STRENGTHENING THE INDEPENDENT EXECUTION OF THE RULINGS OF THE NATIONAL ARBITRATION BODY BASED ON LEGAL PRINCIPLES AND THEORIES

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ABSTRACT

Parties in a dispute usually choose arbitration as their business settlement mechanism to obtain a more dignified substantial justice, instead of just insignificant formal justice for the parties in good faith. Unfortunately, it is hard to achieve such an expectation due to the obligation of arbitration ruling registration to the district court in Article 59 and Article 64 of the Arbitration Law. This regulation has principally weakened the executorial power of the arbitration ruling and has denied its status as independent, final, and binding. This paper discusses the legal principles and theories that may be used to grant independent execution authority to the national arbitration body apart from the district court hegemony. This study focuses on the independent execution of the arbitration body's rulings under the Arbitration Law through a normative approach. The study used descriptive-analytical research specifications to describe and analyze the arbitration law. The futuristic study method is used to identify regulations related to the independent execution of the arbitration rulings in Indonesia. The results show that in the arbitration law reform on the reinforcement of the national arbitration body and its authority to carry out its rulings, it is necessary to consider theories such as welfare state, development of law, economic analysis towards the law, and unlawful acts. Some of the principles available to be used as the basis to reinforce the arbitration law mentioned are the principles of legal certainty, good faith, binding power, and simple-fast-affordable dispute resolution.

Keywords: Independent Execution, Arbitration Ruling, Legal Certainty Principle, Binding Power Principle, Simple Fast-Affordable Dispute Resolution Principle.

INTRODUCTION

As social beings, humans interact with each other to fulfill various needs in economic, social, cultural, religious, and political fields. Within the interaction, especially in the field of economic, humans will establish business or commercial relationships in various activities to improve their welfare. Business activities often contain risks that may lead to profit reduction, damages, or even bankruptcy. The initial good, close, warm, constructive, and positive business

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relationship between the parties may deteriorate in case of a dispute (Rochani and Rahadi, 2013). This may have a long-term destructive impact on the business relationship between the parties. Although Business people mostly use the court as a place to settle business disputes, they are not always satisfied with the outcomes, concerning the duration of the dispute resolution process, issuance of permanent court decisions, the complexity of the mandatory process, the huge costs of litigations. This dissatisfaction often encourages the practice of arbitration as an alternative dispute resolution mechanism.

In such a mechanism, the parties may choose to use the business dispute resolution process through forums other than the court. The choice of forum theory is more prioritizing the freedom of the parties to determine other forms of similar processes, however through a simpler mechanism and it is expected that in such mechanism, there shall be no distortion of law enforcement, hence the result may fulfill people's sense of justice in the society (Suparman, 2012, p.116). Business people are in high need of legal certainty and security in conducting investment and trading activities, notably at the time of a dispute (Suparman, 2012, p.117). For business individuals, it is important to obtain a fast and final settlement of their disputes. In this case, arbitration becomes one of the dispute resolution forums they can use.

In Indonesia, people's interest to resolve disputes through arbitration began to increase since the promulgation of Law No. 30/1999 on the Arbitration and Alternative Dispute Resolution (referred to as the Arbitration Law hereafter). This development is in line with the direction of globalization, where dispute resolution outside of the court has become the choice for business people to resolve their business disputes. Aside from its fast, efficient, and settled characteristics, arbitration is also embracing the win-win solution principle, and it's not beating around the bush due to the absence of appeal and cassation. Arbitration's cost is also more measurable since the process is faster. Other advantages of the arbitration are its immediate (final) and binding aspect and its confidentiality.

People choose arbitration as their dispute resolution forum to achieve a more dignified substantial justice (Suparman, 2012, p.56). However, it is difficult to achieve such objectives under the current condition of arbitration regulation as it leaves shortcomings in terms of the presence of a gap for the parties in bad faith to delay or even avoid carrying out arbitration rulings.

The existing arbitration regulation has caused legal uncertainty or ambiguity, considering that arbitration rulings are final and binding, while on the other hand, the rulings need to be registered and may be canceled on the request of the court as per Article 59 paragraph 1 of the Arbitration Law. This confirms that the arbitration rulings initially agreed upon by the parties will still require legal recognition from the District Court. This obligation to register the arbitration ruling is imposable by sanction in case of non-performance. Article 59 paragraph 4 of the Arbitration Law says that failure to fulfill the provisions as referred to in paragraph 1 shall result in the non-performance of the arbitration ruling. Eman Suparman argues that this not only proves that arbitration ruling is still dependent as it is subordinated to the authority of the district court (Suparman, 2012, p.15). This paper discusses the urgency of the independent executive authority of the national arbitration bodies according to the legal principles and theories, economic, sociological, and cultural aspects.

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RESEARCH METHODS

This is a descriptive-analytical study that discusses the Arbitration Law in a systematic, factual, and accurate manner related to the independent execution of the arbitration ruling according to the legal principles and theories as well as economic aspects. The approach used in this research is multidisciplinary normative (economic, social, and cultural) that examines the conformity of norms in the arbitration ruling registration with the legal principles and theories as well as economic aspects. This study uses secondary data related to the independent execution of the arbitration rulings, either in the form of positive law or literary materials such as scientific papers, books, seminar materials, newspapers, dictionaries, and internet material. This study also uses a futuristic approach to prepare the basis of the legal principles and theories as well as economic aspects dealing with the research problem, as a consideration to draft the regulatory concepts concerning the independent execution of the arbitration rulings to strengthen the arbitration law in Indonesia.

RESULTS AND DISCUSSION

The term arbitration derives from the Latin word arbitrare, which means the authority to resolve a matter according to discretion or a peaceful settlement by an arbitrator or referee (Usman, 2013, p. 137). This gives the impression that the arbitrator or the panel of arbitrators are settling disputes based on their discretion, while in fact, they still implement the law as a judge in a court of law (Sudiarto, 2015). According to Henry Campbell Black, "arbitration" is the reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's ruling issued after a hearing (Henry Campbell Black, 1979; Zaidah, 2015). Margareth L. Moses argues that arbitration is a private system of adjudication whereby parties have decided to resolve their disputes outside any judicial system (Moses, 2012). Meanwhile, Ali Murtadlo claims that 3 matters must be fulfilled in defining arbitration, namely: (1) the presence of dispute; (2) consent to submit to a third party; and (3) final and binding decision that shall be imposed at the end of the process (Murtadlo, 2018).

Alan Redfern and Martin Hunter argue that in some countries, it may be necessary to register the ruling in the national court, generally on payment of an appropriate fee while in other countries, registration for recognition by the courts is optional. It may be a necessary prelude to the enforcement of a foreign ruling (Blackaby et al., 2009). The threat of sanctions as stated in Article 59 paragraph (4) has eliminated the final and binding character of the arbitration ruling, a supposedly permanent and binding force as stipulated in Article 60 of the Arbitration Law.

The condition of gaps or opportunities for the parties with bad faith to delay and/or refuse the implementation of arbitration rulings is also increased by the provisions in Article 61 and Article 62 of the Arbitration Law.

In line with the above-mentioned experts, Eman Suparman claims that the absence of executorial authority by arbitration as a forum that can execute its ruling in Indonesia is becoming a dilemma for people in obtaining justice. Arbitration ruling is still considered as subordinate to the authority of the district court, particularly if the parties do not execute the

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arbitration ruling voluntarily (Blackaby et al., 2009). Priyatna Abdurrasyid argues that Arbitration is only good for the bonafide parties (businessmen) in good faith, it will not be suitable for the parties who often use the court to evade obligations, or for extending time to fulfill obligations (Priyatna Abdurrasyid, 2011).

The Welfare State Theory

The renewal of the arbitration law shall become a part of the national legal development process in line with Pancasila (the Five Principles) and the Preamble to the 1945 Constitution. Jimly Asshidiqie argues that the supremacy of law as a principle shall always be followed by the adoption and practice of democracy or people's sovereignty, it guarantees public participation in the decision-making process of the state, hence, each applied and enforced rules and regulation will reflect people's sense of justice. The applicable laws and regulations must not be stipulated and enacted unilaterally by and/or for the interest of the authorities. The law does not guarantee the interests of a group of people, but the interest of all citizens. The renewal of arbitration law through granting independent authority to the arbitration bodies in executing their rulings is a manifestation of democracy and the supremacy of law under the people's sovereignty. It is believed to increase public participation.

Article 28 D paragraph (1) of the 1945 Constitution becomes the foundation for the renewal of arbitration law, covering the presence of the arbitration body's authority to execute its rulings independently without the interference of the court. The article says that each person has the right of fair recognition, guarantee, protection, and legal certainty as well as equal treatment before the law. In this regard, the parties who choose arbitration as their dispute resolution mechanism by superseding the court must be treated fairly and equally as those who recourse to the court to settle their dispute. It is also mandatory to understand that arbitration as a dispute resolution mechanism must be equipped with the independent execution authority as their counterpart courts. The authority of the national arbitration body to execute its decision independently will separate its jurisdiction from the authority of the court. Hence, the renewal of arbitration law will guarantee a fair legal certainty and equal treatment either during the stage of examination, imposition of the ruling with no court interference.

The Law Development Theory

The law development was brought up by Mochtar Kusumaatmadja when he argues that law is an instrument of social engineering assuming that the presence of regularity or orderliness in the effort for development or change is desirable or even considered as (absolutely) necessary. Another assumption contained in the conception of law as an instrument of development is that the law in terms of legal rules or regulations may indeed function as a tool (regulator) or an instrument of development to distribute people's activities to the direction desired by the relevant development or change. The law is expected to guarantee certainty and order (Kusumaatmadja, 2002). In this regard, the most effective way to maintain regularity and order in arbitration as a dispute settlement mechanism is by the renewal of arbitration law through the removal of

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provisions on the registration of arbitration rulings to the court, and replace them with the authority of the national arbitration body to execute its ruling independently. The amendment referred here must be made by the competent institutions, namely the President together with the House of Representatives. According to the theory of the law of development, the renewal or the development of arbitration law which will enable arbitration to independently execute its rulings shall be able to direct people to quickly and cheaply resolve their disputes through arbitration. Mochtar Kusumaatmadja's views on the functions and roles of law in national development include the idea that (Atmasasmita, 2019):

1. All developing societies are always characterized by the presence of change, and the law is functioning as a guarantee to ensure that the change occurred in good order.
2. Either changes or order is the initial goal of a developing society, in this sense, the law is becoming an instrument (not a tool) that cannot be ignored in the development process.
3. In society, the law shall maintain order through legal certainty and must be able to regulate (assist) the change in the society.
4. A good law is a law that is in accordance with the living law reflecting the values applicable in society.
5. Implementation of the aforementioned functions of law may only be manifested if the law is enforced under certain authorities running within the limits set by relevant laws.

In line with what proceeds, it is safe to say that first, according to the premise that, "All developing societies are always characterized by the presence of change", then the desire to amend the Arbitration Law by removing the provisions concerning the registration of arbitration ruling to the court and to replace it with the provision concerning the authority of the national arbitration body to execute its decision independently, must be understood as a condition where the people and Indonesian arbitration law are also continuously developing and adapting to the people's development and needs.

Second, related to the premise which stated that "... the law is functioning as a guarantee to ensure that the change occurs in order," it entails interpretation that the change referred here is manifested through the renewal to the Arbitration Law, it shall remove the provisions concerning the obligation to register arbitration ruling to the court and replace it with the authority of the national arbitration body to execute its decisions independently.

Third, the premise says that either changes or order (or regularity) is the initial goal of a developing society, in this sense, the law is becoming an instrument (not a tool) that cannot be ignored in the development process." In this regard, the renewal of Arbitration Law occurred through the removal of the provisions on the obligation to register the arbitration ruling to the court and its replacement with the authority of the national arbitration body to execute its decisions independently constitutes as an initial goal for the Indonesian people as a developing society coinciding with their development and needs. The amendment of the Arbitration Law becomes an instrument to prepare a dispute settlement system and mechanism through a comprehensive, complete, and professional arbitration.

Fourth, the premise says that in the society, the law is functioned to maintain order through the legal certainty and also the law (as a social inference) must be able to regulate (assist) the process of change in the society." The renewal of Arbitration Law occurred through the removal

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of the provisions on the obligation to register the arbitration ruling to the court and its replacement with the authority of the national arbitration body to execute its decisions independently is still supporting and maintaining order in the dispute resolution through the existing arbitration, it also simultaneously ensure the legal certainty of the execution of arbitration ruling to go along independently by providing a clear and definite legal basis within the new Arbitration Law.

Fifth, related to the premise which stated that "Implementation of the aforementioned functions of law may only be manifested if the law is enforced under certain authority, however, such authority itself must be running within the border of signs specified in that relevant law," then in this regard, the renewal of the Arbitration Law occurred through the removal of the provisions on the obligation to register the arbitration ruling to the court and its replacement with the authority of the national arbitration body to execute its decisions independently must be made by the President and the House of People's Representative according to the amendment process and stages regulated under the Law No. 12 of 2011 concerning the Formation of Legislation jo. Law no. 15 of 2019 concerning the Amendment to Law No. 12 of 2011 concerning the Formation of Legislation. One of the most important matters in the renewal of the arbitration law is that it is necessary to conduct a study and make recommendations on relevant amendments. In this regard, presumably, this article may be used as material to consider whether to conduct such a study and arrangement of the academic texts as referred above.

The Legal Certainty Principle

According to Kelsen, the law is a system of norms. A norm is a statement emphasizing "what should have been" or das sollen aspects, it includes several regulations on what is supposed to be. Norms are deliberative products and human actions. Laws containing general rules are becoming guidelines for individuals to behave among the society, either in the relationship between individuals or with the society. The rules are serving as limitations for the people to burden or take action against individuals. The presence of rules and their implementation shall create legal certainty (Marzuki, 2008).

The normative certainty of law is when regulation is made and enacted exactly since it clearly and logically regulates. Clear here means that it shall not raise doubt (multiple interpretations) and shall be based on logic. It may also mean that it becomes another system of norms, hence shall not clash with or cause conflict with the existing norms. Legal certainty refers to clear, permanent, consistent, and consequent enforcement of the law, which implementation cannot be affected by subjective conditions. Certainty and justice are not just moral demands, it also factually characterizes the law. An uncertain and unjust law is not just a bad law (Kansil, 2009).

In its relation with the normative legal certainty, which regulations must be clear or do not raise doubt or multiple interpretations, the present arrangement of arbitration in the Arbitration Law is unclear, since it raises both doubt and multiple interpretations. For example, the definition of Arbitration according to Article 1 section 1 is "a method to settle a civil dispute outside of the general judicial environment based on an arbitration agreement made in writing by

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the parties in dispute." It is unclear that as it is seen, apparently that in its implementation, to execute its ruling, arbitration as a dispute resolution method outside of the general judicial environment, still has to involve the court. The presence of the provisions in Article 59 of the Arbitration Law related to the registration of the arbitration ruling to the court is inducing a condition where the execution of arbitration ruling returns to involve or enters into, even under the control of the court. In the definition of Arbitration, as referred, there is also no separation found among the process of examination, decision-making, and execution of the ruling. The definition of arbitration as mentioned must be interpreted as a whole one comprehensive process from the beginning to the execution of the ruling. Thus, it may be said that the presence of provisions concerning the registration of the arbitration ruling to the court is contradictory or inconsistent with the object and purpose as well as the definition of the arbitration itself.

The phrase "dispute resolution," which is found in a large number and scattered around the norms in the Arbitration Law, must also be comprehended as a single process that is intact and inseparable, hence it will also include the execution of the arbitration ruling. It is inappropriate to separate the provisions on the execution of arbitration ruling on a single term, even if it has a different interpretation from the definition of the arbitration itself. The term "dispute resolution" means that a dispute should be completely resolved, clear to the very last stage, where there shall be the execution of the arbitration ruling itself. Hence, the unresolved matters among the disputing parties are complete, where the respective rights and obligations have been restored. The existence of provisions concerning "the execution of arbitration ruling through the obligation to register to the court" indicates that the Arbitration Law caused doubt on the independence and professionalism of the arbitration, or at least showing a half-hearted politics of law in granting existence and authority to the arbitration body as a dispute resolution institution. The same conception should also be made to the phrase "to adjudge" in Article 3 of the Arbitration Law concerning the absolute authority of the arbitration. It should have also including the process of the arbitration ruling execution, to provide real and true justice to the parties disputing in the arbitration forum, instead of just a formal justice.

The renewal of the arbitration law made through the removal of the provisions concerning the obligation to register the arbitration rulings to the court as well as its replacement with the provisions concerning the authority of the national arbitration body to execute its ruling independently also addressed to reinforce the character of the arbitration ruling, which is final, permanent and binding to the parties, as referred to in the Article 60 of the Arbitration Law. The legal certainty is only measured by the existence of norms/provisions regulating the character of the arbitration ruling which is final and binding, it is not in line with the principle of legal certainty that requires the fact that the relevant provisions/norms are executable. It is also in line with the definition of the legal certainty elaborated by Gustav Radbruch, where a fact must be formulated clearly to avoid erroneous interpretation, aside from easily be implemented (Huda, 2020). The renewal of the arbitration law that authorized the independent execution of arbitration ruling by an arbitration body will increase the level of legal certainty in this regard.

Legal certainty also requires clear provisions under a rule and regulation, in this sense, it shall become another system of norms to prevent a clash or conflict of norms. In this regard, the system of arbitration law should be considered as a separated dispute resolution sub-system and

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it shall be inappropriate to place it under or integrated into the sub-system of law in the judicial power. The general explanation to the letter f of the Law No. 48/2009 on the Judicial Authority stated that the provisions concerning the arbitration regulated under the mentioned Law are is only arrangements of general nature (lex generalis). According to that general explanation, the Arbitration Law is supposedly capable of creating provisions with a special nature (lex specialis) with respect to the authority of the national arbitration body to independently execute the arbitration ruling. Thus, although Article 59 paragraph (3) of the Law concerning the Judicial Authority stated that, "If the parties are not performing the arbitration ruling voluntarily, then the ruling shall be executable according to the order from the head of the district court at the request of one of the parties in dispute," in the amendment of the Arbitration Law, it is possible to create a provision concerning the authority to independently execute the arbitration ruling for the national arbitration body. According to the principle of lex specialis derogate legi generalis, the provisions in the Arbitration Law shall supersede the existing arbitration provisions in such Law on the Judicial Authority.

The Good Faith Principle

The principle of good faith is seen as a fundamental principle since basically the parties were choosing arbitration as their dispute resolution mechanism based on consent in good faith. The word "fides" from bonafide. The principle of good faith entails trust in someone's words. Bonafides commonly applied to ensure the contents of a contract. A legal relationship required trust in someone's words to work, and Cicero described it as a fundamental iustitiae (Schermair, 200; Khairandy, 2004).

The good faith mentioned above, must not only referring to the good faith of the parties, but it should also refer to the values developing among the society since it is the part of society. This good faith will eventually reflect people's standard of justice or appropriateness (Warmelo, 1976). With such an interpretation, good faith becomes a universal social force regulating social relationships among them, where each citizen is obligated to act in good faith dealing with their fellow citizen (Holmes, 1978). In this regard, good faith is used as the basis to make a renewal to the Arbitration Law and manifests the authority for the national arbitration body to execute its ruling. It is possible through the establishment of standards for justice or appropriateness that the arbitration process must be interpreted as a whole comprehensive and complete process up to the execution stage. If there is a clear and firm provision on the executive authority of the national arbitration body to independently execute its arbitration ruling in the new Arbitration Law, then there shall be a formation of a new standard of justice or appropriateness among the society, as the development and demand from the people with good faith.

Good faith is an objective conception, which is universally applied in all transactions. This is in line with Roscoe Pound's postulate which argues that men must be to assume that those with whom they deal in the general intercourse of society will act in good faith and will carry out their undertaking according to the expectation of people" (Pound, 1999). Therefore, if a person acts in good faith, whether or not it is per the objective standards based on social habits, then other

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people must also act the same to him. Wirjono Prodjodikoro (1992) divides good faith into 2 types, namely:

1. Good faith when a legal relationship entered into effect. Good faith is usually presupposition or an assumption that occurred inward, where the required conditions of a legal relationship presumably have been fulfilled. The parties with good faith in this context shall be provided with legal protection while the ones with no good faith (te kwader trouw) must bear the liability. The implementation of good faith before a contract shall still refer to the subjective good faith or depending on the honesty of the parties. It is elaborated under the provisions in Article 1977 paragraph (1) and Article 1963 of the Civil Code.
2. Good faith at the implementation of the rights and obligations set forth under a legal relationship. Good faith as elaborated under Article 1338 paragraph (3) of the Civil Code says that an agreement must be carried out in good faith. The good faith construed in such an article contains a context of rationality and appropriateness or objective good faith.

According to the elaboration above, then the provisions concerning the authority of the national arbitration body to independently execute its arbitration ruling will enforce and manifest the principle of good faith in implementing rights and obligations under a legal relationship. It will also come to good faith in the execution of the arbitration ruling as have already been stated previously in the arbitration clause or agreement.

Salim H.S. stated that there are 2 (two) types of good faith. First, a relative good faith, where people pay attention to the real attitudes and behavior of a subject. Second, absolute good faith, where the judgment lies in common sense and justice, the measurement is made objective to assess the situation (an impartial assessment) according to the objective norms (Salim, 2009). In this case, the provision concerning the authority of the national arbitration body to independently execute its ruling will enforce and manifest the principle of absolute good faith, which measurement is objectively regulated under the newly amended Arbitration Law.

Concerning the provisions concerning the authority of the national arbitration body to independently execute its arbitration ruling, it plays the general role of law to maintain a balance between various interests in the society, particularly the interest to resolve disputes through arbitration.

Ismiati stated that the principle of good faith has gone through development, from being defined as a relationship (Relatie Begrip) to become a legal principle that also applied to a condition where there is no legal relationship between the parties. This reinforces the notion that the parties in dispute must perform the arbitration ruling in good faith, either voluntarily or due to coercion from the national arbitration body to independently execute the ruling.

In Article 6 paragraph (1) of the Arbitration Law, it is emphasized that the parties must resolve their dispute according to good faith. A dispute or discrepancy within the civil field may be resolved by the parties through an alternative dispute resolution based on good faith superseding the litigation settlement in the District Court. This means that the principle of good faith is a foundation prioritized at the time when the parties resolving a dispute through arbitration.

The Unlawful Acts Theory

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An arbitration ruling must also be viewed as a source of law, particularly for the disputing parties. As a source of law, when the arbitration ruling is not performed voluntarily, then the non-performing party may be categorized as committing an unlawful act, which must be compensated (Adolf, 2014). The Study on Unlawful Acts (ULA) may also be used to analyze this matter. Article 1365 of the Civil Code stated that "Each unlawful act that brings harm to another person, shall obligate the person who, due to his wrongdoing, is raising damages, to compensate for the loss." According to such definition, an act may be considered as an unlawful act if the following elements exist (Syahrani, 1992):

1. An act against the law;
2. A mistake or error;
3. Damage; and
4. A reciprocal relationship between elements 1, 2, and 3.

An unlawful act shall be considered by observing the existence of actions from the perpetrator presumably violating the law, in contrary with the rights of others, in contrary with the legal obligations of the perpetrator, in contrary with the moral decency and public order, or in contrary with the appropriateness of society, either for themselves or other people. In this regard, the provisions concerning the authority of the national arbitration body to independently execute the ruling must be elaborated under a new Arbitration Law, that way, the non-performing parties may be classified as committing an unlawful act due to the violation of the new Arbitration Law and the Article 1338 paragraph (1) of the Civil Code. At least, he shall face the consequences of non-performing the arbitration clause/agreement that stated that they must voluntarily execute the ruling.

Article 1365 of the Civil Code does not distinguish the intentional (opzet-dolus) and careless (culpa) mistakes, it leaves the judge with the obligation to assess and consider the severity of the mistakes committed by a person concerning the unlawful act, to determine the fairest compensation. In this regard, a party who intentionally non-performing the arbitration ruling voluntarily should have been able to be categorized as committing an unlawful act. He does not perform what has become his/her obligation and thus entitling other parties with damages to sue for civil compensation. The amount of civil compensation may be considered from the presence of intention in the non-performance of the arbitration ruling. An intentional non-performance will lead to a larger amount of compensation.

CONCLUSION

In renewing the arbitration law for the reinforcement of the national arbitration body, precisely through the grant of independent execution authority, it is necessary to have an appropriate and strong theoretical and legal foundation. Several theories of law that may be used in this regard, are the theory of welfare state, theory of the development of law, theory of economic analysis towards the law, and theory of unlawful acts. Meanwhile, the legal principles available to be used as the basis to renew the arbitration law are the principles of legal certainty, good faith, binding power, and simple-fast-affordable dispute resolution.

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