HARMONIZATION OF INTERNATIONAL SALES LAW: CISG AS SUPPLEMENT TO INDONESIAN CONTRACT LAW*

Bunga Dita Rahma Cesaria**

Abstract

The development of the market has promoted free and flexible traffic of goods to enter and leave any countries in the world. Automatically, parties are in need to a simpler, safer and more agreeable way of making a deal especially on the issue of applicable law. In their contract, parties would prefer to choose applicable law that is harmonized and widely recognized rather than spending time to negotiate on applying national law of their own. Convention on Contract for the International Sale of Goods (CISG) is one uniform codification established to waive the long-standing problem of choice of law. Seeing that Indonesia has not become one of them, resolving dispute involving Indonesian party will uphold provisions inherited from Dutch (KUHPer). This is a problem of law among parties that has been ratifying the CISG, since it would raise the notion "which law would prevail to resolve a dispute?". This article aims to encourage Indonesian parties of international sales contract to consider CISG as the choice of law. This is because CISG can supplement inadequacies of Book III KUHPer in some issues such as; formation of contract, obligation of parties and remedies.

Intisari

Perkembangan pasar telah mempromosikan kebebasan dan kemudahan jalur perdagangan barang untuk masuk dan meninggalkan suatu negara. Secara automatis. para pihak membutuhkan suatu cara yang lebih sederhana untuk menyepakati hukum mana yang akan berlaku apabila terjadi sengketa. Didalam dunia perjanjian, para pihak akan cenderung memilih hukum yang sudah terharmonisasi dan dikenal luas, daripada memilih hukum negaranya sendiri yang terkadang memperlambat proses penyelesaian sengketa. Convention on Contract for the International Sale of Goods (CISG) adalah suatu kodifikasi yang diciptakan untuk menghilangkan permasalahan yang telah lama ada, yaitu perihal pilihan hukum. Melihat keadaan dimana Indonesia belum menjadi negara anggota dari CISG, maka penyelesaian sengketa yang pihaknya melibatkan pihak Indonesia akan berpatokan pada hukum colonial yaitu KUHPer. Ini menjadi problema bagi masyarakat dunia yang telah meratifikasi CISG, dikarenakan akan timbul pertanyaan "Hukum mana kah yang akan berlaku untuk menyelesaikan sengketa?". Artikel ini bertujuan untuk memberikan saran kepada para pihak yang berasal dari Indonesia untuk menggunakan CISG sebagai pilihan hukum dalam perdagangan barang. Hal ini dikarenakan CISG dapat memenuhi kekosongan dan kekurangan dalam KUHPer.

Keywords: CISG, commercial law, choice of law, KUHPer, Indonesia.
Kata Kunci: CISG, hukum perniagaan, pilihan hukum, KUHPer, Indonesia.

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A. Introduction

To date, CISG has already had 85 signatory parties since 1998. This puts CISG as one of the most successful uniform law considering that its signatory parties comprise of states from every geographical region, every stage of economic development and every major legal, social, and economic system (Felemegas, 2000-2001). Nevertheless, Indonesia has not followed the trend of acceding to the convention yet.

The fact that Indonesia has not acceded to CISG yet is perhaps because Indonesian parties to international sale of goods do not put so much attention to the contract's choice of law. Based on a recent research taken by Badan Pembinaan Hukum Nasional, Ministry of Law and Human Rights of Indonesia, where usually traders insists on applying their national law, majority of Indonesian traders that deal with foreign parties (for example European Union, United States/Canada, Singapore, England, Australia, China, and ASEAN Countries), agree to appoint their counterparty's domestic law as the applicable law for the contract. Considering that some of those countries are signatories to CISG, appointing their national law would automatically mean appointing CISG as the governing law for the contract (Bonell, 1987).

This should raise a question: does Indonesian party actually understand that applying *alien* law in the contract would consequently put them in the least safe position? Foreign law is definitely unfamiliar for Indonesian party themselves, their counsel, and Indonesian law enforcement (in case of any disputes). In this situation, Indonesian party is getting the so called 'information disadvantage' (Fountoulakis, 2005). Thus, the foreign law might only benefit the party that insists on having it written in the contract.

This article would not advice Indonesian party to insist on the application of Indonesian Contract Law contained in Book III of Indonesian Civil Code. It is understandable that Indonesian Contract Law which was codified on 1847 contains insufficient provisions to accommodate parties' needs in international sales contract. Rather, following the fact that Indonesian parties commonly choose other counter party's national law which leads to application of CISG, this article would introduce the benefits of CISG to supplement Indonesian Contract Law contained in Indonesian Civil Code that Indonesian parties to international sale of goods should be aware of.

To achieve the aim encouraging Indonesian parties to designate CISG as the applicable law, this article will argue that actually CISG can cover the inadequacies of certain provisions in Book III KUHPer. Especially, this article will focus on examining CISG and Book III of KUHPer in the matters of formation, obligations of parties and avoidance of contract. The three matters are chosen among other various matters because those three are the most important issues as they determine the beginning of the contract was made, how the contract should be executed, and how the contract can possibly be ended. Avoidance of contract is indeed rather specific as part of types of remedies, however, avoidance of contract is to be discussed among other types of remedies because it is the last resort of remedies and it may applies differently depending on the type of contract as it will be elaborated further in this article.

B. CISG as Harmonized Rule of International Contract Law

From the actors of international sales of goods perspective, seller and buyer, they face varies of problems such as determining

applicable rule for their contract. Rule by more than one governmental source can complicate the transaction (Brand, 2000). However, as a result of established trade with the same problem in years, merchants around the world have developed an idea known as *lex mercatoria* or law of merchants that governs international trade among them. Efforts to codify this law had been taken by the International Institute for the Unification of Private Law (UNIDROIT), which could not finish the work, and United Nations Commission on International Trade Law (UNCITRAL), which was able to produce Uniform Law on the International Sale of Goods (ULIS) and Uniform Law of Formation of International Sales Contracts (ULF). Later, the two conventions were modified in order to render them capable of wider acceptance by countries of different legal, social and economic system. The result was adoption by diplomatic conference in 1980 regarding the Convention on Contracts for International Sale of Goods (CISG). CISG was then adopted in 1980.

CISG is established as a convention which has international character. This international character implies that the general purpose of CISG is the standardization of law at a level above national law in order to avoid a long-standing problem of conflict of law among states (DiMatteo *et all*, 2005). One particular purpose of CISG is to "provide a uniform text of law for international sale of goods" (Explanatory Note by the UNCITRAL Secretariat). This purpose places CISG within movement towards internationalization of sales law and the creation of a new *lex mercatoria* (DiMatteo *et all*, 2005). CISG has been intended to facilitate and solve the problem of applicable rule to govern international sale. Therefore, CISG is suitable for the trend of international trade conducted by seller and buyer around the world.

CISG has been the most successful effort from UNCITRAL. Within the period of 16 years, from the year of 2000-2016, there have been approximately 1300 court decisions from all over the world under the jurisdiction of CISG (Yearbook of CISG cases: 2000-2016) as the applicable law for the merits. From the fact that parties in different countries choose and from the repeated use of CISG in cases, show that the convention is suitable in accommodating the transaction between parties despite the differences of each state's national legislation.

C. The Scope and Applicability of CISG

CISG applies to international contract of sale of goods and such contract under the scope of CISG should also be the only contract discussed in this essay. CISG does not define the meaning of "international contract of sale of goods", rather the definition can be derived from its provisions. The international character of the contract is seen from parties' different places of business when contract is concluded (Holdsworth, 2001). While contract of sales is not defined explicitly by this convention, some exclusions are made to sales by auction, sales made during enforcement proceeding ordered by court of law, sales wherein the seller provides substantial part of material necessary for production of the goods and sales wherein seller needs to provides services in addition to delivery of goods (*Ibid*). Lastly, goods that fall within the scope of CISG are basically movable goods with exclusions as drawn in Article 2, such as goods for personal use, goods sold by auction or execution by court, stocks, shares, securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity.

Application of CISG to Indonesian parties' contract is not impossible from the perspective of CISG and Indonesian Civil

Code despite the fact that Indonesia is not a party to this convention. Application of CISG to contract involving Indonesian parties can be done through fulfilment of Article 1(1)(a) of the convention; the convention applies when the rules of private international law leads to the application of the law of contracting states. This happens automatically when Indonesian parties agree to use national law of their counter party which also a contracting state of CISG. With due regards to general principle of party autonomy, Article 6 of this convention allows parties to choose to exclude all or part of the convention to apply in the contract. The exclusion must be expressed with clear intention pursuant with Article 8 in which intention should be clearly manifested from at or after the conclusion of the contract (CISG-AC Opinion No. 16).

From the provision of Indonesian Civil Code, designation of CISG under the contract is also made possible. Article 1338 of Indonesian Civil Code states that agreement becomes law to those who made it. This means that either appointment of CISG as choice of law or exclusion of it wholly or partly would still bind parties according to Indonesian Civil Code. Given this, there should be no hurdles of CISG to apply as long as parties have agreed to it.

D. Comparing Indonesian Contract Law and CISG

Indonesian contract law is governed in Book III of Indonesian Civil Code regarding Obligations. There are no different law governing international contract. The suitability of Indonesian Contract Law with CISG can firstly be seen from some contract principles upheld by both. In general, Book III of Indonesian Civil Code affirms some widely recognized contract principles such as the principle of good faith and freedom of contract which both are regulated under Article 1338 Indonesian Civil Code. CISG promotes the same principles. Firstly, under Article 7, interpretation of CISG is to be made with observance of good faith. Secondly, Article 6 illustrates a freedom of contract by allowing parties to this convention to derogate from all or part of this convention. This being said that even though the CISG, once being ratified, becomes the national law of one country, there will still be a room for certain national law to be applicable once parties agree explicitly in the contract to apply such law (Bonell, 1987). Parties can even modify certain provisions under CISG based on Article 6 (Enderlein & Maskow, 1992). Given that, the basic principles contained in Indonesian Civil Code are upheld within CISG as well.

However, not only principles in contract, but there are indeed some aspects that shows that CISG can supplement and covers insufficiencies of Indonesian Civil Code. This section will compare the provisions of Indonesian Civil Code and CISG with regards to formation of contract, obligations of parties, and avoidance of contract.

E. Formation of sales contract

According to Indonesian Civil Code, sale and purchase is an agreement and such agreement is concluded when the parties have reached a consent on the goods and the price even though the goods have not been delivered and the price has not been paid. The price of the goods is to be determined by parties or evaluated by third party.

Meanwhile, according to Article 23 of CISG, a contract is concluded when an acceptance of an offer becomes effective. With regards to an offer, Article 14 (1) of CISG stipulates that

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to

be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Acceptance, according to Article 18(1) and (2) is

> "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. "

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction … An oral offer must be accepted immediately unless the circumstances indicate otherwise.

Formation of contract is indeed rooted from common law tradition (Butler, 2007). However, the abovementioned provision of CISG has provided an example to compromise between the civil and common law system (Id.) where CISG does not require party to prove concepts similar with common law such as offer and acceptance (Chemical Products Case). It recognizes that a contract may be established by an act. This means that CISG still upholds the principle of consent between parties as the most important in formulating a contract without having regard to how such consent is expressed.

This is similar with provision upheld by Indonesian Civil Code where contract is formulated as long as parties have reached consent. It can be derived from the two regulations that provisions on formation of contract and when contracts are deemed concluded between Indonesian Civil Code and CISG is not contrary to each other. Both regulations consider the contract is concluded when parties agree on the goods and the price. Indonesian Civil Code, however, does not explain on how agreement is achieved while CISG asserts that such agreement (or acceptance) can be derived from parties' statement or conduct and further such acceptance is effective when it reaches the offeror. Therefore, even though Indonesia, as a civil law country, does not uphold the offer and acceptance as condition to form a contract in its contract law, CISG can fill the gap of Indonesia's only requirement of consent in formation of contract.

F. Obligation of Parties

Indonesian Civil Code stipulates that sale and purchase is an agreement by which one party binds himself to deliver a good whereas the other party promises to pay the price as agreed upon. In sale and purchase, parties are divided into seller and buyer. Firstly, the main obligations of seller according to Article 1474 of Indonesian Civil Code are to deliver the goods sold and to safeguard it. Delivery means the transfer of the goods sold to the power and the possession of the buyer (Article 1457 Indonesian Civil Code). Seller is also obliged to ensure that the goods delivered by the seller must be in the same condition as it was at the time of the selling (Article 1481 Indonesian Civil Code). Secondly, the buyer has the obligation to pay the purchase price at the time and place determined by the agreement. If such time and place are not determined, the buyer must pay the price at the time and place of delivery should take place.

Compared to CISG, the provisions regarding obligations of parties in this convention do not have that much of a different. Article 30 of CISG stipulates that obligations of seller are:

> "[…] deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."

Nevertheless, with regards to the goods delivered, CISG takes a more detail explanation in which it obliges the seller to deliver the goods in the quality, quantity, and description as well as packaging required by the contract. Conformity of the goods is measured from which the goods (Article 35 CISG):

> "*(a)* Are fit for the purposes for which goods of the same description would ordinarily be used;
> *(b)* Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
> *(c)* Possess the qualities of goods which the seller has held out to the buyer as a sample or model;
> *(d)* Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

Meanwhile obligation of buyer is stipulated under CISG to pay the price of the goods and take delivery of them as required by the contract and the convention. In the matter of obligation of parties, Indonesian Civil Code's provisions are in line with CISG. Similar to the previous matter, obligations of parties under CISG is regulated in a more detail manner than the Indonesian Civil Code in regards to specifying 'the conforming goods' and thus it is possible to be supplemented to the Indonesian Civil Code.

G. Avoidance of contract

Avoidance of contract in Indonesian Civil Code is considered as one of a cause of breach of contract. This matter is interestingly regulated under the Indonesian Civil Code because avoidance of contract is categorized as conditional obligations. Article 1266 of Indonesian Civil Code regulates that:

> "The condition of dissolution of the agreement is always implied as to occur in mutual agreements, in the event one of the parties does not comply with his obligation.
> In such event, the agreement is not dissolved according to the law, but the dissolution must be requested through the court."

In the event the condition of dissolution is not expressed in the agreement, the judge is free, with due regard of the circumstances, at the defender's request, to allow time to the defendant to comply as yet with his obligation, which time, however, may not exceed a period of one month.

Deriving from the aforementioned article, condition of avoidance should be stated in the agreement. According to Subekti, the aforementioned article should not be interpreted as considering all non-compliance of one party as condition to avoid the contract. Rather, breach of contract by one party should not be deemed as automatically become condition to dissolve or avoid the contract. Considering that avoidance of contract should be asked to the judge, the judge then would have to decide whether the breach should result to an avoidance. The judge may decide that the breach is too insignificant to the transaction and deny the aggrieved party's claim to avoid the contract. Additionally, claiming to avoid the contract by reason of

a breach that is not too significant will consequently violate the principle of good faith uphold by Article 1338 of Indonesian Civil Code. Furthermore, the principle of good faith is also upheld since, when condition of avoidance is not explicitly stated, the judge can provide additional time to the breaching party to fulfil its obligation.

On the other hand, CISG sets three conditions that can result on avoidance; fundamental breach of contract, failure or refusal to perform within a reasonable grace period, and anticipatory breach. Firstly, fundamental breach of contract is a breach that it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 25 of CISG requires that the breach must cause detriment. Such detriment must then nullify or essentially depreciate the aggrieved party's reasonable expectation under the contract. Additionally, such detriment must be foreseeable by the breaching party at the time of conclusion of the contract (Babiak, 1992). Furthermore, Article 49 and 64 of CISG stipulate that buyer and seller can avoid the contract when the opposing party's non-performance amounts to fundamental breach of contract.

Secondly, a contract can be avoided by the aggrieved party at the time of failure or refusal to perform within reasonable grace period. This is in the case when one of the party fails to perform its obligation within the period stipulated under the contract and the aggrieved party gives *nachfrist* ultimatum; additional period provided for the breaching party to perform. When the breaching party fails or refuse to perform within such additional period of time, the aggrieved party can declare avoidance of contract.

Thirdly, a party can also avoid the contract even before the period of the contract has ended. The conditions are when the breaching party either declare that it will not or will not be able to perform before the performance date or declare that it will not or will not be able to perform substantial part or all of his obligations within the time for performance.

It is clear that in the matter of avoidance of contract, Indonesian Civil Code provides stricter ground than CISG does. Indonesian Civil Code assume that all condition to dissolve should be stated in the contract otherwise the judge will determine the significance of the breach. Furthermore, there is no clear threshold of a breach that can result in avoidance of contract. Meanwhile CISG provides 3 (three) possibilities for party to avoid contract.

The strict regulation on termination of contract by Indonesian Contract Law should raise a concern in today's development of certain market such as the market of commodity. Commodity market is subject to price fluctuations where curing the breach is not an appropriate remedy (Winsor, 2010). Hence, usually timely delivery is always the essence of the contract (Schwenzer & Hachem, 2009). To bring this matter into the context of comparing Indonesian Contract Law and CISG, when parties stipulate in the contract that timely delivery is of the essence, avoidance can be accommodated by Indonesian Contract Law. However, when it is not expressly stipulated in the contract, Indonesian Contract Law cannot easily provide a termination as an immediate and less costly exit for parties. CISG, on the other hand, has already adapted to this condition. CISG makes it possible for timely delivery to be the essence of the contract even without parties stipulating it in the contract by interpretation through Article

8(2) and (3) of this convention; intention of parties are taken from understanding of a reasonable person of the same kind and negotiations, practices, usages and any subsequent conduct of the parties. Hence, according to CISG, the practices established in the market of commodity; strict compliance to timely delivery and conformity of goods are of the essence, can be acknowledged and become the reason of avoidance of contract.

Bearing this fact, Indonesian Contract Law is not anymore suitable to be applicable for certain international sales, especially sales of commodity. CISG, on the other hand, able to adapt with development. Therefore, it is preferable if parties designate CISG as the choice of law of the contract in the matter that the type of contract would possibly need a quick exit from the breach.

H. Should Indonesia Accede to CISG Then?

Bearing that CISG can supplement Indonesian Contract Law in certain important aspects of international sale of goods contract should raise an issue of whether or not accession to CISG is necessary. Even though the three aspects elaborated above cannot be the threshold to answer such matter, the fact that other countries with various legal system has ratified it at least should make Indonesia consider the significance of this convention in Indonesia's national law.

Nowadays, Indonesia is not the only lost duck on the lone side of the pond in this situation. England, in fact, also has not acceded to CISG despite the fact that its non-accession to CISG is significant since most England's trading partners in the European Union are contracting states of CISG (Hoffman, 2010).

There are two reasons why England has not ratified CISG. Firstly, the ministers do not see ratification of CISG as a priority neither it has desire to do so (Moss, 2005-2006). UK's reluctance to ratify CISG relies on the fact that CISG is less suitable to govern commodity sales than English Law. English Law has stricter standard in case of avoidance based on the reason of non-conforming goods and documents. The other reason being UK's experience in ratifying uniform sales law on 1964; ULIS and ULFIS. These conventions left unused in UK's case laws because UK's reservation to these conventions where the conventions permitted UK to apply uniform law only when the parties agree. This kind of reservation cannot be made under CISG thus CISG will bring real change to English Law on international contract.

Despite being in the same position, Indonesia's reasons to not accede to CISG cannot be similar with UK except for the fact that in Indonesia, CISG also lacks of legislative priority[20]. Indonesia does not have experience like UK where it has every uniformed its contract law thus Indonesia cannot yet able to find the suitable uniformity to its national law. The author cannot think of any reason other than Indonesia's lack of attention to reform its law in this matter when CISG is actually supplementary to Indonesian Contract Law and it can provides certain gap-filling provision where Indonesian Contract Law is no more suitable to govern certain matters. Nevertheless, even if there will be a complicated and long process for Indonesia to accede to CISG, Indonesian parties can still benefit from this convention by way of appointing this convention in their contract

[20] Indonesian Contract Law reform has not been filed in National Legal Program (Prolegnas) 2010-2014

since, as mentioned above, application of CISG is possible for Indonesian parties.

I. Conclusion

In conclusion, in the matter of formation of contract, obligations of parties, and avoidance of contract, there are no contradiction between Indonesian Contract Law and CISG. Rather, CISG can be seen as supplement to Indonesian Civil Code; it can possibly provide the civil code more detail explanation regarding the respective issues. Therefore, Indonesian parties to international sale of goods should consider to designate CISG as the applicable law in order to benefit from its provisions in their dealing with their counter party.

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