Governing the International Commercial Contract Law: The Framework of Implementation to Establish the ASEAN Economy Community 2015

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Abstract

The Head of the State Association of South East Asian Nations (ASEAN) in Summit of Association of South East Asian Nations (ASEAN) in 2007 on Cebu, Manila agreed to accelerate the implementation of ASEAN Economy Community (AEC), which was originally 2020 to 2015. This means that within the next seven months, the people of Indonesia and ASEAN member countries more integrated into one large house named AEC.

This in turn will further encourage increased volume of international trade, both by the domestic consumers to foreign businesses, among foreign consumers by domestic businesses, as well as between foreign entrepreneurs with domestic businesses. As a result, the potential for legal disputes between the parties in international trade transactions can not be avoided. Therefore, the existence of the contract law of international commercial law in order to provide maximum protection for the parties to a transaction are indispensable. The existence of this legal regime will provide great benefit to all parties to a transaction to minimize disputes.

This study aims to assess the significance of the governing of International Commercial Contract Law for Indonesia in the framework of the implementation of establishing the AEC 2015 and also to find legal principles underlying governing the International Commercial Contracts Law for Indonesia in the framework of the implementation of establishing the AEC 2015 so as to provide a valuable contribution to the development of Indonesian national law.

The theory is used to analyze in this research is the theory of "utility" and theory of “integral”. While research method used in a normative juridical research, namely through library research to assess the positive legal rules and principles of law. The approach used is a statute approach, a conceptual approach and a historical approach.

Keywords: governing, international commercial contract, economy community

Introduction

The Heads of State of Association of South-East Asia Nations (ASEAN) in the 12th ASEAN Summit held in Cebu, Manila of 2007 agreed to accelerate the implementation of the establishment of ASEAN Economy Community (AEC) which was originally 2020 to 2015. It means that Indonesian people and people from the other States of ASEAN will be more integrated into one large house freely (Taufiqurrahman, 2014: 22-23).

AEC is a form of economic integration more tangible and meaningful in the ASEAN region. Its establishing is oriented to improve the overall competitiveness of the region on the world market, boost economic growth, reduce poverty and improve the living standard of the States of ASEAN.

To be more effective in its implementation, the Leaders of ASEAN States in the 13th ASEAN Summit on November 2007 in Singapore have agreed Declaration of the AEC Blueprint as a reference for ASEAN States in realizing the AEC 2015. The AEC Blueprint load schedule for each strategic pillar with a target time in four phases, namely between the years 2008-2009, 2010-2011, 2012-2013 and 2014-2015.

There are four pillars which are accommodated in the AEC Blueprint. One of them is ASEAN as a single market and a single production base that is supported by elements of the free flow of goods, services, investment, educated workforce and capital flows more freely. This means that in the framework of establishing the AEC, all ASEAN states should liberalize trade in goods, services, investment and skilled manpower freely and freer flow of capital.

In accordance with the AEC Blueprint, a component of trade flow in goods include a reducing and eliminating of tariffs and non-tariff barriers significantly in accordance with ASEAN Free Trade Agreement (AFTA) scheme. In addition, the facilities in order to smooth the flow of free trade in goods also improved, including the implementation of the ASEAN Single Window (ASW), the scheme of the Common Effective Preferential Tariff (CEPT), Rules of Origin (ROR) and the harmonization of standards and conformance. To realize the free trade flow in goods, the member of ASEAN States agreed to ASEAN Trade in Goods Agreement (ATIGA) at the ASEAN Summit 14 dated February 27, 2009 in Chaam, Thailand.

Regardless of the advantages and disadvantages for Indonesia, establishing the AEC itself in turn will encourage an increase in the volume of international commercial. As a result, the potential for legal disputes between the parties in international commercial transactions can not be avoided. Therefore, the existence of international commercial contract law (ICCL) in order to provide maximum legal protection for the parties to a transaction is needed. The existence of this legal regime it will provide great benefit to all parties to a transaction to minimize disputes.

This paper aims to assess the significance of governing the ICCL for Indonesia in order to implement the establishing of the AEC and to find the legal principle underlying of the governing it ?

Theoretical Framework

In his work entitled "*Introduction to the Principles of Morals and Legislation"* (1780), Jeremy Bentham (1748-1832) introduced a theory about the purpose of the law (Taufiqurrahman, 2010: 32). According to him, the aims of the law to realize what is beneficial or in accordance with the order. The final goal of the legislation is to serve the greatest happiness of the greatest number of people (Hilaire McCoubrey and Nigel D. White, 1996: 240).

Axiological values developed by Bentham is the usefulness of law in society. The law should provide a great benefit to many people. Law is not solely oriented to achieve *a justice* by ignoring *a certainty* or otherwise it is oriented to achieve *a certainty* by ignoring *a justice*, but must consider both the contradictory aspects (Taufiqurrahman, 2014: 26).

According to the understanding from utilitarian, the "utility" is a criteria for people to comply with the law. This is reflected in the following statement: *"... and the test of what laws there ought to be, and what laws ought to be obeyed, was utility"*. (John Stuart Mill, 1962: 14)

According to Bentham, humans are subject to the law are because subject to the law they feel the need or benefit (utility). People follow the law not because the laws of nature. This view is evident in the following statement (John Stuart Mill, 1962: 14) :

> Rejecting natural law, then Bentham defined laws as commands backed up by sanctions, some of which would and some of which would not conform to the dictates of morality, the test here being the test of utility. Rejecting the original contract, he saw both the origin of the laws and the obligation to obey them as derivable from the principle of utility.

In relation to the existing of law in perspective of Indonesian law reform, it is an interesting to study an legal thought on Law of Development Theory. This theory is the concept of legal thought developed by Mochtar Kusumaatmadja in response to the development of law in Indonesia.

The concept of legal thought developed by Mochtar Kusumaatmadja is actually motivated by the objective conditions in which the legal positivism has a dominant influence in the legal mindset carrier in Indonesia. Therefore, the role of the establishment of the law (legislation) to be the main pedestal.

He was highly influenced by the thought of Roscoe Pound and Eugen Ehrlich to incorporate pragmatic goals for development (Taufiqurrahman, 2014: 28). In relation to the formation of law in perspective of Indonesian law reform, it is a relevant and interesting thing to study an legal thought on Law of Development Theory. This theory is the concept of legal thought developed by Mochtar Kusumaatmadja in response to the development of law in Indonesia.

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influenced by the thought of Roscoe Pound and Eugen Ehrlich to incorporate pragmatic goals for development. According to him, the law not merely as a means (tool) as proposed by Roscoe Pound, but as a means (instrument) to build the community. Mochtar Kusumaatmadja views that law and order in business development and legal reform is needed. Law in the sense of the norm of human activity is expected to lead to the desired direction by development and integration. It required a means of written laws and unwritten laws that have to live in harmony with the laws of society.

He understand the law as a means of understanding broader than the law as a tool. This is because: (1) in Indonesian statutory role in the process of legal reform is more prominent than the United States that put the jurisprudence on higher ground, (2) the concept of law as a "tool" will lead to results that are not much different from the application "legisme" as held at the time of the Dutch East Indies. In Indonesia, there is the attitude of the people who show sensitivity to reject the application of the concept, (3) if the "law" here as well as international law, the concept of law as a means of society reform already applied long before this concept was formally accepted as the basis of national law policy. (Mochtar Kusumaatmadja,1976: 9)

Mochtar Kusumaatmadja view that the best way out for Indonesia to build its national law is a priority to the principles of native law or customary law are still valid and relevant to modern life. Colonial-policies style that preserve the original law which he considered as a policy does not bring any progress. Similarly, the introduction of Western law with these limited purposes in reality only a small impact on the process of modernization. Based on this, Mochtar Kusumaatmadja proposed that the development of national laws in Indonesia shall not make a hasty decision between continuing course of colonial legal tradition based on the patterns of Western thought or a priori to develop customary law as national law. (Soetandyo Wignjosoebroto, 1994: 232-233). According to him, the law not merely as a means (tool) as proposed by Roscoe Pound, but as a means (instrument) to build the community.

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The Significance of Governing the ICCL

Up to the present, Indonesia does not have had a law that specifically regulates international commercial contracts (ILCC). It does not mean that Indonesia did not have rules relating to international commercial contracts. The rules are that in fact still show a national character scattered in several places. The rules of a procedural nature set in the Bepalingen Van Wetgeving voor Indonesie (General Provisions concerning Legislation to Indonesia / Afgekondigd bij Publicatie van 30 April 1847, S. 23), hereinafter GP. While the rules are substantially arranged in Book III of Burgerlijk Wetboek or the Civil Code, hereinafter CC, which entered into force in the Netherlands in 1838.

Article 18 GP expressly states as follows: "De Vorm van elke handeling wordt berordeeld naar de wettten van het land of deplaats, alwaar die handeling is verrigt (the shape of each action is determined by the laws of the country or the place where the act was have been done). Under these provisions, the determination of the law applicable to international sales contracts based on the place where the contract was made *(lex loci contractus)*. This provision is very important for the judge to determine the applicable law in the settlement of disputes arising in international trade transactions.

Relating to the substance of ICCL, the parties to a transaction have to pay attention to the general provisions contained in Chapter I-II of Book III CC. This is in accordance with the provisions of Article 1319 BW, which reads: "All agreements, both of which have a specific name, or who do not have a particular name (in this case, including ICCL), subject to the general rules, contained in in this chapter and the last chapter". The provision is reiterated that any contract, named or not named, subject to the general provisions of the Chapter I-II, Book III of CC.

Procedural rules as set out in Article 18 GP and substantial rules as set forth in Book III of the CC and other legal substance applicable in the Netherlands was be applied in the Dutch East Indies (read Indonesia) in 1848 based on the principles of Concordance. Dutch law enforcement (both procedural and substantial) is closely linked to the political laws of the Netherlands who want to impose its laws in the Dutch East Indies as the colonies.

Applicability of procedural and substantial law rules are based on Article II of the Transitional Provisions of the 1945 Constitution which enforces all laws and regulations that apply for before the new changes in the Constitution of 1945. Along with the changes in the 1945 Constitution itself, the legal basis for the application of Article 18 GP and Book III of the CC is based on the Transitional Provisions of Article I of the Fourth Amendment of the Constitution of the Republic of Indonesia which was decided in the Plenary Session of the Assembly of the Republic of Indonesia to the 6th (continued) on August 10, 2002 Annual Session of the Assembly of the Republic of Indonesia. Article I of the Transitional Provisions of the states as follows: "Any legislation that is still valid for the new one has not been held in accordance with this Constitution".

Procedural and substantial law rules as set out in Article 18 GP and Book III of the CC in force since 1848 until today has not changed at all. This means that the age of the rules has reached 167 years. Like humans, these rules are already elderly, so goes limped to reconcile with the demands and global interests more complex today. Therefore, national law reform in the field of international commercial contracts for Indonesia is a necessity that can not be avoided.

Effort to reform national laws in the field of contract law of international trade is not solely based on the age of legal rules which are already elderly, but more substantially based on the objective fact that the rules which apply to international dispute settlement does not have international character. In other words, the rules of law which the national character as stated in Article 18 GP and Book III of the CC apply in the case of international dispute resolution. From the perspective of justice, this fact is certainly less reflects the values of justice.

As described previously that procedurally, Article 18 GP accommodate the principle of *lex loci contractus* meaning that the law applicable in the event the parties do not expressly impose their choice of law, it will apply the law of the country in which the contract was made. In the event that the parties expressly specify the choice of law in his contract, the applicable law is the law chosen. It is based on the principle of *party autonomy* as accommodated in national legislation Indonesia.

National character inherent rules of procedural and substantial is reasonable because in the current modern legal perspective, it is the state as the only organ authorized to establish the law. Though the laws established set of international transactions remain oriented to express the national interests of the countries concerned. Rules of procedural law that national character is always led to the enactment of domestic laws of the countries referred to in principle reflects the national interests of the country. This in turn raises the diversity of laws in the field of international commercial contracts.

Characteristics of the diversity of the rules in the field of ICCL is clearly less favorable to the parties to a transaction, or at least one of the parties. Parties that do not benefit from a diverse legal arrangements are foreign parties who did not know the rules of national law which designated them. The parties to the transaction may be foreign to the rules of substantive law chosen when the law designated to manage the contract is the national law of the State party III. Foreign party shall only apply to one of the parties to a transaction when the rules of the selected substance refers to the application of national law one of the contracting parties.

Both sides or one of the parties to a foreign party to the substantive law chosen either by the parties or by the judge / arbitrator does not know or can not predict in advance exactly rights and obligations assumed by each party. This situation is clearly not profitable for them.

Based on this phenomenon, it is logical once the contracting parties turned his attention to the rules of law which can accommodate the interests of all parties, not the interests of one side or not the interests of third parties. Legal rules that are able to accommodate the interests of the parties in international transactions of course the rules of international law character anyway. Legal rules do not reflect the national interests of one particular country, but rather reflect the common interests of all countries.

Rules containing international character in the field of international commercial contracts are generally found in many conventions produced by international organizations in the field of international trade law. Some of the works of international organizations that have an international character is the United Nations Convention on Contracts for the International Sales of Good (CISG) and the UNIDROIT Principles of International Commercial Contracts (UPICCs). CISG is produced by the United Nations Commission on International Trade Law (UNCITRAL) in 1980, while UPICCs produced by the International Institute for the Unification of International Private Law (UNIDROIT).

The existence of an international character in the CISG and UPICCs is demonstrated by the diversity of the state convention participants representing various legal systems, economic, social, cultural and ideological. Factually, the legal regime of international character in the field of international trade contracts more and more in demand by the parties to a transaction. This can be demonstrated by the increasing number of countries are subjecting themselves to the CISG and or UPICCs.

Until now, the number of countries that have bowed to the CISG as many as 83 countries, namely: Australia, France, Germany, Japan, Republic of Korea, Singapore, United States of America, etc. (www.uncitral.org). While the number of countries that have participated UNDROIT until now there are 63 countries, namely: Australia, France, Germany, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Republic of Korea, The Republic Kingdom, United States of America, etc. (www.unidroit.org).

Along with the increasing volume of international trade Indonesia last few years, as shown in Figure 3.1., The existence of rules of ICCL for Indonesia is a necessity that can not be avoided. Potential disputes between the parties in international commercial transactions can not be avoided, especially with the establishment of the AEC that will be implemented.

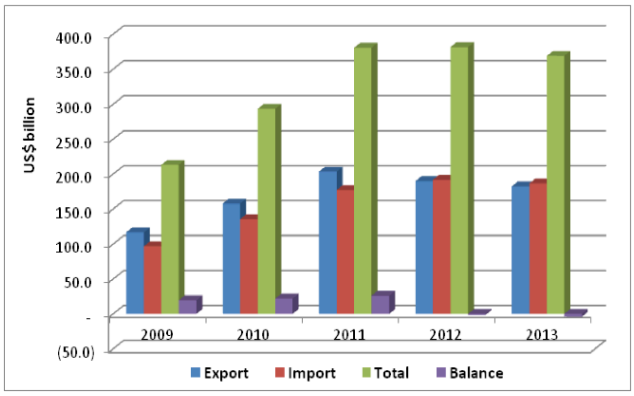

Figure 1: Indonesia Trade Balance of 2009-2013

The parties to the dispute in international commercial transactions are generally less likely that Indonesian law enacted to resolve the dispute. Such phenomenon is expressly recognized by Erman Radjagukguk stating: "Not all the foreigners feel" comfortable "that his contract despite concerns Indonesia governed by and construed in accordance with the Law of Indonesia" (Taufiqurrahman, 2010: 330). They are not interested when their contract be governed and construed in accordance with the Law of Indonesia is not because the quality of the substantive law of Indonesia that bad, but because the characters are attached to the Indonesian law in the field of international trade exhibits more national character. Foreign parties can not predict in advance the rights and obligations that should be borne in execution of the contract.

Inevitability to govern the ICCL in Indonesia can not be separated from its existence in the midst of economic and international trade globalization today. As a logical consequence of the signing of the General Agreement on Tariff and Trade (GATT)/World Trade Organization (WTO), Indonesia must harmonize the domestic law against the principles of the GATT/WTO (Taufiqurrahman, 2012: 63).

The Legal Principle of Governing

Governing the ICCL as a national law reform efforts should get serious attention to the Parliament or the Government. It is based on the argumentation that field of international commercial contract include neutral areas to do the settings in a codification. This argumentation is in tune with a view of Mochtar Kusumaatmadja known as the originator of "Theory of Development Law".

He expressly recommended that studies conducted beforehand to determine what area of law needs to be updated. He stated that laws are not neutral, pursued its development as closely as possible related to the cultural and spiritual life of the nation. While other areas of law - such as contracts, business entities and trade system - can be arranged through the law of national legislation. For those areas of law which is more neutral - such as communications, shipping, postal and telecommunications - a model which has been developed in foreign law system can also be imitated.

Mochtar Kusumaatmadja's view of the above implies that the codification and unification of national laws should be limited, that is directed at law that are not touching the realm of cultural and spiritual life of the people. The national legal reform focused on the development of the less sensitive areas of the law, which does not contain much nuance primordial. It means that the top priority is related areas of law which is more neutral, in that it is a legal contract. Governing the ICCL as a partial renewal of national law should be a priority in the National Legislation Program.

The significance of governing the ICCL for Indonesia is also recognized explicitly by CFG Sunaryati Hartono which states:

> This contract law should not only regulate the contracts concluded between Indonesian businessmen but also regulate contracts which took place between parties Indonesia with foreign parties; whether made in Indonesia and held abroad. Due to the internationalization of the Indonesian economy and the globalization of the world economy, the elements of foreign and international inevitably must be considered by the Indonesian businessman.

Along with globalization that touches all areas of public life, renewal of national contract law governing international trade could not be dismissed. It is based on the fact that Indonesia can not be separated or disengage from external developments. In this era of globalization, shut down regardless of the existence of legal instruments born from badang-body international organization is not the best solution in the implementation of the national legal reform.

Attempts to make contract law arrangements in the field of international trade has actually been started initiated since long. The idea was proposed by Wirjono Prodjodikoro in the First National Congress of Science organized by the Science Council of Indonesia from the date of 3-9 August 1958 (Wirjono Prodjodikoro, 2000: 160).

In subsequent developments, the Working Team Academic Preparation of Legislation on Contracts in the Field of Trade for the first time established by the Government by

virtue of Decree of the Minister of Justice No. G-63.PR.09.03 1992 dated April 30, 1992. Formulation Team, headed by CFG This Hartono Sunaryati responsibility to formulate academic texts in order to give some scientific rationale for the preparation of draft legislation that will come, to give ideas a material adjustment of legislation that are reviewed systemically, the urgency, the foundation and principles used and the idea of legal norms that should be regulated (Taufiqurrahman, 2010: 357).

In its operation, the Drafting Team has succeeded in formulating the basic thoughts twenty crucial in the preparation of academic texts of legislation on contracts in the field of trade. Some items of essential basic thoughts clearly implies recognition of the influence of the law of foreign countries on the development of Indonesian contract law regarding both aspects of substantive and procedural.

Relating to the substantive aspects in the regulation of contract law in the field of trade, some principles of contract law which should be considered are: principle of consensual, principle of fairness, principle of confidentiality, principle of good faith, etc.

While procedural rules in the field of trade contracts, Sudargo Gautama offers a proposal that approaches the most characteristic connection is used as a foothold in determining the law applicable to international contracts. This approach is considered more legal certainty compared to the old approaches in determining the applicable law, including: *lex loci contractus, lex loci solutionis, the proper law of the contract*.

In his paper, Gautama Sudargo insists that principle of *party autonomy* should be retained in the national legislation to be made, particularly with regard to international contracts. Laws have been handpicked by the parties must be respected by anyone, including judges Indonesia. Even if the law chosen by the parties is a foreign law, the judge Indonesia should respect the choice of foreign law.

In this context, so that Indonesian law more acceptable in international trade traffic, then the rule of law in the field of international trade contracts must accommodate all parties concerned. This legal regime should be able to provide benefits to all parties associated in international trade transactions. For the parties, this legal regime should be able to provide legal certainty and give justice in the transaction. For a judge or arbitrator, this legal regime should be able to provide legal certainty and provide fairness in the resolution of the dispute. Legal regime that can provide legal certainty and fairness to the parties and the judge or arbitrator can only be achieved if the legal regime of international character. Even if this is the status of a national legal regime, but which accommodates the interests are mutual interests, international interests.

Thus, the legal principles that serve as the foundation for a set of international trade contract law in accordance with international character is the principle of expediency. Orientation legislators not only directed to provide legal protection to citizens, but at the same time also provide legal protection to foreign nationals as a business partner in international trade transactions.

Closing

Based on the previous description, it can be concluded that the significance of governing the ICCL are in order to foster the trust of the international (business actor) community in ASEAN region to the quality of Indonesian law in which in turn will boost the Indonesia economic growth. Legal principle rationally accommodated in governing the ICCL is utility.

It is recommended that the House of Representatives immediately prepare the Draft of ICCL and inserted it in list of priority scale of the National Legislation Program. The drafted bill that should have an international character, either in relation to both procedural and substantial aspects.

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