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Third-Party Interest in Arbitration Dispute Settlement Process

Rocky Marbun, Abdul Hakim, Abdul Rahmat

Abstract: ***The existence of a Third Party in the Civil Code, in general, is a party to be taken into account not to suffer harm to a civil dispute. However, things are different in Arbitration Law which is a special branch of the Civil Code. Moving from the principle of secrecy, there is a disclosure of information on disputes in the world of commerce, which is characterized by variants of Contract Law in the world of commerce so as to make the potential losses that arise for other parties against the same trade object . Arbitration Law in Indonesia has ignored the interests of interested third parties by relying on the entry of such parties on the basis of voluntary parties and the approval of the Arbitral Tribunal.***

Keywords : law, dispute, arbitration

I. INTRODUCTION

The law serves as the protection of human interests. In order for human interests to be protected, the law must be implemented. The enforcement of the law may proceed normally, peacefully, but may also occur due to lawlessness. In this case the law that has been violated must be enforced. It is through law enforcement that this law becomes a reality. In upholding the law there are three elements that must always be considered, namely legal certainty (*rechtssicherheit*), benefits (*zweckmassigkeit*) and justice (*gerechtigkeit*). (Sudikno Mertokusumo & A. Pitlo, 2013:1). The law also regulates legal relations. The legal relationship consists of the bonds between the individual and the society and between the individuals themselves. In an attempt to regulate, the law adjusts the interests of individuals with the best interests of society, seeks to balance the freedom of the individual and protect the public against individual freedom. Given that the society is made up of individuals who cause interaction, there will always be conflict or tension between individual interests and between the interests of the community. The law seeks to accommodate this tension or conflict as well as possible (Sudikno Mertokusumo, 2005:154).

Disputes usually start from a situation where there are parties who feel harmed by other parties. Dissatisfaction will come to the fore in case of *conflict of interest*. The affected party will express his dissatisfaction to the second party, if the second party can respond and satisfy the first party, finish the conflict. Conversely, if a second party reaction shows dissent or has different values, there will be a so-called dispute (Elsi Kartika Sari & Advendi Simangunsong, 2005) .

Although each society has its own way of resolving the dispute, nevertheless the development of a universally developed and globally developed world begins to recognize homogeneous, favorable and equitable forms of dispute resolution and provide security and justice for the parties. One that is quite popular and much in demand among business people today is the way of dispute resolution through arbitration. As a foreign legal system, the Law of Arbitration, should be in its regulation, formation and application not to be separated from the philosophy of the nation's view of life, namely Pancasila.

Based on the needs of the trade world that have the potential for a business dispute, Indonesia enacted and ratified Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution (*hereinafter referred to as Law No. 30/1999*) as a national law which is a source of law in arbitration law, also in line with the theory in the arbitration of *Lex Arbitri* interpreted as a law that regulates arbitration that takes place within the territory of a country. *Lex Arbitri* regulates, among other things, how arbitration *takes* place, *compulsory* legal rules, arbitration proceedings and so on within the territory of a country. (Huala Adolf, 2014). In relation thereto, the regulation on arbitration as stipulated in Law No. 1999 is an implementation of the politics of national law in establishing a national legal system that wants a legal order condition. But at the same time Padmo Wahyono also asserted that the condition will bring up the government based on the law alone. Order the law in such a way even though firmly reflects the wishes of the people, but in state practice cause inaction in state movement. (Padmo Wahyono, 1986).

Although in essence, an out-of-court settlement of disputes has been introduced since the time of Dutch colonialism, however, the concept of civil court dispute resolution has been hegemonic. Thus, there is an apathy towards the existence of the arbitration itself. Apathy is precisely stated in the General Explanation of Law no. 30/1999 itself. That is what Bagir Manan describes that explaining that any legislation has a congenital defect *(natural defect)* and disability-made *(artificial defect)*, where it is a consequence of the form of written law *(written law)* that resulted in these regulations have limited coverage-just *hospitalization moment* of element -the most important political, economic, social, cultural and defense elements at the time of formation, therefore it is easy to "*out of date* " when compared to rapidly accelerating and accelerated society. (Ridwan, 2014).

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* Correspondence Author
Rocky Marbun, Pancasila University Indonesia, rockymarbun@gmail.com
Abdul Hakim, Pancasila University Indonesia, abdulhakim@gmail.com
Abdul Rahmat, Gorontalo State University, Indonesia abdulrahmat@ung.ac.id

The view from Bagir Manan shows that there are obstacles and constraints in terms of penormatifan a values and principles that are often left behind by the dynamic development of society as business actors.

In addition, dispute resolution through the District Court, within the realm of judicial power, is often referred to as the settlement of disputes by juridical means. (Sudiarto and Zaeni Asyhadie, 2004). However, the District Court is deemed incapable of meeting the acceleration demanded by entrepreneurs, including in settling a dispute, so that the parties find it ineffective to resolve the dispute in the District Court. On the other hand, the equally important issue facing the judges in view of the law is very rigid and *normative-procedural* in the concretization of the law (Eman Suparman, 2004). The phenomenon of legal facts shown by the judiciary in Indonesia has led to public distrust of the judicial authorities. As Kanter notes, that, "if you do not want to lose a buffalo to save a goat, do not process it to the Court (Kanter 2000: 161).

Classically, a sanctuary usually starts from a situation where there are parties who feel harmed by the other side. Dissatisfaction will come to the fore in case of *conflict of interest* . The affected party will express his dissatisfaction to the second party, if the second party can respond positively to the dissatisfaction then the conflict will be resolved. Conversely, if a second party reaction shows dissent or has different values, there will be a so-called dispute (Elsi Kartika Sari & Advendi Simangunsong, 2005:154).

Conventional dispute settlement conducted through a Court body has been done since hundreds or even thousands of years ago. However, over time this Court body is increasingly locked into the juridical wall that elusive justitiabelen *(seeker of justice)* , especially if the justice seeker is a businessman with a business-related dispute. So start thinking of alternatives to resolve disputes outside the Court. (Munir Fuady, 2005:311).

Arbitration Law, as a branch of Civil Code of a special nature contains several deviations from the principles of law and general legal norms set forth in the Civil Procedure Code in general. Thus, the Arbitration Law contains its own procedural law which is contrary to the general Civil Procedural Code. One of the problems, previously unthinkable by the legislator, is related to the entry of the intervention party or a third party in the process of settling the arbitration dispute. However, the absence of such intervention is not absolute, but the existence of an intervening party or an interested third party is linked to the openness of the parties to voluntarily withdraw the third party , even to the approval of the Arbitral Panel examining the case .

This is as regulated in Article 30 of Law no. 30/1999 which affirms "*Third parties outside the arbitration agreement may participate and join in the process of settling disputes through arbitration, where there are elements of a related interest and their participation agreed by the parties to the dispute and approved by arbitrator of the arbitral panel examining the relevant dispute* . " However, in the dynamic development of the business world as a result of efforts to develop its business empire and increased profits, it is possible to have an interplay of interests with those who are not bound by arbitration agreements.

Based on the legal norms, the researcher proposes a limitation of the problem. Is it that besides the "parties" in the arbitration dispute, the Third Party can position itself as an intervention party?

II. METHOD OF RESEARCH

In this study using *normative law research* method (*normative law research*) using normative case study in the form of legal behavior products, such as reviewing the law. The subject of the study is the law that is conceptualized as the norm or rule that is in society and becomes the reference of everyone's behavior. Thus normative legal research focuses on the inventory of positive law, legal principles and doctrines, the discovery of the law in the case of *concreto* , the systematic law, the level of synchronization, comparative law and legal history (Abdulkadir Muhammad, 2004:52).

The logical consequences of this type of research are normative legal research or dogmatic *law research* or doctrinal research. Then as a normative law research then the approach method applied to discuss the problem of research is through the approach of legislation, analytical and conceptual approach, case approach, philosophical approach and comparative approach.

III. RESULT AND DISCUSSION

According to the Global Arbitration Review, what is meant by Arbitration is an alternative to litigation. It is primarily used to resolve disputes arising from commercial contracts, especially contracts with an international element. Arbitration is also the designated default dispute resolution process in disputes between government and companies under international trade or investment treaties. Thus, it may be explained that Arbitration has long been called a creature of contract, a dispute resolution mechanism that has no form or validity beyond the four corners of the parties' arbitration agreement. (SI Strong, 1998).

Arbitration is contractual by nature - a party is not required to submit to arbitration any dispute which does not agree so to submit .... It does not follow, however, that under [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made it clear that a dictated by the ordinary principles of contract and agency (James M. Hosking, 2004).

The same definition is contained in Article 1 number 1 of Law no. 30/1999 which affirms that " *Arbitration is the means of settling a civil dispute outside the general court based on an arbitral agreement made in writing by the parties to the dispute* ." Therefore, such a definition is a kind of international consensus, although the use of editorial which is different.

Understanding of the above provisions, should be systematically understood simultaneously with Article 5 paragraph (1) of Law no. 30/1999 affirming that " *Disputes that can be resolved through arbitration are merely disputes in the field of trade and on rights which, by law and statutory regulations, are fully controlled by the parties to the dispute* ." That is, only the parties to the dispute are the parties to the ruling and subject by an arbitration agreement that may apply for dispute settlement through arbitration.

It is undeniable from Bagir Manan's view above that explains the existence of congenital defects and artificial defects of a law, because of its inability to cover all human activities in the world of commerce / business. Moreover in the business world, the trade process actually has a legal source not solely from the legislation, but also sourced to the law of contract or agreement.

The unique thing of arbitration arrangements in Indonesia is where arbitration as a private court, in addition to conventional justice, is placed under the institution of judicial authority, as regulated in Law Number 48 Year 2009 on Judicial Power [Law no. 48/2009] , which is specifically regulated in Chapter XII on the Settlement of Disputes Outside Courts in Article 58 s / d Article 61 .

Laying of Arbitration in Law no. 48/2009 it causes an arbiter to also assume the status of a judge, just like a judge in a public court. Consequently, *firstly* , overall legal principles in Law no. 48/2009 also applies binding to arbitrators other than those contained in Law no. 30/1999; *second* , the positivistic-legalistic paradigm also affects the arbiter's reasoning patterns in interpreting the phrase "the parties"; *thirdly* , because as a judicial authority based on Law no. 48/2009, there is disparity with the meaning of "the parties" through the process of interpretation. For example: *first* , the process of cancellation of the arbitral award on the West Jakarta District Court Decision Number 1142 / Pdt.P / 2012 / PN.Jkt.Bar., Dated April 15, 2013 , where the arbitrator judicially positivistic legalistic by building legal argumentation based on Article 1340 KUH . Civil *jo.* Article 2 of Law no. 30/1999 *jo.* Article 9 of Law no. 30/1999, in which the phrase is interpreted as a limited manner only bound the parties to the arbitration clause or arbitration agreement only. While the *second* example in the arbitration process, where both arbitrator judges and court judges progressively surpass the provisions of Article 70 *jo* Article 30 of Law no. 30/1999, as contained in BANI Arbitration Verdict Number: 547 / XI / ARB-BANI / 2013 dated December 12, 2014 and Central Jakarta District Court Decision Number: 24 / PDT.ARB / 2015 / PN.JKT.PST., *Jo.* Decision of the Supreme Court Number 97 B / Pdt.Sus-Arbt / 2016. Where shareholders of a limited liability company who sign a contract may be considered a party to the arbitration dispute.

In the first example, Judges of Arbitrators and Conventional Judges are trapped in the Legal Positivism Paradigm, so that they only carry out procedural matters. Against this, what happened Satjipto Rahardjo mentioned as the destruction and decline in the hunt for justice through modern law caused by the game of procedure and raises the question "whether the court is seeking justice or victory?". The *heavly proceduralizied procedural* process runs well above all, even above the *accuracy of substance* . Such a system provokes the *trials without truth*. (Satjipto Rahardjo, 2006). But unlike the example of the second case, where both the Judge Arbitrator and the District Court Judge perform the process of cognitive activity interpretation of the authoritative text.

The most appropriate illustration to describe whether the "Procedural Ratio" is through its operational in the judicial process. In the judicial process, everyone is subject to certain procedures to resolve the conflict / dispute. Thus, one must depart from the notion that the court is neutral and impartial. The process can only be implemented if it is based on the idea of justice that oversees the process. Assuming that the idea of justice exists that the judicial process is workable. Therefore, the idea of justice is constitutive, but it is also regulative because it serves as a procedure to check whether the judicial process is fair or not. According to Jürgen Habermas, the procedural ratio examines the validity of its own products, through an acknowledged procedure intersubjectively. It means that the rational nature can not be attained solely by a single subject. Thus, in the process of justice, justice can be approached through rational argumentation with other participants communicatively, through mutual understanding with other subjects. Therefore, the procedural ratio is a more detailed description of the communicative ratio. Further explained by Jürgen Habermas that the intersubjective examination mechanism is a formal requirement that contains procedural ratios (F. Budi Hardiman , 2013).

Based on the views of Satjipto Rahardjo and Jürgen Habermas mentioned above, then the search for justice through the judicial process should be based on communicative action rather than based on the ratio of praxis alone. That is, in reaching a justice, the judicial process can not only be determined by absolutism and totalism by the meaning of the authoritative text of a single subject with monologal action. However, justice and truth must be achieved through communicative dialogue. In relation to such judgments, neither the Arbitration Tribunal nor the General Courts of justice shall depend not only on the authoritative texts but their judgments shall be directed to the legal relations established between the parties, and to construct a broader thinking of the relations which have occurred on the object of the related agreement. What the Researcher means is that a business entity in running its business, often a legal relationship not to just one party only. In that case, a Judge should be keen to see the connectivity between the treaty with the other. Therefore, openness information in a lawsuit or petition always questioned the accuracy and validity.

Me through the *hermeneutic* tode in view of a judiciary, wanting to take a decision, must undergo a process of merging the horizon with no reference to the initial pre-understanding only. In the view of the Researcher, the attachment of the party in the arbitration clause or the arbitration agreement is one of the earliest forms of awakening established during the initial inspection process by the Panel of Judges or the Arbitration Assembly. Another form of understanding is the written rule that forms the basis of the application or the argument of the respondent. That is, as basic knowledge presented before a judge is the subject of law and written rules. Thus, it can in fact be questioned whether the petition for examination by arbitration submitted by the party who feels aggrieved of his interests is the party according to Article 5 (1) of Law no. 30/1999 is a party which, under the laws and regulations of the law, is "fully controlled" by the parties to the dispute. The existence of third parties, as described in Cases I and Case II, indicates the existence of *Lebenswelt* in the inevitable business relationships, which are then ignored through Article 30 of Law no. 30/1999.

The existence of *Lebenswelt* , in essence, may be accommodated through Article 56 paragraph (1) of Law no. 30/1999 affirming that " *arbiter or arbitral tribunal shall* decide *on the basis of the law, or by* ***justice*** *and* ***propriety*** ." And it is also ordered in Article 5 paragraph (1) of Law no. 48/2009 which asserts that " *Constitutional Justices and judges are obliged to explore, follow and understand the values of law and sense of justice living in society* ." As has been the case of *Hoge Raad* 1919 where the principle of material legality has been embraced in the private law domain. The above then becomes paradoxical when the Elucidation of Article 56 paragraph (1) of Law no. 30/1999 arbitrarily contains the mandate to dismiss the sense of justice and the principle of propriety itself by *summir* based on certain circumstances that are not explained with certainty. So it can be questioned whether Article 30 of Law no. 30/1999 is a dangling authoritative text (*dwingende regels*)? If then returned to the idea of law where justice is the essence of the law itself, then how the legal protection of parties who actually suffered losses due to either rejected participate in the process of arbitration dispute inspection or because of the arbitration decision.

Neither the Arbitrator nor the Judge, in examining the arbitration dispute or the request for the cancellation of the arbitral award, as confirmed in paragraph IV of the 1945 Constitution of the Republic of Indonesia 19 *jo* TAP MPR. III / 2000 *jo* Law no. 12/2011 *jo* Law no. 48/2009, has attachment to Pancasila as a paradigm or perspective in resolving disputes. Therefore, Pancasila does not embrace the separation thesis as taught by the Cartesian, hence the authority holder should consider the traditions in the Business World to understand to the nature of the dispute. In this case, the unity of the duality of the individualistic element (body, taste and ratio) and the element of sociality (rukun) is a circular understanding between part and whole as a simultaneity.

Based on this, the application of justice in the process of law enforcement - essentially - is conceptually, lies in the activities of harmonizing the values of relationships that are outlined in steadfast rules and manifestations and attitudes of action as a series of final value stages of translation, to create , maintaining and maintaining peace of life. (Soerjono Soekanto, 2012). Law enforcement that rely solely on formal procedures, without linking them directly with the spirit behind the birth of legal rules, make the process of law enforcement in a mechanistic way. While lawsuits are not only on the institutionalization of procedures and mechanisms, but also on the application of substantive values. (Bambang Sutiyoso, 2010). If it is withdrawn from the spirit behind the birth of the rules of law, it should be returned to Pancasila as *rechtsidee* (ideals of law) in the overall legislation. Therefore, the reasoning of Law no. 30/1999 should be returned to Pancasila as a philosophy of the nation's life view and a form of respect for the values of the nobility of the dignity of human dignity of Indonesia.

Understanding of the ideals of law (*rechtsidee*) Pancasila that adopts the values of legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*). Where according to Sudikno Mertokusumo that through this law enforcement, the law becomes a reality. In enforcing the law there are three elements that must always be considered the legal certainty (*rechtssicherheit*), benefits (*zweckmassigkeit*) and justice (*gerechtigkeit*). These three elements, in fact are the opinions of Gustav Radbruch, known as *Idee des Recht* (Teachings of the Law).

However, what if there is injustice in the form of losses that are very harmful by Third Parties? While the authority holder is shackled by authoritative text, it should be returned to the meaning of the *rechtsidee* or *idee des recht* . Where the starting point with the situation and condition that in practice always found there is a legal event that there is no law or legislation governing it or although there is law and law but not complete or unclear, then to provide protection for the community in realizing justice, legal certainty and expediency, then for the condition of legislation that is less complete and less clear the law can be applied to the event (Achmad Ali, 2015). Thus, in essence all legal events require a method of legal discovery so that the rule of law can be applied appropriately to the event, so it can be realized a judge verdict that reflects aspects of legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*) and benefits (*zweckmasigkeit*) in it (Bambang Sutiyoso, 2012: 28). The clash between legal certainty and extreme justice, as a result of a "false law," the terms used by Gustav Radbruch and Bagir Manan use the term " *natural defects* and *artificial defects* " while Brian Z Tamanaha uses the term " law is flawed ", according to Gustav Radbruch asserted that justice must take precedence over legal certainty in order to bring about expediency.

According to Frank Haldemann, in the perspective of Gustav Radbruch, when the rule of law reaches the level of extreme injustice, so the contradiction between positive law and justice becomes unbearable, they cease to be law. But when the collision continues, Frank Haldemann (2005: 162) reveals his final formula, as follows: " *First of all that the conflict of justice and legal certainty (Rechtssicherheit) could not be solved absolutely, thus allowing only a conditional priority. Secondly, that this conditional priority operates in favor of legal certainty; thirdly, that the primacy of legal certainty is revoked, when injustice becomes intolerable* . "

If you consider the opinion of Gustav Radbruch, then it can be concluded that when there is a clash between the principle of legal certainty with the principle of justice, then the principle of justice should be preferred. So although, Gustav Radbruch is still classified into positivism, still putting forward the principle of justice that is loaded with abstract norms. To these conditions, how Pancasila as a paradigm provides a solution for a justice against the Suspects, is not in a 'vacuum' and nihilism. The formation of Paradigm (Philosophy) Pancasila law arises as a result of internal factor frictions (Indonesian factors) and external factors. In reaching a justice, in the context of a judgment, it is difficult to escape from the view of Gustav Radbruch who gives the content of the legal ideals of the *primary rules of* a basic norm of the Indonesian nation.

Gustav Radbruch holds that law is an element of culture, then like other cultural elements, the law embodies one of the values in the concrete life of man. What is the value of justice. Law only means as law if the law is a manifestation of justice or at least an attempt in that direction.

The definition of this law becomes a benchmark for fair or unjust legal order established by the community. It is not only that, however, that the same notion becomes the legal basis as law, in the same sense as in other systems of neo-Christianism, ie, as a *transcendental-logical* sense , which underlies all legal notions (Theo Huijbers , 2013: 162) Similarly Brian H. Brix argues in explaining the theory of Gustav Radbruch, that the positive Law, guaranteed by law and power, takes precedence even when the content is unfair and fails for the benefit of the people, unless the conflict between the law and justice reaches such a level tolerated then the law is as 'flawed law', must be subject to justice (Brian H. Brix , 2018: 2) . Based on that, through the concept of Pancasila in viewing the Third Party as a worthy and dignified Indonesian human, the Theory of Justice based on Pancasila must be able to provide justification and legitimacy both academically s as well as practical through the concept of " Holistic-Theological Human Indonesia ".

IV. CONCLUSION

Arbitration as a form of dispute resolution process that has principles of dispute settlement based on - other than Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement - is also subject to Law Number 48 Year 2009 on Judicial Power regulated in Chapter XII Article 58-Article 61. Where based on Article 2 paragraph (2) of Law No. 48/2009 which confirms *"State Judicial implement and enforce the law and justice based on* ***Pancasila."*** And ought also to observe Article 38 paragraph (1) of Law No. 48/2009 which asserts " *In addition to the Supreme Court and the judiciary in underneath and the Constitutional court, there are bodies - bodies others whose functions relate to power judiciary* . "The other bodies whose functions relate to the judicial authority are affirmed in Article 38 paragraph (2) letter e Act no. 48/2009 which affirms " *Functions relating to judicial power as referred to in paragraph (1) shall include:* ***dispute resolution outside the court*** . " Thus, the process of dispute resolution through Law no. 30/1999 should also develop its legal reasoning to uphold law and justice based on Pancasila. Therefore, justice to be achieved is Pancasila based justice. Thus, Indonesia as a country based on the legal state hence its implementation process also participate also based on law aimed to achieve Pancasila based justice. Therefore, the legal reasoning that should be built following Pacasila as a teaching of the philosophical system, with its material object is the Indonesian Man and the object of the formanya is the philosophy of law.

Law enforcement in the context of dispute resolution through arbitration, requires an arbitrator to act as "judge" to understand and accommodate the *Lebenswelt* (World-Life) legal subject of the arbitration proceedings. If the scope of the competence of the Arbitration is the world of commerce, then a *Hintergrundwissen* (background knowledge) as the main theme of *Lebenswelt* (World-Life) of a business entity and / or business actor. Up to this point, the reasoning of an Arbiter is not only constructed on the basis of an early prejudice derived from an authoritative text, but it must do a *fusion of horizon*) between the existing horizons, including the third-party figure and the following horizon. Based on this, the Researcher concludes that a request for intervention from a Third Party capable of conveying the "potential" of a loss to a case being examined in the arbitration process or a Third Party which postulates a loss which has arisen as a result of an arbitral award, and should be classified as part of the phrase "Parties" not bound by arbitration agreements.

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AUTHORS PROFILE

Rocky Marbun, Pancasila University Indonesia, rockymarbun@gmail.com

Abdul Hakim, Pancasila University Indonesia, abdulhakim@gmail.com

Abdul Rahmat, Gorontalo State University, Indonesia abdulrahmat@ung.ac.id