Paradigmatic Perspective Of Indonesian Arbitration Law Reform

by Budi Endarto

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PARADIGMATIC PERSPECTIVE OF INDONESIAN ARBITRATION LAW REFORM

Taufiqurrahman, Universitas Wijaya Putra
Budi Endarto, Universitas Wijaya Putra
Dwi Elok Indriastuti, Universitas Wijaya Putra
Suwarno Abadi, Universitas Wijaya Putra
Rihantoro Bayuaji, Universitas Wijaya Putra
Andy Usmina Wijaya, Universitas Wijaya Putra
Arief Syahrul Alam, Universitas Wijaya Putra
Sekaring Ayumeida Kusnadi, Universitas Wijaya Putra
Wahyu Kurniawan, Universitas Wijaya Putra
Esa Wahyu Endarti, Universitas Wijaya Putra
Indra Prasetyo, Universitas Wijaya Putra
Rita Helmi, Universitas Wijaya Putra and PT Pegadaian Persero
Nabilah Aliyyah, Universitas Wijaya
Andi Iswoyo, Universitas Wijaya
Rusdiyanto, Universitas Airlangga and Universitas Gresik
Nawang Kalbuana, Politeknik Penerbangan Indonesia Curug

ABSTRACT

Along with the development of time, there is a desire from various parties to update Law on Arbitration and Alternative Dispute Resolution No. 30 of 1999. This is based on the fact that UUA is currently considered not in accordance with existing developments. Although the renewal of Indonesian arbitration law is an unavoidable inevitability for Indonesia, it does not mean that the renewal of arbitration law goes as it is, just to follow the existing flow without clarity of direction. The purpose of this research is to analyze the paradigmatic foundations that can be developed to reform Indonesian Arbitration law. The research methods used are normative legal research with a statutory approach and a conceptual approach. The theory used as a knife of analysis is the convergence theory. The results showed that the paradigm of universalistic particularism could be developed to reform Indonesia's arbitration law. In an effort to update Indonesian Arbitration law, the current Arbitration Law is maintained as a domestic arbitration arrangement, while for international arbitration arrangements can adopt uncitral model law on international commercial arbitrationn.

Keyword: Paradigmatic Update, Indonesian Arbitration Law

INTRODUCTION

The resolution of business disputes through arbitration in Indonesia from time to time is increasingly in demand by the business community in the appeal of the settlement path through the IARBI judicial institution, 2020. This is inseparable from the characteristics of arbitration that is confidential and fast. The parties to the dispute are generally unhappy if legal issues with their business partners are known to the general public. The situation will be different if the problems that arise with his business partners are resolved in the judiciary, very open once the general public can know. This is because in accordance with applicable laws and regulations, the final decision in the general judicial environment must be opened and declared open to the

public by the Chief Justice, so that the nature of confidentiality cannot be guaranteed by the judiciary, Law No.48 Th.2009.

Indonesia has its own arbitration law under the 1999 Law on Arbitration and Alternative Dispute Resolution No. 30 of 1999. The law, effective August 12, 1999, has revoked the arbitration rules that were in effect before, namely Article 615-Article 651 Reglement of Civil Events (Reglement of de Rechtsvodering, Staatsblad 1847:52) and Article 377 Of The Refurbished Indonesian Reglement (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Article 705 Reglement of Events For The Outer Regions of Java and Madura (Rechtsreglement Buitengewesten, Staatsblad 1927:227).

LITERATURE RIEVIEW

Convergence theory is a theory that seeks to blend the main characteristics of two legal thoughts that are developing today, namely positive legal thinking (positivism) and natural upstream thinking (naturalism). During this time, these two great legal thoughts were always confronted with each other, as if the two legal thoughts were impossible to put together. Precisely through this theory, the two poles are sought slices that can be developed that do not have to deny each other. It is precisely in the slices of the two legal thoughts that the lack of one pole is covered by the excesses of the other pole, and vice versa. This is based on the idea that not always something that is judged good absolutely must be good, and something that is considered ugly in absolute terms must be ugly. From these two things, look for slices that can connect between the two.

The existence of this Act is actually inseparable from the 1958 New York Convention which has been in force since June 7, 1959. This Convention applies to and applies to all member states that join the New York Convention. Indonesia is one of the countries that participated in ratifying the convention through Presidential Decree No. 34 of 1981 on Ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, State Gazette of 1981 Number 40 dated August 5, 1981. The ratification of the Convention results in Indonesia's obligation to recognize and implement foreign arbitration decisions on Indonesian territory. But in practice, Indonesia does not implement the contents of the convention on the grounds that there are no implementation regulations on the Presidential Decree.

Previously, a similar provision was contained in Law No. 5 of 1968 on the Convention on the Settlement of Disputes between States and Foreign Nationals Regarding Investment, as a process for settlement with arbitration ever made in Indonesia. This law was born as a consequence of Indonesia participating in the Washington Convention, which is about resolving disputes between countries and foreigners regarding investment.

The regulations governing specifically the existence of new arbitrations are clarified by the Supreme Court through Supreme Court Regulation No. 1 of 1990 (PERMA) governing the Procedures for the Implementation of Foreign Arbitration Awards. This regulation is actually intended as an implementation of Presidential Decree No. 34 of 1981 that has been issued before, which is legally binding on recognizing and implementing foreign arbitration rulings on Indonesian territory. Based on this PERMA, foreign arbitration rulings that can be conducted in the Republic of Indonesia territory are only foreign arbitration awards that exist within the scope of trade law (the principle of restrictions) and do not conflict with public order in Indonesia (principle of public order). In addition, foreign arbitration rulings are considered the same as court rulings of permanent legal force (principle executorial kracht) and the execution of foreign arbitase rulings is reciprocal with other countries that are balanced and equal (principle of reciprocity).

Furthermore, in response to the demands and pressures of the business community to regulate more specifically and comprehensively on arbitration and at the same time in order to adopt some of the arbitration provisions contained in the UNCITRAL Model Law (Law on

International Commercial Arbitration of 1985), finally enacted Law No. 30 of 1999. Thus, it can be said that this UUA is actually made in accordance with the needs of the people as business people and the needs of the state as members of the New York convention and the presence of the country to develop in the world of trade.

The fundamental purpose of this UUA is to ensure business people can do their business in Indonesia with the clarity of existing laws. The procedures for the implementation of the ruling stipulated in this Law are enforced as the civil event law. Along with the development of time, there is a desire from various parties to update Indonesian arbitration law. This is based on the fact that UUA is currently considered not in accordance with existing developments. Although the renewal of arbitration law is an unavoidable inevitability for Indonesia, it does not mean that the renewal of arbitration law goes as it is, just following the flow without clarity of direction and concept. In order for the renewal of Indonesian arbitration law can really be a plus for efforts to improve the Indonesian economy through the resolution of business disputes, both in a domestic and international perspective, the renewal of arbitration law and the renewal of economic law in general must be based on a clear paradigmatic foundation.

RESEARCH METHODS

The study uses qualitative research to investigate, discover, describe, and explain qualities or privileges or is described through normative legal research approaches with descriptive analysis specifications (Abadi, 2021; Aliyya, 2021; Rusdiyanto & Hidayat, 2020; Endarto, Taufiqurrahman & Kurniawan, 2021; Endarto, Taufiqurrahman & Suhartono, 2021; Indrawati, 2021; Juanamasta, 2019; Kalbuana & Prasetyo, 2021; Kalbuana & Suryati, 2021; Luwihono, 2021; Prabowo, 2020; Prasetyo, 2021; Prasetyo, Aliyyah, Rusdiyanto & Chamariah, 2021; Prasetyo, Aliyyah, Rusdiyanto & Nartasari, 2021b, 2021a; Rusdiyanto & Agustia, 2020; Rusdiyanto, 2021; Rusdiyanto & Karman, 2020; Shabbir, 2021; Susanto, 2021; Utari, 2021; Nabilah Aliyyah, 2021; Bahtiar Prabowo, 2021; Prasetio, 2021; Prasetyo & Endarti, 2021). This study describes the norms governing arbitration in Indonesia as stated in UUA. With regard to the type of normative research that is a reference, it is used statutory/statute and conceptual approach.

In order to conduct this legal research, it was necessary to consult primary and secondary legal materials, as well as other research sources. Primary legal materials in accordance with the civil law system embraced in Indonesia are laws and regulations which are legal materials that are authoritarian means having authority. Primary legal material in the form of legislation (especially UUA), Model Law, official records or treatises in the making of legislation and judge's decisions. While secondary legal materials are not official documents, namely textbooks, articles and legal journals, in the form of legal publications.

DISCUSSION

The Importance of the Universalistic Particularism Paradigm

Paradigm is the way people look at themselves and their environment that will affect them in thinking, acting and acting. The term paradigm was first proposed by Thomas S. Khun in science which is interpreted as a way of looking, values, methods, basic principles or solving a problem embraced by a scientific society at a given time, (Thomas S. Kuhn, 1962). The paradigm explains what to learn, what to make statements or which guidelines to follow for interpreting answers (Muhammad Muslih, 2016).

Related to the determination of a rational paradigm to be applied in the renewal of law in Indonesia, more so in the economic field, must be considered on two sides carefully and adequately, namely internal needs or national interests that are inward looking and external needs or outward looking interests. The positioning of national interests as a filter and

orientation is primarily based on the fact that the purpose of our state hood it is to protect the whole Indonesian nation and all the Indonesian blood, and promote general welfare, education, and participate in the implementation of the world order, as provided for in paragraph three of the Opening of the Indonesian Constitution. The purpose of statehood which in fact is the national goal of Indonesia as a radiance and actualization of the spirit of the Republic of Indonesia's Proclamation of Independence should be the main reference for whoever manages this country. The filter of this is the values contained of Pancasila as the ideology of the Indonesian nation and state. In other words, the renewal of Indonesian law must be in accordance with Indonesia's national goals derived from Pancasila as an ideology, falsafat and at the same time the basis of the Indonesian state.

The placement of international interests as a filter and the second orientation that must also be considered in the renewal of Indonesian arbitration law (economy) is based on consideration of Indonesia's existence as a world citizen through Law No.7 of 1994 concerning the Ratification of the Agreement on Establishing the World Trade Organization. As a member of the World Trade Organization, Indonesia is legally obligated to incorporate the principles of free trade established by the WTO into its national legislation. With the consideration of global dynamics in the renewal of national law, the regulation of the substance of Indonesia's national law does not experience gaps that are too far away, and even instead aligned with global developments.

The frame of mind that puts the fulfillment of national interests as the first filter and at the same time the main orientation in the reform activities of Indonesian arbitration law (economy) while still considering the fulfillment of international interests as a filter and at the same time the second orientation is referred to as the Universalistic Particularism Paradigm. Particularism itself is a system or understanding that prioritizes the individual interests of a country (in this case Indonesia). While universalistic is a system, or understanding that is or characterizes general or universal. Thus, the paradigm of universalistic particularism here can be interpreted as a framework of thinking, behaving and acting that prioritizes the fulfillment of a country's national interests without abandoning the dynamics of international/global development.

The existence of the paradigm of universalistic particularism is actually rooted in the fusion (convergence) between positive legal thinking (positivism) and natural law thinking (naturalism). John Austin as one of the initiators of positivism is of the view that law in the true sense of what is referred to as "positive law" is a law made by the ruler. The law in this perspective contains several elements in it, namely orders, sanctions, obligations and sovereignty. The enact ability of positive laws is limited or limited to space and time. The law is particular. In contrast to positivism, the legal school of naturalism views its existence as universal, without the restrictions of space and time. The law is particular. In contrast to positivism, the legal school of naturalism views its existence as universal, without the restrictions of space and time. The legal school of naturalism in its development is divided into two groups, namely irrational and rational. Irrationalists in the naturalism believe that the law is identical to God's absolute will. God is the creator of the laws of nature that apply in all places and times. In their view the source of the law comes from God. In contrast to irrationalists, rational adherents of naturalism view that the only universal and eternal source of law is the human ratio.

Particularism emphasizes more on the aspect of sovereignty, where every sovereign state has full power to regulate everything (including the law) within the territory of the state concerned without interference from other states. In this perspective, particularism has always given birth to a diversity of applicable laws. In contrast to particularism, universalism has always given birth to uniformity of applicable laws. This is in line with the view of universalism itself, *i.e.,* the law applies universally. Departing from this understanding, the paradigm of universalistic particularism can also be interpreted as a frame of mind, attitude and action that rests on diversity and uniformity. Philosophically, this paradigm in principle has the same

substantive meaning as the motto of the Indonesian nation, namely "Bhinneka Tunggal Ika" which means "Different but still one".

Substantively, this paradigm of universalistic particularism is actually not much different from Sukarno's view which states "Internationalism cannot live fertile, if it does not speak in the earth of nationalism. Nationalism cannot live fertile, if not live in the sari garden of internationalism, Soekarno (2020).

Implementation of Universalistic Particularism Paradigm in Renewal of Indonesian

Arbitration Law

The renewal of Indonesian arbitration law is an unavoidable inevitability. One of the fundamental considerations for the need for an update of Indonesian arbitration law is because Indonesian arbitration law as UUA is stated is not in line with modern developments in the resolution of international business disputes. Some articles in the UUA are considered contrary to the development of business law and the rules of international arbitration provisions. Therefore, international business people are generally less interested or less interested in choosing the jurisdiction, forum or law of Indonesia as the choice of jurisdiction, forum or applicable law in the contract made in the event of a dispute between the parties. Related to this, Erman Radjagukguk expressly states that not all foreigners feel "comfortable" the contract is regulated and interpreted according to Indonesian law, (Erman Radjagukguk, 1997). The same opinion was also conveyed by Huala Adolf who stated that foreign parties prefer if disputes with Indonesian parties are resolved by arbitration outside Indonesia, (Huala Adolf, 2020). Some of the cases that corroborate the assessment include the case of Avanti Communication, karaha Bodas case, (Varia Justice, Law Magazine of the Year XX, No.233, February 2005). And the Case of Yani Haryanto, (Sudargo Gautama, 1996, h.387-403).

According to the Complete Dictionary of Indonesian, updates mean the process, the way of doing, how to update, (Media Team). In line with Sunaryati Hartono's view, the renewal of Indonesian arbitration law can be done by reducing, replacing and adding some new substances contained in the UUA, so that it becomes something new, better and more modern. In the perspective of the universalistic particularism paradigm, the new Law as a result of such reform must be in harmony with the needs, demands, & national interests (inward looking) and needs, demands &interests of international interests that are universal (outward looking).

Paradigm of Particularism

As previously outlined, the fulfillment of needs, demands & national interests as a reflection of the frame of mind of this particularist paradigm is translated in real action by returning the rules and principles contained in the UUA to the main values in Pancasila and the 1945 Constitution as an embodiment of the ideals the signing of the Declaration of Independence. The first and most important filter in the formation of Indonesian (national) law is Pancasila and the 1945 Constitution, which must be passed before the next filter.

Success through this first filter will determine the existence of the formation of the new law. If this first filter cannot be passed properly, then the formation of the new law is likely to fail in the legislative process that runs. This is because the formation of the law is considered not to be qualified philosophically. This requirement of enforceability as an actualization of one of the principles of the Establishment of good Laws and Regulations, specifically, the principle can be applied which emphasizes that each law and regulation establishment must take into account in society the effectiveness in philosophic, sociological and juridical terms of such laws and regulations; (Law No.12 Th. 2011).

Philosophical considerations in the establishment of a law are intended to show that the laws and regulations formed have been in harmony with the view of life, awareness and legal

ideals (rechtsidee) including the intellectual climate (kebatinan) and national philosophy of the Indonesian people derived from Pancasila and the signing of the NRI Constitution in 1945. This means that a law that qualifies for philosophical conduct must not conflict with the values of the Supreme Divinity (precept 1), the values of a just and bearadab Humanity (precept 2), the values of Unity and Unity (precept 3), the values of Democracy (sila 4) and the values of Social Justice (precept 5).

In this context, does UUA meet the requirements of philosophical enforceability if UUA is enacted to resolve the resolution of international business disputes? To be able to answer about this, it is necessary to look at the character built by the legislators in drafting UUA.

Although the existence of UUA intended to respond to the existence of the New York Convention in 1958 which has been in force since June 7, 1959 does not mean Indonesia adopts the entire substance of the convention into its national legislation (UUA). As one of the countries that ratified the 1958 Convention, Indonesia should (oblige) to include arrangements on the recognition and implementation of foreign arbitration rulings into its national laws and regulations (UUA). But in fact, the obligation was not carried out. In practice, many foreign arbitration rulings cannot be carried out on Republic of Indonesia territory as is mandatory under the 1958 New York Convention.

This fact shows that the establishment of UUA since the beginning of its formation is not intended to be used in the resolution of international business disputes. The character built by the legislators of UUA is a domestic character (national) that is only used to resolve business disputes of national character. In this perspective, it is natural that in the regulations in the UUA there is a clause that is not obtained in the 1958 New York Convention and arbitration rules in other countries, namely on the institution of "Peace" as stipulated in Article 45 of the Act. Article 45 of the Act requires the arbitral tribunal to seek peace first before arbitration efforts are made in the resolution of disputes that occur between the parties. This institution is characteristic of Indonesian arbitration that is different from arbitration in other foreign countries, as a reflection of the value derived from the personality and culture of the Indonesian nation, the same opinion was conveyed by (Huala Adolf, 2020).

In addition to the existence of peace institutions, the domestic (national) character of UUA is also indicated by the existence of limitative and definitive arrangements on the timing of settlement for disputes. As stipulated in Article 48 of the UUA the period of resolution of disputes is a maximum of 180 days. This is in contrast to international standards that generally take longer than 180 days, (Idwan Ganie, 2020).

Another thing that strengthens the assessment that UUA has a domestic/national character is reflected in the necessity of the use of Indonesian in the assembly (Article 28 UUA) and the ruling that must include the monks 'For the Sake of Justice Based on the Supreme Divinity' (Article 54 paragraph (1) UUA). The necessity of using Indonesian and irahs in the ruling is clearly difficult for outsiders to understand.

The monks "For the Sake of Justice Based on the Supreme Divinity" contain high morality and spirituality values for the Indonesian nation. These hands give a moral message to all law enforcement, especially arbitrators, that the verdicts handed down are not solely accountable to their fellow human beings, but to God Almighty, the God who created the universe. The verdicts handed down should be truly oriented to uphold the law, truth and justice. The divine value contained in the first Precept of Pancasila must animate all law enforcement officials, especially arbitrators in examining, adjudicating and deciding the case faced.

The establishment of the law from the beginning designed UUA only to regulate domestic/national arbitration in order to resolve business disputes that occur between the parties. If from the beginning of the establishment of the UUA is not oriented as international arbitration and then imposed as international arbitration, then the imposition of the enactment in turn can injure or tarnish the joints of humanity, namely the absence of respect for the dignity and dignity of humanity as a subject of law in transactions or legal relations carried out. This is clearly not in harmony or contrary to the precepts of Pancasila 2, namely "Just and civilized humanity".

The above precept encourages that the dignity and dignity of humanity possessed by every subject of law that transacts must be upheld and respected. If indeed UUA of domestic/national character is not oriented as international arbitration, then UUA should only be applied as domestic/national arbitration.

In the perspective of legal objectives, the rulings resulting from the rules of arbitration of domestic/national character as stated in the UUA imposed as international arbitration are certainly far from a sense of justice. It only moves on a rigid level of formality and touches less on the substantive aspects of justice that the litigants want to achieve.

Universalistic Paradigm

The next filter as a frame of mind, behaving and behaving in the renewal of Indonesian arbitration law is the nature of universality. As previously outlined that with this universality frame of mind, requiring Indonesia in reforming its national law not only rests on the needs, demands and national interests solely (inward looking), but also considers the dynamics that develop externally (Outward Looking). Global/international developments should also be one of the main considerations in taking its legal renewal policy.

One of the international arbitration law regimes that can be considered for the renewal of Indonesian arbitration law in addition to the New York Convention of 1958 is the work (UNCITRAL 1966) namely UNCITRAL Model Law on International Commercial Arbitrationn 1985 (UML-ICA). This law model was created and signed in 1985. Over time, this model law made fundamental changes to adjust the dynamics of international trade adopted in 2006.

The appointment to UML-ICA 2006 is based on several considerations. Sociological considerations, UML-ICA 2006 has been adopted by 84 countries with a total of 117 jurisdictions. The countries that have adopted it are mostly Indonesia's trading partner countries in international trade, both in Asia, Europe and America. ASEAN countries that have adopted include Singapore (1994), Thailand (2002), Philippines (2004), Malaysia (2005), Cambodia (2006) and Brunei Darussalam (2009). Indonesia's 3 major trading countries in Asia have also adopted, namely: India (1996), China (2020) and Japan (2003), (United Nations, 2020). The more countries that adopted UML-ICA 2006, especially most of Indonesia's trading partners in international trade, the more open the law model is imposed in the resolution of commercial disputes that occur with them. By adopting the law model, it will in turn add to the attractiveness for foreign investors to invest in Indonesia because they can already estimate the arbitration rules that can be enforced because there are relatively similarities.

In addition, alignment with UML-ICA 2006 is also based on political considerations. Paragraph 4 of the NRI Constitution Opening 1945 expressly states that one of Indonesia's goals is to participate in implementing a world order based on independence, lasting peace and social justice. This means that in the eyes of the international community, with the alignment of UUA through self-binding to UML-ICA 2006 shows Indonesia's high commitment in international association traffic for the realization of international order (world) as mandated by the Opening of the NRI Constitution in 1945 (Vienna Convention 1969).

How to Implement Paradigms in the Renewal of Indonesian Arbitration Law

Referring to Huala Adolf's opinion, efforts to reform Indonesian arbitration law can be done by maintaining UUA as a domestic/national arbitration arrangement and creating its own International UUA, namely by adopting UML-ICA 2006 (Huala Adolf, 1999). It is based on the consideration that:

1. Since the beginning of the establishment of UUA, the formation of the law did design the law for the benefit of domestic/national arbitration which is much different from the international arbitration arrangement. Indonesian characteristics can be found in UUA that are not obtained in international arbitration arrangements;

2. Create its own International Arbitration Law by making direct adoption of UML-ICA 2006 provides benefits including savings of time, cost, energy and thought that should be incurred when juxtaposed with the creation of its own version of the International Arbitration Law without reference at all; The quality of a more modern international arbitration arrangement according to the needs and demands of the international business community is more guaranteed by adopting the 2006 UML-ICA compared to its own version of the arrangement. This is based on the fact that the 2006 UML-ICA has been adopted by 80 countries with 117 jurisdictions which incidentally are Indonesia's trading partner countries in international trade activities. In accordance with the provisions in Article 10 of Law No.12 of 2011 concerning the Establishment of Laws and Regulations, UML-ICA 2006 includes material content of international agreements that can be ratified by law.

CONCLUSION

Based on the analysis as previously, it can be concluded that the paradigm of universalistic particularism has a very important meaning, namely as a frame of reference for thinking, acting and acting to reform Indonesian arbitration law in line with the proclamation of Indonesian independence's ideals and the dynamics of the development of the international business community. Therefore, this paradigm can be developed to update Indonesian arbitration law. In addition, UML-ICA 2006 as one of UNCITRAL's largest works in the field of international arbitration that has been adopted by 80 countries with 125 jurisdictions can be used as a reference to update Indonesian arbitration law, especially regarding international arbitration in order to increase the volume of international trade in Indonesia. It is recommended that efforts to update Indonesian arbitration law as stated in the UUA be carried out by maintaining the current LAW AS A domestic/national arbitration regulation and creating its own International Arbitration Law by adopting UML-ICA 2006)

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