The Unidroit Principles of International Commercial Contracts as a Reference for Modern Indonesian Contracts*

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I. INTRODUCTION

The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles or the Principles), developed by the International Institution for Unification of Private Law ("UNIDROIT"), were first published in 1994. The UNIDROIT Principles were drafted by representatives of all major legal systems of the world and experts in contract and international trade law. The UNIDROIT Principles, which establish general rules for International Commercial Contracts, provide a balanced set rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of countries in which they are to be applied. Following their success world wide, a new enlarged edition was published in 2004.

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Indonesian contract law is based on the Dutch 1838 Civil Code and no important amendments have been made. Therefore, many foreign investors and business actors have been cautious to conclude contracts in Indonesia on the ground that the existing contract law is insufficient to respond their business needs. In addition, Indonesia lacks legislation on international contracts, which often are so much more complicated, compared to national contracts. Moreover, due to modern means of communication, (international) transactions are more and more frequently concluded by electronics means, which are also more complicated than the traditional face-to-face contracts regulated by Indonesian Civil Code.

Therefore, it is urgent that Indonesia reforms its contract law to keep up with the modern international contracts. A reliable and effective contract law is one of important factors to attract business people, particularly foreign businessmen to do business in Indonesia. For that purpose, it is advisable that UNIDROIT Principles of International Commercial Contracts be a reference for modern Indonesian contracts.

This paper will examine some important features of UNIDROIT Principles. Then, it will give short description on the Indonesian contracts law and finally make some arguments why the UNIDROIT Principles should be a source of inspiration for modern international commercial contracts in Indonesia.

II. THE UNIDROIT PRINCIPLES: A GENERAL OVERVIEW

Background

The UNIDROIT Principles of International Commercial Contracts, published in 1994 following years of intensive preparatory work and deliberation by a group of experts representing the world's most important legal systems, are typical examples of soft law, in a sense that the Principles are not a binding instrument and therefore their acceptance in practice will depend upon their persuasive authority. This is really a new approach to an effort to make harmonization and unification in the field of international trade law. Traditionally, the instruments would be in the form of conventions, which require the approval of the government and have binding forces.

Since its first publication in 1994- available in some 20 different language versions including all the major international languages- the UNIDROIT Principles have been widely used in practice. In addition, the Principles have been the subject of academic discussions and seminars. In short, they are generally well received.[1]

After the success of the 1994 edition world wide, a new enlarged edition was prepared and then introduced in 2004, exactly ten years of the appearance of the first edition. The new edition is not revision of the 1994 edition but it is rather enlargement.

[1] See Michael Joachim Bonell (ed.), The UNIDROIT Principles in Practice, xv, 2nd Edition, 2006, Transnational Publisher, Inc., New York,

Structure and Formal Presentation

The new edition is composed of the Preamble (1994 version, with the addition of paragraphs 4 and 6 as well as the footnote); Chapter 1: General Provision (1994 version, with the addition of Article1.8 and 1.12); Chapter 2, Section 1: Formation (1994 version) and Section 2: Authority of Agents (new); Chapter 3: Validity (1994 version); Chapter 4: Interpretation (1994 version); Chapter 5, Section 1: Content (1994 version, with the addition of Article 5.1.9) and Section 2: Third Party Rights (new); Chapter 6, Section 1: Performance in General (1994 version) and Section 2: Hardship (1994 version); Chapter 7, Section 1: Non-Performance in General (1994 version), Section 2: Right to Performance (1994 version), Section 3: Termination (1994 version) and Section 4: Damages (1994 version); Chapter 8: Set off (new); Chapter 9, Section 1: Assignment of Rights (new), Section 2: Transfer of Obligations (new) and Section 3: Assignment of Contracts (new); Chapter 10: Limitation of Periods (new).

In general the UNIDROIT Principles are drafted more on the style of the European codes than in the notoriously more elaborate fashion typical of common law status.[2] Each article of the Principles is accompanied by comments. The comments are an integral part of the UNIDROIT Principles. Where appropriate, there are factual illustrations intended to explain the reasons for the black letter rule and the different ways in which the rule may operate in practice. The comments are of particular importance to those using and interpreting the Principles since they sometime augment as well as explain the black letter rules.[3]

Scope of application

In the Preamble to UNIDROIT Principles it is stated that they "set forth general rules for international commercial contracts"[4] What an "international" contract is can be defined in a great many ways. These range from a different of nationalities of the parties or the domiciles or residences of parties in different countries[5] to a necessity of making a choice between the laws of different states or of affecting the interests of international trade. Each of these and others has been adopted in one or another international agreement. The UNIDROIT Principles do not use any of these criteria but the assumption is that the concept of "international" should be given the broadest possible interpretation so as ultimately to exclude only those cases where no international element at all is involved, *i.e.* where all the relevant elements of the contract in question are connected with only one country.[6]

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[2] See Michael Joachim Bonell, The UNIDROIT Principles of International Commercial Contracts and the Principles of the Europen Contract Law: Similar Rules for the Same Purpose?, in Uniform Law Review, NS-Vol 1 1996-2, p. 233.

[3] According to M.P. Furmston, the accompanying comments of black letter text are intended to preserve the clarity of the black latter tect. To get the real meaning of the black letter text, it is advisable to read the black letter text along with the comment and the illustrations. See M.P. Furmston, The UNIDROIT Principles and International Commercial Arbitration, in Institute of International Business Law and Practice (ed.), p. 205.

[4] UNIDROIT Principles, Preamble, paragraph 1. For a further discussion on the scope of application, see also F. Ferrari, Defining the Sphere of the 1994 UNIDROIT Principles on International Commercial Contracts, 69 Tulane Law Review (1995), p. 1125.

[5] For such approach see, e.g., Art.1 (1) lit.(a) the 1980 United Nations Convention on Contracts for The International Sale of Goods (CISG).

[6] A similarly broad concept of "internationality" also underlies the 1985 UNCITRAL Model Law on International Commercial Arbitration, Art. 1 (3).

[7] The approach is basically the same as that adopted in CISG, while stating that the civil or commercial character of the parties or of the contracts is not to be taken into consideration in determining its application, expressly excludes from its sphere of application sales contracts for goods bought personal, family or household house.

The restriction to "commercial" contracts is not intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions. It is principally meant to exclude from the scope of the Principles so called "consumer transaction" which are within the various legal system being increasingly subjected to special rule, mostly of a mandatory character, aimed at protecting the consumers. No definition of "commercial" is given by the principles, the assumption, however, is that the concept of "commercial" contracts should be understood in the broadest possible sense.[7]

The Purpose of the UNIDROIT Principles

Even though the UNIDROIT Principles will be applied in practice only because of their persuasive value, they may still have a considerable role to play in at least five different contexts.[8] To begin with, both international and national legislators may find a source of inspiration in the UNIDROIT Principles. The UNIDROIT Principles could also provide both courts and private arbitrators with useful rules and criteria for interpreting and supplementing existing international instruments and domestic law. Equally, parties who belong to different legal systems or speak different languages may use the UNIDROIT Principles as a guide for drafting their contract, in particular for the identification of the issues to be addressed in the contract. Even more importantly, the parties to an international commercial transaction may use the UNIDROIT Principles as the law governing their contract. Last, but not least, courts and arbitrators may use the UNIDROIT Principles as a substitute for the law otherwise applicable, whenever it proves to be impossible or extremely difficult to establish the content of that law.

Interpretation and Supplementation

The UNIDROIT Principles, like any other legal text, may give rise to doubts about the precise meaning of their content. Moreover, there are a number of issues which would fall within their scope but are not expressly settled by them. The Principles in Article 1.6 prescribe that uncertainties regarding them should be resolved and their terms and concepts interpreted in accordance with the underlying general principles of the UNIDROIT Principles as far as this is possible without reference to domestic law and that their interpretation is to give regard to their international character, their purposes, and the need to promote uniformity in their application.

The Underlying General Principles of the UNIDROIT Principles

There are a number of basic ideas underlying the UNIDROIT Principles. One of the most fundamental ideas underlying the UNIDROIT Principles is that of freedom of contract. Another essential element of the UNIDROIT Principles is their marked openness to usages. It means that the UNIDRIT Principles accord usages and practices developing within the different trade sectors a central role in determination of the rights and duties of the parties to each individual contract. The next underlying principle of the UNIDROIT Principles is the observance of good faith and fair dealing in international

[7] This principle is expressly stated in Art 1.1 ("Freedom of contract") which reads: "The parties are free to enter into a contract and to determine its content

[8] See Preamble of the UNIDROIT Principles.

trade. Under the Principles, the parties' behavior must conform to the good faith and fair dealing throughout the life of the contract, including the negotiation process.

III. INDONESIAN CONTRACT LAW AND THE UNIDROIT PRINCIPLES

It would seem useful, first, to compare the Indonesian contract law with the UNIDROIT Principles before elaborating how the UNIDROIT Principles may play an important role in modernizing Indonesian contracts.

Indonesia has a pluralistic system of private law. Therefore, Indonesian contract law is governed by two separate systems, namely the Indonesian Civil Code (ICC) and Adat Law ("Customary Law").[9]Indonesian Civil Code is based on the Dutch 1838 Civil Code, which in turn was based, and practically is a Dutch translation from the 1800 Napoleonic Civil Code. Since no important amendments have been made since the Dutch Civil Code was introduced in the Netherlands East Indies in 1848, we can say that the Indonesian Contract Law is practically the same as the French Napoleonic Civil Code which catered for business relations of the 10th century. In addition, the existing Indonesia contract law lacks provisions on international contracts. Indonesia is not a party to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).In short, the existing Indonesian contract law is unable to cope with the complicated international transactions as they are today.

The UNIDROIT Principles, on the other hand, are believed to represent a system of rules intended to lay down principles and rules which are generally accepted at international level and best adapted to the special requirements of international commercial contracts. [10]

Freedom of Contract and the Binding Character of Contracts

Both Indonesian contract law and the UNIDROIT Principles share the same basic value of contract - Freedom of contract. The freedom of contract of Indonesian contract law is contained in Article 1338 of the ICC. Article 1338 of the ICC states that "All agreements validly entered into shall serve as law to the parties thereto. Such agreements cannot be withdrawn except by a mutual agreement of the parties, or by reasons determined by law. Such agreements shall be implemented in good faith." The freedom of contract principle under the ICC is subject to fulfilment of public policy and good morals.

Freedom of contract is also one of the most fundamental ideas underlying the UNIDROIT Principles. This principles is expressly stated in Article 1.1 ("*Freedom of Contract*") which reads: "The parties are free to enter into a contract and to determine its content." This principle is further elaborated in the Comment.

As pointed out in the Comment,[11]

"The right of business people to decide freely to whom they will offer their goods and services and by whom

[9] For more elaboration about the pluralism system of Indonesian law, see Sudargo Gautama and Robert N. Hornick, An Introduction to Indonesian Law, Unity in Diversity, Penerbit Alumni Bandung, fourth Printing, 1983.
[10] See Michael Joachim Bonell, "General Report", in A New Approach to International Commercial Contracts- The UNIDROIT Principles of International Commercial Contracts, M.J. Bonell (ed.), Kluwer Law International, 1999, p. 4-9.
[11] See Comment 1 to Art. 1.1. of the Principles

they wish to be supplied, as well as the possibility for them freely to agree on the term of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order."

Thus, there are two aspects of the principle of freedom of contract namely (1) the possibility of concluding contracts with any other person and (2) the freedom of parties to determine the content of their contract.

A number of possible exceptions of this freedom of contract stated in the Principles. With respect to the first aspect, there are economic sectors that States may decide in the public interest to exclude from open competition, with the result that the goods and services in question could only be obtained from the one permitted supplier, be it the public authority itself or a private enterprise acting as licensee of the former. Concerning the second aspect, the Principles contain provisions from which the parties may not derogate.[12] In addition to the mandatory provisions contained in the UNIDROIT Principles, the parties are of course further restricted in their freedom to determine the content of their individual contracts by otherwise applicable mandatory rules enacted by States e.g. anti-trust, exchange control or price, laws imposing special liability regimes or prohibiting grossly unfair contract terms, etc.

Article 1338 of the ICC also conveys another fundamental value of contract - the binding character of contracts. This article is strikingly similar to Article 1.3 of the UBIDROIT Principles: "A contract validly entered into is binding upon the parties. It can be only modified or terminated in accordance with its terms or by agreement or as otherwise provided in there Principles".

Formation of Contracts, Consensualism, Offer and Acceptance

Notwithstanding the freedom of contract principle, Article 1320 of the ICC states that there are four elements of contract that must be satisfied to establish a contractual arrangement in Indonesia, namely, consent of the parties to conclude the contract; legal capacity of the parties to enter into the contract; the contract should have a certain subject; and the contract should have a lawful or permissible purpose.

Generally speaking contracts are deemed to arise when there is mutual consent between the parties to make the contract. The consent of the parties is manifested when one of the parties has expressed to the other contracting party its intent and such intent is in conformity with the intent of the other contracting party.

The principle of consensualism is also recognized in the UNIDROIT Principles. Articles 2.1.1 of the UNIDROIT Principles provides that "A contract my be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement". This principle is also can be concluded from Article 3.2 of the UNIDROIT Principles which state that "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement".

From the wording of Article 2.1.1 mentioned above, the UNIDROIT Principles

[12] See Article 1.1 of the UNIDROIT Principles which is further confirmed in Article 1.5 which states that "the parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles".

adopt the concept of offer and acceptance together with the principle of consensualism. As the Comment has pointed out, it is true that in commercial transaction it is hard to identify clearly the sequence of offer and acceptance over a long period of negotiations. In cases where the moment of its formation can not be determined, a contract may be considered to be concluded provided that the conduct of parties is sufficient to show agreement.[13]

It is also interesting to note that the UNIDROIT Principles do not need the requirement of the consideration of the common law systems for the conclusion of contracts. Similarly, ICC following the civil law system does not require consideration.

Formal Requirement of a Contract

According to ICC, as a general rule, no formal requirements (writing, registration, etc) need to be observed to make a contract binding. Mutual consent of the contracting parties is sufficient.[14] This means that oral agreements are valid and binding. There are, however, exceptions to this general rule as provided under the Civil Code and the prevailing laws and regulations in Indonesia whereby certain contracts must be made in writing or in the form of an authentic deed (notarial deed form).[15]

Similar to ICC, the UNIDROIT Principles do not require any particular form to conclude a contract.[16]The adoption of this principles seems particularly appropriate in the context of international trade relationship where many transactions are concluded at a great speed using highly developed information technology. However, the UNIDROIT Principles recognize the possible exception under the applicable law. National laws or international instruments may impose a formal requirement for particular contracts. In addition, the parties may themselves agree on a specific form for the conclusion of their contract.

[13]It is interesting to note here that the UNIDROIT Principles do not strictly follow the concept of offer and acceptance traditionally used in the common law system. In the matter of formation of contracts, it is common knowledge that the traditional rules connected to the very notion of contract imply the necessary existence of two material elements of consent: an offer and the acceptance of that offer. In the classical conception, it is generally understood that the acceptance is only valid if it corresponds to the offer as made. Otherwise it must be characterized either an outright rejection of the offer or as a counterproposal. Such characterization can be of significant practical importance in the determination of the existence contract as well as the determination of its time and place of formation.

[14]The only "formal" requirement which applies to all contracts is the satisfaction of the conditions in relation to the formation of contracts (i.e. consent, legal capacity, certain subject, lawful purpose).

[15]These exceptions, among others, include (1) a settlement between certain parties over a dispute or a possible dispute; (2) the articles of association of a limited liability company (as regulated under Law No. 1 of 1995 regarding Limited Liabilities Company) (which technically is considered as a contract between its founders); (3) a contract in relation to the grant of security (i.e. fiduciary security agreement); (4) a fixed term employment contract; and (5) a contract in relation to the sale and purchase of land and building (which must be in a notarial deed form and made before a land deed official). Some contracts need to be prepared in a certain form by a notary in Indonesia. An authentic notarial deed form is mostly required in relation to contracts that need to be registered or further processed with government authorities before they can be deemed as meeting applicable legal requirements. An example of this is a contract effecting the sale and purchase of land. This needs to be prepared by a land deed official in a notarial deed form and further registered at the land office. The presence of a nota ry is also sometimes undertaken for "ordinary" contracts, in the event that the parties wish to ensure the authority of the signatories to the relevant contract and for the notary to witness the agreement and consensus of the parties as contemplated in the contract.

[16]See Article 1.2 of the UNIDROIT Principles which provide "Nothing in these Principles require a contract, statement or any other act to be made in or evidenced by a particular form. IT may be proved by any means, including witness".

IV. THE UNIDROIT PRINCIPLES AS A REFERENCE FOR MODERN INDONESIAN COMMERCIAL CONTRACT.

In an effort to attract foreing investors to do business in Indonesia, the availibility of modern and effective contract law is very essential. A modern and realible contract law would certainly reduce commercial risks in doing business in Indonesia. Foreign investors and multinational business actors would be more confident in concluding their contracts in Indonesia in relation to their rights and obligations. Therefore, Indonesia should modernise its existing contract law to be in line with the international contract standard. The existing Indonesian contract law is out of date as it is originally from the Dutch 1838 Civil Code. Indonesia is not a party of any treaties on commercial contracts, including the United Nations Convention on Contracts for International Sale of Goods (CISG).

The need of modernizing contract law has been identified quite some time ago.[17] The debate is whether the Indonesian new law on contract should be purely based on the national concepts or adopts principles from either civil law or common law system.[18] Some academic drafts on contract law have been available and circulated among academicians. However, to date, no draft laws on contract have been submitted to or discussed in the Parliament.

In the midst of the effort to modernize Indonesian contract law, the International Institute for the Unification of Private Law introduced the UNIDROIT Principles of International Commercial Contracts in 1994. Instead of wasting time for many years to do legal research and prepare academic drafts on contract law, it is advisable that Indonesia use the UNIDROIT Principles as a reference to modernize its contract law for some reasons.

First, the UNIDROIT Principles may be used in different contexts. Thus, the Principles can be used not only for drafting a new law (legislation), but also for also other applications in practice.[19] National legislators may find a source of inspiration in the UNIDROIT Principles for the preparation of new legislation in the field of general contract law or with respect to special types of transactions. The UNIDROIT Principles could also provide both courts and private arbitrators with useful rules and criteria for interpreting and supplementing existing international instruments. Equally, parties who belong to different legal systems or speak different languages may use the UNIDROIT Principles as a guide for drafting their contract. rbitrators also may find it convenient, especially when called upon to decide as *amiables compositeurs* according to undefined "usage and customs of international trade" or the enigmatic *lex mercatoria*, to have recourse to a set of rules which are the result of intense research and prolonged deliberation, rather than having to work out solutions on an *ad hoc* basis. Also, there may be good reasons for courts and arbitrators to resort to the UNIDROIT Principles as a substitute for the law

[17] See D. Saragih, "Pembentukan Kontrak Menurut BW Baru Belanda" (Formation of Contracts under the New Dutch Civil Code), in Hukum Kontrak di Indonesia (Contract Law in Indonesia), 1st ed, ELIPS, 1998, p. 94-95.

[18] Ibid

[19] Michael Joachim Bonell, "The UNIDROIT Principles on International Commercial Contracts:Why? What? How?" in The Principles of UNIDROIT and Modern National Codifications, Alfredo Mordechai Rabello (ed), the Hebrew University of Jerusalem, 2001, 17-18.

otherwise applicable, whenever it proves to be impossible or extremely difficult to establish the content of that law.

Perhaps, in the context of modernizing Indonesian contract, the most important one is that the Principles may be used as a model to national legislators for the drafting of new legislation in the field of general contract law or with respect to special types of transactions. In other words, the Principles may serve as a model law that could inspire legislators who strive for law reform. In this respect, not only legislators in developing countries or in countries in transition my find them relevant, but also States trying to modernize existing legislation and seeking inspiration from common international standards.

Second, the UNIDROIT Principles have a great influence on the world trade law. Parties to international commercial contracts now often agree that their contract shall be governed by the UNIDROIT Principles and are widely applied by international commercial arbitration.[20] So, the UNIDROIT Principles are well accepted in international contract practices, and in the settlement of contract disputes through both arbitration and court procedures. This is because the principles are common to the existing national legal systems and /or which seem best adapted to the particular needs of international commercial contracts. It is in the line with the aim of the UNIDROIT Principles-"to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political situations of the countries in which they are to be applied".[21]

Third, the text of UNIDROIT Principles is easily accessible, as over thousand copies of the integral version of the Principles have been published. Moreover, in addition to the five official versions of the Principles prepared by UNDROIT (in English, French, German, Italian, and Spanish), the black letter rules have been translated into many other languages, including Arabic, Chinese, Dutch, Japanese, and Russian. Indonesian version, which is currently being prepared by Indonesian Ministry of Justice and the UNIDROIT, will be soon available.

Fourth, the Principles are not in the form of convention or model law, instead, a body of principles elaborating international principles of contracts without a direct binding force, the acceptance and application of which are exclusively dependent on its persuasive power.

Finally, for the Indonesian lawyers and consultants, the growth in knowledge on the general principles of law like UNIDROIT Principles in the international commercial contracts will give advantages in protecting the interests of Indonesia and its citizens in international business and commercial transactions. Unnoticed issues on international contract law system in the crisis period of Indonesia back in 1998 might be prevented in the future if the legal experts in Indonesia realize the internationally prevailing laws and regulations on contract issues.

[20] Michael Joachim Bonell (ed.), above 1, p. 5.
[21] UNIDROIT Principles, Preamble.

V. CONCLUSION

Indonesian contract law based on the Dutch 1838 Civil Code has been considered out of date and it has been identified as one of some obstacles for foreign business actors to do business in Indonesia. The existing law of contract has to be revised to response the needs of business international. A reliable and effective contract law is one of important factors to attract business people, particularly foreign businesspersons to do business in Indonesia.

An effort to modernize Indonesian contract law has been quite some times. Some draft laws on contract, which have currently been available, uses different legal basis and approaches. However, none of them was specifically drafted to response the needs of international commercial contracts. In the course of globalization and the increasing international communication and trade as well as the needs to attract foreign businesspersons doing business in Indonesia, it is advisable that the new Indonesian contract law refer to international contract principles and rules. To this point, the UNIDROIT Principles on International Commercial Contract may be the best source for modern Indonesian contract law.

In both the Indonesian contract law and the UNIDROIT Principles, certain fundamental principles/values can be identified such as freedom of contracts, binding force of contracts, consensualism, and formal requirement of contracts. It means that some fundamental values in the UNIDROIT Principles are not strange to our contract law. However, in order to keep up with the latest development of international contracts, Indonesian contract law should be updated with reference to the UNIDROIT Principles.

The UNIDROIT Principles best serve the international and national trade community with many potential uses such as an important model for the introduction of domestic contract codes or the revision of existing codes. In addition, the UNIDROIT Principles is part of an overall process of codification, harmonization, and unification aimed at providing a suitable legal structure to international contracts to judges, arbitrators, and business people around the world.