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The significance of accession to the United Nations Convention on Contracts for the International Sale of Goods 1980 for Indonesia

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods 1980 (The Convention) is one of monumental products to respond the need practically of the business actors in international trade traffic. The Convention is not only containing substantive rules, but also containing procedures in determining the law applicable to disputes faced.

The analytical result indicates that the legal concept can be developed in Indonesia for future governing choice of law in international sales of goods transactions is by accession to the Convention. In that accession, it is recommended that Indonesia puts aside the application of Article 1 (1) (b) of the Convention does not reflect valued the appreciation of state sovereignty.

***Keywords**: Choice of Governing Law, International Character, Law Applicable.*

JEL Classification: K12

Introduction

Responding to the needs of international business in an effort to actualize the harmonization of international trade law, The United Nations Commission on International Trade Law (hereinafter abbreviated UNCITRAL)[2] issue of "*The United Nations Convention on Contracts for the International Sales of Good*" (The Convention) in 1980. The Convention is a comprehensive set of transactions of goods is international[3].

The presence of the Convention in international trade traffic created two contradictory views. Those who accept the presence of the Convention view that it will provide convenience and ease for business people to conduct international sale

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[2] UNCITRAL is the United Nations specialized agency in the field of international trade law that was formed in 1966. The agency is tasked to promote the progressive harmonization and unification of international trade law.

[3] The Convention is actually a revision and also the integration of 2 (two) previous convention ever produced by The International Institute for Unification of Private Law (UNIDROIT) in 1964, namely on: "*Uniform Law on the International Sales of Goods*" (Ulis) and "*Uniform Law on the Formation of Contracts for the International Sale of Goods*" (*Ulf*). In addition, this convention as well as an amendment to the "*Convention on the Limitation Period in the International Sale of Goods 1974*". UNIDROIT itself is an institution that aims to examine ways of harmonizing and coordinating different legal regulations of the countries or groups of different countries, with a view to improving the gradual adjustment towards a uniform civil law by this negara.Lembaga whose establishment is located in Rome sponsored by the Volken Bond prior to World War II.

of goods. This is because the Convention in addition contain the unity of procedural choice of law rules, it also contains the unity of substantive law governing international sale of goods.

In contrast to the view of the above, those who care about the issue of sovereignty of a country strongly condemned the globalization efforts of international trade law. They believe that globalization efforts and unification of international trade law is the death knell for the existence of national law or domestic law *(municipal law)*[4].

Especially for Indonesia, entry into force of the Convention that contains a unity of choice of law should get serious attention. It is based on objective conditions in which most of the countries of Indonesia export markets has ratified or acceded to the Convention.[5] Some of them are the United States, China, Australia, Germany, Netherlands and Singapore. This means that in all transactions undertaken by the international freight business from Indonesia with its trading partners from other countries for the current and the next will frequently meet with the Convention.

Based on this phenomenon, re-assessment of Indonesia's positive law governing international trade transactions is a necessity that can not be postponed. This is understandable because of the positive law of Indonesia especially those related to trade transactions, both domestically and internationally, largely a legacy of the Dutch East Indies government that has been around 164 years old. Its presence is considered to be not in accordance with the development and advancement in the field of Information Technology. Especially with the enactment of the unity of the Convention that contain choice of law rules in the field of Contracts for the International Sale of Goods (CISG), the existence of positive law in the field of CISG will be increasingly marginalized in international trade traffic.

Based on these objective conditions, legal issues focused on the issue of whether or not Indonesia committed themselves to the Convention as a national law reform efforts in the field of CISG.

Choice of Law in the Convention

Black's Law Dictionary defines **the choice of law** as a legal question of jurisdiction that should apply in a case at hand. This means the choice of law is a rule relating to the question of law which should apply in a case at hand.

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[4] Rather harsh statement put forward by Erroll P. Mendes who think the various of national legal systems as "*the worst enemy for the international merchants and traders*". See Franco Ferrari, "Uniform Application and Interest Rates Under The 1980 Vienna Sales Convention" in the Cornell International Law Journal (ed.). 1995. *Review of The Convention on Contracts for the International Sale of Goods (CISG),* Kluwer Law International, pp. 3, quoted by Errol P. Mendes. 1998. *The UN Sales Convention & Canada U.S. Transaction: Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law,* 8 JL & Com, p. 109-112.

[5] Until now, there are 72 countries that represent the diversity of political systems, ideology, culture, law, language and religion that have committed themselves to the Convention.

Prior to enactment of the Convention, the methods used to determine the law applicable to the contract *(law applicable to the contract)* based on the rules of Private International Law (PIL) with a subjective approach, objective approach and relationship approaches.

Subjective approach is done by considering the autonomous will that is in the parties which were carried out in a choice of law clause. Based on this approach, the law applicable to the contract is the law chosen by the parties.

And objective approach in determining the relationship approach applicable law will be conducted by a judge or arbitrator in the contract made the parties' choice of law does not specify whether express or tacit. With this approach, the determination of the applicable law is not based on the will of the parties, but rather objective factors, namely: the place of the treaty, the implementation of the agreement, the parties' nationality, domicile of the parties and the position of the forum and the relationships of these factors.

Objective approach of the oldest in the development of choice of law is the *Lex Loci Contractus*. Based on this approach, judges or arbitrators who examine the choice of law dispute shall enforce **the laws of the place where the contract was made** *(law of the place where the contract is made)*. Some states explicitly accommodate this approach in their PIL system include: (1) Czechoslovakia in Par. 46 No. 5 of Czechoslovakia PIL (1948) (1961), (2) Egypt in Egypt CC (1948) Article 19 paragraph 1, (3) Iran in Article 968 of Iran CC, (4) Italian in Italian Disp. Prel. Article 25, (5) Japan in Japan PIL Par.7 paragraph 2; (6) Poland in Poland PIL Article 9 nos. 1-2; (7) Thai in Thailand PIL par. 13 paragraph 1; (9) Syria in Syria CC (1949) Article 20 par. 1[6].

This principle in its development contains weaknesses along with the development and progress made in the field of Information Technology, which raises new approach *Lex Loci Solutionis*. Based on this approach, then the applicable law is the **law of the place where the contract was executed** *(law of the place where the contract is performanced)*.

This approach was actually first developed by **Carl von Savigny Friderich.** In his view, the essence of a contract is the implementation. Therefore, the implementation can be seen as a "sitz" of a contract and the law that runs this place is the law that controls the contract[7].

Countries that accommodate the *lex loci solutionis* approach in their PIL rules are: (1) Germany, (2) some states in the United States (among other things: California, Montana, North Dakota, South Dakota and Oklahoma), (3) Greece, (4) Chile in Article 15 par.1 of Chile C.C., (5) Liechtenstein in Article 17 par. 1 of Sacherenecht Liechtenstein (December 31, 1922), (6) Nicaragua in Article VI.14 of Nicaragua CC, and (7) in Article 36-37 of Treaty of Montevideo[8].

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[6] W. Sumampouw, Pilihan Hukum Sebagai Titik Pertalian Dalam Hukum Perdjandjian Internasional, *Disertasi,* Universitas Indonesia, Jakarta, 1968, p. 12

[7] *Ibidem*, p. 15, It is quoted from Carl von Friderich Savigny, *Sistem des heutigen romischen Rechts, VIII*, Nachdruck Darmstadt, 1949

[8] *Ibidem*

In the 19th century, English judges developed a new approach "*the proper law of the contract*". This approach is the legal system by pointing to the **law chosen by the parties in a contract made or which has the closest relationship and most noticeable with the transaction made.**

Doctrine similar to "*The Proper Law of the Contract*" *is* "*the Center of Gravity*". Based on this approach, then the applicable law is the **law of the place or the legal system that has the most real connection with the contract** *(law of the place / legal system having the closet and the most real connection to the contract)*. Attempts were made to discover the factors in a contract that shows the most obvious association with a particular legal system.

The approach is quite rational in the choice of law with the linkage approach, namely by considering the most characteristic relationship with the contract, which is "*the Most Characteristic Connection to the Contract*". Based on this approach, the determination of the law governing the contract based on the specificity (the character) a contract made. The chosen law is the **law of the country or place that has the most distinctive relationship with the contract.**

This doctrine suggests that all the elements in the contract note and selected in order to determine which element provides specificity (characters) on the contract made. The downside of this doctrine is difficult to determine the implementation of the act of a typical *(characteristic performance)* in a transaction that is international. **Rabel** as the originator of this approach stating that: "*But it Should always be possible to discover the most characteristic connection of an individual contract and, Certainly That of the usual types of business contracts*"[9].

Another approach is the approach to rights which have been obtained *(vested rights)*. Under this approach, the court did not impose a foreign law, but rights acquired under foreign law *(the courts never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws)*.

Last is the approach developed by **Currie Brainned** basing on the analysis of government interests *(governmental interest analysis)*. Under this approach, the determination of the chosen law is the **law of nations whose interests containing general have close links with the legal norms of the main problems faced by**.

Choice of law whether committed by the parties or by the judge / arbitrator with a variety of approaches as already described above will ultimately determine the substance of the enactment of national laws of certain countries. For example, if the parties in the choice of law clause expressly states that the contract is made shall be governed and construed by the laws of Indonesia *(Marshall this contract be governed and interpretated by the law of Indonesia)*, the substance of the law that will apply in disputes between them is the law of (material) Indonesia.

The diversity of the laws governing as described above doesn't give optimum benefits in the settlement of international disputes. Procedure performed by a judge/arbitrator to determine the applicable law convoluted and takes a

[9] Sudargo Gautama, *Hukum Perdata Internasional Indonesia*, Jilid III bagian 2, Buku VIII, Alumni, p. 32 cited in Rabel II, p. 445

relatively longer time. The parties can not be sure what the law would apply to their contra. In addition, the parties can not predict in advance *(unpredictable)* concerning the rights and obligations that should be borne by the law that will govern their transaction.

National character inherent in the choice of procedural law and choice of law is in fact substantially doesn't give optimal benefit in the implementation of the transaction and settlement of international disputes.

Phenomena such as this in turn encourages entrepreneurs, lawyers and other legal practitioners in the field of international trade devised a method and substance of legal options that can meet the demands and needs of the business. Wherever the flow of movement of goods is not expected to pose serious problems for the parties. Legal barriers that have often experienced by businesses in international trade law because of the diversity of local / national policies can at least be minimized.

Hope is ultimately realized by the receipt of the Convention in a diplomatic conference convened by the Secretary General of the United Nations (UN) took place in Vienna on 10-11 April 1980 based on UN General Assembly resolution dated December 16, 1978. The Convention aims to provide convenience to the parties that will enter into arrangements regarding the sale of international goods.

The Convention contains substantial legal options and choice of procedural law in the field of contract of sale of goods internationally. The drafters of the Convention purposely combines both the choice of law (substantive and procedural) in a single device intended to be legal CISG unification and harmonization in the field of international trade law, especially CISG, can be realized. They realize that efforts to achieve harmonization in the field of international trade law can not be achieved if only through the unification of substantive law alone without being followed by a choice of law procedural arrangements leading to imposition of a uniform substantive law is.

The Convention as the choice of substantive law indicates that the substance of it can be referred by the parties, judges or arbitrators as the laws that control or regulate the contract of international sale of goods *(proper law of the contract for the international sale of goods)*. This means that the CISG regulate about the substantive provisions of the sale.

Existence of choice in the procedural law of the Convention is expressly provided for in Article 1 of the Convention concerning "*sphere of application and general provisions*." Based on the above provisions, that determine entry into force of this Convention is not a citizen of the parties to enter into transactions or civil or commercial nature of the parties, but his place of business. The place of business must be located in different countries, where those countries are the countries the participants or if the rules of private international law led to enactment of the law of a State participant.

The formulation as set forth in Article 1 paragraph (1) This Convention indicates that it applies itself to regulate 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 aspect of choice of law and substantial aspects of the legal options.

Procedural aspects associated with the choice of law provision in the next paragraph that restrict international character is only concerned with the place of business of the parties. While the substantial aspects of the legal options associated with the enforceability of this instrument to contracts of international sale of goods for parties originating from the state convention participants. In other words, these legal instruments can serve as a substantive law governing international commercial contracts are made.

Basing the provisions of Article 1 paragraph (1) (a) the Convention, it automatically apply to contracts of sale of goods made by and between parties whose places of business in different countries, namely when such States are the States Participant. In contrast to the procedures applicable laws option conventionally during this, the choice of law which was introduced by the Convention refers to the enactment of substantive rules contained in it itself.

The Convention in addition to automatically bind to the parties that took place of business in the participating countries *(contracting states) are* different, also binds automatically to the parties that took place of business in countries not party *(non-contracting states)*. As the formula set forth in Article 1 paragraph (1) (b) the Convention, this second situation can occur when the rules of private international law led to enactment of the law of a Contracting State.

The provisions of Article 1 paragraph (1) (b) above clearly broaden the spectrum of entry into force of the Convention. It applies automatically to the Convention which not only made by and between the parties which took place of business in the participating countries *(contracting states),* but also by the parties in which one or both businesses located in countries not party *(non-contracting state)* along the principle PIL rules designate the law enforcement from participating countries *(contracting state)*.

As described earlier that the application of Article 1 (1) the Convention is based on combining the requirements of autonomy with the rules of the PIL forum without prejudice to the principle of *party autonomy*. **Peter Schlechtriem** expressly states: *"The Convention combines applicability on the basis of "autonomous" requirements with the lex Fori's rules of private international law ... This Convention, however, does not Eliminate party autonomy ... "*[10].

Party autonomy as a principle universally recognized by almost all legal systems in the world is implicitly contained in Article 6 of the Convention, which reads: *"The Parties may exclude the application of this Convention or, subject to article 12, derogate from or Vary the effect of any of provisions*". Based on this principle, the parties may exclude the Convention into force of the contract that they made, either in part or whole provisions contained in the Convention. This

[10] Peter Schlechtriem, *Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods*, Pace Law School Institute of International Commercial Law, 1986, p. 16, the document is available online at http://www.cisg.law.pace.edu/cisg/biblio.html, accessed at September 3, 2012

indicates that the parties actually have a tremendous opportunity not to be bound by the Convention. This idealistic condition seems contrary to the provisions contained in Article 1 (1) the Convention is so strong binding on the parties to submit to the Convention.

The application of Article 6 of the Convention as a legal basis for interpreting the absence of express choice of law by the parties this can happen because the approach used in the application of the principle of *party autonomy* is *opting-out* approach. In *opting-out* approach, the Convention automatically applies to CISG made by the parties when the parties to the contract did not expressly reject the application of the Convention as the law governing the contract.

Opting-out approach used in the application of the principle of *party autonomy* as embodied in Article 6 the Convention in fact does not weaken the chances of entry into force of the Convention in the contract, on the contrary affirm the existence of the Convention as the law of CISG with a truly international character. Although the parties' wishes and agreed to not enforce the CISG, but it is not stated explicitly in the choice of law clause, and they agreed to choose the law of a Contracting State III which happens to be the State party, it is automatically accepted the Convention.

From the description above, it appears that the potential entry into force of the Convention in international trade traffic is huge. The Convention is not only binding on the participating countries, but also non-contracting states. Although the parties as an independent legal person has the right to exclude the Convention into force on the principle of *party autonomy* that are owned, but the potential remains enormous force. This is because the approach is used instead of *opting-in* approach as is accommodated in the PIL, but *opting-out* approach. With this approach, the Convention automatically applies in every transaction of international goods made by parties whose places of business or habitual residence in the contracting states *are* different.

A guarantee of legal certainty provided by the Convention for parties (business actors) and judge / arbitrator in mechanism of international trade dispute settlement has implications for the more simple examination shows that the Convention still accommodates the values of legal certainty. In addition, the Convention also accommodates the value of justice. The value of justice in the Convention is reflected in the arrangement of balanced rights and obligations between the seller with the buyer. The parties already know what will be the rights and obligations under the substantive rules in the Convention.

II. The Efforts of National Legal Reform

Renewal of national law can be interpreted as a process or a way to establish legal Indonesia completely new, improving an existing Indonesian law so that it looks new or repeat existing Indonesian laws in harmony with the goals and national interests as the embodiment of the ideals of Indonesia's independence proclamation.

Based on the definition above can be seen that the national law reform efforts can be done in three ways, namely: (1) create an entirely new substance, (2) improving existing substance with something new, and (3) repeat of the substance that already exist. Notion is in line with the thinking Hartono Sunaryati law that states that the meaning of legal development includes four businesses, namely: (1) tune (making anything better), (2) change for the better and modern, (3) holding something previously not yet exist; or (4) exclude anything contained in the old system, because it is not necessary and does not fit with the new system[11].

In connection with the renewal of the national law, a concept of legal thought that is relevant and interesting to study the **Law of Development Theory.** This theory is the concept of legal thought developed by Mochtar Kusumaatmadja in response to legal development in Indonesia.

The concept of legal thought developed by Mochtar Kusumaatmadja is actually motivated by the objective conditions in which the Legal Positivism has a dominant influence in the mind-bearers of law in Indonesia. Therefore, the role of the formation of law (legislation) to be the main pedestal.

Mochtar Kusumaatmadja highly influenced by the ideas of Roscoe Pound and Eugen Ehrlich incorporate pragmatic goals for development. According to him, the law not merely as an instrument *(tool)* as suggested by Roscoe Pound, but as a means *(instrument)* to build the community[12]. Mochtar Kusumaatmadja view that the order and regularity in business development and legal reform is necessary. Law within the meaning of norms is expected to direct the activities of humans in the desired direction by the development and integration. It required a means of written laws and unwritten laws that must be in harmony with the laws that live in the community.

According to Mochtar Kusumaatmadja, the notion of law as a means of understanding broader than the law as a tool. This is because: (1) in Indonesia, the role of legislation in the process of legal reform is more prominent than the United States that puts jurisprudence on higher ground, (2) the concept of law as a "tool" will lead to results that are not much different from the application of "legisme" as ever held in the days of the Dutch East Indies. In Indonesia, there is an attitude that shows the sensitivity of society to reject the application of the concept, (3) if the "law" here as well as international law, then the concept of law as a means of

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[11] Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia*, 1982 in Djuhaendah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal*, Citra Aditya Bhakti, Bandung, 1996, p. 2

[12] Roscoe Pound, known as the pioneer American Sosiological Jurisprudence explores the concept of *"law as a tool of social engineering"*. He stated, *"The task of the lawyer is as a 'social engineer' formulating a program of action, attempting to gear individual and social needs to the value of Western democratic society"*. Consistent with this concept, Roscoe Pound put the law ahead of reality.

community renewal has been applied long before the concept was officially accepted as the cornerstone policy of national law[13].

Mochtar Kusumaatmadja view that the best way out of Indonesia in developing its national law is to put the principles of native law or customary law is still valid and relevant to modern life[14] colonial-style policies that preserve the original law is judged according to a policy that does not bring progress nothing. Similarly, the introduction of Western law with limited objectives in reality only a small impact to the process of modernization. Based on this, Mochtar Kusumaatmadja proposed that the development of national laws in Indonesia should not rush just to make a decision between continuing the tradition of colonial law on the basis of Western thought patterns or to a priori develop customary law as national law[15].

A reality that national legislation relating to international trade transactions, the Contract Law, mostly sourced in Book III *Burgerlijk Wetboek* (BW) and Private International Law (PIL), which largely stem from Article 18 *Algemeene Bepalingen Van Wetgeving voor Indonesie* (General Provisions concerning Legislation for Indonesia / *Afgekondigd Publicatie van bij 30 April 1847, S. No. 23)* are outdated and less able to respond to the changes. Not all international business people feel "*comfortable*" contract governed and interpreted according to Indonesian law[16]. Therefore, the legal regulation of international trade contracts through an update Contract Law and PIL Indonesia is a necessity that should not be delayed.

Unfortunately, the list of 2010-2014 National Legislation Program (Prolegnas) as set forth in DPR.Decree No. 02G/DPR RI/II/2010-2011 concerning Amendment to Decree of the Parliament No.41A/DPR RI/I/2009-2010 on 2010-2014 National Legislation Amendment Determination Program does not include materials PIL or Contract Law. This shows that the existence of contract law in the field of international trade received less attention in the framework of national law reform. In the perspective of contract law reform as part of national law, the legislative and executive's inconsideration seems not only focus on the contracts in the field of international trade, other contracts of the domestic are also not getting the attention well at all.

With the exclusion of Contract Law and PIL in the list of Prolegnas does not mean that national law reform efforts in the field of CISG completely closed. Open opportunities through the mechanism of the Open Cumulative bill, especially on points of unity that is the bill Cumulative Open on Ratification of Treaties. The

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[13] Mochtar Kusumaatmadja, *Hukum, Masyarakat dan Pembinaan Hukum Nasional: Suatu Uraian tentang Landasan Pokok Pikiran, Pola dan Mekanisme Pembaharuan Hukum di Indonesia*, Bandung, Lembaga Penulisan Hukum dan Kriminologi FH Unpad, 1976, p. 9-10

[14] *Ibidem*, p. 4-7

[15] Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional: Suatu Kajian tentang Dinamika Sosial-Politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia (1840-1990)*, Jakarta, Raja Grafindo Persada, 1994, p. 232-233

[16] Erman Radjagukguk, "Hukum Kontrak Internasional dan Perdagangan Bebas", *Jurnal Hukum Bisnis*, Vol. 2, 1997, p. 27

existence of this Cumulative bill shows that the legal existence of an international character should be considered in making national legislation. As mentioned earlier, Indonesia can not escape or get away from external developments. In this era of globalization, shut down by ignoring the existence of the law who were born not of the national legislature is not the best way out in the implementation of national law reform.

Completion of contract law and contracts relating to PIL in international trade has a very important function because of contractual and legal aspects relating to the contract PIL became the foundation for every type of international trade transactions. Contract law is basically an umbrella for kontraktan in the closure of the type of contract. As contained in Chapter 1 through Chapter 4 Book III BW, contract law only regulates matters of a general nature (general provisions). This means it is contained in the basic principles associated with the contract.

In regard to setting substantive and procedural legal options in the field of CISG through harmonization of global trade is the approach needs to be done with an understanding not only of national law / domestic exists, but also against the principles of law governing international sales contracts as stated in the legal order transnational.

As described earlier that Indonesia has not yet acceded to the Convention into its national legislation[17]. Whereas in accordance with the principles embodied in the GATT/WTO in which Indonesia is one of the member countries, harmonization of national laws against convention international conventions is a must[18].

Transnational law or institution which in the literature better known as *The New Lex Mercatoria* (NLM) is an independent legal system *(autonomous)* regardless of any national legal system[19]. Pranata law was born b the decisions issued by agencies of international organizations, among others: *United Nations Commission on International Trade and Law* (UNCITRAL), *International Institute for the Unification of International Private Law* (UNIDROIT), *International Chamber of Commerce* (ICC) and *the Federation Internationale des Ingenieurs Counceils* (FIDIC). The main purpose of the works of the body of this international

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[17] Accession is the official statement from a State not party to the convention to commit/submit to the convention. Ratification is the formal declaration of a state convention participants to commit/submit to the convention.

[18] WTO Agreement and the whole package of this Agreement and related aspects o international trade, namely: *Trade in Services, Trade Related Investment Measures* (TRIMs) and *Trade Related Aspects of Intellectual Property Rights* (TRIPs) has been ratified by Indonesia through Law No. 7 of 1994 on Ratification of *Agreement Establishing The World Trade Organization* dated November 2, 1994, Gazette of the Republic of Indonesia Year 1994 Number 57. Ratification of this, of course, provide a considerable influence on all dimensions of people's lives and the nation of Indonesia, especially in the field of economics or law.

[19] Ietje K. Andries, "Unifikasi dan Kodifikasi Hukum Perdagangan Internasional Khususnya Jual Beli Barang Secara Internasional (International Sale of Goods)", in Peter Mahmud Marzuki et al. (ed.), *Jual Beli Barang Secara Internasional*, ELIPS, Jakarta, 1998, p. 34

organization is to develop a uniform law/harmony in the field of international trade that apply to each country.

Indonesia as one of the WTO member countries who are legally bound to harmonize national law in accordance with the needs and interests of global trade, the appointment NLM as an alternative reference to the legal arrangements in the field CISG choice of law in Indonesia is a strategic step, logical and rational.

Admission is a strategic move based on objective facts and the future demands that the international trade relations by business people of Indonesia can not be confined with business partners from countries that use the same legal system with Indonesia (in this case the civil law system), but it is possible to transact with business partners who come from countries with different legal systems, whether adopted common law, socialist law and other legal systems.

The rules contained in the NLM itself is the result of alignment of the various legal systems that exist about international trade. NLM substantively not only benefit one party, but profitable for both parties. NLM is not a legal system totally foreign to their contract. Thus, referral to the NLM in the legal regulation of the legal options relating to the purchase and sale transactions of international goods in Indonesia is a logical step.

Referral to the NLM for Indonesia in the effort to reform national laws in the field of rational CISG is a step That Is based on the purpose of establishment of legal order itself. That is one example as provisions in *the UNIDROIT Principles of International Commercial Contracts* (UPPICs). UPPICs purpose as stated in the opening of which is to "serve as a model for national and international legislators"[20]. Some work of international organizations is a NLM that can be used as a reference within the national legal reform in the field CISG are: (1) UPPICs, (2) UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996; and (3) The Convention.

In order to reform the national contract law, especially concerning the field of CISG as part of efforts to reform the national civil law partially, before touching on substantial aspects, which should receive primary attention is the political will *(political will)*. Executive and the Legislature should have the political will to reform the national civil law is partially through the renewal of national contract law, especially concerning CISG.

Special CISG legal reform in the field, without intending to deny the renewal efforts that have been carried out both by individuals (among others Wirjono Prodjodikoro, R. and R. Setiawan Soebekti) as well as institutions such as BPHN in generating national legislation, it is necessary to consider the existence of the Convention that has prevailed for 20 years in international trade traffic. The considerations made regarding aspects of the philosophical-ideological, juridical, political, economical and sociological.

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[20] Michael Joachim Bonell, An International Restatement of Contract Law, The UNIDOIT Principles of International Commercial Contracts, Transnational Juris Publications, Inc., Irvington, New York, 1994, p. 157

a. Philosophical Considerations

Philosophical values underlying the formation of the Convention is the "equality" *(equality)* and "mutual benefit" *(mutual benefit)*. The drafters of the Convention considers "equality" and "mutual benefit" as an important element in order to enhance friendly relations among nations. Philosophical values underlying the formation of the Convention can be observed in the legal considerations that states:[21]

> *Considering of the opinion That the adoption of uniform rules Govern the which contracts for the international trade on the basis of equality and mutual benefit is an Important element in promoting friendly relations Among States;*
> *Being of the opinion That the adoption of uniform rules Govern contracts for the international sale of goods and take into account the different social, economic and legal systems would Contribute to the removal of legal barriers in international trade and promotes the development of international trade*.

A value of "equality" is accommodated in the Convention direflesikan by enacting a uniform law to the states regardless of social background, economic and legal system of the country concerned. The principle of "uniformity" *(uniformity)* as contained in Article 1 of the Convention is the manifestation of the value of "equality" which is the filosifis basis of the formation the Convention.

Philosophical value of "equality" as stated in the Convention legal considerations are clearly not contradictory and even one soul with the human values embodied in Pancasila Sila to-2. In harmony with the meaning contained in the Sila-2 Pancasila, the state must provide non-discriminatory treatment to all people / citizens regardless of ethnicity, race, religion, and faction. Countries are obliged to respect human dignity, uphold human rights.

As contained in its legal considerations, principles and norms contained in the Convention does not only reflect the values and customs of international trade law that developed in a particular country, but to adopt the values and customs of international trade law that developed from the entire country the Convention participants representing diversity of social, economic and legal systems prevailing in the whole world. Therefore, once the logical scope of application to business, the Convention does not question how the color of ideological, social, economic and legal system of the state of the business concerned. Throughout the country of the perpetrators of the concerned business or place of business of the business concerned is a party to the Convention *(contracting states)* color regardless of ideology, social, economic and legal systems, the Convention automatically applies to them.

The value of equality is also reflected in the Convention norms governing the rights and obligations of the parties. In contrast to the other trading laws, which generally provides many legal protections to the Seller, Part III of the Convention in a balanced set of rights and obligations between the Seller to the Buyer. Section

[21] United Nations, *United Nations Convention on Contracts for the International Sale of Goods (1980),* down load http://uncitral.org/english/texts/sales/CISG.htm, p. 2

45-52 of Article III of the Convention regulate in detail about the obligations that must be performed by the Seller in case of breach of contract. As one example, if the seller deliver the goods before the goods specified date, the buyer is allowed to accept delivery or refuse to accept delivery.[21] The right of rejection on delivery of goods is one form of legal protection provided by the Convention to the Purchaser are rarely encountered in the national law.

Although the Convention contains the values of equality that is implemented into the principle of uniformity, the application of the principle of uniformity should still provide room for enactment of a national legal system of Indonesia. As a sovereign state, a logical one if Indonesia can impose its domestic legal system in its jurisdiction. In international trade activities, enactment of domestic law can not simply be ignored to no effect. Throughout the parties requires the enactment of national laws and the enactment of the Convention mengesampaingkan then it should be respected as a legal option. This is in accordance with the principle of party autonomy *(party autonomy)* are accommodated by almost all legal systems in the world and the Convention itself.

Similarly the lack of choice of law in CISG made by businesses that do not meet the requirements as set forth in Article 1 paragraph (1) (a) Convention, then it should be applicable is the national law designated by rules of PIL regardless of whether countries that concerned is a participating country *(contracting states)* or non-state participants *(non-contracting states)*. It is also consistent with the view that developed in the Choice of Law Multilateral that put in a position diametrically against existence sovereignty of a country. National law of a sovereign state should be considered in the settlement of international disputes that occur. This means that Article 1 paragraph (1) (b) the Convention imposing to CISG automatically made by the parties that do not meet the requirements stipulated in Article 1 paragraph (1) (a) and the rules of the legal validity of the PIL appoint States Parties. Norm is clearly contrary to the sovereignty of every independent country.

The opening paragraph II of the 1945 Constitution contains the basic values of Pancasila which eternal ideals of national / independence, which is an independent country, united, sovereign, just and prosperous. Defamation against the sovereignty of a country as reflected in Article 1 paragraph (1) (b) the Convention that enforces the Convention automatically even if one party does not meet the requirements of Article 1 paragraph (1) (a) that has a place of business in the State Party which is based on the rule- PIL rules designate the State Party is not one soul force and contrary to the eternal values of Pancasila which, as contained in paragraph II Opening of the 1945 Constitution.

In this perspective, which ignores the existence of norms of state sovereignty as stated in Article 1 paragraph (1) (b) the Convention as opposed to the basic values of Pancasila is contained in the Preamble Paragraph II of the 1945 Constitution should be ruled out of existence in the national legislation. This exception does not mean that the equality and uniformity are not aligned with the philosophical value of the Indonesian nation, but merely provide an appreciation

and respect for the sovereignty of a country's existence. Applicability of the CISG in international trade traffic should not turn off the existence of national laws blindly, but still provide room for his national law.

Actually, the Convention itself does not turn off the space for the enactment of national laws in CISG. However, the space for the enactment of national laws in CISG very limited issue and validity of a contract made some exceptions clauses. The provisions of Article 4 the Convention expressly states that the Convention only regulates the formation of a contract of sale and the rights and obligations of the seller and the buyer arising from the contract. This means that judgments about the legitimacy of the contract of sale is made is returned to the respective national laws.

An exception to Article 1 paragraph (1) (b) the Convention by a country wishing to commit himself to the Convention has been accommodated in the full Article 95 the Convention reads: "*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*". This means that if Indonesia wishes to make accession to the CISG, then basing Article 95 CISG, Indonesia must make a declaration which confirms in Article 1 paragraph (1) (b) of the Convention because they conflict with Paragraph II Opening of the 1945 Constitution.

b. Legal Considerations

As described in the previous section, the national law relating to CISG contained in Book III BW and Article 16 AB. Legal tools that have been aged around 1.5 of this century is considered to be incompatible with existing development and progress in the last international trade today. One of the reasons underlying the importance of reforming national laws, particularly in the area CISG, is dropping and the incompatibility of existing national laws and policies have had on contemporary developments in international trade traffic is international in character.

Characterized by the existence of international legal instruments as contained in the CISG both related to aspects of the substantial legal options and choice of procedural law is an inevitable requirement for Indonesia in international trade traffic. Devices existing national laws and current national character increasingly less attractive to international business people as the law governing the CISG. The absence of national legal instruments in the field of international character CISG in turn would make the position of national legal instruments increasingly marginalized in international trade traffic. International business people will not choose Indonesia as the law governing legal CISG made and prefer foreign law international character.

Indonesia's accession to the CISG in turn will make the quality of national laws in the field of CISG Law equals quality of other major countries that have committed themselves to the Convention. Doubt the quality of national law which is felt by the foreign businessmen lately can be minimized.

c. Political Considerations

Pancasila fundamental values contained in Paragraph IV of the Preamble of the 1945 Constitution mandates that the Indonesian state should participate in the establishment of world order based on freedom, abiding peace and social justice. As a large country, Indonesia has great potential to influence and shape international opinion in order to serve the national interest. Constellation of international politics that continues to experience changes very rapidly demanding Indonesia play a role in foreign policy and cooperation both bilaterally, regionally and multilaterally. In this perspective, the increase friendly relations between the countries in the world is an important role to be played by Indonesia in the international political arena.

In the field of international trade, the rule of uniformity in the field of CISG choice is a fundamental requirement in order to enhance friendly relations among nations. This means that the accession to the Convention that contain an unification of choice of law rules in the field of CISG a strategic move to Indonesia in order to enhance friendship relations the countries in the world. This is in accordance with the legal considerations of the CISG which states: [22]

2

Considering of the opinion That the adoption of uniform rules Govern the which contracts for the international trade on the basis of equality and mutual benefit is an Important element in promoting friendly relations Among States;
Being of the opinion that the adoption of uniform rules Govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promotes the development of international trade.

d. Economic Considerations

The economic crisis that hit the United States and Europe now needs to gain awareness and also a strategic move in order just went in order not to hit Indonesia. One of the strategic steps are to increase export competitiveness and efficiency of trading systems. Furthermore, this strategic steps outlined in some programs, one of whom is a program improvement and export development. This means that the reform of national laws, particularly in the field of CISG, must be reoriented to support the improvement and development of exports of goods and services in spurring national economic growth.

As described earlier that the tendency of international business people these days prefer a device is characterized by international business law. In this perspective, accession to the Convention as a national law reform efforts in the field of CISG a strategic move in order to promote national economic growth. It is based on an argument that the Convention which contain substantial legal options and choice of procedural law of international character is a legal regime that has great potential as the applicable law in international trade transactions.

Increased international trade relations by business people of Indonesia in the future can not be confined with business partners from countries that use the

same legal system to Indonesia (in this case the *civil law system),* but it is possible to transact with business partners that come from countries with different legal systems.

III. Closing

Conclusion

Indonesia needs to bind themselves to the Convention as a national law reform efforts in the field of CISG which is the area of "neutral".

The need for binding of Indonesia on the Convention is based on the practical usefulness in international trade traffic, among which is the guarantee of legal certainty, predictability and simplicity in the determination of applicable law. In addition, the need for binding based on also on the things that are strategic, namely philosophical-ideological considerations, juridical, economical and political.

Suggestion

Government of Indonesia to take steps toward self binding on the Convention through the accession into national legislation by making a declaration that releases the application of Article 1 paragraph (1) (b) of the Convention is less respect for the principle of sovereignty of a nation, as mandated in paragraph II Opening of the Constitution 1945.

It should be immediately performed an update of the National Contract Law as an effort to reform the civil law is partially through the harmonization of the *UNIDROIT Principles on International Commercial Contracts* (UPICCs) and other works of the agencies of international organizations in the field of International Trade Law, which is *the New Lex Mercatoria*.

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