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Harmonization Of Contract Binding Character Between Causa In Civil Law And Consideration In Common Law On In Developing Legal System Of Indonesian Trade Contract

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Abstract*: Economic globalization is heading for legal globalization, which influence states in the world to consider common analytical frameworkand effect on global convergence in legal harmonization. Main principle that practiced by legal system heading for certainty of law. Globalization brings two legal system, common law and civil law, into harmonization in economic transnationalrelations. Process of harmonization should consider national character, national independent, and bring the better future for the nation. Harmonization, basically is not contradicted to the basic legal principle in Indonesia.*
Keywords*: Harmonization Binding Character, Contract, Causa,Consideration,civil Law, Common Law, Legal Sistem, Trade*

I. Introduction

An expert in law, Paul Scolten states that although fundamentally the positive law in each country is different according to time and place in where it prevails, but it has the same principle, which is called as the principle that prevails universally, which doesn`t depend on the time and place, it is the principle of good and bad value, and almost all countries have the same sense in evaluating what is good and what is not good. It is also occurred to the contract law, although there are two big traditions between civil contract law and common contract law based on the different principles, but basically the two different traditions have a same sense related to what is good and what is not good in a contract although they are in a different concept and rhetoric.

The representation of the same sense of law above is more explained with the emergence of economic globalization directing to law globalization. The globalization causes the countries over the world have the same frameworks of thinking in evaluating law (common analytical frameworks) causing the increase of global uniformity (global convergence) in the formation of law and the harmony happened in hidden way (ulterior harmonization) between the different law systems, including between civil law and common law which is frequently happened and cannot be denied in this time.

The approach of contract interpretation between civil law and common law is obviously different, especially on the private law , although basically they have the same aim.[1] The difference can be seen from the way of a lawyer in deciding the private lawsuit,[2] which the main principle being the basis of civil law system is "the law get the binding power, because it is stipulated in the legislation regulations which is in the form of law and compiled systematically in codification and compilation. This basic principle is followed remembering the main value as the aim of law is "certainty of law". The law source in the civil law system is "laws" formed by legislator.[3] Thus, the analysis of the binding character of a contract is pointed to the regulation of legislation prevailing in the civil part (civil code).

While in the common law system, the law source in the common law system is "the decision of judge/court" (judicial decisions).Besides it, the societal customs and the regulation of legislation written in laws and the administrative regulations recognized. Furthermore, in the common law system there is 'a role' given to judge that the judge has a large authority to interpret the regulation of law prevails and to create new judicial principles that will be a precedent for other judges in

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[1] B Nicholas, The French Law of Contract (Oxford, Clarendon Press, 1992) 47ff; R David and D Pugsley, Les Contracts en droit anglais (Paris, LGDJ, 1985) 251ff in Catherine Valcke, "Contractual Interpretation at Common Law and Civil Law : An Exercise in Comparative Legal Rethoric", papers.cfm?abstract_id=1132364, downloded in May 12th 2008, recently accessed on Tuesday, January 1st 2013.

[2] A Burrows and E Peel, "Overview" in A Burrows and E Peel (eds), "Contract Terms" (Oxford, Oxford University Press, 2007) 3, 7-8; S Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations" in Burrows and Peel, ibid, at 123, 149-150, in Catherine Valcke, "Contractual Interpretation at Common Law and Civil Law An Exercise in Comparative Legal Rethoric", papers.cfm?abstract_id=1132364, downloaded in May 12th 2008, recently accessed on Tuesday, January 1st 2013.

[3] http://ilhamendra.files.wordpress.com/2009/02/diktat-phi-sejarah.pdf, downloaded on Tuesday, January 1st 2013.

deciding the same case. The common law system uses a doctrine, it is 'the doctrine of precedent/stare decisis' which states that in deciding a case, a judge has to base his decision on the judicial principles of the other judge`s decision in the same previous case (precedent).

Therefore, in the analysis of binding character of a contract in the common law system, there is a possibility of the human ratio usage outside what is regulated in the code of laws. This principle is followed remembering that the main value of law purpose is "justice".

The globalization causes the two systems which is based on the different law aim harmonizes in a transnational relationship between countries in economic section. The model of convergence practice between the common law and the civil law caused by the globalization process, especially the economic globalization can be seen in European Union, particularly in judicial branch of European Union, European Court of Justice (EJC).

ECJ plays a significant role in the integration of European states.[4] The formal role is to ascertain that the interpretation and application of European Union Treaties keeps on the law corridor.[5] Nowadays, ECJ consists of 25 judges, each of them comes from member-state, and 8 lawyers (advocates general). The lawyers come from the countries practicing the civil law tradition and also the common law tradition, because the member-states consists of the follower of civil

[4] Derek Beach, Between Law & Politics: The Relationship Between The European Court Of Justice & EU Member States, 17 (2001) in Louis F. Del Duca, "Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence", www.tilj.org/content/journal/42/num3/DelDuca625.pdf, recently accessed on Tuesday, January 1st 2013.

[5] Ibid, p.23

law tradition and some are the follower of common law tradition, like England and Ireland. In ECJ, the judges coming from the two different law traditions must accommodate and work together in ECJ.

The beginning of legal harmonization process was started in the second half of the ninetieth century, dominantly influenced by the codification of European States (European Codifications).[6] The codification of legislation regulation performed by Continental Europe tradition was influenced by the common law jurisdiction through the spreading of concept and legal regulations sourced from the England law tradition, producing the harmonization of law, although it is not a legal uniformity (albeit not uniform). The main goal (the ultimate goal) of the harmonization is the unification of the private law (unification of private law), which by the judge Lord Justice Kennedy will bring "the big benefit for civilized mankind" (enermous gain to civilised mankind).[7]

The founding of International Institute for the Unification of Private Law (UNIDROIT) in 1926 is the real beginning of the process of private law unification.[8] One of the substantive point of the harmonization in the contract law used is the harmonization between cause concept as the specific feature of civil

[6] Those are French Code Civil (1804) and German Burgerliches Gesetzbuch (1896, prevails in 1990), in José Angelo Estrella Faria, "Future Direction of Legal Harmonization and Law Reform : Stormy Seas or Prosperous Voyage ?", http://www.unidroit.org/english/publications/review/articles/2009-1%262-faria-e.pdf, p.6,recently accessed on Tuesday, January 1st 2013.

[7] Lord Justice Kennedy, "The Unifications of Law", Journal of the Society of Comparative Legislation, vol.10 (1909), 212 et seq. (214-15), in José Angelo Estrella Faria, Ibid.

[8] Herbert Kronke, "Methodical Freedom and Organisational Constraints in the development of Transnational Law", Loyola Law Review, No.51 (2005), 287 et seq. (288-289), in José Angelo Estrella Faria, Ibid.

law and consideration concept as the tradition of common law. Indonesia that fundamentally uses the civil law system and has the legal codification in the form of civil code in the globalization realm is one of the contracting states in International Institute for the Unification of Private Law (UNIDROIT) indirectly through the principles of UNIDROIT should harmonize its contract law with the contract law of common law, including the binding character of consideration in common law tradition. This harmonization process is not actually running without problems, because however the harmonization must keep looking at the identity of nation, the autonomy and prestige of nation, it is not hoped that the harmonization committed will not give the big advantage like proposed by Lord Justice Kennedy, just the opposite bring the destruction for the national economy.

Related to the matters, the writer is interested to do an analysis on the harmonization of the two concepts which are based on the different law system in order to evaluate whether the harmonization is properly performed related to the values of national personality.

II. Formulation of the Problem.

1. How is the binding character of contract of cause in the law concept of civil law contract?
2. How is the binding character of contract of consideration in the law concept of common law?
3. How is the potency of committing the harmonization between cause in civil law tradition and consideration in common law tradition in the development of the legal system on Indonesian commercial contract?

III. Research Methods

The research is conducted with normative jurisdiction approach which only uses the secondary data and refers to the norms of international and national law. The characteristic of research is descriptive which is pointed to answers the challenges of globalization so the whole word will have the same conceptual framework in evaluating the law. It causes the common analytical framework which can increase the uniformity of law forming and couses the realization of legal harmonization between cause in the civil law and consideration in the common law on the development of legal system of International commerce contract

IV. Iv. Result And Discussion

1. The binding character of contract of cause in the civil law tradition.

In all legal systems, basically a promise can be committed. It has been stated that:[9]

"In the law of contracts, the central and inevitable problem is that of enforceability of promise. There are plenty of subsidiary and ollateral problems; the primary question is: when will a promise be enforced?"

Cause is generally viewed as the main basic for binding a contract (the major basis for enforcing agreements) in the countries applying the civil law tradition.[10]Although the existence of cause is needed as the enchantment of an agreement, but generally in civil law practice, lawful agreement has been enough to be a requirement to perform a contract. (agreement alone, if lawful, suffices for enforceability).[11]

[9] Corbin, Contracts § 210 (1950)

[10] William Noel Keyes, "Cause and Consideration in California—A Re Appraisal", 47 Cal. L. Rev. 74. (1959), http://scholarship.law.berkeley.edu/californialawreview/vol47/iss1/5, published in March 31st 1959, recently accessed on Tuesday, January 1st 2013.

[11] See Smith, "A Refresher Course in Cause", 12 LA. L. Rev. 2, 4 (1951). This view is used in the practice in which every serious agreement must be performed and this is often called as postulate of pure reason. See Roussier, "Le Fondement de L`obligation Contractuelle dans Le Droit Crassua Dx L`eglise" (1933) in William Noel Keyes, "Cause and Consideration in California--A Re-Appraisal", 47 Cal. L. Rev. 74 (1959), http://scholarship.law.berkeley.edu/californialawreview/vol47/iss1/5, recently accessed on Thursday, January 3rd 2013.

The terminology cause derives from the core of Justinian Code. The theory of cause is based on the opinion that a contract must have a cause. Cause differs nominate contract, like the contract of trading and renting with innominate contract. The definition of cause in Justinian Code is basically the same as consideration in common law. Contract is the type of do ut des[12], do ut facias[13], facio ut des[14], or fado ut facias[15]. Furthermore, it is developing to be a maxim that if in the contract there is no cause, so the contract has the characteristic of nudum pactum[16], which is on the contract can be given the exception, but it cannot be performed.[17]

[12] do ut des is known in Roman Law, which derives from Latin meaning "I give that you may give". In the innominate contract, in which a party gives something in exchange for something that the party is to give). See Bryan A. Garner, Op.Cit, p. 529

[13] do ut facias is known in Roman Law, which derives from Latin meaning "I give that you may do". In the innominate in which a person gives something to another person who is to do or perform certain work. It is also called as bilateral contract. See Bryan A. Garner, Ibid.

[14] facio ut des comes from the civil law tradition, from Latin language means (I do so that you give). In the contract law context, the meaning is **fold,** that are (1) an innominate contract in which a person agrees to do something for recompense (2) the consideration in such contract. See Bryan A. Garner, Ibid, p. 628

[15] facio ut facias comes from the civil law tradition, in Latin language means "I do that you may do". In the contract law context, the maxim has two meanings, that are (1) an innominate contract in which a person agrees to do something for another person who agrees to do something in return, such as an agreement to marry, (2) the consideration in such a contract. See Bryan A. Garner, Ibid.

[16] Nulum Pactum comes from Latin language means "bare agreement". In the contract law context, the maxim has two meanings, that are (1)known in Roman Law as an informal agreement that is not legally enforceable, because it does not fall within the specific classes of agreements that can support a legal action. But, a pactum could create an exception to or modification of an existing obligation. (2) an agreement that is unenforceable as a contract because it is not "clothed" with consideration. See Bryan A. Garner, Ibid, p. 1096

[17] Bucxland & Mc Nam, "Roman Law and Common Law" , 221 (2d ed. 1952) in William Noel Keyes, "Cause and Consideration in California--A Re-Appraisal, 47 Cal. L. Rev. 74 (1959), http://scholarship.berkeley.edu/californialawreview/vol47/iss1/5, recently accessed on Thursday, January 3rd 2013.

In the article 1108 book III chapter II of French Civil Code concerning "of The Conditions Essential to The Validity of The Conventions", there are four essential conditions to the validity of an agreement, that are:

a. The consent of the party who binds himself;
b. His capacity to make a contract;
c. A definite object which forms the subject matter of the agreement;
d. A lawful cause in the obligation

Then, in chapter IV book III of French Civil Code concerning "of Cause" consisting three articles is stated that:

Article 1131 : An obligation without a cause or with a false cause, or with an unlawful cause, may not have any effect.

Article 1132 : An agreement is nevertheless valid, although its cause is not expressed.

Article 1133 : A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy.

While in Netherland, the source of Indonesian civil code (Burgelijke Wetboek), has occurred reform on the civil law through Nieuw Burgelijke Wetboek (NBW), which regulates certain article on the validity or enchantment of a contract. Where in the book VI concerning Algemeen Gedeelte van het Verbintenissenrecht (General Part of the Law of Obligations), specially Afdeling 4 concerning Rechtsgevolgen van overeenkomsten (Juridical Effect of contracts), article 248 (6.5.3.1) stating that:

Artilcle 248 (1) : Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien- (A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and equity.)

Artilcle 248 (2) : Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn. (A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity)

Thus, in Dutch Civil Code is not concerning "of Cause" as the binding character of an agreement, but it uses a doctrine "Consideration" to evaluate the binding character of an agreement.

In the contract law system of Indonesia, until now is still oriented on the Dutch Civil Code of 1838 which is the authentic copy of French Civil Code, that the binding character of an agreement still uses "cause" (oorzaak) or legal cause (geoorloofde oorzaak), which is written in some articles in book III section II of the Indonesian Civil Code concerning the requirements of legal agreement**:**

The article 1320 of the ICC: In order to reach the validity of an agreement, there are four conditions must be fulfilled:

1. The parties must consent to enter into a contract.
2. The parties must be capable of entering a contract.
3. There must be a particular object.
4. There must be a legal cause.

The article 1335 of the ICC: An agreement without reason, or which has been made on a false or forbidden reason, shall have no effect

The article 1336 of the ICC: If there is no a cause explained, but it is not a forbidden cause , or another cause is not illegal beside the cause mentioned, the agreement is valid.

The article 1337 of the ICC: A cause is forbidden, it is forbidden by the law, or if it is contrary to good morals or public order.

2. The binding character of an agreement of consideration in the common law tradition

The fundamental idea of being conditioned consideration is in order to get rights to do an act from another party, the parties must give the right, or truly give something determined by another party as a price so the act may be performed. Thus, the intended act by A is done by B, if B has done the act or has given the result, A will give the price for B because the act has been fulfilled. If B promises to give a laptop as A promises to pay 700 £ is committed, with the condition that every promise is supported by the considering of each party.

There are some functions of consideration in the contract law:

Consideration as evidence of the existence and seriousness of the undertaking. Consideration is often used to performs an evidence (performs an evidentiary) and functions as the giver of caution (cautionary function).[18] Baragwanath J, the

[18] L Fuller, "Consideration and Form" (1941) 31 Col L Rev 799; William v Roffey Brothers (1991) at 18; R Flannigan, "Privity-—the End of an Era (Error)" (1987) 103 LQR 564, 586-587; S Smith, Contract Theory (OUP 2004) 216-17; Law Commission, "Privity of Contract: Contracts for the benefit of Third Parties" (Law Com Cons No 121, 1991) [2.9].

judge of the appellate court in New Zealand said in the case of Antons Trawl CO Ltd v Smith (2003) that : " the importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end itself. On this view, the focus is on the promiso**r** and indicates that: (a) Consideration is unnecessary if a party`s serious intention to be bound can otherwise be proved, and (b) Consideration only focus goes to the question of which undertakings are enforceable (those seriously intended because they have been paid for) and not who can enforce. Thus, consideration need not come from the claimant; as long as someone 'pays', even a third party can sue.

Although consideration can be as the evidentiary function (instance nominal consideration), its role cannot be lessened**, (a)** even consideration is really existent, in oral agreements its existence may be difficult to prove, (b) even there is consideration, an act can be done impulsively without an intention to bind each other in doing an reciprocal performance (for example the statement, "you can own my house if you sing a song for

me), and (c) even if the promisor states that he want to bind himself on informal act (an act is not arranged in a agreement). All of that will not be able to do if it is not supported by consideration.

a. Consideration functions as welfare maximization

The enforcement of bargains is consistent in efficiency theories interpreting the rules of the contract law which is aimed to maximize the welfare (welfare maximization). Meanwhile, exchange of bargains tends to transfer wealth or service for the party who bargains the highest price, a need of the existence of consideration is the best indicator of transaction maximizing value. The other way**,** the donative promises which is not supported by a reciprocal promise or performance which is known as the term "sterile".[19]The example of donative promises is the reward of rich grandparents to poor students of the same age as their grandson and the exchange of bargaining and demand may not be happened (for example on the circumstance wherein the buyer is mistaken to estimate the price of goods too expensive (mistakenly overvalues).

b. Consideration functions as reciprocity- the intuitive justice of exchange.

The enforcement of bargains reflects the idea of reciprocity. Reciprocation is equality norm in most of social interaction. This matter is even clearer outside the social context; the reciprocation symbolizes an ideal of fairness, because it differs between trading and taking, and differs bargains from instances of exploitation. The popular sentiment of promise enforcement includes some quid pro quo,[20] which a promise should be performed because promisor has paid in order to get what he wants. The other way, promisee has been paid to fulfill the promise, has the stronger reason to perform a promise than perform an unpaid promise. This matter is supported by:

1) The expectation measure of damage. Model of bargains explains how far the extent of liability for breach of contract. The expectation measure is different with contractual action, which gives promisee the price of the enforcement stipulated in the contract, because he has been given an approved thing that is equal to the enforcement of agreement

[19] R Posner, Economic Analysis of Law (6th edition, Aspen, 2003) ch 4; R Posner, 'Gratuitous Promises in Economics and Law' (1977) 6 JLS 411; M Eisenberg, "Donative Promises" (1979) 47 U Chi L Rev 1, www.oup.com/uk/orc/bin/.../chenwishart4e_ch03.pdf, recently accessed on Weditionesday, January 2nd 2013.

[20] E Patterson "An Apology for Consideration" (1958) 58 Columbia L Rev 929, 946-47.

2) The other jurisdiction substantially perform all agreements through the testing of bargain`s obedience and the way to treat the reward (gratuitous promises) in the regime of different legal system.[21]This matter often gives note that the deletion of consideration will bring England Law to the same direction as the civil law system, but this matter doesn`t restrain the tight supervision. The French and German Law emerge to perform promise in a broad meaning than the promise regulated in the England Law. But, in practice, the two laws fundamentally pull the straight line between gratuitous undertakings and reciprocal undertakings.[22] Civil Law perform the gratuitous promises, but putting it on a tight formal requirement which is needless on "synallagmatic contract"[23] (containing bilateral reciprocal undertakings),[24]meanwhile the England Law needs consideration which also needs the promise enforcement of gratuitous undertakings fulfilling the formal requirements.[25]

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[21] J Dawson, Gifts and Promises: Continental and America Law compared (Yale University Press, 1980), p. 223; K Zweigert and H Kotz, Introduction to Comparative Law (3rd edition, Clarendon Press, 1998), p. 392, 395, and 397; O Lando and H Beale, Principles of European Contract Law (Kluwer, 2000), p. 130-33, 158.

[22] J Dawson, Ibid., Arthur T von Mehren, "Civil Law Analogous to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L R 1009.

[23] Synallagmatic contract comes from the Greek Language synallagma means mutual agreement. In civil law (La.Civ.Code Arts. 1908 1911), synallagmatic contract means a contract in which the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other. The special characteristic of synallagmatic contract is on the correlative obligations, in where the commutative agreement is marked with the enforcement of correlative performances.the terminology of synallagmatic contract in civil law tradition is equal as bilateral contract in common law tradition. See Bryan A. Garner, Black`s Law Dictionary Eight Edition, (Thomson Business, St. Paul Mn, 2004), p. 349.

[24] §§320-26 of the German Civil Code (BGB); Art 1102 of the French Civil Code (Code Civil).

[25] R Zimmermann, The Law of Obligations (OUP, 1996) 504-505: "[T]o define the scope of donation, the German Code is using here, under negative auspices, what has traditionally been, in a positive version, the essential test for the enforcement of promises in the English Common Law; the absence of any agreed-upon recompense characterizes donations in Germany, the presence of bargain consideration provides the normal reason for enforcing a promise in England."

c. Consideration functions as the marking of appropriate legal involvement.

The requirement of consideration gives the separating line between the transaction which is able to do by public (public enforceable transactions) and the private agreement which is not able to do (private unenforceable agreements).

3. The potency of harmonization enforcement between cause and consideration in the effort of developing the legal system of Indonesian commercial contract.

Discussing about potency or probability of the harmonization enforcement between cause concept and consideration concept in the analysis or interpretation of the binding character of commercial contract in

Indonesia, it means discussing about compatibility of foreign term to national values that is connected to the aim of harmonization prevailing.

This study is urgent because it can`t be ignored that the harmonization of the two concepts has occurred in hidden way (ulterior harmonization) through the involvement of Indonesia in global economy level involving Indonesia with other countries over the world. Today, the globalization is being questioned by the whole world. It seems like there is no satisfaction on the globalization. According to Stiglitz, a critical economist of World Bank, what is happening today is the real dissatisfaction on the globalization. Stiglitz utters that the economic globalization has made a profit for the countries utilizing it by looking for new markets for their export and accepting foreign investment, but for million people, the globalization is not useful. Most of them in fact are more suffering, when they see their occupations are eliminated and their lives become more and more unsafe. They think they are not capable toward the powers outside their reins. They have seen democracy is destroyed and their culture is scraped completely by the globalization.[26]

According to Prof. Solly Lubis in his lecture concerning Laws and Globalization, the role of national people in studying the globalization is for finding the way to defend the position of Indonesia as an independent country in facing the globalization effects, where a weak autonomy will cause high dependence and weak position of dealings when negotiating with other countries. Regarding this matter, the learning of globalization is aimed to increase the independence and the position of dealings of Indonesia when negotiating with other countries.

Such as Stiglitz explains that however, the globalization also has positive side, the problem is not on the globalization itself, but how the globalization is managed.[27] The rightness evidence of his statement concerning a successful key is on the management of globalization can be seen obviously through the positive effects China gets from the globalization, wherein after the globalization opening the possibility of production marketing from one country to another by nullifying "barrier to entry" , opens the opportunity for China to perform industrialization. From the industrialization, it proves in 2000 China was successful to provide the basic needs of its people through the industrialization.[28]

[26] Joseph E. Stiglitz, Globalisasi dan Kegagalan Lembaga-Lembaga Keuangan Internasional, (Jakarta: PT. Ina Publikatama, 2003), p. 345
[27] Ibid, p. 299-343
[28] Mansour Fakih, Runtuhnya Teori Pembangunan dan Globalisasi, (Yogyakarta : Pustaka Pelajar Offset, 2002), p. 8
People`s Republic of China as the 2nd biggest country in the world with number of people 1,2 billions is regarded as best model of how to treat the globalization movement, through the following principle :
"globalization presents both benefits and risks for a nation… to maximize benefits and minimize risks, policies must be adjusted according to the needs of changing environments… globalization should not mean that China will eliminate its own culture and traditions… local culture and traditions will not contradict globalization if there is a good balance between them."[29]

And it also prevails for Indonesia, it shouldn`t close itself from the globalization due to fear of being affected by the bad effect of globalization or we shouldn`t predict negatively on globalization emergence as an expensive reaction of developed countries, because our country as Notonagoro expresses that it is not a country following the concept "chauvinism" which parts nationality from internationalism, as stipulated in the preamble of 1945 Constitution of The Republic of Indonesia as the basis of country, mentioning that our country has a commitment for the realization of global unity, global brotherhood and also the kinship of nations.[30]

Therefore, it is necessary for Indonesia to know how the globalization is managed and associated with nation`s cultural values. Economic crisis happened in Indonesia today is not the effect of the globalization, but the effect of out

[29] Charles Morrison, Hadi Soesastro, Domestic Adjustment to Globalization, (JCIE, 1998), p. 190-191, in Mubyarto, Membangun Sistem Ekonomi, (Yogyakarta, 2007), p. 58
[30] Notonagoro, Pancasila Secara Ilmiah Popular, 9th edition, (Jakarta : Bumi Aksara (Radar Jaya Offset), 1995), p. 1

country itself which hasn`t found yet the model of managing the globalization with an instrument in the form of nation`s cultural values. The meaningful understanding of the cultural value stated above is not the culture of each ethnic group in Indonesia, but it is Pancasila (The Five Principles of Indonesia) that is as our base commitment to be united in one nation, it is Indonesia.

Thus, the harmonization of consideration and cause concept in the development of legal system of Indonesian Commercial Contract must be appropriate to the soul of national law.

Indonesian country is a constitutional country as stated clearly in the article 1 paragraph 3 of 1945 Constitution of the Republic of Indonesia the third amendment**:** "The state of Indonesia should be a state based on the rule of law". It means that the Unitary State of the Republic of Indonesia is a country which is based on law (rechtsstaat), is not based on the authorization (machtstaat), and the government is based on constitutional system (constitutional law), not absolutism (absolute authorization). As the consequence of the article, the Unitary State of the Republic of Indonesia certainly must honor the patronage on the human rights, and also keep noticing the stipulation of the article 33 and 34 of the 1945 Constitution confirming that the country is

active and responsible on the national economy and social welfare. So, our constitution has beckoned the proportion of right and duty of the government and the people.

As the realization on the confession of human rights patronage, it is arranged some articles in the 1945 Constitution of the Republic of Indonesia which is then enlightened in Law No. 39 of 1999 concerning the human rights. However, it needs to remember that the freedom of rights that is proposed by Indonesia is not a limitless freedom, the freedom of each person is restricted by the other`s rights. As explained in article 1 paragraph 2 of Law No. 39 of 1999 that besides the rights, there is also the basic duty. Thus, in Indonesia, there is an exclamation that the rights and freedom of the humans as a personal figure should be balanced with the obligation and responsibility as the social human. As expressed by Helmut Schmidt, that the value is special and more dominant for the eastern people.[31]

As what is also expressed by Rousseau, the freedom must be given a certain criterion stipulated in the regulation of legislation with general characteristic, by which the free society can be organized. Discussion of the freedom is not only dominated by the freedom of a person, but it harmonizes the freedom of a person with the others. It should form the freedom for the whole society and not the society in which just only the freedom of certain people, so the freedom of other people vanished and oppressed.[32] Furthermore, Kant reveals that the advanced explanation of the general legislation (in this case from the 1945 Constitution to the compiling of some laws regulating the human rights)**,** it is an honor that the freedom which is balanced to the duties must be maintained.[33]

As we understand that basically the contract law is in the open law system, which gives the autonomous freedom for the parties who are involved. But in the context of legal country, the freedom is not the limitless one.

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[31] Moh. Mahfud MD, Membangun Politik Hukum, Menegakkan Konstitusi, (Jakarta : LP3ES, 2006), p. 200-201

[32] Meuwissen, Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum, dan Filsafat Hukum, The Translator B. Arief Sidharta, (Bandung : PT. Refika Aditama , 2007), p. 92-93

[33] Ibid, p. 94

The concept of consideration basically requires the certainty of law and the justice for the parties binding themselves in an agreement. This concept in the international commerce doesn`t require a wrong commerce prohibited by the law or harms the parties binding themselves in the agreement.

Satjipto Rahardjo explains that the economic right needs to be governed related to the economic function in society which is concretely concerned on the production and distribution of goods, so it tends to be sensitive on the thought of justice behind. The economy can less work and do good planning, without being supported by the normative arrangement prevails, which is known as the law. In Indonesia, the condition becomes clearer when it is declared that Indonesia as the legal country as stipulated in article 1 paragraph 3 of the 1945 Constitution, the third amendment. The fundamental statement can also be regarded as a statement that says "the economic process in this country is based on law, it is not just based on the economic consideration.[34]

Thus, fundamentally the concept of consideration can be harmonized with the concept of cause in evaluating the binding character of a contract, because consideration requires an item that in order the contract can be performed not only from the economic consideration, but must concern on the compatibility to the law, morality, and public policy.

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[34] Satjipto Rahardjo, Sisi-Sisi Lain Hukum di Indonesia, 2nd edition, (Jakarta : PT. Kompas Media Nusantara, 2006), p. 21

V. Conclusions

1. The binding character of contract of cause in civil law is limited on the innominate contract, while on the nominate contract, it is just adequate with a legal agreement.
2. The binding character of contract of consideration in common law includes the innominate and nominate contract. Every agreement must be along with consideration in order to be performed.
3. The harmonization between the concept cause and consideration enable to be performed, because it is not contrary to the principle of Indonesian law and can provide the interpretation study of the binding character of contract for the nominate contract, because nowadays on the nominate contract in Indonesia, frequently prevails the standard contract causing the parties that bind themselves are not in the balanced position.

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