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Research Paper

Competency Indonesian National Board Of Arbitration And Dispute With Checking Court Of Arbitration Clause

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ABSTRACT:- *This study aimed to (1) selection of judicial dispute resolution clause in the agreement made by the parties, (2) the authority of the judiciary in checking dispute arbitration clause. This is a descriptive study. Who become informants in this study is Jakarta District Court Judge, Notary and Legal Consultants/ Advocates. The data was collected through observations, interviews and documentation. Data were analyzed qualitatively. The results showed that 1) the selection of judicial dispute resolution clause in the agreement made by the parties occurred because of the type of agreement and the agreement was made. Agreement adheres to the principle of freedom of contract and pacta sunt servanda. But, the basic contractual freedom has limitations, all meet the provisions of Article 1320 of the Civil Law Act, does not violate public order, decency, morality, and not otherwise specified by law. Things that bankruptcy court authority to go into arbitration (Article 303 UUK and PKPU). 2) the District Court authorized check are based conflict arbitration clause obligation to check the judges (Article 10 Judicial Power Law) and related to the cancellation of arbitration decisions, when meeting the conditions as stipulated in Article 70 of Law of Arbitration and considered a violation of public order, as opposed to law and propriety. For that matter, should be applied to the basic lex specialis legi derogat generalists, Judicial Power Law as a general Law and Arbitration Law as Special Law.*

Keywords:- *Competence, Arbitration, Commercial Court, The District Court*

I. INTRODUCTION

In globalization era, the world trade has growing up so fast, the world trade is more advanced , specially in business development that recognized with many international agreement both multirateral and bilateral, where Indonesia is involved in it. On one agreement is usually written the regulation of solve the conflict, which is the way that determined if two parties involved in conflict (Widjaja, 2008)[1]. The Legal contract or agreement in Indonesia is using the open system, means the wider freedom to public to held the various of agreement, as long as not against the law, public regulation and decency (Subekti, 1990)[2].

Monetary Crisis that had happened in was actually due to the currency of rupiah change of matter that went down so weaken the ability to financing among business (Lontoh, 2001)[3]. The decreased of production activities, the decreased of selling and service relating to it weaken too. The fulfillment of obligation od debt payment was disturbing due to the foreign currency that must be buy with the rupiahs that the infact had more difrrentiate (Randa Puang, 2011)[4].

The ability in business in order to develop it busisness was interrupted not even to keep the continuitas of their activities, remind the money of the trader mostly come from credit from bank, investation or other that allowed, that have increased many problem. This situation was very much involved the ability to fulfill its obligation to debt payment. Debt is an obligation caused by the agreement or Law that must be fulfill by the debtor to the creditor and if not able to fulfill, the caused the right of creditor to get the fulfillment from debtor of the property of debtor trough bacnkruptcy.

Look to the business activity or trade with hundreds of transaction everyday, un able to avoid the dispute between the parties. Much more and wider the business activities caused the frequent of higher dispute. Which is need to solved (Margono, 2004) [5].

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There are many ways can be go trough by the parties to solve their conflict ,like trough informal agreement, conciliation, arbitration and court whether district court or commercial court (Soemartono, 2007) [6].

There are 3 (three) main factors that involved the dispute resolution process, like interest, right, and power (Margono,2004) [5]. Within the parties especially in national scale and international is not really popular to apply the dispute to the district court or commercial court. It is due to the long process of of trial or because the court character is must be open hearing for public while the trader dislike to publish their business problem. On 12 Agust 1999, The Government of Indonesia had ratified the Law number 30 year 1999 of Arbitration and dipute resolution arlternative. Apart from that, the recognition of arbitration as one of the alternative of dispute resolution dan can be find under chapter XII article 58 and article 59 point (1) and point (2) Law Number of 48 year 2009 of Judge Power, that mentioned about the effort of civil dispute resolution of outside of the court while trough arbitration or alternative of dispute resolution. While arbitration is a resolution for civil dispute outside of court based on arbitration agreement that written by the parties and the dicision of arbitration are finak and legally binding for the parties.

The government of Indonesia also had ratified two convention that arranged arbitration, like : 1. Convention of the Recognition and Enforcement of Foreign Arbital Award) trough the President decision number 34 year of ratification on Convention of the Recognition and Enforcement of Foreign Arbital Award (Harahap, 2006) [7], and 2. Convention on the Settlement of Investment Dispute Between State and National of Order State-ICSID, that had ratified on 1968 trough the Law number 5 year 1968 of Convention on the Settlement of Investment Dispute Between State and National of Order State-ICSID (Harahap, 2006) [7].

Apart from those conventions, there is a regulation of arbitration which is Nations Commission on International Trade Law (UNCITRAL) (Harahap, 2006) [7]. On article 5 of Law arbitration arranged that dispute able to settlement trough the arbitration only the dispute on trade field and due to the right according the the law and regulation that known very well by the parties.

The bankcruptcy institution is not new instituition in Legal system of Indonesia. Indonesia had the regulation that arranged the bankcruptcy since on colonial era that mentioned under *Verordening op het Faillissement en de Surseance van Betaling de Europeanen in Nederlands Indie* (*Faillissement Verordening*), Staatsblad 1905 number 217 juncto Staatsblad 1906 number 348. According to Staatsblad 1906 number 348, The regulation of bankcruptcy had entry into force on 1 November 1906 and after that not existed anymore the regulation under book III of Book Of Trade Law (Subhan, 2008) [8]. On 22 April 1998, the govermnet issued the government regulation as repkace the government Law number 1 year 1998 of replacing of law of bankcrupcty (*Faillissement Verordening*), then legalized to the law number 4 year 1998 of bankcrupcy, since it was not along together with the demand and law development in society. One of the important change from the bankcrupcty Law is the establishment of the commercial court. Within its development, the law number 4 year 1998 of the bankcrupcty has replaced to the law number 37 year 2004 of the banckruptcy and delay of debt payment. According to the Law number 37 year 2004, kreditor is able to apply the statement of bankcruptcy to the commercial court, when all the requirement have fulfill, like minimum have two creditors whether the debtor do not pay it debt when due date comes.

The bankcrupcy is one of the legal institution that have important function in property rights when it meet with the right and obligation of legal subject. This institution is realization of the article 1131 on civil law (*paritas creditorium principle*) and article 1132on civil law (*pari passu prorate parte principle*) that mentioned about the legal subject responsibility (individu or corporation) to the agreement that have done trought it. Notem that not all the debtors allow to apply for bankcruptcy due to the Law number 37 year 2004 of bankcrupcy and delay of debt payment obligation. Beide of the legal matter, also there are another matter, like where the parties should apply when have the dispute that need legal settelement, is it obliged to contain the choice of law and choice of forum in its contract? With there choice of forum, (Convention on the Choice of Court: 1965). definitely, the parties choose arbitration as a media to settelement all the dispute that caused from the contract. Forum that have choosen by the parties to settelement the dispute is an absolute competence. While lately, the choice of forum caused the problem, when related to the competence of commercial court, district court and arbitration.

Futher more, under article 3 Law of arbitration, stated that district court have no authority to adjudicate the dispute of the parties that have binded under the arbitration agreement. And under article 11 point (a) Law of arbitration that mentioned an written arbitration agreement that exclude the right of the parties whom apply the settlement dispute or even different opinion that mentioned under agreement to the commercial court, to the district court and on point (b) arranged that district court must to reject and not take involved in a settlement dispute that have pointed trough the arbitration except allowed by the Law.

Morever, in fact, the court institution , whether district court and commercial court are still investigate the dispute and imposed decision although in agreement have mentioned the arbitration clause. Sample of case between PT Perusahaan Dagang Tempo (Tempo) versus PT. Roche Indonesia (Roche), where those parties have chosen the institution of National arbitration Indonesia, but the district court of South Jakarta still accepted the application of Tempo and decided under decision number 454/Pdt.G/1999/PN.Jaksel, on 25 January 2000.

Further more, the case of bankcrupcty from PT. Tiara Marga Trakindo versus PT. Hotel Sahid Jaya Internasional. Last relating to the application of banckrupcty statement of PT. Exim SB Leasing versus PT. Itamaraya Gold Industry Tbk. (http://hukumonline, 2002). PT. Environmental Network Indonesia and farmers group of pond FSSP Maserrocinnae versus PT. Putra Putri Fortuna Windu and PPF International Corporation, under the matter that become competence of arbitration.

Under some of contracts, clearly stated that incase of dispute on implementation of contract that will be solve trough district court or arbitration institution. Actually, arbitration is avoid to take the case of dispute into court. While caused some question, is allowed the district court or commercial court to examine the application of bankcrupcy that contained under the arbitration claused?

From all mentioned above, there is seemed to have uncertainty of which of the institution that have authority to solve the dispute of settlement case. Due to those reason, the writer need to choose tittle of dissertation " the Compentence of Arbitration and commercial court under the petition of Bankcrupcy "

Problem Formulation

Based on background above, the writer defined some problem formulation like:

1. How is the competence of district court on examine the case of bankcrupcy that cointained the arbitration clause?
2. How is the justice philosophy that contained under the arbitration and bankcruptcy?

Purposed of Research

1. To know and understanding the competence the district court and commercial court that contained the clause of arbitration in application of bankcrupcty.
2. To know and understand the philoshophy of justice that contained in arbitration institution and banckrupcty institution.

Benefit Of Research

This research is expected to give some benefit :

1. Like theorities, it expected to be bale to advance the knowledge in law that can develop the legal science, specially to contribute in academic and profession of the competence of arbitration, district court and commercial court that contained the arbitration claused.
2. In practicing, the result of its expected to give contribution to :
   - **a.** Public Society in order to more understand the arbitration institution, the competence of district court and the competence of commercial court in the future.
   - **b.** Those of business that have problem with the debt of problem to get the understanding of settlement so have a consideration to take a decision about how to solve the dispute.
   - **c.** Government, relating institution under the company empowerment that have the debt problem as contribute in provide and defined the regulation and policy that containe the business settelement dispute trough competence of arbitration, district court and petition of bankcrupcty.

II. RESEARCH METHOD

This is a descriptive study. Who become informants in this study is Jakarta District Court Judge, Notary and Legal Consultants/ Advocates. The data was collected through observations, interviews and documentation. Data were analyzed qualitatively.

III. RESULT AND DISCUSSION

1. Absolut Competence

a. Competence of Commercial Court

Under the Decision of Commercial court of Jakarta by decision number 80/Pailit/2000/PN.Niaga/Jkt.Pst dated on 3 January 2001. Under its decision, seemed the judge team of commercial court was not detail in giving the chance to debtors in carry on the arbitration decision voluntary trough the extra judicial that have existing law, while only the creditor that hve a chance to examine the competence of commercial court. Of Course, the attitude of the judge advance to the creditor parties, vice versa the debtor would aggrieved so caused the un justice situation. As same as the case number 07/Pailit/2001/PN.Niaga/Srby, the judge decision in compentence actually is not correct , while according to the judge, the applicant is the one who are wrong that used the arbitrar institution as mentioned in agreement claused. In case of leasing, the applicant have submit the billing to the suspected due to the arbitration claused in agreement. In this case, the applicant began to apply its case trough the arbitration institution to settelement dispute between them, while the applicant also submit the case trough the commercial case. So can be conclude that the applicant would no have fair to the suspect in case of the legal effort.

On case above, the applicant put the priority debt payment trough the commercial court . The existence of commercial court under the law of bankcrupcty have no integratif and coordinative yet. The examine of case in commercial court can be done by the judge and judge *ad hoc*. Procedural law that use by the commercial law is civil procedural law that mentioned under HIR/RBg, as mentioned under article 284 point (1) provided "…except provided y the law, the existing procedural civil law that implemented to the commercial court.."

Furthermore, the demanding in economic world for the whole directly proportional with the willingness to increased the work of commercial court, while can be seen from two track like the development from the authority absolute and the development from the authority relative. At least there are 5 field that dominant and willing to be wider its competence abosulut, like banking, state-owned,capital market and property and intellectual rights. The development of absolute competence on commercial court is a demanding, challenging and expectation from the justice seeker.

In order to develop the competence of commercial court in globalization era, need a well done concept to prepare the wider of its competence, so the commercial court would be trusted and credible in front of the justice seeker. The speciality of commercial court on the case of bankcrupcty which is have no appeal so if the parties have no satisfied might field appeal in cassation to the Supremen Court. The period of registration process, examined and imposed the decision on the commercial court to Cassation in Supreme Court strictly regulated for 60 days after the dated of registration of bankcrupcty statement. Related to it, under the procedural law on bankcrupcty case, there is breaktrough on process of examination quikly that from 2 to 4 years needed became only 180 days .

Futher more, the limitation of time in law have not given sanction if the time is overlimit. While the disloyalty to the limitation under the law to the bnkcruocty of debtor like limited company will infect to the investor trade in market capital, both in Jakarta and Surabaya.

In Some cases of bankcrupcty that appeal to the commercial court, the prove is not even simple like it supposed to be. On a case of bankcrupcty that have to improve is only the truth about there is a debt or not that based to accept or reject the application of banckruption that appeal to the commercial court. On practicing, the truth will be prove by the cases on bankcrupcty about the legal relationship that caused the problem of law that must be solve and not to be bankcrupt. The Commercial Court can be creat a mechanism of settelement dispute fairly, fast , open and effective. Fair means to protect the debtot and creditor in balancing, fast means to simple improve (article 6 point (3) Law Numbe 4 year 1998), the length of examine is 30 (thirty) days (article 6 point (4)Law number 4 year 1998), and the law effort of cassation (article 8 point (1) law number 4 year 1998), open means in examin process and solve that easy to known by the society, effective means the decision of commercial court can be used for debtor and creditor in solve their debts. (Wignjosumarto, 2003) [9] .

b. Competence of District Court

Based on result of research, the researcher have opinion that in every relationship of civil law, it might be caused the dispute due to the situation, where one party have problem with other party. The dispute comes from the situation where one party feel have disanvataged by the others. Usually began with unsastified feeling, and subjective also closed. When it continue then will caused the dispute. The dispute must be settelement to keep the relationship in balance and settelement must be done according to the Law or based on early aggrement. (*pacta sunt servanda*).

So if occur the dispute and/or dispute that have arbitration clause in its agreement to the district court, the district court still examine the dispute. The competence of court in district court based on 2 things, like the judge have obligation to examine as mentioned under Law of Judicial Power and related to the cancellation of arbitral decision as mentioned under article 70 law number 30 year 1999.

There are 2 (two) kind of rejection case by the judge:

1. The rejection with clear or un clear legal reason. The rejection to examine the case with the reason of lack or no legal regulation is not allowed. Judge recognice to know law very well and able to imposed decision based on its knowledge and belief which is know as *ius curia novit,*means the judge know law so must be imposed decision to the case that have examined.
2. The rejection due to law reason is aloowed the judge to refuse the case and imposed decision of case, for example the reason of competence, the reason of blood relationship, have been examined and imposed decision *(ne bis in idem*). *ne bis in idem* principle is a principle that related to the case that have examined and imposed decision by the judge. The judge is not allowed to re examine and imposed for second time due to the purpose of law the create a certainty law.

According to the researcher, in case of collision between the judicial power and law of arbitration about the authority of court in examine the dispute of arbitral clause. One side, the judicial power, arranged the obligation of judge to examine each case applying. While one side, the law of arbitral clause, have no mentioned the authority of court to the dispute of arbitral clause, the the implementation of *lex specialis derogat legi*

generalis necessary needed, while the Law of arbitral clause as special law and law of judicial power as general law.

According to the researcher, the legal instrument in Indonesia is based on freedom of contract principle. The instrument or agreement that made by the parties existed as mentioned under article 1338of civil law, means all the agreement made legally and enforceable as lawmaking. It is known as *pacta sunt servanda*. Howevar, its not mean that the freedom of parties without limitation. The limitation to the freedom contract have mentioned under 1320 of Civil Law. So according to the researcher that choice of court in dispute resolution that made by the parties.

According to the researcher, there is another factor that become a constraints so the arbitral decision is used to be difficult to execution and can be as internal and external factor. As internal factor, it can be come up from the reluctance of the party that can be defeated in arbitral decision to accept and carry on the decision voluntary.While the external factor is the district court have own the competence to execution if not given the execution permit. The consequently is the execution is never happen, even the party that win in arbitral decision able to execute by the court.

Based on result of researche, the district court have authority to examine the dispute of arbitral clause, when related to the cancellation of decision that imposed by the arbitral institution. Article 70 of legal arbitration arranged the things that able to used to cancel the decision of arbitral, but in practice the decision of arbitration also can be cancelled, when in examine by the judge recognized against breaking the general regulation and against the law (article 1339 Civil Law).

Actually, the dispute or case that have clause of arbitral is not allowed to apply in district court. And for the case that have imposed or arbitral decision can no be imposed again to the district court, except there is against the law, so the disadvantaged party can apply to the court based on tort, and in order to imposed the arbitral decision is not based on good faith principle, against public policy, against with the law and under article 70 law of arbitration.

According to the researcher, the district court should respect to the arbitral institution, not intervere due to the clear regulation .

2. Justice Philosophy and Bankcrupcty

The measure of justice interpreted differently. According to the researcher that justice is has many dimensions both in law and economic. Today we have discussion about justice that actually became a main topic in each of problem that related to the law enforcement.

The legal truth and justice have manipulated with the systematic way, so the court have no found the reality. The Government policy is not able to take the law becaome a head in determine the justice due to the discriminatic law. (Muchsan,2006 [10].

The researcher agree with John Rawls need to balance between persome and the same interest. How should is delivered measure and the balance that called justice. The justice is a value that bargaining agaian, because of justice guarantedd to living humanity stability. The justice is value that not allow to bargain because the justice is guarantee the stability of human being life. The regulations is need to avoid the conflict interest. New Law will be obeyed if able to keep the justice principles. John Rawls also stated that the demanding of main basic need have covered the basic rights, freedom, power, authority, challenge and welfare.

The concept of justice according to John Rawls have open c equality challenge to all the citizen to take part in politic and governance.The freedom of citizen according to their belief is come from the heart with the social justice in general.

So, the concept is guarantee the citizen to make a change to the law and regulation or law that un fair in one state, morevar the demanding of change must be based on law.

a. Reconciliation (*Win-win Solution)*

Arbitration is become choice of forum that trusted by the trader to solve the dispute outside of court. The settlement of dispute which is used the court raised the unsastified to the parties who are in conflict and public society. According to the researcher, the philosophy of justice analysis in arbitration to reach the reconcilation (*win-win solution*), like:

1. *Pacta Sunt Servanda* Principle

Pacta Sunt Servanda principle positively arranged under the regulation in article 1338 civil law , with main points :

a. Each of the agreement binded the parties
b. The legal binded is similar to the law
c. Can only be withdrawn by mutual decision

In this principle, stated that agreement that have the arbitral clause will bind the parties. As *a contrario*, the court have no authority to investigate due to the arbitral clause. So therefore, the falled off of the arbitral clause is must be from the agreement between two parties and there is no cancellation on sly. One of decision that mentioned clearly is on the supreme court decision number 3179 K/Pdt/1984 on a case of PT. Arpeni Pratama Ocean Line, with consideration, such as:

a. When the agreement contain the arbitral clause, the district court have no authority to investigate and decided the application of counterclaim under the convention or re convention . and
b. Release the arbitral clause clearly with the agreement that signed by two parties.

2. The freedom of contract principle as mentined under article 1338 point (1) of Civil Law

In Business practice, the agreement that have met often raised the dispute due to the conflict interest, so if didn't solve will lost the others. To enforce the justice between the parties, seemed to used the arbitral institution which is cover negotiation, conciliation and arbitration.

Negosiation is one of strategis of dispute settlement wherever the parties agree to settelemet the dispute trough deliberation and negositiation. In this process have no use the third parties because the representative of those two parties have inisiatiave to solve it themselves. Negosiation is one of settlement dispute trough direct negotiation between those parties to find the justice.

In other words, negosiation is a structure process where the parties that have dispute to find the solution between them. Apart from that, there is also know mediation. The mediation is under the article 6 point (3), (4) and (5) of Law of Republik Indonesia Number 30 year 1999 of arbitration and settlement of dispute resolution alternative. In principle, the mediation is a negotiation that take a third party neutral and impartial that able to accept by the two parties. The advantage to use the mediation way is a simple procedural, effective and not expensive, the decision is still under control by the parties. Apart from negotiation and mediation, then according to the researcher is also the consiliation. Consiliation is the effort of settlement dispute trough the negotiation by involves the neutral third party to help the parties to find the way of settlement that have agreed.

Justice as *fairness* have started with one of general choice that able to make together as Rawls theory that Equal Right and Economic Equality. In Equal Right mentioned that " must be arrange the lexical part, which is different principles works when the first principle have worked or the different principle will work if the basic right have no revoked and increased the less expectation. In Rawls principle, stated that must be fulfill the basic right so the equality principle must be done while in other words, the un equality in economic will be valid if not revoked the human rights." (Wibowo, 2003) [11].

According to the researcher, to interpreted the justice is began with the purposed of law that certainty law and benefit. The justice in not explicitly written in clause of agreement text of arbitration that made by the parties that part of the purpose of law it self.

According to the researcher, the philosophy of justice in arbitration to reach the agreement of *win-win solution*,based on agreement that contain the arbitral clause of those parties according to *pacta sunt servanda* principle. The freedom of contract as mentioned under the article 1338 of Civil Law have used to the parties in bankcrupcty dispute.

b. Proposional

General principle stated under the article 1131 of Civil Law and article 1132 Civil Law that Creditor *paritas creditorium* is unsecured creditors are they who have a bill have not guaranteed, the have a number of *pro rata parte* that have provided them that willing to pay after the rest of bankcrupcty estate.

The justice enforcement trough the justice authority is one of the purpose of state principle. The law of judge power (since law of Republik Indonesia Number 14 year 1970 till the last law of Republik Indonesia number 48 year 2009) stated that the court have done by the justice in Indonesia that come from the Almighty God both direct and undirect.

Under the article 24 of the Republik Indonesia Cnstitution of 1945 and the Law of judge authority. The judge authority is one of 3 (three) power in state that speciality to enforce the justice based to the existing law. The Law is guarantee the judge independent in decided the case without the intervere of other parties both executive anf legislative. Even though, the judge in deciding the case is what fair to law, binded to the materril law and procedural law existed.

The main problem of justice can be find in relationship of legal justice, *moral justice* and social justice. The justice is according to law can be found from the existing law and judge decision that reflected the state justice in formal way, fair or not a law or judge decision is by the justice and social justice.

John Rawls have opinion that justice is a fisrt social institution as the truth of the system thinking. According to John Rawls statement that the existence of society is much depend on the formal regulation trough law and the supported institution. Rawls belief that intuition about the social policy can't be determined. The problem has come up, if focusing on the procedural justice that triy to build up a system in structur that have cobver the ideal of moral about the justice. (Rawls, 1972) [12].

According to the researcher, the philosophy principle of justice is *pro rata* that a guarantee to the creditor and the result must be divide proportional between them except the creditors according to law must be put as priority in accepting the bill. This principle is suppress to the divide of debtor property to pay of its debt to the creditor with fairness proportion and with not the same way. When the principle of *paritas creditorium* purpose to delivered justice to all the creditor without distinguish the condition of debtor property, then in contrary the principle of *pro rata* is giving the justice to the creditor with the justice proporsional where the creditor have its claim from debtor than bigger than creditor that have smaller than it.

The un fairness of divided of *paritas creditorium* in bankcrupcy has raised up, then the property of bankcrupcy debtor is smaller than the number of debtor payment. If the property of debtor bankrupt is more bigger that the whole of debt of creditor, so the implementation of principle of pro rata is rather relevant.
So the used of the legal institution of bankcrupcy to the debtor have the pro perty that bigger than the whole number of debts that have no relevant to it.

The deviden of creditor in bankcrupcy divided to 3 (three) classification they are creditor prefren and creditor unsecured. In general civil law the distinguish of creditor only divided from the creditor preferen with unsecured creditor.

Apart from the creditor of concuren, there is a separated creditor that hold the guarantee creditor and preferen creditor or the creditor that have the rights to preferens based to the law of bankcrupcy and other law according to the article 1133 of Civil Law.

IV. CONCLUSION

According to the result and discussion that have mentioned above, then the researcher concluded as :

1. Court institution like district court still investigate the dispute with the arbitral caluse due to 2 (two) things, which are the judge have obligation to investigate and relating with the cancellation of arbitrar decision. According to the article 10 point (1) The law of Judge Power, arranged that judge do not allow to investigate the case. There is a conflict between the law of Judge and the law of Arbitration about the authority to investigate the case. So the implementation of *lex specialis derogat legi generalis* principle where the law of arbitration as special law and the law of Judge power as a general Law.
2. Philosophy of Justice that have found in bankcrupcty is a principle of balance for the creditor while for the debtor have the right to apply the reconciliation trough reorganization and restructrurisation with purpose to keep their business. While the justice philosophy that contain in arbitral institution have create the *win-win solution* is the agreement of the debtor parties and creditor party based on *pacta sunt servanda* principle and the freedom of contract as mentioned under the article 1338 of Civil Law.

V. SUGESTION

1. Need to sincronised and harmonized the substance between the law of judge power, the law of bankcrupcty with the law of arbitration.
2. Need to codify the Bankruptcy Code of United State Of Amerika under the law of Bankcruptcy Indonesia, so there is a solution for the continuitas of debtor business in future. Also its expect to codified the arbitration in Indonesia to give the reconcialitaion between the parties.

REFERENCES

[1]. Widjaja, Gunawan , 2008. Arbitrase VS Pengadilan. Penerbit Kencana Prenada Media Group. Jakarta. Hal 9.
[2]. Subekti. R., 1990. Hukum Perjanjian. Penerbit Intermasa. Jakarta.Hal 13.
[3]. Lontoh R. A. 2001. Penyelesaian Utang Piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang. Penerbit Alumni. Bandung.
[4]. Randa Puang. Victorianus M. H. 2011. Penerapan Asas Pembuktian Sederhana dalam Penjatuhan Putusan Pailit. Penerbit Sarana Tutorial Nurani Sejahtera. Bandung. Hal 1.
[5]. Margono. Suyud, 2004. ADR (*Alternative Disputes Resolution*) dan Arbitrase (Proses Pelembagaan dan Aspek Hukum). Penerbit Ghalia Indonesia. Bogor. Hal 12.
[6]. Soemartono. Gatot. 2007. Arbitrase dan Mediasi di Indonesia. Penerbit Gramedia, Jakarta. Hal 3-4.
[7]. Harahap, M. Yahya. 2006. Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa, Penerbit Citra Aditya Bakti, Hal 6-11. Bandung
[8]. Subhan M. Hadi. 2008. Hukum Kepailitan – Prinsip, Norma dan Praktik di Peradilan. Kencana Prenada Media Group. Jakarta.Hal 5-6
[9]. Wignjosumarto Parwoto. 2003. Hukum Kepailitan selayang Pandang. Penerbit Tatanusa. Jakarta.Hal 140.
[10]. Muchsan. 1985. Hukum Tata Pemerintahan. Penerbit Liberty. Yogyakarta. Bandingkan dengan M. Husni, Moral dan Keadilan sebagai Landasan Penegakkan Hukum Yang Responsif, Jurnal Equality Fakultas Hukum USU, Vol. 11 (1) Februari 2006. Hal 1-7.
[11]. Wibowo.2003 Teori Keadilan John Rawls. tersedia di website http://www.file://localhost/D:/ Filsafat Manusia, diakses tanggal 12 Juni 2013.
[12]. Rawls John. 1972. A Theory of Justice. Harvard University Press. Cambridge Mass. Hal 210-225.