DETERMINING THE LAW APPLICABLE TO THE DISPUTE RESOLUTION OF THE INTERNATIONAL E-COMMERCE

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ABSTRACT

Characteristics of the internet which is cheaper, faster and efficient, in fact, can motivate the business actors to do a transaction of the international sale of goods electronically (e-commerce). In line with establishing the ASEAN Economy Community 2015, creating the disputes among domestic business actors with foreign business actors from ASEAN countries can not be avoided. In the context of dispute resolution , the main problem faced by a court to be solved – if the parties do not specify a choice of law clause in their contract - is the determination of the laws of any country relevant to apply.

This study aimed to know the method that will be used by the judge or arbitrator to determine the law applicable to the dispute resolution of the international e-commerce.

Theory used to analyze is the choice of law theories in International Private Law. While research methods used is a normative juridical research, namely through the library research to review the rules of positive law and legal principles. The approaches used are a statute approach and a conceptual approach.

The results showed that law applicable clause as stipulated in Article 1 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) relevant to be applied to the dispute resolution of the international e-commerce. It is suggested that the substance of the Article can be used as a reference in a harmonization of International Commercial Law in ASEAN.

Keywords: Determining, Law Applicable, Dispute Resolution, E-Commerce

A. INTRODUCTION

The presence of public information is believed to be one of the important agenda of the people in the third millennium. It is characterized, among others, the use of the Internet is increasingly widespread in various activities of human life , not only in developed countries but also in developing countries, including Indonesia. This phenomenon in turn has put the "information" as an economic commodity that is very important and beneficial.

The existence of the Internet as one of the institutions in the mainstream of modern business culture is further reinforced by the rise of commerce electronically (e-commerce) are predicted as "the future business". Fever e-commerce is not only a hit for the business community in developed countries like the United States and European countries only, but has spread various developing countries. e-commerce that was originally engaged in the retail trade as a Compact Disc (CD) or book via the World Wide Web (www), but it's been gone far reaching activities in banking and banking services which include among others "account inquiries", "loan transaction", and so on.

Internet is more selected in the trade transaction because of its easiness, namely :

1. Internet as a very large public network (huge / wide spread network), like that is owned by a public electronic network, that is cheap, fast, and ease of access;

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2. Using electronic data as a medium to deliver the message / data so it can be done sending and receiving of information in an easy and concise, both in the form of electronic data analog and digital.

In a future perspective, the practice of e-commerce is increasing, both in quality and quantity along with the globalization of the economy and its global trade / free market, both produced by the member countries of the World Trade Organization (WTO), Association of South East Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation (APEC).

As in conventional transactions that everything is carried out by using paper, the possibility of disputes between parties to a transaction can not be avoided. The emergence of a dispute between the parties in a transaction either "paper-based transaction" or " paperless-based transaction" is normal and natural. This is because the parties are conducting e-commerce transactions are also human being, which can not be separated from nature to forget and to be selfish. Especially with the establishment of the ASEAN Economic Community will be in 2015, the emergence of e-commerce disputes between the Indonesian business actors with foreign business actors from ASEAN countries can not be avoided.

In handling of the dispute resolution of the international e- commerce, where the elements associated with the case, namely parties, object and execution of the contract are not in the same country, the first problem to be solved is with regard to choice of law, the law which should be applied in dispute settlement of international e-commerce. The issue of choice of law will always appear in the international e-commerce dispute if the contract does not explicitly contain a choice of law clause .

Based on these objective conditions, the research problem can be formulated as follows:

a. what is the significance of the choice of law by the parties in an international e-commerce contract ?
b. what is the procedure of determining the law applicable in the absence of a choice of law by the parties in international e-commerce contract ?

This study aimed to analyze the significance of the choice of law clause in an international e-commerce contract, and also to describe the procedure of determining the law applicable in the absence of a choice of law clause in an international e-commerce contract.

This type of research used to gather and analyze materials is a normative law research. While the approaches used in this study are a statute approach, a conceptual approach and a case approach.

B. THEORETICAL FRAMEWORK

The study of theories of choice of law in this study are started from a cursory review of the choice of law by the parties, or also known as choice of law clauses in international commercial contracts.[2] As we know that the choice of law by the parties is a reflection of the principle of party autonomy in International Private Law (IPL). Party autonomy is a principle that reflects the will of the autonomy owned by the parties to determine the law applicable to the international commercial contracts. In principle, the autonomy of the parties will be the primary consideration in determining the law applicable. As the actualization of freedom owned, the contracting parties can manifest in the form of freedom to determine the law applicable to govern their contract.

[2] A description of the theories of choice of law as a knife used in the analysis of this paper is quoted from the work of Taufiqurrahman entitled "Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan The United Nations Convention on Contracts for the International Sale of Goods 1980 (Character Choice of Law, Study on the Scope of *Application of the United Nations Convention on Contracts for the International Sale of Goods 1980)*", PT. Bayumedia, Surabaya, 2010.

This principle was first introduced by Dumoulin.[3] This principle emerged as a response to dissatisfaction in the determination of the law applicable based on the objective linkage points. He assumed that the points of objective linkage is too rigid and does not provide room for the free will of the parties. Based on these facts, the adherents of subjective selection switch on the will of the parties as the main linkage points in the determination of the law applicable to the contract.

Based on a subjective choice of law which it is based on the autonomy of the parties, the contracting parties have the freedom to choose the law that will be used to regulate their legal relationships. The contracting parties have the freedom to choose the substantive law of a particular national legal system to address the gap. Moreover, the principle of party autonomy also provide the best care efforts to protect the parties' expectations and create a form of legal certainty universally recognized in across national borders transactions. Francis A. Gabor length stated as follows :[4]

> *"This common core is based on the universal recognition of party autonomy: that contracting parties should enjoy the freedom to draft private contracts, selecting the substantives law of a national legal system to fill in gaps. Party autonomy provides the best safeguard for protecting the parties' expectations and creating a universally recognized from of legal certainty in transactions cutting across national boundaries".*

The principle of party autonomy is further developed by Friedrich Carl von Savigny. He always argued about the "Sitz" in any legal relations that occurred. According to Savigny, choice of law especially in the form of voluntary subjection to a law order happen because it has been selected by the lex loci executions . Choice of law as is especially the case in secret.[5]

Furthermore, this principle is further developed by Mancini. According to him, party autonomy is one of the three pillars of the International Private Law (IPL)-whole human building, in addition to the principle of nationality and public order.[6] The freedom of the parties to determine the law to their contractual relationships serve as the foundation of the entire system of its IPL. The freedom of the parties to choose the law that they want is only limited by the understanding of public order.

During its development, the doctrine of the law that gives freedom to choose the law that will govern the contract made by the parties recognized in all legal systems. This is confirmed by Petar Sarcevic which states : "It could be said that, in all legal systems, it is a well-established principle that the parties are free , apart from on certain limitations, to choose the which the law will govern Reviews their contract".[7]

The same view was also expressed by Lando in 1970 who wrote that "Instant confirmation of party autonomy is so accepted by the countries of the world that it belongs to the common core of the legal systems. Differences only exist concerning the limits of freedom the parties".[8] Subjective theory in the determination of the law applicable to the contract which

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[3] Sudargo Gautama. 1998. *Hukum Perdata Internasional Indonesia* (International Private Law), Jilid II Bagian 4 Buku ke-5, Alumni, Bandung, p.24

[4] Francis A. Gabor. 1986. "Emerging Unification of Confliict of Laws Rules Applicable to The International Sale of Goods: UNCITRAL and The New Hague Conference on Private International Law", Northwestern School of Law, *Journal of International Law and Business*, 7 NW.J.INT'L & BUS 696, p.3

[5] Sudargo Gautama, *op.cit*., p.25

[6] Ibid.

[7] Zeljko Matic, "The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods – Rules on the law applicable", in Petar Sarcevic (ed.). 1990. International Contract and Conflicts of Laws, Graham & Trotman / Martinus Nijhoff, London/Dordrecht/Boston, p.56

[8] O. Lando. 1976. "Contract", *International Encyclopedia of Comparative Law*, Vol.III, Tubingen, Mouton, The Hague, Paris, p.3 quoted from Petar Sarcevic, "Choice-of-Issues Related to International Financial Transactions with Special Emphasis on Party Autonomy and its Restrictions", in Petar Sarcevic dan P. Volken (ed.). 1991. *International Contract and Payments*, Graham & Trotman / Martinus Nijhoff, London/Dordrecht/Boston, p.112

is based on the principle of party autonomy is essentially the same philosophical footing or at least goes together with the classical theory of contract law that puts more emphasis on individual freedom of contract.[9]

The doctrine of choice of law in International Private Law (IPL), particularly with respect to international transactions are oriented to provide legal certainty for the parties. According to Stanley E. Cox , there are three models the choice of law to be accommodated in the IPL, namely unilateral choice of law, multilateral choice of law; and substantive choice of law.[10]

The unilateral choice of law emphasis on the sovereignty as the sole source of legitimacy of any decision. According to this theory, the judicial forum to handle disputes typically established itself as a domestic judicial, rather than an international court. The only law that can be applied is the law of the forum.

In the view of unilateralist, the only law that can be applied is the law of the forum . Therefore, the forum should not handle a case unless the relationships associated with the litigation will make the application of the law of the forum can be maintained. Judges must be held fully responsible for the content of the decision . He had to explain why or why suspend the will of the legislature is responsible for setting the policy through judicial law-making powers .

The unilateralist believe that forums can only improve their own policies when they hear cases. Therefore, unilateralist wants the court takes jurisdiction over a case if the court can apply the law of the forum with consciousness to the case. With regard to personal jurisdiction , Stanley length stated as follows :[11]

> *... The unilateralist approach to choice of law, therefore, should insist on limiting personal jurisdiction to only those forums that have an interest in applying their own law to a substantial portion of the underlying conduct involved in any litigation. The policies behind personal jurisdiction and choice of law, in short, coextend under the unilateralist approach.*
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> *This means that a unilateralist should disapprove of personal jurisdiction obtained by methods such as temporary presence in the form or transacting business in the forum unrelated to the litigation.*
>
> *Presence and convenience may be appropriate ways to limit venue, but as justification for the forum's right to adjudicate, they establish no legitimacy for law-wielding power.*
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> *"Specific" jurisdiction is the only valid method of obtaining personal jurisdiction over a defendant under a unilateral approach. Concormitantly, therefore, the unilateralist rejects the notion that a disinterested third state can appropriately exercise personal jurisdiction.*

The multilateralism choice of law assume that the special law (IPL) can be developed through the observation of all sovereignty-sovereignty are concerned and therefore treat all equally sovereign. The role of the court or arbitral is the main multilateral peace maker or refereeing.

Friedrich Carl von Savigny known as a father of multilateral explained that the purpose of the analysis of multilateralism is "discovering for every legal relation (case) that the legal

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[9] In the Indonesian legal system, the principle of freedom of contract contained in Article 1338 Burgerlijk Wetboek (Code of Civil Law). This principle implies that the parties to a contract are free to determine the form, manner and object of the contract entered into, on the basis of good faith in the implementation. Contracts are made to be binding on the parties as the law.

[10] Stanley E. Cox. 2001. "Commentary: Substantive, Multilateral and Unilateral", *37 Willamette Law Review 171*, download dari LexisNexis ™ Academic – Document dated January 23, 2007. Compare with Gene R. Shrive. 1996. "Choice of Law and the Forgiving Constitution", *71 Ind. L.J. 271*, p.271

[11] *Ibid*., p.15

territory to which, in its proper nature, it belongs or is subject (in the which it has its seat)".[12] Different with the unilateralist who stopping their activities at the time of the law applicable of forum found out, multilateralist requires the development of dispute whether a closer relationship to the other jurisdictions. a choice has to be actually made between two or more competing jurisdictions . Therefore, a multilateral approach is often referred to as the selecting jurisdiction.

The main objective of multilateralism approach is the uniformity of the results of the choice of law and predictability of results. In this context, concerns the way in which the uniformity and predictability that goal is reached, there are two (2) approaches were used, namely an objective approach and the subjective approach . In the perspective of the choice of law, theory that uses an objective approach is also referred to as the Objective Choice of Law Theory, while the theory of subjective approach is also referred to as the Subjective Choice of Law Theory .

The Substantive Law of options beyond sovereignty emphasizes the fact that the pattern of conflict. Domestic law which are not suitable to represent the sovereignty dispute is applied in the IPL disputes. There is no reason that the main content of the law applicable to the IPL dispute reflects the contents of a particular / national law. IPL should be the law in international character .

In the view of the adherents of the theory of choice of substantive law, the trial judge placed himself not as a domestic court, but an international court or interstate tribunal. Courts / arbitral required to adjudicate disputes implement a legal device that is designed for the IPL applied outside the domestic context. IPL device is getting legitimacy of efforts to harmonize the expectations formed from the inter-state system .

According to adherents of this theory, the IPL is defined as "a unified system established to resolve disputes arising from the fact that every municipal law may indicate disagreements with other local legal system. This theory seems very idealistic as it strives to realize the existence of rules that can be applied to all existing legal system .

In harmony with the conditions that gave rise to the theory of choice Substantive Law , this theory aims to measure in substantive justice (substantive justice) . Substantive justice that has not been touched either in the Unilateral Choice of Law and The Multilateral Choice of Law are greater accommodated within this Substantive Choice of Law. The parties from the beginning has been able to figure out what would be the rights and obligations under the position determined by the same substance that is applicable in all the countries in the world .

Proponents of this theory among Rabel, Zittelman and Jita highly influenced by Friedrich Carl von Savigny's thought. They have a basic assumption that the need for the principles of the IPL are already accepted as a habit in the international arena and is considered to be universal .

C. ANALYSIS

1. The Significance of a Choice of Law Clause to the Dispute Resolution of International e-Commerce

The contracting parties when process of negotiating and signing a contract hope that the implementation of the contract will not arise a dispute between them. However, although all attempts have been made so that what has been agreed can be implemented, it does not mean that it has been closed to the possibility of emerging a dispute between the parties .

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[12] Hannah L. Buxbaum, 2000. "Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory", *36 Stan. J. Int'l. 23*, p.39, quoted from Friedrich Carl von Savigny. 1980. *A Treatise on the Conflict of Laws 133* (William Guthrie Trans, 2nd ed.). see also Friedrich K. Juenger. 1993. *Choice of Law and Multistate Justice 10-27*

Basically the parties are still human beings with all the advantages and disadvantages. A variety of things that can allow the emergence of a dispute between them, which is due to non-fulfillment of obligations by either party as set forth in the contract, the fulfillment of obligations by one party but not as agreed in the contract and imperfect obligations undertaken by one parties. In short, as carefully as any business transactions (including the sale of international goods) made, the possibility creating a disputes can not be avoided.

In connection with the settlement of international commercial disputes, both conventionally and electronically, procedural issues must be resolved at first before touching the substantive issues. One of the procedural issues that must be resolved first is the determination of the law applicable.[13]

The issue of choice of law is important to be solved in advance by a judge or arbitrator because it relates to the applicability of the substantive law should be applied in resolving disputes. Without preceded by solving the problems of choice of law, it is impossible for a judge or arbitrator who handles can make a decision on the dispute in the international trade fair for the parties .

To determine the law that can be applied to the international commercial transactions, either conventionally or electronically, the judge or arbitrator will examine whether there is a choice of law clause in its contract. The approach used by the judge or arbitrator to determine the law applicable is the subjective approach, namely taking into account the autonomous will of the parties actualized in it's a clause of choice of law. Under this approach , the law applicable to the contract is the law chosen by parties.

The choice of law by the parties can be described as the glasses. If it is used a green monocle, then all objects will appear as green. Similarly, if the parties to a contract to choose the law of international business a particular country, then the contract will be viewed in terms of glasses and governed by law, the law of the chosen state .

Law chosen by the parties to be decisive in terms of assessing the validity of a contract that is international. The selected law also specifies the terms and the timing of default and what sanctions can be imposed on either party in the event proved to be in default. In this context, quite naturally when the UK Lawyer continues to provide advice to their clients for always include a choice of law clause in his contract and choose English law as the "governing law" of contracts made with foreign partners.

Institution of choice of law is becoming increasingly important these days along with the rapid commercial transactions between parties from different countries. Moreover, in international commercial transaction electronically, the presence of foreign elements in the transaction is not only based on the involvement of the parties to a transaction, but also other related parties, namely the Internet Service Provider (ISP) who provide services as the Internet.

Practical issues with regard to choice of law by parties is whether the contracting parties actually have freedom freely without any restrictions at all in choosing a particular legal system against the contract. Although the nature of the choice of law by parties as a reflection of the principle of party autonomy, this does not mean giving freedom freely to the parties to determine which law applies to the contract . This is tantamount to human rights inherent in every person . In exercising rights owned, one is limited by the rights attached to other people. That is, one can not properly exercise their rights without notice and even detrimental to the

[13] Procedural 'issues that arise in international commercial disputes in addition to the choice of law is the choice of jurisdiction and choice of forum. The choice of jurisdiction in a contract specify which state jurisdiction has the authority to decide upon the above dispute, while the choice of forum determines what the forums has the authority to investigate the dispute.

interests / rights of others. This means that in performing the contract choice of law is made, the parties must observe the restrictions .

However, in principle, most of the existing legal system recognizes the limitations in determining the law applicable to the contract by the parties. Things that are generally recognized as a barrier in the Choice of Law by the Parties which are: (1) the necessity of a real relationship (real connection) between the law chosen by the contract ; (2) The choice of law must contain a bona fide , that is based on good faith for the purpose of certainty , protection of fair and surer guarantee for the execution of the contract for the parties ; (3) is not intended for smuggling law ; (4) does not conflict with the rules that are forced (mandatory rules) , one of which is contrary to public order (public policy) .

Despite the lack of similarity in the provision limits to the parties to choose the law applicable to the contract between the national legal systems of countries with one another, but must not be a conflict between the law chosen by the rules of legal coercive forums that deal with disputes the (lex forum) agreed upon by all the existing legal system . It is also implicit in the British court decision in the case of Vita Food Products Inc. , v . Unus Shipping Co. Ltd. (1939) A.C. 277 which states :[14]

> "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

Some restrictions were developed in the IPL to establish the validity of a choice of law by the parties are as follows :[15]

a. choice of law is limited mainly to be executed only in the legal agreement (contract). In contract law itself, contract law is not entirely permissible, but there is a type of contract that should not be entered into the choice of law, for example in the employment contract ;
b. choice is restricted by law and must not conflict with the interests of the state , public interest, public interest or public order. Public order is an emergency brake to stop the implementation of foreign laws and also an emergency brake on the use of the autonomy of the parties are too freely. Maintaining public order that the law chosen by the parties is not contrary to human joints in law and society judge ;
c. choice of law may not lead to smuggling law. The choice of law must be made fairly and in good faith, no special pick a particular legal system for the purpose of smuggling other regulations. In other words, the legal system chosen is the legal system that does have a certain relationship with the contract in question .

The parties in determining the law applicable to the contract can be done in a manner expressly (express choice of law) or by implied choice of law. This view was expressed by Zeljko Matic.[16] Another opinion expressed by Petar Sarcevic distinguishing choice of law within three (3) forms, namely : (1) the choice of law expressly; (2) the implied choice of law; and (3) no choice law.[17]

A different opinion was also expressed by Sudargo Gautama stating that there are four kinds of law choice in IPL, namely : (1) expressly or in so many words *(uitdrukkelijk met zovele*

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[14] David McClean. 2000. *Morris: The Conflict of Laws*, Sweet & Maxwell Ltd. London, p.330

[15] Sudargo Gautama. 1985. *Pengantar Hukum Perdata Internasional Indonesia (Introduction to International Private Law of Indonesia)*, Cet.V, Binacipta, Bandung, p.169. (herein after Sudargo Gautama I)

[16] Zeljko Matic, *op. cit*., p.56.

[17] Petar Sarcevic, *op. cit*., p.111

woorden); (2) secretly (stilzwijgend); (3) is considered (vermoedelijk); and (4) a hypothetical (hypothetische partiwijl).[18]

Mentioning no choice as a form of choice of law by the parties to the sales contract by Petar Sarcevic above would be too much. This is based on an objective fact that the choice of law (no choice) in the contract the parties have not opted to be enforced in a legal contract. Those contracting intentionally or not does not intend to choose the law that will apply to the contract. Similarly, the choice of law is considered (vermoedelijk) and hypothetical (hypothetische partiwijl) propounded by Sudargo Gautama, the parties from the beginning is not willing to choose the law that will govern the contract made. Not by the law chosen by the parties, but by a judge or arbitrator.[19]

Unlike the no choice of law, choice of law expressly, choice of law secretly and choice of law hypothetically contain the will of the parties to choose the law that will govern the contract made. Therefore , the description of the shape or the way the choice of law by the parties is more focused on the form of the choice of law expressly and and implied choice of law.

The contracting parties in performing their choice of law explicitly faced with several options, namely :[20]

(1) the national law of the judge (lex fori) and foreign law;
(2) the national law of the person concerned and the law of the state where the people dwell;
(3) between the national laws of those concerned and the law of the state where the goods are located becomes object of legal relations;
(4) between the national laws of those concerned and the law of the state where the relevant legal act performed (lex loci actus);
(5) the law of the country where a civil agreement born (lex fori contractus) and the law of the country in which the execution of this agreement (lex loci solutionis).

Besides faced with several options as mentioned above , the parties should also consider some factors that can not be ruled out . In this regard, Ravi C. Tennekoon states that there are six factors that must be considered by the parties in determining the choice of law, namely :[21]

(1) the freedom to choose the law that will be enforced ;
(2) certainty and expectations regarding the desired results based on legal documents in question ;
(3) the sophistication of the legal system are selected ;
(4) language ;
(5) litigation forum ; and
(6) the introduction and understanding of the legal system chosen .

Unlike the strictly choice of law, in the choice of law in secret, the parties do not explicitly specify a choice of law clause in their contract. Choice of law made by the use of terms used in the contract. On this choice of law, judges are given the space to seek the will of the parties that is implied in the contract.

With regard to implied choice of law, there are different views. One of them who deny the existence of an implied choice of law is PM North. He asks the question whether a choice can be made by means other than strict contractual provisions :[22]

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[18] Sudargo Gautama I, *op.cit.*, p.173

[19] *Ibid*.

[20] *Ibid*.

[21] Sutan Remy Sjahdeni. 1997. *Kredit Sindikasi, Proses Pembentukan dan Aspek Hukum (Syndication Credit, Establishing Process and Legal Aspect)*, Grafiti, Jakarta, p.110-111, quoted from Ravi C. Tennekoon. 1991. The Law and Regulation of International Finance, Butterwoths, London, p.17-24

[22] *Ibid*., h.112, dikutip dari P.M. North, *supra* n.3, p.156

"How far is an 'inferred' really to be regarded as a choice at all ? Should there continue to be this division into express choice, inferred choice and no choice ? Is the second not really the third, but one where identification of the most closely connected law may be relatively easy".

In connection with the statement, Petar Sarcevic commented that purpose only alternative to express the choice is no choice not only practiced in some countries, but also the law. An example is Article 24 paragraph (1) the Turkish PIL Act (Act No. 2675 on the International Private and Procedural Law of 22 May 1982, Official Gazette No.17701) states that the law applicable is the law chosen is by the parties.[23]

Conversely those who accept the existence of inferred choice as a choice of law states that the implied choice of law is a special category of choice of law (a special category of choice of law). Furthermore, they state :

" In the United States, for example, inferrense is recognized and offerred special treatment by the courts : 'The presence of a choice-of-court clause … and the presence of other factors in the contract may lead a court to conclude that the parties made an implied choice of law'".[24]

The existence of a choice of court clause in the contract that was made showed that they secretly have determined its legal options. If the contract mentioned in the trial option is Jakarta District Court, means secretly the parties have chosen the Indonesian law as the law applicable (the law applicable) on the contract they made.

The existence of different views on the form of the implied choice of law t also appeared in the Hague Conference on Private International Law, held in 1985. From the diverse views, the Hague Conference on Private International Law finally adopted the fifth view, namely, that the contract is made should be clearly indicated by the terms of the contract and the relationship of the parties is viewed as a whole. Receipt of the fifth view shows that the view that accepts the existence of "an implied choice" as a law choice to get international recognition.

Choice of law by the parties of this fact has given assurance to them of the law that will apply to disputes arising out of or in connection with the execution of the contract . However, the certainty of the law is by no means all parties , or at least one of the parties can predict the outcome (predictability) for the implementation of the contract .

This is understandable because of the substance of the law chosen by the parties based on the principle of autonomy of the Parties are very well known by only one party, but the other party is foreign. That could happen if the substantive law chosen is the law of one of the contracting parties. Moreover, the parties are equally foreign to the law to be applied in resolving disputes between them when in their contract to choose the law of another country .

2. Determining the law applicable in the Absence of a Choice of Law by the Parties

The method of determining the law applicable is based on the choice of law by the judge or arbitrator if the parties can not determine the choice of law in contracts made, either expressly or tacitly. It is in fact, a case of this kind has not been lifted to the surface in cyberspace, in which the international commercial contracts electronically (e-commerce) not to include a clause on its legal options. However, based on the objective fact that the international trade in conventional contracts during this still met the contract does not include a choice of law clause, then it will someday be possible.

Considering this condition, attempts to do is to return to the sources of international trade law and regulations. One of the sources of international trade law can be referenced with

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[23] *Ibid*.

[24] *Ibid*., quoted from E.F. Scoles and P. Hay. 1982. *Conflict of Laws*, St. Paul, Minnesota, p.633

regard to international trade transactions electronically is the UNCITRAL[25] Model Law on Electronic Commerce with Guide to Enactment 1996 (UNCITRAL E-Commerce). The model law has been adopted by several states to make domestic law on electronic commerce. Among these are Malaysia (Digital Signature Act 1997), Singapore (Electronic Transaction Act) and other countries.

Ignaz Seidl-Hovenveldern qualify the works of international organizations, new lex mercatoria, as the International Convention. This assessment is based on the authority and legitimacy of these organs to remove it. [26] As an example of which is the UNCITRAL. This institution, in accordance with the Resolution of the UN General Assembly 21202 (XX) dated December 20, 1965, having the main task to increase the progressive harmonization and unification of the Law of International Trade.

In the same position with the International Convention on *the new lex mercatoria* can be a source of international trade law. This refers to Article 38 paragraph (1) The Statute of the International Court of Justice, which states that there are several sources of formal law that may be used in international dispute resolution, namely: (a) International convention; (b) Agreement in simplified form; (c) Customary international law; (d) General principle of law; dan (e) Subsidiary means for the determination of rules of law.[27]

With regard to the determination of the law applicable, the UNCITRAL E-Commerce is just not set up at all. The model law is more focused on the recognition of the media used in the transaction, the data message. In terms of "data message", the information created, received, stored electronically, optical or similar means including, but not limited to EDI, e-mail, telegram, telex and telecopy legally recognized as having validity. When they find a device that is capable of transferring information, the model law is expected to respond to the development of these technologies.

Although a model law does not formulate on determining of the law applicable to the e-commerce contract, but it has laid the foundation in order modification with respect to time and place of the occurrence of contract. The model law has set the time and place of delivery and acceptance is communicated electronically as follows :[28]

(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator;

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the data message has designated an information system for the purpose of receiving data message, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

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[25] *United Natiosn Commission on International Trade Law (UNCITRAL) is a specialized agency of the United Nations (UN) established based on United Nations General Assembly Resolution 2205 (XXI) on December 17, 1966*

[26] Huala Adolf, 1997. *Hukum Ekonomi Internasional (International Law of Economy)*, Rajawali, Jakarta, p.102 quoted from Cf.N.G. Onuf "Further Thoughts on a New Source of International Law", quoted by Ignaz Seidl-Hohenveldern, 1986. "General Course on Public International Law", III Recueil des Cours 55

[27] Ignaz Seidl-Hohenveldern, *International Economic Law*, 2nd revised edition, Martnus Nijhoff Publishers, Netherlands, 1989, h.31-37

[28] Article 15 of the UNCITRAL E-Commerce

The above provisions in principle asserts that the timing of the delivery of electronic communications (data message) is when the data message enters an information system outside the control of the originator.[29] This means that the supply occur or become effective at the time the data message enters an information system outside the control from the addressee.[30] While the determination of the time of receipt of an electronic communication is hung on the availability of information systems owned by the addressee .

Referring to the definition of an information system as set forth in Article 2 letter (c) Model Law , which is a " designated information system " is " a particular system that is used to create, send, store or processing data message" .

If the addressee (in this case is the receiver of information transmitted) has designated information system, it offers in the form of a data message sent by the originator (in this case is the sender of information) are considered acceptable at the time the digital signature enters the designated information system. Thus, although the addressee do not have read the receipt that is sent by the originator, acceptance is considered to occur at the time the e-mail may have entered the information system designated addressee.

Conversely, if the addressee does not have a designated information system, then the e-mail sent by the originator is received at the time of digital signature entering the information system of the addressee. Time of receipt of the data message sent by the originator is at the time of the addressee have obtained and read the e-mail sent. This means that for the addressee have not received or read the e-mail from the originator, the acceptance of the e-mail has not happened yet.

Data message is considered delivered at the place where the originator has a business position and is considered to be received at the place where the addressee has more than one legal domicile, the domicile is the place that has the closest relationship to the transaction in question, or where that is not having ties to the transaction in question, which is the seat of the primary law. Conversely, if the originator or the addressee does not have a permanent legal status, the reference used is the place where they used to be.

With no regulation of law choice in the model law is by no means a solution to the case relating to the determination of the law applicable stalled altogether. In this case, the alternative attempt is to refer international conventions that are more common. As noted earlier, the UNCITRAL Model Law on Electronic Commerce is a model law that specifically regulate trade using electronic means. This means that the model law is an international convention that is specific . Therefore, special provisions are not set, then it is reasonable to use the provisions of a general nature. In this context, the meaning of the general provisions governing international trade is "The United Nations Convention on Contracts for the International Sale of Goods 1980" (hereinafter referred to CISG).

CISG includes material aimed at the formation of international contracts negates the purpose of the law of a particular country in international sales contracts and to facilitate the parties in the event of conflicts of law system. CISG applies to contracts for the sale of goods made between the parties having places of business are in different countries. This is confirmed in Article 1 of CISG, namely :

(1) This Convention applies to contract of sale of goods between parties whose place of bisness are in different states:
    (a) when the States are Contracting States, or;

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[29] Article 2 (c) asserts that “originator” of a data message means a person by when, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message.

[30] Article 2 (d) of the UNCITRAL E-Commerce asserts that “addressee” of a data message means a person who is intended by the originator to receive the data message, but it does not include a person action as an intermediary with respect to with data message.

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Based on the foregoing, the entering into force of CISG is not a citizen of the parties to a transaction or a civil or commercial nature of the parties, but a place of business of the parties. The place of business must be located in different countries, in which these countries are States Parties or, if the rules of private international law (IPL) lead to the enactment of the law of a State Party.

Formulation as set forth in Article 1 paragraph (1) of the CISG indicates that it imposes itself to govern the contract of sale of goods internationally. In the context of choice of law, this provision contains two aspects are closely related to each other, the procedural aspects of the choice of law and substantial aspect of law choice.[31]

Procedural aspects associated with the choice of law provision in the next paragraph that the international character limit only relates to the place of business of the parties. While the substantial aspects of the choice of law associated with the enforceability of these instruments to the contract of sale of goods internationally to the parties who come from countries participating in the Convention . In other words, this legal instrument can serve as a substantial law governing international commercial contracts are made.

Basing the provisions of Article 1 paragraph (1) (a) above, the CISG automatically applies to contracts of sale of goods made by and between parties whose places of business in different States, when these countries are the contracting Parties to the CISG. Unlike the procedure of law choice conducted conventionally, the choice of law which was introduced by the CISG refers to the enactment of substantive rules contained in the CISG itself.

Substantive law chosen as the law governing the contract is not conducted by the judge / arbitrator by or based on the rules of the IPL and is not conducted by the parties through the choice of law clause, but it is established by the provisions of the convention alone (choice of law by regulation). This suggests that the CISG introduces a new method of choice of law, the rules of autonomy choice of law.

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[31] This provision is accommodated in Article 1 of Convention on the Law Applicable to Contract on International Sale of Good concluded by Hague Conference on International Private Law on December 22, 1986 clearly states : "This Convention determines the law applicable to contracts of sale of goods – (*a)* between parties having their places of business in different States; *(b)* in all other cases involving a choice between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration.".

In addition, it is also contained in Article 1 of *United Nations Convention on the Use of Electronic Communications that stating :* ""(1) This Convention applies to use of electronic communications in connection with the formulation or performance of a contract between parties who places of business are in different States. (2) The fact that the parties have their places in different States is to be regarded whenever this fact does not appear either from the contract or from any dealings between the parties or for information disclosed by the parties at any time before or at the conclusion of the contract". It means that conventions apply to all electronic communications exchanged between parties whose places of business are in different States when at least one party has its place of business in a Contracting State (Art.1). It may also apply by virtue of the parties' choice. Contracts concluded for personal, family or household purposes, such as those relating to family law and the law of succession, as well as certain financial transactions, negotiable instruments, and documents of title, are excluded from the Convention's

The autonomy choice of law is not very dependent on the activity of the judge / arbitrator and the parties to impose a particular substantive law, but based on the formulation of the convention directly enforce substantive rules of the CISG. Throughout the two main requirements are formulated or specified by the convention met in a transaction made by the parties, namely : (1) has a place of business in different countries; and (2) the different countries in which the place of business of the parties are the contracting state, the transaction is automatically subject to the substantive rules of the CISG without having to wait for a choice of law by the judge / arbitrator or the parties. Even if the objective facts, especially in the resolution of disputes over the international sale of goods where the role of the judge / arbitrator remained dominant to enact substantive rules of the CISG to the dispute faced before going on the subject of his case, It can not be said that the choice of law was done by the judge / arbitrator. The choice of law is established by convention (choice of law by regulation) as defined in Article 1 (1) (a) of CISG. The role of the judge / arbitrator only what has been formulated by the Convention, which impose substantive rules of the CISG to contracts of sale of goods made by and between parties whose places of business in different States, that when States are the contracting states..

Basing on Article 1 paragraph (1) (a) of CISG, the judge or arbitrator may impose CISG as the law applicable if the parties do not specify a legal option in the contract is made. This can be done by a judge or arbitrator if one or both of the contracting parties are from countries participating CISG. Even more that, if the law chosen by the parties to refer to the contracting states of the CISG, CISG applies as the law chosen automatically.

When the state of one of the parties or both of the contracting parties is not as participants in the CISG, then the judge or arbitrator using the rules of IPL to determine the law applicable to the contract. The method of determining the law applicable is traditionally done by basing on an objective approach and approach relationships/interests.

Basing on this approach, the determination is based on objective factors, among others : a place made an agreement, the execution of the agreement, the citizenship of the parties, domicile of the parties and the position of the forum as well as the relationships of these factors. The judge or arbitrator that the law seeks to combine the linkage objective points. Actually, the points of linkage of this objective will of the parties is also contained in it, but will not directly affect the determination of the law applicable.

Some doctrine creating in approaches of objective, relation/interest and subjective in development of choice of law are doctrine of "*lex loci contractus"*, "*lex loci solutionis"*, *"proper law of the contract"*, "*center of gravity*", "*vested rights*", "*the most characteristic connection to the contract*" and "*the governmental interest analysis"*.[32] Determining the law applicable based on such doctrines showed that **inefficiency**, **uncertainty**, **unpredictability** and **complexity** are conditions that generally accompanies the choice of law using conventional means.

Although the parties have determined choice of law in their contract, as long as the law chosen is not reflect the international character, then in principle the law chosen not provide

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[32] Analyzing detailed on choice of law doctrines can be read in Taufiqurrahman "Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan The United Nations Convention on Contracts for the International Sale of Goods 1980 (Character Choice of La , Study on the Scope of *Application of the United Nations Convention on Contracts for the International Sale of Goods 1980)*", PT. Bayumedia, Surabaya, 2010. *See* Sukarmi, 2005. "Tanggung Jawab Pelaku Usaha atas Kerugian Konsumen yang Disebabkan oleh Perjanjian Baku (Standard Contract dalam Transaksi Elektronik (The Business actors Liability to the Consumer's Injury Caused by Standard Contract on Electronic Transaction)", *Disertasi*, Program Pascasarjana Universitas Padjajaran, Bandung. *See* also "Choice of Law" at <http://en.wikipedia.org/wiki/Choice_of_law>

optimal benefit for either part. Moreover, in determining the law applicable using an objective approach and the relationship or interest, the above conditions increasingly faced by the parties. The conditions are thus considered to be less in tune with the demands and needs of the business.

The condition above reinforce the truth of the substantive choice of law analysis. As the classification of the choice of law made by Stanley E. Cox, who split into three models the choice of law, namely the unilateral choice of law, multilateral choice of law and substantive choice of law, unilateral choice of law and multilateral choice of law highlight aspects of sovereignty not touching side of justice. As adherents of the view choice of substantive law, substantially, the ones selected to be applied in the settlement of international disputes faced not reflect a sense of justice. Although the substance of the law relating to international trade transactions, but the orientation of its formation solely to meet national interests.

Choosing for the national law as the law applicable in international dispute resolution, both on the basis of a choice of law clause and on the basis of application the IPL rules using an objective approach and relationship / interests approach, principally the existence of the law chosen is strange to one side or even both sides. The assurance given by a subjective approach to the choice of law has not been touched in an optimal sense of justice between the parties.

Similarly, for the judge / arbitrator, the certainty of the law chosen by the parties itself don't provide easy of implementation. They have to learn at first because the substance of the law chosen is foreign to them. The difficulties encountered by the judge / arbitrator is even greater if the choice of law approach employed is an objective approach or approaches of interest. That is, the parties do not specify a choice of law explicitly in their contract. The judge or arbitrator have a difficulty in determining the substance of the law chosen. They do not have the certainty of the law applicable and can not predict the rights and obligations that should be borne because he did not know about the law at all.

As method of determining the law applicable in the conventional procedural, CISG also accommodate the express choice of law, the silent choice of law and no choice of law. Three choice of procedural law existing actually does not have a significant impact on the existence of the CISG as the law applicable. Even the express choice of law recognized in the CISG as contained in Article 6 of the CISG, but substances contained in the firm 's choice of law differ from one another .

According to the rules of IPL, when the parties to a contract to choose the designated state law (A) as the law applicable to contracts made, then the domestic law of State A is exactly what will be used by the judge or arbitrator to decide upon on a dispute between the parties. Unlike the CISG, although the parties have chosen the law of designated State as the law applicable to the contract made, it does not mean that judge or arbitrator will automatically enact a domestic law of the State to decide disputes that occur between them. Moreover, the country where the legal system is designated as the law applicable have ratified or acceded to CISG or the contracting states of CISG, the judge / arbitrator will actually enforce the CISG. This is in accordance with the provisions contained in Article 1 paragraph (1) (b) jo. Article 7 of CISG.

In addition, although CISG accommodates principle of party autonomy as contained in the IPL rules, but between them contains a somewhat different meaning. Differences substances contained in this principle due to the different approaches used.

In general, the approach used in the application of the principle of party autonomy is based on the rules of the IPL is a "*opting-in*", while the approach to be accommodated in the CISG is a "*opting -out*". If the approach of "*opting-in* " the party seeking to attach themselves to the CISG should formulate his will expressly mentioned in the contract (clause choice of law, in contrast with the approach of " opting -out " of the parties that are not expressly stated not to be bound by the CISG are deemed to be willing to bind themselves to the CISG.

Therefore, by opting-in approach, judge or arbitrator bound by domestic law of State A in his contract if the parties expressly choose the law of Country A as the law governing their contract. Instead, based on the approach of opting-out, Judge or Arbiter automatically enforces the CISG as the law applicable to the settlement of a dispute between the parties unless they are expressly stated in the contract rejection or exclusion into force of the CISG .

Although the parties to the contract have chosen the national laws of Country A, does not mean the domestic law of State A, which is valid for that State is the State Parties to the Convention. According to Article 1 paragraph (1) (a) of CISG, the law applicable is the CISG. Provisions as contained in Article 1 paragraph (1) (a) of CISG indirectly accommodate the way the choice of law "no-choice". The parties whose different places of business of the contracting states to CISG that did not formulate explicitly in the contract is deemed to have opted CISG as the law governing the contract.

Similarly, the inferred choice recognized its existence based on the rules of the IPL does not have a significant impact on the implementation of a particular country's legal system with the introduction of the CISG. Under rules adopted by the IPL as the Hague Conference in 1986 in Article 7 paragraph (1) of the Convention on the Law Applicable to Contracts for the International Sale of Goods that contracts made must be clearly demonstrated by the terms of the contract and the relationship of the parties seen as a whole. For example , if the contract was made the parties select the jurisdiction (choice of jurisdiction) Germany , then based on the rules of the IPL is considered the parties tacitly choose German domestic law as the law applicable to the contracts they make. Therefore , the judge or arbitrator will use the German domestic law to resolve disputes that occur between them in connection with the execution of the contract. This does not apply to the CISG . Although the contract contained a choice of law secretly with the choice of jurisdiction , namely Germany , does not mean German domestic law applicable . Considering Germany is one of the countries that have ratified the Convention , it is very possible that the law applicable is the CISG .

Tabel 1 : Classification of the Choice of Law based on Approach, Doctrine and Goal to the Law Applicable

No.	Classification of Law Choice	Approach	Doctrine	Goal to the Law Applicable
1	Unilateral Choice of Law	Territorial / Sovereignty	Local Law, Vested Rights, Comity	Certainty of the validity of local/ forum law as a reflection of sovereignty
2	Multilateral Choice of Law	Objective	Lex Loci Contractus, Lex Loci Solutionis,	Certainty enactment of certain jurisdictions , Uniformity of the results of the choice of law; and Predictability of results
		Relation / Interest	Proper Law, The Most Characteristic Connection, The Most Significance Relation, Governmental Analysis	
		Subjective	Party Autonomy	

3	Substantive Choice of Law	Uniformity in Substance	The Best Substantive Law	Substantive Justice of the law applicable
4	Autonomy Choice of Law	Uniformity in Subtance and Procedure	Modificated Party Autonomy (by Opting-Out approach)	Certainty of the law applicable, Predictability of results Simplicity of the time needed to choose the law Effectiveness of the cost in determining the law applicable

Furthermore, in the case of the absence of a choice of law (no choice) by the parties that do not meet the qualifications as set forth in Article 1 paragraph (1) (a) jo. Article 10 CISG, which has a place of business (place of business) or dwelling habit (habitual residence) in the State party (contracting states), the appointment of the law made by the rules of the IPL. Conversely, if both parties or one party has its place of business in Contracting States then it automatically will apply the CISG (opting-out).

Appointment of the law based on the rules of the IPL is performed using the legal qualifications of judge or arbiter (lex forum). When the IPL based on the rules of the law of the forum pointed to the Contracting States, then automatically it can be applied CISG as the law applicable to the dispute (Article 1 paragraph (1) (b) of CISG). Conversely, if, under the rules of the IPL of the law refers to the law of the forum state is not Participants (non-contracting states), then the law applicable is the domestic law of the designated country.

It is difference with the determination of the law applicable using conventional means, determining the law applicable as accommodated in Article 1 paragraph (1) of CISG seems to be to ensure certainty, predictability, simplicity and efficiency to the parties. Substances contained CISG formulated by jurists from various countries is no longer reflect the particular country's national interests , but rather reflect the interests of all countries. The method to determine the law as accommodated in Article 1 paragraph (1) (b) of CISG imposing its substance of CISG itself as the law applicable is very responsive to meet the demands and needs of the business actors. Wherever the flow of goods movement is not expected to pose a serious problem for the party. Legal barriers which is often experienced by business actors in international commercial transaction due to the diversity of national laws that apply at least be minimized .

D. CONCLUSION

Based on the above analysis, it can be concluded that choice of law by the parties in international e-commerce contract has a significance both for the parties and the judge/arbitrator, namely there will be a guarantee of the legal certainty of the law applicable to the contract in dispute resolution. In addition, determining the law applicable as stipulated in Article 1 of CISG relevant to be applied to the dispute resolution of the international e-commerce in case there is no clause of law choice in the contract.

It is recommended to the legislative that the substance as stipulated in Article 1 of CISG can be used as a reference in a harmonization of International Commercial Law in ASEAN, especially in determining the law applicable to the dispute resolution of international e-commerce.

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