



Choice of Law in International Business Contracts

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Info Article

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Abstract

Introduction: Differences in the national legal system and the contract law provisions of each country open up opportunities for conflict and dispute to occur. In addition, differences in national laws that serve as normative references for actors in international trade transactions can also cause doubt and uncertainty for foreign parties. Thus the choice of law can be referred to as the freedom of the parties in a contract to choose which law will be used and applies to the parties in an international agreement considering that the national contract law of each country is very diverse.

Purposes of the Research: This writing aims to analyze the choice of law in international business contracts.

Methods of the Research: This study uses a normative juridical method. Normative legal research is library research, namely research on secondary data. Secondary data has a scope that includes personal letters, books, to official documents issued by the government.

Results of the Research: The legal principles regulated in international business transactions refer to the legal principles of international treaties/contracts agreed upon by the parties, and international trade conventions. The parties involved in international business contracts have the freedom to determine with whom and what the subject matter of the agreement they wish to enter into the contract as long as it does not violate the laws and regulations. Then by entering a choice of law, the parties can easily determine the contents of the business contract because each party can already get clarity about the law that will be used and the interpretation of the contents of the contract so that the implementation of the contract will run more optimally.

A. INTRODUCTION

Indonesia is one of the many countries that have been affected by the Covid-19 pandemic, which has affected the country's economy. Government consumption decreased from 3.25 percent to 1.94 percent. This is because the Government will reduce the allocation in the infrastructure sector in 2020 while the government will increase the budget for health in accordance with the Government's focus on dealing with the pandemic in Indonesia. Not only consumption, investment also decreased from 3.25 percent to 1.94 percent. This decline affected the economy in Indonesia. The decline in investment was greater due to the effect of reduced employment. Trading activities, namely exports and imports with foreign parties, also decreased from -0.87

percent to -7.70 percent in exports and -7.69 percent to -17.71 percent in imports.¹ Thus, it is necessary to develop investment both on a national and international scale to support the country's economy.

Business players' understanding of contract law, especially international business contracts, is becoming increasingly important². This is related to the increase in foreign investment and business players entering the international market. By understanding the business actors involved as parties to international business agreements, it will have an impact on the contract drafting process as well as the implementation of the contents of the contract.

Sudargo Gautama argues that international contract law is a national contract that has a foreign element in it,³ namely the parties who enter into the business transaction are of different nationalities and automatically the parties are also subject to different laws. Thus, in international business transactions, there are two legal systems that are different from each other and each has the same opportunity to be applied to the international business transactions held.

Differences in the national legal system and the contract law provisions of each country open up opportunities for conflict and dispute to occur. In addition, differences in national laws that serve as normative references for actors in international trade transactions can also cause doubt and uncertainty for foreign parties. It can even lead to its own disappointment because what was initially understood as the rights and obligations of each party turned out to be interpreted differently in the existing national legal system.⁴ This is not the ideal condition expected from a business contract entered into in the interests of the parties.

The choice of law is one of its own teachings in the field of general theory of International Private Law or commonly referred to as *partij autonomie*⁵. Thus the choice of law can be referred to as the freedom of the parties in a contract to choose which law will be used and applies to the parties in an international agreement considering that the national contract law of each country is very diverse. This choice of law is then more familiarly known as the choice of law. Based on this explanation, the author will discuss issues such as what is the choice of law in international business contracts.

B. METHOD

This study uses a normative juridical method. Normative legal research is library research, namely research on secondary data. Secondary data has a scope that includes personal letters, books, to official documents issued by the government. The data that will be used in this study are secondary data obtained by conducting a document study consisting of legal materials and research tools used in the document study by

¹ Yenni Ratna Pratiwi, "Pemulihan Perekonomian Indonesia Setelah Kontraksi Akibat Pandemi Covid-19," <https://www.djkn.kemenkeu.go.id/> (2022).

² Ronald Fadly Sopamena, "Alternative Dispute Resolution Dalam Sengketa Bisnis Internasional," *Balobe Law Journal* 2, no. 1 (2022): 1.

³ Sudargo Gautama, *Hukum Perdata Internasional Indonesia* (Jakarta: Binacipta, 1976), p.6.

⁴ Sudargo Gautama, *Kontrak Dagang Internasional* (Bandung: Alumni, 1976), p.7.

⁵ Gautama, *Hukum Perdata Internasional Indonesia*, p.168.

searching the literature. The analysis chosen in this study is a qualitative analysis that is not only able to obtain conclusions, but can also be used for the development of a new research of the same kind.

C. RESULTS AND DISCUSSION

1. International Business Contract Law Arrangements

International business is a business where business activities consist of business transactions between parties originating from more than one country⁶. International marketing is also referred to as business transactions carried out by companies in one country with other companies or individuals in other countries on the basis of mutual agreement. The parties involved in it can be between individuals or legal entities with people or legal entities of different nationalities.

International business contracts are in the realm of private law even though there are foreign elements involved in them so they must pay attention to the rules of international contract law which are usually used in international business. However, this international business contract which involves legal subjects of different nationalities, still pays attention to the rules of contract law that apply in the respective countries of the parties.

The legal principles regulated in international business transactions refer to the legal principles of international agreements/contracts agreed upon by the parties, and international trade conventions. These principles of international business law can be seen from the applicability/source of international contract law, Huala Adolf in his book explains that there are 7 (seven) legal forms that can become sources of international contract law, namely:

- 1) National Law
- 2) Contract Document
- 3) Customs in the field of international trade related to contracts
- 4) General legal principles regarding contracts
- 5) Court ruling
- 6) Doctrine
- 7) International agreements regarding contracts.

Thus, based on the sources of international contract law, it can be concluded that even though international business contracts are still in the realm of private law, they must pay attention to the rules of international law. In Indonesia itself, the regulation of business contracts is still based on the Civil Code (hereinafter referred to as the Civil Code) in Book III concerning Engagement. A contract made, must meet the legal requirements of the agreement as regulated in Article 1230 of the Civil Code, namely agreement, competence, certain things and permissible causes.

A valid agreement must contain elements of conformity, compatibility, meeting the will of the party who entered into the agreement or an agreed statement of will between the parties involved in the agreement. The agreement between the parties in

⁶ Lileys Glorydei Gratia Gijoh, "Implementasi Hukum Dalam Kontrak Bisnis Internasional," *Lex Et Societatis* 9, no. 1 (2021): 111-119.

international business is the beginning of a contract itself. Furthermore, according to article 1321 of the Civil Code, the agreement must be given freely, in the sense that there is no coercion, fraud, and oversight, hereinafter referred to as a defect of will (the will that arises is not pure from the person concerned). Then in its development a fourth defect of will appears, namely the abuse of circumstances

Competence are those who are over 21 years old or married. These people are legally considered capable of carrying out a legal action. In relation to international business contracts entered into by legal entities, the terms of authority also apply. In a legal entity, not everyone in the legal entity has the authority to act to make and sign a business contract. Only people who have the authority can enter into agreements with other parties. For example, in a limited liability company based on Law Number 40 of 2007 concerning Limited Liability Companies, only the director has the authority to represent the company both inside and outside the court such as entering into agreements with other parties. So that people other than directors cannot enter into agreements with other parties, including to conclude international business contracts.

This third condition is determined that an agreement must be about a certain thing, meaning that what is agreed upon is the rights and obligations of both parties or it can also be called the object of the agreement. The object of the agreement referred to here is what is regulated in Articles 1332 to 1334 of the Civil Code. The object of the agreement that can be categorized in the article:

- a) Objects that will exist (except inheritance), as long as they are type-definable and enumerable.
- b) Objects that can be traded (goods used for the public interest cannot be the object of the agreement).

The last condition is a permissible cause. This implies that an agreement must not conflict with the norms that exist in society such as legal norms, moral norms and public order. The terms of agreement and competence are subjective conditions, if one of them is not fulfilled, then the international business contract made can be canceled. Then, the conditions of a certain matter and the conditions of permissible causes are objective conditions which if not fulfilled then the international business contract is null and void by law.

2. Choice of Law in International Business Contracts

In the world of international business, the choice of law institution is widely accepted based on the principle of freedom of contract. This freedom of choice of law is based more on the interests of the parties doing business to choose which law is more profitable for their business. The choice of law will provide a sense of peace for the parties, because the applicable law is a law that is chosen and agreed upon together.

Choice of law clauses are made by many parties involved in international business contracts and are indeed vital for these international business contracts. There are several reasons why choice of law is included in international business contracts, including:

- 1) Fulfill the principle of freedom of contract;
- 2) Practical;

- 3) Reasons for legal certainty;
- 4) Determine the law to be used (*lex causa*).

The parties involved in international business contracts have the freedom to determine with whom and what the subject matter of the agreement they wish to enter into the contract as long as it does not violate the laws and regulations. Then by entering a choice of law, the parties can easily determine the contents of the business contract because each party can already get clarity about the law that will be used and the interpretation of the contents of the contract so that the implementation of the contract will run more optimally.

Choice of law provides legal certainty for the parties because what has been agreed upon by the parties, applies as law. This will provide an overview for each party, what legal steps should be taken in the event of a dispute. International business contracts involve two or more legal subjects of different nationalities. With the choice of law, the parties from the beginning of this agreement already know which law should be used. This is very closely related if there is a dispute in the future. *Lex causa* (the law that should be used) must be determined in advance if there is a dispute over an international business contract. Without a choice of law, the judge must decide the *lex causa* through legal doctrine or theory, which of course will require a long process.

If the parties do not determine the choice of law as *lex causa* in the event of a dispute, then there are several doctrines or theories used by the judge, including:

- 1) *Lex Loci Contractus* Theory

According to the *Lex Loci Contractus* theory, the law used is the law in which the contract was made. This theory is a classic theory that is often used in international business contracts. The problem with this theory is that if the contract is not made face-to-face but through the internet, the parties can be anywhere, including in their respective countries at the time the contract was made.

- 2) *Lex Loci Solutionist* Theory

According to this theory, if there is no choice of law, the court will determine the applicable law based on the place where the agreement is executed. the use of this theory is not always appropriate because the execution of a contract can occur in several places.⁷

- 3) *Teori Lex Fori* Theory

Lex fori theory is the traditional approach to determining which laws apply. The advantage of this theory is that by applying the law from the court (judge), the settlement of cases becomes shorter and cheaper⁸. According to this theory, when the parties do not make a choice of law in the contract they made, then the applicable law is the law in which the judge decides the case.

- 4) The Proper Law of Contract Theory

According to this theory, the law used is the most logical or appropriate law and

⁷ Gautama, *Hukum Perdata Internasional Indonesia*, *Op.Cit.* p.16.

⁸ Huala Adolf, *Dasar-Dasar Hukum Kontrak Internasional*, *Op.Cit* p.148.

is in accordance with the contract by finding the center of gravity of the contract or the closest link point to an international business contract.

D. CONCLUSION

Choice of law or also known as choice of law is the freedom of the parties to determine which law applies to international business contracts. Choice of law is very useful to be used in the event of a dispute. This is made so that the parties can immediately know the *lex causa* or the law that should be used. Thus, the parties involved in international business disputes do not need to go through a long process to simply determine the *lex causa*.

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