

## **The Principle of Private and Confidential in Indonesia Arbitration Dispute Resolution**

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### **Abstract:**

**Discussion:** This study aims to understand and explain the consequences of breaching the principles of Private and Confidential in Indonesia Arbitration.

**Research Method:** This research is a normative juridical with the study of legal principles. The main source of this study is secondary data, which consists of primary, secondary, and tertiary legal resources. The empirical study is used as a non-legal resource, which aids the researcher in analyzing the regulation without altering the character of legal study as a normative approach. The primary data (empirical) includes customs and annulment of arbitral award cases.

**Discussion:** The result shows that the breach of private and confidential under the Arbitration Act is caused by dissension between the principles and the annulment of the arbitral award, which utilize a form of litigation that is accessible to the public. The consequences of such breach may be the inability to achieve the intended purpose of the Arbitration Act; it may also disclose the information regarding the trial and the award to the public, which can harm the parties involved.

**Conclusion:** The government should revise the Arbitration Act or make further rules about private and confidential principles. This will ensure the clarity of the definitions in the articles under the Arbitration Act. Especially regarding the definition of private and confidential principles to prevent any misinterpretation and ensure that the principles remain as per the intended purpose of the Arbitration Act, which is to provide discretion in commercial dispute.

**Key Word:** Private and Confidential Principles, Arbitration Dispute Resolution

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### **I. INTRODUCTION**

In the commercial sector, business actors must pay attention to certain etiquettes, such as corporate's reputation. Reputation is an indicator that can lead the business actors into two possibilities, either a success or a failure (lost cause).<sup>1</sup> Business actors are considered successful when they have a positive image in the eyes of the people. In addition, the poor image reflects failure. To counter such possibilities, the business actors may settle their dispute through non-litigation means, such as arbitration.

Arbitration rule is regulated under Act Number 30 the Years 1999 concerning Arbitration and Alternative Dispute Resolution (Arbitration Act). According to Article 27 of the Arbitration Act, all arbitration proceedings are private, which leads to confidentiality. This Act explicitly addresses the private and confidential process, which are the main characteristics of this regulation. These principles are a common reason for business actors to settle their dispute through arbitration.

According to BANI Rule and Procedure, the arbitral award is one of the objects that must be concealed in the arbitration process.<sup>2</sup> However, the private and confidential aspects can be breached as a result of friction in the Arbitration Act. The conflicted articles are Article 27 and Article 70 verse (2) of Arbitration Act, which states that the request for the annulment of the arbitral award must be filed to the Chief of public court. In

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<sup>1</sup>Batubara, Sulaiman and Orinton Purba, 2013, *Arbitrase Internasional Penyelesaian Sengketa Investasi Asing Melalui ICSID, UNCITRAL, dan SIAC* [International Arbitration Dispute Resolution by ICSID, UNCITRAL, and SIAC], Raih Asa Sukses (Penebar Swadaya Group), Jakarta, p. 26.

<sup>2</sup>Article 14 verse (2) Rules and Procedures of Badan Arbitrase Nasional Indonesia (BANI).

essence, the proceeding of the public court is open to the public, which is contrary to the principles in arbitration.<sup>3</sup>

Friction between Article 27 and Article 70 verse (1) of the Arbitration Act causes the breach of the principles. This situation hinders and prevents the fulfillment of the legal purpose of the Arbitration Act.

## **II. MATERIAL AND METHODS**

This study uses a normative juridical approach that primarily focuses on secondary data through the legal principles obtained from the literature study. The research is descriptive-analytic. The collected data are analyzed qualitatively.

## **III. RESULT**

### **1. The Breach of Private and Confidential Principles in Indonesia Arbitration Dispute Resolution**

The breach of private and confidential principles may turn the information –in the arbitration proceeding- vulnerable. The rule regarding the information is found on Article 14 number 2 of BANI Rules and Procedures, which are documents, reports/ proceeding notes, witnesses testimonies, and the awards. The breach appears when there is an annulment of the arbitral award, filed by one of the parties within the legal efforts of cassation and higher in the Supreme Court.

Arbitration Act has not implemented the private and confidential principles –the main reason for commercial dispute- consistently. The inconsistency in exercising the principles is caused by the annulment of the arbitral award filed to the Chief of public court. In theory, the filed annulment is not final, contrary to the arbitral award. However, the parties may employ legal effort to confirm that the award has violated Article 70 of the Arbitration Act.

The annulment of an arbitral award may override the private and confidential principles in procedural law since the proceeding in the public court is accessible to the public. Friction among the rules in the Arbitration Act prevents the intended purpose of the law to be reached. The legal purpose of the Arbitration Act manifested from the Juridical Power Act, which provides the option to settle the civil dispute through non-litigation means: arbitration and alternative dispute resolution.

In essence, the Arbitration Act was regulated to settle the legal relationship between the involved parties; and restores them to their initial state to provide the opportunity for further agreement. In the regulation, the disputes that may be settled through arbitration are limited to the commercial sector, including commerce, banking, finance, investment, industry, and intellectual property right.

The procedural law of Arbitration aims to settle the dispute privately since the dispute often concerns the commercial sphere. In business etiquette, image is one of the factors that are important for customers' trust. A positive image yields a good market. On the other hand, poor image leads to bad business. Poor image may be received from various factors, including the conflict among the business actors or corporates.

In the Arbitration Act, the principles of private and confidential are the essential answer for settling the disagreement between the parties in a commercial dispute. However, there is a dissonance between the rules. The dissonance stemmed from the private and confidential principles and the annulment of the arbitral award. Even though the annulment aims to examine whether the law has been applied correctly through the arbitral award, if the annulment comes in the cassation process of the Supreme Court, the information regarding the arbitral award will be accessible to the public. The public can access it from the website Direktori Putusan Mahkamah Agung. This creates a loophole that can breach the fundamental aspect of arbitration as a dispute resolution entity.

Arbitration Act does not explain further regarding the procedure of the arbitral award annulment. Therefore, creating friction to the principles of private and confidential, which are the fundamental principles and the foremost advantage of arbitration. The annulment automatically handled according to the litigation process, which is accessible to the public. Based on the cases mentioned before, they served as an example of how many arbitral awards can be accessed publicly. Consequently, the intended purpose of the Arbitration Act can not be thoroughly achieved.

The conformity between one norm to the other creates a regulation that fulfills the legal purpose, which is what every party desired. The exception of the private procedural law —in annulling the arbitral award— may be applied in the process. In addition, protecting the principles of private and confidential is crucial for the disputing parties in the commercial sector.

The renewal of procedural law process regarding the annulment of an arbitral award is exercised through the litigation. However, the process itself is private, which conveys the will of the Arbitration Act,

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<sup>3</sup>Article 13 verse (1) Act Number 14 Years 1970 as revised with Act Number 35 Years 1999 as revised with Act Number 48 Years 2009 on Judicial Power states that all of the court proceeding are accessible to public, except stated otherwise.

private and confidential. Furthermore, the renewal will harmonize both Article 27 and Article 72 verse (1) of the Arbitration Act. Ensuring there are no loopholes in private and confidential principles.

#### **IV. CONCLUSION**

The breach of private and confidential principles in the Arbitration Act is caused by dissonance between the principles and the arbitral award annulment. The Court nullification proceeding will be accessible to the public, which provides the opportunity for disclosure. the disclosure is considered as a breach of private and confidential principles. The consequences of the breach are the inability to attain the main purpose of the Arbitration Act.

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