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ACTION THAT CAN BE TAKEN BY THE PARTIES AS A RESULT OF DIFFERENCES IN THE RIGHT TO SUSPEND PERFORMANCE REGULATED IN CISG 1980 AND INDONESIA CONTRACT LAW

Rafly Nauval Inzaghi^a; Prita Amalia^b; Purnama Trisnamansyah

ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG 1980) and Indonesian contract law have regulated the right to suspend performance. The arrangement is regulated by Article 71 CISG 1980 and Article 1478 of the Indonesia Civil Code (ICC). Until now, Indonesia has not ratified the CISG 1980. This may result in differences in the regulation of the right to suspend performance between CISG 1980 and the ICC. This difference can cause uncertainty for business actors from Indonesia who conduct international trade in goods with partners from CISG 1980 member countries where CISG 1980 applies to contracts that the parties have made. The uncertainty arises because if there is a conflict between the CISG 1980 and the Indonesian Contract Law, the provisions in the Indonesian Contract Law take precedence as mandatory law. This research will analyze the mechanism of the right to suspend performance regulated in CISG 1980 and Indonesia Contract Law. The research method is a comparative normative judicial research method by comparing the mechanism of suspension of the implementation of obligations contained in the CISG 1980 with the Indonesian Contract Law. This research aims to find what efforts can be made by the parties in the event of a difference between the right to suspend performance regulated in the CISG 1980 and Indonesia Contract Law. The results of this research show that the efforts that can be taken by the parties are to derogate the applicability of CISG 1980 as a whole or only derogate the provision of article 71 CISG 1980.

Keywords: anticipatory breach; CISG 1980; international sales contract.

INTRODUCTION

Currently, international trade in goods is experiencing considerable growth. This increase occurs due to several factors, namely the development of technology which makes it easier for business actors to connect, an increase in the sense of dependence between one country and another, and the birth of several international private institutions and the world economy, as well as international trade regulations.¹ When conducting international trade in goods, the parties cannot avoid the use of a contract for

^a Transnational Business Law Department, Faculty of Law, Universitas Padjadjaran, Jl. Ir. Soekarno KM. 21 Jatinangor, Kab. Sumedang, Indonesia, email: rafly19005@mail.unpad.ac.id.

^{bc} Faculty of Law, Universitas Padjadjaran, Jl. Ir. Soekarno KM. 21 Jatinangor, Kab. Sumedang, Indonesia.

¹ Hasoloan, Jimmy (2013). Peranan Perdagangan Internasional dalam Produktivitas dan Perekonomian. *Edunomic*, Vol. 1 Nomor 2. p. 102.

the sale and purchase of goods as a medium used to ensure that every right and obligation owned by the parties goes well. The contract can be made either in written or oral form. The freedom of the parties to make contracts either in written or oral form does not escape the principle of freedom of contract. This principle provides the right in the form of freedom for the parties to determine the contract for the sale and purchase of international goods made either in written or oral form as long as the ² as long as the terms are not contrary to the law.

Contracts for the sale and purchase of international goods are not the same as contracts for the sale and purchase of national goods. The difference is the foreign elements in international contracts of sale and purchase of goods. One of these foreign elements is the choice of law clause which is choose foreign law as the governing law of the contract. The principle of freedom of contract frees the parties to determine which law will (be the governing law) of the contract they will make.

The choice of law in international sale and purchase contracts is an important issue because it involves not only one jurisdiction. This results in each party wanting to use its national law as the governing law of its contract.³ For example, the buyer wants South Korean Law as the law governing his international contract of sale and purchase of goods, but the seller wants the contract to be governed by Indonesian Law. The resolution of these differences will be left to the parties to determine the choice of law to be applied in the contract to be made. After the parties reach an agreement on the applicable law in the international sale and purchase contract, the agreement will be set out in a choice-of-law clause. The clause is not included in the validity of the agreement, but this clause needs to be included in the contract. This is as stated by the United Nations Commission on International Trade Law (UNCITRAL). According to UNCITRAL, a choice of law clause must be included in an international contract for the sale and purchase of goods to prevent uncertainty as to which law will be the governing law and apply to the contract made by the parties.⁴ International treaties, international law, customary law, or the national law of one of the parties to the contract are laws that the parties may choose as the law that will govern and apply to their international contract of sale and purchase of goods.⁵

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG 1980) is an international treaty that can be used as the applicable law in

² Siswanta, Anggitariani Rayi L. dan Maria Mu'ti W (2022). Penerapan Asas Kebebasan Berkontrak pada Perjanjian Baku dalam Perjanjian Kerja. *Soedirman Law Review*. Vol. 4 Nomor 4. p. 411.

³ McKendrick, Ewan (2012). *Contract Law: Text, Cases, and Materials*. Oxford: Oxford University Press. p. 89.

⁴ Adolf, Huala (2018). *Dasar-Dasar Hukum Kontrak Internasional (Edisi Revisi)*. Bandung: PT. Refika Editama. p. 161.

⁵ *Ibid.* p. 5.

international sale and purchase contracts. CISG 1980 regulates matters related to the international sale and purchase of goods involving parties from different CISG 1980 member countries or civil law provisions. directs the use of the national law of the CISG 1980 member states as the applicable law.⁶ Although the CISG 1980 is not used as the governing law and applies to a contract of sale and purchase of international goods, the CISG 1980 can still apply to the contract because if one of the parties to the contract comes from a member state of the CISG 1980. This is in line with the provisions of Article 1 paragraph 1a of the CISG 1980 which states that the CISG 1980 may apply to contracts for the sale and purchase of international goods if one of the parties to the contract is a member state of the CISG 1980.⁷ The applicability of CISG 1980 to a contract of sale and purchase of goods can also be done by choosing CISG 1980 as the choice of law in the contract. However, if business actors from Indonesia trade goods with partners from CISG 1980 member countries that have made reservations under Article 95 of CISG 1980, the parties cannot choose CISG 1980 as the choice of law in the contract.⁸

In the performance of a contract, there is a possibility that one party will not or will not perform its obligations properly before the performance deadline, which can occur by expressly or impliedly communicating its actions to the other party to the contract.⁹ The action taken by the party is an *anticipatory breach*. An *anticipatory breach* occurs before the deadline for the performance of an obligation.¹⁰ Therefore, *anticipatory breach* is different from default. For the anticipatory breach that has occurred, CISG 1980 has provided *remedies* for the injured party, namely the right to suspend the performance of its obligations. This is regulated in Article 71 CISG 1980. Under Article 71 paragraph 1, a party may suspend the performance of its obligations if it appears that the other party will not perform its substantial obligations as mutually determined due to a serious deficiency in its ability capacity or conduct in preparing its obligations or in performing its obligations contract.¹¹ After suspending the performance of its obligations, the party must immediately notify the party that has suspended the performance of its obligations to the party that has committed *the anticipatory breach* and resume the performance of its obligations if the party that has committed *the anticipatory breach* has provided guarantees by its obligations.¹² The application of the suspension of performance

⁶ Ziegel, Jacob (2005). The Scope of the Convention: Reaching Out to Article One and Beyond. *Journal of Law and Commerce*, Vol. 25 Nomor 59. p. 59.

⁷ Pasal 1 ayat 1 huruf a United Nation Convention on Contracts for the International Sale of Goods 1980.

⁸ Oktaviandra, Surya (2018). Indonesia and Its Reluctance to Ratify the United Nations Convention on Contracts for the International Sale of Goods (CISG). *Indonesia Law Review*. Vol. 8 Nomor 3. p. 248.

⁹ Mai, Nan Kham (2014). Suspension of Performance due to Anticipatory Breach in Comparative Law and CISG. *Journal of the Study of Modern Society and Culture*. Nomor 59. p. 293.

¹⁰ *Loc. Cit.*

¹¹ Pasal 71 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

¹² Pasal 71 ayat 3 United Nation Convention on Contracts for the International Sale of Goods 1980.

regulated by CISG 1980 can be found in various cases, such as ATT v Armco, Italian Shoes Case XV, and Bacon Case I.

In the ATT v. Armco case, the buyer (Armco) had a substantial debt to the seller for goods delivered by the seller which the seller was unable to pay, resulting in the seller suspending the remaining deliveries. The arbitrator in that case held that the seller had the right to suspend performance of its obligations due to a serious deficiency in the buyer's ability to make payment.¹³ This case relates to Article 71 paragraph 1a CISG 1980, which states that a party may suspend the performance of its obligations due to a serious deficiency in the ability or capability of the other party to perform its contract.

The Italian Shoes Case XV occurred because the buyer only partially paid for the goods that had been sent by the seller. After all, there were defects in some of the shoes. In this case, *the Berlin Landgericht* judge ruled that the buyer could suspend the performance of its obligations because the seller refused to deliver the shoes that had not been delivered by the seller.¹⁴ This case relates to Article 71 paragraph 1b of the CISG 1980, namely the right to suspend the performance of obligations arises because a party does not perform its obligations due to its actions in preparing or performing the contract.

The Bacon Case I occurred when the buyer refused to accept the remaining 6 shipments out of a total of 10 shipments because the bacon that had been sent by the seller was not hygienically wrapped and could be detained by customs. However, previously the buyer had agreed that *the bacon* would be delivered unwrapped. According to the judge of *the Oberlandesgericht Hamm* Court of Appeal, the buyer's action in rejecting the remaining 6 shipments was not justified because only a small part of one shipment, namely 240 kg out of 22,400 kg, was non-conforming. When calculated from the total bacon to be delivered, which was 200,000 kg, the seller could not be said to have breached its substantial obligations because only a small part had an impact so the buyer did not have the right not to accept the remaining shipments that he had to pay for.¹⁵ This case relates to Article 71 of the CISG 1980 which states that a party may suspend performance of its obligations if the other party does not perform its substantial obligations. Therefore, even though the provisions of Article 71 paragraphs 1a and 1b have been fulfilled, if the substantial obligations are not violated, the party cannot suspend the performance of its obligations.

¹³Unilex, ATT v. Armco, Available from: <https://www.unilex.info/cisg/case/1130> [Accessed Mei 6, 2024].

¹⁴Ziegler, Alexander Von (2005). The Right of Suspension and Stoppage in Transit (And Notification Thereof). *Journal of Law and Commerce*. Vol. 25. pp. 360-361.

¹⁵*Ibid.* p. 362.

Suspension of performance of obligations is also found in Indonesian treaty law, especially in the Civil Code. Suspension of performance of obligations in the Civil Code is the principle of exception non-dimple contracts. This principle is a defense used by the defendant who has been accused of negligence by the plaintiff by stating that the defendant did not carry out his obligations because the plaintiff himself did not carry out his obligations.¹⁶ The principle can be found in Article 1478 which states that the seller has the right to suspend the delivery of goods to the buyer if the buyer has not made payment and the seller does not allow a delay in payment by the buyer.¹⁷

To date, the CISG 1980 has not been ratified by the Government of Indonesia. The non-ratification of CISG 1980 means that the provisions of CISG 1980 do not apply to Indonesian parties. However, CISG 1980 may apply to international contracts to sell and purchase goods for Indonesian parties. This can happen if the other party to the contract is from a CISG 1980 member state or the parties choose CISG 1980 as an option law in the international contract of sale and purchase of goods that he has made ¹⁸ as long as the other party to the contract is from a country that does not make a reservation under Article 95 of the CISG 1980 against Article 1 paragraph 1b of the CISG 1980. One example can be found in KCAB Case No. 10. In that case, there was a dispute between a South Korean seller and an Indonesian buyer about the sale and purchase of an airplane. Although airplanes do not fall within the scope of application of the CISG 1980 and Indonesia is not a member state of the CISG 1980, the Arbitrator in the case held that the CISG 1980 could apply to the contract if the goods traded fell within the scope of the CISG 1980 and the applicable law in the contract was South Korean law.¹⁹ Therefore, it is necessary to analyze the arrangements for the suspension of the implementation of obligations contained in the CISG 1980 to know the efforts that can be taken by the parties in the event of a difference in the arrangements for the suspension of the implementation of obligations in the CISG 1980 with Indonesian treaty law. This is because if there is a conflict between the suspension of the implementation of the obligations contained in the CISG 1980 with the Indonesian Treaty Law, then it can cause uncertainty for the parties. Given, the provisions in Indonesian treaty law must take precedence as *mandatory law*.

Research related to the suspension of the implementation of obligations based on *anticipatory breach* has been conducted by several researchers such as Alexander Von

¹⁶Rombot, Diva dan Djefry W. Lumintang (2020). Wanprestasi Terhadap Sewa Beli dan Akibat Hukumnya Menurut Hukum Perdata di Indonesia. *Lex Administratum*. Vol. 8 Nomor 4. p. 120.

¹⁷Pasal 1478 Kitab Undang-Undang Hukum Perdata.

¹⁸Pasal 1 ayat 1 United Nations Convention on Contracts for the International Sale of Goods 1980.

¹⁹Korean Commercial Arbitration Board (2017), *KCAB Arbitral Awards*, Seoul: Korean Commercial Arbitration Board, p. 177.

Ziegler with his research entitled "*The Right of Suspension and Stoppage in Transit (And Notification Thereof)*" and Ray Irawan Al-Madruis with his research entitled "Implications of the Application of the *Exceptio Non-Adimpleti Contractus* Principle in Agreements Against Deeds Made". However, what distinguishes this research from the aforementioned research is that this research does not only explain the application of the arrangements for the suspension of the performance of obligations contained in the CISG 1980 and Indonesian Treaty Law but also describes the efforts that can be taken by the parties in the event of differences in the arrangements for the suspension of the performance of obligations contained in the CISG 1980 and Indonesian Treaty Law considering that even though Indonesia has not ratified the CISG 1980, the CISG 1980 can apply to international contracts for the sale and purchase of goods where one of the parties is from Indonesia.

RESEARCH METHODS

The legal issues contained in this article will be analyzed using a comparative normative juridical research method carried out by comparing the suspension of performance of obligations regulated by the CISG 1980 with Indonesian treaty law. The data utilized and used in the research are secondary in the form of the Civil Code, CISG 1980, and court decisions and arbitration bodies that are relevant to the suspension of performance of obligations where in the decision, the CISG 1980 and the Civil Code are used by the judge in his consideration to decide the case. The data that has been collected during the research will be analyzed using a qualitative juridical method, to produce efforts that can be taken by the parties if there are differences in the regulation of suspension of performance of obligations between the CISG 1980 and Indonesian Agreement Law.

DISCUSSION

Application of the Rules of Suspension of Performance of Obligations Based on Anticipatory Breach in International Goods Purchase Contracts under the CISG 1980 and Indonesian Treaty Law

In the international trade of goods, the parties make a contract for the sale and purchase of international goods so that their trade activities can run smoothly. In determining the contents of the international sale and purchase contract, the parties are free to determine the clauses. The freedom of the parties to determine the clauses can be done based on the principle of freedom of contract. This principle frees the parties to make an international sale and purchase contract and determine the clauses in the contract as long as the provisions in the contract do not conflict with the national laws

of the parties. Although the parties have specified the CISG 1980 as the applicable law for their international sale and purchase contracts, the provisions of national law cannot be overridden.

One of the clauses in international sale and purchase contracts that regulate which country's law is used as the governing and applicable law in the contract is the choice of law clause. The parties may freely choose either the CISG 1980 or the national law of one of the parties as the governing law applicable to the international sale and purchase contract. However, in choosing CISG 1980 as the applicable law, the parties must pay attention to several articles in CISG 1980, namely Article 1 and Article 2 of CISG 1980. When referring to Article 1 of the CISG 1980, the CISG 1980 applies to international contracts for the sale and purchase of goods where the parties to the contract are from different countries and where the parties are from a member state of the CISG 1980 or where the rules of international civil law direct the use of the national law of one of the parties from a member state of the CISG 1980.²⁰ Although the provisions of Article 1 have been met, not all contracts for the sale and purchase of goods apply to the CISG 1980. This is because Article 2 of the CISG 1980 states the goods that do not fall within the scope of the CISG 1980. These goods are as follows:²¹

- a. Goods that have been purchased for personal or family use
- b. Goods that have been purchased based on the implementation of a court decision or other means implemented based on legal authority
- c. Goods sold through auction
- d. Goods in the form of shares, investment securities, or money
- e. Goods in the form of aircraft or hovercraft
- f. Goods in the form of electricity

An international contract for the sale and purchase of goods contains a set of rights and obligations that the parties to it have. Generally, the buyer's main obligation is to make payment for the goods he has purchased from the seller while the seller's main obligation is to deliver the goods purchased by the buyer to the buyer. However, during the execution of a contract, it is inevitable that a default will occur because one of the parties does not perform or will not perform its contractual obligations or does not properly perform its obligations as required should, if the action occurs at a time before the deadline for the performance of its obligations, then the party has committed an *anticipatory breach*.²²

²⁰ Pasal 1 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

²¹ Pasal 2 United Nation Convention on Contracts for the International Sale of Goods 1980.

²² Hukumonline, Kewajiban *Preparatoire* (Persiapan) Jilid III, Available from: <https://www.hukumonline.com/berita/a/kewajiban-ipraeparatoire-i-persiapan-jilid-iii-lt5acb62fe79592/?page=all>, [Accessed November 8, 2023]

Anticipatory breach is a situation where one of the parties to an international contract of sale and purchase of goods states that he will not perform his obligations which can be stated expressly or implied by the party or the party has intended to perform his obligations inconsistently.²³ *Anticipatory breaches* result in the aggrieved party immediately taking action without having to wait for the deadline for contract execution.²⁴ The action taken can be in the form of suspension of the implementation of obligations or cancellation of the contract. Although not clearly stated, *an anticipatory breach* in CISG 1980 can be found in Article 71 paragraph 1 in the phrase "*it becomes apparent that the other party will not perform a substantial part of his obligation*"²⁵. The phrase indicates that a party to a contract will not perform its substantial obligations. Such indications may be either express or implied. Such indications can be seen from the actions or words of the party who has committed an anticipatory breach that indicates an intention that the party will not perform its contractual obligations properly.²⁶ If *an anticipatory breach* has occurred, the 1980 CISG has provided remedies for the aggrieved party, namely the right to suspend the performance of obligations or cancel the contract for the international sale and purchase of goods. However, to cancel the contract, *the anticipatory breach* must be fundamental.²⁷

One of *the remedies* against *anticipatory breach* that can be found in CISG 1980 is the suspension of the performance of obligations. The regulation of the suspension of performance of the obligation can be found in Article 71 CISG 1980. Based on this article, a party has the right to suspend the performance of its obligations performance of its obligations where there is an indication that the other party will not perform its substantial obligations arising from a serious deficiency in its ability or skill or conduct in preparing for or performing the contract.²⁸ The party who has suspended the performance of its obligations must inform the other party either before or after the goods have been delivered which is done immediately. If the party who has committed an anticipatory breach has provided security by its obligations, then the party who suspended the performance of its obligations must resume its obligations.²⁹ Therefore, to be able to suspend the performance of their obligations, the parties must pay attention to several things, namely as follows:

1. A party does not appear to be performing its substantial obligations.

²³McKendrick, Ewin (2012). *Op. Cit.*, p. 801.

²⁴*Ibid.* p. 802.

²⁵Pasal 71 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

²⁶Beheshti, Reza (2018). Anticipatory Breach of Contract and the Necessity of Adequate Assurance Under English Law and Uniform Commercial Code. *Lloyd's Maritime and Commercial Law Quaterly*. Part 2, p. 277.

²⁷Pasal 72 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

²⁸Pasal 71 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

²⁹Pasal 71 ayat 3 United Nation Convention on Contracts for the International Sale of Goods 1980.

This condition is an *anticipatory breach* found in Article 71 of the CISG 1980. In principle, if after the making of the contract, there is a sign that one party will not perform its obligations or not perform its obligations properly, then that party has committed an anticipatory breach. Not all anticipatory breaches that occur can give rise to the right to suspend the performance of obligations to the injured party. This is because the nature of the *anticipatory breach* is substantial. In determining whether the *anticipatory breach* that occurs is substantial, it is necessary to look at the obligation that has been violated, namely seen from the level of importance of the obligation expected to be carried out by the party who committed the *anticipatory breach* for the party who has been harmed.³⁰ Therefore, a party cannot suspend the performance of its obligations if the anticipatory breach only affects a small portion of the obligations of the party that committed the *anticipatory breach* be able to know whether a party has the right to suspend the performance of its obligations or not, it must be seen from the level of the importance of the obligation of the party who committed the anticipatory breach needs to be seen from the case. However, it must be noted that the anticipatory breach has an impact on the contract as a whole.³¹

The application of this requirement can be found in Bacon Case I (CLOUT Case No. 227). In that case, the seller from Italy and the buyer from Germany entered into a sale and purchase agreement for 200 tons of bacon to be delivered in 10 shipments. The buyer wanted the bacon to be delivered wrapped to the seller. The seller rejected the buyer's request and replied by stating that the bacon would be delivered unwrapped. The buyer agreed to the seller's suggestion. However, the buyer only accepted four shipments and rejected the last six because, in the fourth shipment by the seller, the bacon was not packed to the country's hygienic standards so the bacon could not go through customs. The problematic shipment only amounted to 240 Kg of the total amount that the seller had to send of 200,000 Kg. Therefore, the obligations violated by the seller are only a small part of the seller's overall obligations so the seller cannot be said to have violated its substantial obligations. The judge in the decision stated that the buyer's action of not accepting the rest of the delivery of goods by the buyer was unjustified because only a small part of it was problematic.³²

³⁰Schlechtriem, Peter dan Ingeborg Schwenzer (2016). *Commentary on the UN Convention on the International Sale of Goods 4th Edition*. Oxford: Oxford University Press, p. 1359.

³¹Huber, Peter dan Alastair Mullis (2007). *The CISG A New Textbook for Students and Practitioners*. Munich: Sellier European Law Publisher. p. 340.

³²Bacon Case I, Available from: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-25> [Accessed November 19, 2023].

2. Conditions that must occur to suspend the performance of an obligation

The 1980 CISG has provided two conditions that must be met by a party to obtain the right to suspend the performance of its obligations, which are as follows:

a. Serious deficiencies in ability or aptitude

A serious deficiency in capacity is one of the conditions that must be met to suspend the performance of an obligation by a party. Based on its nature, the deficiency is divided into two, namely subjective and objective. Subjective deficiencies can be in the form of a financial problem, the license has expired, and so on while objective deficiencies can be in the form of a fire hitting the manufacturer's factory, public policies that affect the implementation of the sale and purchase contract of goods, there is an economic embargo on the goods that are the object of the agreement, and so on.³³ In addition to a deficiency in a party's ability, a serious deficiency in its ability is also a condition that must be met for a party to suspend the performance of its obligations. The deficiency can be in the form of delayed payment or non-payment by the buyer to the seller of the mutually agreed price of the goods which results in the seller being able to suspend delivery of the goods.³⁴

An application of this requirement can be found in the case of ATT v. Armco. In that case, the buyer had a substantial debt to the seller which he did not pay as a result of the buyer only paying for part of the goods delivered by the seller. Accordingly, the seller suspended the delivery of the remaining goods. Accordingly, the Arbitrator held that the seller had the right to suspend the performance of its obligations because the buyer was unable to make payment to the seller.³⁵ Also, it should be noted in such cases that the buyer cannot rely on the incomplete delivery by the seller because the buyer did not make full payment to the seller for the goods that the seller had delivered.³⁶

b. The act is in preparation for the performance of the obligation or in the performance of the contract.

The application of this requirement can be seen in Italian Shoes Case XV. In that case, the buyer only paid part of the agreed price of all shoes, which was IT£5,525,000 of the total to be paid of IT£8,411,000. The buyer only paid partially because the shoes that had been sent by the seller had defects. As a result of the

³³ da Silveira, Marcedeh Azeredo (2005). Anticipatory Breach Under the United Nations Convention on Contracts for the International Sale of goods. *Nordic Journal of Commercial Law*. Nomor 2. p. 6.

³⁴ *Ibid.* p. 7.

³⁵ ATT v. Armco, Available from: <https://iicl.law.pace.edu/cisg/case/belarus-october-5-1995-att-v-armco-translation-available> [Accessed November 18, 2023].

³⁶ Lihat Pasal 80 United Nation Convention on Contracts for the International Sale of Goods 1980.

defective goods, the Judge ruled that the buyer had the right to suspend the performance of its obligations for the delivery of defective goods by the seller.³⁷ The delivery of defective goods may not only suspend the performance of the obligation but also void the contract. This is because the delivery of defective goods can become a *fundamental breach* if the goods cannot be resold by the buyer even at a discount. The cancellation of the contract for *the fundamental breach* has been regulated by Article 72 CISG 1980 which states that if *the fundamental breach* occurs before the deadline for the execution of the contract, then the party who has been harmed by this can cancel the contract of sale and purchase of goods that he has made with the party who committed *the fundamental breach*.³⁸

3. The obligation to give prompt notice to the party that has committed *the anticipatory breach* after suspending the performance of its obligations and resuming its obligations after the party that has committed *the anticipatory breach* provides guarantees that are consistent with its obligations

Article 71 paragraph 3 CISG 1980 has provided an obligation for the party suspending the performance of an obligation in the form of further action to be taken by that party, namely to notify the anticipatory breach party of its actions. This article does not state what form the notice is to take. Therefore, the notice must comply with Article 27 CISG 1980 Under that article, the notice must be made by using appropriate means appropriate to the circumstances.³⁹ The language used in the notice will be left to the parties by mutual agreement. However, if no language is specified, the language used in the notice shall be the language frequently used by the parties.⁴⁰

In addition to the obligation to inform about the suspension of the performance of its obligations, there is another obligation that must be carried out, namely if the party who committed *the anticipatory breach* has provided collateral by its obligations, the party that suspended the performance of its obligations is obliged to continue its obligations. Therefore, the right to suspend the performance of its obligations will disappear after the party that commits *an anticipatory breach* submits a guarantee by its obligations to the injured party.⁴¹

³⁷ Italian Shoe Case XV, Available from: <https://iicl.law.pace.edu/cisg/case/germany-may-4-1994-amtsgericht-local-court-german-case-citations-do-not-identify-parties> [Accessed November, 17, 2023].

³⁸ Pasal 72 ayat 1 United Nation Convention on Contracts for the International Sale of Goods 1980.

³⁹ Pasal 27 United Nation Convention on Contracts for the International Sale of Goods 1980.

⁴⁰ UNCITRAL (2016). *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 Edition*. New York: United Nations. p. 120.

⁴¹ Pasal 71 ayat 3 United Nation Convention on Contracts for the International Sale of Goods 1980.

Another choice of law that can be used by the parties as governing law and apply to their international sale and purchase of goods contract is the national law of one of the parties to the contract. Even though the parties do not choose Indonesian Law as the governing law of the contract, Indonesian Law can still apply to the contract if one of the parties is from Indonesia or the business transaction occurs within the territory of the State of Indonesia. This is based on the principle of national legal sovereignty.⁴²

Provisions for the suspension of the performance of obligations can also be found in Indonesian Contract Law. This provision is known as the principle of exception non-dimple contracts. This principle can be found in Article 1478 of the Civil Code. Based on this article, the seller is allowed to postpone the delivery of goods to the buyer if the buyer has not made payment to him even though the buyer has not yet made payment the seller does not allow any delay in payment.⁴³ This principle can only be found in reciprocal agreements because in these agreements the parties have their respective obligations which are interdependent⁴⁴ so that if a party does not perform its obligations, it cannot demand the performance of the other party's obligations. Therefore, this principle is a form of defense carried out by a party who has been accused of negligence in carrying out his contract when the other party himself did not carry out his obligations. The result of the defense is that the party that has been accused can be released from liability for its actions if it is proven that the other party did not carry out its obligations.⁴⁵ However, if the international contract of sale and purchase of goods contains a provision that a party must perform its obligations, the action of the party demanding the performance of the obligations of the party that must perform its obligations first is justified.

The principle of *exception non-dimple contracts* can generally be found in the exceptions raised by the defendant. This is because the principle is an objection. The exception that raises the principle of *exception non-dimple contracts* is included in the Pretoria exception because the stipulation relates to the object of the case.⁴⁶ As mentioned earlier, this defense can only be found in cases arising from reciprocal agreements. It contains a statement that the plaintiff does not have the right to sue the defendant because the plaintiff himself has not performed his

⁴² Adolf, Huala. *Op. Cit.*, p. 20.

⁴³ Pasal 1478 Kitab Undang-Undang Hukum Perdata.

⁴⁴ Budiono, Harlien (2010). *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan (Buku Kedua)*. Bandung: PT. Citra Aditya Bakti. p. 204.

⁴⁵ Syahrani, Riduan (2004). *Seluk-Beluk dan Asas-Asas Hukum Perdata*. Bandung: PT. Alumni. p. 242.

⁴⁶ Rofiq, M. Khoirur (2022). *Hukum Acara Pengadilan Agama*. Semarang: CV. Rafi Sarana Perkasa. p. 208.

obligations. This is because each party has interdependent obligations, so it is not justified to sue because he has not carried out his obligations. However, it should be noted that this needs to be seen from the provisions in the contract so that it can determine who must carry out their obligations first. This can be found in the Cibinong District Court Decision Number 245/Pdt.G/2021/PN.Cbi. In the verdict, the defendant made an exception stating that the plaintiff did not perform his obligations installments for 15 months with a total to be paid by the plaintiff of Rp53,526,495, - even though the plaintiff had received the house from the defendant and had lived in the house. In this case, the judge stated that to prove which party must carry out its obligations, an examination must first be carried out of written evidence such as the Sale and Purchase Bond Agreement (PPJB) for land and buildings that had been made by the parties.⁴⁷

In a dispute over an international sale and purchase contract, it is difficult to determine whether one of the parties can apply exception non-dimple contracts in its exception and be accepted by the judge. This is because Article 1478 does not state what limitations must be met to apply the principle of exception non-dimple contracts. However, it should be noted that generally, exceptions are related to the formality of the lawsuit. This can be seen in the Cibinong District Court Decision Number 245/Pdt.G/2021/PN.Cbi, in which the judge rejected the exception non-dimple contracts argument because the stipulation contained the subject matter of the plaintiff's lawsuit so its nature was no longer exceptional.⁴⁸

Efforts that Can Be Made by Indonesian Parties in the Event of Differences in the Provisions of Suspension of Performance of Obligations Contained in the CISG 1980 with Indonesian Law of Treaties

Arrangements for the suspension of the performance of obligations have indeed been regulated by the CISG 1980 and Indonesian Treaty Law. However, these arrangements have differences between those contained in the CISG 1980 and Indonesian Treaty Law, namely as follows:

- a. Suspension of performance of obligations under the 1980 CISG based on *an anticipatory breach* by the other party.

Suspension of performance of obligations in the CISG 1980 occurs due to *anticipatory breach*. However, this is not the case in the Civil Code. This is because Article 1478 of the Civil Code regulates *anticipatory breach*. The article only gives the seller the right to postpone the delivery of goods to the buyer because the buyer

⁴⁷ Lihat Putusan Pengadilan Negeri Cibinong Nomor 245/Pdt.G/2021/PN.Cbi. p. 35.

⁴⁸ *Loc. Cit.*

has not made a payment. In addition, to state that a party has defaulted, it is necessary to have a statement stating that the party has been negligent, while *an anticipatory breach* does not need such a statement so that *anticipatory breach* cannot be applied in Indonesian treaty law.⁴⁹

- b. The CISG 1980 has clearly stated the conditions that must be met to give rise to the right to suspend the performance of obligations for a party to a contract.

Article 71 paragraph 1 CISG 1980 has provided the conditions for a party who wants to suspend the performance of its obligations, namely a party has committed a substantial *anticipatory breach* due to a serious deficiency in its ability or capability or its actions in preparing or performing the contract while in Indonesian treaty law, the Civil Code does not mention the conditions that must be met such as whether the buyer can carry out its obligations to make payments to the seller or not as long as the deadline for implementing the contract has not expired.

- c. The CISG 1980 has obliged the party suspending the performance of its obligations to notify the other party of its action and obliged the party to resume the performance of its obligations if the party in anticipatory breach has provided appropriate security for its obligations.

Article 71 paragraph 3 CISG 1980 has provided an obligation to the party that has suspended the performance of its obligations to immediately notify its actions to the party that has committed *the anticipatory breach* and resume its obligations if the party that committed *the anticipatory breach* has provided guarantees to it, while Article 1478 of the Civil Code does not elaborate on what actions must be taken by the seller after the seller suspends the delivery of goods to the buyer as long as the contract execution deadline has not expired. However, the seller may send a summons to the buyer if, until the deadline for the execution of the contract, the buyer still does not make payments as agreed upon. The action of a summons is different from the notice stipulated in Article 71 paragraph 3 CISG 1980. This is because the notice contains an act of suspension of the implementation of obligations by a party, such as a seller who suspends the delivery of goods to the buyer, while a summons in the Civil Code contains an admonition or warning to the buyer to make payments before being declared negligent by the seller.⁵⁰

⁴⁹Cahyono, Akhmad Budi (2020). Default and Termination of Contract: A Comparative Study Between Indonesia and the UK. *Yuridika*. Vol. 35 Nomor 3. p. 480.

⁵⁰Badruzaman, Mariam Darus (2015). *Hukum Perikatan dalam KUH Perdata Buku Ketiga Yurisprudensi, Doktrin, serta Penjelasan*. Bandung: PT Citra Aditya Bakti. p. 22.

The existence of these differences creates uncertainty for business actors from Indonesia considering that Indonesia has not ratified CISG 1980. This is exacerbated by the fact that CISG 1980 can apply to international contracts of sale and purchase of goods that have been made by business actors from Indonesia with partners from CISG 1980 member countries. The applicability of the CISG 1980 is based on Article 1 paragraph 1b which states that the CISG 1980 may apply if the rules of international civil law direct the application of CISG 1980 member states. The applicability occurs because the CISG 1980 has been integrated into the national law of the CISG 1980 member states by ratifying the convention. However, this may not apply if the other party to the contract has stated that their country is not bound by the provisions of Article 1 paragraph 1b as stipulated in Article 95 CISG 1980. Therefore, if the CISG 1980 applies to international contracts for the sale and purchase of goods that have been made by parties in which one of the parties is from Indonesia, it is necessary to find efforts that can be made by the parties due to the difference.

Contracts for the sale and purchase of international goods are carried out based on the principle of freedom of contract. Based on this principle, the parties can freely determine the contents of the contract for the sale and purchase of international goods. However, some limitations must be considered by the parties. The limitation that must be considered is that it must not conflict with *mandatory law*. *Mandatory law* is the provisions of a country's national law that have a compelling nature so that if there is a conflict with *the mandatory law*, the provision takes precedence in its application.⁵¹ Generally, *mandatory law* is determined by statute and the compelling nature of the provision may be expressly stated or through interpretation.⁵² The benchmark for a mandatory law is legislation which in this case is the Civil Code.

The principle of freedom of contract has been regulated by the CISG 1980 and the Civil Code. The principle of freedom of contract in CISG 1980 can be found in Article 6 which indicates that the parties can waive the applicability of CISG 1980 as a whole or only certain provisions such as Article 71, while in the Civil Code, it can be found in Article 1338 which indicates that the parties can freely determine the contents of the contract for the sale and purchase of goods as long as it does not conflict with public order. Therefore, the effort that can be taken by the parties is to override the applicability of CISG 1980 as a whole or only the provisions of Article 71.

⁵¹ Pertiwi, Chintya Indah dan F.X. Joko Priyono (2018), *Implikasi Hukum Kontrak Bisnis Internasional yang Dibuat dalam Bahasa Asing. Notarius*. Vol. 11 Nomor 1. p. 23.

⁵² UNIDROIT (2016), *UNIDROIT Principles of International Commercial Contracts 2016*, Roma: International Institute for the Unification of Private Law. p. 11.

As is well known, if one of the parties to an international sale and purchase contract is a member state of the CISG 1980, then the provisions of the CISG 1980 automatically apply to the contract. However, Article 6 of the CISG 1980 has given the parties the right to waive the applicability of the CISG 1980 to their international sale and purchase contracts. The waiver can be done either in whole or in part. The arrangements for such waiver can be found in Articles 11, 14-24, and 29 of the CISG 1980.⁵³

Waiver of the CISG 1980 in its entirety can be done at various stages of contract implementation from contract drafting to dispute resolution. After the making of the contract, the waiver can be done by amending the contract, or at the time of the dispute it can be done based on mutual agreement during the legal process.⁵⁴ Such amendments must take into account the following provisions Article 29 of the CISG 1980 states that contract amendments must be made by mutual agreement of the parties. An amendment to waive the CISG 1980 in its entirety can be made by adding a provision in the choice of law clause stating the waiver of the applicability of the CISG 1980 in its entirety in the international sale and purchase of goods contract.

The intention to waive the applicability of the CISG 1980 in its entirety can be determined by the provisions of Article 8 of the CISG 1980. Under this article, statements and acts by a party must be interpreted by the subjective intention of that party. If not, then the interpretation must be made to a reasonable standard of understanding. However, it should be noted that in determining such intention, the court must consider all the circumstances relating to the statement or act.⁵⁵

In general, the intention to waive the applicability of the CISG 1980 in its entirety to international contracts for the sale and purchase of goods can be determined by including a clause containing the following matters:⁵⁶

- a. the parties expressly declare that the CISG 1980 does not apply to the international contract for sale and purchase of goods that they have entered into.
- b. the parties choose the national law of a party that is not a member state of the CISG 1980.
- c. the parties choose civil law where it is expressly provided that if it does not apply it will be replaced by the CISG 1980.

⁵³ CISG Advisory Council Opinion No, 16: Exclusion of the CISG under Article 6, p. 3.

⁵⁴ Pohl-Michalek, Malgorzata (2023). CISG Exclusion during Legal Proceedings. *The Chinese Journal of Comparative Law*. Vol. 11 Nomor 1. pp. 2-3.

⁵⁵ Lihat Pasal 8 United Nation Convention on Contracts for the International Sale of Goods 1980

⁵⁶ CISG Advisory Council Opinion No.16: Exclusion of the CISG under Article 6. p. 2.

However, the parties' intentions in overriding the 1980 CISG in its entirety cannot be inferred by simply going through the following:⁵⁷

- a. The parties choose the national law of a CISG 1980 member state as the applicable law for their international contracts of sale and purchase of goods.
- b. The parties choose the territorial law of the CISG 1980 member state as the governing law of their international sale and purchase contract.

In addition to being able to waive the CISG 1980 in its entirety, parties can also waive certain provisions of the CISG 1980. One of them is the provisions of Article 71 CISG 1980. However, it should be noted that the provisions of Articles 89-101 CISG 1980 cannot be waived because these articles relate to public international law, i.e. the member states of CISG 1980 are not private entities such as subjects in civil law.⁵⁸

To override the applicability of Article 71 of the CISG 1980, some limitations must be observed. These limitations can be found in Article 12 of the CISG 1980. The Article stipulates that the provisions of Article 11, Article 29, or Part II of the CISG 1980 that allow for the amendment of a contract by mutual agreement made in any form other than in writing shall not apply if a party is from a member state that makes a declaration under Article 96 of the CISG 1980. In addition, the Article states that the provisions of this Article cannot be waived.⁵⁹ The sentence indicates that the provisions of Article 12 are mandatory rules.⁶⁰

The waiver of the applicability of Article 71 CISG 1980 to the international sale and purchase of goods contract can provide benefits for the parties. This is because the parties can make a mutual agreement on the circumstances that can give the right to suspend the performance of obligations to one of the parties. However, it depends on the events that will arise so that the parties can determine for themselves what kind of suspension can be taken by the parties. The agreement can be adjusted to problems that have arisen in the past.⁶¹ However, it should be noted that a waiver of Article 71 of the CISG 1980 should not be allowed to the extent of eliminating the remedies contained in the CISG 1980. Such a waiver must not lead to a situation where the performance of the contract of sale and purchase of goods becomes optional, subject only to the will of the obliged party.⁶²

⁵⁷ *Loc. Cit.*

⁵⁸ UNCITRAL. *Op. Cit.*, p. 33.

⁵⁹ Lihat Pasal 12 United Nation Convention on Contracts for the International Sale of Goods 1980

⁶⁰ GÜL, İbrahim (2016). Freedom of Contract, Party Autonomy and Its Limit Under Cisg. *Hacettepe Law Review*, Vol. 6 Nomor 1. p. 93.

⁶¹ Lawrence, William (2020). Serious Deficiencies in the Drafting of Article 71 of the CISG on Suspension Due to Prospective Impairment of Contract Expectations. *Journal of Law and Commerce*. Vol. 39 Nomor 1. p. 72.

⁶² CISG Advisory Council Opinion No. 17: Limitation and Exclusion Clauses in CISG Contracts. p. 11.

Waiver of the applicability of Article 71 of the CISG 1980 can be done by expressly stating that Article 71 of the CISG 1980 is waived in the contract for the international sale and purchase of goods. The clause can be made either at the time of contracting or after contracting as long as the parties have agreed to include the clause. In other words, if a business actor from Indonesia wishes to waive the provisions of Article 71 CISG 1980, then that party must inform the other party to the contract and state clearly in a contract that it will make or a contract that it has made regarding the waiver of the application of Article 71 CISG 1980.

CONCLUSION

The CISG 1980 and the Indonesian Law of Treaties have indeed regulated the mechanism for the suspension of the performance of obligations. The arrangements for the suspension of the performance of obligations contained in the CISG 1980 have differences from those contained in the Indonesian Law of Treaties. These differences include, among others, that the suspension of performance of obligations in CISG 1980 is based on anticipatory breach while in Indonesian treaty law, it is not, CISG 1980 has provided conditions that must be met in suspending the performance of obligations while Article 1478 of the Civil Code does not mention what conditions can give rise to the right to suspend the performance of obligations, and CISG 1980 has regulated further actions that can be taken by the party suspending the performance of its obligations. The existence of these differences creates uncertainty for business actors from Indonesia. This is exacerbated by the non-ratification of CISG 1980 into Indonesian laws and regulations. To overcome this, several efforts can be taken by the business actor, namely to waive the applicability of CISG 1980 as a whole or waive the provisions of Article 71 of CISG 1980. The waiver must be expressly stated in the clause contained in the international sale and purchase contract. For example, in the choice of law clause, the parties expressly state that the CISG 1980 does not apply to the international sale and purchase contract they have made. In addition, in overriding The applicability of the 1980 CISG as a whole or only Article 71 of the 1980 CISG, must take into account the existing limitations.

The author can provide suggestions for several parties, namely first, business actors to include provisions related to the suspension of the implementation of obligations in the anticipatory breach clause in their international sale and purchase contracts and include provisions excluding the use of CISG 1980 as a whole or only Article 71 in the choice of law clause. Second, the Government of Indonesia, to consider ratifying the CISG 1980 into Indonesian legislation to create legal certainty for business actors who carry out international trade in goods with partners from CISG 1980 member countries.

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