



# International Jurisdiction of the Indonesian Court in Private International Law Litigation

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**Abstract.** This article will evaluate Indonesian statutory law that can be used as the basis for the Indonesian court to assert jurisdiction over defendants residing abroad. The analysis of this article will be based on legal doctrinal research with statutory and comparative approaches. The instrument used as the comparison rule is the ALI/ UNIDROIT Principles of Transnational Civil Procedure, a ‘soft law’ instrument in which some basic principles of civil procedure applicable in civil law and common law systems converge. The analysis will show that some rules in Indonesian civil procedure can be the basis for the Indonesian court to exercise jurisdiction over non-resident defendants, with considerable attention given to Article 100 Rv. Parallel with its exorbitant jurisdiction, it will be shown that the Indonesian court may also assert jurisdiction in consumer disputes against a trade residing abroad as long as its products are distributed in Indonesia. The Indonesian court also has jurisdiction over labour disputes involving an employer domiciled abroad so far as the employees perform their employment obligation within Indonesian territory.

**Keywords:** Court Jurisdiction · Indonesian Court · Civil Litigation · Private International Law

## 1 Introduction

If there are foreign elements in a civil law relationship, such a relationship shall have private international law issues. One issue of private international law is which national court shall seize jurisdiction over the case [1], but such an issue also correlates with the issue of access to justice. Access to justice concerns whether the people shall obtain justice effectively through the existing legal system and enforce their rights and responsibilities [2]. To provide access to justice, the people shall be able to access the national courts efficiently, including national courts that may have jurisdiction over defendants who reside abroad in accordance with the general principles of jurisdiction. The jurisdictional issue of the national courts over non-resident defendants becomes crucial in this globalized world, where people from various jurisdictions may come into contact and engage in many legal relationships.

Almost all legal systems accept that a national court shall have jurisdiction over defendants domiciled within the court’s territory. Such jurisdiction is called general

jurisdiction, in which the defendant can be sued in almost any kind of civil lawsuit before the court whose territory covers the defendant's domicile [3]. Even though this general principle prevails in almost all legal systems, different approaches exist between civil law and common law systems. For example, the civil law system applies the principle of actor sequitur forum rei, whereby 'the plaintiff shall follow the thing's forum', meaning the plaintiff shall submit its civil lawsuit to the court—as forum—where the defendant is domiciled [4]. In contrast, in the common law system, the court may exercise jurisdiction over the defendant as long as the defendant can be reached by the service of process [5]. Nevertheless, such different approaches will have a similar result: the court has jurisdiction over defendants residing within its territory.

This article will evaluate some provisions in Indonesian law that can be the basis for the Indonesian court to exercise jurisdiction over defendants domiciled outside the territory of the Republic of Indonesia in civil and commercial cases. There is no specific statutory provision on Indonesian private international law to date. Indonesian civil procedure also has no clear provision enabling the Indonesian court to have jurisdiction over defendants residing abroad except for Article 100 Rv, a provision in the Civil Procedural Rules (Rv) for European inhabitants during the Dutch Colonial Administration. Even though the court that had jurisdiction over the European inhabitants was abolished after Indonesian independence, the Rv still applies today as guidelines for the Indonesian court when the Native Regulations (HIR) are silent on certain procedures [6]. Therefore, some statutory laws enacted after Indonesian independence, which contain court jurisdiction on special cases, will also be reviewed to assess the opportunity to use them as the basis for the Indonesian court to exercise jurisdiction.

Accordingly, this article will examine two questions: (1) What are the general principles universally applicable for the national court to assert jurisdiction over defendants domiciled outside the national territory? and (2) What are the rules as the basis for the Indonesian court to assert jurisdiction over defendants domiciled outside Indonesian territory?

## 2 Discussion and Analysis

The discussion of this article will be initiated with the general principles of court jurisdiction in international civil litigation. In this case, the selected international instrument is the ALI/ UNIDROIT Principles of Transnational Civil Procedure ('the Principles'), which converge principles of the civil law and common law systems [7]. The discussion will also evaluate the statutory laws applicable in Indonesia regarding the national court's jurisdiction in private international litigation, especially when defendants reside outside Indonesian territory. Therefore, the discussion will first focus on the general rules of jurisdiction in Indonesian civil procedure and then on the court jurisdiction rules outside Indonesian civil procedure that can form the basis for dragging foreign defendants before the Indonesian court.

### 2.1 The General Principles of Jurisdiction in Private International Litigation

The Principles laid the foundation to harmonize the procedural rules in private international litigation. Regarding national court jurisdiction, Principle 2 provides that the

primary court jurisdiction in private international litigation on rights in persona disputes belongs to the court where the parties have agreed in a choice of court agreement [7]. If there is no such agreement, the court of the state that has a substantial connection with the party or transaction or occurrence in dispute may exercise jurisdiction over the dispute, generally based on the defendant domiciled in the forum state [7]. When there is no reasonable forum available, the court where the defendant is present may exercise jurisdiction, the so-called *forum necessitatis*, which will be discussed later [7].

In subsequent developments to provide access to justice, the jurisdiction of the court aims to protect weaker parties, enabling them to access the court easily. As the Brussels Regulation adopts the principles of *forum actoris* and *forum laboris*, the court where the consumer has his domicile and the court where the employee has his habitual workplace may exercise jurisdiction over disputes initiated by them against the trader or the employer, even if they reside outside the forum state.

Those general principles of court jurisdiction will be the basis for evaluating some statutory provisions in Indonesia concerning court jurisdiction, which can be the foundation for the Indonesian court to exercise jurisdiction over defendants residing abroad.

## **2.2 Indonesian Civil Procedure as the Basis for the Indonesian Court's Jurisdiction Over Foreign Defendants**

Indonesian civil procedure still refers to the HIR inherited from the Dutch Colonial Administration. When the HIR is silent on certain procedures, the judges usually refer to the Rv or Supreme Court Regulations enacted to regulate certain procedures not contained in the HIR.

As a civil law system, the Indonesian legal system follows the *actor sequitur forum rei* principle, stipulated in Article 118(1) of the HIR, to determine jurisdiction over defendants. However, some exceptions are made in certain conditions, which can provide the basis for the Indonesian court to assert jurisdiction over defendants domiciled outside Indonesian territory who cannot be reached in accordance with the *actor sequitur forum rei* principle. The *actor sequitur forum rei* principle also appears in Article 118(2). This article provides that if a case has more than one defendant, each of whom has different residences not within one jurisdiction of a district court, then the plaintiff can file in the district court whose jurisdiction includes the residence of one of the defendants.

Accordingly, in a multiple-defendant case involving defendants residing in Indonesia and abroad, Article 118(2) of the HIR becomes the basis for dragging the defendants residing outside Indonesian territory before an Indonesian court. For instance, in *Richard Bruce Ness v Jane Perlez and New York Times*, the District Court of Central Jakarta refused to exercise jurisdiction because both the plaintiff and defendants were not Indonesian nationals; thus, the submission was declared inadmissible [8]. However, in a second attempt, the plaintiff added an Indonesian defendant who resided in Central Jakarta. Surprisingly, the District Court of Central Jakarta admitted and declared in its interlocutory judgments that it had jurisdiction over the case and subsequently delivered its judgement [9].

When the case concerns immovable property within Indonesian territory, the Indonesian court where the property is situated has exclusive jurisdiction in accordance with

Article 118(3) of the HIR. The principle laid down in the article is *forum rei sitae*, which means that the forum where the property is situated shall have jurisdiction [10]. The defendant who resides abroad may have interests in the immovable property and can be sued before an Indonesian court. According to Article 118(3), the court shall exercise jurisdiction and disregard the domicile of the defendant.

Generally, in the dispute of rights in personam that involves foreign elements, the parties may consent in writing to choose a national court of a state or another forum, such as arbitration. However, Article 118(4) of the HIR is unclear because it is merely a choice of domicile rather than a choice of forum provision. According to Article 118(4), the parties may agree in writing to choose a certain domicile. Nevertheless, the plaintiff may have an option to submit its lawsuit to the court whose jurisdiction covers the chosen domicile or the court where the defendant is domiciled.

The most notorious rule on the jurisdiction of the Indonesian court regarding defendants residing abroad is Article 100 Rv. This article provides that ‘a foreigner does not reside in Indonesia, may be sued before Indonesian court for his/ her legal obligations made in Indonesia or abroad with Indonesian citizen.’ Under this article, an Indonesian citizen can drag a foreigner residing abroad before an Indonesian court as the defendant. This defendant is bound with legal obligations to the Indonesian plaintiff.

Article 100 Rv provides so-called ‘exorbitant jurisdiction’, which is unusual and unacceptable in almost all legal systems because it is contrary to the principle of personal jurisdiction. The principle is that the personal jurisdiction of the court in rights in personam disputes is determined by the existence of real and substantial connections between the forum and the respected transaction. It cannot be determined only by the nationality of the plaintiff. Article 100 Rv has the same substance as Article 127 of the Dutch Code of Civil Procedure, which mirrors Article 14 of the French Civil Code. This provision aims to protect national interests against foreigners [11]. However, Article 127 of the Dutch Code of Civil Procedure was repealed in 2002, and Brussels Regulation (EC) No 44/2001 was entered into force. Article 14 of the French Civil Code is still applicable but has no effect on EU residents under Brussels Regulation (EU) No 1215/2012.

Many legal scholars oppose the application of exorbitant jurisdiction to determine the jurisdiction of a national court over non-resident defendants. The exorbitant jurisdiction provided in Article 100 Rv can be described as jurisdiction validly exercised under the jurisdictional rules of the state, but it nevertheless appears unreasonable to non-nationals because of the ground used to justify jurisdiction [12]. Accordingly, jurisdiction is exorbitant when the court exercises jurisdiction in a case that lacks sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action or fails to take account of the principle of the proper administration of justice [13]. In addition, it prioritizes political interests without considering the interests of the parties in the case [14]. Other critics say that exorbitant jurisdiction is a chauvinistic rule inspired by the sole interests of the state’s nationals or residents, as the interests of the other party are often not considered [26].

Despite the criticisms of exorbitant jurisdiction, there are several grounds for which exorbitant jurisdiction has been accepted in principle to determine the personal jurisdiction of the court. For example, in the *forum actoris*, consumers may lodge their lawsuit

against the trader in the courts where the consumers are domiciled. This also applies in *forum laboris*, which gives employees the right to lodge their lawsuit against the employer in the court where the employees perform their obligations according to an employment contract. In both jurisdictions, the defendant (trader or employer) is not required to reside or physically be present in the forum country. Only the product must be distributed within the territory of the forum country, or there is an employment agreement that the employees are obliged to carry out their work within the territory of the forum country. In this case, the *forum actoris* and *forum laboris* are intended to provide convenience and protection for the consumers and employees in a relatively weaker position than the opposing party [27].

Exorbitant jurisdiction is recognised as part of *forum necessitates* provided in Principle 2.2, which states that the Principle covers the concept of *forum necessitatis*—the forum of necessity whereby a court may properly exercise jurisdiction when no other forum is reasonably available [7]. Thus, it is suggested that the application of exorbitant jurisdiction, with the various underlying reasons, should be accompanied by the consideration that ‘at the root of the notion of jurisdiction lies an inherent contradiction: jurisdiction has always meant power and the exercise of power, and at the same time a notion of restraints on power’ [17]. The application of exorbitant jurisdiction, however, is based on the authority possessed by a sovereign state to enforce and apply its law within its territory, but in the application of that jurisdiction when dealing with international interests, the state should use restraint by considering the principles in international law, namely comity, mutual convenience, the tacit consent of nations, fairness, justice and reasonableness. In this case, it is necessary to consider the theories of legitimacy and restraint [18].

To some extent, Article 100 Rv can still be applied as the foundation for an Indonesian court to assert jurisdiction in international civil litigation over non-resident defendants. However, the court must consider the limitation to prevent the excessive application of Article 100 Rv. Therefore, some requirements must be furnished by the plaintiff when submitting under Article 100 Rv, such as that the plaintiff submitted the case in the state forum that is proper according to the principles of jurisdiction. However, the plaintiff did not obtain justice because the forum demonstrated some attitudes contrary to the natural justice principles (i.e. non-bias, fair hearing and reasoned decision). Otherwise, the Indonesian court may also consider Principle 2.2, which provides that when there is no other forum reasonably available to try the case, the Indonesian court may exercise jurisdiction over the case in the interest of Indonesian nationals.

### **2.3 The Rules Outside of Indonesian Civil Procedure as the Basis for the Indonesian Court’s Jurisdiction Over Foreign Defendants**

Parallel to the exorbitant jurisdiction, Law No 8 of 1999 on Consumer Protection (‘Law No 8/1999’) and Law No 2 of 2004 on Industrial Relations Dispute Settlement (‘Law No 2/2004’) both provide the basis for an Indonesian court to exercise jurisdiction against a trader or employer who resides abroad. The provisions regarding court jurisdiction on those statutory laws aim to protect the weaker parties by providing easy access to the court.

### (a) Court Jurisdiction in Consumer Disputes

The legal relationship between consumers and traders is considered imbalanced [15]. The consumers are on the weaker or vulnerable side because the traders have a relatively stronger position in terms of capital and knowledge about the mechanisms of production and distribution compared to the consumers. Therefore, the state must provide some legal protection to the consumers, such as the product liability of traders and the shifting of the burden of proof in which the consumers have no obligation to prove the fault of the traders, but the traders must prove that they are not at fault. The traders must also prove they have carried out their production properly and carefully according to good manufacturing practices. In contrast, consumers only need to prove their losses due to the production of the traders without proving fault.

The modern civil justice system applies the *forum actoris* principle in consumer disputes. According to the principle of *forum actoris*, the court where the consumer, as a plaintiff, has its domicile shall have jurisdiction over consumer disputes [19]. The principle of *forum actoris* is adopted in Article 23 of Law No 8/1999. Under this article, if a trader refuses, does not respond to or does not fulfil a consumer's claim for compensation, the consumer can submit a complaint to the Consumer Dispute Resolution Agency (a quasi-judicial institution established in every district) or file a lawsuit against the trader in the district court where the consumer is domiciled.

However, the Indonesian court did not consider the provision in Article 23 of Law No 8/1999 as the basis of jurisdiction against a defendant who is a trader residing abroad. For example, in *Go Liok Tjioe et al. v AHC Management Pte. Ltd. et al.*, the plaintiff filed its lawsuit before the District Court of Denpasar against a defendant who resided in Singapore under Indonesian consumer protection law (Law No 8/1999). In its objection to jurisdiction, the defendant contended that the District Court had no jurisdiction because the defendant was domiciled in Singapore. The defendant also argued that the contract provides that Singaporean law shall govern and the parties agreed to a choice of court clause to settle the dispute in a Singaporean court. Subsequently, the District Court declared that it lacked jurisdiction, and the lawsuit was inadmissible because the parties had agreed to Singaporean law as the law of the contract and the Singaporean court as the chosen forum [20].

On appeal, the High Court of Denpasar accepted the plaintiff's submission and reversed the District Court's judgement. The High Court of Denpasar considered, *inter alia*, that under Article 100 Rv, Indonesian courts can reach not only Indonesian nationals but also any foreigner domiciled abroad for a legal obligation made with Indonesian nationals [21]. At the cassation appeal, the Supreme Court declined the defendant's request and upheld the High Court's judgement [22]. Besides failing to implement *forum actoris* in the consumer disputes under Article 23 of Law No 8/1999, the courts also failed to consider that the *forum actoris* cannot be excluded by choice of court agreement in which, in this case, the contract provides the Singaporean Court as the forum.

*Forum actoris* cannot be waived by choice of forum in consumer contracts. Thus, any agreement between consumers and traders, which is generally stated in a standard contract, to choose a particular court of forum to impede the implementation of the *forum actoris* must be considered null and void [19]. The *forum actoris* principle only

applies if the traders act purposefully (which must be proven by their actions) to make the consumers' domicile the product distribution area. If there is no intention to do so, the court cannot implement such *forum actoris* to enforce jurisdiction over the non-resident trader as the defendant [19].

It must be noted that the implementation of *forum actoris* may be problematic when the transaction is made online. For example, the consumer might buy a product outside the territory of the consumer's state, while the trader does not have a branch office or representative in the state where the consumer is domiciled. This scenario can occur when the trader places its product information online on an Internet server; therefore, consumers from various countries can access the information and make online transactions. The fact that the information can be accessed everywhere does not constitute jurisdiction for the courts where the information can be accessed to try the dispute arising from an online transaction [28] or the court where the server is located [28]. However, if the trader deliberately sends an email containing product information and offers that product to a consumer, such a fact is sufficient evidence that the trader has submitted itself to the jurisdiction of the court where the consumer is domiciled [28, 29].

### (b) Court Jurisdiction in Labour Disputes

In Indonesia, labour disputes are regulated under Law No 2/2004. Based on this statutory law, labour disputes between employees and employers are heard by the Industrial Relations Court, which has subject matter jurisdiction over such disputes. The court panel consists of two *ad hoc* judges, one appointed by the labour union and one appointed by the association of employers, and a third permanent judge of the court sitting as the presiding judge.

When a dispute arises between the employees and employer, Article 81 of Law No 2/2004 provides that 'the claim on labour dispute shall be instituted to the Industrial Relations Court where its jurisdiction covers the workplace of the employee(s).' This article has adopted the principle of *forum laboris* to determine the court's jurisdiction. The principle protects the employees to obtain justice so that it is unnecessary for the employees to defend their rights before the court where the employer resides, but the employer must—given its stronger position—be present before the court where the employees perform their working obligations. In addition, *forum laboris* cannot be ruled out with the choice of court agreement in the labour contract between the employee and the employer [16]. Any clause contrary to such rule shall be deemed unbinding.

To some extent, implementing *forum laboris* in Indonesia is still regarded as ineffective in providing access to justice for the workers. This problem occurred because the Industrial Relation Court, as a specialized judicial institution, is located only in the province's capital city; hence, it is difficult for workers from remote areas to defend their rights before such a court [24]. In some cases, difficulties in implementing *forum laboris* may also arise, such as when the employee performs his working obligation within more than one court jurisdiction; or when he works, according to the labour contract, online, not in a certain place.

By taking a comparative approach to the applicable regulation in the European Union, [23] which recognizes *forum laboris* in the Brussels Regulation, the European Court of Justice ruled that if the employee carries out his work in several places, each of which



is within the jurisdiction of a different court, then the court with the most appropriate jurisdiction must be determined. The European Court of Justice provides some criteria to determine the employee's habitual workplace and the most competent court under the *forum laboris* principle [25]:

1. The employee's habitual workplace is the place where or from which the employee is considered to have fulfilled his obligations to the employer;
2. The employee's habitual workplace is where the employee effectively has a centre to carry out activities and where or from where the employee carries out an essential part of obligations to the employer;
3. If there is no place as the centre for carrying out activities, then the place where the employee spends the most time carrying out his obligations to the employers is considered the employee's habitual workplace.

In line with the Indonesian government's efforts to increase foreign direct investment (FDI), Article 81 of Law No 2/2004 embodies the principle of *forum laboris*. Article 81 may provide effective protection to the employees that enable them to sue not only the FDI company, an Indonesian legal entity, but also its affiliates, including foreign investors who may reside abroad. Therefore, under Article 81, the Indonesian court (i.e. the Industrial Relation Court) shall have jurisdiction over disputes initiated by the employees against the employer, even when the employer resides in a foreign jurisdiction.

### 3 Conclusion

The general principles of court jurisdiction in private international law cases, as provided in the Principles, have laid down that the national court selected as the forum in an agreement between the parties becomes the primary jurisdiction to try the case. When such agreement is absent, the court of the state having substantial connections with the facts of the case is competent. Almost all countries provide for such substantial connection as the defendant's domicile in the territory of the forum state. In a situation where no available court has jurisdiction over the case, the principle of *forum necessitatis* may apply to the court where the defendant is physically present or where the defendant's property is located. To protect weaker parties, it is also accepted that *forum actoris* and *forum laboris* should be implemented to protect consumers and employees.

The assessment found that the general jurisdiction for Indonesian courts to exercise jurisdiction is according to the principle of *actor sequitur forum rei* as provided in Article 118(1) of the HIR. To exercise jurisdiction over defendants residing abroad, certain civil procedural rules can be the basis for such jurisdiction:

1. Article 118(2) of the HIR can serve as the basis in a multiple defendants case in which at least one of the defendants resides in Indonesia;
2. Article 118(3) of the HIR becomes the basis for exclusive jurisdiction for the Indonesian court in a dispute concerning immovable property located in the territory of Indonesia;
3. Article 118(4) of the HIR is unclear whether it can be the basis for the choice of court agreement or choice of domicile;



4. Article 100 Rv is generally employed as the basis for the plaintiff to sue against defendants residing abroad. This article does not conform to the requirement of substantial connections between the state forum and the facts of the dispute. However, to some extent, this article can be served as a *forum necessitatis* when there is no available forum to try the dispute;
5. Article 23 of Law No 8/1999 embodies the *forum actoris* principle in which the consumers may sue the non-resident trader as the defendant before an Indonesian court; and
6. Article 81 of Law No 4/2004 is the implementation of the *forum laboris* principle that enables the employees when suing the employer in an Indonesian court as long as their workplace is within Indonesian territory.

However, there are still some gaps that must be considered to be further regulated when drafting the bill on Civil Procedure or the bill on Private International Law, such as the exclusive jurisdiction of Indonesian courts in the dispute of the personal status of Indonesian nationals, the status of a legal entity established according to Indonesian law, and any rights registered in Indonesia. Ultimately, the issue that is parallel to the jurisdictional issue of Indonesian courts in private international litigation that must be considered is the recognition and enforcement of Indonesian courts' judgements by foreign courts—the so-called 'indirect jurisdiction'—which, until today, has become a marginal issue for legal scholars and lawmakers in Indonesia. To provide access to justice effectively, this issue must be settled simultaneously.

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