

**THE GOOD FAITH PRINCIPLE IN TRUST AND CONFIDENTIALITY
ON THE ARBITRATION PROCESS**

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Abstract

This article is to demonstrate that the principle of good faith (*iktikad baik*) manifests in the principles of trust and confidentiality. Not only is good faith one of the key causes of the emergence of a dispute, it also indeed has a great influence on the success of resolving that dispute. Despite its importance, we have found that many disputing parties do not apply this principle to resolve their disputes. Even though, this principle plays a huge part on maintaining trust and confidentiality at the same time. The purpose of this paper is to increase awareness on the application of the good faith principle, noting that there are still realities where this principle is not applied. In this paper, we first elaborate on the descriptive comprehension of all these three principles. Afterwards, we observe how good faith connects with the other two principles. Through the manifestations of good faith, we have concluded that the *a quo* principle acts as a key basis for the application of the other two principles. In trust, applying good faith means making the arbitration trustworthy, whereas in confidentiality, maintaining good faith keeps the information confidential to irrelevant parties. In the conclusion, we have pointed a few concrete resolutions on maintaining the principle of good faith, trust, and confidentiality. This is found by observing the two factors that cause the realities when the principle of good faith is not applied, which consists of the normative and human factor.

Keywords: Confidentiality; Good Faith; Trust

A. Introduction

Arbitration, etymologically, is rooted from the Latin “arbitrare” referring to the power to settle a case by wisdom.¹ Meanwhile, Subekti defines arbitration as the dispute settlement based on an agreement (arbitration clause) that the disputing parties will comply with the award given by an arbitrator or an arbitration tribunal they have selected.² According to Black’s Law Dictionary, arbitration is defined as an arrangement for taking an abiding by the judgement of selected persons in some disputed matter, instead of carrying it to establish tribunals of justice,

¹ R. Subekti, *Arbitrase Perdagangan* (Bandung: Binacipta, 1992), 7.

² *Ibid.*

and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.³ By Samuel Johnson, he defines arbitration as the settling of a question by “a judge mutually agreed on” by the disputants.⁴

The process of arbitration involves:

- a. An identifiable dispute or controversial between parties;
- b. Which by agreement of such parties;
- c. Is referred or referable to one or more persons for final decision.⁵

Thus, arbitration can be defined as an arrangement for taking and abiding by the judgement of selected persons in some disputed manner.⁶

This settlement method has some crucial advantages:

- a. Confidentiality;
- b. Faster process than the courts then much cheaper; and
- c. Final and binding.⁷

These are some of the other advantages that attract many disputing parties, especially businessmen, to choose this method. It is proven that, in Indonesian National Arbitration Board (“BANI”) itself since its establishment, the trend shows that the number of people choosing BANI as their dispute settlement forum is growing even more every year.⁸

While many prefer using arbitration as their dispute settlement, the principles in arbitration need more attention. Two of them are fundamental: trust and confidentiality. Both determine the success or failure of the arbitration process. In reality, these principles are, however, not maintained consistently.

³ Henry Campbell Black, *Black’s Law Dictionary, Revised fourth edition* (St. Paul, Minnesota: West Publishing Co, 1968).

⁴ Thomas Willing Balch, “Arbitration as a term of International Law,” *Columbia Law Review* 15 (November 1915): 592.

⁵ Kenneth S. Carlston, “Theory of Arbitration Process,” *Law and Contemporary Problems* 17 (1952): 631.

⁶ *Ibid.*

⁷ Gatot Soemartono, *Arbitrase dan Mediasi di Indonesia* (Jakarta: PT Gramedia Pustaka Utama, 2006), 12. Also look at the explanatory part of *Law 30/1999* regarding Arbitration and Alternative Dispute Resolution.

⁸ Badan Arbitrase Nasional Indonesia, “Data Kasus yang Ditangani oleh BANI sampai 2020” [Cases Handled by BANI until the end of 2020].

In the context of trust, both arbitrators and disputing parties must keep this principle intact. Not only are arbitrators responsible to the parties, but also to the arbitration process in a term of leading the process with integrity and fairness. On the other hand, the parties have to demonstrate that they fully trust the tribunal they have selected and show that they are trustworthy by having the good faith in resolving their dispute.

With respect to maintaining confidentiality, both arbitrators and disputing parties also play the crucial roles. Pursuant to Article 14 (2) of Arbitration Rules and Procedures of BANI 2022, that circulating information about the case to non-relevant people is prohibited for both of them. One of the reasons that this prohibition is not complied with is the disputing parties attempting to defeat one another to gain greater claims. For example, they tell the mass media about the case. In fact, an annulment submission is another example for it makes arbitral awards become open to the public when being processed in the general court.

This article has a thesis that not maintaining trust and confidentiality connects with the principle of good faith; while the other writings have pointed out the importance of the principle not by connecting with the other two former principles. Through Cremades' statement, we have found that it is difficult to find any international arbitration award that is not based or at least does not mention the principle of good faith, also known as the omnipresence of good faith.⁹ It is clear to him, the fact that the principle of good faith appears in a majority of arbitral awards that it is an important element in international arbitration.¹⁰

Further, Sipiorski mentions that the principle of good faith is important in international investment arbitration through its role on sustaining the system, maintaining justice, and grounding international investment law in public international law.¹¹ Novianty, Amirulloh, Permata, and Suparman also expresses that good faith acts as a legal principle for the reinforcement of the national arbitration body, by the grant of independent execution

⁹ Bernardo M. Cremades, "Good Faith in International Arbitration," *M. American University International Law Review* 27 (2012): 761.

¹⁰ *Ibid.*, 789.

¹¹ Emily Sipiorski, "Good Faith in International Investment Arbitration," *European Journal of International Law* 3, no. 4 (November 2019): 1458.

authority.¹² Therefore, it is widely known that good faith is a fundamental principle on the arbitration system.

In this case, we have decided to point out the connection between maintaining trust and confidentiality with good faith. In reality, there are still many circumstances where an arbitration award is not executed by the disputing parties even though its validity is recognized (*diakui*).¹³ This shows that even though the arbitration clause is legally valid, there may be a possibility that the disputing party does not execute it. On understanding this reality, we have found that the root of the problem is the disputing parties simply does not apply the principle of good faith, which then causes trust and confidentiality to not be maintained as well.

For example, on the Pertamina and PLN vs. KBC case, the reason behind why the award is not executed is because Pertamina submitted an annulment of the arbitration award to the Central Jakarta District Court.¹⁴ Firstly, this act is clear sign that Pertamina is not applying good faith to the arbitration award. Secondly, because Pertamina did not apply good faith to the arbitration award, this has caused the trust and confidentiality principle of the award to not be maintained as well.

Pertamina has broken the principle of trust by not executing the arbitration clause, to which they have consented and agreed to when they made the award. In terms of confidentiality, Pertamina has not maintained it by disclosing the award which comes as a consequence when they submitted the annulment to the Central Jakarta District Court. This has made the award open to public, thus not in line with the principle of confidentiality which is based on the private nature of the dispute.¹⁵

¹² Nelly Novianty, Muhammad Amirulloh, Rika Ratna Permata, Eman Suparman, “Strengthening The Independent Execution of The Rulings of The National Arbitration Body Based on Legal Principles and Theories,” *Journal of Legal, Ethica and Regulatory Issues* 25, no. 1 (2022): 10.

¹³ See, for example the Pertamina and PLN vs. KBC case; PT. SA vs. Vinmar Overseas Ltd case; Bankers Trust Company vs. Pt. Mayora Tbk case; and AAAN PLC vs. PT. APM case.

¹⁴ Central Jakarta District Court, Decision No. 86/Pdt.G/2002/PN.JKT.PST.

¹⁵ Bernardo M. Cremades and Rodrigo Cortes, “The Principle of Confidentiality in Arbitration: A Necessary Crisis,” *Journal of Arbitration Studies* 23 (August 2013): 27.

This thesis is justified, through this paper, by observing the domino effects of good faith. Thus, the formulation of the problem answered in this paper is: how does good faith manifest in trust and confidentiality in arbitration?

First, all these three principles are elaborated descriptively. Afterwards, in the final part of discussion, there is a conclusion that good faith is an initial point of maintaining both trust and confidentiality – failing to have good faith will automatically fail the other two principles.

There are a few things that need to be pointed out. First, the research object of this paper is the principles. The existing laws have limitations in providing further explanation in respect of this matter. In defining good faith, trust, and confidentiality, the authoritative dictionaries, doctrines, and our careful analysis thus become the key tools. Nevertheless, the relevant laws and regulations are still necessary to see the existence of these principles, although it is not explicit.

Second, the realities that involved parties in arbitration did not apply these principles are kept confidential. Many readers might find that this paper is not proven by facts even though the main cause of writing this paper is such realities. We do not do that for the sake of confidentiality. If revealing the facts is necessary, we only use the cases that have been submitted for annulment.

However, in order to maintain this principle, we are only focusing on the logic behind the connection between these three principles. This is because the principle of good faith acts as a continuity with the principle of trust and confidentiality, whereas if the principle of good faith is not applied, it additionally has a causality effect that makes the principle of trust and confidentiality to also not be maintained.

B. Discussion

B.1. Definition and importance of good faith

Etymologically, good faith (iktikad) is rooted from the Arabic اِعْتِقَاد (i'tiqād) meaning belief (faith) or opinion.¹⁶ In essence, in the context of arbitration, good faith is an intention

¹⁶ KBBI Daring, “Arti Kata Itikad,” accessed on January 28, 2022, <https://kbbi.web.id/itikad>.

to resolve a dispute on the basis of these three grounds:

- a. Truth;
- b. Benefit; and
- c. Justice.

There are several implications that arise directly from these grounds. First, the purpose/intent of submitting a case to an arbitration institution is to settle disputes, not merely to gain claims as much as possible. Second, this purpose has an implication on the way the arbitration process is done; the disputing parties should not cherry-pick facts and arguments that are in his favor. To Priyatna, arbitration is a dispute settlement, the same as the court, that bases its resolution on evidence provided by the parties, but with honesty and willingness.¹⁷ Pursuant to Article 70 of Law Number 30, manipulating and hiding relevant facts could be, in fact, reasons for annulment.

Hesselink mentions that good faith must objectively be understood as the implementation of the contract that does not only depend on the clause but also has to be done properly and reasonably.¹⁸ As deduced from Article 1338 Paragraph (3) of Civil Code, mentions that the principle of good faith is the basis in which the parties involved must abide by the contract based on trust or goodwill. However, Butarbutar states that even though the contract must be carried out in accordance with good faith, it should also be carried out before making the contract as a consideration to make or not to make the contract.¹⁹ Hence, the formulation of the principle of good faith must be interpreted in two ways:

- a. The subjective sense; and
- b. The objective sense.

From the subjective sense, it relates to the inner attitude of the party involved, in the form of honesty to make contracts and good intentions. From the objective sense, it refers to

¹⁷ H. Priyatna Abdurrasyid, *Penyelesaian Sengketa Komersial Nasional dan Internasional) di Luar Pengadilan*” (Scientific Paper published on September 1996), 1.

¹⁸ Hesselink, M.W., “The concept of good faith,” *Towards A European Civil Code, Fourth Revision Expanded Edition* (2010): 619.

¹⁹ Elisabeth Nurhaini Butarbutar, “Implementation of Good Faith Principle as an Effort to Prevent the Business Dispute,” *Journal of Advanced Research in Law and Economics* 9 (2020): 1134.

the norm applicable, in a sense that the contract is carried out in accordance with the norms that have been agreed in the contract.²⁰

Based on Black's Law Dictionary, good faith is a thought that consists of four elements.

- a. The first element is honesty in intent.²¹ This means that the demonstrated intention is sincere to resolve the disputes.
- b. The second element is loyalty to duties or obligations.²² This element is one of the concrete manifestations of someone that is consistent with his good faith.
- c. The third element is compliance with the commercial standards in transactions.²³
- d. Fourth, a person with good faith does not cheat on the system or seek personal gains, but does have the intention for the sake of collective goods.²⁴

The next question is: why is good faith necessary in arbitration? Normatively, the term "itikad baik" (good faith) is mentioned 3 (three) times in Law 30/1999. According to these several provisions, good faith must be the basis of both in making an arbitration clause and in the arbitration process when a dispute arises.

- a. Article 6 paragraph (1).

In this context, good faith is discussed at the stage that arbitration is being selected as a method of dispute resolution or the creation of an arbitration clause.

- b. Article 6 paragraph (7).

In this context, good faith is discussed in the stages of the arbitration process carried out by the disputing parties.

- c. Article 21.

In this context, good faith is discussed at the stage of the arbitration process carried out by arbitral tribunals.

²⁰ *Ibid.*

²¹ Also look at Anita Dewi, *Asas Itikad Baik dalam Penyelesaian Sengketa Kontrak Melalui Arbitrase* (Bandung: Alumni, 2013), 95.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

Beside its normative importance, good faith, based on our observation, has 3 (three) practical importance. First, the application of good faith has the potential to have a ripple effect. When one party applies the principle, it is more likely that the other party applies it as well. Second, the application of good faith by both parties makes the dispute resolution process in the nuances of honesty, not adversarial. Third, from the side of arbitral tribunals, the application of good faith in the dispute resolution process will make the tribunals easier in making fair awards. The disputing parties not having good faith will complicate the process by hiding or manipulating facts.

B.2. The trust principle

Percaya (trust) is, etymologically, rooted from the Sanskrit word प्रत्यय (*pratyaya*) which means oath, description or concept, stance, idea, assumption, belief, awareness, proof.²⁵ Meanwhile, in terms of terminology, there are four meanings of trust. They are as follows:²⁶

- a. Admitting or believing that something is true or real;
- b. Assuming or believing that something really exists;
- c. Assuming or believing that someone is honest (not evil and so on);
- d. Being very sure or ensuring someone's or something's ability or advantage (that will be able to meet (his/her) expectations).

In the other words, trust is a psychological behavior that is concerned with accepting what the other people, that have been given an expectation, do in order to fulfill that expectation.²⁷ By also looking at the Oxford English Dictionary, trust is the belief that someone or something is good, sincere, honest, and so on, and will not try to hurt or deceive those who believe.²⁸

²⁵ KBBI Daring, "Arti Kata Percaya," accessed January 28, 2022, <https://kbbi.web.id/percaya>.

²⁶ *Ibid.*

²⁷ Donni Juni, *Perilaku Konsumen: Dalam Persaingan Bisnis Kontemporer* (Bandung: CV Alfabeta, 2017), 116.

²⁸ Oxford Learners Dictionary, "Arti Kata Trust," accessed January 28, 2022, https://www.oxfordlearnersdictionaries.com/definition/english/trust_1?q=trust.

From this linguistic construction, there are two important elements that appear in trust: willingness and expectations. In respect of willingness, rationalizations and considerations are based on:

- a. The existence of abilities/skills that can be entrusted to solve a problem or more; and
- b. The existence of integrity or morality in a narrow sense in solving that problem.

These two influence one another. A person will find it difficult to trust the other person having an ability but lacking honesty and often committing fraud. Likewise, that person will also find it difficult to trust the other person that is honest but not able to solve the problem.

Meanwhile, with respect to expectation, it is the goal to which the willingness is directed. The form of expectation in arbitration is, normatively, the disputes being resolved on the basis of truth and justice. From the perspective of the disputing parties, this expectation as well as willingness do not only arise due to a factor commonly referred to as relational trust (trust based on the quality of the arbitrator).

However, another aspect, which can also generate trust, is from the concept of procedural justice (trust based on formal proceedings in arbitration). Tom R. Tyler, a professor of legal psychology at Yale Law School, in his book entitled “Psychology and the Design of Legal Institutions” reveals the importance of fair settlement procedures to public trust in resolving disputes in court.²⁹ In essence, the community will still be satisfied with the results, even if they lose, if the court procedures they go through are carried out fairly and objectively.

The existence of trust, as a principle in arbitration, cannot be found explicitly in the arbitration laws while in some other laws, principles are explicitly stated.³⁰ There are, however, several things that can be observed to check the existence of trust as one of the principles.

²⁹ Tom R. Tyler, *Psychology and the Design of Legal Institutions* (Nijmegen: Wolf Legal Publishers, 2007), 22.

³⁰ An example is Chapter II in Law no. 48 of 2009 concerning Judicial Power which contains principles in the administration of judicial power. Another example is Article 5 in Law number 30 of 2014 concerning Government Administration which regulates the existence of three principles in the administration of government (legality, protection of human rights, and general principles of good governance (AUPB)). Article 5 of Law number 30 of 2002 concerning the Corruption Eradication Commission (KPK) also contains the same thing, namely the principles that must be obeyed by the KPK in carrying out its duties and powers, such as legal certainty, transparency, accountability, public interest, and proportionality.

First, trust is justified because, from the beginning, it has already existed since the parties decide that they choose arbitration to resolve their dispute. The implementation of the principle of freedom of contract, in choosing what forum will be used to resolve disputes, implies trust in it. The choice of forum – in this case is arbitration – can only be made if the parties, without the people in the forum, have agreed that their dispute will be resolved through that forum. The principle of trust is different than the principle of consensualism.

Etymologically, consensualism roots from the word “consensual” meaning the willing agreement of all the people involved.³¹ Tan Kamello states that the *a quo* principle is an essential basis of contract law, relating to the birth of the contract.³² Further, Badruzaman mentions that by treating an agreement to make an agreement, both parties must have free will.³³

The agreement made by the disputing parties is binding as a law for the parties that made it, thus each party must respect the clauses containing the rights and obligations contained in the treaty.³⁴ The principle of consensualism governs the agreement on both sides, making a conformity between the will and the statements made by the disputing parties, so that the agreement can legally be held accountable.³⁵

To this understanding, the principle of consensualism can be concluded as a principle that is applied when a contract is made. Normatively, based on Article 1320 Paragraph (1) of Civil Code, consensualism is where one of the conditions of the agreement is the existence of the consent of both parties. Salim further states that the agreement is a conformity between the will and the statements by each party.³⁶ To further elaborate, this principle arises at the very beginning when the disputing parties give consent and agreement to the arbitration clause.

³¹ Cambridge Dictionary, “Arti Kata Consensual,” accessed January 29, 2022, <https://dictionary.cambridge.org/dictionary/english/consensual>.

³² T. Kamello, *Civil Law, Personal, Family and Property Law* (Medan: Usu Press, 2012), 17.

³³ M.D. Badruzaman, *Compilation of Contract Laws* (Bandung: Citra Aditya Bakti, 2001), 18.

³⁴ Tarmizi, “The Principle of Consensualism and Freedom of Contract as a Reflection of Morality and Legal Certainty of Contract Laws in Indonesia,” *Webology* 17 (December 2020): 345.

³⁵ H.A Dardiri Hasyim, “Reconstruction of the civil code article based on the value of contractual justice,” *Jurnal Hukum Volkgeist* 4 (June 2020): 144.

³⁶ Salim HS., *Perkembangan Hukum Kontrak Innominaat di Indonesia* (Jakarta: Sinar Grafika, 2008), 22.

On the other hand, the principle of trust acts as a continuity of the principle of consensualism, whereas after both parties give their consent to the arbitration clause, they trust each other to execute the arbitration award. This means, that if they were ever to have a dispute in the future, they would settle it by arbitration. Even though both of them firmly highlights on agreement, they have a slight difference as to when they are applied. For the principle of consensualism, it is applied early on when they make the contract, while on the contrary, the principle of trust applies after the principle of consensualism when both parties trust the other on executing the arbitration clause they have consented to.

Second, not only do the parties have the freedom to choose arbitration as the forum, they also have the freedom to choose which arbitrator to sit in the tribunal (personal level) pursuant to art. 9 (3) and the explanatory part of Law 30/1999. It is one of the advantages in arbitration that the disputing parties can choose their own arbitrators that are having integrity, honesty, expertise and professionalism in the disputed field and are not at all in favor of the party who chose them. In this context, the trust concept that becomes the basis is relational trust. Arbitrators who are considered problematic in terms of ability and/or integrity will certainly not be chosen. In fact, an arbitrator chosen by the applicant party also needs to seek approval from the respondent party.³⁷ In other words, the arbitrators chosen are actually the choice of both parties.

Third, this trust is also concretized in the perspective of the arbitration body. The body absolutely tends to make sure that it is trustworthy for disputing businessmen. These are some of the mechanisms to do that.

a. A strict process to be arbitrators of the body.³⁸

This strictness relatively exists in various law enforcement institutions, such as being judges of the general court. The distinguishing factor is that the arbitration body has an interest, like a company, to be chosen by the public in resolving disputes. Otherwise, the body will ‘die’ naturally. One of the legit reasons is that its source of funding does come

³⁷ Article 11 *Arbitration Rules and Procedures of the Indonesian National Arbitration Board 2021*.

³⁸ *Ibid.*, art. 10.

from disputing businessmen wanting to resolve their disputes through arbitration instead of the government.

- b. The mechanism to give sanction to arbitrators not maintaining this principle.³⁹

In addition, one of the factors that influence trust in dispute resolution institutions is the reality of bribery. The arbitration body has interest in respect of this matter; if there is even a single bribery case, it will naturally affect the existence of the arbitral tribunal. Especially in a business world with a strong profit-and-loss orientation, the parties will choose the most credible body to resolve disputes objectively, not institutions without integrity. To date, there have been no cases of corruption or bribery involving BANI's arbitrators.

- c. The existence of the right of denial based on arts. 22-26 of Law 30/1999 and art. 12 of *Arbitration Rules and Procedures of the Indonesian National Arbitration Board 2022*.

One example is that after the parties determine arbitrators that will resolve their dispute, they are prohibited from meeting personally with the parties. If this is found, one of the parties can file a right of denial which will be assessed by the body to replace those arbitrators breaking that rule.

In practice, maintaining trust is crucial before, during, and after the arbitration process is carried out. Before the process begins, the basis of the arbitration clause has to be trust. Otherwise, the dispute resolution process through arbitration becomes ineffective as both parties do not trust one another. By nature, a person wanting to make a legal relationship with another person, expects something in return; and this expectation is in the form of rights. In parallel, the fulfillment of this expectation will happen once obligations have been done; in this context, the person has to make sacrifices.⁴⁰ In fact, even if these sacrifices have been made, there is no guarantee that the rights in return will be completely the same as was expected.

The absence of the guarantee requires the existence of a trust that must be based on careful rationalizations. For example, John Gabarro of Harvard Business School suggests that the person will look at the track record of the other person he will trust, both in terms of ability

³⁹ Article 10 *Code of Ethics and Code of Conduct for Arbitrators*.

⁴⁰ In Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT. Citra Aditya Bakti, 2014), 131, Prof. R. M. T. Sukamto Notonagoro suggests that right is a power to accept or do something that is supposed to be taken or be done.

and integrity.⁴¹ At the same time, the comparison process – comparing that other person with another person as an additional option – will also take place to make sure his choice is right. In other words, the relationship has to be mutualism.

Likewise, when legal relationships are being carried out, trust must always exist. In the context when these relationships are being carried out, there have been sacrifices from each party to one another. If distrust arises, the quality of these legal relationships can be disrupted or even stopped; the redundancy becomes inevitable. In fact, trust principle will determine whether the disputing parties will re-establish their relations in the future. Once each of them is not trustworthy, the future relations will be unlikely to happen.

B.3. The confidentiality principle

Based on *Kamus Besar Bahasa Indonesia* (KBBI), secrets (*rahasia*) are something that is deliberately hidden to let no one else know.⁴² Meanwhile in the Oxford Dictionary, confidentiality is a situation where someone expects that someone else will keep the information, which is told, secret; in the verb, the word that is often used is to confide.⁴³ Etymologically, confidentiality comes from the Latin “confidentia” or in English “confidence” which means trust in the others. In popular usage, confidence is used to refer to confidence (intra-personal side), but confidence is also the equivalent of trust (interpersonal side).

Furthermore, in the Oxford Dictionary of Law 5th Edition, the search for the word “confidential information” will be directed to the term breach of confidence (violating the trust that has been given). By definition, the term is a disclosure of confidential information without getting permission.

The reason the information must be kept confidential is because its disclosure would be detrimental to the interests of the businessmen concerned. One type of information referred to, both referring to the Oxford Dictionary of Law and the Black’s Law Dictionary, is trade secrets.

⁴¹ Sabrina C. Salam, “Foster Trust through Competence and Integrity,” in *The Blackwell Handbook of Principles of Organizational Behaviour*, ed. Edwin A Locke (New Jersey: Blackwell Publishing, 2017), 285-299.

⁴² KBBI Daring, “Arti Kata Rahasia,” accessed on January 28, 2022, <https://kbbi.kemdikbud.go.id/entri/rahasia>.

⁴³ Oxford Learners Dictionary, “Arti Kata Confidentiality,” accessed January 29, 2022, <https://www.oxfordlearnersdictionaries.com/definition/english/confidentiality?q=confidentiality>.

There are four elements of confidentiality, in the context relevant to this paper, namely:

- a. information;
- b. that information affects the interests of the businessmen concerned;
- c. contains interpersonal aspects in the form of trust in keeping the information confidential;
- d. confidentiality is not always confidential as long as there is a context in which the interests of others will be disturbed if it is not disclosed.

Related to the first element, based on KBBI, information is enlightenment (*penerangan*).⁴⁴ From its root word, namely “light”, enlightenment means assuming that something that was originally dark becomes visible. If this understanding is contextualized in terms of information, information makes people who do not know become know. While, in general, the substance of information has no limits, information in essence contains words and sentences that contain something that makes people know.

However, in the context of confidentiality in arbitration, the information is limited in terms of its scope. Only information that affects the interests or reputation of disputing businessmen can enter the universe of information that is being discussed. More concretely, the information is actually not only related to trade secrets, but also everything related to the disputed materials. A good reputation has both relational and market importance.

Third, confidentiality contains an interpersonal aspect. For example, the disputing parties trust the other party – in this case, arbitral tribunals – to maintain the confidentiality of the information. Pursuant to Article 1 paragraph (7) of Law 30/1999 which states, “[a] arbitrators are one or more persons selected by the disputing parties ... to give an award regarding a particular dispute submitted to the settlement by arbitration”. This selection implies confidence in the selected arbitrator. According to Emmanuel Gaillard and John Savage, one of the four arbitrators’ obligations, to maintain that confidence, is that they must maintain the confidentiality of all matters relating to the arbitration cases they are settling.⁴⁵

⁴⁴ KBBI Daring, “Arti Kata Informasi,” accessed January 29, 2022, <https://kbbi.kemdikbud.go.id/entri/informasi>.

⁴⁵ Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Hague: Kluwer Law International, 1999), 609-613.

Last but not least, confidentiality is also contextual and can be open but very limited. In general, confidential information should be disclosed whenever the interests of other parties are compromised when the information is not disclosed. However, notifying such information must be based on careful rationalizations. First, the information will not be circulated to irrelevant parties. Second, the notification is done for a specific purpose, such as solving the cases.

Confidentiality in arbitration is an important principle that needs to be applied while settling a dispute in arbitration. Reuben elaborates that confidentiality in arbitration is adversarial in nature, meaning the parties concerning already safeguard sensitive evidence.⁴⁶ This concludes that in protecting their evidence in arbitration, the principle of confidentiality will ultimately continue.

Nonetheless, confidentiality has become one of the most controversial issues in arbitration. On the one hand, confidentiality is widely recognized as an important advantage, contributing to its attractiveness.⁴⁷ Whereas on the other hand, there is no uniform regulation in national legislation or arbitration rules as to the scope or to the existence of a duty of confidentiality.⁴⁸ This has made an ongoing doctrinal debate over the existence of an implied duty towards confidentiality, in the absence of a legal or contractual basis.⁴⁹ Thus, it has become important to take a uniform approach towards confidentiality in international commercial arbitration.

In terms of importance, confidentiality needs to be approached normatively. Confidentiality is not stated, explicitly, as a principle of Law 30/1999. However, its absence, in an explicit way, does not mean that it is not the principle. Moreover, although confidentiality is related to the procedural aspects of arbitration, its existence has a great influence on the substance of the disputes.

⁴⁶ Richard C. Reuben, “Confidentiality in Arbitration: Beyond the Myth,” *Kansas Law Review* 54 (2005-2006): 1280.

⁴⁷ For example, Ashford (2014), 217; Pryles (2014), 109; Queen Mary University of London in partnership with White & Case 2015 International Arbitration Survey, 6.

⁴⁸ For example, Paragraph (31) of *UNCITRAL Notes*.

⁴⁹ Elza Reymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Commercial Arbitration* (Switzerland: Springer Publisher, 2019), 1.

Confidentiality in arbitration is contained in Article 27 of the law. Pursuant to it, all arbitration trials by an arbitrator or an arbitral tribunal, are closed and not opened for the public. These closed trials are different from the trial procedure in the general court that is opened for the public. In contrast to the provision in Law Number 48/2009 concerning Judicial Power in which it is stated that court decisions are only valid and have legal force if they are pronounced in a trial open to the public;⁵⁰ there is no such provision in Law 30/1999.

In addition, on the Explanation Part of the law, confidentiality is one of the advantages of arbitration over the other institutions. This assumes that there is a general understanding in arbitration procedures that confidentiality is a procedural entity that must be maintained in the entire implementation of dispute resolution through arbitration.

The normative basis for confidentiality is also found in the internal regulations for the arbitrators – in this case is the regulations issued by BANI. Pursuant to Article 14 paragraph (2) (Confidentiality Section) of the 2022 BANI Indonesia Arbitration Rules and Procedures:

“All trials are closed to the public, and all matters relating to the appointment of arbitrators, including documents, reports/records of trials, witness testimonies and decisions, must be kept confidential between the parties, the arbitrators and BANI, except by laws and regulations it (that confidentiality) is not required or agreed upon by all disputing parties.”

This is also in line with Article 6 of the Code of Ethics and Guidelines for Arbitrators’ Conduct, in which it is stated in several paragraphs that:

- a. The arbitrators are obliged to maintain confidentiality on all matters relating to the case, the course of the Arbitration process, the results of the deliberation of the arbitral tribunals, and/or the awards, before and after the awards are read to the disputing parties;
- b. The arbitrators are prohibited from discussing the cases they are settling outside the court proceedings;
- c. The arbitrators are prohibited from using confidential information obtained during the Arbitration process for their personal interests or the interests of others.

⁵⁰ Article 13(1) jo. Article 52 (1) *Law Number 48 of 2009* explain that the courts have to make their decisions accessible to the public.

On an international perspective, other jurisdictions have an implied duty regarding the confidentiality clause, several of which are the Indian Arbitration and Conciliation Act, the English Arbitration Act, and the Singapore Arbitration Act. To those jurisdictions, Popat has stated that the obliged confidentiality in the arbitration agreement comes to place either by an expressed confidentiality clause, or implication.⁵¹ On an effort to make a uniform approach towards confidentiality as a way to solve the ongoing doctrinal problem it has as stated before, Reymond-Eniaeva has made it clear that it can be achievable by the harmonization of national arbitration laws.⁵² They propose that rules on confidentiality be introduced to the UNCITRAL Model Law and into national arbitration laws.⁵³ A good example can be set by Switzerland through introducing these rules into Chapter 12 of the Private International Law Act.⁵⁴

The importance of confidentiality could also be observed in practice. First, it is to maintain the reputation of the concerned businessmen. Besides, from the side of arbitral tribunals, the confidentiality guarantee helps them settle the disputes.

Normally, businessmen are apt to settle their disputes in a format not open to the public. Rosan Perkasa Roeslani, the former Chairman of the Indonesian Chamber of Commerce and Industry (Kadin), provides testimony that such a format protects companies' reputation.⁵⁵ As written by Margarot Jacoby in Huffpost, not only does a lawsuit cost a company a lot of money, regardless it has been dismissed by the court, it also makes customers hesitant to do business with that company.⁵⁶ The reason is that the news spread cannot be filtered by the company; thus, customers play safe to stay out of the trouble. In the other words, reputation becomes one of the main business assets responsible for sustained financial outcomes.⁵⁷

⁵¹ Mihir Popat, "Confidentiality in Arbitration – to what extent does it hold up," *Jus Corpus Law Journal* 1, no. 4 (June-August 2021): 226.

⁵² Eniaeva, *Towards a Uniform Approach*, 855.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Badan Arbitrase Nasional Indonesia, *The Role of BANI in the Development of Arbitration* (Jakarta: BANI, 2020), 68.

⁵⁶ Margarot Jacoby, "How Employment Lawsuits Can Ruin Your Small Business," *Huffpost*, accessed February 18, 2022, https://www.huffpost.com/entry/how-employment-lawsuits-c_b_7737362.

⁵⁷ Peter W. Roberts and Grahame R Dowling, "Corporate Reputation and Sustained Superior Financial Performance," *Strategic Management Journal* 23 (September 2002): 1077, <https://doi.org/10.1002/smj.274>.

Meanwhile, arbitral tribunals also have an interest in the existence of this principle. They need as much data as possible to be able to resolve disputes appropriately and fairly. Lack of and/or defects in information will affect the precision of the judgment they will make on cases they are resolving. One of the most significant methods is that they must provide assurances to the disputing parties that the information will not be circulated to irrelevant parties. This assurance is found in the arbitrator's code of ethics, where arbitrators are prohibited from discussing cases they are handling outside the trial.

B.4. Manifestations of good faith

Good faith is the initial point; thus, it is the basis of the application of the principle of trust and the principle of confidentiality. The logic is that the initial point affects the process and the end. In other words, the application of the principles of trust and confidentiality is a ripple effect of whether the parties have good faith in settling their disputes through arbitration.

Two aspects, as to how this point manifests in the application of those two principles, that need to be further elaborated are:

- a. The relationship between arbitral tribunals and disputing parties; and
- b. The relationship between the disputing parties.

In arbitration, the intention is to resolve disputes. In the other words, the trust given to arbitral tribunals is to resolve disputes, not to defeat one of the parties or earn the maximum claim that benefits individually. From this trust, several implications emerge.

First, arbitral tribunals are not to represent disputing parties but to assist in resolving disputes. One significant difference between “to represent” and “to assist” is that the former is an act of acting on behalf of the ones selecting; thus, the interests that must be taken care of are the parties they represent. Meanwhile, in the context of the latter, if the appointing party is objectively proven to have made a mistake, the selected arbitrator must be giving a fair award on that mistake. In the other words, each arbitrator has to be both substantially and procedurally fair to each disputing party.

The second implication is that arbitral tribunals must implement the arbitrator's code of ethics, such as: not having conflict of interest, prohibition of doing harmful acts, prohibition of having an agreement with one of the parties, prohibition of meeting in person with one of the parties, and so on and so forth. Having integrity is one of the main reasons that can make disputing parties trust arbitral tribunals. For this reason, a right of denial mechanism is available if the parties find that one or more arbitrators do not maintain their integrity. Likewise, the parties may not do activities that make the tribunals not comply with the code of ethics.

Meanwhile, the second aspect relates to the relationship between disputing parties. When the arbitration clause is on their agreements, one another has agreed that arbitration will be the forum to settle any disputes emerging; this forum, as mentioned before, requires the parties to apply the principle of good faith to resolving their disputes.

The first implication is that honesty and non-adversarial should be the atmosphere of the arbitration process. While the second implication is that each party must not do deception, conspiracy, and fact manipulation in the process.

However, there is a trend that becomes a problem. Many cases have got into the annulment submission to the District Court. Until 2020, there were 137 annulment submissions. Despite only 7 (seven) applications that were granted by the court, there is an issue of trust emerging. This number shows that the submitting parties did not trust the tribunals in resolving their disputes due to the fact that most of the submissions were made on the basis that the tribunals had done trickery.

However, that this distrust was truly valid or just a way for them to prolong the process is still in question. On the other hand, if this trend keeps growing, the tribunals could not see that the parties have good faith in resolving their disputes although the tribunals have done their best in a fair way. Not only has this trend affected the relationship between the tribunals and the disputing parties, it has also affected the relationship between the disputing parties.

Although there is indeed the annulment mechanism in Law 30/1999, the mechanism has caused the ineffectiveness of the dispute resolution through arbitration. Procedures that can

be carried out in an efficient and effective way are not achieved. This is also against the protection of information when the cases get published (in a District Court decision).

In business, information relating to disputes must be kept confidential in order to maintain reputation. In other words, not maintaining such confidentiality means deliberately damaging the reputation. Otherwise, it would be contrary to the good faith that has been agreed upon and desired to be achieved while determining arbitration as the settling forum.

In terms of circulation of information, both the Arbitration Board (the institution as a whole) and the disputing parties play a proportional role in maintaining the principle. Pursuant to Law 30/1999, it is stated that “All dispute examination by arbitration is closed to the public”. This characteristic depends on all the involved parties.

The first subject that needs to be looked at is from the Arbitration Board - in this context is BANI – and its arbitrators. The term “Board” is used to include all the internal staff, not limited to arbitrators, that know the incoming disputes, starting from the Chairman of the board, the Secretary General, the clerks, to the staff receiving the entry of cases. Although not all internals know the details of each case, names of the disputing parties will certainly be known by most of them. Though, circulating the names is not even allowed.

Arbitrators are one of the involved people that have the greatest responsibility in maintaining confidentiality. They are the ones assisting and helping disputing parties resolve disputes. Information, either confidential or public, related to the disputes has to be known by them because they need this to resolve disputes.

At the same time, with all the information that they know, they have to be trustworthy in maintaining the confidentiality of the information. One of the guarantees that can be given, by the Arbitration Board, is the imposition of the heaviest sanction against the arbitrator in the form of being removed from the BANI Arbitrator list accompanied by the revocation of the FCBArb predicate.⁵⁸ Reputation related to maintaining the confidentiality of incoming disputes is a determining factor for business people involved in disputes in choosing arbitration to resolve disputes.

⁵⁸ Indonesian National Arbitrage Agency. *Code of Ethics and Code of Conduct for Arbitrators*, art. 10.

The registrars also have a responsibility to maintain the confidentiality of disputes. Not only are they the minutest of the entire process of dispute resolution, they are also the ones that put arbitral tribunal's deliberations in arbitral awards. In the other words, they are in fact far more aware of the details of the case than the Chairman of the board; thus, the board needs to make sure that the registrars are trustworthy to maintain the information, one of which is to impose severe sanctions for the violation.

Then, the next subject is the parties outside the arbitration body such disputing parties. One example is letting irrelevant parties, such as other business people and the mass media, know about their disputes. We found a fact where a lawyer disclosed a dispute in arbitration through the mass media. The orientation is uncertain and could be:

- a. To undermine the reputation of the opponent in the case by giving one-sided arguments to the mass media; or
- b. To market itself as experienced and often-winning litigator in handling cases that go to arbitration.

The problem is that the disclosure of such information outside the court will not affect the success of the dispute resolution.

The problem is that neither the Arbitration Board nor the tribunals can do anything to this person. The authority to give sanctions is only to internal parties of the Arbitration Board. In fact, in the event that the disclosure of the information is carried out in the middle of the dispute resolution process, the arbitral tribunal is also not authorized to do anything against the party. Moreover, there is no special procedure for the affected party to take any countermeasures against the party that has disclosed the information.

Another example is submitting the annulment to the District Court, with the intention from the start that the submitting party submitting has an orientation to win the case, not to resolve the dispute fairly, regardless of winning or losing. By implication, when the award is submitted for annulment, it becomes open to the public. Due to the existence of this mechanism based on Article 70 of Law 30/1999, both the Arbitration Board and the tribunals cannot prevent the parties from submitting the annulment.

The findings of our study is that the manifestations of good faith relates and becomes the basis for the implication of the principle of trust and confidentiality. This is observed through the issue arising, where there are still submissions to annul an arbitration award. When a disputing party submits an annulment to the court, they automatically do not execute the principle of good faith. Subsequently, they have also broken the principle of trust and confidentiality.

Through the principle of trust, this act has made a distrust between the relationship of:

- a. The tribunals and the disputing parties; and
- b. The relationship between the disputing parties.

By submitting an annulment, the private information of an arbitral award becomes open to the public, which means they have also broken the principle of confidentiality.

Normatively, there is currently no comprehensive basis regarding these three principles (good faith, trust and confidentiality). Our resolution is to add several articles to the law:

- a. The first, will state explicitly what principles are included in the arbitration process as contained in several other laws. This article will provide an explicit normative basis for the parties in arbitration that these principles must be maintained when resolving disputes through arbitration. In addition, the article also needs to provide an explanation section regarding the definition of these principles.
- b. The second will be related to obligations and prohibitions for the disputing parties in arbitration, in a comprehensive manner i.e., the obligation of the parties to keep information confidential from any irrelevant people when arbitration is in process. This article should be supported by any suitable sanctions such as compensations for those breaking the obligations.
- c. The third suggestion is in relation to Article 70 of Law 30/1999. There will have to be a reformulation of what basis can be used to annul arbitral awards to prevent the information from being open to the public. These have to be restrictive and related to fundamental mistakes if its existence is still necessary.

Even though these normative suggestions have been provided, the human factor remains the determining factor. Even if the norms that have been regulated are good, the parties may still be searching for legal loopholes. Thus, the orientation in arbitration has to be the dispute resolution instead of attempting to win the maximum claim. To achieve this, maintaining the three principles is the key. Nevertheless, such a mental revolution still requires a long process, especially in the context of Indonesia.

C. Conclusion

The principle of good faith determines the success or failure of dispute resolution. Its position as the initial point becomes the basis for the application of the principle of trust and the principle of confidentiality in arbitration. In trust, good faith determines whether each involved party is trustworthy. While in confidentiality, disputing parties not maintaining good faith may not keep the information confidential from irrelevant parties.

The problem is that there are still realities where a disputing party submits an annulment to their arbitration award. This shows a sign that the principle of good faith is not applied. As a consequence, this act has also broken the principle of confidentiality and trust. The root of the problem to these realities is simply because the parties involved does not apply good faith while executing it.

To solve this occurring problem, we must first find a resolution to ensure that the disputing parties apply the principle of good faith. This can be achieved by imagining good faith not as an abstract statement written by the law, rather a concrete one that can be implemented into physical efforts by the parties involved. This resolution can only be found by analyzing the factors that cause these realities, which consists of: 1) normative factors; and 2) human factors.

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