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APPLYING THE NEW LEX MERCATORIA BY OPTING-OUT APPROACH IN SETTLEMENT OF INTERNATIONAL COMMERCIAL CONTRACT DISPUTES*

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ABSTRACT

The problem that must be solved at first in international commercial contract dispute settlement is the determination of applicable law. This problem is not easy to be solved in the absence of a choice of law clause. Generally, judges or arbitrators attempt to use conventional methods determination that ultimately designate national law from either party. This conventional method certainly creates a sense of injustice for one of the parties whose national law is not embarrassed. From the condition above, the existence of an international law regime (the New Lex Mercatoria made by International Organizations operating in the field of International Commercial Law) as well as an approach that enforces the law regime is urgently needed in international trade traffic. The purpose of this study was to determine the importance of using an opting-out approach to enforce the New Lex Mercatoria in the resolution of commercial disputes encountered. The research method used is normative legal research method with the statute and conceptual approach. The results show that the "opting-out" approach further expands the potential of the New Lex Mercatoria in the settlement of international commercial contract disputes that ultimately leads to the harmonization of international commercial law.

Keywords: The New Lex Mercatoria; Opting-Out; Disputes; International Commercial Contract.

I. INTRODUCTION

As a legal relationship that occurs in general, eventhough formulation the contract based on good faith of the parties, emergence of disputes in international commercial transactions cannot be avoided.[1] One of the causes is the diversity of laws that apply in international commercial transactions. This can be understood because every country with its sovereignty seeks to make legal rules in accordance with ideology, culture, economics and politics which are based on their respective national interests which differ from each other.

Unlike the settlement of disputes that are local or national, international dispute resolution is more complicated, therefore it demands for an arbitrator or judge to be more careful, and patient in resolving the dispute. This is because there are at least 2 (two) legal systems related to the transactions carried out, namely the legal system of the seller and the legal system of the buyer.

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[1] "Good faith" is a term used in contract law, related to the "fair treatment". In Black's legal culture, the definition of good faith states "A mental state based on: 1. Integrity in the mind or purpose; 2. Commitment to another; 3. Compliance with the standard commercial practices of fair dealing in a particular business or 4. Lack of fraud and education or education contrary to conscience". It has two general and independent meanings, namely "fairness in legal practice", which in contract based on trust and "misconceptions and negligence", which are protected as rights. Hereinafter read Jalal Soltan Ahmadi, et.al., "The Rules of Efficient Economics in Interpretation of Inconclusive (Incomplete) Contract", Islamic Azad University, Zanjanc Branch, Private Law Department, Zanjan, Iran in *Astra Salvansis*, Review of History and Culture, Year VI, Supplement no. 1, 2018, p.275-288

Before touching the substance aspect of the dispute, an arbitrator or judge must solve the problem of what law will be applied to resolve the dispute at first. To solve this problem, in general, the arbitrator or judge will see whether there is a choice of law clause in the contract that was made.

If in the contract there is a choice of law clause, the arbitrator or judge will use the law chosen by the parties to resolve the dispute between them. On the contrary, if the contract is made there is no choice of law clause, then the arbitrator or judge will use the rules of Private International Law (PIL). Even if in an international commercial contract there is a choice of law clause, it does not mean that an arbitrator or judge is easier to resolve the dispute. This is very likely to occur if the law chosen by the parties is a law that is not known before by the arbitrator or judge. To be able to decide fairly for the parties, of course, the arbitrator or judge needs more time to study the substance of the law chosen by the parties that is totally foreign to him.

The purpose of this study was to determine the importance of using an opting-out approach to enforce the New Lex Mercatoria (NLM) in the resolution of commercial disputes encountered. The type of legal research used in this study is normative legal research.

This type of research will focus studies on norms relating to international commercial contracts to get answers to legal issues raised. While the approach used is a normative approach and conceptual approach. The normative approach is carried out by observing the norms in the convention that have relevance to legal issues about an "opting-out" approach in resolving international commercial contract disputes. Furthermore, the conceptual approach is carried out by examining concepts related to the determination of laws that apply to international commercial contracts.

II. DISCUSSION AND RESULTS

Determining to the Applicabel Law

In connection with the determination of the applicable law in international commercial transactions, Stanley E. Cox. introduced 3 (three) approaches or theories in determining to the applicable law, namely (1) unilateral law choice; (2) multilateral law choice; and (3) substantive law choice.[2]

The first approach in determining to the applicable law is the unilateral law choice (ULC). This theory emphasizes aspect of sovereignty as the only source of legitimacy for any decision on court issues.[3] In this context, the forum justice that handles disputes usually places itself as a domestic court, not as an international court. As a domestic court, this does not mean that the forum justice simply ignores the international aspects of the disputes handled. Forum justice always recognizes that the source of its power and authority to decide disputes depends solely on facts that underlie cases that

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[2] Stanley E. Cox. 2001. "Commentary: Substantive, Multilateral and Unilateral", *37 Willamette Law Review 171*, download dari LexisNexis ™ Academic – Document dated Januari 1, 2007. A description of the theories in determining to the applicable law in international commercial contract is used as a knife of the analysis of this article 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. Also see Taufiqurrahman, "Determining the Law Appliacble to the Dispute Resolution of the International E-Commerce", *Proceeding* of International Conference on International Conference on Electronic Commerce Law "E-Commerce Law in Asia: Opportinities and Challenges", Faculty of Law of Brawijaya University, 18-19 November 2014, p.28-47

[3] Some PIL scholars who can be grouped into the Unilateral Law Choice followers or better known as Unilateralists are Ulrich Huber, Brainerd Currie, Albert Ehrenzweig, Joseph Story, Walter Wheeler Cook, J.H. Beale and Dicey. Their views focus on the scope of the application of particular rules. Faced with IPL disputes, the forum of law requires simply whether forum law can be applied. If the court on the basis of its analysis of particular rules and underlying objectives concludes that the forum law is fully applicable to the disputes faced, then the law of the forum is enforced.

affect the interests of its own sovereignty. The only law that can be applied is the law of the forum *(lex forum)*. Therefore, the forum should not handle a case unless the relations related to litigation will make the application of forum law maintained.

Based on the description above, it appears that the certainty of law in the settlement of international disputes is not owned by the parties to the contract. Certainty is only owned by the court. The court will enforce forum law against the disputes faced. The application of this forum law is an expression of the sovereignty of a country. The emergence of forum shopping in international dispute resolution cannot be avoided. The Parties, especially the Plaintiffs, will endeavor to find forums that can accommodate their interests in resolving the disputes faced.

The second approach in determining to to the contract is the multilateral law choice (MLC). Based on this theory that bearing as respond for the weakness in the ULC, the judge seeks to balance the sovereignty of all sovereignty that has an interest in finding the proposed policy through certain litigation. The existence of a court that adjudicates the PIL dispute is not a domestic court and also is not a pure international court. The multilateral conflict court gains its power and authority from several sovereignty that has policies that seek to balance and improve. He is one of those sovereignty. The idea introduced by this law choice is the idea of sharing sovereignty.

According to the MLC, the court resolves among competing sovereignty. This assumes that special legal instruments (in this case PIL) can be developed through observing all the sovereignty concerned and therefore treating all sovereignty fairly. The role of the multilateral court is primarily a peace maker or arbitrator.

Friedrich Carl von Savigny, known as Father of the Multilateralist, explained that the aim of multilateralism analysis is *"discovering for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat)"*.[4] It is different with Unilateralism stopping at the discovery that forum law applies, Multilateralism requires the development of whether a dispute relationship is closer to other jurisdictions, and a choice must be made between two or more of the jurisdiction selecting.[5]

The aim of the multilateralism approach is uniformity and predictability of results. In this context, regarding the way in which the goals of uniformity and predictability are achieved, there are 3 approaches used, namely the objective approach, the relationship approach and the subjective approach.[6]

The objective approach in determining the applicable law is by linking contracts with objective conditions, especially territorial. The approach taken by the arbitrator or judge using this objective linking point is referred to as an "objective approach". Objective conditions that can be used as points of connection in determining the applicable law include the place where the contract is made and implemented. Actually, in these objective relations points the will of the parties is contained in it, but the will does not directly influence the determination of the applicable law by the arbitrator or judge. Some doctrines in PIL that can be grouped in this theory are *"lex loci contractus"* doctrine and *"lex loci solutionis"* doctrine.

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

[5] *Ibid*. Cited from David F Cavers, A Critique of the Choice of Law Problem, *47 Harv. L. Rev*. 1933, p. 173-177

[6] Taufiqurrahman, "The Significance of Accession to the United Nations Convention on Contracts for the International Sale of Goods 1980 for Indonesia", Juridical Tribune, Volume 2, Issue 2, December 2012, p.56-73

The doctrine of *"lex loci contractus"* is the oldest objective approach in determining the applicable law is related to where the contract is made (doctrine of *lex loci contractus*). Based on this doctrine, the arbitrator or judge in determining the applicable law applies the law of the place where the contract was made.[7] This approach is suitable in a period where people are still used to closing contracts in certain places or meeting rooms.

In contrast to doctrine of *"lex loci contractus"*, in doctrine of *"lex loci solutionis"*, determining the applicable law is based on the place where the contract is implemented. [8] This doctrine created in along with developments in the field of Communication Technology, where the parties transacting through means of communication in the form of telex, telegram and facsimile are no longer dealing face to face, it will be difficult to determine where the contract is made.

Furthermore, in the 19th century, British judges in determining the applicable law developed a "relationship approach", namely by linking the "proper law of the contract" contract. This doctrine is the legal system by pointing to the law chosen by the parties in the contract that is made or which has the closest and most real relationship with the transaction made.

An doctrine similar to "the Proper Law of the Contract" is "the Center of Gravity" doctrine. Based on this doctrine, the applicable law is the law of the legal system having the closet and the most real connection to the contract. Efforts are made to find factors in a contract that show the most tangible linkages with a particular legal system.

A rational relationship approach in determining the applicable law is an approach that emphasizes the most characteristic relationship with the contract, namely "the Most Characteristic Connection to the Contract" doctrine. Based on this doctrine, the determination of the law governing the contract is based on the peculiarity (character) of the contract made. The law chosen is the law of the country or place that has the most typical relationship with the contract.

Another linkage approach is the doctrine developed by Brainned Currie based on governmental interest analysis. Based on this doctrine, the determination of the law chosen is the law of the country whose interests that contain general policy are closely related to the legal principles of the subject matter at hand.

The application of the various approaches above, namely the objective approach and the relationship approach, actually can direct the arbitrator or judge to determine the applicable law in resolving international commercial disputes faced. However, these approaches cannot factually guarantee legal certainty for the parties to the contract. As a result, the parties cannot yet optimally estimate the legal risks that will arise from an agreed international commercial contract.

Responding to the need for legal certainty in determining the applicable law, a "subjective approach" emerged in its development. With this approach, the arbitrator or judge considers the autonomous will of the parties actualized in the legal choice clause. Based on this approach, the law that applies to contracts is the law chosen by the parties.

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[7] The *"lex loci contractus"* doctrine was adopted in the Indonesian Law system, namely in Article 18 *Algemeene Bepalingen Van Wetgeving voor Indonesie* (General Provisions on Legislation for Indonesia / *Afgekondigd bij Publicatie van* 30 April 1847, S. No.23). This article reads in full: "*De vorm van elke handeling wordt with the order naar de wettten van het land of deplaats, alwaar die handeling is verrigt* (The form of each act is determined by the law of the country or place, where it has been committed)".

[8] This approach was actually developed first by Friedrich Carl von Savigny. In his view, the essence of a contract is implementation. Therefore, this place of performance can be seen as a "sitz" of a contract and the law that controls this place is the law that controls the contract. Next read W. Sumampouw, op.cit., p. 15 quoted from Friderich Carl von Svigny. 1849. System des heutigen romischen Rechts, VIII, Nachdruck Darmstadt

The autonomous will of the parties is the main consideration in determining the applicable law. As an actualization of the freedom owned, the parties to the contract can manifest it in the form of freedom to determine the applicable law to regulate the contract made. The subjective approach based on the principle of party autonomy was originally introduced by Dumoulin. [9]

Based on the principle of Party Autonomy, the contracting parties have the freedom to choose the law that will be used to regulate their legal relations. Francis A. Gabor stated that contracting parties have the freedom to choose substantive laws from certain national legal systems to overcome the gap. In addition, the principle of Party Autonomy also provides the best safeguard efforts to protect the expectations of the parties and create a form of legal certainty that is universally recognized in transactions that cross national borders.[10]

The principle of Party Autonomy which gives freedom to choose the law that will regulate the contract in its development is recognized in all legal systems. This was confirmed by Petar Sarcevic who stated: "It could be said that, in all legal systems, it is a well-established principle that the parties are free, apart from certain limitations, to choose the law which will govern their contract".[11] The same view was expressed by Lando in 1970 who wrote that "party autonomy is widely accepted by the countries of the world that it belongs to the common core of the legal system. Differences only exist about the limits of freedom the parties".[12]

The acceptance of this subjective approach in Indonesian legislation formally was only accommodated in 1999 through the Republic of Indonesia Act No. 30 of 1999 concerning Arbitration and Alternative Dispute Settlement, State Gazette of Republic Indonesia Year 1999 No.138 – Additional, State Gazette of Republic Indonesia Year No.3872. Article 5 paragraph (1) of the Act which came into force on 12 August 1999 reflects a subjective approach in determining applicable law. The provision reads in full as follows: "*Disputes that can be resolved through arbitration are only disputes in the field of trade and regarding rights which according to law and legislation are fully controlled by the disputing party*".

The formulation as stated in Article 5 paragraph (1) of Law No. 30 of 1999 indirectly ended the debate about whether Party Autonomy was recognized or not by in the Indonesian legal system. The above formula shows that the Indonesian legal system recognizes and accepts the existence of legal choices by the parties. The parties have the freedom to determine the laws that apply to contracts that they make. The freedom held by the parties is based on the principle of autonomy party.

The existence of the MLC, either the objective approach, the relationship approach or the subjective approach, in determining the law applicable to international commercial contracts is still existing. However, MLC is considered to still not provide optimal legal certainty for the parties. Although in the subjective approach, the parties' will has been accommodated to determine the applicable law for the contract made, but the MLC cannot satisfy all parties. When the parties have

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[9] Sudargo Gautama, Hukum Perdata Internasional Indonesia (*Private International Law of Indonesia)*, Volume II Part 4 5th Book, Alumni, Bandung, 1998, p.24

[10] Francis A. Gabor, "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, 1986, p.3

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

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

agreed that the law of one of the parties agreed upon as the law governs, then clearly the loss is on the other side. It means that the MLC does not provide a guarantee of certainty that contains justice for all parties.

The third approach in determining to to the contract is the substantive law choice (SLC). Unlike the ULC or the MLC which relies more on the application of domestic law of a particular sovereign state, the SLC attempts to free itself from the attachment of sovereignty a country at all. This theory basically assumes that all jurisdictions should impose the best substantive law on international fact patterns or between the same countries. Focusing on the contents of the best law means that a court should not be allowed to apply its own law.

It means that this theory adopted the principle of justice.[13] The content of law applied to the contract is not manisfestation from the national law of the parties. It reflected an international character. In addition, the court can potentially implement better patterns of facts between countries. The SLC stops the court from applying the law of the limitations and sovereignty in which the court is located. Stanley explicitly stated: "A substantive choice of law approach to borders and sovereignty".

1. Party Autonomy and Freedom of Contract

As an actualization of freedom owned by parties in contract, in addition to the freedom to choose laws based on the principle of Autonomy Party, the parties also have freedom in other forms, namely the freedom to determine their own form, type and content of the contract. Like the principle of Autonomy of the Parties, this latter freedom or better known as the principle of freedom of contract. This principle is also widely accepted by almost all legal systems in the world.

Given the beginning of its development, the principle of freedom of contract actually offers fresh air in business and trade activities. [14] This principle frontally rejects any form of intervention or interference from the authorities over the business and trade activities they carry out. The acquisition of goods is no longer based on their status in the community, but is based on the quality of individuals in expressing their interests by entering into contracts.

The community has complete freedom in conducting business and trade activities, especially in making contracts. There are no external forces (mainly from kings) that affect their business and trade activities. This principle thrives along with the strengthening of the understanding of natural law which states that man is guided by a principle that he is part of nature as a rational and intelligent creature, he acts according to his desires and movements his heart (impulses). [15]

The principle of freedom of contract is born in the realm of liberalism which glorifies individual freedom. This principle gets a place in society because it is in harmony and at the same time as a

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[13] The law has the most important role as a means to strengthen the moral values in society. It is the law that must be inherent in the principles of justice and good. Separation of the law from morality may lead to a significant reduction in the regulatory impact of the law to public relations. The principle of justice should be applied to the basic structure of society through the exercise of a sense of justice in citizens. And the senses of justice in citizens are formed also by eliminating the distortions of legislation. Furthermore, read S.V. Putapenko, et.al., "The Moral Foundations of Legal liability (Criminal, Administartive, Tort)", in *Astra Salvansis*, Review of History and Culture, Year VI, Supplement no. 2, 2017, p.825-839

[14] The principle of freedom of contract is a principle that was born in the free will theory in the nineteenth century. This classical contract law theory is strongly influenced by concepts derived from liberal philosophy, political understanding and economics. The laizzes faire economic principle which is at the heart of nineteenth-century economic thought requires that the parties who make contracts have full freedom in contractual relations, with a minimum of intervention from the state. The revolutionary political theory that developed at that time looked at the state as an institution that was outside a unity of individual will. According to this theory, law is a command or product of a will. If someone is bound to a contract, because he really wants the attachment.

[15] O. Lando, *loc.cit.*

manifestation of human rights. In this context, Hugo Grotius (1583-1645) as one of the foremost of the natural law stating that the right to enter into an agreement is one of human rights.[16]

A similar view was expressed by Van Apeldoorn which stated that freedom of contract is a consequence of the recognition of the existence of property rights and ownership rights itself is the main realization of individual freedom.[17] This understanding reached its peak in the beginning of the French revolution which carried the slogan "*liberte, egalite et fraternite*" (freedom, equality and brotherhood).

The birth of this principle is in line with the birth of classical economics that glorifies laissez faire or free competition.[18] Adam Smith as one of the proponents of this understanding states "that each man when seeking selfish advantage is led by an invisible hand to promote an end part of his intention, so that individual selfishness is the best means of fostering social welfare."[19]

Based on the description above, it can be understood that the existence of party autonomy cannot be released from freedom of contract. Both Party Autonomy and Freedom of Contract, have the same level, namely free will owned by each individual as a legal subject.

With the free will of each individual, the parties can determine their own legal system from a particular country chosen as the law governing the international contract that is made and determine the substance of the freedom of contract.[20] In connection with the existence of the principle of freedom of contract and party autonomy, among legal scholars are divided into 2 (two) large groups. The first group views that there is no significant difference between the principles of Freedom of Contract and the principle of Party Autonomy. Between freedom of contract with party autonomy cannot be separated from one another. According to this opinion, Party Autonomy is a manifestation of Contracting Freedom. In other words, the freedom held by the parties in determining the law applicable to the contract is based on the principle of party autonomy which is an expression of freedom of contract. One of the scholars included in this group is David McClean. He explicitly stated that the principle of party autonomy is an PIL aspect of freedom of contract.[21]

The principle of freedom of contract to give birth to two postulates, namely the existence of contractual engagements is permissible and every contractual engagement made in a free condition is true. These two postulates give rise to the maxim "*volenti non fit inura*" which means that if someone knows the dangers that exist and voluntarily enters the danger, he is considered to have estimated the risk that arises and cannot ask for compensation if the risk arises.[22]

This maxim paved the way to the abuse of the principle of freedom of contract by parties who have a strong position in the transaction. By hiding behind the principle of freedom of contract or autonomy of the parties, the party who has a strong position in the transaction can force the contents of the contract or law selected in the contract and certain conditions that benefit him must be met by the other party in a contract. If the weak party agrees, he cannot claim compensation because of the risk he experienced as long as the strong party fulfills its obligations as stated in the contract.

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[16] Ibid., p.20 quoted from Lee, *The Jurisprudence of Holland*, p.295
[17] P van Dijk, at. al. 1995. *Van Apeldoorn's Inleiding tot de Studie van het Nederlandse Recht,* W.E.J., Tjeenk-Willink, Zwolleh.508
[18] *Ibid*.
[19] Adam Smith, *The Wealth of Nations*, New York, The Modern Library, 1965, p.vii
[20] Hague Conference on Private International Law (HCCH) in its latest work entitled "Principles on Choice of Law in International Commercial Contracts" uses the term "Freedom of Choice" which has the same meaning as "Party Autonomy". This work was only approved on March 19, 2015 and can be accessed at <https://assets.hcch.net/does/sda3ed47-f54d-4c43-aaef-5eafc7cif2ai.pdf>
[21] David McClean, *Morris: The Conflict of Laws*, Fifth Edition, Sweet & Maxwell Ltd., London, 2000, p.21
[22] Henry Campbell Black, *Black's Law Dictionary*, Abriged Fifth Edition, West Publishing Company, St. Minnesota, 1983, p.812

Based on this phenomenon, the understanding of the philosophical foundation of freedom of contract and the autonomy of the parties is very important in directing so that these principles are not used to exploit weaker parties, namely *"exploitation de" lhomme par l "homme"*.

Contracting parties do not have freedom as freely as possible in contracting. The free will of each individual coexists with free will from a group of individuals. Individual free will that reflects basic human rights is always in tandem with universal will. This means that between rights and obligations is always present in alignment.

Abuse of the principle of freedom of contract is essentially a deviation from the essence of freedom of contract itself. The rights held are upheld in such a way without regard to the obligations that should be considered in carrying out their rights. This means that in principle of freedom of contract contains an understanding that one party values the existence of another, and vice versa.

Likewise in the party autonomy, the freedom that is owned by the parties in choosing the applicable law is not without limits. Some limitations in determining to the applicable law include mandatory rules, public order and compelling rules from other countries.

The freedom of individual autonomy has really put in place the formation of the ex nihilo contract, namely the contract as a manifestation of the free will of the parties making the contract. The exclusive contract is the free will of the parties making the contract. Through the postulate that the contract as a whole creates new obligations and such obligations exclusively is determined by the will of the parties, the freedom of contract has severed the relationship between customs and contractual obligations.

According to this classical theory, the parties that make this contract are equal, the parties also have the ability to determine the fair bargain between them. This view is in line with the idea that the contract is a product made by the parties (with the freedom to determine the contents of the contract and choose the law that applies to the contract) and also in accordance with the spirit of the free market and free competition.

Free will which emphasizes more on the will or intention, the parties as the basis for the emergence of obligations for the parties to the contract. The emphasis is on individual will, contractual obligations can be created by a communion will, a joint action. The choice of law by these parties can be likened to glasses. If glasses with green lenses are used, everything will appear as green. Likewise, if the parties to an international business contract choose the law of a particular country, the contract will be viewed in terms of legal perspective and controlled by the law of the country chosen. The law chosen by the parties is decisive in terms of assessing the validity of an international contract. The law that is chosen also determines the terms and when the default and what sanctions can be imposed on one of the parties in the event of a default. In this context, it is only natural that the British Lawyers always advise their clients to always include legal choice clauses in their contracts and choose British law as a "governing law" on contracts made with foreign partners by saying "If you make contracts with traders overseas, do not forget to include a clause that English law will apply to this contract".[23]

2. The New Lex Mercatoria and the Opting-Out Approach

Determination of the applicable law both carried out by the arbitrator or judge or by the parties with various approaches as previously explained will ultimately determine the application of the substance of the national law of certain countries. For example, if the parties in the choice of law clause

[23] Sudargo Gautama, *Private International Law of Indonesia*, Volume III, Part 2, 8th Book, Alumni, Bandung, 2002, p.25

expressly state that the contract this shall be governed and interpreted by the law of Indonesia. then the legal substance to be applied in resolving disputes between them is Indonesian law.

As a reflection of the principle of sovereignty owned by a nation state, there is a diversity of local laws that govern a particular legal relationship. This is very reasonable because the law established is oriented to the national interests of the country concerned and the national interests of other countries.

The legal diversity that governs as described above cannot give satisfaction to all parties. When the parties have agreed that the law of one of the parties agreed upon as the law governs, then clearly the loss is on the other side. In other words, based on the approach taken in determining the applicable law, it cannot provide justice for all parties. This is because substantively, the law that must be applied is nothing more than a law of national character, which only represents the national interests of the country concerned.

The phenomena as outlined earlier in turn encourage business actors, lawyers and practitioners of international commercial law to think of a method and substance for determining the applicable law in international commercial transactions that can meet the demands and needs of the business world. Whenever and wherever international commercial transactions are carried out, it is expected not to cause serious problems for the parties. Legal barriers which have often been experienced by business actors in international commercial transactions because of the variety of national laws that apply at least can be minimized. The presence of a legal instrument in international commercial transactions that is universally applicable for business actors is a necessity that cannot be avoided. Moreover, in the current era of economic globalization, the presence of international commercial law instruments that are uniformly applicable throughout the world is a necessity.

To realize this idealistic dream, the approach used is an autonomous approach. In this approach, the focus of attention in regulating international commercial transactions is not solely on procedural aspects that impose a particular legal regime, but also simultaneously on the substantive aspects of the legal regime in force. In this perspective, the source of regulation of international commercial law does not depart from the national interests of a particular country, but departs from a universal common interest in international commercial traffic, namely international customs, international legislation and arbitral awards. Therefore, substantively, the content of the international commercial law regime that it produces is no longer a national character, but an international character. Clive M. Schmitthoff from the United Kingdom calls this international legal regime the "*new lex mercatoria*" or the "*new lex merchant*".[24] One of the works of international organizations in the field of international commercial law that can be classified as the NLM is the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The NLM is an autonomous legal order and the law of the *societas mercatorium*.[25] This regime can be imposed by arbitrators or judges as applicable law in the settlement of international commercial disputes. The legal regime with international character has only optimally meant for the parties if the law is factually designated as the applicable law in the settlement of international commercial disputes. In this perspective, if the determination of the applicable law only relies on conventional approaches that have been valid, namely the objective approach and subjective approach, without any modification at all, then the international commercial law regime with international character only exists in the world of mere dreams. Its form exists, but the legal regime is functionally never enforced in reality. This is

[24] Ahmet Cemill Yildirim, *Solid, Liquid and Gas Forms of the New Lex Mercatoria: How Do They Operate in Practice*, available at <cisgw3.law.pace.edu/cisg/biblio/Yildrim2.pdf>, accessed on August 5, 2018, p.10
[25] *Ibid*

very likely to occur because the conventional approach only refers to the application of international commercial law with a national character from one of the parties contracting or even designating foreign national law from both parties. Therefore, with an autonomous approach, in the substance of the established international commercial law regime, procedural aspects are arranged in a way that ultimately imposes its own substantive aspects.

The creativity carried out by the NLM universalists or designers to ensure the effectiveness of the international commercial law regime is carried out by modifying the objective approach and subjective approach in determining the applicable law. Modification of the objective approach was carried out by limiting the space for the enactment of national character laws from the parties to the contract by expanding the space for the enforcement of the international character legal regime. The applicable space limitation and expansion is carried out by the regulation that the international character legal regime applies to commercial transactions carried out by parties who have a place of business in different countries if the country is a country that participates in the legal regime or if the rules of the PIL designates convention countries.

This means that if the parties to the transaction have a place of business in a different country and one of the countries where the different place of business is one of the legal regime convention countries or the rules of the PIL designate the applicability of the convention country, then the international commercial law regime automatically applies. This modification of the procedural approach in the CISG is strictly regulated in Article 1 paragraph (1) of the CISG on "sphere of application and general provisions" which states that 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 (b)when the rules of private international law lead to the application of the law of a Contracting State.[26]

Based on the above provisions, which determines the entry into force of this Convention (CISG) is not a citizen of the parties conducting the transaction or the civil or trade nature of the parties, but the place of business. The place of business must be in a different country, where the countries are participating countries or if the rules of international civil law cause the law to apply to a participating State.

The formulation as stated in article 1 paragraph (1) of this Convention shows that the CISG applies itself to regulate contracts for the sale of international goods. In the context of determining the applicable law, this provision contains two aspects that are closely related to one another, namely the procedural aspects and substantial aspects in determining the applicable law.

The procedural aspect of determining the applicable law is related to the provisions in the next paragraph which limits international character only to the place of business of the parties. While the substantial aspect of law choice is related to the application of this instrument to contracts for the sale of international goods for parties from convention participating countries. In other words, this legal instrument can act as a substantial law governing international commercial contracts made.

Based on the provisions in Article 1 paragraph (1) (a) above, the CISG automatically applies to the contract of sale of goods carried out by and between the parties who own a place of business in different countries, namely when those countries are contracting parties. In contrast to the procedures

[26] This provision is alike with Article 1 of Convention on the Law Applicable to Contracts for the International Sale of Goods concluded by the Hague Conference on Private International Law (HCCH). The next, read the HCCH, "*Convention on the Law Applicable to Contracts for the International Sale of Goods*", available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=61>, accessed on August 5, 2018

in determining of the applicable law conventionally, the determination of the applicable law introduced by the CISG refers to the enactment of the substantive rules contained in the CISG itself.

Modification of the objective approach that extends the application of the CISG is further strengthened by the modification of the subjective approach. This modification is strictly regulated in Article 6 of the CISG which states: "The Parties may include the application of this Convention or, subject to article 12, derogate from or vary the effect of any of provisions". Under this article, parties who have an "party autonomy" can abolish the validity of the CISG as applicable law. In addition, subject to article 12, parties can also deviate or change the influence of any of its provisions. The definition of "can abolish the application of the Convention" means the parties must express their refusal if they do not want to be bound by the CISG. As previously explained, the meaning of "party autonomy" in the NLM is done by an "opting-out" approach. This is closely related to the modification of the objective approach in Article 1 paragraph (1) of the CISG which extends the space for the enactment of the CISG.

Even if the parties based on the party autonomy principle have the right to free themselves from the attachment to the CISG as stated in Article 6 of the CISG, in fact they are also difficult to escape the attachment of the Convention. In the practice of international sale of goods, the parties generally do not pay attention to the existence of choice of law clause. They rarely use the rights they have to choose which state (national) law they want to apply to their contracts and also do not formally state their rejection of the CISG. In a situation like this, namely the absence of explicit mention by the parties to the contract that they make and the absence of explicit rejection of the CISG, the CISG designer based on Article 6 of the Convention considers that the parties agree to enforce the Convention as the law that applies to their contract.

The application of Article 6 of the CISG as a legal basis for interpreting that the parties actually have chosen CISG as the applicable law in international commercial transactions made because the approach used in the implementation of the autonomy party principle is an opting-out approach. In this opt-out approach, the CISG automatically applies to contracts made by the parties when the parties to the contract do not expressly reject the application of the CISG as the law governing the contract.[27]

In the discussion of Article 6, there was indeed a very fierce debate among the participating countries. Anglo-Saxon countries raise a very basic problem, namely whether the parties must expressly choose the CISG in an effort to enforce it (called an "opting-in" solution) or whether the Convention will automatically enforce it, unless the parties agree to enforce the different laws ("opting-out" solutions). In the end, the proposal for "opting-in" which requires choosing the Convention into a set of standard contract terms is rejected, as is the requirement to enter a reservation clause in the final provisions of the Convention.[28]

With the adoption of an opting-out approach in the application of Article 6 which contains the principle of party autonomy, the likelihood of the enactment of the CISG in international trade traffic is very large. Parties that do not expressly reject the entry into force of the CISG or override the validity of the CISG partially or wholly automatically binds itself to the CISG. Even the parties who in their contract explicitly choose to apply the law of a particular country which happens to be a participant country, then automatically the CISG applies. This is a logical consequence of the opting-out approach.

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[27] Peter Schlechtriem, *op. cit.*, p.22, quoted from A/Conf.97/C.1/SR.3 at 6 *et seq.* (=O.R.247) (discussion); A/Conf.97/C.2/SR.1 at 7 *et seq.* (=O.R.437); id. SR. at 2) (debates in the Second Committee)

[28] *Ibid*

Even though the parties wished and agreed to not apply the CISG, but it was not expressly stated in the contract and they agreed to choose the law from the third party which happened to be a Contracting State, then automatically the CISG applies. For example: A and B agree to enact laws from State C which are Contracting States. They actually want the law of the selected State C to be domestic law that regulates the transactions of international trade. However, because the purpose is not expressly stated in the legal choice clause, then based on the opting-out approach, it can be interpreted otherwise that they want the CISG to become effective in the transactions they do. This result will be different if the opting-in approach is applied. Based on the opting-in approach, the determination of the third party's law as the law chosen in its legal choice clause indicates that the parties are deemed to refuse to be bound or impose the CISG and impose domestic law of the relevant State regulating international trade transactions.

The proposal from the Canadian and Belgian delegations who hoped that when the parties chose the national law of a particular country as the law governing the contract, what was meant was the domestic sale and purchase law of the country (the "opting-in" approach) rejected by some participants of the Convention. In connection with the proposal, the French delegation stated that in the event of doubt, the choice of national law by the parties meant that the Convention would apply when the State had adopted the CISG. This of course does not apply if the parties explicitly have chosen the law of sale and purchase from certain countries.

National law on international commercial contracts from one party or party III applies only as a law governing the parties' contracts when the parties to the contract explicitly choose the law of the country concerned or by the appointment of the rules of the Private International Law which designates the law of the state concerned and the country concerned has made a declaration when ratifying, accepting or acceding to the CISG not to be bound by Article 1 paragraph (1) (b) of the Convention. The exceptions made by this state are limited in Article 95 of the CISG which expressly states: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention ". Based on this provision, the country which has declared not to be bound by Article 1 paragraph (1) (b) of the Convention, if the legal system is referred to as the law governing of the CISG based on forum PIL rules, then the domestic law of the country concerned specifically regulating international commercial transactions.[29]

The substantive law chosen as the law governing contracts is not carried out by the judge / arbitrator through or based on the rules of the PIL and also not carried out by the parties through the choice of law clause, but is carried out or determined by the provisions of the convention itself (choice of law by regulation). This shows that the CISG introduced a new approach in determining the applicable law in international commercial transactions, namely the autonomy approach or the autonomy choice of law.

Through this approach, the potential for the enactment of CISG or other international commercial contract law regimes as the NLM in international commercial traffic is increasing. In addition, the more countries that are committed to the CISG and other the NLM or at least become members of international organizations that produce works of the NLM, the greater the chances of the NLM is in the international commercialt transaction. This condition will eventually accelerate the emergence of unification and harmonization of international commercial law. Furthermore, the development of the

[29]One of countries declared not to be bound to Article 1 paragraph (1) (b) of CISG is United State of America

determination of laws that are based on doctrine, approaches and objectives of regulation in international commercial traffic can be described in brief in the table below:

Table 1: The Classification of Law Choice Based on Doctrine, Approaches, Charracter and Goals in International Commercial Transaction

Choice of Law	Approach	Charracter	Doctrine	Goal
Unilateralism (Stanley E. Cox)	Territorial / Soverignty	Local/ National	Local Law, Vested Rights, Comity	**Certainty of the validity of the forum's local law as a reflection of sovereignty**
Multilateralism (Stanley E. Cox)	Objective Relation Subjective	Local/ National	Lex Loci Contractus, Lex Loci Solutionis, Proper Law, The Most Charracteristic Connection, The Most Significance Relation, Governmental Analysis Party Autonomy	**Certainty of the validity of certain jurisdictions, uniformity of results of choice of law and predictability of results**
Substantivism (Stanley E. Cox)	Substantive	International	The Best Substantive Law	**Substantive justice of applicable law**
Autonom (CISG/The New Lex Mercatoria)	**Autonom**	**International**	**Proper Law, Party Autonomy, Opting-Out**	**Substantive justice and Certainty of applicable law, uniformity of results of choice of law and predictability of results, unification and harmonization of international commercial law**

III. CONCLUSIONS

From the previous description, it can be concluded that the opting-out approach in the implementation of Party Autonomy which are accommodated in the CISG or the NLM will in turn accelerate the realization of unification and harmonization of international commercial law. The existence of the NLM in international commercial traffic is more expected by arbitrators or judges in the settlement faced because the legal regime with international character is considered to provide more assurance of certainty and justice for the parties.

It is expected that countries that have not committed themselves to CISG and/or other the NLM, including Indonesia, to immediately bind themselves. With the participation of the state to be bound in the three legal regimes, it will indirectly provide optimal legal protection for its citizens in carrying out international commercial transactions.

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