How lawyers win land conflicts for corporations: Legal Strategy and its influence on the Rule of Law in Indonesia

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4 Pre-Litigation, Litigation, and Enforcement Strategies

This chapter focuses on strategies for acquiring land to derive income from land title or tenure. It shows how lawyers and their clients are using or avoiding the legal system for this purpose, how lawyers influence the process of litigation and its outcome, and what the role of legal knowledge is.

Most of the data in this chapter were collected through four years of participant observation in a 'family' lawyer's[1] firm. Lawyers are central actors in developing strategies when it comes to acquiring land. Therefore, the focus on strategies used by lawyers will provide the most comprehensive and varied description of strategies and the availability of tactics, compared to focusing on another actor. My account may not be exhaustive, but I do think that this chapter covers these strategies and provides a useful point of departure for further research in law, society, and governance.[2]

The goal of this chapter is to present the various strategies lawyers perform and what is needed for their performance. I try not to make a distinction between which strategies are legal and within ethical and normative boundaries, and which strategies overstep or even blatantly violate them. Many of the strategies discussed are unethical, not only because they use illegal means but because they are used in a way transforming the rules and the legal system into something other than what was intended (cf. LoPucki & Weyrauch 2010:85).

The chapter roughly follows a chronological order of land disputes. It begins with (1) 'pre-litigation strategies'. These are strategies designed and implemented before going to court to negotiate effectively regarding land entitlement or to expose one's bargaining power. The latter refers to actions that convey to the opponent that one can actually win the case when it comes to litigation. (2) 'Litigation strategies' are strategies performed once disputes become lawsuits to control the outcome of the lawsuits, and (3) 'Enforcement strategies' are strategies for dealing with a decision, which can include enforcement or making the decision unenforceable. In other words, how to 'creatively comply', or evade the decision while maintaining the appearance of compliance.[3] I chose to use this structure because the strategies are linked to these phases of litigation, even if a strict division cannot be made.

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1 Discussed in Chapter 2.

2 I also provide comparisons from literature on international and globalized legal practice.

3 See, e.g., McBarnet, D. (1991). Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma. The British Journal of Sociology, 42(3), 323–344.

4.1 Pre-Litigation strategies

Establish a favorable position

Even before there is a sign of contest or after land has been cleared of constructions and vegetation,[4] developers mark the area of the vacant land to reinforce their control over it. The marking of territory is pre-emptive. It serves two different purposes: it makes future claims easier, such as registering and splitting or merging land area in land certificates[5] and prevents the cleared area from being occupied (again). This is by putting up boundaries (e.g., by using patok, i.e., poles, pegs, signs), fences, and brick walls, by building stalls (warung) selling cigarettes and food items, and by setting up security checkpoints (pos satpam). The warung and pos satpam will serve as shelters for personnel employed to guard the area. In other words, parties have to 'squat' on their land before they can build more permanent buildings or start working on development projects.[6]

When entitlement to land is being disputed, i.e., several parties are claiming to own the land, parties prepare for litigation by considering the timing for the procedure, the budget, and the opponent's ability. Timing or tempo[7] is about whether and how fast one should bring the dispute to litigation. This is because being outrun by the opponent and ending up as a defendant significantly limits the strategies. To find out when to bring the dispute to litigation, parties need to have the ability to gauge whether negotiation is reaching a deadlock.

Negotiations are performed using the rhetoric of achieving the goal of *sama-sama senang*, i.e., that both parties have to be pleased.[8] They are performed as pleasant meetings at dining tables, filled with nice metaphors and rhetoric such as brotherhood and trust, but this attitude quickly sours when parties gauge that the negotiation will not result in a deal.

The next important aspect is the budget. Lawyers see 'middle class' people as the worst opponents since they cannot be paid off or reasoned with.[9] As stated by a lawyer: 'the hardest opponents are mid-level compa-

4 There are various legal bases for this. For instance, it could be that the NLA has issued a land certificate under their name, or based on the receipt of tax payments, such as *eigendomverponding* and *girik*. For the process of land clearing, see Chapter 3.

5 For example, to be sold as *kavling*, i.e., ready-to-build sections of land.

6 When the area is not developed for a long time, these personnel sometimes refuse to move from the area.

7 Bourdieu (1980:81) explained tempo as structurally inseparable from practice, '*practice is inseparable from temporality, not only because it is played out in time, but also because it plays strategically with time and especially with tempo*'.

8 Also referred to as *sama-sama cuan*, meaning that both parties receive profit. A kind of win/win situation.

9 Perhaps this is because they feel that their livelihood is being disturbed. In my observation I encountered expressions such as '*we are only doing work*', '*we are only trying to feed [ourselves/our family]*', and '*we only want to please [others/God].*'

nies or middle-class people. For companies or people without money or lower class, you just need to pay them off. Elites or large companies care more about reputation or larger business goals, so you still have the opportunity to reason with them. But this middle class is the most dangerous, because they have the money and they do not care about reputation.'[10]

'Middle class' opponents are likely willing to spend their entire capital when the negotiations are over, acting unpredictably to assert that they are protecting their own interests. This is out of an attitude of not wanting to become the loser, and out of honor or *harga diri* (self-value or self-worth).

Moreover, engaging parties with little capital in litigation is not beneficial, which is why a dispute is often not brought to litigation: the cost is higher than the possible gain. There are two exceptions. First, if going to litigation is for shaming or revenge. In other words, a case is submitted to court to make someone's life difficult.[11] Second, if the goal of litigation is to claim ownership by undermining the opponent's basis of ownership (e.g., notarial deeds and land certificates) or by canceling the legitimacy of transaction documents (i.e., contracts).

It is also important to measure the opponent's ability. This depends on what kind of lawyer the opponent has. Therefore, I will first explain what to consider when engaging lawyers.

4.1.1 Engage both cooperative and combative lawyers

Lawyers are either cooperative or combative towards an opponent, and these attitudes reflect how clients want the dispute to end (Gilson & Mnookin 1994). These attitudes do not necessarily lawyers' ethical conditions, although the combative feature is likely to be found in brokers and fixers. In Chapter 2, I explained that for clients, good lawyers are people who 'get things done'. Three skills are the most important for this: 1) knowledge of banking and financial law to structure transactions, 2) the ability to incorporate different norms or ideals by citing religious scriptures and invoking customary rules[12] in their arguments, and 3) *jago sogok* (literally champion in bribing) which actually means ingratiation (Jones 1964) rather than the narrower bribing, which I will explain further below.

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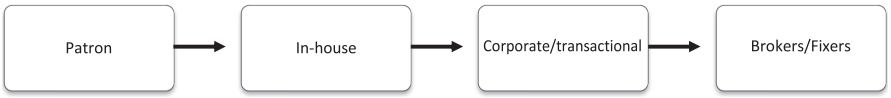
10 Based on observation of an initial meeting between a litigator and a potential client at the litigator's office.

11 See Chapter 2 about professional relationships between lawyers and clients. Additionally, in Chapter 1 (case studies) we have seen a number of parties who state that they cannot think about anything but the lawsuit. Some described how their thoughts are so fully occupied with the lawsuit that they are unable to hold a job, so they claimed for repayment of loss. I want to note that I have found no expert testimony (e.g., from a psychologist) regarding this in any of the case studies. Perhaps it is more common in criminal law, although it is outside the scope of this research.

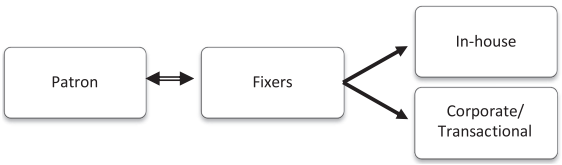
12 They refer to *kebiasaan, adat, aturan, tata cara, mekanisme*.

Determine the executive of a case

Before developing litigation strategies, lawyers and clients have to determine and agree who has the duty to invent strategies and the right to instruct others to put the strategies into actions. Furthermore, most of the strategies—especially pre-litigation strategies—are only feasible with certain structures developed by lawyers and their clients. As seen in Chapter 3, about 90% of businesses in Indonesia are family businesses, which means that lawyers in this study seldom have to protect an individual's interest(s) and instead handle the wider business group or family. I found different command chain structures. In the first one, the lawyer is expected to receive a command. It is illustrated as follows:



Most lawyers prefer the second type,[13] where they work closely with the patron, who is the beneficial owner, the *pater familias*, the oldest male in the family, the person running the business, the founder of a company group, the *chief*, or the head of a club or group association.[14] In this model, the patron and lawyers develop the strategies together. They work as equals and use in-house lawyers and transactional lawyers only for 'corporate and commercial communications', such as issuing internal letters to be later used as evidence, to send letters on behalf of the company,[15] and to issue legal opinions to appease investors.



13 This is required by 'family' lawyers. They base this requirement on lawyers' independency and professionalism. Interview with LC, EY, IS.

14 These are clubs whose membership is based on subscriptions, contributions, or invitations based on *bibit, bebet, bobot*, such as PERPIT (Perhimpunan Pengusaha Indonesia Tionghoa) and HIPMI (Himpunant Pengusaha Muda Indonesia). Further research on these clubs is important because the leader can regulate procedures on business negotiations amongst the members.

15 According to an interview with a transactional lawyer, this includes fabricating the background of license issuance by drafting communications between clients and government institutions to be signed together with the licenses. Interview with KS.

This model provides the benefit of having a fixer as the Chinese wall between the executive of strategies (patron and fixer) and subordinate or the service giver (in-house and transactional lawyers).[16] In this model, fixers also act as a kind of bridge of information between the patron and the service-giving lawyers they employ and have the power to instruct them in the name of the patron or client.

Pay attention to image

Clients select particular lawyers because they bring with them a certain image. In this manner, they can show to their opponent what their objective is or intimidate them.[17] The image concerns the size and reputation of firms, who will issue letters/opinions/notices/*somasi*[18] (I will refer to these generally as letters). When the letters are to be presented to banks for a loan, big international firms known to consist of corporate or transactional lawyers are important, as they have the image of being free from corruption. A different image is required when the letters are submitted to court officials, as they determine the attitude of court officials. This is an image of being powerful and having the means to carry out the claims made in the letters.

In litigation, lawyers also act as spokespersons of companies[19] who handle crisis communications strategies and in turn, affect the company's image.[20] Any litigation has to be disclosed in a company's—particularly a publicly listed company's[21]—annual reports.[22] The annual reports affect the company's performance in terms of stock prices. This makes having both a 'cooperative lawyer' and 'combative lawyer' important. The former is hired as a front or 'formal' representative to communicate or negotiate (usually a 'professional' lawyer) with, e.g., investors, the *OJK* (Financial Services Authority), and financial news media (e.g., Bloomberg), while the latter is free to make deals.

16 This is notably different from what research on corporate lawyers has found in more developed jurisdictions, such as the United States and United Kingdom.

17 Professional litigators and transactional lawyers would withdraw from a case if the opponent is a known fixer and recommend the client engage another fixer to level the playing field. Interview with Fikri Assegaf and Frans Hendra Winarta.

18 Notice or summons, see *Somasi* below.

19 The Power of Attorneys I encountered include the authority of the lawyers to answer questions and make statements in relation to the dispute.

20 See, for example, Carney, A & Jorden, A. 1993. Prepare for business-related crises. *The Public Relations Journal* 49.8:34.

21 OJK Circular Letter no. 30/SEOJK.04/2016. Otherwise, companies are bound by accounting standards issued by Ikatan Akuntan Indonesia (Indonesian Association of Accountants), which states that all litigation, particularly that effecting companies' financial condition have to be disclosed.

22 For example, in their 2014 annual reports, PT. Ciputra Development Tbk. (CTRA) reports no cases, PT. Lippo Karawaci Tbk. (LPKR) reports 25 cases, Summarecon Agung reports 8 cases, and PT. Bumi Serpong Damai Tbk. (BSDE) listed no 'significant' cases.

Moreover, some companies (e.g., companies with foreign shareholders and oil and gas companies) have a general rule that prohibits the use of certain types of lawyers,[23] but this rule does not always work in practice. Parties who want to hire fixers manage to circumvent this rule. For example, in-house legal counsels from oil and gas companies operating in Indonesia have to follow BpMigas[24] regulation[25] about employing 'external legal counsels' who have to be 'clean' or have the image of not being corrupt.[26] The 'external legal counsels' are usually required for litigation, but they are free to further outsource their services to another lawyer.[27]

4.1.2 Know the opponent

To be able to gauge the ability of their opponents, (prospective) litigants and their lawyers spend many hours exchanging knowledge about their opponents: who the opponents are associated with and whether or not they have a powerful backer.[28] For this, clients hire all kinds of consultants, referring to these consultants as '*Business Prevention Department*' or *BPD*.[29]

The consultants referred to as BPD include different kinds of 'service provider' organizations. These include highly professional accountants[30] who provide financial reports, *corporate/transactional lawyers* who provide legal opinions, '*NGOs*' for organizing masses and performing studies,

23 This is pursuant to United States' Federal law, the Foreign Corrupt Practices Act of 1977 (or FCPA) 15 U.S.C. § 78dd-1, et seq. FCPA is known primarily for two of its main provisions: one that addresses accounting transparency requirements under the United States' Securities Exchange Act of 1934 and another concerning bribery of foreign officials. This is according to interviews with corporate lawyers. Clients fear being in American courts and being scrutinized by their home enforcement bodies. For example, in 2014, the Japanese Marubeni Corporation pleaded guilty under FCPA for bribing an Indonesian state-official and had to pay a fine of USD$88 million. Marubeni Corporation and its joint ventures were also suspended by the Japanese International Cooperation Agency (JICA) from competing for procurement contracts for 9 months.

24 BpMigas is a government-appointed institution that was authorized to guide and supervise contractors in Co-operation Contracts for 'exploration, exploitation and marketing of oil and gas'. The Constitutional Court Decision No. 26/PUU-X/2012 declared BpMigas unconstitutional. The President then transferred the authority to the Ministry of Energy and Mineral Resources, but the regulation is still referred to at the time of interviews in 2014 and 2015.

25 Surat Keputusan BpMigas Pedoman Tata kerja 028/PTK/XII/2007 about Utilizing Lawyers/Legal Consultants Services by Contractors with Co-operation Agreements.

26 Not corrupt meaning unwilling to bribe judges and strictly referring to black letter law.

27 Interview with an in-house counsel of BpMigas, 17 September 2015.

28 Also referred to as *dekking*. See Lindsey (2006:30–32).

29 After a lengthy interview with an investor/shareholder, he dismissively stated 'with disputes just consult the BPD', which is apparently a well-known term in the banking and finance community. Interview SK.

30 Professional accountants include PwC, KPMG, and local accounting firms registered with OJK. See http://www.ojk.go.id/akuntan/. Last accessed, 17 July 2017.

seminars, and conferences,[31] and advisors who are mysterious and sometimes outrageous (more so than fixers). For example, some advisors present themselves as having psychic abilities.[32]

This kind of advisor provides information about relationships, and whether or not to engage in a relationship with another without disclosing his or her contacts and sources. They build their reputation by having true predictions.[33] Advice from these advisors is important in considering whether or not to handle a case. Most parties would prefer to avoid handling disputes that could escalate out of their control, e.g., gaining media attention or becoming politically significant.[34] This is usually measured by the (potential) involvement and ranking of parties who also hold a public position.

In serious disputes, BPDs are important because the opinions they issue for the litigants shield the litigants against accusations or claims from opponents and authorities. This can include a tax advisor's opinion saying that he has checked the company's tax liability and that there is none left or a corporate/transactional lawyer's opinion that the transaction the company is doing does not involve any legal violations. The weight of these opinions depends completely on the reputation of the entity that issues it.

4.1.3 Build and use social capital

Chapter 2 described professional relationships and hiring behavior[35] and chapter 3 described getting projects that they are based on long-term trust relationships. This means that 'corruption' in Indonesia involves not only

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31 During one of my interviews, a representative from Salim Group (May 2014) stated that they '*couldn't trust researchers* [to be independent]' since the group '*pay a lot of those* [researchers] *as well, for example LIPI*'. LIPI or Indonesian Institute of Sciences is an institution formed by state regulations, which claims to be the first, biggest, and best research institution in Indonesia. LIPI has authority to, for example, use and conserve flora, fauna, and the environment, and monitor all scientific publications in Indonesia.

32 Often referred to as 'orang pintar' (clever person). The advisors refer to their advisees by saying: '*his career will skyrocket soon*', or '*this guy has jail in front of him*', or '*you see, this guy has bad luck with him (referring to a reporting about a judge being arrested for corruption) because his nose is bent, like [your client] A, you have to be careful with him.*'

33 I found that one of the 'psychic' political advisors is known to hang around the inner circle of the Cendana family, which means he was just conveying to the lawyer what he had seen and heard in his network and from his contacts.

34 For example, in the Bank Century bail-out dispute, lawyers refused to handle a case concerning the procedure of issuing an arrest warrant to a foreign national. They were unwilling to fall out of favor with the National Police force and risk being the cause of damage to the (inter)national reputation of the institution. Rafat Ali Rizvi, an investor accused of fraud and money laundering in the Bank Century case, claimed he reached out to almost all top-of-the-bill litigators in Indonesia, but none of them wanted to file a rebuttal on his behalf. He was then sentenced *in absentia.* He subsequently filed a lawsuit against the Indonesian Government at ICSID Case No. ARB/11/13.

35 For example, employing children of police officials, public prosecutors, and court officials' family members to join the lawyer's firm.

bribing or a simple *quid pro quo* scenario but also the larger concept of ingratiation (Jones 1964). Ingratiation involves behaving towards someone to gain something or to achieve a certain goal. The goal might be in someone's favor and generally include building and collecting social capital. Ingratiation works as long as it is sufficiently concealed. If someone knows they are being ingratiated, they are less likely to be in favor of, or to fulfill the goal of the ingratiator (Smart 1993).

Know who manages favors

Because it is based on long-term exchanges, ingratiation needs a longer thread of analysis: by considering kinship, similarities in ethnicities, hometowns, and previous training and postings. Knowledge of public administration is also needed to be able to see patterns of career development to know who will have more potential to be useful in the future. By way of illustration, a lawyer stated, '*don't think I become this good [of a lawyer] because I give bribe to judges, no, never. All I did was to be in their favor, so they trust me. So far, the most illegal thing I did was teaching them how to watch porn from their mobile phones*'.[36]

This extends the concept of bribing to something similar to *guanxi* in China (e.g., Li 2010; Smart 1993). A favor as an object of exchange is referred to as *hutang budi* (debt of favor/duty) and *balas budi* (return of favor/duty). Invoking *balas budi* or *hutang budi* means that someone owes a favor to another, which has to be paid out of a duty of loyalty. This relationship is close, long-lasting, personal, and emotional; akin to that of *anak buah* (child/apprentice) and *bapak* (father) (van Klinken 2014:21-2; Nas 1991).

Family-based networks are known to exist in the Supreme Court, at least in the Javanese old boy network (Pompe 2005:389). The Indonesian bureaucracy has been characterized by *bapakism* (e.g., Rademakers 1998; Jackson 1980; Geertz 1961) for many years. This means *bapak* is the owner of wisdom who can instruct the *anak buah* to follow him, or do something for him without any objections or questions. What is often overlooked in this insight about family (as an organizational unit) is *ibuism*, while the *ibu*s (mothers) actually hold economic power and influence the wellbeing of the household. They also extend social capital by networking[37] and trading.[38]

This means that there is a kind of division of labor. *Bapak* is the holder of status (authority and prestige), and *ibu* (mother/woman) is an internal manager who is in charge of internal financial affairs and exchanges of

36 Interview with OS.

37 With 'organisasi istri,' such as Dharma Wanita.

38 They buy and sell jewelry, clothing items (bags and shoes), and land (houses). It is a common rule in bankruptcy that the bankrupt asset (boedel) of an individual does not involve clothing. This perhaps could explain behaviors of the wives in buying expensive bags and shoes, sometimes jewelry, although it could not be regarded as 'clothing', as their personal investments. Therefore, research into the market of these goods would perhaps reveal issues regarding political finance and transactions.

favors (Carey & Houben 1987:23; Djajadiningrat-nieuwenhuis 1987:44-46; Suryakusuma 1996:102). Therefore, it is necessary to realize the roles of wives in effectively ingratiating or invoking *balas budi* or *hutang budi* on the target.

Support amenable judges[39]

Ingratiation is a dominant method in determining the position and career development of civil servants and public officials.[40] Before filing a lawsuit, lawyers assess which judges they might have to deal with. If possible, they will wait until their favorable judge is on the bench. This possibility concerns the career movement of judges, or *mutasi*,[41] which could be influenced through connections with the judge's superior (the head of the district/high court and Supreme Court), who decides whether and when a judge is moved from one area to another. This is why certain judges' wives also (try to) influence decisions on *mutasi*.

Mutasi could include promotion or demotion. In Indonesia, demotion can include a civil servant moving to another position with a raise of their rank or echelon, or to a position with low income or being unfavorable for their career advancement. For example, *mutasi* from being a chairman of Manado's Administrative Court to being a vice-chairman at Jakarta's Administrative Court is not considered a demotion (Bedner 2001:206). *Mutasi* was implemented to disseminate national and state law throughout the archipelago, but it has turned into an important force of patronage and an effective instrument for granting and withholding favors (Pompe 2005:124).

4.1.4 Have a broad Power of Attorney and vague legal opinions

Formally, Power of Attorney has to be 'specific' to be submitted in court,[42] which should mean that the proxy is only given authority to act on specific actions as stated in the Power of Attorney. In practice, this requirement is fulfilled by stating the word *KHUSUS* (literally: specific) at the beginning of the Power of Attorney, even though the actual content is not really specific. For instance, it is common that the Power of Attorney have substitution rights, and the authorized actions are broad, such as '*the Proxy is given the right to take any legal actions necessary to protect and defend the rights and interests of the principle*'.

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39 According to data from KPK (Corruption Eradication Commission), there are 14 judges charged for corruption. https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi/tpk-berdasarkan-profesi-jabatan. Last accessed, 29 May 2017.

40 Judges are also part of the civil service.

41 Regulated by Supreme Court Circular Letter (SEMA) No. U.P.1/8038/1968 and No. U.P.3/6711/1969.

42 Supreme Court Circular Letter No. 6/1994.

The approach is similar to drafting legal opinions. Lawyers are not allowed to promise the outcomes of litigation, although at the same time they have to manage their clients' expectations. Moreover, their opinions on the prospect of the outcome are often required as a guarantee to the investor, creditor, or parent company, or to fulfill a company auditor's requirement.[43] This dilemma is resolved by using vague words such as 'most likely', 'probably', 'the evidence shows a strong legal basis', and the like. In these manners, lawyers prevent having to respond to clients' wishes and at the same time having the freedom to handle a case as they like.

4.1.5 Structure assets and financial transactions

This process of structuring assets and designing financial transactions is referred to by practitioners as Legal/Financial engineering. It involves meetings where lawyers assess the possibilities of (financial) risks and arrange the (transaction) structure of legal entities to facilitate legal strategies.

How to finance litigation

Lawyers, particularly brokers and fixers usually require two types of fees: (1) a professional fee, which could be by hourly, success-based, or on a lump sum basis, and (2) a 'disbursement' fee, which can be billed from time to time by the lawyers to the clients. This disbursement fee is what the lawyers claim to be paid 'to process the lawsuit', which essentially means paying public and court officials. A disbursement fee is also often referred to as 'operational costs.'[44]

Funding could come from the client company, which usually have a 'fighting fund'[45] allocated for disputes, or from a third-party funder. These third-party funders are companies specialized in giving loans[46] to fund litigation and who have an interest in the outcome of the litigation, i.e., will receive a portion of the settlement.[47]

In Indonesia, some lawyers are keen to finance litigation themselves to enjoy any prospective profit. Lawyers could be disguised as a 'third-party funder' by being a shareholder of the landholding company. They do this by entering into contracts in the form of pledges, transfers, *cessie* (assignment), or trusts against a certain percentage of shares in the company. The more difficult the case is, the higher the percentage set by lawyers. This means that a lawyers' position is raised from being a service-giver to a client

43 For example, Ernst and Young required this from the Marubeni Corporation regarding litigation against the Sugar Group companies.

44 This is negotiated in a comparative manner based on the value of the object in dispute. It is similar to the situation in China, as found by Li (2010:49).

45 This term is commonly used to refer to money raised to finance a political campaign.

46 Such as for bail-out and opt-out systems in the United States.

47 In the United States and United Kingdom's legal system, this is a concept connected to class action and also to manage a class action.

to becoming the client's business partner. This kind of relationship is rife with conflicts of interest and what other authors have referred to as insider trading.[48]

Implement legal and financial engineering

Legal and financial engineering means structuring assets and transactions by considering the legal and financial risks. There are two purposes for this: either finding the assets of opponents or hiding one's own assets.

Parties hide assets rigorously as a defense strategy, not just against another claimant of the asset, but also against authorities that could oblige them to pay for licenses or taxes. One of the most efficient ways for creditors to gain possession of the collateral (almost always a land title) is through a bankruptcy petition.

To file bankruptcy against a debtor, Bankruptcy Law in Indonesia requires two or more creditors. It could be tricky for a creditor to find another since debtors often hide their assets in other pseudo-companies or under someone else's name (a nominee).[49] Creative methods are required to find this second (and third, and so on) creditor, e.g., obtaining a debtor's tax return. Furthermore, to know how to find assets, parties need to know how to hide assets. This is by developing a transaction scheme referred to as legal and financial engineering.

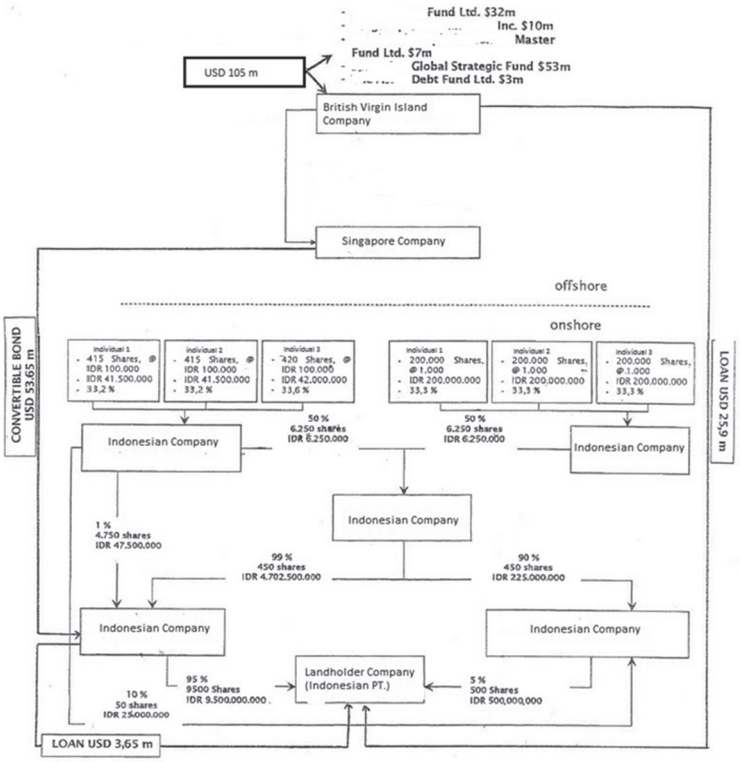
Legal and financial engineering is a process of designing and structuring transactions and relationships of companies in a group by the future litigants and their lawyers.[50] It has many purposes. These include tax planning, protecting the patron/beneficial owner by creating barriers between relationships, hiding assets, or protecting the value of the company during litigation. It also includes designing how a lawyer's fee would be transferred, as fees increasingly take the form of shares (of land or a percentage of company ownership). The point of this process is also to make lawyers and clients gain the same understanding about what they have to perform and who will perform the transaction. The scheme of transactions is

48 Discussions about third-party funding and insider trading are still underdeveloped in Indonesia, unlike in other jurisdictions, where discussions ranged from the economics to ethical aspects of litigation funding by accountants, jurists, and political and social scientists. For example, Johnson (1980) has argued in favor of putting lawyers' motivation in relation to their fees in the equation to understand and predict the economic consideration of litigation. In 2015, Leiden University commenced a conference that discussed topics surrounding third-party litigation funding. The conference was attended by practicing lawyers, in-house counsels, academics, law firm representatives, and litigation funding companies.

49 An investigation about why this practice is popular could be based on the history of Chinese-Indonesians and the development of the political economy, particularly policymaking. See for instance, Mackie, J. (1991). Towkays and Tycoons: The Chinese in Indonesian Economic Life in the 1920s and 1980s. Indonesia, 83–96 and Lindsey, T., & Pausacker, H. (Eds.). (2005). Chinese Indonesians: remembering, distorting, forgetting (No. 61). Institute of Southeast Asian Studies.

50 See some examples in Flood and Skordaki (2009).

complex, even though parties try to make it as simple as possible. The scheme is usually developed together by parties and lawyers, and is made visible in a diagram such as follows:



Source: participant observation.

Making the scheme visible (usually drawn on a white board while parties and lawyers are developing the scheme) is useful for parties and their lawyers to also consider the (legal and financial) risks and possibilities involved in moving the assets around. Another important consideration is to make sure the shares value of the company is not disturbed while going to litigation. In other words, parties need to keep control of the market value of their company.[51]

51 This activity is performed and supported by some stock brokers and appraisers who are usually private (accounting) firms. Stockbrokers could manipulate the value of stocks in the capital market by doing a series of bogus transactions. Without the involvement of the stockbroker, one way of controlling the value of a company is by doing inbreng. Inbreng is the term for the capital injection of goods. This means including objects such as land, buildings, or machinery as part of the capital of a company. As a strategy, inbreng is used to control the registered value of those objects in the company (accounting) book. Appraisers could either put a high value on the object to raise capital, or a low value to save on tax. Tax is charged by the percentage of the sale or purchase value (see Chapter 3 footnote 58). This allows parties to control the (value of) shares and stocks of a company while in litigation.

Know how financial market operate

Ultimately, banks or other financial institutions would do the actual performance of a contract. This means that they will be the ones who transfer funds from one legal entity to another. Thus, it is important to know how banks operate, how to give an instruction, and who has to sign it. In other words, it is important to know what it takes to transfer a large sum of money, sometimes across multiple jurisdictions or countries.

There are a number of banking terms that parties need to be familiar with. The most important ones are MT103 and T+(number). MT103 is an electronic message derived by the banking system specifically for international transfers. It serves as a proof of transaction. When a party has sent MT103 to another, it means they have already instructed the banks to transfer (or made an electronic transfer) to the fund. Funds could already be seen in the destination account, although this depends on the expected T+(number). T+(number) means the expected number of days for the settlement to be complete after the transaction date. It is usually Transaction date + 1, 2, or 3 days (for example, T+3) until settlement. This number depends on how the international banking system operates, including capital markets. For instance, the United States Securities and Exchange Commission regulated[52] T+2 for settlement of transactions.[53]

Having these kinds of esoteric knowledge is particularly important for the performance of contracts. Knowing about timing is essential in some contracts as part of specific performance. By way of illustration, one sale and purchase contract could be entered into with a motivation to obtain funds to pay a debt or pay for another transaction. This means there is a kind of potential domino effect. If one contract performance is not fulfilled on time, it could lead to another (financial) crisis.

4.1.6 Contract drafting strategies

Contracts vary in different degrees and evolve along with the complexity of transactions or the number of stakeholders and the specificity of their claims and liability. However, there are two competing views about what a 'good contract' means. Lawyers in modern firms think that short and concise contracts are 'sloppy work'. According to them, it is better that a contract be long and cover everything, although they realize that when it comes to enforcement, it will not be useable. On the other hand, litigators think that the practice of making long and elaborate contracts is a waste of the clients' time and money.

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52 This is quite dominant since transactions with US dollars usually need to be 'cleared' through capital markets such as the New York Stock Exchange (NYSE). For clearing, settlement systems such as Euroclear (see www.euroclear.com) are important.

53 Before 2017, this was T+3. https://www.sec.gov/news/press-release/2017-68-0. Last accessed: 18 April 2018.

Several Indonesian lawyers recommended that contracts should always be drafted from the perspective of enforcement. For contracts to be enforceable, transactions should be simple and clear enough to be recognizable in Indonesian courts. Additionally, they recommended that they be drafted in Indonesian. Contracts in English, which are favorable and familiar to investors, allow for too much uncertainty about their translation and consequently, their interpretation by Indonesian courts.[54]

These competing views, one for a long comprehensive contract, even though it may not be enforceable, and the other for a short, simplified but enforceable contract reflect the parties' competing ideals. With comprehensive contracts, lawyers (and their clients) hope that contracting parties would behave as the contracts have stated, while for the latter, lawyers (and their clients) expect to use courts to force their counterparty to comply in the future.

Avoid Indonesian courts

Lawyers in Indonesia, particularly the corporate transactional lawyers, seek to waive the authority of Indonesian courts in deciding disputes over contracts as they prefer to bring disputes to arbitration or another jurisdiction outside Indonesia. They do this by including a clause in contracts waiving the applicability of Articles 1266 and 1267 Civil Code.[55] These articles would have given Indonesian courts the authority to decide whether obligations in contracts are void.[56]

This practice raises some questions: First, what is a breach of contract if parties are free to void their obligation? Second, if the Articles are set aside, does it mean that a party in a contract has the authority to interpret the contract themselves? Cancellation of a contract can be used to avoid obligations in the contracts. For instance, a creditor/seller could always claim

54 Evans, Rachel. 2010. The only way to enforce. *International Financial Law Review* http://www.iflr.com/Article/2633920/The-only-way-to-enforce.html.

55 Article 1266: A void condition is deemed to have been included in reciprocal agreements, in case a party does not fulfill his obligations. In such cases, the agreement is not void by law, but voidance must be requested before the Court. The request must also be made, even though the conditions of voidance concerning the nonfulfillment of an obligation are included in the agreement. If the conditions of voidance are not included in the agreement, then the judge, considering the situation, upon the defendant's request, has the discretion to fix a timeframe to fulfill such obligations, but such a timeframe may not exceed one month.
Article 1267: The party against whom the obligation is not fulfilled may opt to compel the counterparty to fulfill the agreement where such fulfillment is still possible, or demand the termination of such an agreement, with the compensation of costs, damages, and interests.

56 A contract could be cancelled if it does not fulfill a contractual validity requirement. The requirements are that there be 1) an agreement between parties, 2) capabilities of parties in agreement, 3) specific subject matter, and 4) *halal* cause (Article 1320 - 1337 KUH Per.).

that a debtor/buyer is not paying their debt (purchase price) in the way the seller interpreted how the debt should be paid. With this reason, the seller could claim back the object of the transaction (usually land). This is used when the seller realizes that the land is worth more than the purchase price.[57]

Waiving Articles 1266 and 1267 is also used to gain the ability to expedite confiscation of land rights that are guarantees/collaterals *(Hak Tanggungan*[58]*)* in a contract. By using these clauses, it creates a possibility for creditors to 'directly' confiscate land under collateral.[59] However, rather than expedite the process by avoiding courts, this results in inefficiencies because the debtor or the land rights holder will still file a *perlawanan* (rebuttal) before the courts, a process which will be discussed alongside enforcement strategies below.

This means that the attempt to avoid Indonesian courts is almost impossible when a land title is the object of a transaction. It just extends the 'legal technical' argument and increases uncertainty.

Buy/sell land without transfer of title

When a transfer of property is intended only as an investment, i.e., the buyer does not intend to develop the land but rather looks for another buyer who will buy it again for a profit, the name is not changed in the land certificate. This is for efficiency. Costs of registering are high, so the land transfer is only performed by signing a PPJB (*Perjanjian Pengikatan Jual Beli* or Sale and Purchase Agreement), and will execute AJB (*Akta Jual Beli* or Deed of Sale and Purchase) with the final buyer.

The difference between PPJB and AJB is that PPJB is only a commitment of the seller that they will sell (to the buyer for the agreed price), and a promise from the buyer to pay the purchase price to the seller. PPJB is not the actual sale and purchase, or transfer of property. This must be done through the signing of an AJB, which has to be notarized by a Notary/PPAT to be binding. The AJB then should be submitted to the NLA within 7 working days to change the name of the titleholder in the land certificate. The process of changing the name of the titleholder is called *Balik Nama*, literally translated as the 'switching of name'. According to interviews, *Balik Nama* is usually a straightforward process with very minimal risk

57 I found one case with precisely this 'strategy' in mind during participant observation. Seller regrets having to have sold her land and is suing the buyer for breach of contract under the reason that although the buyer have paid for the land in full, he did not pay it in the precise way of installments stated in the sell and purchase agreement.

58 For a brief explanation about *Hak Tanggungan* (mortgage title), see the Introduction chapter on corporate and land law.

59 Article 6 and 20(1) Law No. 4/1996 about Mortgage over Land and objects related to land.

of interference. Lawyers have not encountered any case in which the AJB has been signed, but *Balik Nama* could not be processed, as this means the Notary/PPAT had made a mistake in issuing the AJB and could be personally responsible and criminally charged, causing Notaries/PPATs to be extra careful before they issue an AJB.

Backdate

Backdating legitimates an action that has been performed. For example, if a party is being sued for embezzlement, they will craft a backdated sale and purchase contract to legitimize the transfer of funds or assets from A to B. Backdating can also be used as a method of settlement. For example, if A and B agree to backdate an agreement/contract, it can override or cause a court decision to be irrelevant.

4.1.7 Protect the real patron

To prepare for a lawsuit, it is important that a patron/beneficiary does not become liable as a result of the lawsuit. This could be performed by way of structuring assets and financial transactions as I explained above. Additionally, the following strategies are used to avoid possible liabilities by hiding the true owners/beneficiaries of companies.

Replace the director

Members of the Board of Directors have to represent companies in court[60] and have the possibility of being personally liable for actions taken by the company.[61] However, there is no minimum education requirement in Company Law (UUPT) for the member of the Board of Directors and Board of Commissioners.

The Board of Commissioner has the power to dismiss the director(s) (1) temporarily for 30 days by sending a letter, continued by commencing a RUPS,[62] which will either decide to cancel or confirm the dismissal. If a RUPS is not commenced, the director in question will be back to function normally after 30 days.[63] Alternatively, (2) if the director is also a majority shareholder, the Article of Incorporation has to be amended with an Extraordinary RUPS ('RUPS-LB'). If the quorum is not met after the third RUPS-LB, an injunction could be requested from the Head of the District Court.[64]

60 Article 98(1) Law No. 40/2007.
61 Article 95(4) Law No. 40/2007.
62 See Shareholders' Meeting as a forum below.
63 Article 106 Law No. 40/2007.
64 Article 86 Law No. 40/2007.

Members of the Board of Commissioners cannot be responsible for (the lack of) supervision and as long as they can prove that: '(1) they have carried out their supervision in good faith and prudence in the interests of the Company and in accordance with the Company's purpose and objectives; (2) they do not have any direct or indirect personal interest in the actions of management of the Board of Directors which caused the losses; and (3) they have given the Board of Directors advice to prevent the arising or continuing of losses.'[65]

Thus, in terms of the law, the Board of Commissioners has more authority and less responsibility compared to the Board of Directors. This explains why the real patrons or beneficiaries often sit on the Board of Commissioners instead of on the Board of Directors.

Establish another legal personality

To avoid risks of a counterclaim, it is useful for lawyers to create another legal personality other than the main firm, or for clients to use a 'shell' company in litigation. In chapter 2, I explained about satellite firms. Lawyers often form teams or entities similar to satellite firms with names that seem like a CSO for moral activism or cause lawyering,[66] such as 'defender for democracy' or 'protector of international justice,'[67] while the team actually works for a specific case or client. Establishing another legal personality has the benefit of making it easier to manage litigation costs and funding, avoid conflict of interest, and portray lawyers as litigating for an ethical cause instead of profit, increasing sympathy from judges and outsiders.

Establish standing

Only the formal holder of land (an entity with the name stated in the land certificate) has the legal standing to sue; that is, they have to show that they have an interest in the outcome of the dispute. This could be complicated if the name in the certificate is that of a big international bank or a holding company that is reluctant to be involved in a lawsuit.

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65 Article 114(5) Law No. 40/2007.

66 Traditionally, this was the field of NGOs and legal aid institutions, not of for-profit commercial lawyers. For more, see Sarat and Scheingold (1998).

67 For example, they use Tim Pembela Demokrasi Indonesia specifically for filing a single claim (on behalf of Sanusi Wiradinata against Lucas). By contrast, they use Tim penasehat hukum Advokat Cinta Tanah Air (Legal consultant team ACTA) to file a claim against Jakarta Governor Basuki Tjahaja Purnama, and use Tim Advokasi Jakarta Bersih (Advocate Team for Clean Jakarta) and Tim Advokasi Bhinneka Tunggal Ika (Bhinneka Tunggal Ika Advocacy team) to defend the Governor.

These banks/holding companies act as 'arrangers' in a complex transaction or syndicated loan scheme. They hold the land title and in turn have the power to 'arrange' the complex transaction by performing transfers,[68] while the actual shares/interests over the land or the creditors remain anonymous to those who are not involved in the syndicated loan. As a fixer put it, 'parties in land dispute cases are usually just 'fronting'. The interest to land has been sold to multiple investors behind the curtain. The fronting is just a vehicle to share profit if they win.'

To establish standing, lawyers have to be able to establish and explain the interest of a party even though the interest is remote. They do this by simplifying the complex investment scheme for outsiders and judges.

4.1.8 'Certify' evidence

When preparing for litigation, the lawyers will commence due diligence and documents will be prepared in preparation for submitting them to the court. Certified/legalized documents serve as stronger evidence in courts compared to uncertified ones, while deeds[69] are deemed to be the strongest form of evidence. For documents to be made into deeds, they need to be legalized by a notary.[70]

There is an odd train of thought applied to the certification of copied document, such as certificates and contracts. In practice, it is not technically the contents of the certificates or contracts that are being certified to be included as evidence in litigation, but rather the stamp duty[71] on them. The reasoning is that the Central Post Office issues the stamp duty, so the Central Post Office has to certify it by putting its 'original' stamp over the (copied) stamp duty. This practice is referred to as *nasegelen*.[72]

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68 In a land dispute case, an arranger sometimes refuses to submit lawsuits in cases of disagreement between shareholders on when to sell the land. A case in point involved a land dispute in Sidoarjo with HSBC as the arranger.

69 *Akta Otentik* or Authentic Deed, is defined in Article 1868 of the Indonesian Civil Code, which states, 'An authentic deed is one which has been drawn up in a legal format, by or before public officials who are authorized to do so at the location where this takes place.'

70 There are three kinds of documents/letters for use as evidence: ordinary letters, authentic deeds, and *akta bawah tangan*. *Akta bawah tangan* (Article 1874 Civil Code) means that the document/receipt/letter was not drawn up in front of an official (notary) but the signatory is legalized by the notary, meaning that the signature on the document is authentic. The strength of the evidence can be similar to an authentic deed if the signatory also acknowledges that it is their signature on the document/receipt/letter (Article 1875 Civil Code).

71 Elucidation of Article 2(1)(a) of Law No. 13/1985.

72 Or *nazegelen*. Originated from Supreme Court Circular Letter No. 1/1963 (or No. 640/P/1937/M/1963) about guidance for making decisions, paragraph C.

Source: https://mitracipagantimember.wordpress.com/2015/01/28/contoh-fotocopy-akta-yang-terlegalisir-di-kantor-pos/

4.1.9 Increase chance by using many forums and test dominance of one forum against another

Due to jurisdiction problems mentioned in Chapters 1 and 3, parties have many dispute resolution forum options. The choice depends on which forum will have the highest possibility of meeting the party's goal or objective. My research showed that players choose the forum whose legal procedures—i.e., the rules of the game—are the most removed from black letter laws, even if the forum provides the least predictability.[73] This points to Commercial Courts, which are also subjected to district court procedures, giving a lot of discretionary power to the *kurator*/manager of the bankrupt estate.[74] This is related to the fact that unclear procedures allow lawyers to have more freedom in managing the litigation process. In other words, having control is more important than having (legal) certainty.

Administrative Courts are perceived to have the smallest gap because they have their own legal procedure, although these were the least predictable when they were newly established (Bedner 1997:279-299). In the middle are civil and criminal procedures (in district courts).

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73 This is a result derived from my interview question: *'which legal procedure is the most removed from law than actual practice?'* To refer to legal procedure, I had to interchangeably use the term jurisdiction, *hukum acara* (procedural law), *proses beracara* (process of procedure), or *aturan main* (rules of the game).

74 For an overview of the establishment and causes of failure, see Halliday and Carruthers (2009:193-6, 196-210)

The following are the various forums and causes of action available:

Shareholders' meeting (RUPS)

There are two kinds of Shareholders' Meeting: Annual (*RUPS*) or Extraordinary (*RUPS-LB*) Shareholders' Meeting, which can be commenced at any time by the shareholders or the Board of Commissioners.

The Article of Association (*Anggaran Dasar*) is supposed to regulate relationships in the company, and decision-making procedure in a company.[75] A Shareholder's Meeting is needed to amend the Article of Association, and a quorum has to be met. If the Board of Directors and Board of Commissioners ignore the shareholders' request for the Meeting, the shareholder can submit an application to the district court of the company's domicile to oblige the Board of Directors and Board of Commissioners to be present at the court-ordered Shareholders' Meeting. This court-ordered shareholders' meeting is a strategy to be used when the Board of Directors and Board of Commissioners are not under the control of a shareholder or if they have been inactive.[76]

Lawyers refer going to the meeting as going to war. By way of example, a lawyer who just came back to her office after a meeting stated, 'thankfully we managed to postpone the RUPS. Some of the shareholders supporting our clients did not show up. Their car tires were found flat at their office parking lot.'[77] It was to prevent shareholders that are known to be in the opposition from attending the RUPS or voting in the RUPS. Lawyers must be able to be quick and at the edge of their seats at all times during the meeting to object to and question their opponent, for instance by inquiring about the validity of a Power of Attorney of an attendee representing a shareholder. This practice is similar to the pre-trial conference in the United States legal system.

National Land Agency

The NLA has its own dispute resolution mechanism to be used before having to go through litigation. It is a mediation process which involves three steps: (1) '*gelar*' (or 'spread' in English, i.e., opening all the data for all parties to assess) *internal*', which involves internal NLA officials where they analyze their records related to a land dispute, (2) '*gelar external*', where NLA invite the disputants, and an NLA official acts as the leader

75 Changes in Articles of Association have to be legalized by a Notary and certain changes require approval from the Minister of Law and Human Rights. Article 21(2) Law No. 40/2007.

76 The court can set the meeting's agenda, the timing for notices, the number of attendants required, designate the chair of the meeting, and they can do so with or without being bound by the provisions of UUPT or the articles of association.

77 Interview UG.

of the *gelar*, (3) mediation, which involves NLA officials, disputants, and a certified mediator. If a consensus is reached, the result will be made into a Reconciliation Deed and registered at district court, which will ideally make the consensus binding and executable. However, the registration in the district court still needs to be in a form of a decision by the court (*penetapan*), which means it is similar to going through litigation.

Administrative Court

Lawyers generally avoid Administrative Courts because there is not much leeway available.[78] The Administrative Courts' procedure is perceived as the most predictable. However, the Administrative Court has exclusive jurisdiction to decide on a dispute regarding decisions made by a governmental body. This means, in land disputes, lawyers need to use Administrative Courts to request changes to land certificates because they are issued by the NLA, and thus need to register the change of status accordingly.

Commercial Court: Bankruptcy and Suspension of Payment[79]

In the commercial court system, there are two options to pursue: a mechanism for Suspension of Payment (PKPU), which can be commenced by either the debtor or creditor, if they foresee the inability of the debtor to pay their debt, and the creation of a composition plan, which needs approval from a district court judge. I found in my observations that this process is often abused to 'whitewash' a company's debt[80] or for a creditor to capture land as collateral instead of getting repayment.[81]

A bankruptcy petition could also be filed against a debtor in order to halt the transfer of land title by the debtor.[82] However, to have legal standing as a bankruptcy petitioner, the debt or obligation (stated in the contract(s)) must be proven 'simply'. There also have to be two creditors or more. It becomes tricky if the plaintiff is the sole creditor, or if another creditor does not want to litigate. Then, lawyers will have to be 'creative' in finding another creditor, to the extent that lawyers 'create' another creditor

78 On the other hand, weaker parties often do not get the opportunity to bring their cases to the Administrative Court because they are not aware of their position (not being informed about the administrative decision) before the time limit to bring the case to an Administrative Court already expired (90 days since the issuance of administrative decisions).

79 Law No. 37/2004.

80 For instance, if a debtor doesn't want to pay, they can use this process after hiding their asset (using "legal and financial engineering", as described above) or cooperating with a creditor.

81 A creditor would try to avoid getting paid (through various reasons, such as citing the wrong account number or method of payment, etc.) and then file bankruptcy to obtain the collateral (land rights) when the value of land is greater than the debt.

82 Article 34 Law No. 37/2004.

themselves, for example by transferring the plaintiff's debt to multiple companies owned by the lawyer, and the companies then 'pose' as creditors.[83]

Moreover, in any bankruptcy process, the petitioning party could propose the *kurator* who will be in charge of managing the bankruptcy estate to the court. Currently, lawyers who are active in commercial courts are also active as the chairmen or founders of a professional association of *kurator*, which operate like bar associations.[84] Through an internal mechanism of proposing the *kurator*, the lawyers maintain a certain control over bankruptcy cases.

Commercial court cases enjoy an expedited procedure for appeal because they do not have to go through a high court, only directly to the Supreme Court,[85] and Supreme Court has to give its decision within a prescribed timeframe, by the latest 60 days since the Supreme Court receive the request.[86]

Arbitration

Indonesia has a long-standing arbitration association, formed long before the Law on Lawyers in 2003. However, BANI (*Badan Arbitrase Nasional Indonesia* or Indonesia National Arbitration Body) is used less than arbitration bodies in Singapore[87] and Hong Kong.[88] During my research, I did not encounter any case being handled by BANI. Nevertheless, arbitration in Singapore and Hong Kong is expensive and does not have any enforcement effect. An investor even jokingly referred to it as '*like polygamy, too much hassle without extra reward*'.[89]

Arbitration in Indonesia is practiced only by a handful of corporate transactional lawyers. While arbitration are considered a field of transnational business justice which is 'dealing in virtue' (Dezalay & Garth 1996), it works somewhat like banks. They give out decisions regarding credits, debts and loan repayments based on technical calculations and an important subject of future research, particularly on the emergence of specialized professions in facilitating arbitration procedure.[90] The most notable are

83 See also footnote 48 and 49 above.
84 Currently there are three associations, all established by lawyers with their own firms: HKPI (Himpunan Kurator dan Pengurus Indonesia) by Tandra & Associates, AKPI (Asosiasi Kurator dan Pengurus Indonesia) by James Purba & Partners, and IKAPI (Ikatan Kurator dan Pengurus Indonesia) by Lucas, SH & Partners.
85 Article 11(1) Law No. 37/2004.
86 Article 13 Law No. 37/2004.
87 SIAC (Singapore International Arbitration Centre).
88 HKIAC (Hong Kong International Arbitration Centre).
89 Interview with AL.
90 See also the 21st Century T-shaped lawyers. https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer.html. Last accessed: 8 June 2017.

the litigation accountants (related to litigation funding above).[91] These accountants' reports and analyses are the most important evidence used in arbitration proceedings.

General Court:

1) *Criminal law.* Criminal law is the most effective mechanism for intimidating opponents. It entails 'real' risks, such as travel bans, imprisonment, and being on an Interpol Red Notice list,[92] which means someone is considered an international fugitive. It is not the business that is under attack, but someone's life and reputation. To use criminal law in this manner, complaints to the police usually consist of fraud or embezzlement,[93] and the police will commence a *gelar,* which will decide whether or not to continue the investigation. To use criminal law, the party needs to make a deal with the police or public prosecutor. This is concerning choosing which article of law the police or prosecutor would use to indict the opponent and the corresponding sanction. The law on electronic information and transactions (Law No. 19/2016, previously Law No. 11/2008) is increasingly in use because of its Article 45, which provides a wider scope for negotiating in this manner since it provides '*imprisonment and/or fine*' as sanctions.[94] From the perspective of the suspects or defendants, the aim is for the police to stop their investigation. For this, the police have to issue an *SP3* (*Surat Perintah Penghentian Penyidikan* or Letter for Termination of Investigation). When an *SP3* cannot be issued, defendants would try getting a *P19*, meaning the public prosecutor would return the investigation file to the police because it is incomplete. A criminal case becomes alarming when a *P21* is issued, meaning that the investigation has been completed and the case is to be forwarded to a court, although a *P19* could be issued again. Public prosecutors could also issue an instruction to stop a case, although it is less common. This is referred to as SKPP (*Surat Ketetapan Penghentian Penuntutan* or Ordinance for Termination of Prosecution). These acronyms refer to the corresponding forms.

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91 Virtually in almost every international arbitration and litigation conferences, they will attend and/or present their idea of business. See for instance FTI Consulting.

92 The Indonesian National Police has the authority to enlist someone in the Interpol Red Notice. https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices

93 Although generally avoided, it is also possible to file a complaint under Anti-Corruption law to the police or directly to the public prosecutor. Anti-corruption is the jurisdiction of a special Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or known as KPK).

94 Articles 45(1–5) and Article 45A(1–2) and 45B consists of articles about distributing electronic information in a tortious manner.

In 2016, the Supreme Court issued a regulation on the adjudication procedure for corporate crimes.[95] The penalty includes imposing a fine on the corporation. If the fine is not paid, it can be substituted with jail time. Those liable for and on behalf of corporate conducts include the (broadly-phrased) 'management' (Article 1(10)).[96] The regulation is still new, so further research is required on what actions cause a person to be criminally liable.

2) *Escape obligations by nullifying the contract.* Criminal law could also be used to nullify the contract. The police report is submitted to district courts as the basis of annulment or voidance with an allegation that it did not fulfill requirements of a valid contract. This could bring the contract or deed to be *cacat hukum,* or 'legally flawed' and not binding. *Cacat hukum* could be declared if formal requirements of entering into contracts or creating a deed are not fulfilled. There are several uncertainties that are generated from the uncertain status of the Indonesian Civil Code regarding these requirements, e.g., whether a spousal agreement is needed for entering into a contract.[97] Because these uncertainties have never been tested by the courts, drafting contracts results in highly formalized practices and particularly concern notaries,[98] since they are criminally liable for creating a deed.[99]

3) *Tort or Breach of Contract.* The rule of thumb is not to imply both tort and breach of contract together in one suit, because the court could reject it as *obscuur libel* (see Chapter 1).[100] The strategy for using one or the other involves deciding whether or not a contract will be used. Breach of contract is used when there is a written contract that benefits the interests of the plaintiff. Tort is referred to as an unlawful act (*Perbuatan*

95 Supreme Court regulation (PERMA) No. 13/2016.

96 'Pengurus adalah organ korporasi yang menjalankan pengurusan korporasi sesuai anggaran dasar atau undang-undang yang berwenang mewakili korporasi, termasuk mereka yang tidak memiliki kewenangan untuk mengambil keputusan, namun dalam kenyataannya dapat mengendalikan atau turut mempengaruhi kebijakan korporasi atau turut memutuskan kebijakan dalam korporasi yang dapat dikualifikasikan sebagai tindak pidana.'

97 These are usually established by the practice of notaries or PPAT. For example, before being able to purchase a house, a prenuptial agreement is required for Indonesian citizens who are married to a citizen of another country. This is under the reasoning of avoiding risks of the 'foreigner' having a claim over the land, should there be a divorce or death.

98 Lawyers could hide behind their 'professionalism' by relating it to their independency. They could draft contracts or deeds without being a signatory, and so not be liable for them.

99 This usually occurs through allegations of falsifying information in an authentic deed, which is a criminal offence under Article 266 Indonesian Criminal Code. See also Chapter 1 about the nature of discovery.

100 In opinions delivered by, e.g., Supreme Court judges Subekti and Harifin Tumpa.

Melawan Hukum literally meaning an act against the law) and *wanprestasi* being a breach of contract. *Perbuatan Melawan Hukum* is broader than *wanprestasi* as it also involves acts that violate regulations other than law, such as norms and customs.[101] It is used when the contract is not in favor of the claimant.

4) *Apply Article 1917.* The principle of *nebis in idem* is originally only applicable in criminal/public law, not civil/private law. It is similar to double jeopardy, meaning no similar cases should be adjudicated twice. However, the principle in its broad sense is also used by applying Article 1917 of the Indonesian Civil Code, which states '*The authority of a court of law does not extend beyond the subject of the judgment. In order to invoke such authority, it shall be required that the case which has been heard shall be the same; that the claim is based upon the same grounds, and is made by and against the same parties having the same relationship*'.

4.1.10 Somasi (summons)

Disputing starts with the sending out of letters of *somasi*. *Somasi* is a procedure established by practice based on an interpretation of the Indonesian Civil Code.[102] Essentially, it involves warning letters being sent as notifications to fulfill an obligation or perform an agreement. *Somasi* letters are usually sent two or three times. It includes a warning and a time limit given to solve the issue, e.g., giving three working days to transfer payment. The second and third *somasi* are used to show that the due date stated in the first *somasi* has not been met. This means the parties receiving the *somasi* are not cooperating, and the right to pursue litigation has been established.

When receiving *somasi*, the best way is to avoid signing a receipt, not to respond so parties can still deny receiving the *somasi*, or include a counterclaim when responding. This is because a receipt or responding shortly could imply an acknowledgment of debt or lack of performance.

4.1.11 Drafting and filing complaint/lawsuit

There are three important aspects to fulfill when drafting a lawsuit. First, make sure every interested party is included to avoid the risk of having the lawsuit rejected during *eksepsi*,[103] e.g., under the principle of *Error in*

101 Opinion of the Head of the Supreme Court Wirjono Prodjodikoro (Prodjodikoro 1953).

102 Article 1238 sets the condition of default of a debtor only after they have received *surat perintah* (orders, instructions). It states, 'The debtor shall be deemed in default, either by an order or other similar deed, or pursuant to the obligation itself, where such obligation stipulates that the debtor shall be in default, upon failure to deliver within the stipulated time period.' The reasoning is that the debtor's obligation to pay damages does not occur immediately when the debtor is negligent. There has to be a declaration of negligence by the creditor that is conveyed to the debtor (Article 1238 and 1243 Civil Code).

103 See *Legal Basis* in Chapter 1.

Persona,[104] which also applies to lawsuits that do not include all of the interested parties. As found in Chapter 1, it is crucial to include the notary (PPAT) and the NLA official in lawsuits concerning land title.

Second, the lawsuit has to have a proper headline. Following the proper 'procedure' of a particular claim (knowing what precise vocabulary to use in a claim, e.g., when requesting *penetapan* or *putusan*[105]) is already a win by itself. The court registrar (*panitera*) is the first gatekeeper for this. *Panitera* can use formality reasons for refusing claims, e.g., saying that the claim uses a wrong term, even if this is not the case. For this, lawyers would approach and consult the Head of the Courts[106] and cooperate with the *panitera* even before submitting their claim.[107]

Third, the narrative of the claim (*posita* and *petitum*) has to be simple and understandable so it can appeal to judges who are unfamiliar with the complex web of contracts that usually involve long-term business transactions between numerous parties from various countries. This is an important skill that lawyers must have since they have to simplify the complexity into a straightforward and relatable story. Lawyers have to make clear why their client is right, and the opponent is wrong, and why the client is entitled to damages.[108]

4.2 Litigation strategies

In pre-litigation strategies, timing about how fast one should bring the case to court is important. Being outrun by the opponent and ending up as a defendant limits the strategies one can employ. In litigation strategies, parties influence the timing of the procedure to negotiate and show their power. They manipulate the timing by delaying hearings or expediting them. By showing how judges react and decide on their request for delaying and expediting the hearings, parties show their power to the opponent regarding eventually influencing the outcome of the case.[109]

104 See also *Defense* in Chapter 1.

105 See enforcement strategies below.

106 Either the Head of the District Court (Ketua Pengadilan Negeri or KPN), Head of the High Court (Ketua Pengadilan Tinggi or KPT), or Head of the Supreme Court (Ketua Mahkamah Agung or Ketua MA). This is because they are responsible for implementation of case administration at their respective courts (PERMA No. 7/2015).

107 Panitera can also inform lawyers about which judges would be assigned to examine the case. In the Supreme Court, this used to be the task of the court secretary. The position used to be held by Nurhadi, who resigned in July 2016 after being investigated by the KPK (https://news.detik.com/berita/d-3384116/mantan-sekretaris-ma-nurhadi-kembali-diperiksa-kpk and http://www.thejakartapost.com/news/2016/08/05/supreme-court-official-accused-safeguarding-multiple-cases.html).

108 Often, lawyers would use overarching principles such as *itikad baik* (good faith), *kepastian hukum* (legal certainty) and *pemerintahan yang baik* (good governance) to avoid having to really explain a transaction scheme (which could reveal that their client is also at fault).

109 Moreover, prolonging litigation is also a strategy to drain the counterparties' resources.

However, there is a limit to this negotiation tactic of delaying and expediting hearings. After the defendant has submitted their response (*jawaban*) against the claim made by the plaintiff, it is not possible for the plaintiff to withdraw their claim or lawsuit without the defendant's agreement, and there is no out-of-court settlement. Settling is possible, although a Settlement Deed (referred to as *Akta van Dading*[110]) has to be 'legalized' by the judge and made into a *penetapan* (court decision/injunction). This procedure is referred to as *dading*.[111]

Planning the timing surrounding the month of Ramadhan is one of the most important considerations for lawyers. This is because approaching the month, the costs of the procedure will be higher because people need more money to throw parties, but will yield few results because the work pace is slower, making dealings more difficult. Lawyers will either aim to obtain a decision before the start of Ramadhan or postpone any action until after the month.[112]

Basic litigation procedure

Even though there are many small variations of the course of litigation, the basic procedure is as follows. The court convenes in each step.

In administrative and civil district court cases, a plaintiff will (1) submit a *gugatan* (claim) containing *posita*[113] (the basis of the claim), *petitum* (what the plaintiff asks the court to grant), and *provisi* (a request for performance while the case is ongoing). The defendants are allowed to (2) give a *jawaban* (response), which often contain a *rekonvensi* (counterclaim(s)). The plaintiff could (3) respond to the *jawaban* with a *replik*, and the defendant could (4) respond to the *replik* with a *duplik.* Then there will be two or three (5) hearings on evidence and witnesses, followed by (6) a hearing of *kesimpulan* (conclusions from both parties), and lastly, (7) the reading of the decision. The decision can be appealed to the court of appeal (High Court).

Procedures on special district court cases (commercial court) are shorter, without *replik* and *duplik.*[114] An appeal goes directly to the Supreme Court.

110 A procedure interpreted from Article 130 HIR.

111 *Dading* is considered *inkracht* (legal and binding), meaning that no appeal is allowed, and that only an extraordinary appeal or judicial review (*peninjauan kembali*) is possible (See *Appeal Procedure* in Chapter 1).

112 Some firms prefer to close the office for one or two months to save costs. This is because people claiming to be representatives of judges, policemen, and prosecutors often come to their offices to ask for a 'donation'.

113 Lawyers often confuse this with *petita*, the possible plural form of *petitum* in Latin.

114 In special district court cases, particularly bankruptcy, parties are more constrained to play on *time*, since there are various limitations prescribed by laws and regulations on the procedure. For instance, for disputes concerning shareholder meetings (RUPS), timing for actions are regulated in Articles 79 to 86 of the Indonesian Company Law.

4.2.1 Tactics in court

Hire influential expert witnesses

There are two kinds of witnesses in Indonesian litigation: (1) witnesses of fact and (2) expert witnesses. The odd thing in this system is that expert witnesses are usually *legal* experts, who testify about their opinion on how to interpret laws or legal principles. The best expert witnesses are former Supreme Court judges, as their testimony carries more weight for the judges (ex-peers) because of their seniority.

Witnesses of facts in corporate land litigation are usually officials from the National Land Agency, government officials (for instance *camat* or district heads), or notaries/PPAT, who will testify according to the position of the office that they hold.

Witnesses are provided by the parties. In other words, the parties pay them for testifying. This means that they are not neutral; they present either on behalf of a plaintiff or defendant.[115]

Keep recordings

One of the tasks of the junior lawyers in a case is to make audio and video recordings of hearings, particularly when it is the reading of the decision. The records serve three purposes: (1) as proof in case the written decision is not the same as the pronounced decision, (2) to announce the decision in the public media, and (3) to consider follow-up strategies.

4.2.2 Tactics outside court

Use the media

Parties use the media for various reasons. First, to find information about the enactment of new laws and regulations. Second, to monitor the reporting about cases and the condition of companies, such as bankruptcy, the auctioning of land, shareholder meetings (*RUPS*), and other various legal actions that have to be announced to the public by an OJK requirement. Third, to manipulate judges through the reporting of an ongoing case.

For the first two reasons, all major newspapers are monitored. This is the task of juniors and interns at law firms, who would be the first ones at the office reading all the newspapers and creating a summary in the form of newspaper clippings for their superiors to read. On the other hand, parties who are forced to announce certain legal actions could choose to hide the required publication within the most obscure newspaper.

115 Compare this with issues regarding hot-tubbing in articles about the UK and Australian legal systems. For example, see Yarnall, M. A. (2009). Dueling scientific experts: Is Australia's hot tub method a viable solution for the American judiciary. Or. L. Rev., 88, 311.

Influencing judges' opinions through the media is important in a system without a jury. The question is which media the lawyers should use for this. Lawyers will try to find out which newspapers judges (and courts) subscribe to and which magazines are lying around their offices.[116] For publishing *their* stories, parties would hire journalists, and if they take the form of an opinion or advertisement, there are rates for these set by publishing companies.[117]

Arrange demonstrations and mass mobilization

To influence media reports, parties also fund demonstrations. They would hire someone who could 'provide a lot of bodies'[118] to stand around at the location of demonstrations, carrying banners. By demonstrating directly in front of the courthouse, it could be used to intimidate judges during a hearing, or inside the courtroom to create disorder.[119]

Monitor cases

In managing their clients' expectations, lawyers make sure that they prepare a reaction plan. Knowing what to expect, the possibilities they could explore, and having response strategies would make clients comfortable (see legal/financial engineering above). For this, it is important to know the exact stage of a case. Lawyers (particularly *fixers*) refer to this as 'monitoring'. It is an investigation to find out at which 'hand' the case is currently at, so they could tell their client that, e.g., the docket has been numbered, Judge A is reading it right now, or two out of three judges have read it. Parties could engage a lawyer specifically for monitoring. It does not necessarily mean that the lawyer would represent the parties at court hearings.

4.2.3 Appeals[120]

There are normally no hearings at the appeal stage, whether in the High Courts or the Supreme Court. Lawyers can request hearings at the High

116 Some try to access their electronic devices.

117 This is according to the amount of space it requires. I have heard of one billion rupiah (around USD$95,000 at the time of writing, February 2018) per half a page in major newspapers, and at least five times more for time slots in a major television channel. I also encountered a political party's magazine editor who was offering to sell a slot in the magazine so a lawyer could put his name as the 'legal consultant' of the magazine as a way to give a donation.

118 Interview with an investor, December 2016.

119 During my participant observation, some hearings kept on being postponed because there were 'lots of people demonstrating'. Eventually, the lawyers claim some '*preman* came with pick-up trucks and barged into the courtroom' (hearings at Sidoarjo District Court in 2010).

120 See also Chapter 1 on appeal procedure.

Courts, but this is rare.[121] One reason for this is if there is a witness whose testimony has not been heard.

To lodge an appeal, parties submit memorandums (memorandums or counter-memorandums of appeal or cassation). These have to be submitted within two weeks since the court delivers the judgment or memorandum or counter-memorandum to the party/opponent. Since this limitation only starts from the point of delivery, parties can manipulate the timing of the appeal or cassation by cooperating with court officials to delay the delivery. However, this practice is becoming more difficult because it requires the cooperation of court registrars, who are increasingly afraid of being charged for corruption by the KPK.

4.2.4 Securing certainty of winning litigation

Bedner (2001: 238) distinguishes three ways that money or *rezeki* (good luck) influences litigation: the absolute and relative jurisdiction, the duration of litigation, and the decision-making process. This concerns the latter. However, successfully giving bribes to judges does not automatically mean the party will get their favorable decision. To be certain of winning by giving a bribe is still a delicate matter.

Assuming that their opponent would also bribe judges, parties usually have to guess the amount of money (as part of the *jago sogok* skill I mentioned) that they give to judges. This amount has to be enough to 'outbid' their opponent. It means that this first approach is as uncertain as a silent auction. It bears the risk of the opponent 'bidding' more, and the party may end up losing. Securing the certainty of winning often means securing certainty of the amount a party *should* 'bid'. This is only achievable by asking the judges how much the 'bid' should be to secure the winning. I found in my interviews that being certain of winning or having the judge give the favorable decision will be more expensive than the silent auction. This is because my interviewees said that there would be an '*auction-like bargaining*'[122] with the judge acting as an auctioneer. Moreover, to have some of my interviewees know about this procedure means it has happened before and confirms speculations made by Bedner (2001:237).

Parties could also pressure a judge to render a decision in their favor by going through the judges' superiors. This could be the *ketua* or chairmen of courts, or anyone who could influence the development of the judge's career,[123] e.g., by deciding on their *mutasi* (see section 1.3 above). This is also why there is a belief that senior judges who are about to retire would be

121 Interview PM.

122 *Tawar-menawar seperti lelang*. Interview GL, JN, MA.

123 Previously, the Ministry of Law and Human Rights had a role, but since *reformasi*, this court management authority was transferred fully to the Supreme Court. This was also the task of the court's secretary.

more independent because they could deviate from the superior's wishes or instructions.[124]

In this game of winning at any cost, the play is so 'dirty' that the standard of what is good is lowered. Many interviewees claims that their firm is (morally) better because even if they do try to influence judges outside of courtrooms, they '*do not ever threaten judges or policemen.*'[125] They also do not handle adultery or drug cases, even if the client is a judge, policeman, or prosecutor and even if handling the case could allow them to later ask for favors.[126]

4.3 Enforcement strategies

A formal copy of the court judgment is needed for enforcement. Usually, lawyers have to pay unofficial fees for it, even in the case of their client.[127] Ideally, enforcement or the performance of a court decision should be implemented by the party being instructed according to the decision. However, parties do not always comply. The enforcement or performance of court decisions, or *eksekusi*, is mostly regulated in Articles 195 to 224 HIR[128]. There have been problems with HIR from the start as I have discussed in Chapter 1, and it has never been redressed.

In practice, enforcement is a separate procedure. Parties (winning parties or parties who have an interest in the performance of the court decisions) have to submit a request to the court to issue a *penetapan*. It is referred to as *penetapan*, not *putusan* (decision/order) because it is technically a result of a unilateral petition process. *Penetapan* can also be issued for seizures and injunctions, especially in the beginning of a dispute, to make sure the opponent does not transfer or build a permanent building on the land under dispute.

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124 I also have to note that in Indonesian society, this 'superior' also includes the superior's representatives: their 'assistants' who are entrusted to be the intermediaries, such as wives, housemaids, drivers, bodyguards, or bag carriers. It was also mentioned by Rafat Ali Rizvi regarding the Bank Century case, that a 'bag carrier' called Didong was the principal intermediary in carrying instructions and bribes.

125 They claimed, '*Hotman* [the name of an infamous fixer] *is worse because he would provide them with women and cash-in the favor with threats, for example that he would tell their wives or their superior'.* Hotman Paris has a talkshow in which he demonstrates his ability to buy people (women) with money and objects. The show has received a warning from Komisi Penyiaran Indonesia, a commission in charge of regulating broadcasts. See http://www.kpi.go.id/index.php/id/umum/38-dalam-negeri/34248-warning-untuk-program-hotman-paris-show-di-i-news-tv. Last accessed, 21 February 2018.

126 Four fixers claimed in various interviews that even if they can and they do influence judges outside courtrooms, they do so as far as it concerns giving money and conveniences, such as cars, houses, and drivers. They '*don't do adultery and drug cases, even if the client is someone important and s/he begs for us to take their case. Only dirty lawyers do that'.*

127 See also Bedner 2016, footnote 85.

128 About HIR, see Chapter 1, short history of Indonesian legal procedure.

The authority for *eksekusi* is at the first instance court or district court, and can only be performed by an instruction from the head of the district court.[129] This system has two characteristics: (1) when it comes to enforcement, the head of a district court has more authority than the Supreme Court, yet the Supreme Court is authorized to supervise them and decide about the advancement of their career, and (2) even though a case has reached a decision from the Supreme Court through lengthy appeals and cassation processes, when parties seek enforcement, they have to go back to a district court to seek a *penetapan*. During which, any 'interested' parties can file a rebuttal (*perlawanan*[130]), which in practice may mean the start of an entirely new process as we have seen in Chapter 1. On the other hand, any *penetapan* is considered as *inkracht*, which means it could only be appealed through a judicial review (*peninjauan kembali*). Himawan (cited in Bedner 2001:216) observed that this is an administration of justice in five instances: district courts, high courts, Supreme Court, judicial review, and *eksekusi.*

Winning scenario: Self-enforcement

In theory, there is a possibility for the self-enforcement of court decisions. The Law on Mortgage of Land regulates that creditors can enforce their rights by selling land through public auctions,[131] and by claiming that a contract/deed has executorial power as *grosse akta*,[132] which avoids and limits court involvement so enforcement can be performed more efficiently (Pompe 2005:240-242). In practice, this often fails[133] and courts could order (and have) that the *eksekusi* be voided/canceled if performed without permission from the court.[134]

129 Referring to HIR and Article 54 and 55 Law No. 48/2009.

130 See also Chapter 1 about parties and above about self-enforcing structures.

131 Article 6 UU HT. Some fixers have their own auction house or have *anak buah* at state auction offices. Land as collateral under *grosse akta* could be enforced (sold through) private auction houses, which makes it easier for the fixers instead of having to go through state auction offices (KPKNL), which is required when performing an auction as per a court decision.

132 This is because of an interpretation of Article 224 HIR, that a document containing 'irah-irah', which means a sentence as the heading of the document declaring 'Demi Keadilan Berdasarkan Ketuhanan yang Maha Esa' or when the HIR was drafted: '[*atas titah raja*]' is enforceable as grosse akta.

133 See, for instance, KPPU case in Davis, JR (2008) The Competition Commission: A new kind of player in Indonesia's Legal System, in Lindsey, T, Indonesia: Law and Society, Federation press. p. 636–670.

134 This practice started in the 1980s by Ketua Muda Perdata (head of civil cases) Prof. Z. Asikin Kusumah Atmadja, SH and have also been decided with note No. VII/1988/Perdata, February 1988, which was attached to Supreme Court Decisions No. 1520K/Pdt/1984, 31 Mei 1986 and No. 3021 K/Pdt/1984, amongst others. It was under the reasoning that the 'irah-irah' was also overused as a contract heading for complicated transactions.

Another interim way of self-enforcing is to publish the court decision (whether *putusan* or *penetapan*) in major newspapers, thus giving a warning to potential buyers of the land under dispute.

Losing scenario: Postpone enforcement and deflect the effect of the decision

There are other means aside from filing a rebuttal to avoid *eksekusi*. Parties can file an appeal, or file a new claim in another forum.[135] There is also a possibility to make the court decision irrelevant by transferring the asset away from entities subject to the court order, although it is difficult, and under a bankruptcy situation, it might require cooperation with the *kurator*. Parties could also create another claim over the land under dispute, e.g., by backdating a rental agreement of the land.

4.4 Conclusion: A business of favors

In this chapter, I have presented the real condition of legal reasoning in terms of what influences court procedures and decisions in Indonesia. At first glance, many of the strategies seem similar to lawyers' practice globally, and could be considered regular requirements for lawyers to defend their client 'zealously', such as knowing how to draft contracts and court claims in the strongest and most convincing way possible. However, some strategies transgress all ethical norms, for instance backdating contracts. Even though we can still justify these strategies with an appeal to lawyers' obligation to protect clients' interests, these strategies take this obligation too far that it undermine the consistency of the legal system. The strategies discussed do show that the condition of the legal system in Indonesia is not good, because it provides too much leeway for lawyers to use the legal system as they wish (cf. LoPucki & Weyrauch 2010).

Nevertheless, this chapter showed that legal knowledge has a role, even though it is being used as a means to an end. This is a small but positive development compared to the finding by Bedner (2001:241-2) that actors (in that case the lawyers he interviewed) assume legal knowledge does not play a role at all because of the dominance of corruption in the legal system.

In addition to using the weaknesses of the legal system, repeat players use the structural advantages that are already in place not only to influence the content and meaning of the law (Talesh in Galanter 2014:iv), but also to bend and transform reality into legal facts that will serve their goals. In Indonesia, this structural advantage is dominant in the form of social capital or loyalty to others.

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135 For example, a case about ownership of a sugar plantation in Lampung has resulted in at least 7 cassation and 5 judicial review decisions in 2008, 2009, 2011, 2012, 2013, 2015, and 2018 (see Mahkamah Agung docket on Marubeni Corporation et al v. PT. Sweet Indolampung et al.).

Repeat players accumulate social capital through ingratiation, which requires concealment for it to be successful. Furthermore, since social capital is related to enforcing obligations and trusts, its usefulness is uncertain until one tries to use it (Bourdieu 1986; Smart 1993). These characteristics of concealment and uncertainty are then reflected in the nature of litigation. Because of the dominance of these deemed-to-be illicit and illegal personal relationships and networks, litigation further becomes a mere show. Its development remains behind the curtain and creates a gap of knowledge concerning procedural law.

This condition suggests that access to litigation and legal enforcement is disproportionate towards the dominant groups, who can derive profit from the use of social capital while the dominated groups have to sell their knowledge and skills to gain economic capital (Bourdieu 1986:85). Moreover, this characteristic is sustainable for the dominant groups, and they influence others to act correspondingly, pushing the *brokers* to act like *fixers*. In other words, the most dominant actors constituting the legal system deeply distrust it, creating a devil's circle of litigation without resolution. This instrumental view of the law is undermining the development of the rule of law (Tamanaha 2006), which will be analyzed further in the conclusion of this book.