

Keeping up with The CISG: A Case of Indonesia

M. Ikhwan Maulana Haeruddin^{*1}, Muhammad Alfi Rifadli Mansur²,
Mansur Mansur³, Ilham Thaief⁴, Muhammad Ilham Wardhana Haeruddin⁵

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Abstract

Convention on Contracts for International Sales of Goods (CISG) contracts are essential for international trade as this ensures the principle of justice is met globally. Indonesia as a developing country should be aware of the international trade law, as the Indonesian legal system had remained largely unchanged from Dutch colonial heritage since a century and a half ago. Therefore, there is a current debate on whether Indonesia should ratify the CISG or not? This paper offers abundant of consideration in order to answer the question. The aims of this research are: 1) to determine why Indonesia has refrained from ratifying the CISG up to now to, 2) To determine current pressures on Indonesia to ratify CISG, 3) to assess potential advantages of ratification, 4) to assess potential disadvantages of ratification, and 5) To make recommendations with respect to reservations that Indonesia should consider. This paper employs research methods by systematically reviewing the relevant literature. Inclusion criteria will be that (a) sources contain the key terms of "Indonesia" and/or "CISG", (b) sources are published in English, (c) sources are more recent than 2001. It is discovered that decision makers in Indonesia face the difficult choice of whether staying with an embedded system of rules for contractual disputes of an international or to keep up with the CISG. The majority of opinion appears to suggest that Indonesia needs to reform its economic legislation and ratifying the CISG at the same would be prudent. The challenges for decision makers is choosing an appropriate time and giving the judiciary meaningful instruction on the interpretation of key provisions.

Keywords: CISG, International Trade, Developing Country, Indonesia.

JEL Classification: F13, F23, F53, F66, M010, M16.

1. Introduction

1.1 Background and the Research Aims

The purpose of the current research paper is to examine the history

1. Department of Management, Universitas Negeri Makassar, Makassar, Indonesia (Corresponding Author: ikhwan.maulana@unm.ac.id).

2. Monash Business School, Monash University, Melbourne, Australia (rifadli.alfi@monash.edu.au).

3. Department of Agro-technology, Universitas Islam Makassar, Makassar, Indonesia (mansur.mansur@uim.ac.id).

4. Department of Economics, Universitas Negeri Makassar, Makassar, Indonesia (ilham@unm.ac.id).

5. Department of Management, Universitas Negeri Makassar, Makassar, Indonesia (ilham.wardhana@unm.ac.id).

and relationship between Indonesia and the United Nations' Convention on Contracts for International Sales of Goods (the CISG). The use of contracts is an essential part of international trade. Written and verbal agreements are important to clarify terms, and also to ensure that the principle of justice is satisfied when people fail on their commercial promises (Fauzi, 2016; Gutmann, 2013). The freedom to contract refers to the conditions of having free choice to offer or accept terms and to determine one's matter autonomously (Meng, 2006).

In the realm of private law, parties tend to have a wide scope of autonomy to determine terms and conditions largely unencumbered by governments or legislation. Moreover, Meng (2006) claims the consequence is that parties to private agreements largely can chose the rules by which disputes will be resolved. However, issues arise when parties fail to provide a jurisdiction to resolve disputes. International private law, also known as conflict of laws, refers to the sets of rules used to determine which body, typically a state, has jurisdiction to resolve a legal dispute in such cases (Dicey, Morris, & Collins, 2000). The CISG provides a means to avoid issues of choice of law (Soni, 2014). The CISG provides a set of "accepted substantive rules" to which parties, arbitrators, and courts can rely. The CISG is considered as part of domestic law in relation to the transaction unless express terms in a contract exclude such (Lookofsky, 2016).

To date, 85 countries, including most of the major economies, have ratified the CISG. Indonesia, with a population of almost 260 million people (4th globally) and a gross domestic product of \$862 billion (16th) in 2015 (Haeruddin, 2016), and growing at approximately 5%, is a notable absentee. In more recent years, and particularly since 2013 as the Association of South East Asian Nations ('ASEAN') has pressed hard for regional economic integration, decision makers in Indonesia have been under pressure to ratify the CISG (Bell, 2005.)

Based on the aforementioned facts above, then it is fair to argue to propose a question, should Indonesia ratify the CISG? This paper aims to answer this question by addressing five (5) research objectives. Firstly is to determine why Indonesia has refrained from ratifying the CISG up to now. Secondly, is to determine current pressures on Indonesia to ratify CISG, as the third objective is to assess potential

advantages of ratification. Fourth, is to assess potential disadvantages of ratification and lastly to make recommendations with respect to reservations that Indonesia should consider.

2. Methodology

A systematic review of the literature will be conducted. Inclusion criteria will be that (a) sources contain the key terms of "Indonesia" and/or "CISG", (b) that sources are published in English, (c) that sources are more recent than 2001. Exclusion criteria are that non-academic sources will be omitted as will sources published in languages other than English and earlier than 2001. Electronic databases from Monash University library Australia will be used. In general, the application of the results of the paper can be as a reference for the Government of Indonesia and other international economic players in determining regulations relating to international business transactions, especially with the CISG.

3. Findings

In total 16 sources were included in the study. The findings are provided under headings for each of the five research questions as follows.

3.1 Why Indonesia Has Refrained from Ratifying the CISG Up to Now

It was found that the Indonesian legal system had remained largely unchanged from its colonial heritage a century and a half ago. Taufiqurrahman (2014) asserts that the legal regime was a legacy of the Dutch colonial government and that it maintained a wide range of related dynamics from the era. Indonesia has typically been an autonomous legal system in relation to international conventions and declarations. In the context of trade agreements, the situation is roughly the same. Moreover, Taufiqurrahman emphasizes that "a reality that cannot be denied that the laws of Indonesia applicable today, especially regarding international trade transactions, are less conducive to the changes" (Taufiqurrahman, 2014: 78).

It could also be speculated that Indonesia had experienced similar issues with the United Kingdom, another absentee. There could be less interest from the government (Moss, 2005). Indonesia is a setting with

a popular style government tended to focus on other legislative priorities. There could also be potential opposition from larger organizations, who are hesitant to move from a regime that they feel works for them (Taufiqurrahman, 2014). Finally, there may be limited resources for the change (Moss, 2005).

3.2 Current Pressures on Indonesia to Ratify

It appears one of the largest bodies supporting ratification of the CISG by Indonesia is ASEAN (Fong, 2015); however there is doubt to extent that the ASEAN will be able to meet its goals of cooperation at the same time given the lack of substantive law adopted by the association (Reyes, 2014) and the fact that other member nations such as Thailand and yet to adopt the CISG (Fong, 2015). Nonetheless, there appears to be a push from representatives of business and the judiciary to adopt a more foreigner friendly trade law (Taufiqurrahman, 2014), in line with international expectations of free trade and globalisation.

3.3 Advantages of Ratification for Indonesia

By ratifying the CISG, Indonesia is believed to gain benefits associated with harmonisation (Fong, 2015), which are: more certainty (Spagnolo, 2008), more consistency, lower administration costs, and faster transactions. Ratifying the provisions of the CISG would remove the uncertainty of dealing with Indonesian businesses for foreign importers and exporters according to Taufiqurrahman (2014). Such a development should promote business. Also, Japan, one of Indonesia's largest trading partners, belatedly ratified the CISG in 2008 (Sono, 2008), suggesting Indonesia should follow.

The ratification of CISG by the Indonesian government will automatically have an impact on the improvement of Indonesian laws. Such amendments may include the harmonization of reviewing laws and regulations to conform to the principles contained in the convention. The harmonization can be done either by refining the rules on domestic contract that has existed at the national level, or by creating a new stand-alone legislation or special about international contract law (Taufiqurrahman, 2012). In Indonesia, the rules governing the buying and selling activities is the Book of Civil Law

and Book of Trade Law, which only focus on buying and selling within the scope of domestic / national and does not regulate the buying and selling activities on an international scale (Taufiqurrahman, 2012). If the Indonesian government ratified the CISG, which regulates international buying and selling, the area of law would be regulated more firmly, so that Indonesian laws relating to contract law and international trade law would be more certain and reduce cross border risks, which eventually will increase its national income and balance of trade.

It is believed that Indonesia will be able to perform better within ASEAN by ratifying the CISG. It may be possible for parties to utilise better alternative dispute resolution procedures such as arbitration within ASEAN through CISG adoption. In the context, the CISG can contribute to strengthening regional economic integration in ASEAN (Haeruddin, 2017). CISG can provide a modern legislative framework suitable to be applied at the domestic, regional and global level (Taufiqurrahman, 2012). Adding the CISG would better provide for standard form contracts (Fong, 2015) and more clarify in interpretation of terms.

In addition, the ratification can benefit Indonesia because the contents of the CISG contract may be modified or terminated by the mere agreement of parties (CISG, Article 29). As global competition forces Indonesia to be adaptable, dynamic, and responsive, a modification in particular agreement is a value added. Indonesia as a potential international seller to other countries is best known for its natural resources. As soon as a particular country is in need of particular items, which is not included in the former agreement, then Indonesia may modify the agreement with other party's approval. This is strengthened by Del Luca's work (2005). Moreover, with the intensive use of email in international trade, related parties should ensure that conversations by email will not be considered as a contract because under the CISG a formal written contract is not required in order for it to apply.

3.4 Potential Disadvantages of Ratification

Drawbacks of ratification may exist. On one level, there is arguably loss of sovereignty and loss of jurisdiction. Felemegas writes on the

"New International Economic Order" (2001), which highlighting generic challenges for nations such as Indonesia. One such challenge is language. The CISG has been approved in English, French, Arabic, Chinese, Russian and Spanish (CISG, Article 101). However, the production of adequate translations of the CISG without error in other languages has been marked with problems. It can be argued that most of Indonesian people's foreign language proficiency are categorised in low level (Chodidjah, 2007; Lengkanawati, 2004; Weda & Sakti, 2018). Indonesian international traders, particularly those in the remote area, are not familiar with English, not to mention another foreign language. This can be a disadvantage for Indonesia .

There are other issues such as what Taufiqurrahman (2014) refers to as the need to develop a new Indonesian Economic System to match the CISG. Hikmahanto Juwana, a professor of Law at the University of Indonesia, argues that it remains very unclear whether the provisions of Book III of Indonesian Civil Code needs to be overhauled so to accord with CISG, or whether it will also apply to transactions which do not have international character if Book III is revised. Similarly there is uncertainty about whether the norms under the CISG will be transformed in a separate and specific legislation (2016).

CISG itself in article 6 provides the opportunity for the parties to ignore the use of CISG itself. Such is evident in article 6, "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions" (Taufiqurrahman, 2014: 80). The existence of article 6 has diminished the significance of the CISG as an international convention, as the CISG could be mustered by the agreement of the parties who choose domestic law rather than the CISG. As soon as the other party is welcoming the Indonesian domestic law, then CISG would not be effective and this can be a disadvantage for this party as this cannot be solve in the international trade court as soon as a problem arise .

Moreover, despite of the advantage of the flexibility the agreement, CISG Article 11 is allowing a free form of contract as "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses". This may be translated differently by

parties, which again may be caused by the cultural differences, communication styles, and so forth. In Indonesia, the sale of goods valued over \$500 need to be evidenced in a formal writing (Musa, Haeruddin, & Haeruddin, 2018). However in Indonesia context, this problem can be tackled by special agreement that must specify the goods' value within the contract.

Transfer costs are another issue. There are considerable transfer costs for Indonesia with limited evidence that decisions will be different after ratification. Murray Jr. notes referring to cases determined based on the convention that "the extant CISG case law is anything but a testament to the ability of courts to transcend their particular traditions" (2001, p. 366). Part of the transfer costs could be greater uncertainty initially as Indonesian judges are unfamiliar with the CISG (Taufiqurrahman, 2014).

3.5 Reservations that Indonesia Should Include

One of the issues for Indonesia with the CISG appears to be achieving certainty and consistency (Taufiqurrahman, 2014). Indonesia should adopt a similar term as Israel in that the CISG also applies to parties whose place of business is in a State that is not a Contracting State. Although not a reservation, it may encourage a uniform adoption of the CISG. It may also be prudent for Indonesia to lodge a reservation concerning articles 11 and 12. Article 11 of the CISG provides "A contract of sale need not be concluded in or evidenced by writing". It then follows "and is not subject to any other requirement as to form. It may be proved by any means, including witnesses" (Taufiqurrahman, 2014). The CISG aims to permit contracts to be formed based on verbal agreements alone. Given the traditional approach of the Indonesia system to commercial matters including contracts, it may be more appropriate to rely on contract for sales evidenced in writing (CISG Article 29, paragraph 2).

4. Implications

Decision makers in Indonesia face the difficult choice of staying with an embedded system of rules for contractual disputes of an international or whether to adopt the CISG. The majority of opinion appears to suggest that Indonesia needs to reform its economic

legislation and ratifying the CISG at the same would be prudent. The future challenges for decision makers is choosing an appropriate time and giving the judiciary meaningful instruction on the interpretation of key provisions.

The ratification should not be seen as the ultimate goal, but must be regarded as the beginning of a long effort to implement a national convention, to complement the efforts done before. At the national level, the government needs to take measures to complement the Civil Code and the Commercial code to enact legislation that specifically regulates the field of international trade.

5. Conclusion

The current study has attempted to examine the history and relationship between Indonesia and the CISG. Limitations of the study are numerous. One issue was that most sources were written in Indonesian and outside the scope of the current investigation. Moreover, it was found that there were limited translations of Indonesian law commentary available.

Any discussion of the development of international instruments related to contracts international trade should continue to be observed in an effort to determine the implications for international trade activities, particularly in the context of adjustment and improvement of national legislation. Holistic, systematic, and concrete steps need to be taken to enhance the national contract law governing international trade rules especially for Indonesia and CISG by means of: inventory; systematization; analysis; intensive public consultation with stakeholders; transformation; dissemination and technical assistance for businesses that international business transactions can take place smoothly.

Ultimately, the study was able to identify that there is some movement in the country to adopt the CISG. The ratification of CISG by the Government of Indonesia will bring more advantages than disadvantages. If CISG ratified by the Indonesian government, it will provide legal certainty for Indonesia, the companies that are doing international sales contracts based on a clear legal rules. The move also will automatically enhance Indonesian positive law, particularly with respect to the legal sale and purchase on an international scale. In

the author's opinion, sooner or later, it is possible for the adoption of the CISG to be ratified by Indonesia.

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