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DRAFTING INTER-ASIAN LEGALITIES: JAKARTA'S TRANSNATIONAL CORPORATE LAWYERS

Abstract

Asia's legal architecture is in a state of transformation, with commerce and information flowing easily across borders. These socio-political changes are a challenge to traditional notions of jurisdiction and applicable substantive law. I argue that a new body of law is developing — akin to a law of merchants or *lex mercatoria* — to facilitate these complex commercial relationships. I demonstrate how the map of inter-Asian legalities — the connective tissue within and between Asian legal systems — is being redrawn, blending non-state local rules, domestic state laws, international law, and privatised transnational law. These legal regimes are often applied in plural legal environments that are facilitated and administered by legal intermediaries. I argue that in recent decades, a new breed of legal intermediary has emerged in the form of transnational corporate lawyers and the global law firms for which they work. This article will focus on the transnational corporate lawyers of Jakarta, Indonesia, who implement new modes of documenting and disputing commercial relationships.

I Preamble

At the time of writing, international borders are closed, people are working from home, airlines across the globe are halting services, and corporations are going into liquidation. In this context, it seems an odd time to write about transnational corporate lawyers and legal interconnections across Asia. However, commercial and trade activities have remained active through technologies such as cloud systems and video conferencing.[1] These technologies have allowed arbitral forums to continue hearing matters (even if suboptimally) and contracts to be drafted by lawyers operating from their homes.

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1 Emily Bary, 'Zoom, Microsoft Teams Usage Are Rocketing during Coronavirus Pandemic, New Data Show', *Market Watch* (online, 1 April 2020) <https://www.marketwatch.com/story/zoom-microsoft-cloud-usage-are-rocketing-during-coronavirus-pandemic-new-data-show-2020-03-30>; Brendan Ittelson, 'A Story of Agility and Innovation: Findings from the Impact of Video Communications during COVID-19 Report', (online, 25 March 2021) <https://blog.zoom.us/findings-from-the-impact-of-video-communications-during-covid-19-report/>.

With this all said, just as the COVID-19[2] pandemic will become a matter of historical record, trade and legal interconnections will continue as they have for hundreds of years. Consequently, this article remains relevant to our contemporary situation and future legal environments. Our entangled legal realities are, therefore, worth remembering as an essential element of legal practice, research, and education.

II Introduction

Over the past few decades, Asia has undergone major changes to its legal architecture, and with these changes, new actors and institutions have developed. The new modes and agents of legal change are captured in the interaction between state and non-state laws, actors and institutions. They combine to facilitate transnational commercial and political relationships across the region and beyond.[3] Transnational corporate lawyers, acting as legal intermediaries navigating Asia's new legal architecture, are an important element of inter-Asian legalities. Transnational corporate lawyers navigate the amalgam of local legal practices, domestic laws, international treaties, and private transnational contractual arrangements underpinning an intricate fabric of transnational governance.[4] These lawyers operate across the sea lanes of Asia from Hong Kong to Dubai and span the newly re-emerging inland 'silk road' from China to Europe.[5] Important to these transnational private arrangements are contract-based commercial relationships and privatised dispute resolution processes.[6] In this legal domain, where globalisation creates new forms of commercial interaction, the

2 COVID-19 is also referred to as SARS-CoV-2, coronavirus, or novel coronavirus.

3 The study of connections across the Asian region — broadly defined — has been brought back into scholarly attention by Prasenjit Duara. See generally Prasenjit Duara, 'Asia Redux: Conceptualizing a Region for Our Times' (2010) 69(4) *Journal of Asian Studies* 963.

4 Legal and anthropological examinations of the ideas of plural legal arrangements that exist within and flow across borders are provided by Franz von Benda-Beckmann and Keebet von Benda-Beckmann. See Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 38(53–4) *Journal of Legal Pluralism and Unofficial Law* 1. See also H Patrick Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50(4) *McGill Law Review* 863; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012).

5 These connections have existed for hundreds of years: Engseng Ho, *The Graves of Tarim: Genealogy and Mobility across the Indian Ocean* (University of California Press, 2006); John N Miksic, *Singapore and the Silk Road of the Sea 1300–1800* (National University of Singapore Press, 2013); Abdul Sheriff and Engseng Ho (eds), *The Indian Ocean: Oceanic Connections and the Creation of New Societies* (Hurst & Company, 2014).

6 Philip Caryl Jessup, *Transnational Law* (Yale University Press, 1956); Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2012), 206–8; Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (Cambridge University Press, 2015) 22–5.

transnational corporate lawyers are based in service centres (or professional 'garrison towns') such as Dubai, Jakarta, and Singapore.[7]

For the purposes of this article, transnational corporate lawyers are considered to be both transactional lawyers and dispute resolution lawyers primarily involved with International Commercial Arbitration.[8] As these lawyers operate on commercial arrangements that cross multiple jurisdictions, they do not simply apply one statute, treaty arrangement or an identifiable series of cases. Rather, a combination of state and non-state legal instruments and rules are applied based upon the business arrangements, parties involved, local sociopolitical requirements and jurisdictions being traversed.[9]

I argue that this complex legal reality that transnational corporate lawyers traverse can be viewed as a re-imagined *lex mercatoria*, or a law of merchants.[10] *Lex mercatoria,* as a legal concept, emerged from the customary trade practices of merchants in the medieval period around Mediterranean seaports and inland trade centres.[11] *Lex mercatoria* created an informal legal regime regulating the relationship between merchants.[12] This body of law, whether in its historical form or its current iteration, allows for complex cross-border transactions and the resolution of disputes arising from them.[13]

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7 Jeremy J Kingsley and Melinda Heap, 'Dubai: Creating a Global Legal Platform?' (2019) 20(1) *Melbourne Journal of International Law* 277, 281–5.

8 The notion of transnational corporate lawyers has been studied over the past two decades. See, eg, John Flood, 'Transnational Lawyering: Clients, Ethics and Regulation' in Lynn Mather and Leslie Levin (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012) 176 ('Transnational Lawyering'). The complex regulatory environment and challenges thrown up by transnational lawyers are discussed in Donald H Rivkin, 'Transnational Legal Practice' (1998) 32(2) *International Lawyer* 413, 423–6.

9 Much of the discussion of transnational law in this article focuses on private contractual relationships, however, the role of the nation-state should not be underestimated in this new legal architecture. See Paolo Contini, 'International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8(3) *American Journal of Comparative Law* 283.

10 A new vision of *lex mercatoria* has been simmering in legal debates for the last few decades: Harold J Berman and Colin Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19(1) *Harvard International Law Journal* 221; Nikitas Hatzimihail, 'The Many Lives — and Faces — of Lex Mercatoria: History as Genealogy in International Business Law' (2008) 71(3) *Law and Contemporary Problems* 169.

11 Hatzimihail (n 10) 172–4.

12 See Jeremy J Kingsley, 'Introduction: Reimagining Lex Mercatoria' (2020) 40(2) *Comparative Studies of South Asia, Africa and the Middle East* 257.

13 See Neilesh Bose and Victor V Ramraj, 'Lex Mercatoria, Legal Pluralism, and the Modern State through the Lens of the East India Company, 1600–1757' (2020) 40(2) *Comparative Studies of South Asia, Africa and the Middle East* 277. This article examines colonial notions and applications of *lex mercatoria* that occurred across south Asia.

I contend that the reconstitution of this medieval legal notion underpins a web of mercantile relationships across Asia.[14] The fabric that weaves these relationships together requires facilitators, ie legal intermediaries, who can guide their clients across boundaries and points of regulatory friction to secure these transactions. They are the administrators of globalisation and document Asia's legal architecture ('inter-Asian legalities').

In order to identify these legal connections across Asia and examine the substantive law developing from these mercantile interactions, this article focuses on the capital city of one of Asia's largest States and an emerging global city, Jakarta. It is from this commercial centre that I will examine how transnational corporate lawyers have become key actors within this new Asian legal architecture.

Legal intermediaries are people, and increasingly technological systems, that facilitate and provide the documentation, rules, and mediate (or decide) the outcome of commercial, social, and political relationships and disputes.[15] In this context, the concept of 'figures of prowess'[16] is a useful framework to use in relation to legal intermediaries as these actors can assist in defining the way that larger transnational legal interactions operate. By examining these figures of prowess — these lawyers — we are able to interrogate the way that commercial and political relationships develop and are structured within and across borders. Legal intermediaries have become a useful focus of analysis, as their role deepens our understanding of the networks that link the smallest villages in eastern Indonesia to the metropolis of Jakarta and then onward to Singapore and further afield.[17] In complex legal environments, transnational corporate lawyers and the firms they work for are important as

14 See, eg, Robert Hillman, 'Cross-Border Investment, Conflict of Laws and the Privatization of Securities Law' (1992) 55(4) *Law and Contemporary Problems* 331, 331–5; A Claire Cutler, 'The Privatization of Global Governance and the Modern Law Merchant' in Adrienne Windoff-Héritier (ed), *Common Goods: Reinventing European and International Governance* (Rowan & Littlefield, 2002) 127.

15 In the digital age, the complexity of who should be classified as legal intermediary, what the parameters of their functions are and the role of technology in the facilitation of legal services needs to be considered as a thick series of interactions. Technologies can augment the facilitation of legal services, such as online precedent systems and legal databases, while other technology bypass human interaction, such as automated service agreements and online compliance systems (like the infamous Commonwealth 'robodebt' program). For further discussion on legal automation and intermediaries: see Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2010) 99–145; Harry Surden, 'Machine Learning and Law' (2014) 89(1) *Washington Law Review* 87.

16 Joshua Barker et al, 'Figures of Indonesian Modernity' (2009) 87(1) *Indonesia* 35, 35.

17 For a discussion of the need for the incorporation of a broader social science, particularly anthropology, into the study of law, see, Jeremy J Kingsley and Kari Telle, 'Does Anthropology Matter to Law?' (2018) 2(2) *Journal of Legal Anthropology* 61, 61–2; Lawrence Rosen, 'Reconciling Anthropology and Law' (2018) 2(2) *Journal of Legal Anthropology* 105, 105–8.

they are perceived by many commercial and political actors to provide legitimacy and authority to cross-border legal relationships.[18]

Part III outlines the background and parameters of transnational corporate lawyers operating in Jakarta. This article will then seek to provide historical context to the role and function of legal intermediaries within the mercantile life of the Indonesian archipelago and its connection to other parts of Asia and beyond. Then finally, to consider the complex role of lawyers within transnational legal transactions and disputes, the article unpicks a succinct, but practical, case study. Through focusing on Asia, this article allows us to understand global commercial and legal infrastructure and consequently consider a re-emerging body of law in *lex mercatoria*.

III Situating Jakarta's Transnational Corporate Lawyers

It has long been recognised that what is 'global' essentially always becomes 'territorialised'. The legal concepts examined in this article became more grounded through working with Jakarta lawyers, which allowed me to illuminate and make sense of their understandings of their own practice.[19] In order to explore transnational law and its actors, this article undertakes a finely-grained account of the activities of Jakarta's transnational corporate lawyers and the law firms for which they work, gathered over five years of field work.[20] I use Jakarta as a hub for legal infrastructure in the world's fourth most populous country, Indonesia.[21] Given Indonesia's economic size and strategic location in the region dominating the maritime trade routes across Asia,[22] Jakarta provides a reference point for us to consider inter-Asian legalities and the new law of merchants.

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18 John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14(1) *Indiana Journal of Global Legal Studies* 35.

19 Arjun Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' (1990) 7(2–3) *Theory, Culture and Society* 295.

20 Focusing on lawyers and their practice to refine our understanding of law has been undertaken in Michael J Kelly, *Lives of Lawyers Revisited: Transformation and Resilience in the Organisation of Legal Practice* (University of Michigan Press, 2007) 7. The importance of carefully reviewing the way legal practice gives meaning to our understanding of law is also examined in Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985). While in the field of transnational legal practice one cannot avoid Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of Transnational Legal Order* (University of Chicago Press, 1996) ('*Dealing in Virtue*').

21 'Indonesia Overview', *World Bank* (Web Page, 6 April 2021) <https://www.worldbank.org/en/country/indonesia/overview#:~:text=Today%2C%20Indonesia%20is%20the%20world's,%2C%20to%209.78%25%20in%202020>.

22 Political and business elites in Indonesia have been attempting to leverage their strategic geography, and the control of many of the globe's major sea lanes. See Chaminda Abeysinghe and Hashan Wijesinghe, 'Geo-Economics of the Global Maritime Fulcrum (GMF) Vision of Indonesia' (2021) 16(1) *Technium Social Sciences Journal* 561.

The globalisation of legal services has challenged the nature and identity of Indonesian law firms. Over the past 20 years, Indonesian corporate law firms have started to gain pre-eminence as players within the Indonesian legal services sector, with the number and size of these firms growing dramatically.[23] Scholars have divided Indonesian lawyers and their law firms into 'white hat' and 'black hat' categories.[24] 'White hat' lawyers are those who seek to assist clients to comply with Indonesian law and actively attempt to remain immune to corrupt practices, while 'black hat' lawyers are those who are actively involved in longstanding practices in Indonesia connected to judicial corruption and bureaucratic manipulation.[25] This article deals with the Indonesian corporate law firms that are considered 'white hat' in that they aim to offer foreign and local businesses the tools to comply with Indonesian and foreign regulatory requirements.[26]

The internationalisation of legal practice has had an uneven impact on Indonesia. What has occurred in the legal services sector is better described as nationalised globalisation that protects the local actors and law firms. This is exhibited by the regulations guiding the admission to practice and the provision of legal services in Indonesia. To be a lawyer, one must be an Indonesian citizen and resident.[27] While foreign lawyers are allowed to practise in Indonesia, they can only provide limited consulting services and must hold a work permit in order to undertake this limited role.[28] On 14 November 2017, the Indonesian Ministry of Law and Human Rights (*Kementrian Hukum dan Hak Asasi*) issued a decree concerning the role and employment of foreign lawyers.[29] The decision allows foreign lawyers to practise in Indonesian firms at a ratio of 4:1, with a maximum of five foreign lawyers per firm.

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23 Ahmad Fikri Assegaf, 'Besar Itu Perlu: Perkembangan Kantor Advokat Di Indonesia dan Tantangannya' [Big Need: Development of Advocate Offices in Indonesia and the Challenges] (2015) 10(1) *Jurnal Hukum & Pasar Modal* [Journal of Law & Capital Markets] 5. This article promotes the importance of expanding the size of Indonesian law firms and the depth of services that they can provide, indicating the approach that the author has to legal practice as the founding partner of Indonesia's largest full-service law firm, Assegaf Hamzah & Partners.

24 Santy Kouwagam and Adriaan Bedner, 'Indonesia: Professionals, Brokers and Fixers' in Richard Abel et al (eds), *Lawyers in 21st Century Societies* (Hart, 2020) 735.

25 Tim Lindsey, 'The Criminal State: *Premanisme* and the New Indonesia' in Grayson J Lloyd and Shannon L Smith (eds), *Indonesia Today: Challenges of History* (Institute of Southeast Asian Studies, 2001) 283.

26 The extraterritorial application of anti-corruption measures can be seen in the *Criminal Code Act 1995* (Cth) div 70; *Foreign Corrupt Practices Act of 1977*, 15 USC § 78dd–1; *Bribery Act 2010* (UK) s 6.

27 Undang-Undang Republik Indonesia Nomor 18 Tahun 2003 Tentang Advokat [Law No 18 of 2003 on Advocates] (Indonesia) art 23(2). The permission process and requirements for documentation to become a foreign legal consultant are dealt with in art 3(2) of this legislation.

28 Ibid art 23(4).

29 Ministry of Law and Human Rights Decision No. 26 of 2017 art 3.

Indonesian firms with only three Indonesian lawyers are also permitted to hire one foreign lawyer.

This means that as of 24 February 2020, before the COVID-19 pandemic's full effects were felt, there were only 40 foreign lawyers practising in Jakarta[30] among Indonesia's top 30 commercial law firms.[31] In the top 20 firms, there are, on average, two to four foreign counsel, while in the next 10 largest firms, there are maximally two foreign counsel.[32] This number of foreign legal practitioners is small compared to the over 1,200 foreign lawyers working in Singapore.[33] Consequently, Jakarta is a global legal centre dominated by Indonesian nationals and local law firms.[34] Although, many Indonesian firms have now formed alliances with global law firms.[35]

Jakarta creates the legal, administrative, and political hub for the archipelagic nation of Indonesia which consists of over 17,000 islands. The city provides a centralised node for Indonesian business, politics, and legal networks, which then connect into

30 Foreign counsel in Jakarta are coming from the following countries: Japan: six; Singapore: two; Malaysia: four; Korea: one; Philippines: two; China: one; Netherlands: four; United Kingdom: five; United States: eight; Australia: six; New Zealand: one.

31 The top 30 law firms in Indonesia were identified through a ranking list developed by leading Indonesian legal website, Hukumonline: 'Ini Dia Daftar Corporate Law Firm Terbesar dan Menengah Indonesia 2019' [List of Indonesia's Largest and Middle-Sized Corporate Law Firms 2019], Hukum Online [Law Online] (Blog Post, 29 March 2019) <https://www.hukumonline.com/berita/baca/lt5c9dcb196e932/>.

32 These figures were gathered through assessing these law firms' webpages.

33 Gabriel The, 'How Many Lawyers Are There in Singapore?', *Asia Law Network* (Web Page, 30 August 2017) <https://learn.asialawnetwork.com/2017/08/30/how-many-lawyers-singapore-infographic/>.

34 These alliances include large Indonesian firms such as Hadiputranto Hadinoto & Partners (representing global law firm, Baker McKenzie), Hiswara Bunjamin & Tandjung (representing global firm, Herbert Smith Freehills), Hanafiah Ponggawa & Partners (representing global firm, Dentons) and premium boutique law firm Yang & Co (representing American law firm, Schnader). See 'Indonesia', *Baker McKenzie* (Web Page) <https://www.bakermckenzie.com/en/locations/asia-pacific/indonesia>; 'Jakarta', *Herbert Smith Freehills* (Web Page) <https://www.herbertsmithfreehills.com/where-we-work/jakarta>; 'Jakarta', *Dentons* (Web Page) <https://www.dentons.com/en/global-presence/asean/indonesia/jakarta>; 'Jakarta', *Schnader* (Web Page) <https://www.schnader.com/locations/jakarta/>.

35 The impetus to form alliances with global law firms to meet international expectations has been discussed in Linda Widyati and Dede Fikry, 'Pola Interaksi Advokat Indonesia dan Advokat Asing Dalam Menjawab Tantangan Dinamika Dunia Business di Indonesia' [Pattern of Interaction between Indonesian Advocates and Foreign Advocates in Answering the Challenge of the Dynamic Business World in Indonesia] (2015) 10(1) *Jurnal Hukum & Pasar Modal* [Journal of Law & Capital Markets] 34. The authors are two lawyers who were the driving force behind Clifford Chance's Indonesia affiliation that closed in 2017 after just a few years of operation.

global business and political networks.[36] The Jakarta-centric nature of Indonesian business and political affairs is evident in the fact that the nation's entire suite of large and medium-sized corporate law firms is based solely in the capital. The only exception to this is Indonesia's largest law firm, Assegaf Hamzah & Partners, which has a satellite Surabaya office (Indonesia's second largest business city).[37] This contrasts with comparable corporate law firms in Australia, which have two to six domestic offices in numerous cities.[38]

The field research undertaken, which underpins this article, involved spending six months working within one boutique corporate law firm and two larger full service corporate law firms in Jakarta.[39] The case study in this article is based on observations of lawyers' activities, sociopolitical role, and intellectual influences illuminating the fabric of transnational governance across Asia through careful consideration of the networks that these transnational corporate lawyers create.[40] An example of the potency of everyday legalities, and the utility of investigations that provide detailed descriptions and analysis of the activities of lawyers, known as ethnographic accounts, is Didier Fassin's work on Parisian policing.[41] Accompanying police officers on patrol, operating in the outer suburbs of the French capital for 16 months, Fassin observed their daily activities, practices and modes of behaviour. As a result, he identified the enforcement of French criminal law not as a hypothetical

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36 William H Leggett, *The Flexible Imagination: At Work in the Transnational Corporate Offices of Jakarta, Indonesia* (Lexington Books, 2013) 17.

37 See 'Contact Us', *Assegaf Hamzah & Partners* (Web Page) <https://www.ahp.id/contact-us>.

38 For example, Corrs Chambers Westgarth has four domestic offices and Clayton Utz has six domestic offices. See 'Contact Us', *Corrs Chambers Westgarth* (Web Page) <https://corrs.com.au/contact-us>; 'Our Offices', *Clayton Utz* (Web Page) <https://www.claytonutz.com/about/offices>.

39 Ethics approvals were received for this research. In accordance with these approvals, the law firms and lawyers who participated in this research have been de-identified.

40 The complex functioning of workplaces and the findings they provide has enabled incredible insight when attempting to understand how sociopolitical realities emerge. Anthropologist and social theorist Bruno Latour was one of the leading scholars studying these intricate workplace arrangements. He focused primarily upon laboratories but has also undertaken an analysis of legal functioning in practice: Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'etat* (Polity Press, 2010). The theoretical framework that he deployed was the concept known as actor-network theory, which looked at the way that different players within a process interacted with one another. This theoretical approach was also considered by legal anthropologist Annalise Riles when studying Japanese market regulators and their application of regulatory controls upon the market: Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011). Legal practice and the importance of placing the practice of their activities into context has been examined in John Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (1991) 25(1) *Law & Society Review* 419.

41 Didier Fassin, *Enforcing Order: An Ethnography of Urban Policing* (Polity Press, 2013).

exercise but as a lived activity. Working in the office of major commercial law firms and sitting alongside these lawyers has allowed me to understand the pressures that these practitioners face, observe their modes of behaviour, and reflect upon the documents they draft.[42]

This research expands upon academic work over the past two decades on transnational corporate lawyers and the firms in which they work.[43] This article also relies on the scholarly investigations into other forms of legal intermediaries: human rights lawyers,[44] and Japanese financial service regulators.[45] Finally, this research builds on anthropological scholarship about lawyers practising in the courtroom.[46] However, in this article I seek to ground these discussions not in the spectacle of the courtroom, but in the everyday experiences of lawyers in their offices drafting, strategising, and negotiating. My research looks behind the curtain and into the relatively mundane operations of a law office in Jakarta. In so doing, I have developed an ethnography of legal practice that speaks to the larger legal, social and political issues, exposing inter-Asian legalities and the creation of a substantive body of law, a reimagined *lex mercatoria*.[47]

IV Continuity of Connections

In the contemporary environment, transnational corporate lawyers facilitate and give meaning to a web of state and non-state legal instruments and infrastructures that enable sociopolitical and commercial interactions across Asia and beyond. When studying these Jakarta lawyers, it is necessary to bear in mind that law evolves within a historical continuum. The common law, for instance, is based on accumulating legal doctrines over time.[48] This is no different among South-East Asia's legal systems. Jakarta's transnational lawyers operate within a contemporary legal environment

42 Both Latour and Fassin highlight the operation and human processes of law as an activity benefitting from being studied in intricate detail: Latour (n 40); ibid.

43 See, eg, Dezalay and Garth, *Dealing in Virtue* (n 20); James Faulconbridge et al, 'Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work' (2008) 28(3) *Northwestern Journal of International Law and Business* 455; Flood, 'Transnational Lawyering' (n 8).

44 Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

45 Annelise Riles, 'Market Collaboration: Finance, Culture and Ethnography after Neo-Liberalism' (2013) 115(4) *American Anthropologist* 555.

46 See, eg, Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford University Press, 2000); Michael G Peletz, 'A Tale of Two Courts: Judicial Transformation and the Rise of a Corporate Islamic Governmentality in Malaysia' (2015) 42(1) *American Ethnologist* 144.

47 Kingsley, 'Introduction: Reimagining Lex Mercatoria' (n 12).

48 See Theodore F T Plunkett, *A Concise History of the Common Law* (Little, Brown & Company, 5th ed, 1956).

that has its foundation in pre-existing notions of governance and law.[49] The idea of law, its transmission and documentation, has been an important element used for interpreting inter-Asian connections for centuries.[50] Significant research has been undertaken to discover the trade routes, and therefore commercial connections, and the modes of authoritative legal intermediary, which have for millennia moved across Asia along the interior from Persia to China and across the Indian Ocean.[51]

To facilitate these commercial connections across the maritime Indian Ocean, traders needed their relationships to be documented and protected by facilitators who were deemed legitimate. For several hundred years preceding the mid 20th century, these facilitators were Muslim religious leaders, *ulama*, who acted pursuant to legal principles defined by Sharia (Islamic law), which received wide purchase among Muslims and non-Muslim traders.[52] These legal interconnections subsequently shaped the historical trajectories of Asia and the Middle East. According to historian Fahad Bishara, the Indian Ocean world has been moulded by law, which 'furnished the institutions and instruments necessary to organize commerce and settlement[s]'.[53] Another historian, Michael Laffan, identified how commerce and legal arrangements moved across the Indian Ocean and brought social change along with it in the form of Islam to the Malay-Indonesian world.[54]

Law needs an authoritative language and Islam, in those historical circumstances, often provided the legitimacy to support mercantile interactions by providing figures of prowess, religious scholars, and legal frameworks that provided the documentation ascribing these commercial relationships.[55] Therefore, Muslim religious scholars who documented the legal interactions between traders in South-East Asia were activating a context appropriate mode of a law of traders (*lex mercatoria*).[56] They were acting as legal intermediaries for a privatised law of traders that was authoritative and legitimate for its time and place. Traders felt that these authority figures, and the documents they drafted, secured their commercial relationships and provided a

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49 One of the leading texts that looks at governance structures in South-East Asia before and into the colonial period is written by Tony Day: Tony Day, *Fluid Iron: State Formation in Southeast Asia* (University of Hawai'i Press, 2002).

50 See Michael Laffan, *The Making of Indonesian Islam: Orientalism and the Narration of a Sufi Past* (Princeton University Press, 2011); Fahad Ahmad Bishara, *Law and Economic Life in the Western Indian Ocean, 1780–1950: A Sea of Debt* (Cambridge University Press, 2014).

51 See Miksic (n 5); Sheriff and Ho (n 5); Susan Whitfield, *Life along the Silk Road* (University of California Press, 2015).

52 M B Hooker, 'Southeast Asian Sharī'ahs' (2013) 20(2) *Studia Islamika* 183.

53 Bishara (n 50) 9.

54 Laffan (n 50).

55 Hatzimihail (n 10) 172–4.

56 Kingsley, 'Introduction: Reimagining Lex Mercatoria' (n 12); Nurfadzilah Yahaya, *Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia* (Cornell University Press, 2020).

reliable forum for resolving problems flowing from these activities.[57] In contemporary circumstances, the nature of the substantive law used to connect business and politics across Asia and the legal intermediaries used to apply it has changed.

It is important to recognise that the reimagined *lex mercatoria*, as noted, is also built upon a pre-colonial and colonial legal archaeology. To contextualise Jakarta's legal profession, it is necessary to understand the legal context in the archipelago. There is a large body of literature about South-East Asian governance and legal history in the period before European colonisation.[58] During this pre-colonial period and the early colonial period in Indonesia, these forms of governance were the sultanates and their royal courts, who dominated these arrangements in the Malay-Indonesian world.[59] They were focused on performing statecraft and on the symbolism of their authority rather than pragmatic function.[60] This approach to statecraft is significantly different to those that emerged from Europe. As anthropologist Partha Chatterjee has noted, this divergence should not be marked as positive or negative but a reality of cleavages amongst governance structures and approaches to political life.[61] These longstanding modes of governance should be borne in mind when seeking to understand the actions of contemporary legal intermediaries.

Preceding Indonesian independence there was a period of over 300 years of Dutch colonial rule over the Indonesian archipelago.[62] It was a heavily extractive form of colonialism, and authorities were focused on regulating trade without a deep desire to regulate Indonesian society. Essentially, 'there was very little investment by the Dutch in law in Indonesia'.[63] Through relationships with ruling sultanates and their subjects, the Dutch sought to have commercial control without needing to exert too much legal or political energy. Even in the late phases of the Dutch colonial period, 'legal training among local elites was therefore late and small scale. The private profession remained small with very few local lawyers'.[64] When Dutch reformers sought to bring changes to the colonial court system in the 19th century, the changes were driven by the colonial authorities using Dutch civil servants rather than

57 Bishara (n 50) 9–14.

58 Day (n 49).

59 Ibid.

60 John Pemberton, *On the Subject of 'Java'* (Cornell University Press, 1994); Jeremy Kingsley and Kari Telle, 'Introduction: Performing the State' (2016) 172(2–3) *Bijdragen tot de taal-, land- en volkenkunde* [Journal of the Humanities and Social Sciences of Southeast Asia] 171.

61 Partha Chatterjee, *Lineage of Political Society: Studies in Postcolonial Democracy* (Columbia University Press, 2011).

62 M C Ricklefs, *A History of Modern Indonesia since c 1300* (Macmillan, 1994) 61–236.

63 Yves Dezalay and Bryant G Garth, *Asian Revivals: Lawyers in the Shadow of Empire* (University of Chicago Press, 2010) 41 ('*Lawyers in the Shadow of Empire*').

64 Ibid 43.

indigenous actors.[65] Therefore, like many postcolonial States, Indonesia struggled to create the human capital necessary to develop a functional national legal system.[66]

Over the last 50 years, significant legal, political, and economic change has altered the nature and modes of governance and legal interactions across Asia. This new legal architecture emerged in the wake of the Second World War and the Cold War that followed it. It was a moment of significance with formerly colonialised parts of the world gaining their independence. Essentially, new actors, polities, and mercantile interests emerged.[67] The recent genealogy of geopolitical affairs explains why corporate lawyers have become intermediaries within this new transnational fabric of governance. The end of colonialism came with the conclusion of the Second World War. This led to the emergence of new nation-states. Therefore, the post-colonial political reconfiguration saw the development of locally constituted legal systems independent from, yet heavily influenced by, their colonial legal legacies.[68] With the postcolonial period came a 'localisation' of legal practice and standards, as noted in the last section. These political changes have meant the development of local legal professions and associations, including the proliferation of Bar associations alongside the emergence of these newly independent Asian States (these may have existed beforehand, but they became more important after independence).[69]

The transforming political environment also saw borders emerge where they had previously not existed, yet business relationships still flowed between these sovereign States. As these lines of demarcation emerged, lawyers saw an opportunity to create mechanisms for cross-border commercial interactions. A new breed of corporate lawyers, operating within regional law firms like Rajah & Tann, founded in 1976 in Singapore,[70] developed the skills to deal within this new regulatory environment where commercial transactions often flowed across multiple jurisdictions and business and government actors needed to use intermediaries to navigate these legal

65 Sanne Ravensbergen, 'Rule of Lawyers: Liberalism and Colonial Judges in Nineteenth-Century Java' in René Koekkoek, Anne-Isabelle Richard and Arthur Weststeijn (eds), *The Dutch Empire between Ideas and Practice* (Palgrave Macmillan, 2019) 159.

66 Daniel S Lev, 'Judicial Unification in Post-Colonial Indonesia' (1973) 16 *Indonesia* 1.

67 Dezalay and Garth, *Lawyers in the Shadow of Empire* (n 63).

68 Daniel Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40 *Indonesia* 57; Tim Lindsey and Mas Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia' in Tim Lindsey (ed), *Indonesia Law and Society* (Federation Press, 2008) 2.

69 Daniel S Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer International, 2000). This is a seminal text that reflects Indonesia's legal evolution in the postcolonial period. Similar transformations occurred elsewhere in Asia during this period.

70 This is one of Singapore's leading corporate law firms and they have created alliances with influential law firms across Asia. See 'Home', *Rajah & Tann Asia* (Web Page) <https://www.rajahtannasia.com>.

demarcations.[71] The case study later in this article looks at how legal intermediaries have been managing these reconfigured boundaries and the diverse responses of business communities to cross-border commercial relationships.

Over the past decades with the rise of globalisation and an increase in transnational commerce, there has been the emergence of new practice areas in New York and London, which have diffused globally.[72] Many of these new areas of practice were specifically devised to overcome or avoid territorial borders. One of the most important of these new practice areas was international commercial arbitration. This privatised dispute resolution mechanism came to the fore in the early 1980s with the United States government seeking compensation from Iran on behalf of the former's companies, whose assets were appropriated after the 1979 Iranian Revolution. This situation was a legal grey zone as these two States, the United States and Iran, had severed diplomatic relations.[73] In order to overcome this political dilemma, lawyers constructed a private arbitration body, the Iran–United States Claims Tribunal ('Claims Tribunal'), to facilitate compensation for the nationalisation of investments by United States businesses in Iran.[74]

This privatised process developed to resolve a series of disputes between businesses/investors and the Iranian State created a wave of arbitral proceedings during which almost all top tier law firms in London and New York formed dedicated arbitration teams.[75] As the Claims Tribunal slowed down following years of proceedings, this group of now experienced lawyers sought to apply their newly acquired talents towards resolving large-scale infrastructure and cross-border commercial disputes outside of domestic courts. They offered their skills to Asian clients from regional

71 It is only in the last three decades that reforms have opened up the legal services market in Singapore, however, the local firms still remain significant to the practice of law in this pivotal South-East Asian city-state: Yasmin Lambert, 'Early Reforms Recast Singapore as a Hub of Legal Services', *Financial Times* (online, 27 June 2019) <https://www.ft.com/content/3d9129f0-8e93-11e9-a1c1-51bf8f989972>.

72 Jonathan V Beaverstock, Peter J Taylor and Richard G Smith, 'The Long Arm of the Law: London's Law Firms in a Globalising World Economy' (1999) 31(10) *Environment and Planning A: Economy and Space* 1857.

73 Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) 15.

74 Ibid.

75 During this period, there was also significant legal infrastructure developed to facilitate international commercial dispute resolution such as the *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 61/33, UN Doc A/40/17 (7 July 2006) annex I ('*UNCITRAL Model Law*'). The *UNCITRAL Model Law* was designed to more efficiently manage transnational privatised dispute resolution: Luke Nottage, 'A Weather Map for International Arbitration: Mainly Sunny, Some Clouds, Possible Thunderstorms' (2015) 26(4) *American Review of International Arbitration* 495.

offices, such as Singapore, Hong Kong and Jakarta.[76]Another important element of inter-Asian legalities is the nature of the clients of law firms across Asia. Newly empowered local business elites have become more cosmopolitan in orientation over the last few decades, alongside changing political circumstances, although this is often influenced by local realities and longstanding business practices, discussed in the case study.[77] This cosmopolitanism became clear when talking privately with one of Indonesia's most important banking and finance lawyers, who noted that many of Indonesia's new generation of business elite wanted to develop their businesses across borders and enter into joint ventures with foreign business partners. In making these sorts of commercial arrangements, many entrepreneurs and executives have seen the benefit of, or need for, sophisticated legal representation. With this said, the transition to more sophisticated legal services, using transnational corporate lawyers, is not universally accepted. And where their services are used, these intermediaries' recommendations are not necessarily adopted, such as will be seen in the case study.

In recent years, another rationale behind the use of more sophisticated legal services emerges from the concerns of politicians and businesspeople over higher levels of probity and accountability. In short, transnational corporate lawyers and law firms lend an air of credibility, compliance, and good governance to business and political activities. For instance, Indonesian anti-corruption regulators have become significantly more aggressive, such that business leaders can no longer fearlessly 'grease the wheels' of enterprise with corrupt business practices.[78] Lawyers are consequently becoming important in avoiding (or minimising) these kinds of risks.[79] In 2017, the Chief Executive Officer of Garuda was placed under investigation for allegedly receiving bribes from Rolls-Royce, and was subsequently found guilty of corruption.[80] Similar high profile corruption investigations can be seen elsewhere in Asia,

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76 International arbitration teams have emerged in the last decade across the Indo-Pacific region as part of this transformation. For instance, global law firm White & Case brought arbitration partner Matthew Secomb from their Paris office to run their team in Singapore.

77 William Case, 'Interlocking Elites in Southeast Asia' (2003) 2(1) *Comparative Sociology* 249, 252.

78 The increased anti-corruption measures in Indonesia are described by Simon Butt. See Simon Butt, *Corruption and Law in Indonesia* (Routledge, 2012). These anti-corruption measures have lately been placed under pressure: see Michael Buehler, 'Indonesia Takes a Wrong Turn in Crusade against Corruption', *Financial Times* (online, 10 March 2019) <https://www.ft.com/content/048ecc9c-7819-3553-9ec7-546dd19f09ae>; Jefferson Ng, *Jokowi after the First Term: Indonesia's KPK: Clipping Its Anti-Corruption Wings?* (RSIS Commentary No 187, 25 September 2019).

79 Leading Indonesian corporate law firms, such as Assegaf Hamzah & Partners, have marketed their services to potential clients as a mechanism for avoiding, or minimising, entanglement with corrupt business practices. See, eg, 'A New Standard to Convict Defendants in Corruption Cases', *Assegaf Hamzah & Partners Client Update* (Web Page, 6 August 2020) <https://www.ahp.id/client-update-6-August-2020>.

80 Cici Marlina Rahayu, 'Skandal Korupsi Rolls-Royce, KPK: Ini Perkara Lintas', *Detik News* (online, 19 January 2017) <https://news.detik.com/berita/d-3400462/skandal-korupsi-rolls-royce-kpk-ini-perkara-lintas-negara>. In mid 2020, the cases that

for example, in Hong Kong.[81] Providing guidance to foreign and domestic clients about avoiding corruption or other inappropriate practices is no insignificant task for lawyers operating in administratively and politically opaque environments. Legal advice to avoid these pitfalls emerges at many stages of business negotiations and transactions.

In the case study discussed in the next section, I outline how the in-house counsel team were concerned with improving regulatory compliance and record keeping procedures to document the history of commercial relationships. However, these concerns about a changing political and legal environment were not necessarily shared by the senior management of their business. Importantly, the case study examines the complex array of laws and legal regimes with which transnational corporate lawyers interact on a daily basis, as they create a new legal architecture across Asia: the *lex mercatoria* which lies at the heart of this article. It identifies how human interactions guide the decision-making processes of businesspeople and the way these are reflected in the new law of traders.

V Case Study: Lawyers Negotiating between Business Cultures

We live in a complex, interconnected world. This case study is based in a 'frustrating struggle for coherence and meaning' in the '"flexible" world of global capitalism'.[82] It is useful to offer an example of the most mundane of legal practice situations in order to understand the challenges of managing complex inter-cultural business environments.[83] The following provides an example of the manner in which transnational corporate lawyers advise their clients.[84] It is an illustration of contractual analysis and the accompanying consultation with an Indonesian client from a mid-sized tourism business. These experiences emerged during my placement at a boutique law firm in Jakarta during early 2018.

commenced were concluded with the Indonesian Anti-Corruption Commission successfully prosecuting the two Garuda executives. They were both given sentences of over six years imprisonment and fined in excess of AUD 100 thousand each. See Corruption Eradication Commission (RI), 'International Cooperation in the Investigation of the Garuda Case' (Press Release, 11 May 2020) <https://www.kpk.go.id/en/news/press-releases/1687-international-cooperation-in-the-investigation-of-garuda-case>.

81 Cal Wong, 'Former Hong Kong Chief Executive Sentenced to Jail', *The Diplomat* (online, 28 February 2017) <http://thediplomat.com/2017/02/former-hong-kong-chief-executive-sentenced-to-jail/>.

82 Leggett (n 36) 1.

83 Lawyers craft a sociopolitical role that is complex, powerful and sometimes even nefarious: George Melloan, 'Rule of Law or Rule by Lawyers?', *Wall Street Journal* (New York City, 21 November 2000) 27.

84 This case study emerges from the author's field notes dated 16, 18 and 20 January 2018, Swinburne University Human Research Ethics Committee approval 2017/352.

The case study allows me to apply a 'thick description'[85] to my analysis of the activities and nature of contemporary lawyering. By immersing oneself in a law firm, and engaging in ethnography, my assumptions were tested, and in this instance, proven wrong.[86] An ethnographic lens provides this article with a unique framework to consider what it means to be a contemporary lawyer.[87] The case study highlights the application of *lex mercatoria* and gives meaning to inter-Asian legalities through the mundane act of analysing a contract. Focusing on the roles of lawyers, and their professional activities, should be a significant form of legal analysis.[88] Lawyers are figures of prowess who through their actions make tangible legal ideas and practicalities.[89]

The case study starts just after returning from lunch, when I was asked along with another associate, Dina, to meet with one of the partners. The partner, Lia, handed us two contracts.[90] One was a contract that our client, a local tourism services provider, was currently using to gain exclusive access to an online hotel and airfare database/purchasing system. The second document was the proposed new contract, which was intended to be a continuation of this relationship. It had been given to our clients by their European partner who provided the online services. The instructions from our client had been to compare the two contracts and advise them on whether to proceed with the new arrangement. Additionally, they wanted us to identify any possible amendments to the new agreement. These were relatively simple instructions. Dina and I were told to prepare a comparison document reviewing the two agreements and then provide a series of potential amendments to be put forward to the client.

Watching these lawyers prepare their advice and then present their findings to their clients allowed me to understand the process of how and why law is practiced in diverse ways across different legal and business cultures. Legal scholar Marc Galanter highlighted the importance of focusing upon the 'culture of law practice' and the nature and impact of their backgrounds and pressures upon lawyers and their clients

85 Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973) ch 1.

86 For an explanation of the importance of legal scholars immersing themselves in legal cultures and systems other than their own (or learning through immersion more generally), see Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law' (1998) 46(1) *American Journal of Comparative Law* 43.

87 Danilyn Rutherford, 'Kinky Empiricism' (2012) 27(3) *Cultural Anthropology* 465.

88 Kingsley and Telle, 'Does Anthropology Matter to Law?' (n 17).

89 Barker et al (n 16).

90 Watching Lia and Dina during this meeting was a visual reminder of the significant leadership role that female lawyers played in all three Jakarta law firms that I had worked at. Lia was in fact the founding partner of the boutique law firm where I worked and had been pivotal in leading the firm's expansion, which had been exponential — over 30% annual growth over the preceding five years (both in revenue and personnel).

in their application of the law.[91] The everyday activity for commercial lawyers of preparing a legal advice provided a reality check for me as to our client's commercial priorities and orientations. When attempting to understand *lex mercatoria*, local context becomes vital to understanding the nuances within larger regional and global networks.[92]

After the initial meeting with Lia, Dina and I went away and reviewed both contracts. After about three hours, I emailed Dina with my initial feedback on the documents. She then proceeded to review the agreements overnight and the next morning we sat down to discuss our initial assessments. On the face of the new contract, our client was significantly disadvantaged in several obvious ways. There were provisions that allowed for the contracts to be amended unilaterally by the European service provider and importantly the new arrangements lacked exclusivity in the Indonesian market for the online service (potentially allowing our client's rivals to use the service). Finally, the contract gave the European party the ability to intervene in our client's internal business operations in a manner that would be appropriate for a joint venture arrangement but not under a software licence. Both of us felt that these issues would concern our client.

I also identified some additional problems, particularly the use in the proposed contract of a dispute resolution clause that provided for institutional arbitration at the International Chamber of Commerce ('ICC') in Paris. The initial contract had no similar provision. I did not doubt the validity of using ICC processes or its status as a leading arbitral centre.[93] Rather, my concern was that it was an inappropriate forum for resolving disputes arising out of this contract, given the location of our client in Indonesia and the relatively small amount of money involved. The total contract value was USD 25 million with the licence fee per annum being USD 5 million and the contract length five years. My suggestion was that this clause should be amended to use a more appropriate forum for dispute resolution. For instance, a local court such as the District Court for Central Jakarta (*Pengadilan Negeri Jakarta Pusat*). If arbitration was preferred, there were more geographically appropriate arbitral forums, and therefore reasonably priced options, such as the Singapore International Arbitration Centre.

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91 Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34(2) *Journal of Legal Education* 268, 270.

92 Through participating in the initial analysis of our client's proposed contract and then proceeding to our client's offices to meet them, I was able to observe the tensions existing within the local business culture and the manner in which these were documented: Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (n 40). Putting a lawyer into their context helps us to understand law and its application.

93 It is sensible for foreign business entities investing in Indonesia to have arbitration clauses in their contracts, due to the perceived risks involved with participation in the Indonesian court system. With this said, enforcing a foreign arbitral decision is unlikely to be successful in an Indonesian court: Fifi Junita, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5(1) *Macquarie Journal of Business Law* 369.

Dina noted that her major concern with the contract was that it was drafted only in English. In recent years, best practice at Indonesian corporate law firms has involved drafting contracts bilingually. It was standard practice to draft contracts with versions in English and Indonesian to avoid Indonesian domestic courts voiding the contract.[94] This drafting practice had arisen due to several court decisions and relatively unclear statutory provisions concerning whether Indonesian language versions of contracts are required. Dina's position relied on the ambiguous requirements of an Indonesian statute on the use of the Indonesian language.[95] The importance of having Indonesian language versions of contracts, alongside English, for example, was confirmed in the 2015 Indonesian Supreme Court Case of *PT Bangun Karya Pratama Lestari v Nine AM Ltd*.[96] This is not a definitive position, but due to the lack of clarity, the common practice among Indonesia's corporate lawyers is to advise clients on the importance of bilingual contract drafting to evade the voiding of a contract based on the language used. The importance of Indonesian language in the drafting of contracts reflects the nationalised globalisation discussed earlier where an Indonesian assertion of sovereignty interacts with global commercial connections.

We then prepared a draft letter of advice on the most important issues that we felt required the client's attention. Lia carefully reviewed this advice, then Dina and I incorporated her feedback into the letter. Once this was all completed, Lia signed the letter of advice, as required by the firm's oversight processes, and we then sent it to our client within 24 hours of receiving our instructions from Lia. So far, all was progressing as I would have anticipated: our law firm had received instructions and documentation from a client, which we had reviewed, thoroughly developing a letter of advice based on law, and with an eye to protecting our client's commercial interests.

Two days later, Dina, Lia and I drove to our client's offices. It was in this meeting that things started to veer from the direction I had expected. We were visiting the client to explain our legal advice and see if they wanted us to assist with their forthcoming negotiations. Our meeting was scheduled for 10am and the meeting was a short five kilometre drive from our office. Despite the notorious Jakarta traffic congestion

94 Since the time of undertaking fieldwork, the voidability of contracts for non-use of the Indonesian language has been removed: Peraturan Presiden No 63 Tahun 2019 Tentang Penggunaan Bahasa Indonesia [Presidential Regulation No 63 of 2019 on the Use of Indonesian Language] (Indonesia), 30 September 2019. There is still ambiguity, particularly around whether Indonesian parties can use English as a choice of governing language. Nevertheless, the problem of immediate voidability no longer exists. Despite these reforms, Indonesian lawyers still actively advise bilingual drafting as it remains a prudent practice.

95 Undang-Undang Republik Indonesia Nomor 24 Tahun 2009 Tentang Bendera, Bahasa, dan Lambang Negara, serta Lagu Kebangsaan [Law No 24 of 2009 on National Flag, Language, Symbols and Anthem] (Indonesia) art 31(1). See also Undang-Undang Republik Indonesia Nomor 30 Tahun 2004 Tentang Jabatan Notaris [Law No 30 of 2004 on Notaries] (Indonesia) art 43(1).

96 Indonesian Supreme Court Decision, No 601 K/Pdt/2015, 31 August 2015.

(*macet*) we made quick time across town and arrived just before our designated appointment time.

The three of us were then ushered up two flights of stairs and invited into a boardroom. It was a pleasant but basic room dominated by a large table that could seat approximately 20 people. At one end of the room was a projector and screen, while at the other end of the room was a large cabinet covering the full wall. On the shelves was a treasure trove of travel awards, trophies, and industry recognition plaques. This display cabinet was more than an ornamental representation of the business' success. It also represented the centrality of ritual, and its importance within business cultures and governance, within Javanese, and Indonesian, society.[97]

As we sat down, we were offered refreshments by an immaculately uniformed administrative assistant. While such an offering is not uncommon in other global business environments, the role of food and drink and its consumption between business associates has a particularly important role in Jakarta. It is part of the relational dynamics that drive Indonesian business rather than a courtesy or formality — essentially, it is pivotal to the social infrastructure of business.[98] These are seen in Indonesia through an array of social activities, such as the Islamic concept of maintaining good relations with your neighbours and colleagues (*silaturahmi*) or the idea that the community, and groups of friends, should collect and share money together to facilitate business and social life (*arisan*). These social activities provide a backbone to commercial, political and community life across the archipelago.[99] Similar relationships are seen elsewhere in Asia, such as China with its notion of *guan xi* (personalised social networks of power) which highlights the importance of the highly acculturated local legal and business cultures.

We waited for a few minutes before the general manager and a member of the in-house legal team arrived. We then sat and talked over coffee for a few minutes as introductions were given and small talk made. The general manager was dressed simply, yet sophisticated, in Western business attire but without tie or jacket, while the female member of their legal team was conservatively dressed, in a red *kebaya* (a traditional blouse worn in Indonesia), and she held herself with a reserved demeanour. Throughout the meeting she was silent, other than at the very start, as she was putting

97 Pemberton (n 60).

98 Sociality, or human interactions, are essential for the creation of social connections and networks in Indonesian business circles. One's relationships secure connections and access to business. Sociality as a concept is discussed in Nicholas J Long and Henrietta L Moore, 'Sociality Revisited: Setting a New Agenda' (2012) 30(1) *Cambridge Journal of Anthropology* 40.

99 See Zamakhsyari Dhofier, 'The Pesantren Tradition: A Study of the Role of the Kyai in the Maintenance of the Traditional Ideology of Islam in Java' (PhD Thesis, The Australian National University, 1980); Virginie Vial, 'Micro-Entrepreneurship in a Hostile Environment: Evidence from Indonesia' (2011) 47(2) *Bulletin of Indonesian Economic Studies* 233; Sujoko Efferin and Monika S Hartono, 'Management Control and Leadership Styles in Family Business: An Indonesian Case Study' (2015) 11(1) *Journal of Accounting & Organizational Change* 130.

the draft letter of advice onto the projector. She studiously deferred to the authority of the general manager.

During the meeting, Dina was given the role of leading the discussion. Lia would clarify any arguments or points of law as necessary. She made additional comments to mesh the legal advice with business prerogatives or commercial realities. My role was not to speak unless it related to international or foreign law — so, for instance, the arbitration and choice of law clauses were left for me to explain.

Dina started by highlighting our first major concern in relation to the obligations under the proposed contract. The general obligations seemed to bind our client strictly but provided non-exclusive licence rights to the online product in the Indonesian market. Connected to this general concern was the presence of clauses imposing obligations upon our client that extended beyond the life of the business agreement. On the surface of things, there seemed to be no particular reason for our client to accept these clauses. Such a combined position of disadvantage would have seemed to be an obvious point of concern. However, it was at this juncture that the atmosphere in the room changed surprisingly. The general manager stopped Dina midway through her explanation, saying that he understood our point, however, this was an 'incredibly important business relationship' and technical (legal) matters should not impede these working arrangements. From this point onwards, the general manager made the same point repeatedly after every clause of concern was raised and its potential implications identified.

Frustration grew with Dina becoming bewildered with the client's seemingly illogical approach. Running through my mind was a simple question: why retain a law firm with high charge out rates to review a contract when you had no intention of negotiating any clauses or rejecting the contract either in part or whole? It seemed an expensive exercise without any underlying strategy. As this question swirled through my mind, Lia tried to diffuse the situation by saying, 'we will tell you where you stand legally but the commercial decisions are obviously yours'. It was a wise statement, which was aimed at reassuring our client and reminding Dina (and me) that our client would use our legal advice in whatever way they felt appropriate.[100] Lia recognised, like the earlier Muslim religious leaders of South-East Asia, that their authority and legitimacy as legal intermediaries depended upon the parties to a transaction or dispute accepting their sociopolitical standing.[101]

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100 Relationships are at the heart of social and business structures in Indonesia — see for example discussion of *silaturahim* and communal meals in this part of the article. Lia understood that whatever form of legal relationships a business would use, as their lawyer, there was an overriding imperative to maintain, and where possible deepen, their relationship with their client. By identifying legal problems and not pushing back against the general manager, Lia showed her firm's proficiency and professionalism, alongside due deference to his prerogative to act on the advice in the manner he thought fit.

101 See Jeremy J Kingsley, *Religious Authority and Local Governance in Eastern Indonesia* (Melbourne University Press, 2018).

This situation highlighted a tension, which we were unaware of before the meeting, within the company itself. The legal counsel who had invited us had not received the full support of the general manager for taking a more formally documented and legalistic approach to transnational business partnerships. The General Manager's approach in contrast is best described as relational contracting.[102] The divergence of the client's interests from my perceptions and their approach to contract law had a rational basis. The efficacy of contract law and its enforcement is relatively weak in Indonesia.[103] As a result, a business culture has developed that emphasises relationships and business networks over formal legal instruments and processes. This reticence is accepted in many quarters of Indonesian business.[104] With this said, these commercial arrangements are never fully written into formal contracts, nor based solely on relational contracting.[105] These arrangements are usually a combination of written documentation and business relationships. This case study is an example of this combination of modes of commercial arrangement.

Despite there being many drafting issues, our client remained unconcerned. The general manager recognised our frustration, and as the meeting was about to end, said that he wanted to explain his business philosophy. His approach was that 'in business all that counts are developing and maintaining quality relationships'. To him everything else, including legal issues, were of secondary concern. He trusted relationships and mutual interest above all else.[106]

To explain this philosophy, he told us about the time he met a Japanese businessman who was interested in exploring an opportunity to develop a three-star hotel in Jakarta. On the surface, the businessman looked the part. He was well-dressed and appeared to be an experienced business operator. Additionally, all his correspondence and legal documentation appeared to be legitimate. In order to progress this

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102 For a thorough investigation of relational contracting, see Quan H Nguyen, 'The Norms and Incentive Structures of Relational Contracting in Vietnam: Two Surveys' (2007) 9(1) *Australian Journal of Asian Law* 44.

103 Ross H McLeod, 'Doing Business in Indonesia: Legal and Bureaucratic Constraints' (Working Paper, Research School of Pacific and Asian Studies, Australian National University, October 2006) <https://devpolicy.crawford.anu.edu.au/acde/publications/publish/papers/wp2006/wp-econ-2006-12.pdf>; Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 312.

104 Cristiana Victoria Marta Davidescu, 'Culture and Ethics in Indonesian Business' (Conference Paper, International Conference on Business, Entrepreneurship and Management, Universitas Widyatama, January 2012) 199 <https://repository.widyatama.ac.id/xmlui/bitstream/handle/123456789/3375/CONTENTS%20CHRISTIANA.pdf?sequence=6>.

105 Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

106 The role of social infrastructure and relationships to facilitate business is not unique to Jakarta and can be seen elsewhere. For example, Julia Elyachar described the importance of business relationships and social practices in Cairo. See Julia Elyachar, 'Phatic Labor, Infrastructure, and the Question of Empowerment in Cairo' (2010) 37(3) *American Ethnologist* 452.

opportunity, the general manager spent a week in Jakarta working with his Japanese colleague on the project, introducing him to builders and architects, while scouting appropriate sites for their enterprise. The only thing that had seemed a little outside of the usual was the small size of the rooms desired.

It was only when they went for dinner at the end of the week, in one of Jakarta's fanciest restaurants, when the real business strategy emerged. As they settled into a private dining room, their Japanese business partner brought 'his people' into the private dining room. Far from being the business executives anticipated, several scantily dressed women entered the function room. Within minutes, the relationship had collapsed as the Japanese associate made clear this hotel was essentially a front for a brothel. The general manager then noted that no contract can protect someone from devious businesspeople, or at least, that this was his belief.

The client's business model considered longterm working relationships to be the best form of business security.[107] From this perspective, the bottom line focused on relational contracts rather than formal agreements. Our client understood the risks that were present in the new contract provided, and yet was willing to accept all the clauses as specified. What emerged afterwards was that the legal team had been seeking to change the corporate culture of our client. The in-house legal team wanted to utilise a more sophisticated approach to the application of legal advice in business processes, however, the general manager obviously was not interested in this kind of orientation.

In conclusion, legal prudence would have been to seek amendments to the proposed agreement, and work on the relationship simultaneously. However, the business culture of the senior management in this medium-sized Indonesian business was oriented differently. This case study exemplifies the complex interplay between legal and business cultures and the fact that transnational law is not necessarily a hegemonic or unidirectional force. Legal intermediaries need to navigate situations where multiple legal and social orders exist, and weigh these up against the application of more formal legal instruments. The situation illuminates how complex local environments are navigated by an array of actors who create the contours of transnational legal practice.

While this is a case study of a simple contract negotiation, it shows how the development of a letter of advice is an acculturated process. Global mercantile networks need places to situate their activities in order to undertake their business operations and secure their capital.[108] Consequently, this case study demonstrates that networks are created between Asian legal systems and global actors that cannot be papered

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107 For a discussion of the manner in which relational connections drive Asian business and localised approaches to contracting, see Gary G Hamilton (ed), *Asian Business Networks* (De Gruyter Studies in Organization, 1996); Ludwig Bstieler and Martin Hemmert, 'The Effectiveness of Relational and Contractual Governance in New Product Development Collaborations: Evidence from Korea' (2015) 45–6(1) *Technovation* 29.

108 Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press, 2001).

over but are highly localised and operate within deeply contextualised environments. If we examine this simple act of contract negotiation as evidence of a new *lex mercatoria*, it is necessary to recognise that it does not exist in a political or social vacuum, and legal intermediaries navigate an array of interests, objectives and modes of creating business relationships.[109] Legal intermediaries thus become the bridge between business cultures and facilitate commerce among individuals and groups that operate in diverse social, political and economic environments. While trying to understand inter-Asian legalities, and more generally global connections, we therefore need to ground — make local — our legal analysis.[110]

VI Conclusion

This article has considered the manner in which Asia is developing a new legal architecture. It seeks to place transnational corporate lawyers in the architecture as legal intermediaries who facilitate cross-border legal connections through negotiations, documentation, compliance management and dispute resolution. This concept of inter-Asian legality has been examined by considering the manner in which legal practice takes place, and the way in which a new substantive body of law is developing from interconnected mercantile relationships.

Inter-Asian legalities navigate the emergence of postcolonial boundaries and the impact of globalisation. As the case study identifies, contemporary legal interactions are not straightforward. The case study aims to make tangible the complexity of local business cultures navigated by transnational corporate lawyers. The web of commercial relationships creates a legal architecture — a fabric of transnational governance — which is underpinned through an emerging body of substantive law, in *lex mercatoria*. This body of law incorporates an amalgam of informal networks, customary local practices/rules, privatised legal relationships written into contracts, domestic law and international treaties.

These business relationships are facilitated through formal and informal legal mechanisms, which have been created to enable transnational business activities. *Lex mercatoria* is consequently a flexible set of legal instruments, rules, and social relationships, enabled by transnational corporate lawyers who negotiate, document and sanctify cross-border transactions and dispute resolution. This article orients its vision from Jakarta outwards to show how legal networks originate and are connected into larger webs of mercantile association. This finely-grained approach to Asia's interconnected legalities incorporates diverse legal environments where multiple regulatory actors and institutions operate in parallel. In this legal landscape, problems and opportunities do not stop at borders.

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109 These plural legal, political and commercial environments create complex environments, resulting in 'hybrid jurisdictions': Rivke Jaffe, 'The Hybrid State: Crime and Citizenship in Urban Jamaica' (2013) 40(4) *American Ethnologist* 734.

110 George E Marcus, 'Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography' (1995) 24(1) *Annual Review of Anthropology* 95.