

The Role of a Notary in Making A Choice of Law of an International Business Contract

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ABSTRACT

As a consequence of the globalization era, legal relations between the world community are open and very easy. The International Business Contract is one of the legal relations used to facilitate cooperation between them, but sometimes the ease in cooperation often faces obstacles in the event of a dispute between them, for example wrong one party does not fulfill its promises (achievements). It is quite common that the parties involved in a certain business are faced with disputes resulting from the legal contract they previously made. To anticipate such happenings, they always include choices in the contract clause although they sometimes skip to do so. The lack of such a clause will bring about a problem which is law should they refer to to solve the dispute. This is where the role of a notary is very important in making a choice of law for international business contract. The role of notary is closely related to his authority, namely making authentic deeds. The Method used in normative juridical research which is carried out as an effort to obtain the necessary data related to the problem. The data source is secondary as consisting of primary legal materials, secondary legal materials, and tertiary legal materials. In addition, primary data is also used to support secondary data legal out using qualitative juridical analysis methods. From the research results it can be obtained that the choice of law must be determined based on theory and principles in international private law. The role of a notary in making a choice of law for international business contract is limited to providing suggestions or legal counseling on the choice of law. Notary may not determine the choice of law in the international business contracts they make. But only given recommendations to their clients.

Keywords

*Choice of law, Notary,
International Business Contract*

INTRODUCTION

The rapid development of globalization and technology flows has resulted in higher needs of society. The magnitude of this level of need cannot be fully met by the State. This is due to the limited resources of both natural and human resources. The growth of the number and needs of human life is in line with the development of advanced technology that so quickly makes the number of activities and the way humans are active. This is good as an individual, a legal entity, a collection of individuals, or a certain community of people, and a nation or part of the world community.

As a consequence of the foregoing, legal relations between world communities are open. This legal relationship is one of the private laws that gives freedom to the parties concerned to make a contract that is capable of being an achievement in a bond (Isradjuningtias, 2015; Jamil & Nury & Rumawi, 2020). An international business contract is basically a contract between 2 (two) or more legal subjects so as to create an obligation to perform or not perform a certain action. This means that every party contained in the contract has an obligation to carry out the contents of the contract in good faith (Fuadi, 2001). In international business

contracts there is a foreign element, which results in an incomprehension of the applicable law outside the other state party.

International business contracts are one of the legal relationships used to facilitate cooperation between the parties. These parties can be States, government and non-governmental international organizations, individuals, and other multi-national companies (Andara et al., 2020). Such international business contracts are needed to provide protection and legal certainty to parties conducting international business. The contract is poured through an authentic deed drawn up by a Notary (Ayu, 2018).

At the time of entering into such a contract, the parties may feel confused by the existence of a choice of law (hereinafter referred to as the choice of law). Thus, at other times it can be said that the parties chose the wrong law for their contract. This is what often causes disputes between the parties, because of the incomprehension of the law chosen by the parties. The law chosen by one party is not necessarily accepted by the other. Although in a contract choice of law is not a prerequisite for the validity of a contract, but of course choice of law has an important role. If the choice of law is not stated, it can be said that a contract is considered defective (Junardi et al., 2019).

According to Indonesian Civil Law based on the principle of freedom of contract, the parties involved in the agreement can freely determine the clauses of their contract with restrictions not contrary to the Law, public order and Decency. In a contract can be made a dispute resolution clause, the parties can exercise their choice of law which will be used to resolve the dispute that arises (Gautama & Hornick, 2022; Thalib, 2014). The choice of law is also commonly used in dispute resolution clauses of international business contracts with restrictions that it must not conflict with public order and must not be transformed into legal smuggling. The role of a Notary is needed in terms of determining the choice of law of an international business contract. One of the notary's authorities is to provide legal counseling in connection with making deeds. This counseling is the basis for the parties' consideration to determine the choice of law in their contract.

METHODS

This legal research uses the Normative Juridical approach method, which is a problem approach by examining and reviewing a valid and competent law to be used as a basis for carrying out problem solving. This is done to find a rule of law, principle or legal doctrine to answer legal problems that will produce concepts or theories in solving the problem under study. The data to be used in this study secondary data obtained by conducting document studies consisting of legal materials and research tools used in document studies are carried out by searching literature literature. The analysis chosen in this study is a qualitative analysis that is not only able to obtain conclusions, but also able to be used for the development of a new similar research.

RESULTS

International Civil Law is a law that regulates private relations (between individuals) that contain foreign elements or cross the territorial boundaries of the State. Foreign elements or crossing the boundaries of the territory of the State can be related to the subject, object or location of the making or execution of legal acts. Related to the subject, for example, legal relations carried out by those of different nationalities or domiciles, related to the object, for example, the object of the agreement is abroad, related to the making and implementation of legal acts, for example, the legal acts are made / carried out abroad.

One form of International Civil law relations is international business relations. International business relations are activities aimed at obtaining profits carried out by business people who contain foreign elements. Every business relationship requires certainty to support the business venture (Koesnadi et al., 2023a). In international business relations, contracts are commonly used in international business to obtain legal certainty and protection of the interests of the parties (Sinaga, 2021). These contracts are usually referred to as international business contracts. An international business contract is a reciprocal agreement between two or more business actors that contains foreign elements and has legal consequences for the parties.

The content of the contract includes the object of the contract along with the arrangement of its rights and obligations, including in determining clauses in dispute resolution. In the dispute clause the parties may make a choice of law. So, the choice of law is the law chosen by the parties to the contract as a tool to interpret the content of the contract including objects, arrangements of rights and obligations or to resolve in case of disputes. The choice of law as one of the principles in International Civil Law (hereinafter referred to as HPI) is limited by the provisions of, among others:

- Does not violate public order
- May only be in the field of contract law
- Must not be regarding employment contract law
- Must not be regarding civil provisions of a public nature.
- Legal choice must be made bona fide (in good faith) and must not be deliberately chosen with the

intention of smuggling the law

For international business contracts for which there is no choice of law, the law that should be used (hereinafter referred to as *lex cause*) is uncertain because the determination process still has to be carried out and it is up to the judge to base on which doctrine/theory to determine the *lex cause*. There are several theories in international civil law that can be used to find the *lex cause* for a party relationship for which there is no legal choice, including:

a. *Lex Loci Contractus*

According to this theory, the applicable law is the law of the place where the contract was made. This theory is a classical theory that is not easy to apply in the practice of forming modern international business contracts, because the contracting parties are not always present face to face forming a contract somewhere (contract between absent persons). They may contract by telephone or other means of communication.

b. *Lex Loci Solutionis*

According to this theory, the applicable law is the law of the place where the contract is executed, not the place where the contract is signed. The main difficulty of this contract is, if the contract is to be executed not somewhere, such as the case of buying and selling involving parties (sellers and buyers) who are in different countries and with different legal systems (Politon, 2017).

c. *The Proper Law of Contract*

According to this theory, the applicable law is the law of the country that most reasonably applies to the contract, that is, by looking for the center of gravity or the link point that is closest to the contract (Purwanto, 2011).

d. *The Most Characteristic Connection*

According to this theory, the applicable law is that of the party that performs the most characteristic feats. The advantage of this last theory is that with this theory can be avoided some difficulties, such as the necessity to hold a classification of *lex loci contractus* or *lex loci solutionis*, in addition to also being promised legal certainty earlier by this theory (Koesnadi et al., 2023b)

The international business contract must be in the form of an authentic deed drawn up by a Notary. This is because the nature of a Notarial deed is to have perfect evidentiary power. Based on Article 1 number 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN), a Notary is a general official who is authorized to make authentic deeds and other authorities. Notarial Deeds made before a Notary as a general officer have formal proof and material proof that can support the establishment of the principle of prudence in making international business contracts.

The notary only provides counseling to the client who will make the deed to him only. Notary legal counseling can be done by providing a correct understanding to the presenters. The notary must explain the contents of the authentic deed that has been made. Not everyone who makes an authentic deed to a Notary can understand well the deed (Lubis, 2021). Notaries do not receive honorariums in providing legal counseling to their clients. The role of a Notary in providing legal counseling is carried out in order to assist in making authentic deeds and this is an inseparable unity from one another.

The role of a Notary in determining the choice of law of an international business contract, is only in providing advice to the parties regarding the choice of law of the business contract. The notary is not entitled to determine the choice of law of the parties' contract. A notary can only provide legal counseling on the contract. This is in accordance with the authority of the Notary in Article 15 of the UUJN.

Legal counseling followed by the making of deeds is an inseparable whole. It's just that in providing legal counseling, the Notary must provide an explanation of the actual legal situation in accordance with the applicable laws and regulations, explain the rights and obligations of the parties in order to achieve high legal awareness in society, be honest, impartial and with a full sense of responsibility. Before the Notary provides legal counseling, he must understand well the problem being questioned by the client to him, so that the Notary does not give an erroneous or inappropriate explanation and even violate the applicable provisions. In addition, in providing legal counseling, the Notary must be able to assess in advance what the parties who come to him want, give advice in accordance with the law, and find the appropriate legal forms desired by the parties (Prijanto & Tho'in, 2021). In providing legal counseling, the Notary has a role to always act honestly and impartially, provide services in accordance with the applicable provisions in the law, and keep confidential all information and everything he gets from the interceptors or his clients to other parties.

CONCLUSION

The choice of law is a very important clause for an international business contract. This is because the choice of law is the law that governs the performance of the international contract. If it is wrong to determine the choice of law, it will be fatal for the parties and will even cause legal smuggling in the international business contract. A notary only acts as a provider of legal advice or counseling to his clients on the choice of law of an international business contract. The notary in providing legal counseling must understand the determination

of the choice of law of a business contract. Thus, the Notary can advise his client which law is good to use in the contract. The notary is not entitled to determine the choice of law against the contract. Notaries can only provide input on choice of law that should be used for international business contracts based on the theory of choice of law acquisition.

REFERENCES

- Andara, D., Aburaera, S., & Baharuddin, H. (2020). Juridical Analyst Supervision Function of the Notary Supervisory Board in the City of Baubau. *Gerechtheid Law Journal*, 1(1), 47–57.
- Ayu, I. K. (2018). Peran Pengadilan Negeri Indonesia dalam Penyelesaian Sengketa Transaksi Elektronik Internasional. *Legality: Jurnal Ilmiah Hukum*, 26(1), 40–52.
- Fuadi, M. (2001). *Hukum kontrak:(dari sudut pandang hukum bisnis)*.
- Gautama, S., & Hornick, R. N. (2022). *An introduction to Indonesian law: Unity in diversity*. Penerbit Alumni.
- Isradjungtias, A. C. (2015). Force majeure (overmacht) dalam hukum kontrak (perjanjian) Indonesia. *Veritas et Justitia*, 1(1).
- Jamil, N. K., & Nury & Rumawi, R. (2020). Implikasi asas pacta sunt servanda pada keadaan memaksa (force majeure) dalam hukum perjanjian indonesia. *Jurnal Kertha Semaya*, 8(7), 1044–1054.
- Junardi, N., Sidik, S. H., & Muhaimin, M. (2019). A Study in Sumbawa Regency: Dissolution of Cooperatives According to The Indonesian Legal System. *International Journal of Multicultural and Multireligious Understanding*, 6(3), 79–85.
- Koesnadi, M., Pieris, J., & Tehupeior, A. (2023a). THE ROLE OF A NOTARY IN MAKING A CHOICE OF LAW OF AN INTERNATIONAL BUSINESS CONTRACT. *International Journal of Social Service and Research (IJSSR)*, 3(4).
- Koesnadi, M., Pieris, J., & Tehupeior, A. (2023b). THE ROLE OF A NOTARY IN MAKING A CHOICE OF LAW OF AN INTERNATIONAL BUSINESS CONTRACT. *International Journal of Social Service and Research (IJSSR)*, 3(4).
- Lubis, T. M. (2021). Akibat Hukum Pembatalan Perjanjian Bilateral Terkait Pinjaman Kepada China Dalam Perspektif Hukum Internasional. *Res Nullius Law Journal*, 3(1), 79–88.
- Politon, R. (2017). Pemenuhan Hak Dan Kewajiban Sesuai Kesepakatan para pihak dalam kontrak Ditinjau dari kitab undang undang Hukum perdata. *Lex Crimen*, 6(3).
- Prijanto, T., & Tho'in, M. (2021). Hukum Bisnis terhadap Perdagangan Internasional Era Globalisasi sebagai Perlindungan Eksportir, Importir, dan Investor. *Jurnal Ilmu Manajemen Dan Akuntansi Terapan (JIMAT)*, 12(1), 97–103.
- Purwanto, H. (2011). Keberadaan Asas Rebus Sic Stantibus Dalam Perjanjian Internasional. *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, 102–121.
- Sinaga, N. A. (2021). Perspektif Force Majeure Dan Rebus Sic Stantibus Dalam Sistem Hukum Indonesia. *Jurnal Ilmiah Hukum Dirgantara*, 11(1).
- Thalib, A. (2014). *Learning The English Law First Edition*. UIR Press.