵⁴ which presumably also applies to the arbitration clause.⁵⁵ When the parties choose Indonesian law, is the arbitration clause required to be in the Indonesian language? Although Law No 24 of 2009 is not part of the civil code, it is still a part of the Indonesian law that regulates contracts and therefore it would indeed apply when the parties have chosen Indonesian law as the law governing the arbitration clause. This seems to be the interpretation of most parties to arbitrations – whenever one of the parties is Indonesian, the contract, including the arbitration clause is almost always bilingual (English and Indonesian).

The more interesting question is whether the arbitration clause needs to be in Indonesian when one of the parties is Indonesian but the parties choose, for example, Singapore law as the law governing the contract and the arbitration clause. Singapore’s substantive contract law has no requirement that the arbitration clause be in Bahasa Indonesia and therefore in principle, the arbitral tribunal would probably find that a clause drafted only in English would be valid – the tribunal is unlikely to apply the Indonesian law even if arguably that law might be a matter of public policy (public order) in Indonesia.⁵⁶

However, an Indonesian Court, deciding whether to refer a case to arbitration in Singapore or asked to enforce an arbitral award, might feel that this language requirement is a matter of public policy in Indonesia. That Court might therefore find itself bound to hold that an arbitration agreement not in Indonesian is invalid as a matter of public policy notwithstanding the choice of law made by the parties (Singapore’s law). The fact that, when it comes to enforcement of awards, article V(1)(a) of the NYC states that the court must decide the validity of the arbitration agreement based only on the law chosen by the parties, not on its own law,⁵⁷ does not prevent the Court from refusing enforcement if the “enforcement of the award would be contrary to the public policy”⁵⁸ of Indonesia. Therefore even if the Indonesian Court would not find the agreement invalid under the Singapore law chosen by the parties and did not at this point discuss the possible invalidity as being against public policy

⁵³ Indonesia, *Undang-Undang tentang Bendera, Bahasa, Dan Lambang Negara, Serta Lagu Kebangsaan (Law on National Flag, Language, Emblem and Anthem)*, UU No. 24 Tahun 2009 (Law No 24 of Year 2009) art. 31.

⁵⁴ This is the formulation proposed by the SIAC in its “Model Clause”, <https://www.siac.org.sg/model-clauses/siac-model-clause>, accessed on 27 February 2022.

⁵⁵ Interestingly, the “Model Clause of the Hong Kong International Arbitration Centre” suggests that the parties consider a separate choice of law clause for the arbitration clause. See <https://www.hkiac.org/arbitration/model-clauses#Arbitration%20under%20the%20HKIAC%20Administered%20Arbitration%20Rules>, accessed 27 February 2022.

⁵⁶ “[...] as a practical matter, international arbitral tribunals are somewhat more likely than national courts to take a pragmatic and balanced approach to issues of public policy and to accord substantial weight to principles of party autonomy.” Born, *p. 173*.

⁵⁷ NYC, *art. V(1)(a)*: “the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” It should be noted however that when a court is considering referring a case to arbitration, art. II(3) of the NYC does not specify which law applies to the validity of the agreement, though it would be surprising if it were not the same law as the one mentioned in Art. V(1)(a) – the law chosen by the parties, or failing a choice, the law of the seat.

⁵⁸ NYC, *art. V(2)(b)*, see also, Indonesian Arbitration Law, art. 66(c).

/public order, conducting arbitration in Singapore could be entirely futile if the only place of enforcement is Indonesia (the only place where the assets are) – at the time of enforcement, the court may refuse enforcement on public policy/public order grounds. It would therefore be prudent to make sure every contract and arbitration clause with an Indonesian party is in Indonesian as well as English or another language as provided by Law No 24 of 2009 even if the parties choose a law other than Indonesia's to govern their contract and the arbitration clause.

Another issue is whether Law No 24 of 2009 requires that the arbitration rules referred to in the arbitration clause also be in Indonesian. The arbitration rules chosen by the parties apply because they are incorporated into the arbitration agreement by reference, i.e. they are part of the arbitration agreement. For example, the SIAC Model Clause reads in part as follows:

*“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, **which rules are deemed to be incorporated by reference in this clause.**”⁵⁹*

Since the arbitration rules are part of the contract between the parties shouldn't they also be drafted in Indonesian as well as in (usually) English?

The SIAC website does include a translation in Indonesian of the SIAC Rules but states:

“English is the official language of the SIAC Rules 2016. In the event of any discrepancy or inconsistency between the English version of these Rules and any other languages in which these Rules are published, the English version shall prevail.”⁶⁰

Please note that this statement by the SIAC is not part of the Rules themselves but is simply put on the website and therefore it is not part of the arbitration agreement between the parties which refers only to the rules, not the website. Therefore the prevalence of the English official version is not stated in the Rules and is not part of the arbitration agreement. In addition, it is not clear that a reference to the Rules of the SIAC in the Model Clause includes a reference to the Indonesian version of such rules. Be that as it may, there would be an arguable case that because the SIAC Rules are available in an Indonesian translation, they satisfy the requirement of Law No 24 of 2009 when incorporated into the arbitration agreement. It might however be safer to mention in the arbitration clause itself that what is incorporated are the English version of the Rules along with their Indonesian translation found on the SIAC website and that the English version prevails in case of inconsistencies.

It should be noted however that the arbitration rules of arbitral institutions other than the SIAC are unlikely to be readily available in Indonesian.

⁵⁹ SIAC Model Clause, emphasis added.

⁶⁰ SIAC Rules,

C. Does the Indonesian Arbitration Law include some substantive contract law applicable to contracts and arbitration clauses even in arbitrations seated outside of Indonesia?

Arbitration laws may contain conflicts of legal rules to determine the substantive law applicable to the contract but they do not usually include substantive rules of contract law. The arbitration law (*lex arbitri*) of a given jurisdiction is usually concerned only with the conduct of the arbitration when the seat is within that jurisdiction and with the enforcement of foreign awards within that jurisdiction. The substantive contract law (*lex contractus*) of that jurisdiction would not be found in its arbitration law but in the civil code or the common law and some cases, in some statutes other than the arbitration law (the Indonesian language requirement, for example).

But the Indonesian Arbitration Law is not like most arbitration laws and some of its provisions could be argued to be concerned with substantive contract law rather than arbitration law. For example, article 10(g) of the Indonesian Arbitration Law states:

“An arbitration agreement will not become void because of the circumstances mentioned below:

- a. the death of one of the parties;*
- b. the bankruptcy of one of the parties;*
- c. novation;*
- d. the insolvency of one of the parties;*
- e. inheritance;*
- f. effectivity of requirements for the cancellation of the main contract;*
- g. if the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who agreed to arbitrate; or*
- h. the expiration of voidance of the main contract.”*

Some may argue that many of these examples are substantive rules of contract law – novation, assignment of contracts, etc. The proper reading of this article, however, is, first, as the vast majority of authors agree, that only the provisions of the Indonesian Arbitration Law relating to the enforcement of foreign awards apply to foreign seated arbitration⁶¹ and this has been confirmed by the Indonesian Supreme Court.⁶² Therefore article 10 does not apply to an arbitration seated in Singapore, i.e. it is not part of the substantive contract law of Indonesia (*lex contractus*) but of the arbitration law (*lex arbitri*).

Second, article 10 is in a part of the Law entitled “Chapter III: Terms of Arbitration, Appointment of Arbitrators, and Right of Refusal” which is clearly procedural, not substantive, in nature.

Third, even if these provisions were part of the substantive contract law of Indonesia concerning arbitration agreements (which they are not), these provisions simply state that the arbitration agreement is severable and transmissible. They are examples of

⁶¹ “As to its scope of application, the New Arbitration Law does not contain any express provision as regards international or domestic arbitration other than in the context of recognition and enforcement of arbitral awards. Given that international awards are only expressly referred to in the provisions on enforcement of awards, the common view is that the rest of the New Arbitration Law does not apply to international arbitration.” Soemartono, p. 303.

⁶² Indonesia, Supreme Court, *Karaha Bodas*, “Decision No. 01/Banding/Wasit.Int/2002” (8 March 2004).

cases where the arbitration clause remains valid, not of cases where it might become invalid.

Therefore attempts at arguing that the Indonesian Arbitration Law has substantive contract law provisions applicable to foreign-seated arbitration should simply be rejected.

D. What if Indonesian law renders the agreement invalid?

We have assumed until now that the parties have clearly chosen the Indonesian law as the law governing both the contract and the arbitration clause. Let us change this assumption to what is more common: the parties have chosen Indonesian law as the law governing the contract but have remained silent as to the law governing the arbitration clause which has been included in the contract. As mentioned, in Singapore, the presumption is that the law chosen to govern the main contract also governs the arbitration clause.

What if, because the arbitration clause is not in Indonesian or for any other reason, Indonesian law renders the arbitration clause invalid and denies jurisdiction to the tribunal, thus in fact denying the parties the opportunity to go to arbitration as they had clearly agreed to? If the parties have clearly and specifically chosen Indonesian law to govern their arbitration agreement, then, so be it.

But what if the parties did not specifically mention the law governing the arbitration clause? Should we apply the law of the main contract even though that law makes the arbitration clause invalid? The parties have clearly expressed an intention to arbitrate. Shouldn't we presume that since they had a clear intention to arbitrate, they could not have intended Indonesian law to apply to the clause as this would make the arbitration agreement and their clear intention to arbitrate invalid? Should we not say that, under the circumstances, the arbitration clause should be seen as a separate contract from the main contract in which it sits, and that the choice of law applicable to the main contract, which would normally also apply to the arbitration clause,⁶³ should not so apply, i.e. the parties should be presumed not to have wanted the arbitration clause to be governed by a law that renders it invalid? That would leave the arbitration clause without a choice of law and would let the tribunal choose a governing law that would not make the arbitration clause invalid and would therefore allow the arbitration to proceed.

This is exactly what happened in the English case of *Sulamérica*.⁶⁴ In that case, the law chosen by the parties to govern the main contract would have rendered the arbitration clause invalid. The English Court of Appeal, therefore, decided that the parties could not have intended the arbitration agreement to be governed by a law that would have made the arbitration clause invalid and therefore deemed the arbitration clause to be a separate agreement and stated that it should be governed by the law of the seat, i.e. English law, which is held to have the closest connection to the arbitration clause.

This approach was in principle approved in Singapore in *obiter dicta* that stated

⁶³ A presumption the Singapore High Court approved in *Singapore, BCY v BCZ* [2016] SGHC 249.

⁶⁴ *England, Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2013] 1 WLR 102 (C.A.).

that the three-step approach⁶⁵ of *Sulamérica* was correct,⁶⁶ though there has not yet been a case in which the highest court in Singapore has reached the third step and held that it could disregard the law governing the main contract⁶⁷ and apply the law with the closest connection instead, a test which, in my view, is not exactly consistent with the NYC.⁶⁸

What to do when the law of the main contract would invalidate the arbitration clause is a hotly debated issue in international arbitration and a full account of the debates and possible solutions is unfortunately beyond the scope of this article.⁶⁹

E. Jurisdiction over non-contractual claims

When describing the scope of the jurisdiction of the tribunal, most arbitration clauses include words such as “any dispute arising out of or in connection with this contract.”⁷⁰ The purpose of words like “in connection with” is to allow the tribunal to have jurisdiction over matters, sometime non-contractual matters, relating to the contract. For example, one of the issues in arbitration may involve property law rather than contract law but the issue can be connected to the contract that is the object of the arbitration clause. Also, if while performing the contract a party commits a contractual fault (in common law terms, a breach of contract) which can also be characterized as a delict (a tort) or commits a separate delict, the tribunal would have jurisdiction over the delictual claim if connected to the contract. I have seen a few instances where the Indonesian party to arbitration also claimed that, in performing the contract, the foreign party defamed the Indonesian party. A claim in defamation is a delictual claim (a tort) but if it happened in the performance of the contract, or is related to it, it would be within the jurisdiction of the tribunal.

In the infamous *Tempo* case, the Court held that an arbitral tribunal could not decide delictual (tort) matters,⁷¹ but this is luckily no longer the case today and Courts in Indonesia now recognize that delictual matters relating to a contract may be arbitrated.⁷²

An additional difficulty occurs however when the Indonesian party files a complaint with the authorities for criminal defamation which is a crime in Indonesia. Unfortunately, some businesses in Indonesia have recourse to the criminal process

⁶⁵ These steps are 1. Whether the parties have specifically chosen the law applicable to the arbitration clause? 2. If not, whether they should be assumed to have chosen the same law as the law governing the main contract? And 3. If not, which law has the closest connection to the arbitration clause? (Usually the law of the seat).

⁶⁶ Singapore, *BNA v BNB* [2019] SGCA 84 (C.A.).

⁶⁷ In *BNA*, the Court of Appeal decided it had no jurisdiction to determine the law applicable to the arbitration agreement as the seat of the arbitration was in China.

⁶⁸ This “closest connection” test is not exactly the same as the one at Art. V(1)(a) of the NYC, which says that if no choice is made, the law of the seat should apply.

⁶⁹ See *supra* note 27.

⁷⁰ SIAC Model Clause,

⁷¹ Indonesia, South Jakarta District Court, *PT Perusahaan Dagang Tempo v. PT Roche Indonesia*, “*Interlocutory Decision No. 454/Pdt.G/1999/PN.Jkt.Sel*” (25 January 2000).

⁷² “Considering that even though the Plaintiff has made a tort claim [. . .] in our opinion the purported tort in fact arose from the termination of the contract by the Respondent which has been subjected to settlement by arbitration under the arbitration clause in the contract [. . .] We must declare ourselves to be without absolute jurisdiction to examine and adjudge this case.” Indonesia, Central Jakarta District Court, *PT Digital Fiducia Indonesia v. Hendrisman Rahim*, “*Interlocutory Decision No. 106/Pdt.G/2013/PN.Jkt.Pst*” (19 September 2013) p. 43 as translated in Soemartono, p. 308.

to put undue pressure on their business partners to resolve what are essentially business disputes. Once the criminal process starts, as is typically the case in many civil law jurisdictions, the Indonesian party to the arbitration agreement can apply to become a civil party to the criminal process and obtain compensation for the crime from the Court hearing the criminal case.⁷³ This compensation is effectively a compensation for the very delict which can also and simultaneously be the object of a claim in arbitration. There is therefore a conflict of jurisdictions as the criminal court and the tribunal would both consider a claim for compensation for defamation and the danger of double compensation is real. Should the court refuse to admit the complainant as a civil party if the compensation for the crime is also compensation for a delict that is within the scope of the arbitration agreement?

To my knowledge, this issue does not seem to have been addressed yet, but in principle, the Indonesian District Court should refuse to hear the civil case if it falls within the scope of the arbitration agreement. In fact, the Code of Criminal Procedure states that “the district court concerned shall consider its competence to adjudicate said [civil] claim”⁷⁴ within the criminal trial. In considering its competence the District Court should respect the Indonesian Arbitration Law which states that “the District Court shall have no jurisdiction to hear disputes of parties bound by an arbitration agreement”⁷⁵ and that “the existence of a written agreement shall exclude the parties’ right to submit their disputes or difference of opinion contained in the agreement to the District Court.”⁷⁶

IV. OTHER CONFLICTUAL ISSUES

A. How Indonesian courts may be asked to exercise personal jurisdiction over the arbitrators sitting in Singapore

Many courts at the seat of arbitration and many tribunals, particularly from common law jurisdictions, issue anti-suit injunctions against a party when that party brings to court a matter that falls within the scope of a valid arbitration agreement.⁷⁷ In principle, such anti-suit injunctions should not be required if all the courts in the world always and readily referred matters to arbitration when the matters fall within the scope of an arbitration agreement as required by article II(3) of the NYC.⁷⁸

Conversely, courts from some countries, having determined that they have jurisdiction and that a tribunal does not, have also issued anti-arbitration orders or injunctions which order the parties to put an end to the arbitration.

Such anti-suit and anti-arbitration orders are a sign of the failure of NYC to resolve all conflicts of jurisdictions between the courts and the arbitral tribunals. In some

⁷³ “If an act that forms the basis of an accusation in the examination of a criminal case by a district court causes harm to another person, the head judge at trial may at the request of said person decide to combine the civil suit for compensation with the criminal case.” Indonesia, *Undang-Undang tentang Kitab Undang-Undang Hukum Acara Pidana* (Code of Criminal Procedure), UU No. 8 Tahun 1981 (Law No. 8 Year 1981) art. 98(1).

⁷⁴ *Ibid.*, art. 99(1).

⁷⁵ Indonesia Arbitration Law, art. 3.

⁷⁶ Indonesia Arbitration Law, art. 11(1).

⁷⁷ It should be noted that the Indonesian Supreme Court has held that such antisuit injunctions are not enforceable in Indonesia for being against public policy. See Indonesia, Supreme Court, *Astro Nusantara International BV v. PT Ayunda Primamitra*, “Decision No. 01 K/Pdt.Sus/2010” (24 February 2010).

⁷⁸ See again Indonesia Arbitration Law, art. 3 and 11(1).

cases, it might well be that some courts willfully ignore arbitration agreements, do not understand arbitration, or worse, are corrupt and therefore, without any justification, seize jurisdiction and try to stop the arbitration. Such instances of complete disregard for NYC should rightly be denounced.

Let us not forget however that tribunals or courts at the seat issuing such anti-suit orders and the courts in front of which a party has chosen to pursue its case, issuing anti-arbitration orders, may also have a genuine and honest disagreement about the validity of the arbitration agreement which leads each side to sincerely, competently, and honestly believe it alone has jurisdiction and that the other side does not. Such conflicts of jurisdictions over whether a court or a tribunal has jurisdiction frequently happen even between jurisdictions that are known to be arbitration-friendly and known for their integrity. For example in the case of *Dallah*, the French Court applying French law was of the view that the tribunal had jurisdiction⁷⁹ but the English Court, also applying French law, was of the view that the tribunal did not have jurisdiction,⁸⁰ and, presumably, that a court somewhere had jurisdiction.⁸¹ No one would accuse the French or English courts of being amateurish when it comes to the law of arbitration, and corruption is absolutely not a concern, yet they fundamentally disagreed on whether the tribunal or a court had jurisdiction over the matter.

One should therefore be slow to judge the decision of a court in Indonesia or elsewhere to the effect that the tribunal does not have jurisdiction. There may have been many cases in Indonesia where the courts questionably denied the jurisdiction of a tribunal, but we must analyze every decision before concluding that it is unjustified.

There is one situation however in which the anti-arbitration orders sought by Indonesian parties and sometimes granted by Indonesian Courts, cannot be justified. Whereas anti-suit and anti-arbitration orders in the vast majority of countries are issued only against the parties that have brought the lawsuit or the arbitration and not against the court or the tribunal, sometimes in Indonesia an order is sought not only against the parties but also against the arbitrators personally. This can take the form of a *uang paksa* (*astreinte* in French, *dwangsom* in Dutch) which is an order to the other party and the arbitrators personally to desist from the arbitration, failing which the party and the arbitrators will have to pay a sum of money in the form of damages for non-performance to the complaining party for every day that the order is not respected.⁸² This is frankly quite outrageous and severely hurts Indonesia's reputation in the international business and arbitration community. How would Indonesia feel if a Court in Singapore was to order Indonesian judges to personally pay tens of thousands of US dollars because, in the exercise of their functions, they

⁷⁹ France, *Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co*, *Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533* (17 February 2011), (in French) [https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15b54f1531ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originContext=document&transitionType=DocumentImage&uniqueId=939220ed-91a0-40fc-b67a-36e63c41bd4e&ppcid=978e20c11f9a4cbacef90ba01a4037f&contextData=\(sc.DocLink\)&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15b54f1531ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originContext=document&transitionType=DocumentImage&uniqueId=939220ed-91a0-40fc-b67a-36e63c41bd4e&ppcid=978e20c11f9a4cbacef90ba01a4037f&contextData=(sc.DocLink)&comp=pluk) accessed 27 February 2022.

⁸⁰ *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] 3 W.L.R. 1472 (U.K. Supreme Court).

⁸¹ The courts did not issue anti-suit or anti-arbitration injunctions as they were concerned with the enforcement of an award, but I am using this case to show that courts may have a sincere disagreement about whether a court or a tribunal has jurisdiction.

⁸² "In the *Lirik* arbitration, proceedings were even brought against the individual arbitrators and the institution administering the arbitration. Nor is this an isolated or historic practice." *Global Arbitration Review, "It's getting easier in Indonesia."*, <https://globalarbitrationreview.com/its-getting-easier-in-indonesia> accessed 27 February 2022.

sincerely disagree with the Singapore Court on a point of law relating to their very own jurisdiction? This is how outrageous *uang paksa* orders against arbitrators are.

The payment of such damages imposed on arbitrators cannot be enforced in Singapore since the IAA exempts arbitrators from any liability⁸³ as do most Rules of Arbitration.⁸⁴ The fact that the arbitration rules or the law of the seat chosen by the parties exempt from liability the arbitrators should bar any party, especially one who has agreed to these rules and/or to a seat in Singapore, from seeking a *uang paksa* order against the arbitrators. An arbitrator who is the object of such an order would however be traveling to Indonesia at his or her own risk.

One of the consequences of such requests by some Indonesian parties is that some professional arbitrators who would be excellent at handling Indonesia-related cases refuse to sit on such matters for fear of being the object of such an order. This is damaging Indonesia's reputation as well as detrimental to the parties to arbitrations as they cannot recruit some of the very best arbitrators for their cases. It is hoped that Indonesian Courts will no longer grant requests by Indonesian parties for orders against arbitrators.

B. One thing the Tribunal should know about enforcement of the award in Indonesia

I mentioned that I would not focus on the enforcement in Indonesia of awards issued by Singapore-seated tribunals, but I will mention one provision of the Indonesian Arbitration Law that requires tribunals to take action before they become *functus officio* (before they no longer have official authority – i.e. before they are no longer tribunals). It is a case of the Indonesian law of enforcement of awards affecting the tribunal seated in Singapore.

Rules of arbitration often require the tribunal to issue an enforceable award.⁸⁵ Article 67(1) of the Indonesian Arbitration Law states:

“An application to enforce an International Arbitration Award shall be submitted after the award has been delivered to the Clerk of the Central Jakarta District Court and registered there by the arbitrator or his/her/its proxy.” (Emphasis added)

This is an extremely unusual, and frankly outlandish, provision and it is a clear violation of the NYC which provides that it is a party to the arbitration, not the arbitrator, who must submit the award for enforcement. Article IV(1) of the NYC states:

“To obtain the recognition and enforcement mentioned in the preceding article,

⁸³ IAA, s. 25: “An arbitrator shall not be liable for — (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.”

⁸⁴ See for example SIAC Rules, Rule 38.1 “Any arbitrator, including any Emergency Arbitrator, any person appointed by the Tribunal, including any administrative secretary and any expert, the President, members of the Court, and any directors, officers and employees of SIAC, shall not be liable to any person for any negligence, act or omission in connection with any arbitration administered by SIAC in accordance with these Rules.” See also *ICC Rules of Arbitration 2021*, art. 41: “The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”

⁸⁵ See for example SIAC Rules, rule 41.2.

the party applying for recognition and enforcement shall, at the time of the application, supply:

“(a) The duly authenticated original award or a duly certified copy thereof;” (Emphasis added).

Given this bizarre provision of the Indonesian Arbitration Law, a tribunal seated in Singapore which is going to issue an award that one of the parties may want to enforce in Indonesia will likely be asked to issue “powers of attorney” (using a common-law term but also an accurate translation of the Indonesian term “*kuasa*” – power), or in proper civil law English, to issue a mandate (“*lastgeving*” in Dutch)⁸⁶ to the parties authorizing them to submit and register the award on behalf of the arbitrator(s). This can be done either as an annex to the award or as a separate act of mandate. This makes sure that the award is enforceable in Indonesia.

As we know, however, the tribunal becomes *functus officio*, usually, right after issuing the award – it no longer is a tribunal or an arbitrator.⁸⁷ Therefore, the mandate should be given before the Tribunal becomes *functus officio*, although arguably the arbitrators, even after they have become *functus officio*, still have the statutory power to file the award with the court or to give a mandate to someone to do so under Article 67(1) of the Indonesian Arbitration Law.

I sometimes wonder how efficient such a mandate can be. Under Indonesian law, a mandate ends when the mandator ceases to exist,⁸⁸ and therefore arguably the mandate would be terminated the minute it is issued along with the award, as the tribunal is usually *functus officio* at that very moment. Nevertheless, such mandates do seem to work probably because they are authorized by the Indonesian Arbitration Law.

V. CONCLUSION

By assuming that the parties to the arbitration had determined that the seat would be in Singapore and that the contract and the arbitration clause would be governed by Indonesian law, this article has avoided some of the most difficult issues of conflicts of laws in arbitration. If no seat is chosen, who should determine the seat (an arbitral institution if any, the courts or the arbitral tribunal)? If no law is chosen, who determines what law applies and how (*voie directe*, *voie indirecte*, law of the seat)?

Nevertheless, even when the parties have chosen Indonesian law and chosen Singapore as the seat, many issues of comparative law and conflicts of laws and jurisdictions still arise. This short article has only broached the topic of conflicts in international arbitration in a very specific context – arbitration in Singapore with an Indonesian party under Indonesian contract law. It is hoped that this short introductory article may contribute to helping avoid some of the pitfalls that diverse rules and situations of conflicts can create in such arbitrations.

⁸⁶ Indonesian Civil Code, art. 1792-1819.

⁸⁷ Model Law, Art. 32(3) states “The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings” which most of the time takes place with the issuance of the award.

⁸⁸ The tribunal becoming *functus officio* is not listed among the facts that terminate a mandate, but the examples provided at art. 1813-1819 of the Indonesian Civil Code lead us to believe that when the mandator ceases to exist (*functus officio*), the mandate ends.

BIBLIOGRAPHY

Legal Documents

a) Laws

England. *Arbitration Act 1996*, <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed on 27 February 2022.

Indonesia. *Burgerlijk Wetboek voor Indonesie (Kitab Undang-Undang Hukum Perdata / Indonesian Civil Code)*, 30 April 1847, S. 1947 No. 23.

Indonesia. *Undang-Undang tentang Peraturan Dasar Pokok Agraria* (Law regarding Basic Agrarian Law). UU No. 5 Tahun 1960, LN No. 104 Tahun 1960 (Law Number 5 Year 1960, SG No. 104 Year 1960).

Indonesia. *Undang-Undang tentang Kitab Undang-Undang Hukum Acara Pidana* (Code of Criminal Procedure), UU No. 8 Tahun 1981 (Law No. 8 Year 1981).

Indonesia. *Undang-Undang tentang Bendera, Bahasa, Dan Lambang Negara, Serta Lagu Kebangsaan* (Law on National Flag, Language, Emblem and Anthem), UU No. 24 Tahun 2009 (Law No 24 of Year 2009).

Indonesia. *Undang-Undang tentang Arbitrase dan Alternatif Penyelesaian Sengketa* (Arbitration and Alternative Dispute Resolution), UU No. 30 Tahun 1999 (Law No. 30 Year 1999).

Indonesia. *Undang-Undang Tentang Kekuasaan Kehakiman (Law on Judicial Power)*, UU No. 48 Tahun 2009 (Law No 48 Year 2009).

Singapore. *International Arbitration Act*, Statute of Singapore, Chapter 143A.

b) Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York, 10 June 1958. *United Nations Treaty Series*. Vol. 330. No. 4739. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed on 27 February 2022.

c) Official Documents of the United Nations

United Nations. General Assembly. *UNCITRAL Model Law on International Commercial Arbitration 1985, Resolution 40/72 (11 December 1985) UN Document A/40/17, annex 1*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf accessed on 27 February 2022.

United Nations. General Assembly. *UNCITRAL Model Law on International Commercial Arbitration 2006, Resolution 61/33 (4 December 2006)*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed on 27 February 2022.

d) Rules of arbitration

Arbitration Rules of the Singapore International Arbitration Centre [SIAC Rules] 6th Edition, 1 August 2016, <https://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English%20Feb%202017.pdf>, accessed on 27 February 2022.

ICC Rules of Arbitration 2021, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> Accessed on 27 February 2022.

e) Cases

England, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs*,

- Government of Pakistan* [2010] 3 W.L.R. 1472 (U.K. Supreme Court).
- England, Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 (C.A.).
- France, *Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co, Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533* (17 February 2011), available in French at [https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15b54f1531ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=939220ed-91a0-40fc-b67a-36e63c41bd4e&ppcid=978e20c11f9a4cbbacef90ba01a4037f&contextData=\(sc.DocLink\)&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15b54f1531ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=939220ed-91a0-40fc-b67a-36e63c41bd4e&ppcid=978e20c11f9a4cbbacef90ba01a4037f&contextData=(sc.DocLink)&comp=pluk) accessed 27 February 2022.
- Indonesia, Supreme Court, *Astro Nusantara International BV v. PT Ayunda Primamitra*, “Decision No. 01 K/Pdt.Sus/2010” (24 February 2010).
- Indonesia, Supreme Court, *Karaha Bodas*, “Decision No. 01/Banding/Wasit.Int/2002” (8 March 2004).
- Indonesia, Central Jakarta District Court, *PT Digital Fiducia Indonesia v. Hendrisman Rahim*, “Interlocutory Decision No. 106/Pdt.G/2013/PN.Jkt.Pst” (19 September 2013).
- Indonesia, South Jakarta District Court, *PT Perusahaan Dagang Tempo v. PT Roche Indonesia*, “Interlocutory Decision No. 454/Pdt.G/1999/PN.Jkt.Sel” (25 January 2000).
- Indonesia, Central Jakarta District Court, *PT Perusahaan Listrik Negara (Persero) v. PT Paiton Energy*, “Interlocutory Decision No. 517/Pdt.G/1999/PN.Jkt.Pst” (13 December 1999).
- Singapore, *BCY v BCZ* [2016] SGHC 249.
- Singapore, *BNA v BNB* [2019] SGCA 84.
- Singapore, *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] SGHC 187.
- Singapore, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.

Books

- Born, Gary. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 6th ed. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2021.
- Budidjaja, Tony. *Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia*. Jakarta: Tatanusa, 2002.
- Chan, Darius, *et al. Law and Theory of International Commercial Arbitration in Singapore*. Singapore: SAL Academy Publishing, 2022.
- Rajagukguk, Erman. *Arbitrase Dalam Putusan Pengadilan*. Jakarta: Chandra Pratama, 2000.

Book Chapters

- Bell, Gary F. “Arbitration and Comparative Law” in *The Cambridge Companion to International Arbitration*, edited by C.L. Lim, 61-78. Cambridge: Cambridge University Press, 2021.
- Bell, Gary F. “Codification and Decodification: The State of the Civil and Commercial Codes in Indonesia” in *Codification in East Asia – Selected Papers from the 2nd IACL Thematic Conference*, edited by Wen-Yeu Wang, 39-50. Switzerland: Springer, 2014.
- Soemartono, Gatot and Lumbantobing, John. “Indonesian Arbitration Law and

Practice in Light of the UNCITRAL Model Law” in *The UNCITRAL Model Law and Asian Arbitration Laws*, edited by Gary F Bell, 262-298. Cambridge: Cambridge University Press, 2018.

Articles

- Adolf, Huala. “The Provisions on the Enforcement of Foreign Arbitration Awards in Indonesia (under the New York Convention of 1958).” *Journal of Arbitration Studies* 27 Vol. 3 (2017): 33-52.
- Bedner, Adriaan. “Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions.” *Hague Journal on the Rule of Law* Year 5 (2013): 253-273.
- Bell, Gary F. “The Civil Law, the Common Law, and the English Language – Challenges and Opportunities in Asia.” *Asian Journal of Comparative Law* 14 (2019): S29–S49.
- Rubins, Noah. “The Enforcement and Annulment of International Arbitration Awards in Indonesia.” *American University International Law Review* 20 (2005): 359-402.

Websites

- Global Arbitration Review, “It’s getting easier in Indonesia.” <https://globalarbitrationreview.com/its-getting-easier-in-indonesia> accessed 27 February 2022.
- Singapore International Arbitration Centre [SIAC], “Annual Report 2020”, p. 17, https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf accessed on 27 February 2022.