

CHAPTER-5

THE FUTURE PROSPECT OF INDONESIA'S ACCESSION TO THE CISG IN ORDER TO HARMONIZE INTERNATIONAL COMMERCIAL LAW IN THE ASEAN

*Erna Priliyasi**

I INTRODUCTION

First, I would like to express gratitude for the selection of panel of speakers and it is such an honor to be selected to participate in the UNCITRAL-UM Joint Conference 2017 that was held on 11 and 12 December 2017 in Macau, China.

My office, National Law Development Agency, Ministry of Law and Human Rights of Republic of Indonesia in 2013 established a Working Group on Preparation of an Academic Bill on the Convention for the International Sale of goods (CISG) and I was involved in the working group and became a coordinator to organize some seminars on the CISG. The study and the seminar developed a recommendation for the Government of Indonesia to ratify the CISG. In this regard, allow me to share some points of the result of the research and my thoughts regarding the future prospect of Indonesian's accession to the CISG in order to harmonize international commercial law in the ASEAN.

II BACKGROUND

Today, almost all businesses run the trading of goods by passing through its borders. Trading goods with foreign traders is a basic need for the traders to expand the opportunity to make a profit, as well as to divert their traded products that are not absorbed in their own markets. Seen from the perspective of relations among countries, international trade becomes a fundamental requirement for survival in a world of economic interdependence. International trade is a cross-border sale and purchase transaction, which involves two parties across state lines. These parties are often those originated from different countries or have different nationalities.

Based on the basic assumption described above, it is no wonder today we are witnessing a rapid development in the field of international trade that is characterized by the application of various trade agreements between the countries of the world such as the GATT / WTO, NAFTA, AFTA, APEC, and the EU, including important development occurring recently in ASEAN, namely the desire to realize the ASEAN

* Head of Legal Cooperation Department, National Law Development Agency, Ministry of Law and Human Rights, Indonesia.

Economic Community.

Legally speaking, international trade transaction means a transaction involving the interests of more than one national law. A trade is said to be an international trade, if the sale and purchase transactions have led to the choice of law between two different legal systems, and the objects traded must be submitted across state boundaries, and the existence of foreign elements or elements foreign to the legal system.

Areas of law that are important to consider in international trade is a legal contract. Differences in the legal contracts in international sale and purchase transactions involving businesses of two or more different countries would cause a lack of legal certainty. For example, the international sale and purchase transactions conducted by a Singapore businessman with an Indonesian businessman will involve two different systems of law. Singapore contract law, which is derived from the Anglo-Saxon systems of law, has different arrangements with the Indonesian contract law that is derived from Continental European legal tradition. Legal uncertainty arises when there is a dispute in which these businesses are likely to be faced with a system of contract law that is really foreign and unpredictable to the businessman.

The phenomenon of international trade has led to a need for rules that are universal to govern the rights and obligations of the merchants in international trade transactions. Laws that are different in different countries have resulted in legal uncertainty and difficulty among the traders in making international trade contracts.

Recognizing these needs, the United Nations (UN) through one of its bodies took the initiative to develop an international legal instrument, later known as the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). This convention is one of the documents created through diplomatic efforts of the United Nations Commission on International Trade Law ("UNCITRAL"). CISG seeks to bridge the gap between different legal systems in the world, especially among *civil law* (sub-traditions of France and Germany) and *common law* (sub-traditions of British and American), by harmonizing the law for the international sale of goods (opening CISG). CISG governs the making of the contract of sale, and the rights and obligations of buyers and sellers (including legal measures for them). CISG entered into force on January 1, 1988 for countries that were parties to it at that time.

III THE CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG)

CISG includes international material contract formation aimed at negating the purpose of the law of a specific country in international sales contracts as well as to facilitate the parties in the event of a conflict between the legal systems. CISG applies to contracts for goods made between the trading parties from different countries.

In accordance with the purpose of establishing UNCITRAL itself, which is to harmonize and unify private international law, the CISG is an instrument of the law governing the contract of international sale of goods. This means that the more countries in the world are ratifying the CISG, the faster the realization of the unification and harmonization will be in the field of international goods purchase contracts. Thus, in turn, it will reduce legal barriers often faced by businesses in international trade transactions. With membership of 84¹ countries from different legal backgrounds, the

¹ As of 29 December 2015, UNCITRAL reports that 84 States have adopted the CISG, <<https://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 30 October 2018.

CISG has gained recognition as a legal instrument that could accommodate the trading interests of many countries.

3.1 Aim of CISG and Structure

CISG pertains to international contracts to eliminate the need to apply state laws in international trade contracts, thereby assisting parties in the event of a conflict between legal systems. CISG applies to contracts for the sale of goods entered between parties whose place of trade is in a different country (1 (1)). Thus, the deciding factor is the place of trade and not the citizenship of the parties.

CISG consists of 101 articles divided into 4 parts i.e. Part I: Governing the scope (articles 1-6) and general provisions (articles 7-13); Part II: Rules governing the formation of contracts for the international sale of goods (articles 14-24); Part III: Rights and Obligations of the seller and the buyer of the written contract and Part IV: Final Provisions.

3.2 Key CISG Principles

If the parties choose the law of a state that is a party to CISG without reservations, or if the parties do not expressly exclude it, then their contract may be subject to CISG [Art. 2];

Some countries (e.g. US, Singapore, China) have made reservations that they are only willing to apply CISG on contracts made by their merchants with other merchants who are also members of CISG [Art. 95];

If Indonesia accedes to CISG, contracts made by Indonesian merchants with merchants from countries that reserve the use of the CISG shall remain subject to CISG (and not subject to the national law of either or both States);

The parties may override the CISG (either in whole or in part) and choose the national law of a country [Art. 6 CISG].

IV INDONESIA AND CISG

Indonesia has not yet become a signatory to the CISG but from the results of the study and from various discussion forums on the CISG, the Indonesian government is advised to accede to the CISG.

The need to accede to the CISG is increasing today, when there is a commitment of ASEAN countries to strengthen regional cooperation through the establishment of the ASEAN community (*Community ASEAN*), including the ASEAN Economic Community. In order to realize an ASEAN Economic Community, the ASEAN has recommended to its member countries to harmonize the law of international sales contract through the ratification of the CISG.

4.1 Reasons why CISG accession would be positive for Indonesia:

As Indonesia's economy becomes more open as a result of globalization, more and more trade transactions are conducted between Indonesians and foreign parties; therefore, it is necessary to institute legal rules that support international trade activities;

Currently, Indonesia does not yet have laws that specifically regulate international sales.

The trading law contained in the Civil Code is not ready to deal with complex international trade problems, such as the question of when the contract was entered into [Part II; in Indonesia there are many theories, e.g. acceptance of the contract, conveying

acceptance, etc.), the application of customary international law, e.g. INCOTERMS, ICC Uniform Customs and Practice for Documentary Credits, UNIDROIT Principles of International Commercial Contracts [Art 7], buyer and seller rights in the event of non-conformity [Art 35-44], unilateral contracting rights and consequences [Art 49 (1), Art 64 (1), and Art 81-84], the right to suspend obligations, price reduction rights [Art 50], etc.

Indonesia does not yet have a strong law or legal system or law enforcement that is capable of providing reasonable and appropriate legal protection to parties conducting international trade transactions.

4.2 *Benefits of Accession*

Accession may encourage acceleration of amendments to the law of treaties provided for in the Indonesian Civil Code to make Indonesia's legal system more modern and at the same time harmonious with the law of contracts of other countries;

In view of the breadth and depth of substance set forth in the CISG on international freight contracts, ratification or accession of Indonesia to the CISG may have a positive impact, particularly as a source of legal principles of international contracts for the sale of goods.

V *RENEWAL OF INDONESIA CONTRACT LAW*

Indonesian Contract Law currently adheres to the civil law tradition and is still guided by rules which originate from the Dutch East Indies colonial government, namely its Civil Code, especially Book III of the Engagement and more specially set out in Chapter II of the Legal Relationship in a Contract. Indonesian contract law is a legal product that is out of date and has not kept up with current developments, especially concerning international trade contracts.

Momentum for renewal of contract law in Indonesia increased when ASEAN took the initiative to harmonize various trade laws, including contract laws. Changes in Indonesian contract law are thus urgent and need to be promoted, as Indonesia develops in terms of free trade and global trade. As an ASEAN country that is a regional hub, Indonesia needs to show more commitment by participating in regional and inter-regional economic development efforts.

Changes in Indonesian contract law must be carried out in line with the harmonization of ASEAN contract law; the approach taken to amend Book III of the Civil Code must be carried out in line with the recommendations made by ASEAN. ASEAN has recommended that ASEAN member states ratify CISG or renew their national contract law in terms with CISG. In line with ASEAN's recommendation, the sectorial body, ASLOM, led by Singapore, has established a Working Group on the harmonization of trade laws.

Renewal of Indonesian contract law is necessitated by growing public need. The government should realize that harmonization of ASEAN contract law would be a great benefit, especially in the sale and purchase of international goods, given the diversity of the legal systems of contract law in ASEAN.

VI *HARMONIZATION OF TRADE LAW IN ASEAN*

Given that ASEAN countries have different legal systems, especially in contract law, harmonization of international contracts of sale law is urgently required

so that buying and selling goods among ASEAN countries will enjoy legal certainty which in turn will facilitate trade transactions.

In entering into contracts, especially for the sale and purchase of goods, ASEAN nations are guided by the principle of freedom of contract, which implementation needs to be adjusted to the rules of law applicable in each country as well as the standard of contract of sale and purchase of goods that applies internationally. This requires agreement that contract law should be harmonized among member countries so that conflicts of interest and differing legal systems for contract law can be adjusted for the sake of legal certainty and justice.

VII CONCLUSION

CISG specifies the principles contained in the law of contract in general and these principles are not contradictory with the Civil Code.

Effort by the Indonesian government to accede the COSG are the right step because in Indonesia there are no specific rules governing sale and purchase of goods internationally.

Indonesian accession to the CISG is also expected to have a positive impact for the harmonization of the legal contract of sale in the ASEAN region.

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