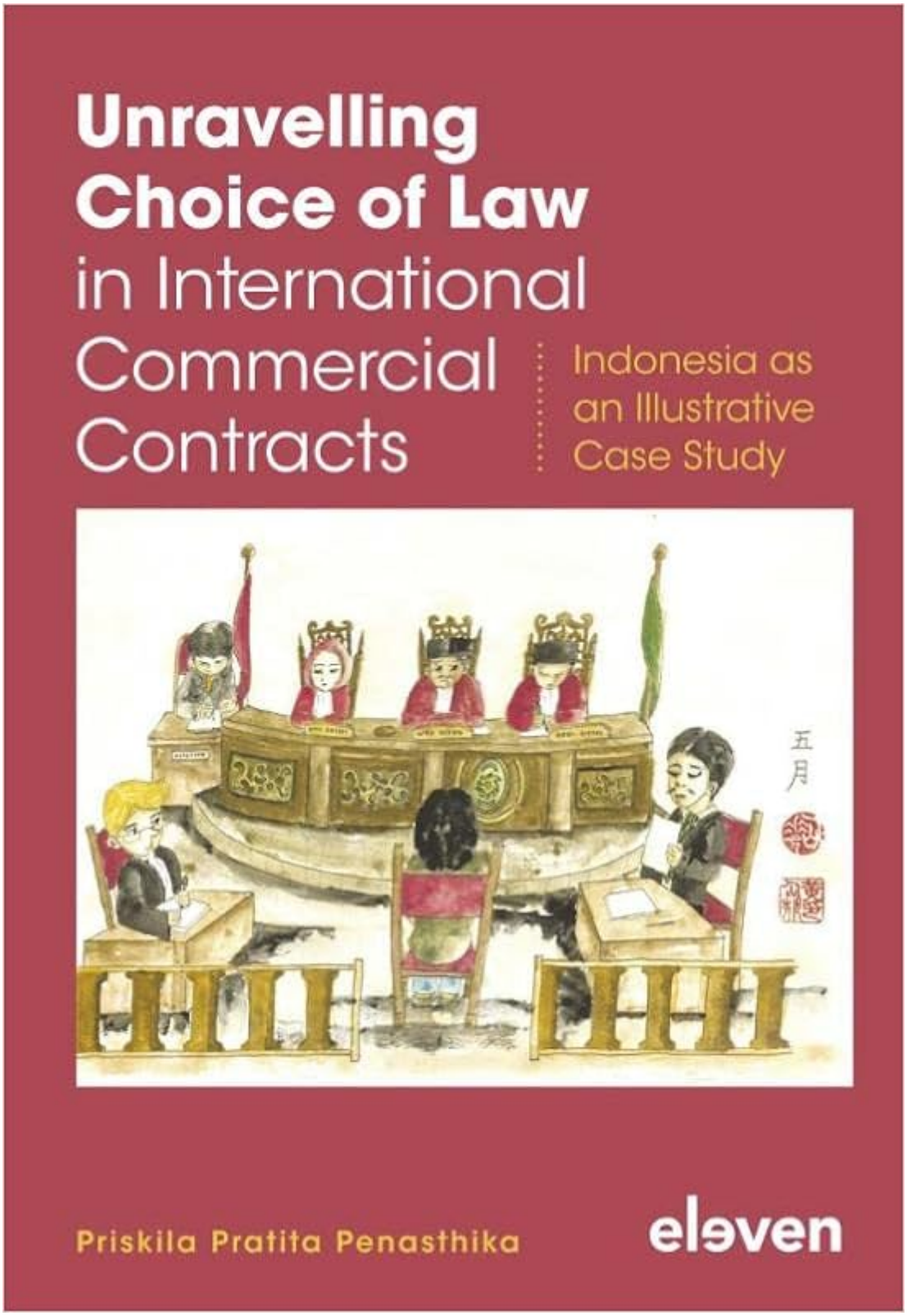
# Review of: PP Penasthika, Unravelling Choice of Law in International Commercial Contracts: Indonesia as an Illustrative Case Study (The Hague: Eleven Publishers 2022)




Very recently, Indonesian private international law has attracted significant scholarship in the English language.[1] Dr Penasthika's monograph ('the monograph')[2] is one such work that deserves attention for its compelling and comprehensive account of choice of law in international commercial contracts in Indonesia. My review attempts to capture the methodology, summarise the contents, and give a verdict on the quality of this monograph.

Penasthika has based this work on her PhD thesis, undertaken at Erasmus University in Rotterdam. The monograph contains six chapters over 233 pages, excluding the acknowledgments, table of contents, lists of tables and figures, abbreviations, bibliography, and annex. A robust and clearly expressed methodology of doctrinal and empirical research is applied. The monograph predominantly examines 19 Indonesian court decisions on choice of law in international commercial contracts during the period, 2000-2020. It is mainly written from a civil law perspective, which is unsurprising, given that the author is Indonesian and wrote her thesis in the Netherlands – both Indonesia and the Netherlands are civil law countries. One positive aspect of the methodology that is especially worth mentioning is Penasthika's very transparent and thorough account of the state of previous academic research in Indonesia, and the gap she has endeavoured to fill with her monograph.

The first chapter provides an introduction to the book, the central theme of which is the reluctance to give effect to choice of law (especially foreign law) in international commercial contracts in Indonesia, compared with global developments. Consequently, Penasthika states that some of the core benefits of giving effect to choice of law in international commercial contracts would contribute to Indonesia's *VISI 2045* to rank among the world's most developed countries; improve the practice of international dispute settlement in Indonesia; promote the harmonisation project on private international law in Asia and global initiatives, and lead to the legal reform of outdated rules on choice of law in Indonesia.

Conversely, Chapter One also acknowledges the book's limitations, namely, that it only covers the express choice of law in international commercial contracts. Therefore, implied or tacit choice of law, law in the absence of choice, and contracts for the protection of weaker parties have not been included. Moreover, no new choice of law theories have been advanced, and the issue of forum selection clauses has not been addressed. However, a further limitation that Penasthika could have considered is whether 19 judicial decisions represent an adequate sample size for empirical research in a monograph.

Chapter Two of this work proceeds to discuss choice of law in international commercial contracts in a global context. The key contribution of this chapter is that it provides a theoretical framework for discussing choice of law in further chapters of the monograph. First, the history of choice of law theory and debate is traced and summarised, dating back to 120-118 BC and extending into the 20th century. Second, the chapter traces the wide acceptance of choice of law in the 20th century across a large number of countries and regions. Nevertheless, Penasthika also highlights that a few countries remain reluctant or hostile to choice of law, despite widespread acceptance of the principle in the 21st century. She is of the view that this resistance is due to concerns over territoriality and sovereignty in the countries involved. Fourth, the chapter discusses the regional and international harmonisation of choice of law.

In addition, Chapter Two contains an interesting theoretical debate on choice of law, which may be encapsulated in the question: is choice of law based on the perspective of state or party sovereignty? Alternatively, who has the authority to permit parties to make a choice of law: the state or the parties themselves?

Chapter Two then examines the way in which choice of law functions, including the international character of the contract, types of contracts (such as weaker party or commercial, and immovable property), the validity of the choice of law agreement, the chosen law, and the choice invalidating the contract. Finally, this second chapter discusses the limits on choice of law, such as public policy and mandatory rules.

In Chapter Three, Penasthika looks at Indonesia’s civil law and private international law regime. The key contribution of this chapter is that it gives the reader an understanding of the sources of Indonesia’s private international law regime, which helps clarify the chapters that follow. Chapter Three also contains a thorough and enlightening evaluation of Indonesian scholarly views on choice of law in contract. Essentially, this chapter lays the foundation for discussing

Indonesian choice of law rules on commercial contracts in subsequent chapters. Like other Asian and African countries, Indonesia experiences legal pluralism, due to its history of Dutch colonialism and a form of apartheid. Thus, in the Indonesian legal system, there is an interplay of civil law, which is inherited from the Dutch East Indies, *adat* (customary law), and Islamic law. It was especially fascinating to me to discover here that the Indonesian language is usually a legal requirement for drafting contracts involving Indonesians. This may be aimed at protecting Indonesians in transactions and preserving their indigenous language.

Next, Chapter Four contains what I would describe as the real 'meat' of the monograph, looking at how Indonesian practitioners (judges and lawyers) handle choice of law in international commercial matters, particularly regarding issues of foreign law. This fourth chapter summarises and analyses 19 Indonesian decisions from 2000 to 2020. The discussion is divided into three parts: (i) refusing jurisdiction based on foreign forum, illustrated by four cases; (ii) refusing jurisdiction on the basis of foreign law, illustrated by seven cases, and (iii) disregarding choice of forum and choice of law, illustrated by eight cases. The latter two approaches are dominant in Indonesian practice.

As the reader, one thing I found striking about Indonesian practice is that a choice of foreign law alone can oust the jurisdiction of the Indonesian courts. Penasthika rightly observes that this signifies confusion between jurisdiction and choice of law, because what the Indonesian courts should apply is substantive and not procedural law. Procedural law matters are reserved for the forum, and some Indonesian judges only appear to see the procedural aspects of choice of law. I would also add that the Indonesian approach ignores the global reality of applying foreign law, which is at the heart of private international law. This confusion results in a loss of dispute resolution business for practitioners in Indonesia, which is not good for Indonesia's economy. The big question is, why do many Indonesian judges refrain from applying choice of law, especially foreign law? This interesting question is mainly addressed in Chapter Five, which contains the empirical research.

In Chapter Five, Penasthika presents the results of her interviews with practitioners (including Indonesian judges and lawyers, and foreign consultants who are familiar with the Indonesian legal system), a legal scholar (with expertise in private international law), and an expert attached to the court (with expertise in choice of law issues in Indonesia). These interviews especially explore the problem of applying foreign law in Indonesia.

The central cause of the problem is identified as the Indonesian Supreme Court decision in *Bernhard Josef Rifeel v PT Merck Indonesia*,[3] which ousted the jurisdiction of the Indonesian courts based on foreign law. This decision has since been followed by many Indonesian judges. However, Penasthika and several other scholars question the accuracy of the decision and the cases in which it has been applied.

Drawing upon the interview data, Penasthika states the reasons for foreign law not being applied in the Indonesian courts, as follows:

'(i) it is difficult to delve into a foreign law; (ii) it is hard to apply a foreign law correctly; (iii) Indonesian judges are not trained to settle disputes governed by foreign law; (iv) the law of civil procedure in Indonesia does not provide clear rules regarding disputes involving foreign elements, such as foreign party or foreign law; (v) the judges consider that foreign law contradicts Indonesian law; and (vi) Indonesian judges espouse legal positivism.'[4]

Additionally, some judges, citing Article 1338 BW in Indonesia, regard the choice of foreign law as a contractual agreement not to resolve a dispute in the Indonesian courts, and many lawyers present a contract claim as tort. This practice is seriously criticised by Penasthika, in the first instance because it confuses substantive contract law with choice of law, and in the second, because it is tantamount to abusive litigation tactics.

Chapter Six then concludes the monograph, summarising the research findings

and making proposals and suggestions for future research. First, Penasthika states that Indonesia could indeed fulfil its vision for 2045 to become a highly developed country, provided that its courts give effect to choice of law rules, as opposed to Indonesia isolating itself from global trends in the choice of law for commercial contracts. Second, knowledge of choice of law needs to be expanded in Indonesia. Third, the regulatory framework for choice of law in Indonesia requires development, and fourth, judicial practice should be improved in the context.

The author closes with the prediction that choice of law will become a topical and fascinating field in Indonesia.

My verdict is that this monograph is an indispensable research work on choice of law in international commercial contracts in Indonesia. I highly commend it as a work of quality, researched and written to a high standard. Anyone interested in choice of law will therefore be fascinated by this book.

[1] YU Oppusunggu, 'Indonesia' in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asia Business Law Institute, Singapore, 2017) 91 – 104; A Kusumadara, 'Indonesia' in A Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart, 2019) 243 – 258; A Kusumadara, *Indonesian Private International Law* (Hart, 2021); A Kusumadara, 'Indonesia' in A Reyes and W Lui (eds), *Direct Jurisdiction: Asian Perspectives* (Hart, 2021) 249 – 273; A Kusumadara, "Jurisdiction of courts chosen in the parties' choice of court agreements: an unsettled issue in Indonesian private international law and the way-out" (2022) 18 *Journal of Private International Law* 424 – 449; J Lumbantobing and BS Hardjowahono**,** 'Indonesia: Indonesian Perspectives on the Hague Principles' in D Girsberger et al (eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford: Oxford University Press 2021) paras 25.01 – 25.43; PP Penasthika, *Unravelling Choice of Law in International Commercial Contracts: Indonesia as*

*an Illustrative Case Study* (The Hague: Eleven Publishers 2022).

[2] Penasthika (ibid).

[3] Judgment of the Supreme Court 1537K/PDT/1989, 21 January 1991.

[4] Penasthika (n 1), 179.