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Alvansa Vickya
Universitas Indonesia, alvansa.vickya@gmail.com

Tiurma M.P. Allagan
Universitas Indonesia, pittaallagan2@gmail.com

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IMPLICATIONS OF NON-EXCLUSIVE CHOICE OF FORUM CLAUSES IN DETERMINING THE COMPETENT DISPUTE RESOLUTION FORUM IN INDONESIA

Alvansa Vickya[1], Tiurma M. Pitta Allagan[2]

Bachelor of Law, Universitas Indonesia.
Senior Lecturer, Universitas Indonesia.

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Corresponding author's e mail : alvansa.vickya@gmail.com ; pittaallagan2@gmail.com

Abstract

This research aims to analyze the implications of a non-exclusive choice of forum clause in determining the competent dispute resolution forum in Indonesia based on theories related to Private International Law, International Contract Law, and International Civil Procedure Law. Based on the results of this research, the implications of the non-exclusive choice of forum clause in determining the competent dispute resolution forum in Indonesia have not been fully regulated by Indonesian laws and regulations. This can be seen from the use of the doctrines of forum non conveniens, lis pendens, and res judicata, the three of which are still not contained in the laws and regulations in Indonesia, even though there are already doctrines implied in Article 118 of HIR, namely the basis of presence and the principle of effectiveness. This shows that there is no legal certainty regarding a dispute in which the parties have a non-exclusive choice of forum. Therefore, it would be better if Indonesia had a written law about Private International Law and ratified the Hague Choice of Court Convention 2005 to provide certainty, justice, and legal benefits for every party who will act in the civil and commercial law field, especially in disputes arising from international contracts in which there is a non-exclusive choice of forum.

Keywords*: non-exclusive choice of forum, Indonesian international procedural law, dispute*

Abstrak

Penelitian ini ditujukan untuk menganalisis implikasi adanya klausul pilihan forum non eksklusif perihal penentuan forum penyelesaian sengketa di Indonesia berdasarkan teori-teori terkait Hukum Perdata Internasional, Hukum Kontrak Internasional dan Hukum Acara Perdata Internasional. Penulis dalam penelitian ini menggunakan metode penelitian yuridis normatif. Berdasarkan hasil penelitian ini, implikasi dari klausul pilihan forum non eksklusif dalam menentukan forum penyelesaian sengketa di Indonesia belum diatur secara utuh oleh peraturan perundang-undangan di Indonesia. Hal tersebut dapat dilihat dengan masih digunakannya doktrin forum non conveniens, lis pendens, serta res judicata yang ketiganya masih belum terdapat dalam peraturan perundang-undangan di Indonesia, meskipun telah terdapat doktrin yang tersirat dalam Pasal 118 HIR, yakni the basis of presence dan principle of effectiveness. Hal ini menunjukkan bahwa belum terdapat kepastian hukum terhadap suatu sengketa yang di dalamnya terdapat pilihan forum non eksklusif di antara para pihaknya. Oleh karena itu, alangkah lebih baiknya apabila Indonesia memiliki Undang-Undang Hukum Perdata Internasional dan aksesi Hague Choice of Court Convention 2005 demi memberikan kepastian, keadilan, serta kemanfaatan hukum bagi setiap pihak yang akan bertindak dalam ranah hukum perdata dan dagang, khususnya dalam sengketa yang timbul dari kontrak internasional yang di dalamnya terdapat pilihan forum non eksklusif.

Kata Kunci*: Pilihan Forum Non Eksklusif, Hukum Acara Perdata Internasional Indonesia, Sengketa*

[1] Bachelor of Law, University of Indonesia. alvansa.vickya@gmail.com
[2] Senior Lecturer of Private International Law, Faculty of Law, University of Indonesia. tiurma@ui.ac.id

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I. INTRODUCTION

In this day and age, the relevance of Private International Law is growing day by day. Private International Law, according to Sudargo Gautama, is:

> *"All regulations and legal judgment that indicate which legal systems apply or what constitutes law, where the relationships and events between citizens and citizens at a certain time show the points of connection and the systems and the legal rules of two or more different countries in the sphere of power of place, person, and issues."*[3]

Developments in the relevance of Private International Law, one of which is caused by a substantial increase in cross-border transactions, have resulted in legal problems such as disputes over jurisdictions competent to examine and adjudicate cases in cross-border transactions.[4] There is a contract with an essential function in these cross-border transactions.[5] The development of contracts in cross-border transactions or what can be known as international contracts in Private International Law are often broken down into two theories, namely the choice of law and the choice of forum.

Choice of law is about the law that applies to a contract determined by the parties themselves, also known as *partij autonomie, which means the parties' autonomy to determine the law that will rule over their contract.*[6] The parties' autonomy does not provide the ability for the parties to create laws for themselves but only gives the parties the authority to choose the law to be used as long as it is still limited to the field of contract law.[7] This is different from the choice of forum, which is defined as the selection of a forum or institution that the parties have agreed upon as a forum that has the authority to examine and adjudicate disputes arising from the parties' legal relationship.[8] The choice of the forum itself, according to Black's Law Dictionary, is referred to as a forum-selection clause, namely a contractual provision in the form of an agreement between the parties in determining the country or the form of a forum in resolving cases between the parties, where this provision is often known as exclusive choice of forum clause.[9]

The difference between the choice of law and choice of forum has been emphasized in Indonesia by jurisprudence, especially in Judgment No. 3253K/PDT/1990, dated November 30, 1993. In that judgment, it is ruled that although the parties have the freedom to make choices about the law governing the agreement, the Procedure Law that has to be used is the Procedure Law of the country where the trial was conducted. It is a landmark decision which means that regardless of the Material Law that applies to the contract, the Procedure Law will still be based on which country the trial was conducted.[10] Through this judgment, the judges find that the legal basis of the Choice Forum itself in Indonesia is based on Article 1338 *Burgerlijk Wetboek (BW), which*

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

[4] Mary Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," in *Optional Choice of Court Agreements in Private International Law*, Mary Keyes, *ed*., (Swiss: Springer Nature Switzerland AG, 2020), 3.

[5] Basuki Rekso Wibowo, "Pembaruan Hukum Antar Tatahukum Indonesia Dalam Rangka Mendukung Perkembangan Ekonomi di Era Globalisasi," *Jurnal Rechtsvinding Volume 7 No. 2* (Agustus 2018), 170.

[6] Gautama, *Pengantar,* 34.

[7] Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid II Bagian 4 Buku ke-5*, (Bandung: Penerbit P.T. Alumni, 2004), 4-5.

[8] Zulfa Djoko Basuki, *et al., Hukum Perdata Internasional*, ed. 2, (Tangerang Selatan: Penerbit Universitas Terbuka, 2020), 7.4.

[9] Garner, *ed*., *Black's,* 726.

[10] Garner, *ed*., *Black's,* 726.

contains the principle of freedom of contract.

Theory regarding the choice of forum was then developed to give rise to the theory of non-exclusive choice of forum, which differs from the choice of forum in general in the form of an exclusive choice of forum.[11] The development and research of theory regarding a non-exclusive choice of the forum are still lacking compared to an exclusive choice of forum, even though a non-exclusive choice of forum is more complex than the exclusive one. This is because the non-exclusive choice of forum is not explicitly regulated by Indonesian Law, whereas the exclusive choice of the forum could be based on the choice of domicile in Indonesian Procedural Law. Furthermore, the scarcity of cases with a non-exclusive choice of forum is few and far between, which contributes to the scarcity of research on the non-exclusive choice of forum.

The non-exclusive choice of forum has legal consequences in that any forum other than the forum that the parties have chosen can adjudicate the case in question.[12] Regarding this development, there is an imbalance regarding the regulation between an exclusive choice of forum and a non-exclusive choice of forum, where the regulation regarding the non-exclusive choice of the forum does not have the same legal certainty as the exclusive choice of forum.[13] This raises legal issues that need to be resolved regarding the non-exclusive choice of the forum because there is no legal certainty regarding the implications of the non-exclusive choice of the forum itself.[14]

Based on those premises above, legal issues regarding the non-exclusive choice of the forum must be solved to get a legal certainty concerning the non-exclusive choice of forum in Indonesia, specifically regarding the implication and application of a non-exclusive choice of forum based on Indonesian Law. In accordance with the legal issues, this article will provide detailed theories in Indonesian International Civil Procedural Law to thoroughly understands the fundamental issues related to the non-exclusive choice of forum in Indonesian Law and the relative authority of Indonesian Courts.

II. INDONESIAN INTERNATIONAL CIVIL PROCEDURAL LAW

Indonesia's International Civil Procedural Law includes all regulations of a civil procedural nature that have foreign elements. This law regulates international aspects, namely foreign aspects of the procedural law of the litigants, so it can be concluded that the Indonesian International Civil Procedural Law is part of the Procedural Law as long as there are foreign elements in it.[15] Therefore, it can be concluded that the Indonesian International Civil Procedural Law is the Indonesian Civil Procedural Law in which there are foreign elements. The definition of civil procedural law itself, according to Retnowulan Sutantio, is all legal rules aimed at determining and regulating the implementation of civil rights and obligations derived from material civil law.[16] In addition, there is an opinion from Subekti which says that civil procedural law is the guarantor of the wheels of the court so that it can run smoothly so that all rights and obligations given by material law, both written and

[11] Keyes, *Optional,* 3.
[12] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 236.
[13] Keyes, *Optional,* 5.
[14] Keyes, *Optional* 5-6.
[15] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 203.
[16] Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori and Praktek*, (Bandung: Mandar Maju, 2009), 1-2.

unwritten laws, can be realized.[17]

There are two opinions on this International Civil Procedural Law where one party considers that the International Civil Procedural Law is included in the Civil Procedural Law. In contrast, the other party considers the material contained in it foreign elements, so it is considered part of Private International Law.[18] International Civil Procedure Law covers the subject of "conflict of jurisdiction" or "*conflict de jurisdiction". This is because the elaboration of issues in International Civil Procedure Law must use the aspects of International Civil Law to include it in the issues of Private International Law. Therefore, International Civil Procedure Law is considered a part of International Civil Law due to foreign elements that make it closer to International Civil Law than Civil Procedure Law.*[19] However, the International Civil Procedural Law provisions can be said to relate to foreign elements in the Civil Procedural Law. This is indicated by the possibility that the parties or one of the litigation parties are foreign nationals, the evidence submitted is abroad, the use of foreign material law, the recognition of foreign judgment, or the need for assistance in the examination conducted by the foreign court.[20]

According to Sudargo Gautama, the legal issues contained in the Indonesian International Civil Procedural Law include:[21]

1. Jurisdiction

The issue regarding jurisdiction is due to the absence of specific rules regarding jurisdictional competence or the authority of Indonesian judges in examining and adjudicating civil disputes with foreign elements. However, there are regulations relating to the commencement of cases being examined and tried in Indonesia, namely Article 118 of the *Herziene Indonesisch Reglement*[22] ("HIR"). In the article, there are several ways, namely submitted to the District Court at the defendant's place of residence, submitted to the District Court at the defendant's residence, submitted to the residence of one of the defendants if there are several defendants, submitted to the District Court at the plaintiff's residence if there are several defendants. Besides that, there is a possibility that the parties have chosen a domicile so that the lawsuit can be filed at the District Court at the defendant's residence or the District Court at the domicile chosen by the parties.[23] There is a problem regarding suing foreign parties in Indonesian Courts due to the possibility that foreign parties do not have a domicile or place of residence in Indonesia. Therefore, the provisions of Article 100 of the *Reglement of de Rechtsvordering*[24] ("RV") are used as the basis for suing foreign

[17] Subekti, *Hukum Acara Perdata*, (Bandung: Binacipta, 1982), 8.

[18] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 204.

[19] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 205-206.

[20] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 208.

[21] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 208-209.

[22] *Herziene Indonesisch Reglement* applies in the Dutch East Indies, especially for Java and Madura, which is stated in the *Staatsblad* of 1884 No. 16 and *Staatsblad* of 1941 No. 44 which then came into force in Indonesia based on Article II of the transitional rules of the 1945 Constitution which were amended to become Article I of the transitional rules of the 1945 Constitution after the 4th Amendment.

[23] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 211.

[24] *Reglement of de Rechtsvordering* is a civil procedural law that applies in the Dutch East Indies as stated in the *Staatsblad* of 1847 No. 52 and *Staatsblad* of 1849 No. 63 against the European Group and the Foreign Eastern Group at that time, where this provision was then applied in Indonesia based on Article II of the transitional rules of the 1945 Constitution which were amended to become Article I of the transitional rules of the 1945 Constitution after the 4th Amendment.

parties. Based on these provisions, Indonesian civil and commercial laws are enforced against foreign nationals as long as they are not specified otherwise.[25] The application of Article 100 RV is notably seen in Judgment No. 3215K/PDT/2001 between Suharto as the plaintiff against Time Magazine and several other defendants regarding the good name of Soeharto that Time Magazine tarnished.[26]

2. Recognition and Implementation of Foreign Court Judgment

Judgment from foreign courts in the form of *condemnatoir judgment or punishing judgment regarding the rights and liabilities of parties cannot be implemented in Indonesia, and this is because of the principle of territorial sovereignty, which resulted in foreign court judgment cannot be directly implemented in Indonesia in its power as long as there is no international agreement resulting in the foreign court's judgment can be directly implemented in Indonesia. This is based on Article 436 RV Indonesia, which states that foreign court judgment cannot be directly implemented in Indonesia except for cases concerning ships under Article 724 Wetboek van Koophandel*[27].[28] The foreign judge's judgment was also strengthened by the 1920 *Hoge Raad (Dutch Supreme Court) Judgment, which adjudicated that the foreign judge's judgment had no definite force (gezag van gewijsde). The reason for this is because of Article 431 RV, the principle of judicial sovereignty and territorial sovereignty. The two principles state that courts from a country can only recognize the power of court judgment from the same country. Therefore, the judgment of a foreign court that cannot be executed directly in Indonesia under Article 436 RV resulted in him being required to file a new lawsuit regarding the case in Indonesia. The foreign court's judgment can only be presented as evidence in the judicial process in Indonesia. The proving power of the foreign court's judgment is the court's authority that examines and hears the case, namely to consider it as evidence or not.*[29]

3. Evidence Examination

Evidence as a third issue is based on the issue of which rules are used in evidence, whether it includes procedure or substance. There are two prominent opinions regarding the classification of evidence as a part of procedural law (procedures) or material law (substance). This difference is because several legal systems in various countries classify evidence to be regulated by the civil procedural law of their own country. According to Sudargo Gautama, judges in Indonesia will always use their country's procedural law, so it can be concluded that the rules of procedural law used in Indonesia are *lex fori, which means the evidence will be classified as a part of procedural law in Indonesia.*[30]

4. Litis Pendentie

The fourth problem is litis pendentie (lis alibi pendens or lis pendens). This theory means that a case with the same parties can be simultaneously heard and tried by more than one court. In this case, if a case with the same parties can be examined and tried by more than one court at the same time, there is a limitation in the form of one case for

[25] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 214-216.

[26] 24.

[27] *Wetboek van Koophandel* entered into force in the Dutch East Indies on April 30, 1847, as stated in the *Staatsblad* of 1847 No. 23 which then came into force in Indonesia based on Article II of the transitional rules of the 1945 Constitution which were amended into Article I of the transitional rules of the 1945 Constitution after the 4th Amendment, where this provision began to be known as the Commercial Code.

[28] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 277-282.

[29] Basuki, *et al., Hukum Perdata ...,* 7.24.

[30] Basuki, *et al., Hukum Perdata ...,* 307-309.

one court so that one can only be examined by one court. This is because if there is more than one judgment from several different courts, it will result in those judgments being vexatoir or useless, according to Sudargo Gautama.[31]

Concerning the jurisdiction issues stated above, according to Sudargo Gautama, the determination of the relative authority as part of the court's jurisdiction is based on the presence and the principle of effectiveness.[32] According to the first principle, the territorial jurisdiction of a country is limited to people and all objects contained within the territory of that country, except for matters based on immunity, sovereign states, and diplomatic staff, so it is considered that if the defendant is not examined and tried in domicile, will be detrimental to the defendant in their evidence examination.[33] Furthermore, based on the second principle, an enforceable judgment is considered only given by the court where the defendant is domiciled so that justice can be created for the parties.[34] Based on the Indonesian International Civil Procedural Law, the determination of the relative authority of a court is regulated in Article 118 HIR and Article 142 *Rechtreglement voor de Buitengewesten*[35] *("RBg"), where these provisions are based on the principle of the basis of presence and the principle of effectiveness, the provisions of which contain:*[36]

1. The court has the authority in the jurisdiction of the defendant's domicile (*actor sequitur forum rei*) or if the defendant's place of residence is unknown, the court in the jurisdiction where the defendant's habitual residence is located.[37] This principle is intended to protect the defendant's interests in defending himself so that justice will arise for the parties, especially the defendant.[38] This is explicitly regulated in Article 118 paragraph (1) of HIR.
2. If there is more than one defendant, each court in the domicile of the defendants can have the authority so that the lawsuit must be submitted to the district court in the jurisdiction where one of the defendants is domiciled.[39] This determination is also known as *actor sequitur forum rei* with option rights because the plaintiff can choose one of the District Courts from where the defendants live, where this determination is also intended to support the principles of a simple, fast, and low-cost trial.[40] This is explicitly regulated in Article 118 paragraph (2) of HIR.
3. There is also a *sequitur forum rei actor* without option rights in Article 118 paragraph (2) HIR which is based on the residence of the principal debtor, where if the defendants have a relationship with each other, one has the position of the principal debtor, while the other has the position of the guarantor. The District

[31] Basuki, *et al., Hukum Perdata ...*,274-275

[32] Basuki, *et al., Hukum Perdata ...,* 213.

[33] Basuki, *et al., Hukum Perdata ...,* 213.

[34] Basuki, *et al., Hukum Perdata ...,* 213.

[35] *Rechtreglement voor de Buitengewesten* or RBg applies in the Dutch East Indies, especially for areas other than Java and Madura, which is laid out in the *Staatsblad* of 1927 No. 227 which then came into force in Indonesia based on Article II of the transitional rules of the 1945 Constitution which were amended to become Article I of the transitional rules of the 1945 Constitution after the 4th Amendment.

The authors use HIR on the basis that the author is located in Java and Madura, so it uses the *Herzien Inlandsch Reglement* in this paper, although both apply in Indonesia in different regions.

[36] Basuki, *et al*., *Hukum Perdata ...*, 7.8.

[37] Basuki, *et al*., *Hukum Perdata ...*, 7.8.

[38] M. Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, and Putusan Pengadilan*, ed. 2, (Jakarta: Sinar Grafika, 2021), 243.

[39] Basuki, *et al*., *Hukum Perdata ...*, 7.8.

[40] Harahap, *Hukum Acara Perdata ...,* 246-247.

Court has the authority to adjudicate the case and to reside in the principal debtor's residence. Plaintiff, in this case, does not have the right to exercise the option right to choose a District Court, which has the authority at the residence of the defendants who have guarantor status.[41]

4. If the domicile or habitual residence of the defendant is not known, the lawsuit will be submitted to a court in the jurisdiction of the plaintiff or where one of the plaintiffs is domiciled.[42] In its application, the plaintiff may not manipulate intentionally stating that the residence of the defendant is unknown so that a certificate from the competent authority is required regarding the unknown place of residence of the defendant.[43] This is regulated explicitly in Article 118 paragraph (3) HIR.
5. If the lawsuit has a connection with an immovable object, the lawsuit must be filed in the court area where the object is located (*forum rei sitae*).[44] There are two conditions for the *forum rei sitae* to apply: the location of the defendant's residence is unknown, and the object of the dispute is immovable so that if the defendant's residence is known, the *actor sequitur forum rei* will apply to the case.[45] This is regulated in Article 118 paragraph (3) HIR.
6. A court can be authorized if there has been a choice of domicile among the parties so that the court in the jurisdiction of the domicile will have authority over the case.[46] The choice of domicile itself does not override the provisions of the principle of *actor sequitur forum rei* because it is voluntary following the provisions of Article 118 paragraph (4) HIR so that the plaintiff has the freedom to choose if there is a choice of domicile and the residence of the defendant or the defendants is known.[47] In addition, against the plaintiff's freedom of choice, an exception cannot be filed because the *actor sequitur forum rei* is not ruled out for the choice of domicile of the parties.[48] This reflects the upholding of the basis of presence and the principle of effectiveness.

Other provisions govern the court's authority in examining and adjudicating cases containing foreign elements, such as the defendant being a foreign citizen. This provision is in Article 100 RV, which stipulates that the Indonesian party can sue a foreign party who does not have a domicile in Indonesia before an Indonesian court. This is a continuation of the provisions of Article 3 of *Algemene Bepalingen van Wetgeving voor Indonesie which stipulates that Indonesian civil law and commercial law may apply to foreigners as long as it is not regulated otherwise.*[49] In addition to Article 118 of the HIR, there are provisions of Article 99 paragraph (1) of the RV, which are in line with Article 118 of the HIR. Based on Article 99 paragraph (1) RV, the lawsuit must initially be submitted to the court in the area where the defendant is domiciled, and if the domicile of the defendant is not known, the lawsuit must be submitted to the defendant's habitual residence.[50] If the defendant does not have a habitual residence or domicile in Indonesia, the lawsuit is filed in the court where the

[41] Harahap, *Hukum Acara Perdata ...,* 246-247.
[42] Basuki, *et al*., *Hukum Perdata* ..., p.7.8.
[43] Harahap, *Hukum Acara Perdata ...,* 248.
[44] Basuki, *et al*., *Hukum Perdata* ..., p.7.8.
[45] Harahap, *Hukum Acara Perdata ...,* 250.
[46] Basuki, *et al*., *Hukum Perdata* ..., p.7.9.
[47] Harahap, *Hukum Acara Perdata ...,* 251-252.
[48] Harahap, *Hukum Acara Perdata ...,* 251-252.
[49] Basuki, *et al*., *Hukum Perdata* ..., 7.9.
[50] Basuki, *et al*., *Hukum Perdata* ..., 7.9-7.10.

plaintiff is domiciled (*forum actoris). Based on the above provisions, it can be concluded that Indonesia adheres to the defendant's domicile and habitual residence as a point of contact for the lawsuit.*[51]

In addition, according to Sudargo Gautama, based on Article 99 Paragraph 3 RV, if the defendant does not have legal standing in Indonesia and does not have a habitual residence or habitual residence in Indonesia, the Indonesian Court can still have the authority to examine and adjudicate. The case as long as the plaintiff is domiciled in Indonesia. Based on Article 100 RV, wherein this theory, Indonesian Citizens can sue Foreign Citizens based on an agreement between the two in the Indonesian Courts. However, the theory has been criticized by various parties because it is considered a legal trap for foreigners who do not know it.[52]

III.CHOICE OF FORUM

There is another option other than the court's authority or jurisdiction over a case, as stated in Article 118 HIR above. This option is called a choice of forum, where the parties choose the forum that will adjudicate the case between parties based on Article 1338 BW (freedom of contract) and Article 118 (6) HIR (choice of domicile). According to Sudargo Gautama, the choice of forum is the freedom for the parties to choose a forum to resolve the dispute between them. However, there are restrictions on this freedom. It is not allowed to choose a forum to resolve disputes in a certain country if the internal law of that country states that the chosen forum is not authorized. Therefore, although the parties may deviate from the relative competence of a forum, they are still limited by the internal legal rules of the forum in the chosen country, especially in the courts.[53]

The term choice of forum is also known as choice of forum and choice of jurisdiction. However, there are differences between the two, where the choice of forum is the selection of a forum from an institution as a dispute resolution institution, while the choice of jurisdiction is the election of the authority of an institution, in this case, the jurisdiction of the court.[54] The primary function of the choice of forum in an international contract is legal certainty in the form of certainty regarding which court has the authority to examine and adjudicate a dispute related to the international contract from the parties themselves.[55] In addition, there are opinions regarding the four main principles of choice of forum, namely:[56]

1. The Principle of Freedom of the Parties/Party Autonomy explains that the forum that will resolve the dispute between the parties is based on the freedom of agreement of the parties themselves, and there is freedom for the parties if they change the dispute resolution forum was agreed upon initially.
2. The *bona fide* principle means that the forum chosen by the parties to resolve disputes must be carried out in good faith and respected by all parties, including the courts. Respect for the parties' agreement is based on the parties' agreement, which is considered the chosen forum to be neutral and fair in resolving disputes

[51] Basuki*, et al*., *Hukum Perdata* ..., 7.10.

[52] Sudargo Gautama, *The Commercial Laws of Indonesia*, (Bandung: Citra Aditya Bakti, 1998), 30.

[53] Gautama*, Hukum ... Jilid III Bagian 2 Buku ke-8,* 233.

[54] Basuki, et al., *Hukum Perdata* ..., 7.43.

[55] Huala Adolf, *Dasar-Dasar Hukum Kontrak Internasional Edisi Revisi*, (Bandung: Refika Aditama, 2014), 188.

[56] Huala Adolf, *Dasar-Dasar Hukum*…, 190-193.

among themselves, where this belief is also known as "genuine intention".

3. The Predictability and Effectiveness Principle explains that the choice of forum should be based on considerations regarding the effectiveness of a forum in examining and adjudicating disputes between parties. This effectiveness includes whether or not the judgment of the chosen forum can be executed. The consideration regarding the effectiveness of this forum is not intended for forum shopping but rather to find an effective forum in giving its judgment, not only providing benefits to one party.
4. The Principle of Exclusive Jurisdiction suggests that the choice of forum should be made firmly and exclusively so as not to create dual jurisdiction. This is based on not creating uncertainty regarding the forum authorized to resolve disputes between the parties.

Even so, there are still restrictions on the choice of forum agreement, restrictions on the choice of forum, such as:[57]

1. No element of fraud is allowed in determining the dispute resolution forum between the parties. This is regulated because even though the parties have the autonomy to determine the authorized forum in resolving disputes, good faith and agreement between the parties are still needed to determine the dispute resolution forum.
2. Limitation of the main authority of the case by the court in the form of absolute competence of a court itself, such as labor disputes which are only examined and adjudicated by the Court of Industrial Relations.
3. Limitations of the court's authority to the disputing parties, such as not being able to be examined and tried by foreign courts on state actions in the field of public law.
4. Forum non conveniens as a limitation in the form of not implementing the choice of a forum from the parties by the court that the parties have chosen. This is since other courts are considered more appropriate for examining and adjudicating the parties' disputes by the courts that have been chosen.
5. The effectiveness or functionality of the chosen forum, where there is a possibility that even though the chosen forum has examined and adjudicated the dispute of the parties, the judgment of the forum is not effective or does not function so that it cannot be implemented. Another reason is the possibility that the forum chosen by the parties is completely unable to examine and adjudicate the parties' disputes due to certain reasons.
6. The public order of a country also limits the choice of forum. If the choice of forum is contrary to the public order, the courts in that country will not respect the choice of the forum from the parties.

As stated in the introduction, the choice of the forum itself as a theory is developed into the exclusive choice of forum and the non-exclusive choice of forum. The exclusive choice of forum is an agreement between the parties in determining the forum that is authorized to examine and adjudicate disputes that arise or may arise based on their relation to the parties' engagement. The parties, in this case, will choose an authorized forum by excluding the authority of other forums. There are two purposes for using the exclusive forum option: making the selected forum an authorized forum and excluding other forums that have the possibility of becoming competent forums

[57] Huala Adolf, *Dasar-Dasar Hukum*..., 193-196.

in examining and adjudicating disputes.[58]

The exclusivity of a chosen forum gives rise to the choice of that forum as a *Janus-faced clause.*[59] This is because the choice of the forum only refers to a forum as an authorized forum. However, on the other hand, the choice of the forum itself is an exception to all the other forums that were not selected. The existence of exclusivity in a choice of forum proves that two things arise due to the agreement, appointing a forum as an authorized forum and refusing other forums to become an authorized forum.

The non-exclusive choice of forum, according to Sudargo Gautama, is a choice of forum in which any forum other than the forum that the parties have chosen can adjudicate the case. [60] This type of choice of forum can result in a multi-faceted dispute. A *multifora dispute is when there are multiple competent forums have the authority to resolve a dispute.* [61] This is also supported by the opinion of Michael E. Schneider, which states that a *multifora dispute is a dispute that has multiple competent forums.* [62] Thus, the implication of this choice of forum, because of its non-exclusivity, means that other courts besides the chosen court could become competent to adjudicate the case. Since all other courts besides the chosen court could be competent, a parallel proceeding is possible, resulting in more than one judgment for the same case in different jurisdictions and courts.

The implication of a non-exclusive choice of a forum that results in more than one judgment for the same case in different jurisdictions and courts means that it is crucial to determine the competent dispute resolution forums in cases with a non-exclusive choice of forum. Several doctrines to determine the competent dispute resolution forums are recognized in Indonesia, namely *forum non conveniens, lis pendens, and res judicata.* The first doctrine, namely *forum non conveniens, is recognized in Indonesia.* This doctrine explains that a court can be considered incompetent to examine and adjudicate a case if a court is more appropriate in examining and adjudicating the case even though there has been a choice of forum or a choice of jurisdiction between the parties. [63]

According to Sudargo Gautama, the doctrine of *forum non conveniens means that a court is incompetent if the judicial process overrides the interests of foreign parties. This was based on the case of Inre Logain v. Bank of Scotland (1906) in England. In that case, the British judge stated that if the events related to the case occurred in a country other than the country's chosen Court, then the Court would not have the authority to examine and adjudicate the case because there is a possibility that one party will make it difficult for the other parties.*[64] The doctrine of the *forum non conveniens provides freedom for judges to adjudicate that they are incompetent to examine and adjudicate cases before them, even though, based on formal law regarding international authority, they have authority over these cases. The basis of this doctrine is in the form of insufficient points*

[58] Zheng Tang, "*Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce*," *Journal of Private International Law Volume 1 No. 2* (Oktober 2005), 237.

[59] Michael Gruson, "*Forum-Selection Clauses in International and Interstate Commercial Agreements*," *University of Illinois Law Review No. 1* (1982), 136.

[60] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 236.

[61] Setiawan, "Kontrak Bisnis Internasional: *Choice of Law & Choice of Jurisdiction*," *Varia Peradilan Majalah Hukum Bulanan Tahun IX No. 107* (Agustus 1994), 127.

[62] Michale E. Schneider, "*Multi-Fora Disputes*," *Arbitration International Volume 6 Issue 2* (1990), 101.

[63] Harahap, *Hukum Acara Perdata ...,* 256-257.

[64] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 274.

of connection/points of contact within the legal scope of a court. [65] In practice, this doctrine itself is an extension of the relative competence of a court because there is a possibility that a court may be more appropriate than another forum based on a more substantial connection to a dispute. The starting point of this more substantial connectivity is based on connecting factors or connectivity factors. The details of the connecting factors themselves are: [66]

1. Ease and cost of litigation;
2. Availability of witnesses and related documents;
3. Residence of the parties;
4. The place where the parties conduct their business activities;
5. The law governing the dispute comes from the choice of law or not.

Second, the doctrine of *lis pendens is a doctrine that is often used when there is a dispute regarding which forum is competent to resolve a dispute. According to this doctrine, a case with the same parties is heard and tried by more than one Court simultaneously. If there is more than one judgment from several different courts, the result is that the judgment is vexatoir or useless, according to Sudargo Gautama.*[67] If there is litigation between the same parties in foreign jurisdictions, there is a possibility to file a "stay of action" or postponement of the proceeding of the case between the parties. This delay can also be based on the doctrine of *forum non conveniens. The postponement of the examination of cases by this court has been regulated in Indonesia with Article 134 RV. Based on this provision, it is stated that if there is a similar case between the same parties that have been filed in another court, the other Court must refuse to adjudicate the case. However, this regulation is primarily intended for internal Indonesian matters without mentioning international relations.*[68]

Third and last, the doctrine of *res judicata is a doctrine that means a particular court has tried a case. This judgment must be final and binding so that the same parties can file no appeal or new lawsuit. Therefore, it can be concluded that res judicata aims as a doctrine to prevent the submission of the same case by the same parties if a competent court has rendered a final and binding judgment. This doctrine results in prohibiting a new judicial process from appearing as a counterclaim to a judgment.*[69]

The use of the above doctrines must comply with the principle of the basis of presence and the principle of effectiveness based on the Indonesian International Civil Procedural Law in Article 118 of the HIR regarding the determination of a court's authority to examine adjudicate cases. [70] This is intended so that judgment issued by a court can be implemented and are not in vain or *vexatoir. Therefore, if all the above doctrines are fulfilled and the principles of the basis of presence and effectiveness are fulfilled, certainty, justice, and legal benefits will be achieved for the parties in cases that have been adjudicated.*

Since no written law explicitly regulates the non-exclusive choice of forum, it is essential for Indonesia to have a law regulating the choice of forum, especially to differentiate between the exclusive choice of forum and non-exclusive choice of forum.

[65] Gautama, *The Commercial Laws ...*, 34.
[66] Harahap, *Hukum Acara Perdata ...*, 255-257.
[67] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 274-275
[68] Gautama, *The Commercial Laws ...*, 40.
[69] John Mckee Van Fleet, *Res Judicata, A Treaties on the Law of Former Adjudication Volume I*, (Indianapolis and Kansas City: The Bowen-Merrill Company, 1895), 2.
[70] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 213.

The regulation will be able to avoid the negative implication of non-exclusive choice of forum, such as the parallel proceeding of the same cases that resulted in more than one judgment for the same case. Based on that reason, Indonesia could have acceded to the Hague Choice of Court Convention 2005, but until now, Indonesia has not yet acceded to the Hague Choice of Court Convention 2005, which entered into force for the participating countries in October 2015. The reason for Indonesia not yet acceding this convention is based on Article 431 RV which regulates the territorial sovereignty of Indonesian courts, which makes foreign courts not applicable in Indonesia. Based on the writers' perspective, Indonesia should accede to this convention as this convention is considered to have important meanings in regulating the choice of forum based on Article 118 HIR and Article 1338 BW as a part of the jurisdictional authority of Indonesian courts in foreign jurisdictions. The important meanings of the Hague Choice of Court Convention 2005 from the writers' perspective are stated below:[71]

1. The provisions of this convention can encourage international trade and investment because it will increase the predictability of the choice of court by the parties so that the implementation of the judgment of the court of choice of the parties becomes easier;
2. There is respect for the national court, which is based on two grounds in the form of acknowledgment of the choice of forum or court by the parties and the obligation to implement court judgment;
3. The creation of cooperation between member countries that encourage increased international cooperation between courts of countries so that it will result in the knowledge, experience, and work ethic of each court;
4. The emergence of legal certainty over the choice of courts of the parties so that the desire of the parties to settle disputes between them in a certain chosen forum can be easily realized and create legal certainty.

Arrangements regarding the non-exclusive choice of the forum are regulated in the provisions of Article 3(b) and 22 Convention on Choice of Court Agreements which contain:[72]

Article 3

b) a choice of court agreement that designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive ***unless the parties have expressly provided otherwise***;

Article 22

(1) A Contracting State may declare that its courts will recognize and enforce judgments given by courts of the other Contracting States designated in a choice of court agreement concluded by two or more parties that meet the requirements of Article 3, paragraph c), and designates, to decide disputes which have arisen or may arise in connection with a particular legal relationship, ***a court or courts of one or more Contracting States (a non-exclusive choice of court agreement)***.

(2) Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that

[71] Gautama, *Hukum ... Jilid III Bagian 2 Buku ke-8*, 138-141.

[72] Hague Conference on Private International Law, Convention on Choice of Court Agreements 2005, 30 Juni 2005, Article 3(b) and 22.

has made such a declaration, the judgment shall be recognized and enforced under this Convention, if -

a) the court of origin was designated in a ***non-exclusive choice of court agreement***;
b) there exists neither a judgment given by any other court before which proceedings could be brought following the ***non-exclusive choice of court agreement*** nor a proceeding pending between the same parties in any other such court on the same cause of action; and
c) the court of origin was the court first seised."

In this provision, the non-exclusive choice of forum clause results in other courts that are not the courts of choice for the non-exclusive choice of the forum being competent to examine and adjudicate disputes. However, in this convention, the provisions regarding the non-exclusive choice of the forum are only limited to the courts of the convention's member countries, not to all forums that examine and adjudicate disputes. Based on this convention, Indonesia could have a jurisdictional authority in foreign jurisdictions and courts that will strengthen legal certainty in Indonesian laws concerning a case with a non-exclusive choice of forum.

These cases below could become an example that the judges respect the choice of the forum agreed by the parties, namely the non-exclusive choice of forum. Moreover, the judges understand that the choice of forum is different from the choice of law and the difference between a non-exclusive choice of forum and the exclusive choice of forum. These judgments could be set as an example of how judges handle a case with a non-exclusive choice of forum.

A. Banten High Court Judgment No. 11/PDT/2021/PT BTN jo. Tangerang District Court Judgment No. 269/Pdt.G/2018/PN.Tng

In this case, at least four connectivity factors indicate that the Indonesian courts, especially the Tangerang District Court, have the authority to adjudicate cases between the parties. These factors include the ease and cost of litigation, the availability of witnesses and documents related to the case, the residence of the parties, and the place where the parties conduct business activities.

The first factor, namely the ease and cost of litigation, is shown in the filing of a lawsuit at the domicile of Defendant I which has its domicile on Jalan BSD Boulevard Barat, Green Office Park Kav. 3, BSD City, Sampora, Cisauk, Tangerang, Banten, Indonesia so that it falls within the scope of authority of the Tangerang District Court. In addition, the lawsuit filed at the residence of Defendant I meets the requirements of the lawsuit following the provisions of Article 118 HIR, where this provision is based on the principle of the basis of presence and the principle of effectiveness, which states that if there is more than one defendant, each court is domiciled. The defendants could have the authority to submit the lawsuit to the district court in the jurisdiction where one of the defendants is domiciled. Therefore, it can be concluded that the Indonesian courts fulfill the first factor due to the ease and low cost of the judicial process for the parties. In this case, two of the three parties have their domicile in Indonesia.

The second factor is the availability of witnesses and documents related to the

case. This is because the execution of the contract between the parties is executed in Indonesia, so the witnesses and related documents would be in Indonesia as well. The witnesses can be factory workers from Plaintiff as the Supplier for the Defendants as the Buyer. In addition, Plaintiff must have documents related to the contract with the Defendants because he has his domicile and place of business in Indonesia.

The third factor is the residence of the parties as indicated by the domicile of the Plaintiff/Appellate, who is domiciled at Rungkut Industri I-Number 14, Surabaya, Indonesia, and Defendant I, which has its domicile on Jalan BSD Boulevard Barat, Green Office Park Kav. 3, BSD City, Sampora, Cisauk, Tangerang, Banten, Indonesia. Two of the three litigants have their domicile in Indonesia, so Indonesian courts have closer ties than Singapore courts.

The fourth factor in the form of where the parties conduct their business activities shows a close relationship between the dispute between the parties and the Indonesian courts. The business activities evidence this carried out by the parties, namely in Indonesia, where Plaintiff has business activities in Indonesia and Defendant I has a place of business activity in the form of factories in Cikarang, West Java, Indonesia, and Surabaya, East Java, Indonesia. Therefore, although Defendant II does not only have business activities in Indonesia, two of the three disputing parties have business activities in Indonesia. The implementation of the contract will be carried out in Indonesia so that the dispute has a close relationship with the Indonesian courts.

In addition to the forum non conveniens doctrine above, there are lis pendens and res judicata doctrines to determine which forum is competent to adjudicate the case. There is no examination of the case by more than one court at the same time, and there is no judgment that has permanent legal force because only the Tangerang District Court examines the case so that the Tangerang District Court can become the competent forum to examine, hear, and adjudicate the dispute between the parties. Based on those explanations, it can be concluded that the Indonesian courts, in this case, the Tangerang District Court, have close connectivity factors to the cases brought against them. In addition, there is no case examination from other courts, and there is no judgment that has permanent legal force when the lawsuit is submitted to the Tangerang District Court. There is also another reason that Defendant has a domicile and place of business in Indonesia so that the judgment from the Indonesian court will fulfill the principle of the basis of presence and principle of effectiveness according to the basis of Article 118 HIR. Therefore, the Tangerang District Court has the authority to examine, hear, and adjudicate cases in the Banten High Court Judgment No. 11/PDT/2021/PT BTN jo. Tangerang District Court Judgment No. 269/Pdt.G/2018/PN.Tng according to the principle of the basis of presence and principle of effectiveness.

B. Supreme Court Cassation Judgment No. 3440K/PDT/2020 jo. Denpasar High Court Judgment No. 167/PDT/2019/PT DPS jo. Denpasar District Court Judgment No. 482/Pdt.G/2018/PN Dps

In this case, at least four connectivity factors indicate that the Indonesian courts, especially the Denpasar District Court, have the authority to adjudicate cases between the parties. These factors include the ease and cost of litigation, the availability of witnesses and related documents, the residence of the parties, and the place where the parties conduct their business activities.

The first factor, namely the ease and cost of litigation, is shown in the filing of a lawsuit at the domicile of the parties having domicile and domicile in Indonesia, where the Defendants have their domicile in Bali, Indonesia so that the Denpasar District Court has the authority over The Defendants. In addition, the lawsuit filed at the residences of the Defendants meets the requirements of the lawsuit per the provisions of Article 118 HIR, where this provision is based on the principle of the basis of presence and the principle of effectiveness, which states that if there is more than one defendant, Each court in the domicile of the defendants could have the authority so that the lawsuit could be submitted to the district court in the jurisdiction where one of the defendants is domiciled. Therefore, it can be concluded that the Indonesian courts fulfill the first factor due to the ease and low cost of the judicial process for the parties because they have their domicile in Indonesia.

The second factor is the residence of the parties indicated by the domicile of Plaintiff, who is domiciled at Rungkut Industri I-Number 14, Surabaya, Indonesia, and Defendant I, who has a domicile on Jalan BSD Boulevard Barat, Green Office Park Kav. 3, BSD City, Sampora, Cisauk, Tangerang, Banten, Indonesia. Two of the three litigants have their domicile in Indonesia, so Indonesian courts have a closer relationship than Singapore courts.

The third factor is the availability of witnesses and documents related to cases that are more directed to Indonesian courts because the implementation and object of the agreement and the parties are in Indonesia, according to the Panel of Judges in Judgment No. 167/PDT/2019/PT DPS, of course, the witnesses and documents related to the case are in Indonesia.

The fourth factor is evidenced by the place where the Defendants conduct business activities, which shows a close relationship between the dispute between the parties and the Indonesian courts. The business activities evidence this carried out by the Defendants in Indonesia, where Defendant I has an office at Gallery Building 1, Novotel Bali, Nusa Dua Hotel and Residence, Jalan Pantai Mengiat, BTDC Complex, PO Box 116, 80363, Nusa Dua, Bali, Indonesia to carry out its business activities in Indonesia. In addition, Defendant II has a business address at the Accor Vacation Club Sales Office, Gallery Building, Novotel Nusa Dua Hotel and Residence, Jalan Terompong BTDC Lot SW 2, Nusa Dua 80363, Bali, Indonesia, as the head office for him. Therefore, it is clear that the Defendants have business activities in Indonesia, so the dispute between the parties has a close relationship with the Indonesian courts.

In addition to the *forum non conveniens doctrine above, there are lis pendens and res judicata doctrines to determine which forum is competent to adjudicate the case. There is no examination of the case by more than one court at the same time, and there is no judgment that has permanent legal force because only the Denpasar District Court examines the case so that the Denpasar District Court can become the competent forum to examine, hear, and adjudicate the dispute between the parties. Based on those premises, it can be concluded that the Indonesian courts, in this case, the Denpasar District Court, have close connectivity factors to the cases brought against them. There is also another reason that because there is a Defendant, namely Defendant II, who is domiciled and has a place of business in Indonesia, the decision of the Indonesian court will fulfill the principle of the basis of presence and principle of effectiveness under the basis of Article 118 HIR. In addition, there has been no examination of cases from other courts, and there is no judgment that has permanent legal force when the lawsuit is submitted to the Denpasar District Court. Therefore, the Supreme Court's Cassation Decision No. 3440K/PDT/2020 jo. Denpasar High Court Decision No. 167/PDT/2019/PT DPS jo. Denpasar*

District Court Decision No. 482/Pdt.G/2018/PN Dps has the authority to examine, hear, and adjudicate the case according to the principle of the basis of presence and principle of effectiveness.

IV. CONCLUSION

Based on the explanations contained in the previous chapters regarding the implications of the non-exclusive choice of forum clause in determining the dispute resolution forum in Indonesia, the conclusions are as follows:

The implications of the non-exclusive choice of forum clause in determining the dispute resolution forum in Indonesia is that because of its non-exclusivity, other courts besides the chosen court could become competent to adjudicate the case. Since all other courts besides the chosen court could be competent, a parallel proceeding is possible, resulting in more than one judgment for the same case in different jurisdictions and courts. The solution to that negative implication is by using the theory of primary point of contact as a factor that indicates that a legal relationship is a legal relationship that is included in the section of International Civil Law, where this theory was later developed in an international contract. An international contract itself is a contract that contains foreign elements or characters in the form of indicators of a contract belonging to the realm of international contract law, where this is defined in various ways ranging from the domicile of the parties in different countries to more general criteria such as the existence of significant relationship or connection of the contract to more than one country, the choice of law from different countries, or affecting the interests of international trade.

The determination of the competent forum will be based on several doctrines. The first doctrine is *forum non conveniens* which states that a court has no authority if the judicial process will override the interests of foreign parties. This doctrine itself is an extension of the relative competence of a court because there is a possibility that a court can be more appropriate than other forums based on a more substantial connection to a dispute. The deciding point of this more substantial connectivity is based on connecting factors or connectivity factors.

In addition to the *forum non conveniens* doctrine above, there are *lis pendens* and *res judicata* doctrines in determining which forum is competent to adjudicate a case. The *lis pendens* doctrine is a doctrine that states that a case with the same parties being examined and tried by more than one court at the same time will result in more than one judgment from several different courts. The consequences that will arise are that the judgment is *vexatoir* or in vain so that the same case should not be examined and tried by more than one court at the same time. The next doctrine is *res judicata*, which states that a case that has been tried by a certain court and the judgment has permanent legal force makes it impossible to submit a new lawsuit by the same parties.

The use of the above doctrines must comply with the principle of the basis of presence and the principle of effectiveness based on the Indonesian International Civil Procedural Law in Article 118 of the HIR regarding the determination of the authority of a court to examine, hear, and adjudicate cases. This is intended so that judgment issued by a court can be implemented and are not in vain or *vexatoir*. Therefore, if all the above doctrines are fulfilled, and the principles of the basis of presence and effectiveness are fulfilled, certainty, justice, and legal benefits will be achieved for the

parties in cases that have been examined, tried, and adjudicated.

Based on the results of the analysis in the previous chapter regarding the application of theories regarding the non-exclusive choice of forum in the judgment of the Indonesian Courts, it is clear that due to the absence of laws and regulations governing disputes in which the parties have an agreement regarding the non-exclusive choice of forum, it is clear that the judge difficult to determine the competent forum. This difficulty is due to the inadequacy of the current laws and regulations, so the use of doctrines related to the non-exclusive choice of forum is required. Therefore, it can be concluded that the doctrines related to the non-exclusive choice of the forum have a great influence in determining the forum competent to adjudicate disputes between the parties in which there is a non-exclusive choice of forum.

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