

Embodiment Principles of Clearing Justice in Consumer Arbitration

Azwir Agus

Faculty of Law, University of Sumatera Utara, Indonesia. E-mail: wirazwiragus@gmail.com

ARTICLE INFO

Keywords:

Arbitration; Consumer Disputes; Principles of Justice; Verification System

How to cite:

Agus, A. (2018). "Embodiment Principles of Clearing Justice in Consumer Arbitration," *Hasanuddin Law Review*, 4(3): 383-388

DOI:

10.20956/halrev.v4i3.3067

ABSTRACT

The realization of the principle of justice in proving the settlement of consumer disputes through arbitration in Indonesia is equally important. Undeniable, there is a weakness of the consumer protection law, both substantial norms and formal law. This article is normative legal research that refers to norms and legal principles in the legislation or court decisions. The results show that the proof is one of the trials that plays an important role. In general, the verification system is distinguished based on civil law and common law understandings influenced by various proof system theories such as the presumption of liability principle adopted in the Indonesian consumer protection law. The principle of justice in the consumer arbitration system is different from the arbitration verification system that is universally applicable in Indonesia. The ultimate goal of choosing consumer arbitration is to get substantial justice that is more dignified and not just obtaining formal justice.

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1. Introduction

Consumers and business people (producers) are like two sides of a coin that cannot be separated or there are two interests that need one another. Consumers need products or services resulting from business activities, and businesses need consumers to absorb or buy the results of their business. Balance in all aspects concerning the interests of both parties is ideal and must be taken into account.¹ Imbalance or disruption to the interests of consumers and business actors is slow or fast will also affect the interests of other parties.

Legal certainty includes all efforts to empower consumers in obtaining or deciding on their goods and/or services needs and maintaining or defending their rights, if they are harmed by the behavior of business actors providing consumer needs.² In the

¹ Horton, D., & Chandrasekher, A. C. (2015). After the Revolution: An Empirical Study of Consumer Arbitration. *Geo. LJ*, 104, 57.

² AZ. Nasution, (2003). *Aspek Hukum Perlindungan Konsumen*, in Journal Teropong, Edition May, Masyarakat Pemantau Peradilan Indonesia. Jakarta: Fakultas Hukum Universitas Indonesia, p. 6-7.

globalization era, national economic development must be able to support the growth of the business world so as to be able to produce various goods or services that can improve the welfare of many people.³

The relationship between consumers and producers can lead to disputes due to damage, pollution or loss of consumption of goods or use of services. One alternative solution to settling this dispute is through arbitration. In short, the arbitration is an arbitral process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard⁴. Juridically formal the arbitration law in Indonesia formulates the notion of arbitration is a procedure for the settlement of a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute⁵. In other words, arbitration is a method of resolving disputes in civil matters that are approved by both parties, which are binding and can be implemented or enforced.

Further, the balance of interests between consumers and producers in the arbitration trial is by realizing the principle of justice in the event of verification. The realization of justice is very important, for three reasons, namely first, that there are weaknesses in the Indonesian consumer protection law, especially in the settlement of consumer disputes arbitrarily. This situation has become more complicated if the legislation under consumer protection laws (such as government regulations, trade and industry ministerial decrees and/or other regulations) continue with conflicting norms. This reinforces the conclusion that the formulation of a number of norms in the Indonesian consumer protection law is not within the framework of the national legal system and is difficult to harmonize.

Return to discussion in the scope of consumer protection. Article 28 of the Indonesian consumer protection law states that proof of the element of 'error' in the claim for compensation is the responsibility of the producer. This system comes from the Presumption of Liability Principle, which states that the defendant is always considered responsible until the defendant can prove his innocence, the burden of proof is on the defendant.⁶ The burden of proof guideline is based on the principle of civil procedural law, namely the principle of *audi et al*, or parties who litigate in a civil process in court, must be treated equally by the judge. The parties have the same opportunity to win and equal opportunities to lose.⁷ The same processual position of the parties who litigate before the judge is a proof of burden sharing theory. The judge must share the burden of proof based on the similarity of the parties' position so that the possibility of winning between the parties is the same. The judge must share the burden of proof to the parties who have litigation appropriately, which is sometimes only the defendant, and sometimes both of them⁸.

³ Widjaja G and Yani, A. (2003). *Hukum Tentang Perlindungan Konsumen*, Jakarta: PT. Gramedia Pustaka Utama, p. 98

⁴ Black, H.C. (1991). *Black's Law Dictionary*. St. Paul Minn: West Publishing Co, p. 70

⁵ Article 1 number (1) of Law Number 30 Year 1999 concerning Arbitration & Alternative Dispute Settlement.

⁶ Shidarta, (2000). *Hukum Perlindungan Konsumen Indonesia*. Jakarta: Grasindo, p. 62

⁷ Ali, A. (1983). Sekelumit Tinjauan Tentang Hubungan Antara Asas Audi Et Alterem Partem Dengan Asas-Asas Lainnya Dalam Hukum Acara Perdata, *Jurnal Hukum dan Pembangunan*, Vol.13 No.6: 523-524. *Audi Et Alterem Partem* comes from Latin, which means "hear also the other party". This principle is often referred to as 'Audiatur at alters pars', which is the same understanding 'Einers mannes Rese ist keines Mannes Rede' atau 'man soll sie horen alle beide'.

⁸ Ali A and Heryani, W. (2012). *Asas-Asas Hukum Pembuktian*. Jakarta: Kencana, p. 121.

2. Research Methods

This article is normative legal research that refers to norms and legal principles in the legislation or court decisions.⁹ This study also carried out several approaches, namely the statute approach, conceptual approach and historical approach.¹⁰ While the data collection tool used in this study is through document study that is to study and understand library materials related to the object of research. The study of this document is carried out on documents available both in the library and in the field, namely documents, regulations and arbitration procedures and other sources as well as information relating to the issues discussed.

3. Consumer Dispute Resolution through Arbitration: Challenges and Development

Indonesia's consumer protection law has determined the burden of proof, in resolving disputes. The proof of burden will determine directly how the end of a legal process in court or arbitration. If the party placed the burden of proof cannot prove the fact in question, then the party will be deemed defeated even though the opponent (the consumer) also cannot prove the fact he argued.

The implementation of the burden of proof is regulated by certain principles which are restrictive in nature, restricting the freedom of the judge so that it can be avoided from abuse of office or authority (*de tournament de pouvoir*).¹¹ In the Indonesian legal system, between the burden of submitting evidence and the burden of convincing, the stages of separation were not held, and at the same time took place when the parties were charged with proof. Three possibilities for whom the burden of proof is placed in a case, namely only to the plaintiff, only to the defendant or to both. In the event that proof is always charged to one party or always to both parties, such determination will lead to rigidity and injustice.¹²

The principle of justice is safeguarding the balance, harmony and harmony of all areas of the nation's life. Need legal means to encourage the balance of interests between consumers and producers then balance the interests of the government representing the public interest through various policies or regulations to maintain legal certainty in the application or law enforcement of the field of consumer protection. The purpose of choosing an arbitration forum will ultimately lead to the settlement of disputes, namely getting substantial justice that is more useful and not just obtaining meaningless formal justice.¹³ Although, the enforcement of justice is a goal in resolving consumer disputes through arbitration, it is realized that it is not easy to understand it, because there are a variety of meanings that can be seen from various perspectives and theories.

In relation to the consumer arbitration verification system, the burden of proof is placed on the shoulders of the producer as the party being sued to prove that there is no mistake in the claim for compensation. Consequently, if the producer fails to prove, it will be sufficient as a legitimate reason according to the law, the compensation claim demanded by the consumer will be granted. This inverse proof burden positions the consumer as a

⁹ Soekanto S and Mamudji, S. (1995). *Penelitian Hukum Normatif; Suatu Tinjauan Singkat*. Jakarta: RajaGrafindo Persada, p. 15.

¹⁰ Ibrahim, J. (2011). *Teori & Metodologi Penelitian Hukum Normatif*. Malang: Boymedia, p. 305.

¹¹ Rigozzi, A. (2010). Challenging awards of the Court of Arbitration for Sport. *Journal of International Dispute Settlement*, 1(1), 217-265.

¹² *Ibid.*, p. 124.

¹³ Suparman, E. (2004). *Pilihan Forum Arbitrase Dalam Sengketa Komersial Untuk Penegakan Keadilan*, Jakarta: Tatanusa, p. 79.

weak party while the producer has a higher financial strength and degree so that the law is given the responsibility to prove the element of error.

In contrast to the principle of fairness in a system of proof that is generally applicable both in civil procedural law, arbitration law or procedure rules for arbitration institutions in Indonesia, those applying a balanced verification system, namely the party submitting events on the basis of a right, is required to prove these events and vice versa for those who disagree, are also required to prove it. Judges must listen to both parties and provide as much opportunity as possible to carry out the evidence according to the principles of *audi et alteram partem*.

The rationale of the proof of load reversal system is that the producer is considered guilty, until the person concerned can prove otherwise. This system is contrary to the principle of the presumption of innocence which is commonly known in law. In the event that the producer assures the judge or arbitrator about the unrighteousness of the consumers' arguments or is obliged to present sufficient facts according to the law to provide certainty to the Judge regarding the absence of errors in the event or causal relationship of the incident. Such a situation shows that consumer protection laws have made the expectation of a balance of position between consumers and producers as the goal of the law, to be unbalanced or unfair because consumers remain in a weak position and tend not to attempt to prove the event argued. Consumers only depend on proving errors from the manufacturer. In practice, the proof system is ineffective and is not implemented absolutely because producers will always try to hide their mistakes and refuse to provide compensation so that consumers are sometimes charged with proof.

4. Realization of the Principle of Justice in the Event of Consumer Arbitration Verification

Regarding the burden of proof system in the settlement of consumer disputes, the Indonesian consumer protection law must still adhere to the values of justice contained in Pancasila as the basic foundation (basic norms) formed by a law that is humane, just, civilized and socially just for all people in Indonesia. Fair and civilized humanitarian precepts as a basis for the protection of human rights that place humans in a civilized manner without reducing their rights at all. In the principle of social justice, the concept of social justice and legal justice is distinguished. Justice in law literally has a narrow meaning that what is in accordance with the law is considered fair while those who violate the law are considered unfair, and to restore it is held a court. Social justice in Pancasila is a source of value that must be translated into legal justice. The nature of social justice is to create and realize justice in human relations with themselves, human relations with others, human relations with their countries, and human relations with their gods.

Pancasila as the root of ideas and thoughts about the law or the perception of the meaning of the Indonesian legal law. In essence, it consists of three elements, namely justice, usefulness and legal certainty¹⁴. Pancasila as a source of law becomes the basic norm of the Indonesian people in shaping the legislation. The value of justice contained in Pancasila is the basic foundation for the establishment of a humanitarian, just, civilized and socially just law for all Indonesians. The characteristics of Pancasila justice require an understanding of the similarity of vision, mission, goals and perceptions in

¹⁴ Febriansyah, F.I. (2016). *Keadilan Berdasarkan Pancasila, Dasar Filosofis dan Ideologis Bangsa*, Yogyakarta: Deepublish, p. 151.

creating a just law. The characteristics of Pancasila justice if analyzed by John Rawls' theory of justice have in common with Aristotle's opinion. This commonality of opinion is that justice must be understood as equality. Humans as social beings must obtain equality in the law or similarity in obtaining justice. Rawls's view positions the same and equal situation between each individual in society, there is no difference in status, position or having a higher position with each other, so that one party can do a balanced agreement.

Likewise, the formulation of the principles of consumer protection in the Indonesian consumer protection law, refers to the philosophy of national development, namely the development of Indonesian people as a whole based on Pancasila. The principles of consumer protection are divided into three basic principles, namely the principle of benefit, justice and legal certainty. As a principle of law, it automatically becomes the main reference in the formation of legislation and in various activities related to consumer protection.

The principle of balance that means justice in principle is the maintenance of balance, harmony and harmony in all areas of the nation's life. Legal infrastructure and facilities encourage a growing balance of interests between consumers and producers. The tendency that consumers are always in a weak position when dealing with producers has given rise to efforts to protect consumers by not ignoring the protection of producers and the interests of the people represented by the government. The value of such justice is contained in the Pancasila which is the basic foundation for the formation of a humanitarian, just, civilized and socially just law for all the people of Indonesia.

5. Conclusion

The proof is one of the trials that plays an important role. In general, the verification system is distinguished based on civil law and common law understandings influenced by various proof system theories such as the presumption of liability principle adopted in the Indonesian consumer protection law. The principle of justice in the consumer arbitration system is different from the arbitration verification system that is universally applicable in Indonesia. The realization of justice cannot be harmonized with other laws, leading to injustice for producers and consumers. The principle of justice is one of the main principles in the judicial or arbitration system. The ultimate goal of choosing consumer arbitration is to get substantial justice that is more dignified and not just obtaining formal justice. The development of a proof system in consumer arbitration in Indonesia is in line with globalization. The realization of the principle of justice that has a legal characteristic of the nation's personality in the consumer arbitration verification system will provide justice for producers and consumers and provide justice for all people of a country.

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