CHAPTER II

LITERATUR REVIEW

A. Theoretical framework

The legal theory of development was introduced by Mochtar Kusumaatmadja, an expert on international law, during his lectures in Seminar Hukum Nasional on the year 1973. When Mochtar Kusumaatmadja served as the Minister of Justice, the legal theory in which he named it as The Legal Theory of Development was applied as a law matter on Pelita I (1970-1975). The Legal Theory of Development was not applied anymore on Rencana Pembangunan Jangka Menengah and on Rencana Pembangunan Jangka Panjang Nasional Year 2009-2014.[1]

On the development plans, a system of law suggested by Friedman was used. Friedman stated that law as a system is a subject of social science, not the social science itself that is independent. The system of law as a science law is very influential amongst Continental jurist. A system of law, which Friedman stated, is a complex organization where interaction between law structures happened, in which it is the system of court. He stated that in this case the substance refers to regulations, and cultures is a

[1] Romli Atmasasmita (2012), *Teori Hukum Integratif,* Genta Publishing, Yogyakarta. Pg. 59-60

part of the common culture, norm and practices. In short, cultures are elements from social behaviors and values from the society.[2]

Mochtar Kusumaatmadja stated that the system of law that was an inheritance from the Dutch Colonization only educates people to be craftsmen, but unable to analyze the changes in the people and able to find a solution to the problems on the application of laws in the society.[3]

Mochtar Kusumaatmadja's view about the function and role of national development, later on was known as The Legal Theory of Development, as stated on premises, in which it is the principal of this teaching. The premises are stated below:

1. All the people that are currently developing can always be characterized by the changes and law functions to guarantee that the changes will happen in an order. Mochtar Kusumaatmadja explained that the changes that are in order can be helped by rules of law or court decisions or a combination of both. Mochtar Kusumaatmadja desires changes that are in order, not as a result ofrom violence only.

[2] Lawrence M. Friedman (1975), *The Legal System: A Social Science Perspective, Russel Sage Foundation*. Pg. 11-16

[3] Mochtar Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*, Lembaga Penelitian Hukum dan Kriminonogi Fakultas Hukum Universitas Padjadjaran, Bina Cipta, tanpa tahun. Pg. 6-8

2. Whether it is a change or a orderliness they are the first purpose of the society that is developing, thus law turns to be a facility (not a tool) that cannot be ignored on the process of development.
3. The function of law in the society is to maintain orderliness by maintaining legal security and also law (as a social norms) has to be able to regulate (help) the process of changing in the society.
4. A good law is a good that corresponds with the living law in the society. Certainly it has to be suitable or is a reflection of the values that is in the society.
5. To implement the functions of law above, it can only be gained if the law was conducted on a power, but that power has to work on regulations that was contained in the law itself.[4]

These 5 essence of Legal Theory of Development reflects a view about law as follows:

1. Law lives and develops together with the development of society. This differs from the thought of Savigny, in which law will always fall behind the development of society. The development of law as mentioned, correlates with the school of Sociological Jurisprudence, in which it stated that the only

[4] Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, Bina Cipta, Bandung

reflection for the development of society lies in the court decisions with the assumption that the court decisions will always contains the right values that was approved by the society in where the law lives and develops.

2. Mochtar Kusumaatmadja added, because of historical Indonesian law reasons, the development of law that parallels with the development of society can also be created with the creation of acts, not only by court. The crucial problem by the system of law in Indonesia that prioritize acts as the source of law rather than jurisprudence is that every act is a political product that does not detach from any interests by the influence of power. By that reason, John Rawls, intercede the different point of view by emphasizing that justice that was created by law has to be constituted by the "fair" values. The concept of justice (law) from Rawls was based by the concept of liberalism that believes law can only be understood if justice is a concept of politic. Justice as a concept of politic can only be justified with political values and not to be seen from moral, religion and philosophy doctrines.
3. Mochtar Kusumaatmadja stated that law as a facility on the development of society not as a tool so that the development can be held in order and organized.

4. The legal security cannot be disputed with justice and justice cannot be declared based only by the will of the power holder, but it has to be in accordance with the good values that develops in the society. Mochtar Kusumaatmadja's Legal Theory of Development (National) does not entirely leaving the concept of analytical jurisprudence, but it even has "gather" the school of "analytical jurisprudence", the school of "sociological jurisprudence", and the school of "pragmatic legal realism".[5] Based from those three school of law, the application of the Legal Theory of Development on practices can only be done by making acts or by court decisions or by both ways.[6]

B. Conceptual Framework

1. Definition

a. Definition of Implementation

The black's law dictionary defines implementation as such things as are used or employed for a trade, or furniture of a house. Coolidge v. Choate, 11 Mete. (Mass.) defines: whatever may supply wants; particularly applied to tools, utensils, vessels, instruments of

[5] Roger Cotterrell (2003), *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*: 2nd, Oxford University Press

[6] Mochtar Kusumaatmadja, *Hukum, Masyarakat, dan Pembinaan Hukum Nasional*; Lembaga Penelitian Hukum dan Kriminologi Fakultas Hukum Universitas Padjadjaran, Bina Cipta, (tanpa tahun).

labor; as, the implements of trade or of husbandry.[7] Implementation is an action or application of plans that has been planned carefully and on details. Implementation usually are considered done once it is considered permanent.[8]

According to Kamus Besar Bahasa Indonesia, implementation is an action and application, where both of these thing were intended to find out about certain things that has been agreed before. Implementation is a process to make sure that a policy has been applied and has reached its goal.[9]

Implementation according to the Webster Dictionary was defined shortly in which to implement means to provide the means for carrying out; and to give practical effect. Van Meter and Van Horn (1975) defines implementation as the actions that was done by individuals, officials or groups of governors or private parties to achieve the goals that has been determined in a policy decisions.[10]

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[7] Henry Campbell Black (1968), Black's Law Dictionary 4th edition, West Publishing CO. Pg. 888

[8] A. Kurniawan, "9 Pengertian Implementasi Menurut Para Ahli" http://www.gurupendidikan.com/9-pengertian-implementasi-menurut-para-ahli/. 20 December 2016

[9] Departemen Pendidikan (2008), Kamus Besar Bahasa Indonesia (Edisi Keempat), PT Gramedia Pustaka Utama Jakarta. Pg. 529

[10] Merriam Webster, "*Implementation*" https://www.merriam-webster.com/dictionary/implementation. 20 December 2016

b. Definition of Principle

According to Black's Law Dictionary, Principle has the definition as a Chief; leading; most important or considerable; primary; original. Highest in rank, authority, character, importance, or degree.[11]

Kamus Besar Bahasa Indonesia has the definition in which principle is a base (the truths that act as the foundation of thinking, acting and etc).[12] According to Merriam Webster, principle is a comprehensive and fundamental law, doctrine, or assumption; (1) **:** a rule or code of conduct (2) **:** habitual devotion to right principles (a man of *principle*); the laws or facts of nature underlying the working of an artificial device.[13]

c. Definition of Commercial

According to Black's Law Dictionary, Commercial relates to or connected with trade and traffic or commerce in general.[14] Commercial according to Merriam Webster Dictionary means occupied with or engaged in commerce or work intended for commerce; of or relating to commerce; characteristic of commerce; suitable, adequate, or prepared for commerce;[15]

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[11] Henry Campbell Black. *Op. Cit*. Pg. 1355

[12] Departemen Pendidikan. *Op. Cit*. Pg. 1102

[13] Merriam Webster, "*Principle*" https://www.merriam-webster.com/dictionary/principle 20 December 2016

[14] Henry Campbell Black. *Op. Cit*. Pg. 337

[15] Merriam Webster, "*Commercial*" https://www.merriam-webster.com/dictionary/commercial 21 December 2016

d. Definition of Agreement

Agreement (Perjanjian) according to Kamus Besar Bahasa Indonesia, was taken from the word "janji" which means remarks that states readiness or has the ability to do something.[16] In English, the word agreement according the Dictionary of Merriam Webster means the harmony of opinion, action, or character; The act or fact of agreeing; An arrangement as to a course of action; Compact, treaty; A contract duly executed and legally binding; The language or instrument embodying such a contract.[17] According to Black's Law Dictionary, Agreement has the definition as follows: A coming or knitting together of minds; a corning together in opinion or determination; the coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; The consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation.[18]

Agreement itself has the definition where it is an agreement made by 2 parties or more, where each of the party agreed and will follow what has been agreed on the agreement. According to Kitab

[16] Departemen Pendidikan. *Op. Cit*. Pg. 566

[17] Merriam Webster, "*Agreement*" https://www.merriam-webster.com/dictionary/agreement 21 December 2016

[18] Henry Campbell Blac. *Op. Cit*. Pg. 89

Undang-Undang Hukum Perdata in Indonesia, agreement is an act in which one party or more binds himself with another one party or more.[19]

Agreement does not binded in only certain shape. Agreement can be made orally or written. Certainly if the agreement was made written, it will be easier to become an evidence when dispute happens.

Agreement is not only as a tool of evidence, but it is also a requirement for the agreement itself, for example the agreement of Perseroan Terbatas has to be made with Akta Notaris.[20]

The requirements of a legitimate agreement is regulated in B.W. article 1320 that stated "for an agreement to be legitimate, it needs 4 requirements:

1. Agreed by those who will be binded
2. Competent to make an agreement
3. Agreed on a certain thing
4. A halal cause

The first two can be categorized as a subjective requirement, because those requirements relates to the subjects of the agreement. Then the other two requirements can be categorized as objective requirement because the requirements relate to the objects of the agreement.

[19] Kitab undang-undang hukum perdata pasal 1313

[20] Kitab Undang-undang Hukum Dagang pasal 38

e. Definition of Engagement

Engagement (Perikatan) according to Black's Law Dictionary, it means to employ or involve one's self; to take part in; to embark on.[21] In the Dictionary of Meriam Webster, engage has the definition to offer (as one's word) as security for a debt or cause; to bind (as oneself) to do something; to deal with especially at length; to pledge oneself; to make a guarantee; to do or take part in something.[22]

Engagement can happen when there is a partnership or because of the acts. Engagement can also happen because of acts against the law and voluntary representatives.[23] Engagement (Perikatan) come from the word "ikat" which means a rope to tie, unite, bind, or join. Engage itself has the definition of linkage, communication, trust, and fellowship.[24]

Article 1233 B.W stated that "All obligations arise either from agreements or law."

Article 1352 B.W. stated that "agreements made from acts, based only by acts (uit de wet alleen) or from acts that is a result from deed (uit de wet ten gevolge van's mensen toedoen)."

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[21] Henry Campbell Black, *Op. Cit*. Pg. 622

[22] Merriam Webster, "*Engagement*" https://www.merriam-webster.com/dictionary/engagement 22 December 2016

[23] Kitab Undang-undang Hukum Perdata pasal 1353-1354

[24] Departemen Pendidikan. *Op. Cit.* Pg. 520

Article 1353 B.W. stated that "Agreements made from acts as a result of deed, come from halal deed or from an act against the law (onrechmatige daad)."

According to Prof. Subekti S.H. on his book with the title Pokok-Pokok Hukum Perdata elaborated that the word engagement has a wider definition compare to the word agreement, engagement has a more abstract definition whereas agreement is a more concrete event.[25]

Prof. Subekti S.H. also stated that there are different types of engagement, which are:[26]

1) Conditional engagement (voorwaardelijk)

   Conditional engagement is an engagement that relies to an event in the future that is still uncertain whether it will happen or not.

2) Engagement that relies on a provision of time (tijdsbepaling)

   Engagement that relies on a provision of time differs a bit from conditional engagement. The difference is the certain event will definitely happen but when or the time is still uncertain. For example someone's death is definitely will happen but it is uncertain when will the time be.

[25] Subekti (2001), *Pokok-pokok hukum perdata*, Intermasa, Jakarta. Pg. 122

[26] *Ibid*. Pg. 128

3) Engagement that allows preference (alternatief)

An engagement where there is 2 or more performances. The party can choose to do performance A or performance B.

4) Engagement of shared responsibilities (hoofdelijk atau solidair)

Engagement of shared responsibilities is an engagement where some parties together bind with each other to do a performance. Just like on the case of debts, there are 2 parties that bear the responsibilities together to pay the debt.

5) Engagement that can be divided and cannot be divided

This type of engagement has a definition that is rather unique. Engagement that can be divided and those that cannot be divided can be agreed by both of the parties when the engagement is about to be done. An example for the engagement that can be divided is in which one of the party is obligated to do his performance but he cannot perform it because he passed away, then the performance will be shared to his heirs.

6) Engagement with determination of the law (strafbeding)

Engagement with determination of the law is usually used to prevent the debtors neglecting their obligation. In practices, usually the debtors will get a punishment if he is unable to fulfill his obligation.

It can also be said that engagement is a concrete matter because the book III B.W regulates about a legal connection that did not come from any consent or agreement. But the parties are bound. For example the engagements that appear from an unlawful act and the engagements that appear from the arrangements of someone's interest without consent. [27]

Mr.Dr. H.F. Vollmar in his book "inleiding tot de Studie van het Nederlands Burgerlijk Recht" (1) stated as below:

"Reviewing from the substantial, we can see that engagement exist as long as the person (debtor) has the obligation to do a performance that can be forced to the creditors and can also by the help of the judge."[28]

An expert named Patlo stated an idea about engagement, he said that engagement is a legal relation that has the quality of a wealth between 2 parties or more, with a base where a party (creditor) has the right and the other party (debtor) has the obligation to do a performance.

[27] *Ibid*

[28] Mariam Darus Badrulzaman (2001), *Kompilasi hukum perikatan*, Citra Aditya Bakti, Bandung. Pg. 1

f. Definition of performance

Performance is something that should be done in an engagement.[29]

According to B.W. on article 1234 stated that "Every engagement is done to give something, to do something, or to not do something"

Thus engagement has 3 form which are:

1) To give something
2) To do something
3) To not do something

If a party did not do his performance, it was called tort (wanprestasi).

Tort has another meaning which is breaking promises. A party can be said has done tort if:

1) Debtor did not fulfill the performance at all
2) Debtor did fulfill the performance but is late
3) Debtor did mistakes or was not suitable to fulfill. [30]

For the party that is negligent and did tort, they can be sued in front of the court, and the court can decide on decisions that will inflict on loss to the defendant. The negligence that was done has to be stated

[29] Meriam Darus Badrulzamam (1970), *Asas-Asas Hukum Perikatan*, Medan: FH USU. Pg. 8

[30] Mariam Darus Badrulzaman (2001), *Kompilasi hukum perikatan*, Citra Aditya Bakti, Bandung. Pg. 18

publicly. If the warnings given to the party was ignored, they can be sued to the court.[31]

Party that was at disadvantage by the tort can sued for his rights, such as:

1) Right for the fulfillment of engagement (nakomen);
2) Right for the dissolution of engagement or if the engagement is reciprocal, he can ask for the cancellation of the engagement. (ontbinding);
3) Right for compensation (schade vergoeding);
4) Right on having the engagement fulfilled but with compensation;
5) Right for the dissolution or cancellation of the engagement accompanied with compensation.

g. Definition of party

According to Kamus Besar Bahasa Indonesia party means party as in sides, directions, purposes, or a group in a war, games, politics, agreements, and etc. Webster dictionary, a person or group taking one side of a question, dispute, or contest (The *parties* in the lawsuit reached an agreement.); a group of persons organized for the purpose of directing the policies of a government (political *parties* with opposing agendas); a person

[31] Subekti, *Op. Cit*. Pg. 146

or group participating in an action or affair (a mountain-climbing *party*) (a *party* to the transaction>)[32]

2. History

a. UNIDROIT

The origin of UNIDROIT date back to the first decades of the twentieth century. It was on 26 september 1924, that the assembly of the League of Nations was called upon to take a decision in relation to an offer made by the Italian Government following an initiative by Senator Vittorio Scialoja, Professor of Roman Law at the University of Rome, for establishing in Rome of an International institute for the Unification of Private Law, for which the Italian Government undertook to pay a yearly contribution.[33]

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between

[32] Merriam Webster, "*Party*" https://www.merriam-webster.com/dictionary/party 22 December 2016

[33] Lena Peters (2011), *International Institute for The Unification of Private Law (UNIDROIT)*, Wolters Kluwer, Great Britain. Pg. 13

States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.[34]

The purpose of UNIDROIT has remained the essentially the same as when it was first founded, even the emphasis and the ways by which the purpose of the organization is achieved by changed with the times. Thus, Article 1 of the 1940 statute, which albeit slightly modified over the years remains in force, states that the purpose of the organization is to 'examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by various States of uniform rules of private law'.[35]

'Uniform law' is the name given to the regulations adopted in the form of international conventions, protocols or model laws by States cooperating to find common solutions to specific problems. When they deal with private law, these solutions will affect the lives and activities of individual persons and companies.[36]

Ultimately the purposes of the unification of law are to facilitate relations between States and between Individuals and businesses of different States by providing for the same, or for a very similar, regulation of those relations are such that some form of

[34] UNIDROIT, "History and Overview" http://www.unidroit.org/about-unidroit/overview 27 December 2016

[35] Lena Peters, *Op. Cit*, Pg 17

[36] *Ibid*

agreement is imperative, and to promote economic development by the adoption of uniform rules facilitating foreign investment and other relations such as the transfer of technology.[37]

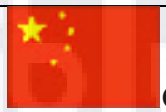
UNIDROIT has an essentially three-tiered structure, made up of a General Assembly of the Member States, a Governing Council elected by the General Assembly, and a Secretariat. The Secretariat is the executive organ of UNIDROIT responsible carrying out its Work Programme from day to day. It is headed by a Secretary-General appointed by the Governing Council on the nomination of the President of the Institute. The Secretary-General is assisted by a team of international civil servants and supporting staff.

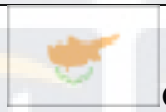
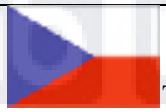
Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.

[37] *Ibid*

Table 2.1

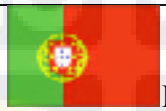
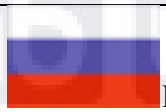
Member of Unidroit

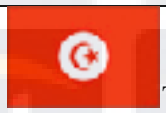
No.	Member of States	Member Since
1	 Argentina	05/04/1972
2	 Australia	20/03/1973
3	 Austria	09/08/1948
4	 Belgium	20/04/1940
5	 Bolivia	22/04/1940
6	 Brazil	18/06/1940
7	 Bulgaria	22/06/1940
8	 Canada	02/03/1968
9	 Chile	02/05/1951
10	 China	01/01/1986

11	 Colombia	19/04/1940
12	 Croatia	01/01/1996
13	 Cuba	14/10/1940
14	 Cyprus	01/01/1999
15	 The Czech Republic	13/01/1993
16	 Denmark	17/06/1940
17	 Egypt	22/11/1951
18	 Estonia	10/12/2001
19	 Findland	19/04/1940
20	 France	09/08/1948
21	 Germany	24/04/1940

22	 Greece	20/04/1940
23	 Holy See	19/04/1945
24	 Hungary	20/04/1940
25	 India	26/11/1950
26	 Indonesia	01/01/2009
27	 Iran	04/04/1951
28	 Iraq	03/05/1973
29	 Ireland	16/04/1940
30	 Israel	05/04/1954
31	 Italy	20/04/1940
32	 Japan	01/01/1954

33	 Latvia	01/01/2006
34	 Lithuania	01/01/2007
35	 Luxembourg	09/10/1951
36	 Malta	05/06/1970
37	 Mexico	06/05/1940
38	 Netherlands	11/04/1940
39	 Nicaragua	20/04/1940
40	 Nigeria	29/10/1964
41	 Norway	13/07/1951
42	 Pakistan	30/05/1964
43	 Paraguay	02/05/1940

44	 Poland	01/01/1979
45	 Portugal	16/05/1949
46	 Republic of Korea	01/01/1981
47	 Romania	19/04/1940
48	 Russian Federation	01/01/1990
49	 San Marino	03/02/1945
50	 Saudi Arabia	01/01/2009
51	 Serbia	13/04/2001
52	 Slovakia	13/01/1993
53	 Slovenia	30/01/1995
54	 South Africa	27/04/1971

55	 Spain	09/04/1940
56	 Sweden	11/04/1940
57	 Switzerland	20/04/1940
58	 Tunisia	01/01/1980
59	 Turkey	15/03/1950
60	 The United Kingdom	24/09/1948
61	 The United States of America	13/03/1964
62	 Uruguay	20/04/1940
63	 Venezuela	09/05/1940

Source: UNIDROIT[38]

[38] UNIDROIT, "*Membership*" http://www.unidroit.org/about-unidroit/membership 27 December 2016

The official languages of UNIDROIT are English, French, German, Italian and Spanish; its working languages are English and French.[39] UNIDROIT is also known as UNIDROIT Principles of International Commercial Contracts (UPICC).

The purposes of UNIDROIT are as follows:[40]

1) Defines the general rules for international commercial contracts;
2) Applied as the choice of law if the parties have agreed that the contract is subjected to UPICC;
3) Will be enforced if the parties agrees that the contract is subjected to the principles of the general law of *lex mercatoria*[41] and the likes;
4) Provides solutions when solving problems proved to be impossible if the applicable law was used;

[39] UNIDROIT, "*History and Overview*" http://www.unidroit.org/about-unidroit/overview 27 December 2016

[40] Taryana Soenandar (2004), *Prinsip-Prinsip UNIDROIT sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional*, Sinar Grafika, Jakarta, Pg. 34.

[41] According to K. Prent C.M and friends, the linguistic definition of *lex mercatoria* is taken from *Latin,* which means the law of commerce or commercial. *See K. Prent C.M, Kamus Latin-Indonesia, Jakarta: Penerbit Kanisius 1969.* On general in different literatures the term *lex mercatoria* defined as a uniformed law. But the word uniform was criticized since a uniform private law that applicable to every state will not be materialized. According to Alan D. Rose, he stated that it is better to use the word "harmonization". See Alan D. Rose, *The Chalenges for Uniform Law in the Twenty-First Century, Uniform Law Rview,* NS-Vol.1*,* 1996, Pg. 9-25 dikutip dari Taryana Soenandar, *Prinsip-Prinsip UNIDROIT Sebagai Sumber Hukum Kontrak dan Penyelesaian Sengketa Bisnis Internasional*, Sinar Grafika, Jakarta, 2004, hal 15.

5) Used to interpret or to add internationally uniformed law instruments;
6) Used as a model for the law makers nationally or internationally.

Principles of UNIDROIT can be seen from the articles and can be divided into 12 main points as follows:

1) The principle of freedom of contract;

The first UNIDROIT's principle is the freedom of contract. Freedom of contract means there are unlimited freedom for the people given by the law to make an agreement about anything as long as it does not conflicting with the law acts, decency and public order. This principle contained in article 1.1 UPICC that states: *"The parties are free to enter into a contract and determine its content"*

This article emphasize that the parties are free to make a contract and free to determine what they are going to agree on. On the commentary of this article, UNIDROIT also added that in the freedom of the parties on making the contract, the parties are also free also choose who are they going to partner with. The status of

this individual, as stated by Bonnel, does not rely on what law he applied or the nationality.[42]

The principal of freedom of contract does not always be defined as an absolute freedom, the freedom of contract has been limited on regulations whether it is from national law or international law, also stated in article 1.4 UNIDROIT:

"Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."

2) The principle of Good Faith and Fair Dealing;

The main base for every commercial transaction is the principle of good faith and fair dealing. Both of this principles has to be the base of every process of the contract from the negotiation until the implementation and the end of contract. Article 1.7 UPICC stated:[43]

[42] Micchael Joachim Bonnel (1995), "*The UNIDROIT Principles of International Commercial Contract: Why? What? How?*" 69 Tul. L. Rev. 1121

[43] Taryana Soenandar, *Op. Cit*, Pg. 42

1. *Each party must act in accordance with good faith and fair dealing in international trade;*
2. *The parties may not exclude or limit this duty.*

According to the substance of the articles above there are 3 elements of good faith and fair dealing which are:[44]

1. Good faith and fair dealing as the main principle that act as a base of contract;
2. Good faith and fair dealing in UPICCs were emphasized on international commerce practices;
3. Good faith and fair dealing is coercive;

3) The principal of acknowledging the customs of business transactions in the country concerned :

In this matter UNIDROIT gives a guidance on how customary law applied, seen in article 1.8 UPICC:

"A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment"

[44] *Ibid.,* Pg. 42

The term above contains important things which are:[45]

1. The customary practices have to fulfill certain criteria;
2. The customary practices that apply to both of the parties;
3. The customary practices that were agreed;
4. Other customary practices that were known by a lot of people and was routinely done;
5. The customary practices that are incorrect;
6. The valid local customary practices overrides the general rule;

If the customary practices had been agreed to be applied on a transaction, therefore the customary law will overrides the general rule that regulates that customs. The reason is because customary law bound the parties with their requirements that fully regulate the contract. Exceptions are only given when there are forced provisions. This was emphasized on article 1.5 UPICC.

[45] *Ibid.,* Pg. 45

4) The principle where deals made by offer and acceptance or by measures;

This was contained in article 2.1. UPICC, which stated:

"A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement"

The essence from that statement above is that deals are made because of:

1. Offer and acceptance;
2. A behaviour that shows signs of deal on agreeing to engage in a contract.

The basis of UNIDROIT's thought is when deal is made, it is enough to make a contract. The concept of offer and acceptance was used to determine whether and when the parties had reached a deal. But in the practice, sometimes contract that has to do with complicated transactions and often reached after a long negotiation without knowing the sequence of the offers and acceptances, so it will be hard to determine when exactly the word deal has been spoken.

5) The principle of prohibiting negotiation in bad faith

The prohibition of negotiation in bad faith contained in article 2.15 UPICC about *Negotiation in Bad Faith* that stated:

"(1) A party is free to negotiate and is not liable for failure to reach an agreement;

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party;

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party".

6) Obligation to keep confidential information;

When the parties negotiating, certainly there will be corporate's confidential information that were revealed and is known by both of the party. There will be a possibility they will utilize the information for their own benefit. In article 2.16 UPICC regulates the obligation to keep confidential information:

"Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a

contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party"

7) The principle of the protection of the weak party from standard-form provisions;

The practice of using a standard-form contract can be seen from article 2.19 UPICC, that stated:

"(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party"

If one of the party or both parties use the standard-form provisions, then the general rule of making contract will follow as stated in UPICC Article 2.1.20 to Article 2.1.11. Article 2.1.20 regulates about *Surprising terms.*

"*(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.*

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.",

Article 2.1.21 about *Conflict between standard terms and non-standard terms "In case of conflict between a standard term and a term which is not a standard term the latter prevails*".

Article 2.1.22 about *Battle of forms "Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract*".

8) The principle of contract's legitimate requirements;

Corresponding to the term in Article 3.1 UPICC, which is:

"These Principles do not deal with invalidity arising from (a) lack of capacity; (b) immorality or illegality"

The statement above means that the principles of UNIDROIT does not regulate the invalidity that is caused by incapacities, no authorities, amorality, and illegality. Perhaps all the basic requirement of legitimate contract that was found in different national law system was used in the scope of UNIDROIT's principle. The reason behind this exception is because there is a complexity that sticks to the questions about status, authority and public policy and also the extreme differences on how those matters applied on domestic law.[46]

9) A contract can be cancelled if it contains Gross Disparity

The basis of this principle is an application of the good faith and fair dealing principle. This was caused because of the huge disparity in the people. Because of that a set of rule is needed to protect the parties that are at disadvantage. Article 3.10 UPICC governs that:

[46] Taryana Soenandar, *Op. Cit*, Pg. 64

"(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly"

10) The principle of "*contraproferentem*" on interpreting a standard-form contract;

The articles that regulate the interpretation of contract are located in UPICC Chapter 4.1 and onto the next 8 article (Article 4.1 until 4.8). Article 4.6 stated that

"If contract terms supplied by one party are unclear, an interpretation against that party is preferred"

The term stated that if the requirements for a contract that was proposed by a party was unclear, then the interpretation that contradicts the party should be preferred. The parties have to be responsible for the formulation of the requirements for the contract, whether the contract was formulated on its own, or whether it has added requirements. For instance by using the standard-form requirement that has been prepared before, sometimes the parties who make the contract has to bear the risk for the unclearness of the contract they made.[47]

[47] *Ibid.,* Pg. 69

11) The principle of respecting the contract if there is Hardship;

The term about *hardship* is different with the term *force majeur*. The term about *hardship* can be found in *Section* 2, that consist of 3 articles :

Article 6.2.1 about *Contract to be observed "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship*".

Article 6.2.2 about the *Definition of hardship* "*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party*".

Article 6.2.3 about the *Effects of hardship "(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium*".

12) The principle of the release from responsibilities if the situation forces to (Force Majeur)

The explanation about *force majeur* is in Article 7.1.7 UPICC:

"(1) Non-performance by a party is excused if that party proves that the non performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due"

This article regulates about situation that forces with explanations as follows:[48]

1. *Force majeur* that was done by one of the party can be forgiven if that party can proved that the force majeur was caused by an obstacle outside his control and that obstacle was naturally hoped to not happen;
2. If the obstacle only last for temporary, then the granting of forgiveness will have legal consequences

[48] Taryana Soenandar, *Op. Cit*, Pg. 80-81

of time periods by paying attention to the cause of the obstacle to the contract;

3. The party that fails to fulfil the contract has to give notification to the other party about his obstacle and the cause of his incapabilities to fulfil the contract. If the notification was not received by the other party on the regular time span, after the failed party knows or should have known about the obstacle, he will be responsible for the loss caused by the failure of receiving the notification;
4. This article does not prevent a party to use his right to end the contract, holding the implementation of contract, or to ask for the payment of interest for the money that has been dued.

b. History of private law in Indonesia

Private law is rules of law that governs the behaviour of every people towards other people that relates to rights and duties that arise from society or family's association. According to H. F. A Vollmar, an expert of International Law, private law is a set of rules or norms that give limits and because of that, it gives protection to individual's interest in an exact ratio between one's interest and others, from

people on a society especially regarding relations about family and traffics.[49]

Private law divided into two, material private law and formal private law. Material private law regulates the private interests of every law subjects. Formal private law regulates regulates on how someone can defend his right if it was violated by other people.[50]

In general, Indonesian Civil Code (KUH Perdata) also known as Bugerlijk Wetboek (BW) is a codification of private law that was arranged in Netherland. The arrangement was greatly influenced by the private law in France (Code Napolen). Code Napoleon itself was arranged according to Roman law (Corpus Juris Civilis) in which at the time was considered the most perfect law.[51]

Indonesian Civil Code (BW) was successfully arranged by a committee lead by Mr.J.M.Kemper and most was sourced from Code Napoleon and other parts, also the codification of Indonesian Civil Code was finished on 5th July 1830, but was enacted in Netherland on 1 October 1938. In that same year, The Book of Law of Commerce (WVK) was also enacted.[52]

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[49] Salim H.S. (2001), *Pengantar Hukum Perdata Tertulis (BW)*, Proyek Penelitian dan Pengabdian Pada Masyarakat. Jakarta. Pg. 5

[50] Kompasiana, "*Sejarah Hukum Perdata di Indonesia*" http://www.kompasiana.com/syaifudinzuhri/sejarah-hukum-perdata-di-indonesia_54f95224a33311ac048b4cda. 11 January 2017

[51] *Ibid*

[52] *Ibid*

On 31st Oktober 1837 Scholten van Oud Haarlem was appointed as the head committee of codification, together with MR. A. A Van Vloten and Mr. Meyer in which both as a member. The committee was unsuccessful. Finally a new committee was assigned, led by Mr. C. J Scholten van Oud Haarlem again, but the members were changed which are Mr. J. Schneither and Mr. J. Van Nes. Finally this committee succeeded on codifying Indonesian Civil Code based on the principle of concordance. Meaning the code of private law in Netherland has took place in Indonesian Civil Code because Indonesian Civil Code emulates the Dutch civil law.[53]

Codification of Indonesian Civil Code (BW) Indonesia was announced on 30th April 1847 by Statsblad No. 23, and was enacted from 1st Januari 1848. Also it has to be noted that to produce this codification of Indonesian Civil Code (BW) Indonesia, Scholten and his friends consults J. Van de Vinne, Directueur Lands Middelen en Nomein. Because of it, he also took part on the making of the codification.[54]

Aside from that, the coded private law that applied in Indonesia is a Dutch private law product and was taken by the principle of concordance where the law that is applied in Dutch colonies will be the same as the law in the country of the colonialist.

[53] *Ibid*

[54] *Ibid*

In a substantial macro, the development of the Indonesian private law is as follows: First, the Indonesian private law is a provision of the Dutch East Indies that applied in Indonesia (Algemene Bepalingen van Wetgeving/AB) based on stbll.No.23 30th Aprill 1847 that consist of 36 Articles. Second, with concordance on the year 1949, Indonesian Civil Code (BW) was acted by the government of Netherland. Aside from BW, Indonesian Book of the Law of Commerce (WvK) was also enacted which was regulated in stbl.1847 No.23

On the historical perspective, private law in Indonesia divided into two periods, before independence and after independence.

First, before Indonesia gain independence, just like the rest of the colonies, the law that was valid in Indonesia is the law of the colonialist. The same thing also applies to private law. The private law that was applied by the Dutch for Indonesia has experienced a long historical run. At first the Dutch private law was designed by a committee created in the year 1814, led by Mr.J.M Kempers (1776-1824). On the year 1816, Kempers delivers the plan for that code of law to the government of Netherland and it was based from an old Dutch law and was named Ontwerp Kempers. The Ontwerp Kempers was strongly resisted by P.Th.Nicolai, a Belgian member of the parlement and also the President of the Belgian Court. In 1824

Kempers passed away, and the making of the codification was given to Nicolai. It results to the making of the Dutch private law, in which it was oriented to French Civil Code. French Civil Code itself was based on Roman law, Corpus Civilis from Jusinianus. By that the Dutch private law is a combination of the customary law/old Dutch law and French Civil Code. In 1838, the codification of Dutch private law was enacted by stbl.1838.[55]

In 1848 the codification of Dutch private law was applied in Indonesia by stbl.1848 and seven years later the private law in Indonesia was reaffirmed again with stbl.1919.

Second, after Indonesia gained Independence, the private law that was valid in Indonesia, based on Article II transitional rules UUD 1945 where it defines that every regulations will be stated as valid until a new set of rules will be defined by UUD, includes the Dutch Civil Law that was still valid in Indonesia. This has to be done to prevent legal vacuum (rechtvacuum) on private law section. But overall the Indonesia private law in its historical journey undergoes several development process or changes where the changes was adapting to the condition of Indonesia itself.[56]

[55] Titik Triwulan Tutik (2010), *Hukum Perdata dalam Sistem Hukum Nasional*, Kencana, Jakarta, Cet,2. Pg.18-19.

[56] *Ibid*

Structure of the Civil Code consists of four Books, which are: Book I, concerning family, matrimony, and inheritance. The section on matrimony is no longer applicable as it has been replaced by Law No. 1 Year 1974. The section on family and inheritance applies only to non-Muslim citizen.

Book II, concerning assets, lien, and mortgage. The section on mortgage is no longer applicable as of the enactment of Law No.42 Year 1996.

Book III, concerning contracts which applies facultatively, means that contracting parties may waive it.

Book IV, concerning evidence, which is still applicable especially as procedural law.

c. History of Singapore Law, The Law of Contract

Contract law in Singapore is largely based on the common law of contract in England. Hence, the rules developed in the Singapore courts do bear a very close resemblance to those developed under English common law. Indeed, where there is no Singapore authority specifically on point, it will usually be assumed that the position will, in the first instance, be no different from that in England. Unlike its neighbours Malaysia and Brunei, following Independence in 1965, Singapore's Parliament made no attempt to

codify Singapore's law of contract. Accordingly, much of the law of contract in Singapore remains in the form of judge-made rules.[57]

In some circumstances, these judge-made rules have been modified by specific statutes. Many of these statutes are English in origin. To begin with, 13 English commercial statutes have been incorporated as part of the Statutes of the Republic of Singapore by virtue of s 4 of the Application of English Law Act (Cap 7A, 1993 Rev Ed). These are listed in Part II of the First Schedule of this Act. Other statutes, eg the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed), are modelled upon English statutes. There are also other areas where statutory development based on non-English models has taken place, eg the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed) (which was largely drawn from fair trading legislation enacted in Alberta and Sasketchewan).[58]

[57] Singapore Law, "Commercial Law" http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8#section8. Art 8.1.1 13 January 2017

[58] *Ibid.,* Art 8.1.2

3. How to make a contract

a. Indonesia

The making of contract in Indonesia is based on the principles in Indonesia which are:

1. The principle of freedom of contract

   The principle that acts as a foundation of an agreement. The parties have freedom to make a contract, sign and to not violate the law.

   An expert named Anson said, "A promise more than a mere statement of intention fot it imports a willingness on the part of the promiser to be bound to the person to whom it is made".[59]

2. The principle of consensualism

   This principle can be found in Kitab Undang-undang Hukum Perdata in Article 1320. The article also stated all the requirements. This principle also gives a chance to both parties to express its wishes on an agreement. Because of that, the principle of consensualism also relates to Article 1388 Indonesian Civil Code[60]

[59] Mariam Darus Badrulzaman (2001), *Kompilasi hukum perikatan*, Citra Aditya Bakti, Bandung. Pg. 83

[60] *Ibid.,* Pg. 87

Requirements of a valid agreement:[61]

i. Agreement on which they are willing to bound to each other;

ii. The capacity to make an engagement

iii. A certain thing

iv. A halal cause

All of the agreements made in valid applies as an Act for those who made it. An agreement cannot be withdrawn except with the consent of both parties, or because of reasons governed the law. An agreement has to be implemented in a good faith..[62]

3. The principle of trust

The parties on the agreement has to have a sense of trust with each other. Trust in here refers to trusting other party that they will fulfill the performance and will not violate the terms in the agreement.

Somebody that makes an agreement with another party will grow trust for each other and believe that they are going to keep their promises, which in here to fulfill their performance.[63]

[61] Kitab Undang-undang Hukum Perdata Pasal 1320

[62] *Ibid*., Pasal 1338

[63] Mariam Darus Badrulzaman, *Op. Cit*. Pg. 87

Without the trust, agreement cannot be achieved by the parties. With this trust, each party are able to bound themselves and for both of them, the agreement has a binding power as an Act.[64]

4. The principle of the power to bind

Agreement contains a principle that has the power to bind. Agreement is binding ever party that was included. The binding of the parties on an agreement does not limited by the terms agreed but also by other factors as long as it is suits the custom, decency, and moral values.

5. The principle of equality in law

The principle of equality in law place both of the parties in an equality, no differences whether there is a different in skin color, race, wealth, power, occupation, and etc. Each party is obligated to see the equality and forces both of the party to respect each other.

[64] *Ibid*

6. The principle of balance

This principle wants both of the parties to fulfill and implement the agreement. The principle of balance is a continuation of the principle of equality. Someone's position has to be in balance with the other's position.[65]

7. The principle of legal certainty

Agreement is a figure of law that should contain legal certainty. The certainty can be gained from the binding power from the agreement, which is as an Act for both of the parties.[66]

8. The principle of morality

This principle can be seen in an engagement, where someone's voluntary act will not inflict a right for him to sue. This principle opens a chance for each party to do something voluntary. [67]

This principle forces the parties to do legal acts based on moral as a call from his conscience.[68]

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[65] Mariam Darus Badrulzaman, Op. Cit. Pg. 88

[66] *Ibid*

[67] *Ibid*

[68] *Ibid*

9. The principle of decency

The principle of decency was stated in Article 1339 Kitab Undang-undang Hukum Perdata which states: "Agreements is bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by propriety, customs, or the law.[69]

The principle of deceny in here relates to the content of agreement. According to Prof. Dr. Meriam Darus Badrulzaman, S.H., the principle of decency has to be maintained because by this principle, a measurement for the relation also determined by the justice in society.[70]

b. Singapore

A contract is a legally binding agreement, usually between only two parties. For the contract to be legally binding, several requirements must be fulfilled:[71]

1. A meeting of the minds between the parties, manifested through offer and acceptance;
2. Consideration;

[69] Kitab Undang-undang Hukum Perdata Pasal 1339

[70] Mariam Darus Badrulzaman, Op. Cit. Pg. 89

[71] Singapore Legal Advice, "*Requisite Elements in the Formation of a Contract"* https://singaporelegaladvice.com/law-articles/requisite-elements-in-the-formation-of-a-contract/ 11 January 2017

3. An intention to create legal relations;
4. Parties must have a capacity to contract; and
5. The parties must freely consent to the agreement.

Under the first requirement, two steps must take place: offer and acceptance.[72]

An "offer" is defined as an expression of willingness to contract on specific terms, and it is made with the intention that it will become binding on the parties as soon as it is accepted by the person to whom it is being addressed to (the "offeree"). Thus, an "offer" has three requirements:[73]

1. It contains the terms of the exchange;
2. It is an indication of the willingness of the person making the offer (the "offeror") to be bound by the contractual terms; and
3. It confers on the offeree the power to bind the to offeror the contract so that the latter can no longer withdraw the offer upon acceptance.

An "acceptance" is the unconditional acceptance of all the terms stated in the offer. For it to be effective, it has to be communicated to the offeror. It may be written or orally

[72] *Ibid*

[73] *Ibid*

communicated to the offeror. In general, silence will not amount to an acceptance, but there are exceptional cases.[74]

Under the second limb, the general rule is that a promise is only enforceable if it is supported by consideration. "Consideration" is something that has value in the eyes of the law and given in exchange for a promise. It can be understood using the "benefit-detriment analysis''. A simple example would be a seller offering to sell his goods to a buyer and the buyer promising to pay him in return for the goods. In this example, the price of the goods paid is the consideration – the offeree buyer agrees to suffer a detriment in terms of the money he pays to the seller, where the offeror seller benefits by receiving money from the buyer.[75]

In the third limb, there must be an intention by both parties to create legal relations. The law makes a determination based on the facts at hand. Usually the law is unlikely to find such an intention in a social or domestic setting. For instance, a husband promising his wife that he would buy her a Prada bag in exchange for making him breakfast for a week, is unlikely to be bound by a legal contract. However, the law will consider otherwise in instances where

[74] *Ibid*

[75] *Ibid*

agreements were entered in a business or commercial context, even if the parties involved had familial or close social relationships.[76]

In the fourth limb, broadly speaking, minors (below 21), or mentally incapacitated persons, do not have the capacity to enter into a contract. However, certain contracts such as sale of goods, services, or employment contracts, remain binding on minors.[77]

Finally, it is a requirement under the law that both parties must freely consent to the agreement. This means that if one party coerces the other into signing the contract, via duress or undue influence, the law may not recognise its legality.[78]

[76] *Ibid*

[77] *Ibid*

[78] *Ibid*

C. Legal Framework

1. UNIDROIT

Article 1.1 UPICC

"The parties are free to enter into a contract and determine its content"

Article 1.7 UPICC

1) "Each party must act in accordance with good faith and fair dealing in international trade;

2) The parties may not exclude or limit this duty."

Pasal 1.8 UPICC:

"A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment"

Article 2.1. UPICC

"A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement"

Article 2.15 UPICC

"(1) A party is free to negotiate and is not liable for failure to reach an agreement;

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party;

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party".

Article 2.16 UPICC

"Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party"

Pasal 2.19 UPICC

"(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party"

Article 2.1.20 UPICC

"*(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.*

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.",

Article 2.1.21 UPICC

"In case of conflict between a standard term and a term which is not a standard term the latter prevails".

Article 2.1.22 UPICC

"Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract".

Pasal 3.1 UPICC

"These Principles do not deal with invalidity arising from (a) lack of capacity; (b) immorality or illegality"

Article 3.10 UPICC

"(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before

the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly"

Article 4.6 UPICC

"If contract terms supplied by one party are unclear, an interpretation against that party is preferred"

Pasal 6.2.1 UPICC

"Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship".

Article 6.2.2 UPICC

"*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party*".

Article 6.2.3 UPICC

"(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium".

Article 7.1.7 UPICC

"(1) Non-performance by a party is excused if that party proves that the non performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who

fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due"

2. Indonesian Private Law

Article 1320

"In order to be valid, an agreement must satisfy the following four conditions:

1. there must be consent of the individuals who are bound thereby;

2. there must be capacity to enter into an obligation;

3. there must be a specific subject matter;

4. there must be a permitted cause."

Article1330

"The following individuals are incompetent to conclude agreements:

1. minors;

2. individuals under guardianship;

3. married women, in the events stipulated by law, and in general, individuals who are prohibited by law from concluding specific agreements."

Article 1338

"All valid agreements apply to the individuals who have concluded them as law. Such agreements are irrevocable other than by mutual consent, or pursuant to reasons stipulated by the law. They must be executed in good faith."

Article 1245

" The debtor needs not compensate for costs, damages or interests, if an act of God or an accident prevented him from giving or doing an obligation, or because of such reasons he committed a prohibited act."

Article 1339

"Agreements is bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by propriety, customs, or the law.

Article 330

"Minors are those who have not reached the full age of twenty one years and who have not previously entered into matrimony; the minority age limit has been changed from 23 years to 21 years on December 1, 1905) If a marriage is dissolved prior to the spouses having reached the full age of twenty one years, they is not regain the status of a minor.

Minors, who are not under the authority of their parents, shall be under guardianship, pursuant to and in the manner described in the third, fourth, fifth and sixth section of this title.

Stipulation of the interpretation of the term "minor" as used in the legal regulations with regard to the indigenous population

(Ordinance of January 31, 1931)

In order to eliminate the uncertainty caused by the ordinance of December 21, 1917 in A.17-738, this has been revoked and stipulated as follows:

(1) Where the term "minor" is referred to in legal regulations, this term shall be interpreted as follows, to the extent that it concerns the indigenous population: any individual who has not reached the age of twenty one years and who has not previously entered into matrimony,

(2) In the event that the marriage is dissolved prior to the individuals reaching the age of twenty two years, they is not regain the status of a minor.

(3) Reference to marriage in this ordinance is not be interpreted as reference to a marriage between children.

3. Singapore Law, The Law of Contract

8.2.2

"An offer is a promise, or other expression of willingness, by the 'offeror' to be bound on certain specified terms upon the unqualified acceptance of these terms by the person to whom the offer is made (the 'offeree'). Provided the other formation elements (ie consideration and intention to create legal relations) are present, the acceptance of an offer results in a valid contract."

8.2.5

"An offer is accepted by the unconditional and unqualified assent to its terms by the offeree. This assent may be expressed through words or conduct, but cannot be inferred from mere silence save in very exceptional circumstances."