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Legal Study of The Choice of Law of The Parties in An International Trade Contract

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ABSTRACT: Technological Progress and the communications result economic activity shall no longer circles by State boundary. Phenomenon Regionalism that happened in various world cleft these days, like ASEAN or Uni Europe bornedly it transactionof so-called by e-commerce. International trade has become backbone for State to become prosperous, secure and prosperous and the strength. Defrayal of International trade by letter L/C or organizable except that by other law system

KEYWORD: Choice Of Law, Contract Trade International

I. INTRODUCTION

Along with the flow of globalization, international trade is a rapidly developing field. The scope of the legal field is also quite broad. Cross-border trade relations can include many types, from simple forms, namely barter, buying and selling goods or commodities (agricultural products, plantations and the like) to complex trade relations or transactions. This is due to the existence of technology services (especially information technology) so that trade transactions are taking place faster. The existence of buying and selling activities from the national level has increased to international buying and selling activities, or those carried out across countries and are often referred to as international trade. In this international trade transaction, it is inseparable from an agreement/contract. This agreement or contract is a bridge for regulating a commercial activity.[1] Because the context is international trade, the contract used is an international trade contract.

National borders are no longer an obstacle to transactions. Even with the rapid development of technology, today traders do not need to know or recognize their trading partners who are far away in other parts of the world. This is evident from the birth of transactions called e-commerce. International trade has become the backbone for countries to become prosperous, prosperous and strong. This has been proven in world developments.[2] Referring to the purpose of a fair shift in wealth (gerechtvaardigde) and giving rise to legal consequences for the enrichment of the parties also fairly. For that reason, the concept of justice enters the realm of international trade law and places "justice as right order".[3] The contract embodies the intent and purpose of creating a better situation (een beter leven brengen) for both parties. In order for the exchange as a fair enrichment to be viewed as a fair exchange, an achievement must be balanced with a counter-achievement. Reciprocal exchange is a key concept for creating the justice above. Contracts have three basic purposes, as follows: The first purpose of a contract is to enforce a promise and protect the reasonable expectations that arise from it. The essence of a contract is a promise or a set of promises that can be enforced, or it can also be said as an agreement that is enforced according to law. The second purpose of a contract is to prevent enrichment (efforts to enrich oneself) that are carried out unfairly or incorrectly.

The Civil Code does not explicitly state when the contract occurs. As in Article 1320 of the Civil Code, it is only stated that there is sufficient consensus of the parties. According to Syahmin, there are 4 (four) theories that discuss when a contract occurs, namely: [4]

1) Statement theory (Uitingsthories);

[1] Ricardo Simanjuntak, "*Asas-asas Utama Hukum Kontrak Dalam Kontrak Dagang Internasional: Sebuah Tinjauan Hukum"*, Jurnal Hukum Bisnis, Volume 27, No. 4 (2008), hlm. 14.

[2] Huala Adof, *Hukum Perdagangan Internasional*, Jakarta: PT. Raja Grafindo Persada, cet. 1, 2005, hlm 2

[3] Ade Maman Suherman, *"Perdagangan Bebas (Free Trade) dalam Perspektif Keadilan Internasional",* Indonesian Journal of International Law, Vol. 5, No. 2, Januari 2008, hlm. 256.

[4] Azwar Mahyuzar, *"Peranan Hukum Kontrak Internasional Dalam Perdagangan Bebas",* Jurnal Hukum Equality Fakultas Hukum USU, Volume 12, No.1, (2007), hlm. 49-50.

2) Delivery theory (Verzendtheorie);
3) Knowledge theory (Vernemingstheorie);
4) Acceptance theory (Ontvangstheorie).

Advances in technology and communication have resulted in economic activities no longer being confined by national borders. The phenomenon of regionalism that occurs in various parts of the world today, such as ASEAN or the European Union. The parties before closing a trade agreement, need to be careful about potential trading partners, the substance of the agreement, rights and obligations, risks, choice of law and dispute resolution forums.[1] In trade, a trade contract is defined as an agreement containing various provisions and agreements made by all parties involved in the trade process. Trade contracts are made based on considering the interests of all parties involved. For the creation of the trade contract itself, the parties involved are not allowed to violate any regulations that have been made, and must also be based on applicable laws.[6]

International trade generally uses two or more legal systems of government. Buyers and sellers may operate under two different legal systems. The freight forwarder who transports the goods and the marine insurance contract that insures the voyage and cargo may be governed by separate legal systems. International trade financing by means of a Letter of Credit or otherwise may be governed by another legal system. When disputes arise, the parties may submit their disputes to the courts of the jurisdiction of their choice.

A. Main Issues

Based on the description above, we can draw the main issues that can be analyzed so as to answer this question, namely how is the implementation of choice of law by the parties (party autonomy)?, and What are the limitations in the choice of law of a contract?

B. Writing Purpose

The purpose of writing this paper is to understand the choice of law by the parties (party autonomy), associated with certain limitations in a contract. ***C. Research Methods***

This article is written using a normative legal research method, namely legal research based on or referring to legal rules or norms contained in laws and regulations. Soetandyo Wignyosoebroto calls the term in question as doctrinal research (study about the norms) which tends to be qualitative.[2] In general, normative legal research is a documentation study through the use of secondary data sources, such as laws and regulations, court decisions, legal theories, and the opinions of leading legal scholars. Therefore, the analysis used in this study is a qualitative normative analysis because all data is qualitative. Normative legal research can be in the form of an inventory of positive law, efforts to discover the principles and philosophical basis or doctrine of positive law, and efforts to discover the law in concreto that is appropriate for the application of resolving a particular case.[3]

The approach methods used in writing this thesis are the statute approach, conceptual approach, and analytical approach.

II. RESEARCH RESULTS AND DISCUSSION

A. Choice Of Law in A Trade Contract

Contract law is part of civil law, both national and international contracts, both are subject to the general rules of political law. The choice of law and choice of forum in international business contracts are based on the freedom of contract and the agreement of the parties. In general, the limitations of the choice of law and choice of international

business forum is determined in Article 1339 of the Civil Code which must not conflict with propriety, customs, laws, and legal systems applicable in each country.

1. Choice of Law Terms and Principles

Countries as actors playing a role in international trade contracts also have different values. Differences in views, opinions, and interests make international trade contracts more vulnerable to violations in each of their implementations. However, the result of this is that the formation of sanctions in international trade contracts becomes difficult to form, because of the differences in views that exist.[4] Choice of law is only justified in the field of contract law. Choice of law cannot be made in the field of family law, for

[1] Huala Adof, *Hukum Perekonomian Internasional*, Jakarta: PT. Raja Grafindo Persada, cet. 1, 2005, hlm 1 [6] Anindita, Sri Laksmi. t.t., "*Hukum yang Digunakan dalam Kontrak Dagang Internasional*", dalam *Indonesian Journal of International Law*.

[2] Sudikno Mertokusumo. 2001, *Penemuan Hukum Suatu Pengantar.* Cet. II. Yogyakarta: Liberty, hlm. 29.

[3] Di samping penelitian doktrinal, Soetandyo juga mengkategorikan penelitian hukum empirik (socio-legal research) atau penelitian terhadap efektifitas hukum menurut Soerjono Soekanto sebagai penelitian non-doktrinal (penelitian atas bekerjanya norma tersebut dalam masyarakat / study of the norms) yang cenderung bersifat kuantitatif, dalam Yusuf Shofie. *Pelaku Usaha, Konsumen, dan Tindak Pidana Korporasi*. Cet. I. Jakarta: Ghalia Indonesia, 2002, hlm.
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[4] *Ibid*. Hlm 1

example.[5] The problem of choice of law to be enforced or applied is one of the important problems in an international trade contract. Terms of choice of law in other languages include: Partij autonomie, autonomy des parties (French), intension of the parties (English) or (choice of law). The parties to a contract are free to make a choice, they can choose the law that must be used for their contract. The parties can choose a particular law.[6]

Choice of law is which law will be used in making a contract.[7] The parties to a trade agreement have the right to make an agreement on the choice of law and choice of forum that applies to the agreement. The choice of law determines the governing law, likewise, the choice of arbitration forum (arbitration clause) determines the jurisdiction of the dispute resolution forum.[8]

The role of choice of law here is the law that will be used by the judicial body to: [9]

- ✦ Determine the validity of a trade contract;
- ✦ Interpret agreements in a contract;
- ✦ Determine whether or not a performance has been implemented (implementation of a trade contract); ▪ Determine the legal consequences of a breach of contract.

The applicable law may include several types of law. These laws are: the law that will be applied to the subject matter of the dispute (applicable substantive law or lex causae) and the law that will apply to the trial (procedural law).

The applicable law will depend to some extent on the agreement of the parties. The applicable law can be the national law of a particular country. Usually, the national law exists or is related to the nationality of one of the parties. This method of selection is commonly applied today. If one or both parties do not agree on one of the national laws, they will usually then try to find a national law that is relatively more neutral. Another possible alternative in international trade law is to apply the principles of compliance and eligibility (ex aequo et bono), however, the application of this principle must also be based on the agreement of the parties.[15]

Choice of law is now generally accepted in international trade contracts, both by western countries with liberal capitalist systems that accept this choice of law, as well as socialist countries.

2. Various Legal Options

There are 4 (four) types of ways to choose the law to be used in international trade law (ITR), namely:

1. Explicit choice of law;
2. Tacit choice of law;
3. Assumed choice of law; and
4. Hypothetical choice of law.

2. 1. Choice Of Law Expressly

This explicit choice of law can be seen in the clauses of joint venture contracts, management contracts or technical assistant contracts, where the parties to the contract expressly and clearly determine which law they choose. This usually appears in the governing law or applicable law clause which reads: "this contract will be governed by the law of the Republic of Indonesia" or the agreement shall be governed by and construed in all respects in accordance with the law of England. An example is the contracts made by Pertamina regarding the LNG sales contract from December

3, 1973, in article 12 it is stated that: this contract shall be governed by and interpreted in accordance with the law of the State of New York, United States of America". The choice of law is the State of New York, which is appropriate because the United States does not recognize civil law for the United States Federation, but each state has its own civil law which is different. So in the explicit choice of law, the choice of law is stated in words that state the choice of a particular law in the contract. When a judge determines which law should apply to a contract, the judge will use the choice of law as the determining point.[10] ***2. 2. The Choice Of Law Is Tacit.***

To find out whether there is a particular choice of law that is stated tacitly, it can be concluded from the intent or provisions and facts contained in a contract. Facts related to the contract, for example the language used, the currency used, the Indonesian style. This conclusion is an interpretation of the judge or court. In reality, it is possible that the parties did not intend as the court concluded.

This conclusion is the interpretation of the judge or court. In reality, it is possible that the parties did not intend what the court concluded.[17]

[5] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, Bandung: Penerbit Binacipta, cet. Ke-5, 1987, hlm. 204

[6] *Ibid*. Hlm 168

[7] Salim S. *Hukum Kontrak, Teori dan Teknik Penyusunan Kontrak*, Jakarta: Penerbit Sinar Grafika, cet. Ke-3 2006, hlm. 106

[8] Basuki Rekso Wibowo, *Kompetensi Peradilan Umum Terhadap Putusan Arbitrase*, librari@lib.unair.ac.id, 1 Januari 1999

[9] Adolf, *Hukum Perdagangan Internasional*, hlm. 214 [15] *Ibid*., hlm. 215

[10] Ridwan Khairandy, *Pengantar Hukum Perdata Internasional*, Yogyakarta: FH UII Press, cet. 1, 2007 hlm 131 [17] *Ibid*., hlm 134

2. 3. Choice Of Law Is Considered

This choice of law is considered to be only a presumption iuris, a legal assumption. The judge accepts that there has been a choice of law based on mere assumption. In such a choice of law it cannot be proven according to existing channels. The judge's assumption is a basis that is considered sufficient to maintain that the parties have truly intended the application of a certain legal system.

2. 4. Choice Of Law Is Hyphothetical

This hypothetical choice of law is known especially in Germany. Actually, here there is no will from the parties to choose at all. The judge makes the choice of law. The judge works with fiction, if the parties have thought about which law to use, which law they choose in the best possible way, so, actually there is no choice of law for the parties. The judge determines the choice of law. Many people do not accept the choice of law as assumed, let alone the choice of law hypothetically. Therefore, it is better to use only the explicit choice of law or the tacit choice of law. The problems that will arise in connection with the occurrence of disputes relating to these contracts do not contain clauses regarding governing law or applicable law. In addition, international trade contracts are not always made in writing. In such circumstances, of course there will be no choice of law. Based on which law the judge must adjudicate the case in question or which law should apply to these contracts, the judge can use the help of a secondary link point or other link point, namely the place where the contract was signed or the place where the contract was implemented.

B. Limitations on Choice of Law

Choice of law, although generally accepted, is still questionable regarding the limits of the authority to choose this law. There are certain limits to the flexibility of choosing this law. The problem faced is, how far is this choice of law permitted, whether it can be applied as widely as possible, or is it limited. In principle, the parties are free to make the choice of law they want, but this freedom does not mean arbitrary. The limitations on the choice of law are as follows: the choice of law may only be made as long as it does not violate what is known as "public order" (public policy), the choice of law may not turn into legal smuggling, the choice of law is limited by a certain legal system that is coercive (dwingen recht).[11]

1. Choice of Law Does Not Violate Public Order

The issue of choice of law is closely related to the issue of public order. Choice of law is permitted based on the principle of freedom of contract. However, freedom does not mean that it has no limits. This freedom is limited by the provisions of public order (public policy).[12] Public order is an emergency brake that can stop the application of foreign law. Public order is also an emergency brake against the use of the parties' autonomy too freely. Public order ensures that the law chosen by the parties does not conflict with the basic principles of law and the judge's society.[13] Its use must also be careful and as economical as possible, because if this emergency brake is used too quickly, international trade law will not be able to run properly. On the other hand, if we use the institution of public order too much, it means that we will always use our own national law, even though our international civil law has determined the use of law.

The concept of public order varies from country to country. Public order is tied to time and place. If the situation and conditions are different, the understanding of public order will also change. Public policy is also closely related to political considerations. It can be said that policy makers play an important role in this public order.[14] In accordance with the universal and very basic legal principle that is defeated by personal interests, therefore, if there is a trade contract that is contrary to public order, then the contract is certainly contrary to the laws in force in a country.[15]

2. Choice of Law Must Not Become a Legal Smuggler

There is a clear relationship between legal smuggling and choice of law. In legal smuggling, the individual follows the provisions that he has made himself. In the choice of law, there is no choice between: following the law or following the affairs that are made himself. In the choice of law, what is chosen is the legal provisions that apply to the countries of the parties. While in legal smuggling, what is chosen is an objective point of connection such as citizenship, domicile, place of contract (lex loci contractus), or place of object (lex rei sitae). All of these points of connection are influenced by the parties in legal smuggling.[16] For example, they change citizenship or move the place of goods or make contracts in another place. All of these show acts that constitute legal smuggling. The choice of law must be done bona fide, there is no special choice of a certain place for the purpose of smuggling other regulations. In other words, what can be chosen is the law that has a relationship with the contract.

[11] Gautama, *Op.Cit.,* hlm. 171
[12] Khairandy, *Op.Cit,* hlm. 130
[13] Gautama, *Op.Cit.,* hlm 172
[14] *Ibid.* Hlm 135
[15] Munir Fuady, *Hukum Kontrak* (*dari Sudut Pandang Hukum Bisnis*), Bandung: PT. Citra Aditya Bakti, 2001, hlm. 82
[16] *Ibid.,* hlm. 84

C. Restrictions by Certain Legal Systems that are Compulsory (dwingen recht)

One of the limitations in the choice of law is regarding certain legal systems that are mandatory. The parties cannot deviate from the rules that are mandatory. This is generally accepted in both internal and international legal settings.[17] Compulsory law (dwingen recht) limits the freedom of the parties in determining the choice of law. These limitations are determined by the economic conditions of modern life, such as consumer protection, prevention of abuse of
authority by economic rulers and maintaining a fair competitive climate in the economy.[18] ***D. Cases***

1. The Zechav affair of 1935

Samuel Jones & Co (export ltd) vs Louis Zecha. Zecha residing in Sukabumi and trading under the brand name "Soekaboemische Snelpersdrukkerij" sued the English company Samuel Jones & co. Domiciled in London, demanding payment of 12 promissory notes drawn by the company George Mann & Coy Ltd in London. The transfer of the promissory notes to Jones was only a pretense to facilitate the collection of Zecha. The reciprocal issue is which law should be used for the endorsement and cession that has been made. According to the first instance judge, the endorsement that has been drawn in London uses English, also the currency is Poundsterling, Berta lex loci contractus is in London according to the method applicable there. So the Judge assumes that English law applies to the endorsement. However, Zecha objected and argued that Indonesian law should not be used but English law. The high court also agreed that the deed of cession was made in Dutch and also the contents of the deed, this shows that the parties have chosen the law. Indonesia as the applicable legal system. Although the cession was carried out in London, the court considered that Indonesian law was applicable, not the lex loci contractus that determined, but the intention of the parties and recognized the choice of law as a secondary point of connection for this international trade law contract.

2. Case of "Nicolas Treller" 1924

The Dutch Supreme Court decided the case of the stoomtreiler Nicolaas, which had insured the amount of F. 80,000, for a journey from Ijmuiden to Immingham and back, marine insurance was concluded with the defendants, namely NV. Mascapai van Assurantie and 10 other airlines (among them Danish and Swedish companies). This insurance was concluded for the Casco, boiler, engines and equipment of the ship. During the journey the ship sank, and the plaintiff demanded payment from the insurance company which did not want to pay. The defendants consisting of 11 insurance companies, 6 of which were domiciled in the Netherlands and Dutch citizens refused to pay. They considered that at the time of the insurance contract, the parties wanted the use of English law. According to the provisions of the insurance contract, it was stated that the English Marine Insurance Act was applicable. Also all the

conditions and urgency of the English Lloyds policy were used, while this policy was considered as if it had been signed in London. They argued that the policy in question was void under English law, because the policy contained a clause prohibiting English law. The clause stipulated that no other proof of the value or budget of the ship specified in the policy was required. This clause was considered to be in conflict with section 4 of the Marine Insurance Act 1906 which stipulated that any insurance contract of an "estimated" nature was void under English law, therefore they refused to pay the plaintiff.

Meanwhile, the plaintiff believes that, although the agreement in question is generally subject to English law, it is also possible that for specific matters in this clause Dutch law applies, because the insurance policy was signed in the Netherlands and 6 of the 11 insurance companies are domiciled in the Netherlands and have Dutch citizenship. It is not necessary for the entire agreement to be subject to only one type of law, namely English law, but it is also possible that another part, namely the insurance agreement, is governed by Dutch law. The Dutch Supreme Court considered that according to Dutch law, the parties are not required to regulate all parts of their agreement by only one type of law and the mandatory rules of a foreign law are also not necessary if the parties do not want the application of this mandatory rule even though they have accepted the application of the relevant foreign law, the relevant insurance agreement is not void. The Panel of Judges of the Supreme Court has accepted the principle of choice of law by the parties in this decision with political considerations. It can be said that policy makers play an important role in this public order.

III. CONCLUSION

National borders are no longer an obstacle to transactions. Advances in technology and communication have resulted in economic activities no longer being constrained by national borders. Before concluding a trade agreement, the parties need to be careful about potential trade partners, the substance of the agreement, rights and obligations, risks, choice of law and dispute resolution forum. The parties entering into a trade agreement have the right to make an agreement on the choice of law and choice of forum that applies to the agreement. When a dispute arises, the parties can submit a resolution of their dispute using the courts of the chosen jurisdiction.

[17] Sudargo Gautama, *Hukum Perdata Internasional Indonesia,* Buku Kelima Jilid Kedua (BagianKeempat), Bandung: Penerbit Alumni, 1998

[18] *Ibid.* Hlm. 98

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