

## THE PRINCIPLES OF JUSTICE AND LEGAL ASSURANCE IN CHOICE OF LAW FOR INTERNATIONAL ELECTRONIC CONTRACT

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### **Abstract**

Along with globalization, legal relationships between parties are not exclusively domestic since it also involves foreign element. As the result, it affects the usage of different legal systems in establishing a contract. Unlike commercial contracts in which the position between parties is equal, consumer contracts place the consumers unequally resulting in lameness and disproportion among consumers in terms of conveying a common will to choose the clauses of contract. The existence of injustice causes a key paradigm shift on contractual freedom from "both-sided autonomy" to "one-sided autonomy." Additionally, legal uncertainty will also appear particularly on the tug-of-use of the sea point based on whether unilateral, multilateral, or substantive choices of law. Such condition requires harmonization as necessity along with the legal context increasingly global.

### **Keywords**

the principle sided autonomy, justice and legal assurance, harmonization

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## Introduction

The growth of international business activities and the changing on technology of information dramatically increase the frequency of interaction in national legal system of a country. In this current global market, the boundary of national territory is no longer a serious problem and makes the business transaction no longer purely national. The current legal relationships among marketers mostly contain foreign element (Moch. Isnaeni, 2013). In such international context, the contracting parties are free determining the form, content, and terms of contract they hold. This latitude is commonly known as a contractual freedom, and international arenas frequently referred to party autonomy.

Party autonomy is described as having a will to determine its own law. The will raises a contractual responsibility derived from the involved parties independently establishing a contract along with the whole legal consequences (Atiyah, 1981 in Ridwan Khairandy, 2003). This is the base of making contract. One important part contained in law of contract is parties' contractual freedom which is the first phase of the party autonomy principle (Maryke Silalahi Nuth, 2012).

Contractual freedom requires parties to have equal bargaining power. Pitney argued that it was impossible to uphold contractual freedom without equality on bargaining power between parties. In fact, the contracting parties did not always have equality in their bargaining power. As the consequence, parties with higher position would dominate the weaker ones.

Contractual freedom and the principle of consensus are no longer in harmony, especially with the pretext of efficiency. The dominate parties are free designing the draft of a standardized contract. This standard contract is classified into *adhesion contract*, given that the terms of condition unilaterally predetermined by the dominantes will burden the weaker party. The legality of such contract is controverted.

PS. Atiyah argued that the primary assumption dealing with the doctrine of contractual freedom on bargaining power was equal. Every individual is autonomous, independent, and equal among others. An individual has similarity with others; at least they have equal autonomy and rights to be free from other's intervention in controlling themselves.

Instead, disproportion seems apparently more dominant in consumer contract. This derived from an idea that in consumer perspective, the disproportion raises in parties'

bargaining power. A producer-consumer relationship is assumed as a subordinate relationship, in which the consumer is identified as subordinate in the process of determining contractual will (Agus Yudha Hernoko, 2010).

Generally, an electronic contract is established in paperless setting. It causes disproportion on party autonomy since the clauses contained is in the form of standard contract (Friedrich Kessler, 1943). Another party (i.e., buyer or consumer) has no robust bargaining power to make negotiation since the contract is designed by electronic system which gives them no choice but taking or leaving it. Jon Bing asserted:

*"Consumer contracts are usually regarded as adhesion contracts, in the meaning that terms and conditions are designed by the supplier and cannot be negotiated or altered by the consumer. The adhesion contract can be defined as "an agreement..... in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage". Contracts of this kind are concluded on "take it or leave it" basis (Jon Bing, 2009).*

The clauses contained in electronic transaction has provided the choice of law typically designed in small print letter, making it unclear and difficult to understand by the consumers. The consumers' limitation to actively determine the clauses of the choice of law makes them have unequal bargaining power (Timothy Lester, 2003). The merchants have higher power and more dominant position since they predetermine the choice of law with no clear notification. The consumers, indeed, have no power to understand the complex and standard clauses. It is more likely that the merchants tend to misuse their dominance for their own business interests.

Lameness and disproportion between parties in expressing a common will to choose the clauses of the contract brings a key paradigm shift into reality on its contractual freedom from both-sided autonomy to one-sided autonomy. Maryke Silalahi Nuth stated:

*"consumers are consider as week party of contract due to fact that bussines are in more efficient position to bargain for term of contract, consumers have a difficulty to understand the complex term of the contract which may deprive the consumer protection by implementing the governing law that is more favorable for bussines to pursue their commercial interest".*

This paradigm causes injustice in contract. The soul and the breath of parties' freedom are considered as jargon only and not realized for wrapping the entire interests within

contract. Drawing on this crucial issue on justice, a depth understanding about philosophical review on the principles of justice and legal assurance to have freedom in choosing the law in transactional electronic contracts along with its harmonization by the universal constructs of international law.

### **Justice Principles From Philosophers' Perspectives**

The legal purposes considered as the basis of regulation include legal assurance, expediency, and orderliness. In addition to those purposes, justice is also identified as a value. In a good life, there are four value considered as the key foundations of life. It involves justice, truth, law, and moral. Following Plato, justice is the highest value of benevolence. He said, *"Justice is the supreme virtue which harmonizes all other virtues."* *Institute of Justinian* defined justice as constant and continual purposes to provide people their rights. The institute stated, *"Justice is the constant and continual purpose which gives to everyone his own"* (Munir Fuady, 2003). Robert Reiner illustrated arguments on justice as an *essentially contested concept*. An appropriate understanding on what justice is remains complex and abstract, especially when it relates to various interests (Robert Reiner, 2002). Aristotle defined the term justice by stating, *"justice consists in treating equals equally and unequals unequally, in proportion to their inequality"*, indicating that similar matters should be treated equally and different matters should be treated differently in proportional manner (Notohamidjojo, 1971).

John Locke, Rosseau, Immanuel Kant, and John Rawls are several thinkers debating the essence of justice in a contract. John Rawls proposed a theory of justice which criticized the theories from John Locke, Rosseau, and Immanuel Kant since they tended to be utilitarianism and intuitionism. Jeremy Bentham and John Stuart Mill are prominent as the initiators and the advocates of utilitarianism; hence, they were criticized by Robert Nozick and Ronald Dworkin (Andre Ata Ujan, 1999).

Rawls called utilitarianism as a view assessing that the merits of people's deeds in moral accent significantly depended on the merits of the consequence. Dworkin named it as *"goal based theory"* and assumed that it failed assuring a social justice due to prioritizing the principles of utility and rights. Furthermore, utilitarianism is not appropriate for the ideas of justice to base (Raymond Wacks, 1995).

Utilitarianism saw individual happiness as equal. Satisfaction which commonly referred to materials is considered as a valid and binding measure. Thus, it seems that satisfaction will never be able to be mathematically measured. Viewed in moral aspect,

however, it takes the principle of utility on top and put aside the principle of rights. It seems that utilitarianism has a good purpose to use teleological approach to address the gap between both principles. In fact, this view failed to play its role. Some critics argued that utilitarianism had no capacity to handle the two kinds of moral issues, rights and justice (Manuel Velasquez, 2005). Furthermore, Rawls noted that it was unfair sacrificing individual's rights to gain higher economic benefits for community as a whole. He thought that it controverted the idea of justice which required freedom for everyone. Social decisions that bring consequences to all members of society must be taken based on the idea of utility. Rawls defined justice as fairness by relying on two principles of fairness: *First*, every individual is equal on their rights to have extensive and equal basic freedom. *Second*, social and economic lameness must be arranged to bring benefits for everyone, and all positions are open for everyone (John Rawls, 2011).

Relying freedom on those two principles reveals the boundaries of freedom based on public interest, orderliness, and public welfare. In legal context, Rawls argued that law had tight relation with fairness as orderliness. Rawls defined law as compelling public norms to regulate individuals' deeds and provide a social-cooperation framework.

Rawls' idea on law as a social-cooperation framework is similar to Habermas' thought that an individual's freedom was restricted by other individuals' freedom. This argument is based on the principle of fairness relied on respect, equal rights for individual, and solidarity based on empathy and social welfare. Both Rawls and Habermas agreed that law that ruled people had to be controlled by the principle of social justice. However, what makes their view different is that Rawls stressed on materials/substance and Habermas concerned on the procedures or ways (Bur Rasuanto, 2005).

Dealing with social benefits in the context of justice, chances to improve the prospect of lives should not only be provided for talented and capable people, but also for less capable ones. However, the different principle does not require equal benefits for everyone, but tends to require reciprocal ones (Lord Lloyd of Hampstead & Freeman, 1985). Rawls' fairness theory on "*the different principle*" is then criticized since it gave chance for the government's intervention to violate individual's rights. This idea also tends to put aside one's effort and perseverance to reach particular standard of prosperity for the sake of less capable people's interests. However, the followers of Rawls' theory believed that its advantages were more than its disadvantages.

Amartya Sen also criticized Rawls' view although she admitted that Rawls' idea had an important contribution to the development of fairness theory, in particular to the definition of '*justice as fairness*'. Justice stresses on prerequisites. Rawls elaborated the prerequisites, such as people's necessity on rationality and impartiality, and people's necessity to have and practice their freedom. Additionally, Rawls contributed by stressing on people's moral power in which people commonly had awareness to what they thought was good and fair.

Following Amartya Sen, research urgency on justice is not only to abstract which perfect justice institution is, but also how we get fair condition. It is also to improve justice through actual realization and the existing comparison among individuals in society (Amartya Sen, 2009). Furthermore, Amartya Sen's objection on Rawls' idea is similar to her objection on contractors in age of enlightenment. Although she agreed logic as primary means to analyze justice context in the construct of *justice as fairness*, Amartya Sen criticized some important theories from Rawls. One of those referred to the concept of contract and original position. Amartya Sen provided several significant suggestions, especially in examining the extent of the idea of original position could be actually implemented. In addition to the application issue of original position, she criticized the impartiality of original position which was identified as a closed impartiality. She argued, "*with closed impartiality the procedure of making impartial judgement invokes only the members of a given society or nation (or what John Rawls calls a given 'people') for whom the judgements are being made*".

In addition to justice as the primary topic, another important element that covers the concept of justice is equity. Equity is necessary to complete the enforceability of justice. It is defined as benevolence encouraging people to use what belongs to them to have rational and logical deeds. Moreover, the implementation of equity is in line with the norms and the influence is increasing on conflict resolution when legal aspect does not address it (Curzon, 1967).

The negligence on practice can turn the nature of justice that is actually virtue into disavowal toward the justice itself. Justice is objective, *zakelijk* and general. It means that justice is absolute, compulsory, too abstract in its implementation without considering individual circumstance, and too generalizable. In civil law system, the principles of equity include in the principles of good faith, fairness, decency, and propriety. Jurisprudence that frames the misuse of rights is originally restricted on the violation of law, and then it turns to the usage of law as the base and the current

development relied on equity. In this case, judges are required to consider any conditions covering the offenders. These equity-based considerations are expected to lead the judges to provide the fairest verdict based on the principle of fairness, *et aequo et bono*.

### **Choice of Law as The Manifestation of Party Autonomy Principle**

The terms of '*choice of law*' as contractual freedom are vary, such as *Partij autonomie* or *De autonomie van partijen* (Dutch), *Contratto di collagamento* (Italy), *autonomie de la volonté* (French) or *intention of the parties* (English) (Sudargo Gautama, 2004). Additionally, there are also some other terms including *rechtskeuze*, *Rechtswahl*, *choice of law* and *connecting agreement*. The labeling of the term "*party autonomy*" is often misled (*misleadend*). Parties only have their freedom to choose which desired law to be mentioned in the contract. Kolleewijn stated, "*Het is slechts kiesvrijheid ...niet het recht tot self regeling*", indicating that it is the freedom to choose, not to be autonomous (Abdul Gani Abdullah, 2005). Niboyet saw that *autonomie de la volonté* was in line with the freedom provided for individuals to conduct their willing to choose and decide which law they need for their legal relationships. These legal relationship should rely on international facet. Different elements must be included as one of the absolute prerequisites to choose laws on international civil law. No different element means no choice of law.

The rapid development of information technology along with the products' dissemination are likely to happen due to globalization, and its impact leaks to legal facet. Law, technology of information, and globalization are three sectors which development are intertwined. Globalization brings a new global trade system that causes the legal systems among countries collide. In globalization, law acts whether to maintain its own regulation or to adjust with a legal system of another country. This tightly relates to the choice of jurisdiction that will prevail in the implementation of the contract.

Globalization is marked by the existence of internet that improve consumers' insights to do transactions of goods and service in international setting. Thus, electronic transactions bring relevant judicial issues in protecting parties' interests, in particular for buyers. Electronic transactions, somehow, impact the uncertainty on the path of commerce. This brings much differences on regulations among countries. Timothy P. Lester asserted this argument by stating:

*“The global Internet greatly increases consumers’ ability to buy goods and services internationally. Therefore, ecommerce brings the jurisdictional issues in relation to consumer protection sharply into focus. However, the concept of e commerceamplifies the “uncertainties that typically inhere in cross-border trade. Because Internet transactions are inherently global, they potentially implicate many different national regulations”.*

### **Justice and Legal Assurance as Contractual Base in Choice of Law**

In relation to the essence of justice within contract, some scholars, including John Locke, Rousseau, Immanuel Kant, and John Rawls, proposed their ideas on contract-based justice. They realized that without contract along with rights and obligations within, a business community will not work. Thus, with no contract, people will never be pleased to engage in and rely on other’s statement. Contracts provide a way to assure that each individual will hold their promise and eventually, the transaction will probably happen.

In regard to the complexity on contractual relationships in business field, particularly dealing with justice in a contract and based on those ideas, we are not allowed to be glued on the difference of classic justice. It means that the analysis of justice in a contract must combine the concept of equal rights in exchange (*performance-contra-performance*) as known in the concept of both commutative and distributive justice as the base of contractual relationship.

Understanding justice in a contract should not lead us to monistic view (single concept), but more than that, it should be comprehensive. In commutative justice that underlines the relationship between individuals, including contract, it should be considered as equality only, since this view will reveal injustice when encountering disproportion among contracting parties. Similarly, distributive justice set in the relationship between nation and people, the concept of proportional distribution contained within can be led to the perspective of contractual relationship between parties (Muhammad Taufik, 2013).

Rawls offered a problem solving on justice issue by constructing a contract-based theory of justice. For him, an sufficient theory of justice has to be constructed by contractual approach, in which the principles of justice collectively selected purely derive from mutual agreement from all parties in free, rational, and equal setting. Through contractual approach, a theory of justice has capacity to assure the implementation of rights and simultaneously distribute the obligation to all parties in equal manner. Therefore, Rawls asserted that a concept of good fairness should be

contractual which resulted in putting aside the concept of justice that is not contractual-based for the sake of the justice itself (Agus Yudha Hernoko, 2010).

Dealing with justice in contract, Agus Yudha Hernoko argued that the dimension of commercial business contract tended to stress on the appreciation toward partnership and business sustainability (*efficiency and profit oriented*), and not be glued on mathematical proportion. In contrast, party relationship constructions on commercial business contract tend to stress on the proportionality of rights and obligation exchange between parties. By agreeing the universal basis (e.g., good faith and fair dealing; reasonableness and equity; *redelijkheid en billijkheid*; propriety and justice) in business practices, it shows that what is put on top is providing assurance that different interests between parties is already set through mechanism of obligation distribution in proportional manner, apart from the final proportion the parties will receive.

Rawls argued that similarity in result is not an excuse to justify a procedure. Justice as fairness or as pure procedures does not require every individual who get engaged in and run the same procedures to have the same result. In the contrary, the result of fair procedures has to be considered equitable, although each of individuals does not get the same result. Thus, the concept of justice revealed from a mutually accepted procedure has to be accepted as an equitable concept and publicly applicable. Therefore, what should keep in mind is that justice does not always bring every individual into the equal result without considering any differences that objectively exist in every of them. In the context of the choice of law, for instance, the concept of justice can be considered exist as well. This condition is in particular found in a basic concept of contractual freedom. Looking into the path, the concept of contractual freedom itself has the elements of justice, assurance, and utility.

The aspect of justice in contractual freedom, in accordance to the author's view, derives from a belief that places the deal between parties as a part of law or regulation. This belief emerges along with the development of contractual relationship between parties assured by the law as supreme power and manifests as regulation for parties who make the relationship. This principle is almost recognized by all countries, including Indonesia which then has article 1338 subsection (1) on Civil Code as the base. The provision mentioned that every contract legally made prevailed as regulation for they engaged in.

Nevertheless, the choice of law always encounters a legal regime each country follow. Besides, issues in e-commercial transactions are not quite easy to approach using existing principles in international civil law. The increasingly global world brings effects on the importance of establishing particular regulation in e-commerce field. However, some consider that such deed is not necessary yet since the concept and the principles of international civil law of each country seem still useful to approach such matter.

Therefore, several problems dealing with assurance and justice remain exist and perceived by people with freedom to select the choice of law. A freedom of choosing law as patron as a supreme legal source provided by the regulation impacts on the distribution of justice for parties. On the other hand, it causes injustice for another party. It means that when a law of one particular party is chosen, another party which national legal system is not accommodated will be in disadvantageous position. From author's perspective, there is still such a romp between a pendulum of legal assurance and a pendulum of justice in the freedom to decide the choice of law

Some theories of freedom to decide the choice of law used, based on Stanley E. Cox, include: 1) the choice of unilateral law; 2) the choice of multilateral law; and 3) the choice of substantive law.

Theory of the choice of unilateral law stresses on the aspect of (national) sovereignty as the only legitimization source on any decision for jurisdiction issues. In this context, forum court handling conflicts usually places itself in domestic setting, not international one. Forum court always admits that the source of its power and authority to give verdict on conflicts solely depends on facts underlying the issue and it affects the importance of the sovereignty itself. The only regulation to be applied is forum law.

The limitation of this unilateral theory is that contracting parties do not have law assurance for international conflict resolution. Drawing on this context, the author assumes that although the distribution of justice embeds on the parties' freedom, legal assurance is not contra-productive for the party. Assurance is only in favor of jurisdiction. The establishment of this forum is a sovereignty expression of a country. This, as the result, effects on the emerging will on behalf of the parties to seek for a forum accommodating their interests to resolve the conflict encountered. This condition, indeed, brings disadvantages to other parties whose legal interests are not accommodated in a given forum.

The disadvantage of *unilateral* theory brings out *multilateral* theory. In this theory, the judges seek to proportionate their concern on sovereignty among any sovereignty which has particular interests in order to establish policies proposed through a given litigation. This idea is better known as '*the idea of sharing sovereignty*'. The primary purpose of this multilateral approach is monotony of the choice of law and predictability of the result. There are two approaches in this regard, including subjective and objective approaches.

Objective approach (*the objective choice of law theory*) is an approach to choose law that controls and governs international contracts by linking that law to the objective connection points, indicating that it does not depend on individual's subjective, but referring more to objective factors such as location of contract establishment (*lex loci contractus*), location of contract implementation (*lex loci solutionis*), citizenship among parties, parties domiciles, language used, and other objective factors.

Both *lex loci contractus* and *lex loci solutionis* have limitations in their development in line with the development and the progress of communication technology. Thus, a more rational theory is developed, such as *the center of gravity*, *the most characteristic to the contract*, *the most significant relationship* and *public interest*. Although those theories are helpful, no legal assurance seems apparent for all contracting parties. At least, one of both parties engaged in a contract has not capability to predict the rights and obligation along with its juridical implications that have occurred since the beginning of transaction (unpredictable). Multilateral theory, in its development, has accommodated the prevalence of foreign law to overcome any international conflicts. However, the perspective of this prevalence is still particular as the choice of unilateral law. In other word, the theory of the choice of multilateral law refers to further development of the choice of unilateral law.

An extreme perspective on the choice of law reveals the choice of substantive law. Unlike the choice of unilateral or multilateral laws that derive from the choice of subjective and objective laws and much depend on the implementation of domestic setting of a sovereign country, substantive theory seeks to escape from the attachment of a state's sovereignty.

Substantive theory stresses on the nature beyond a sovereignty of conflicted facts. Drawing on this theory, domestic law representing particular sovereignty is not appropriate to be applied in International Civil Law. There is no excuse that the basic content of a governing law on the conflict of International Civil Law reflects the

content of law from particular sovereignty. International Civil Law is exclusive in its nature.

In line with the condition which encourages the emergence of substantive law, this theory aims to reach substantive justice. Substantive justice that has less attention from both the choice of unilateral and multilateral laws is more accommodated in this substantive law. The basic value as axiological one derived from the choice of substantive law is substantive justice and assurance. Assurance in the choice of substantive law remains as axiological value that is inseparable and prominent.

In practical setting, the enforceability for the choice of law in many countries shows a variety of law. Thus, any approaches used to decide an applicable law leads to the application of material law that varies, including domestic law in particular country. It is an interesting subject to be further analyzed that the tug-of-interest in deciding which law possibly applied is not simple, especially for the contract made *infirmly* determining the governing law and it is made electronically which is not easy to approach through the existing principles of International Civil Law. However, the clauses on the choice of law quite effect on the status of the contract in the future context. The functions of the choice of law are as follow:

1. To decide which law will be applied to determine or explain the terms of contract or regulation that sets and regulates the contract;
2. To prevent any legal uncertainty on contract in the implementation of contractual obligation between parties;
3. As "legal source" when a contract does not set particular terms of condition.

### **Harmonization as an Attempt to Bring Justice and Legal Assurance Into Reality**

Globalization causes convergence from legal order or legal system. Experts on law and economic fields have predicted that the implications of globalization would force the legal order to be convergent in order to reach economic efficiency.

This is due to the fact that a regulation order which is in relation to a legal order makes a legal system unable to provide an optimal solution for the emerging conflicts (Anthony Ogas, 1999). Many experts on legal field predicted a similar convergence that will happen. Particularly, legal experts who follow functionalist comparatists believed that the concept of legal unification was desirable and inevitable in a legal order (Catherine Valcke, 2004).

Their argumentations are based on functional equivalence, in which a legal system seems different since they have different doctrines and institutions. However, the intended difference is on surface only, since the intended institution is basically able to encounter the similar and equal function. Hence, it is considered that substantial legal order is similar. Therefore, it will make the attempt of harmonization easy to formally unify the law (Konrad Zweigert & Hein Kötz, 1998). *United Nations Convention on Contracts for the International Sale of Goods* (CISG or Vienna Convention), *Unidroit Principles of International Commercial Contracts* (Unidroit Principles or UPICC) and *Principles of European Contract Law* (PECL) are several examples that clearly define the attempt of legal unification and harmonization as supporting access of legal convergence between the tradition of Civil Law and Common Law.

This restricted unification is intended to civil/private law, in particular to the law of contract, as currently happens. It is undeniable that the law of contract is practically needed for international business transactions, thus, it needs an equal definition dealing with the terms used and the rules applied among parties. In this case, the transaction contains the elements of foreign law. Logically, it seems easier to reconcile arguments on things with common interests. In traditional view, the governing law should refer to the principles and criteria given in domestic law to be applied, indeed, there is no uniformed law.

In current practice, both jurisdiction and inspection of arbitration tend to leave methods causing conflicts and they seek for interpretation through international instruments by referring to the autonomous and uniformed principles. This approach has clearly gone down with current conventions (see article 7 of *UN Convention on Contracts for the International Sale of Goods* (CISG) in 1980. The uniformed law, after loaded into various national legal systems, turns formally into integrated part of national law. In substantive view, however, the approach does not eliminate the original properties from special legal order which is autonomously developed in international context and applied uniformly across the globe (Evi Djuniarti, 2005).

There are possible differences on applicable regulations of a country agreed by both parties in a contract due to the nature of openness principle (*aanvullend recht*) derived from appreciation of the contract as the law established by parties (*sanctity of contract*). Thus, it enables the choice of law on another law and the choice of jurisdiction on another state's jurisdiction without mitigating one of the countries' sovereignty as long

as both parties agree with the deal. Nevertheless, this all discussion is not intended to deny the possibility of unification and harmonization in other sectors of law.

Basically, the existence of common interest may encourage the zest to do unification and harmonization on law up to particular limits, as happened in European Union. The convergence of civil law aims to focus on one of comparable fields (*tertium comparationis*). Countries around the world are increasingly aware of the emerging issues on *e-commerce* transactions. This concern should be immediately anticipated given that such transactions are more increasing along with the increasing economic globalization and commercial relationship.

Encountering this development, many countries across the globe commonly establish their national regulation for anticipation. However, the national laws which are likely different among countries may become a serious hindrance for international trade. Consistent with the name labeled as *Model Law*, the provision do not fetter countries. They are free to whether follow or object *Model Law* in full or partial manner. in 1996, UNCITRAL succeeded formulating a quite important legal rule named as UNCITRAL *Model Law on Electronic Commerce*. This model aimed to promote the uniformed provisions of law in terms of computer network usage for commercial transactions. The primary reason of using *Model Law* as an instrument is apparent in the resolution No. No 51/162, in 1996 stating as follows.

*"Convinced that the establishment of a model law facilitating the use of electronic commerce that is acceptable to States with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations, Noting that the Model Law on Electronic Commerce was adopted by the Commission at its twenty-ninth session after consideration of the observations of Governments and interested organizations, Believing that the adoption of the Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists,...".*

Based on the resolution, there are 3 primary reasons (aims) of choosing this *Model Law*:

- (1) *Model Law* is mutually accepted many countries with different legal, social, and economic systems. *Model Law* can also provide a significant progress on the development of harmonious international economic relationships;

- (2) *Model Law* is selected since many countries (and other related international organizations) have previously proposed the usage of this legal instrument; and
- (3) *Model Law* is helpful for many countries to establish their national regulations in *e-commerce* context.

### **Conclusion**

Globalization marked by the presence of internet improves consumers' capability to conduct international transactions of goods and service. In such a relationship, it is unavoidable for foreign elements to get involved among contracting parties. Foreign elements within contracts causes the choice of law, defined as a freedom to choose particular law to set in a contract. In order to reach the goal of contractual freedom, parties who make a deal must have equal bargaining power. The basic assumption on a doctrine of contractual freedom is that the bargaining position between parties should be equal. However, it is impossible to maintain a contractual freedom without any simultaneous acknowledgement on the equality of parties' bargaining power. Disproportion between parties is particularly more dominant in consumer contract. This is based on an idea that, in a perspective of consumer protection, there is a disproportion on parties' bargaining power. A producer-consumer relationship is assumed as a subordinate relationship which treats consumers as subordinate in the process of determining contractual will.

Therefore, an attempt to provide justice and legal assurance is crucially urgent. However, in a freedom of the choice of law, one of the parties is potentially aggrieved due to the dominance of another party that compels particular law which tends to benefit the dominant party. This condition is unavoidable since globalization brings a new global trade system that makes the legal systems among related countries collide. In a globalization, law acts whether to maintain its own regulation or to adjust with a legal system of another country. The implication of globalization will force the legal orders to converge each other.

The law of contract is practically needed in trans-national business transactions. Thus, it needs an equal definition dealing with the terms used and the rules applied among parties. In this case, the transaction contains the elements of foreign law. Logically, it seems easier to reconcile arguments on things with common interests. Common interest may force the zest to do unification and harmonization on law, thus, different interpretations on justice and legal assurance can be eliminated.

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