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*Doing Business in Indonesia: enforcement of contracts in the
general courts and the creation of a specialized commercial court
for intellectual property and bankruptcy cases*

Christoph ANTONS¹

Professor of Comparative Law

*Director of the Centre for Comparative Law ad Development Studies in Asia and the
Pacific (CLDSAP)*

University of Wollongong, Australia

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Doing Business in Indonesia: enforcement of contracts in the general courts and the creation of a specialised commercial court for intellectual property and bankruptcy cases

By Christoph Antons²

Conventional theory suggests that the reliable enforcement of contracts is a basic precondition for businesses. Seen in this light, the situation in Indonesia, and indeed in much of East and Southeast Asia, seems paradoxical. Countries have achieved persistently high growth rates using often archaic and outdated legal systems. However, not only is the Indonesian system outdated, it is also costly and cumbersome. According to the World Bank Doing Business Report of 2006 it takes on average 34 days and 570 days to enforce a contract in Indonesia. The costs for the procedure amount to 126.5% of the actual debt. This leads to a ranking of 145 in the 'Enforcing Contracts' category out of 155 countries, the worst among Indonesia's rankings in the report and still significantly lower than the country's ranking at 115 for the overall ease of doing business.

This paper will examine the reasons for the neglect of much of private and commercial law and accompanying procedural laws in Indonesia. It will then examine how businesses operate under these conditions and how, in spite of these difficult circumstances, contracts continue to be used. After a short discussion of the effects of the Asian Crisis, it will look at most recent reform efforts, in particular with the creation of a Commercial Court responsible for bankruptcy and intellectual property cases only. An initial assessment of the performance of this court will be attempted. The paper concludes with some final

² Professor of Comparative Law and Director, Centre for Comparative Law and Development Studies in Asia and the Pacific, University of Wollongong, Australia; QEII Fellow, Australian Research Council; Adjunct Fellow, Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich.

remarks on the legal heritage theory advocated in the *Doing Business* report of 2004 and on the relationship between business law regulation, economic efficiency, development policies and foreign investment as exemplified by intellectual property laws.

The historical background of commercial law and procedural law in Indonesia

While the history of European derived law in Indonesia dates back to the arrival of first Portuguese and then Dutch colonizers in the archipelago, it was not until the dissolution of the Dutch East Indies Company (VOC) in 1800 and the French interregnum in the Netherlands that the colonial “state” of the Netherlands East Indies was formed. Especially after the revolutionary year of 1848 in Europe, traders and the upcoming bourgeoisie began to demand economic liberalization of the colony.³ The result was a wave of mainly private and commercial laws for the Netherlands East Indies enacted in or around the year 1848, including the Civil Code (*Burgerlijk Wetboek*), the Commercial Code (*Wetboek van Koophandel*) and two different procedural codes for Europeans on the one hand (*Reglement of de Regstvordering voor het Hoog Gerechtshof en de Raden van Justitie*) and for the indigenous population on the other hand (*Reglement op de administratie der policie, mitsgaders op de burgerlijke Regstpleging en strafvordering voor inlanders en daarmede gelijkgestelde personen*). The policy of the colonial government to keep the various groups of populations legally apart meant that the vast majority of Indonesians had little or nothing to do with the European derived part of the legal system. Dutch derived law applied in general only to Europeans and to citizens of non-European countries with similar legal systems, such as US Americans or (from the end of the 19th century onwards) the Japanese. Dutch derived commercial law applied to the population group of the so-called “Foreign Orientals” (*Vreemde*

³ Robison, *Indonesia: The Rise of Capital*, Sydney: Allen & Unwin 1986, 6; Ricklefs, *A History of Modern Indonesia*, 3rd ed., Stanford: Stanford University Press, 2001, 161.

Oosterlingen), traders of mainly Chinese, Indian or Arab descent, who had often lived in the colony for generations and were given privileged positions in trade by the Dutch, but otherwise to some extent restricted in their opportunities to mingle with other population groups. After the foundation of the Republic of China, the Chinese became subjected to Dutch law with only few exceptions. Ethnic Indonesians, however, remained under the principles of Islamic law and/or traditional customary law (*adat*). Towards the end of the colonial period, this developed into a complicated conflict of law system called the *intergentioneel recht* (nowadays translated into Indonesian as *hukum antargolongan* (intergroup law)), that foresaw for transactions between members of different population groups and also for the complete change from one group to another via “equalization” (*gelijkstelling*) with the Europeans or assimilation with the indigenous population (*inlanders*).⁴ Therefore, the Dutch left a legal system behind that distinguished sharply between Europeans and people from similar legal systems, Foreign Orientals and indigenous Indonesians on racial and religious grounds. Although appeals would go to the colonial higher courts, different courts were administering law to these various groups and different procedural laws applied.

First cracks in the system appeared with the Japanese occupation during World War II, when the Japanese applied anti-European and anti-Dutch policies leading to some unification of the court system and procedural laws and to the abolishment of the dominant legal status of the Europeans.⁵ Importantly, the revised procedural laws for Indonesians (*Herziene Indische Reglement*, valid on Java and Madura, and the *Rechtsreglement Buitengewesten* for the outer islands)

⁴ For details of the system see Gautama, *Hukum Antargolongan: Suatu Pengantar*, 11th ed., PT. Ihtiar Baru Van Hoeve, Jakarta 1993

⁵ Gautama and Hornick, *An Introduction to Indonesian Law: Unity in Diversity*, 4th ed., Bandung: Penerbit Alumni, 1983, 181; Lev, ‘Judicial Institutions and Legal Culture in Indonesia’, in: Holt (ed.), *Culture and Politics in Indonesia*, Ithaca-London 1972, 257

became now the procedural law for all inhabitants of the archipelago.⁶ When the Republic of Indonesia came into being in 1945, Article II of the Transitional Provisions of the new Constitution and Government Decree No. 2 of 1945 provided for the continuing relevance of the colonial laws and institutions until their replacement in accordance with the new constitution⁷.

Commercial law reform during the 'New Order' years and during 'Reformasi'

Thus, it came that Dutch civil, commercial and procedural law survived the transition to independence. It also survived the reign of Indonesia's first President Sukarno (in Indonesia referred to as the 'Old Order' (Orde Lama)) largely unharmed, in spite of revolutionary rhetoric for its replacement and the deletion of eight articles of the Civil Code.⁸ When the 'New Order' (Orde Baru) of General Suharto seized power in 1965, there were initial hopes for a revision of some of the excesses of the late Sukarno years in the legal field, such as the excessive use of administrative and presidential decrees. However, those hoping for a more extensive role of Dutch derived state law and a general reform of the increasingly outdated legislation were soon disappointed. The authoritarian nature of the Suharto regime and the strong role of the military in it meant that liberal ideas of the rule of law, parliamentary democracy and human rights had little prospects. However, throughout its reign and in contrast to the Sukarno years, the 'New Order' and the economic technocrats in the National Development Planning Agency (Badan Perencanaan Pembangunan Nasional – BAPPENAS) remained business oriented and foreign investor friendly. The influence of the technocrats grew in particular after a period of economic

⁶ Mertokusumo, *Hukum Acara Perdata Indonesia*, 6th ed., Yogyakarta: Penerbit Liberty, 2002, 7; Setiawan, 'Hukum Acara Perdata', in: Setiawan, *Aneka Masalah Hukum dan Hukum Acara Perdata*, Bandung: Penerbit Alumni 1992, 360

⁷ Gautama, *Legal Developments in Independent Indonesia (1945-1970)*, in: *LAWASIA*, December 1970, 157

⁸ For details see Gautama and Hornick, pp. 183-187

nationalist policies based on the high prices for oil and gas came to an end in the mid-1980s and Indonesia shifted to an export oriented approach that made the attraction of foreign investment even more important. The late 1980s and the final years of the Suharto government in the 1990s thus saw a period of reform for Indonesian business law, with a completely new set of intellectual property laws, the replacement of a part of the old Dutch Commercial Code with a new Company Law and the revision of the Bankruptcy Law and introduction of a specialised Commercial Court. Interim President Habibie continued these reforms after the end of Suharto's reign in 1998 with a revised banking law, a new law on the Central Bank, a law on arbitration and alternative dispute resolution, an anti-monopoly law and a consumer protection law. Commercial law reform continued under the subsequent Presidents Abdurahman Wahid, Megawati Sukarnoputri and Susilo Bambang Yudhoyono, although there was also a strong focus on constitutional reform⁹ and on administrative decentralization. The entire period after the end of the Suharto regime has been described as one of 'reformation' (reformasi).

Reform of the court system and of procedural laws

The strong emphasis on substantive commercial law reform has, however, not been accompanied by a thorough reform of the civil procedural codes. The international focus on human rights has brought a certain attention for criminal law procedures and the Indonesian Criminal Procedural Code was completely revised in 1981.¹⁰ Civil Procedural law has not attracted a similar interest and 61 years after independence, the *Herziene Indonesisch Reglement* (as it became known

⁹ Lindsey, 'Indonesia: Devaluing Asian values, rewriting rule of law', in: Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the U.S.*, London-New York: RoutledgeCurzon, pp. 298-312

¹⁰ Fitzpatrick, 'Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure', in: Lindsey (ed.), *Indonesia: Law and Society*, Sydney: Federation Press, pp. 339-354

after independence) or HIR and the *Rechtsreglement Buitengewesten* or Rbg. still apply. They are heavily criticized by Indonesian lawyers as outdated, especially because of their paternalistic colonial character of providing procedures for the 'simple needs' in commercial matters of the indigenous population in a largely agrarian society during colonial times. Rather than opting for a comprehensive reform of the civil procedural codes, Indonesia has enacted a large number of laws and decrees dealing with the structure and the organization of courts and increasingly providing specialized provisions for specialized courts. The more important general ones are the Law regarding Powers in Judicial Affairs of 2004 and the Law on General Judicature of 1986 as revised in 2004. These laws are largely concerned with the administration of the courts and the appointment of judges, although they cover a few procedural matters as well for both the civil and criminal jurisdiction of the courts. These revisions and the laws mentioned subsequently became also necessary with the third amendment of the Indonesian Constitution in 2001, which introduced among other things the new Constitutional Court and a Judicial Commission responsible for the appointment and supervision of judges and it provided that "the judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice." (Art. 24(1) of the Constitution of 1945). This was a long awaited step to remove the courts from the influence of the Ministry of Justice, which under the 'New Order' had increasingly managed the personal and financial matters of the courts and thereby ensured the political dependence of the judges.¹¹ Low payment of judges, at least at the lower courts, as civil servants, also opened the door to corruption. According to one study, by 1992 no less than 666 general court judges or 30% of the entire judiciary had been subjected to

¹¹ Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse*, Ithaca: Cornell Southeast Asia Program Publications, 2005, pp. 171-173

disciplinary action for corruption. Estimates by insiders around the same time even put the number of corrupt judges at approximately 50%.¹²

Of the more specialized laws regarding the judiciary, the Law on the Supreme Court of 1985 was also revised in 2004 and a further law formed the Indonesian Judicial Commission (Komisi Yudisial) as a supervisory agency of the judiciary. Further, a large number of specialized courts have been founded, mostly under special legislation outlining their structure, functions and procedural rules, but occasionally also as part of substantive legislation. Examples for the former group are the Law on the Children's Court of 1997, the Law on the Human Rights Court of 2000, the Law about the Settlement of Industrial Relations Disputes of 2004, the Law on the Taxation Court of 2002, the Law on the Religious Courts of 1989, the Law on the Administrative Courts of 1986 and the Law on the Constitutional Court of 2003. Provisions on specialised courts as part of substantive laws can be found for example in the Law on Fisheries of 2004, in the Shipping Law of 1992, in the Autonomy Law for the Special Province of Aceh of 2001 and in the Revised Bankruptcy Law and the various new intellectual property laws for the Commercial Court. The Commercial Court will be analysed in greater detail below.

Commercial contracts under the current system

Indonesian law does not distinguish between commercial contracts and other forms of contracts. The old Dutch Civil Code remains, therefore, relevant for commercial contract law. Equally, since commercial contract law is not among the areas covered by one of the new special courts with their specialized procedural provisions, the general procedural codes remain relevant, in particular the *Herziene Indonesisch Reglement* (HIR) and the *Rechtsreglement*

¹² *Ibid.*, pp. 412-417

Buitengewesten (Rbg.). While it is too early to judge the effects of the most recent reforms of the court structure, in the past, the jurisdiction of the general courts tended to be affected by the following issues:

1. While the main appeal procedure (*kasasi*) has been inherited via the Dutch system from the French cassation, the Supreme Court has increasingly broadened the grounds for what is reviewable to the point of largely ignoring the distinction between fact and law-specific questions.¹³ A review of trade mark cases reveals, however, that it is hard to find any consistency in this matter.¹⁴ One of the arguments seems to be that the poor quality of district court judgments often requires a full review of the case.¹⁵
2. The increase in the number of appeals has been accompanied by a policy to discourage provisional enforcement, up to the point that this policy was expressly prescribed by a Supreme Court Circular Letter in 1978.¹⁶ The effect has been that an appeal effectively stays the execution of the judgment¹⁷ and that the appeal became a delaying tactic of the defendant.¹⁸
3. Appeal decisions can be subjected to a further special review (*peninjauan kembali*) by the Supreme Court. Of the various reasons for the further review outlined in Article 67 of the Law on the Supreme Court, the more

¹³ Pompe, 232-234

¹⁴ Antons, *Intellectual Property Law in Indonesia*, London: Kluwer Law International, 2000, pp. 292-293

¹⁵ Pompe, p. 233

¹⁶ Gautama, *Indonesian Business Law*, Bandung: PT Citra Aditya Bakti, 1995, 531

¹⁷ Setiawan, 'Civil Proceedings, Litigations and Enforcement of Judgments and Other Remedies', in: Ministry of Law-Singapore Academy of Law-Faculty of Law, national University of Singapore, *Proceedings of the First Indonesia-Singapore Law Seminar*, 26-27 February 1993, p. 55

¹⁸ Pompe, p. 240

important ones are the subsequent identification of false evidence, the emergence of new evidence or clear errors by the judges deciding the case in earlier instances. Although Article 66(2) of the Law on the Supreme Court clearly states that the procedure does not effect the execution of the judgment, this is in fact the case because of hierarchical considerations of the judges in the lower courts. Thereby, the special review has again become a useful instrument for delaying tactics by the defendant, so much so that one Supreme Court Judge estimated that among one thousand further review applications, there was on average only one well-founded one.¹⁹

4. At its discretion, the Supreme Court has often decided to stay the enforcement of its own decision, for example in cases of overriding public interest and sometimes for an indefinite length of time.²⁰ The incidences, which trigger such a stay of execution, are difficult to predict. Equally, business people in Indonesia are well aware that obtaining a court decision in their favour does not yet guarantee payment and that the enforcement of the judgment is a further step.
5. While the recent court reforms are encouraging, claims about corruption are still frequently being made in the media. In the past, the many steps to enforcement of a judgment meant that litigation was costly and only a matter of last resort.²¹ The government has now taken various matters to confront and to penalise corruption, but newspaper reports indicate that the situation will certainly not change from one day to another. In fact,

¹⁹ Pompe, p. 246

²⁰ Pompe, p. 248, cites two cases published in the magazine *Tempo*, where enforcement had been delayed by twenty-seven and more than ten years respectively.

²¹ Goodpaster, 'Reflections on Corruption in Indonesia', in: Lindsey and Dick (eds.), *Corruption in Asia: Rethinking the Governance Paradigm*, Sydney: Federation Press 2002, 96-97

there are also claims that the currently ongoing process of tax and financial and administrative decentralization empowering local districts has made matters worse.

In view of the difficulties outlined above, business people in Indonesia continue to “bargain in the shadow of the law”. The threat of litigation is effective in bringing people to the bargaining table, not so much because they are afraid that the truth will emerge in efficient legal proceedings, but because litigation can be a costly nightmare, especially for equally strong parties which both have long pockets.

In spite of the persistent problems, it would be wrong to think, however, that nothing has changed since the onset of reformation. But those changes that can be perceived at present have yet less to do with legal reforms than with a reform of the corporate environment. Most importantly, the Suharto period public sector ‘franchise’ system, as Ross McLeod has called it²², has been dismantled to some extent and is less influential. A popular mock term used during the ‘New Order’ for business ventures involving both army or political backing and Chinese Indonesian businessmen was that of the ‘Ali Baba firm’. ‘Ali’ referred here to politically connected Indonesians, often from the ranks of the army or Suharto’s inner circle, who would provide the political patronage for the venture and ensure the smooth acquisition of licences, preferential credit allocation etc. ‘Baba’, a term for a locally born Chinese, referred to Chinese-Indonesian business people, who brought the capital, skills and international trading networks to the venture.²³ Given that these firms had both long pockets and were politically extremely well connected, commercial disputes with them were largely pointless. Accordingly, the security provided by contracts was limited. Relationships to the

²² McLeod, ‘Soeharto’s Indonesia: A Better Class of Corruption’, 7(2) *Agenda*, 2000, 99-112

²³ Schwarz, *A Nation in Waiting: Indonesia in the 1990s*, Sydney: Allen & Unwin, p. 107, describes the phenomenon by using the term ‘cukong’ for the ethnic Chinese.

powerful were much more important than carefully drafted agreements that could not be enforced.

One of the most important changes since 'reformasi' is that the role of army or politically backed businesses has been reduced. It seems that there is a variety of factors behind this phenomenon, including a relatively more transparent environment because of improved legal and democratic institutions and intensive scrutiny by a now very free and outspoken media and by opposition parties as well as an improved position of foreign ownership leading to a greater choice of partners, in particular for small and medium sized enterprises. As a result, the Indonesian corporate landscape has become much more diverse than during the 'New Order'. For commercial contracting, this means that more often than in the past companies of roughly equal strength will be dealing with each other. For these businesses, contracts are important to provide the fundamentals for their relationship and as a constant reference point for their operations. As a result, the role of commercial contracts between equal partners at various levels of the economy is becoming more important than during the Suharto years. This is equally reflected in a growing importance of commercial lawyers, which in turn has triggered a rising interest in legal studies and a rising number of enrolments in law schools. Law is increasingly being perceived as a potentially lucrative business.

Of course, this increased 'bargaining in the shadow of the law' between roughly equal partners does not yet help in situations, where the relationship is grossly unequal. If there is a failure of relationship between roughly equal partners, the mere threat of litigation will be sufficient to bring the parties to the negotiation table, where the agreement will be reviewed and, if necessary, amended, for example by adding new terms of payment or agreeing to different forms of delivery or performance of the contract. In a grossly unequal relationship, this

mechanism will fail and there is no incentive for the more powerful party to renegotiate. Instead, the weaker party can be simply overpowered and be presented with contractual terms on a 'take it or leave it' basis.

Alternative dispute resolution

A further aspect of law reform, which may have some bearing on these matters, is the greater encouragement of commercial arbitration and alternative dispute resolution (ADR) mechanisms since the late 1990s. The most important general legislation in this field is the Law on Arbitration and Alternative Dispute Resolution of 1999. For foreign arbitral awards in the field of commercial law, the law prescribes that the award must be recognized in Indonesia and that an exequatur must be obtained from the Head of the District Court of Central Jakarta that the award is enforceable. The main reason for not recognizing foreign arbitral awards is conflict with public order or policy. As one commentator has pointed out: "Determining whether something is or is not contrary to public policy is, therefore, a matter for the court's discretion and it will be decided on a case by case basis. Recognition of a foreign arbitral award will thus depend on how the Indonesian court views each application." As a result, the same commentator points out that "enforcement of foreign arbitral awards in Indonesia has been successful only in cases where the losing parties did not actively resist the enforcement of the awards"²⁴ and he concludes that "in the absence of any clear criteria of what considerations constitute public policy, the enforceability of foreign arbitral awards remains uncertain in Indonesia"²⁵. National arbitration awards equally should not conflict with good morals and public policy.²⁶ But even where arbitration awards are recognized, the

²⁴ Budidjaja, *Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia*, Jakarta: PT Tatanusa, 2002, p. 34

²⁵ Budidjaja, p. 107

²⁶ *Ibid.*, p. 31

enforcement follows then again the procedures of the general Civil Procedural Law (Art. 69(3)) with some of the associated problems that have been identified above.²⁷

Apart from the general law on arbitration and alternative dispute resolution, there are various special mediation bodies and provisions for dispute resolution, such as in the field of taxes, unfair competition, industrial relations, consumer protection and environmental protection.²⁸ Alternative dispute resolution is also now encouraged in almost all intellectual property laws after the complete reform of the intellectual property legislation between 2000 and 2002. The Act for the Protection of Plant Varieties of 2000 is the only exception to this, as it does not mention alternative dispute mechanisms.

The Commercial Court

The foundation of Indonesia's first Commercial Court (*Pengadilan Niaga*) in 1998 was not a carefully planned and coordinated act of court reform, but an emergency measure in the wake of the Asian Crisis. It came after intensive negotiations between IMF advisers in Jakarta and the Indonesian government, when it was realized that the ordinary courts were unable to deal with the rapid rise of corporate insolvencies on the basis of the colonial *Faillissements Verordening*.²⁹ The emergency character of the changes can be seen from the legal form that was chosen to implement it. The changes to the bankruptcy legislation were implemented as a 'Government Regulation in lieu of Law' (*Peraturan Pemerintah Pengganti Undang-Undang* or *PERPU*). According to Article 22(1) and

²⁷ See in general on the problems with arbitration also Suparman, *Pilihan Forum Arbitrase dalam Sengketa Komersial untuk Penegakan Keadilan*, Jakarta: PT Tatanusa 2004

²⁸ Widjaja, *Alternatif Penyelesaian Sengketa*, Jakarta: PT RajaGrafindo Persada, 2005

²⁹ Gautama, *Komentar atas Peraturan Kepailitan Baru Untuk Indonesia (1998)*, Bandung: PT Citra Aditya Bakti, 1998, p. 8; Hoff, *Indonesian Bankruptcy Law*, Jakarta: PT Tatanusa, 3

(2) of the Indonesian Constitution, such government regulations in lieu of law are possible in cases of extreme urgency, but must be approved by the Indonesian Parliament (Dewan Perwakilan Rakyat or DPR) at its next session. In this case, PERPU No. 1 of 1998 was ratified by the DPR in July 1998 and signed into law by President Habibie in September 1998.³⁰ In 2004, this law was replaced by a completely revised Bankruptcy Law.³¹

The provisions about the Commercial Court were originally to be found in Chapter 3 of the Revised Bankruptcy Code and they are now included in Chapter V of the new Bankruptcy law. The first Commercial Court was formed at the District Court of Central Jakarta, but the President by decision could open further Commercial Courts in line with needs and resources. This happened as early as 1999, when four further Commercial Courts in the cities of Surabaya, Medan, Semarang and Ujaung Pandang were opened on the basis of Presidential Decree No.97 of 1999.³² With the exception of the small jurisdiction of the Commercial Court in Semarang, which is only responsible for Central Java and the Special Administrative Region of Yogyakarta, the courts have an extended jurisdiction over several provinces on various islands of the Indonesian archipelago.³³ Appointments to the Commercial Courts are made by the Chief Justice of the Supreme Court. To be appointed, judges must be experienced within the general courts, they must possess special knowledge and dedication in the field of commercial law must be authoritative, honest, just and well mannered and must have followed a special training program for commercial court judges. There is also a provision for the appointment of experts as *ad hoc* non-career judges. If no

³⁰ Hoff, 4

³¹ Law No. 37 of 2004 concerning bankruptcy and the postponing of the obligation to pay a debt

³² Antons, 'Specialised Intellectual Property Courts in Southeast Asia', in: Kur, Luginbühl and Waage (eds.), "...und sie bewegt sich doch!" - Patent Law on the Move, Cologne-Berlin-Munich: Carl Heymanns Verlag, 2005, 291

³³ Antons and Priapantja, 'Civil Enforcement of Intellectual Property Rights in Indonesia', paper presented at the conference on 'Indonesian Legal Institutions', Asian Law Center, University of Washington, Seattle, 22 April 2004

specialised provisions apply, the general procedural law remains applicable in the Commercial Court. Appeal to the Supreme Court and special review (*peninjauan kembali*) remain possible. In the latter case, the Supreme Court is given only one month to decide if it concerns an error by the previous courts and three months if there is new evidence.

Importantly, Article 280(2) of the Revised Bankruptcy Act foresaw from the beginning the possibility to extend the jurisdiction of the Commercial Courts to commercial matters other than bankruptcy. At the time, it was envisaged that a further Government Regulation would enumerate these additional areas of responsibility. The opportunity for extending the responsibility of the Commercial Courts arose with the revision of the intellectual property legislation between 2000 and 2002. This revision was undertaken to meet the deadlines of the WTO Agreement on trade related aspects of intellectual property rights (TRIPS), which is an essential component of the Agreement founding the WTO. The Indonesian intellectual property reform between 2000 and 2002 was designed to bring the Indonesian legislation into line with the standards prescribed by TRIPS by completely revising the copyright, patent and trade mark legislation and by introducing with trade secrets, industrial designs, designs of circuit layouts and plant varieties four new fields of intellectual property protection.³⁴

However, not all of these fields have been brought under the umbrella of the new specialized Court. Only the core areas of copyright, patents, trade marks, industrial designs and designs of circuit layouts are now under the Commercial Court, whereas plant varieties, trade secrets and also border control measures

³⁴ For details see Antons, 'Indonesia', in: Heath (ed.), *Intellectual Property Law in Asia*, London: Kluwer Law International, 2003, pp. 391-428

against the import of intellectual property infringing material remain the responsibility of the general courts.

For those areas of intellectual property that from now on fell under the responsibility of the Commercial Court, the Government not only prescribed the court's responsibility, but it also took the unusual step of adding procedural chapters to the various intellectual property acts. These specialized procedural provisions addressed various matters of specific concern in intellectual property cases, such as a reversal of the burden of proof in cases of patent violation claims involving process patents and the introduction of injunctive relief (*penetapan sementara*). Injunctions such as Anton Piller orders or Mareva injunctions play an extremely important role in intellectual property cases, in particular in the Anglo-American jurisdictions, because of the ease with which evidence can be destroyed or assets can be removed. As was outlined above, in Indonesia provisional judgments (*putusan provisional*) perhaps came closest to injunctive relief, but their use was extremely restricted under Supreme Court policies. New procedural provisions in the intellectual property legislation thus filled this void and provided for injunctions both during ongoing proceedings and *ex parte*.³⁵

A further feature of the procedural provisions in the intellectual property laws are tight deadlines for the submission of claims and appeals, but also for the courts in setting the dates for court sessions, in coming to a decision and in informing the parties of the outcome of the case. These tight deadlines are provided not only for the first instance at the Commercial Court, but also for appeals to the Supreme Court. The deadlines for the Commercial Court are somewhat similar. For the most common claims of cancellation of a wrongful registration and for claims for damages, they foresee that the courts sets the date for a first session within 60 days and takes a decision within 90 days. The latter deadline may be extended by a further 30 days, if the Chief Justice of the

³⁵ Antons, 'Specialised Intellectual Property Courts in Southeast Asia', p. 294

Supreme Court agrees. Appeals to the Supreme Court have to be decided within 90 days.

Among the procedural changes introduced by the new Bankruptcy Act in 2004 amended version was the possibility for judges to file dissenting opinions. However, this applied for bankruptcy cases only. There is no indication as to how the specialized procedural rules in the various intellectual property laws relates to the general provisions about the Commercial Court in the new Bankruptcy Act. The various pieces of legislation do not make reference to each other. Article 299 of the new Bankruptcy Act says merely that general civil procedural law applies, unless there something different is stated in the provisions of the new bankruptcy legislation. However, since the Bankruptcy Act regulates the structure of the courts, the appointment of judges and the process of appeal, it must be assumed that the procedural rules in the new intellectual property legislation become *lex specialis* in comparison to the more general rules on the Commercial Court in the Bankruptcy Act. Further, since the Bankruptcy Act refers itself to the general provisions of the Indonesian procedural law (the *Herziene Indonesisch Reglement* and the *Rechtsreglement Buitengewesten*), the plaintiff in an intellectual property case must in fact be aware of an amalgam of procedural provisions, starting from the more specialized ones in the intellectual property laws for matters such as injunctions and deadlines, via the less specialized ones of the Bankruptcy Act for matters such as composition of the courts to the general procedural provisions of the HIR and the Rbg. for issues such as evidence taking or the formalities of the submission of the claim. In spite of the definite progress brought by the various new procedural provisions for the

Commercial Court, the wide spread of the provisions over various pieces of legislation thus means that the picture often remains quite confusing.³⁶

How has the new Commercial Court performed? Again, the picture is mixed and there is a striking contrast between strong criticism of the court's decisions in bankruptcy cases and its relatively good performance in intellectual property law cases. Soon after its establishment, international observers began to criticise the court for wrong or inappropriate decisions in bankruptcy cases.³⁷ Some of the criticism was directed directly against the Commercial Court, whereas in other cases it was the Supreme Court that was in the firing line for its appeal decisions. Perhaps the most notorious case became the bankruptcy declaration of highly profitable Canadian life insurance company Manulife in 2002.³⁸ In 2004, the IMF evaluated the performance of the court as follows:

“Although the Court's image remains poor, studies have found that up to 70 percent of its decisions are in fact based on sound or defensible legal reasoning. It is the remaining 30 percent or so of, usually, high profile controversial decisions that continue to tarnish the Court's reputation. Many observers believe these decisions could only have been reached as a result of external influences. Moreover, observers also note that much of the Court's perception problems originate from the Supreme Court, where some cases properly-decided at the Commercial Court have been wrongly-decided on appeal.”³⁹

³⁶ This is particularly the case, if compared with the clearer Rules of Court of similar specialized courts elsewhere, such as in Thailand, see Antons, 'Specialised Intellectual Property Courts in Southeast Asia', 298.

³⁷ See for example the various discussions of cases in Hoff.

³⁸ Robison and Hadiz, *Reorganising Power in Indonesia: The politics of oligarchy in an age of markets*, London-New York: RoutledgeCurzon 2004, p. 265, fn.1. See also the detailed discussion of the case in the World Bank Brief for the Consultative Group on Indonesia, *Indonesia – Maintaining Stability, Deepening Reforms*, 2003, p. 34

³⁹ IMF, *Indonesia: Selected Issues*, IMF Country Report No. 04/189, July 2004, 46

In 2003, the World Bank had also concluded that “the principal problem appears to be more in the area of enforcement, which goes beyond the capacity of the courts.”⁴⁰ The IMF Report of 2004 included a number of recommendation for the long-term institutional reform of the judiciary to address issues such as personnel and financial management. Many of these improvements were to come from the Judicial Commission, which was just about to be formed.

In comparison to its bankruptcy decisions and judging from the first five volumes of decided cases, mainly in the field of trade marks, the intellectual property decisions of the Commercial Court have been much less controversial and largely sound.⁴¹ Occasionally, longstanding problems with how to define well-known trade marks have re-emerged⁴² and the courts have been criticized because of this.⁴³ Overall, however, practitioners in Indonesia are reasonably content with the decision of the Commercial Court in trade mark cases. Especially the speed with which the decisions are made, has improved considerably. Of the cases decided in 2002 and 2003 by the Central Jakarta Commercial Court, only one case exceeded the maximum period allowed for decisions in trade mark cases of four months after the granting of an extension. In fact, many cases were decided in less than two months. The greater specialization means that a limited number of judges have been allowed to gain experience and to continuously work with intellectual property cases. Regular publication of Central Jakarta Commercial Court decisions by a commercial

⁴⁰ World Bank, *Indonesia Development Policy Report: Beyond Macroeconomic Stability*, Report No. 27374-IND, 2003, p. 45

⁴¹ Antons, ‘Specialised Intellectual Property Courts in Southeast Asia’; Antons and Priapantja.

⁴² Antons, ‘The Protection of Well-known Marks in Indonesia’, in: Heath and Liu (eds.), *The Protection of Well-known Marks in Asia*, London: Kluwer Law International, 2000, pp. 199-213

⁴³ Mapes, ‘Battle to Reclaim a Brand’, *Far Eastern Economic Review*, 22 May 2003; Suryomurcito, ‘Intellectual property laws still weak’, *The Jakarta Post*, 31 January 2005

publisher to allow for public scrutiny is a further positive development.⁴⁴ Among the challenges to the new court structure are to retain this specialization by improving the prospects for promotion of Commercial Court judges and by allowing for leapfrog promotions to equally specialized branches of the Supreme Court, which are in the process of being created. However, all in all and in spite of the criticisms and still existing problems, the creation of specialized courts in Indonesia has been an important step forward and it confirms the appropriateness of the recommendations in this regard, which were made in the various Doing Business Reports from 2004 to 2006.

The legal heritage theory in the Doing Business Report from the viewpoint of comparative law

In the Doing Business Report of 2004, the colonial heritage of legislation was discussed. Lighter regulation was found in particular in common law and Nordic countries and associated with better economic outcomes. Heavy regulation, on the other hand, was linked to the French or socialist legal tradition and associated with less efficient economic performance. Interestingly, it was also associated with less democracy and with “tropical climates”.⁴⁵ Also among the positive performers are with Japan and Korea two countries regarded as belonging to the German tradition and with the Netherlands a single country that is classified as belonging to the French tradition.

This part of the report suffers from a lack of understanding of the history of European derived laws in colonial settings and from the rather crude classification of the various countries as belonging exclusively to the English, French, German, Nordic or Socialist systems respectively. It is indeed common in

⁴⁵ Doing Business 2004, p. 87

comparative law to classify countries as belonging to 'legal families', a methodology that, as even the leading comparative text of Zweigert and Kötz⁴⁶ admits, is ultimately unsatisfactory and subjective and "vulnerable to alteration by historical development and change." The distinctions used in the *Doing Business* report are largely those of Arminjon, Nolde and Wolff, but with the additional category of the socialist systems introduced by René David⁴⁷. In Asia, socialist China and the East Asian countries of Japan and Korea are noted as having a German legal tradition, all of mainly Southeast Asia with the exception of Thailand and Malaysia is French, as are Indonesia and the Philippines.⁴⁸

The problem with such classifications is that they regard developing countries in Asia, Africa and Latin America largely as passive recipients of European laws, whose systems are somehow frozen in time and they largely ignore legally pluralist settings and the influence of non-European laws.⁴⁹ Some attempts are made at including Chinese and Japanese law (in Zweigert and Kötz under a heading "Law in the Far East") as well as Islamic and Hindu Law (as "Religious Legal Systems"). The research of non-European systems less widespread or perceived as less important than these is largely left to legal anthropologists.

As a result, the complicated negotiation process about national legal systems that is going on in many developing countries is ignored. The *Doing Business Report 2004* is correct in finding that many laws in developing countries still date back to colonial times and that in many areas of law, not much reform has taken

⁴⁶ Zweigert and Kötz, *An Introduction to Comparative Law*, 3rd ed., Oxford: Clarendon Press, 1998

⁴⁷ *Ibid.*, pp. 64-65

⁴⁸ *Doing Business 2004*, p. 85

⁴⁹ More recent comparative law literature has attempted to open up the field and to include the effects of globalisation and of developments in non-Western countries, see for example Menski, *Comparative Law in a Global Context: The legal systems of Asia and Africa*, London: Platinum Publishing 2000; Legrand, 'How to compare now', *Legal Studies*, Vol. 16 No. 2, 1996, 232-242; Glenn, *Legal Traditions of the world: Sustainable diversity in law*, Oxford: Oxford University Press. See also Antons, 'Analysing Asian Law: The Need for a general Concept', *Law in Context*, Vol. 13(1), 1995, pp. 106-123.

place.⁵⁰ However, this overlooks the more complicated history of post-colonial legislation. After all, the law introduced by colonial powers in developing countries was rarely identical with the increasingly sophisticated law in the countries from which it originated and it did not benefit from emerging ideas of the rule of law and democracy there.⁵¹ The colony of the Dutch East Indies for example allowed at no stage real representative government, different laws were applied to different groups of the population and rule by executive decree and in an ad hoc fashion was fairly common. This tendency to rule by executive decree has been difficult to overcome in independent Indonesia. The efforts to find compromises on the national law are further complicated by the fact that in many cases, different parts of the population see their interests best served by different parts of the pluralist legal order.⁵²

However, even if non-Western components of a developing country's legal system are ignored, the adoption of European derived laws is not or no longer solely a result of colonization. First of all, the *Doing Business Report 2004* is wrong in finding that "Thailand is the only East Asian country never to have been colonized."⁵³ Japan of course also prevented colonization by the Western powers by opening up the country to trade and by concluding what became known in Japan as the "unequal treaties" in 1854 providing for extraterritoriality of citizens of Western powers and a separate consular jurisdiction for them.⁵⁴ As is well-known, the Japanese embarked on a process to "gather the strong points of the

⁵⁰ See p. 94 of the 2004 Report.

⁵¹ Antons, 'Legal Culture and History of Law in Asia', in: Heath (ed.), *Intellectual Property Law in Asia*, London: Kluwer Law International, 13-35

⁵² Antons, 'Law Reform in the 'Developmental States' of East and Southeast Asia; From the Asian Crisis to September 11, 2001, and Beyond', in: Antons and Gessner, *Globalisation and Resistance: Law Reform in Asia Since the Crisis* (in print)

⁵³ p. 95 of the 2004 Report.

⁵⁴ Hane, *Modern Japan – A Historical Survey*, Boulder, Colorado: Westview Press, 1986, 68; Haley, *Authority Without Power: Law and the Japanese Paradox*, New York-Oxford: Oxford University Press 1991, 68

five worlds and construct the great learning of our imperial nation".⁵⁵ In the field of law, reform took place in a process that John Owen Haley has referred to as "selective adaptation", which actually in many ways was also a continuation of the earlier wave of reception of Chinese law in the 7th and 8th century.⁵⁶ For "selective adaptation", the country drew on various sources, with a particular strong German influence in Civil and Commercial Law and Procedural Law, but using among others Anglo-American and local Japanese concepts for areas such as trusts and family law. Anglo-American influence became stronger after World War in constitutional law and in various fields of business law.⁵⁷ Thus, to conclude that Japanese law is derived from German law appears as a simplification.

The same would be true for other countries that have adopted Japanese law because of colonization by the Japanese, as Korea and Taiwan, or voluntarily, as Thailand, which is classified in the *Doing Business Report* as an English derived system in spite of the fact that parts of its legislation are translations from Japanese models and French influence has been fairly strong as well in legislation as well as in legal education.⁵⁸ However, the previous European colonies in Asia have also not been standing still since decolonisation. Some in fact, such as Sri Lanka and the Philippines, had received various legal traditions during the colonization process and the Philippines and the People's Republic of China are referred to in Zweigert and Kötz as 'hybrid' systems of law.⁵⁹ To a certain extent of course, most systems will be hybrid, if examined more closely. However, the process of selectively adapting law from many different sources has been particularly strong in parts of the post-independence developing world, where

⁵⁵ Japanese reformer Sakuma Zōzan as quoted in Hane, 73.

⁵⁶ Haley, pp. 29-32 and 82-96

⁵⁷ Tanaka and Smith, *The Japanese Legal System: Introductory Cases and Materials*, 185

⁵⁸ The Thai legal system is classified in M.B. Hooker, *A Concise Legal History of South-East Asia*, Oxford: Clarendon Press, 1978, as largely French derived.

⁵⁹ Zweigert and Kötz, 72

European institutions had been forcefully introduced, had little local tradition and where governments felt as a consequence few cultural or historical inhibitions to borrow from various traditions.⁶⁰ Thus, aspects of Anglo-American law have been particularly strong in various fields of commercial law and in procedural law in countries classified in the report as being in the civil law tradition such as Indonesia, Thailand or Vietnam.⁶¹

Conclusion

If East and Southeast Asian legal systems are thus essentially hybrid rather than clearly French or English or German derived, the negative judgment about French derived systems and the positive connotations associated with the other systems appears in a different light and may have to be corrected, depending on what part of the commercial law system is examined and what legal tradition is attributed to it. It is clear from the above and from the Indonesian example that many developing countries have been active in transforming their systems in an *ad hoc* manner, although much of this may have happened in the form of executive decrees and via judicial activism of the courts. Thus, it may not have attracted as much attention as if new comprehensive legislation had been passed. It is equally clear that law reform has often been constrained by politics, as is correctly stated in the *Doing Business Report 2004*.⁶² A lack of democracy mentioned in the report, indeed seems to be one of the reasons for the intense politicization of law. Other reasons are the importance of industrial policies in developing and newly industrializing nations and the continuing negotiations about legal unification as an ideal in view of widespread and persistent legal

⁶⁰ For the example of intellectual property law, see Antons, 'Specialised Intellectual Property Courts in Southeast Asia', 299

⁶¹ See for Thailand Aryanuntaka, 'TRIPS and the Specialised Intellectual Property Court in Thailand', *International Review of Industrial Property and Copyright Law*, Vol. 30 No.4/1999, pp. 362-363

⁶² See p. 86.

pluralism in reality. Legally pluralist settings offer citizens a choice of forum for their disputes. Unless the state courts and national legal systems finally begin to deliver on their promises of effective and easily accessible justice, people may continue to seek it elsewhere.

In spite of some of the methodological weaknesses identified above in particular with regards to comparative law, the *Doing Business Reports* correctly identify many of the constraints that lawyers and businesses are facing in contract and commercial law enforcement. The discussion in this paper has covered not only contracts but also intellectual property law and enforcement. For the field of intellectual property law, the emphasis of the *Doing Business Reports* on specialized courts has been found to be a step in the right direction, even if the results are still sometimes mixed and more time is needed for the reforms to make intellectual property enforcement much more effective. The absence of the issue of intellectual property protection from the Reports is surprising. After all, intellectual property protection via the TRIPS Agreement is an essential part of the WTO Agreement. Currently, intellectual property chapters in bilateral Free Trade Agreements are among the most hotly debated parts of such agreements. Economists regularly point to the importance of intellectual property protection for investment decisions based on statistics for some industries (notably chemicals), where, depending on the country involved, between 31% and 81% of firms regard intellectual property protection as too weak to proceed with the investment.⁶³ In view of this importance of intellectual property in the global economy, a discussion of intellectual property protection should be included in future reports.

⁶³ Maskus, *Intellectual Property Rights in the Global Economy*, Washington, DC: Institute for International Economics, 2000, 128.