



Volume 33 No. 1, Januari 2018  
DOI : 10.20473/ydk.v33i1.7256

Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan  
Surabaya, 60286 Indonesia, +6231-5023151/5023252  
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id  
Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

by <http://e-journal.unair.ac.id/index.php/YDK/index> under a Creative  
Commons Attribution-NonCommercial-ShareAlike 4.0  
International License.



FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

Article history: Submitted 4 August 2017; Accepted 6 November 2017; Available online 1 January 2018

## BINDING EFFECT OF ARBITRATION CLAUSE TO THIRD PARTIES: PRIVACY OF CONTRACT DOCTRINE VS. PIERCING THE CORPORATE VEIL

Y. Sogar Simamora, Sujayadi dan Yuniarti

sogar@fh.unair.ac.id

Universitas Airlangga

### Abstract

The arbitration agreement is the legal basis for the arbitration forum to examine and adjudicate the dispute which arose from a private relationship where the parties agree to settle the dispute in arbitration forum. As an agreement, the arbitration agreement still applies the principles of contract, including the principle of privity of contract. In the doctrine of privity of contract, an agreement is only binding and have legal effect only to the parties, the agreement in principle, cannot provide profit or loss to a third party. In the arbitration agreement, only the parties are bound by the arbitration agreement that can become parties to the case investigation. However, in the development of arbitration practice also shows that a third party, not a signatory to the arbitration agreement can be held accountable through an examination of the arbitration case. Such a situation is possible if the third party is resident as a holding company or shareholder of a limited liability company, in which the limited liability company is bound by an arbitration agreement, and the holding company or shareholder proven to perform actions through a subsidiary or a limited liability resulting harm the other party.

**Keywords:** Contract; Arbitration; Privity of Contract; Piercing the Corporate Veil.

### Abstrak

*Perjanjian arbitrase adalah dasar bagi forum arbitrase untuk menguji dan mengadili suatu sengketa yang timbul dari hubungan hokum private. Sebagai suatu perjanjian, dalam perjanjian arbitrase tetap belaku prinsip "the privity of contract", yakni bahwa perjanjian tersebut hanya mengikat para pihak, sehingga tidak memiliki akibat hokum terhadap kerugian yang diderita oleh pihak ketiga. Dalam perjanjian arbitrase, hanya para pihak yang menyepakati perjanjian tersebut yang dapat dijadikan pihak dalam forum arbitrase. Namun, dalam perkembangannya ternyata pihak ketiga yang bukan merupakan pihak dalam perjanjian arbitrase dapat juga dijadikan sebagai pihak dalam forum arbitrase. Situasi tersebut dimungkinkan apabila pihak ketiga tersebut merupakan pemegang saham pengendali atau induk perusahaan atau merupakan beneficial owner dari suatu perusahaan, yang mana perusahaan tersebut merupakan salah satu pihak dalam perjanjian arbitrase. Hal tersebut dimungkinkan apabila holding company ataupun pemegang saham terbukti melakukan suatu tindakan melalui subsidiary companynya dan mengakibatkan kerugian pada pihak ketiga.*

**Kata Kunci:** Kontrak; Arbitrase; Privity of Contract; Piercing the Corporate Veil.

### **Introduction**

Arbitration forum competence to adjudicate a dispute between parties comes from contract that they have been agreed. This agreement can be made before or after the dispute comes up. Therefore, arbitration is a contractual dispute settlement forum, because the existence of the forum is based on the agreement of the disputing parties to hand over the settlement of the dispute to the arbitral tribunal.

As a contract, the provision of contractual validation is also bind the arbitration clause. In Indonesian law of contract, the contract validation is regulated under the book of civil law (*Burgerlijk Wetboek = BW*), in article 1320 BW the provision of contract validation are: 1) consensus; 2) the competence of the parties; 3) specific object; and 4) causa allowed. With reference to consensus in arbitral agreement, the consensus between parties to hand over the dispute settlement to the arbitral tribunal has to be expressed in written form within the contract. Meanwhile, the competence requirement is to regulate whether parties have capabilities to bind themselves in an arbitration agreement by considering the national law of parties in which they are agreed to choose as the regulating law. Subsequently, specific object requirement in an arbitration clause means that they have to be clearly stated the dispute in which will be brought in an arbitration tribunal. Thus, not every dispute can be brought in an arbitration tribunal, it is only a dispute in which an arbitration tribunal recognise according to arbitration law (*lex arbitri*) that can be settle in an arbitration tribunal (arbitrability) that can be accepted as an arbitration object. Finally, the causa allowed as the last provision of contract validity refers to the objective of all contracting parties, whom in this case bind themselves under the law of arbitration to settle their dispute.

As a contract, an arbitration also bind by principles of contract law, such as privity of contract, which determined that a contract is only bind for the parties that involves, therefore it will not cause any effect to the third party, this is regulated under article 1315 BW. Nevertheless, it could be arranged that this contract bring benefits to the third party (*derden beding*), as regulated in 1317 BW. An arbitrage agreement that has been agreed by the parties has legal effect, that is 1) the court has

no authority to judge the dispute and 2) parties lose their rights to submit the dispute to the court. Further effect from this agreement is that only parties of the contract who have legal standing to settle those dispute under an arbitrage forum.

An arbitrage agreement also recognise in a contract that involve multinational companies (MNEs), as a legal person. Within the structure of MNEs, under Indonesian company law, only recognise single limited liability, which means that the liability of a legal act only refer to the doer, thus, it will not affected holding company. But, it will have an effect to the holding company as shareholder, for this situation the shifting the burden of proof doctrin will be applied. Concerning those issues, this article will be analyse: 1) third party involvement in the examination of the case in arbitration forum and 2) the implementation of piercing the corporate veil to claimed holding company liability or shareholders in the arbitral forum.

### **Third Party Involvement in Arbitration Forum**

The access to justice principle requires that every litigants get a fair settlement through the examination process in a fast, simple, and inexpensive. In addition, the decision of the court should be able to resolve disputes thoroughly for all parties involved, therefore all parties who have an involvement in the dispute should be withdrawn as a party in the process of examination and therefore the judgment is binding for all of them. Examination that have an absence of parties would result in incomplete dispute settlement, and there are those who are not bound by the decision that might have potential in the future to claim the same dispute and processed by the court. If a lawsuit is filed by an incomplete party, the defendant at the time of delivery of the defendant's first answer may file a *plurium litis consortium*. The court, on the basis of the exception, will examine and decide upon it along with the principal issue of the case,<sup>1</sup> if there is a party that has not been included in the investigation of the case, the court will declare the lawsuit unacceptable (*niet ontvankelijk verklaard*).

In the examination of civil cases in court it is possible for a third party to intervene in the ongoing case review. In civil justice system adopted in Indonesia, there are three

---

<sup>1</sup> Article 136 HIR.

forms of third-party interventions on the examination of civil cases in court:

1. *Voeging* (Article 279 to 282 Rv), i.e the entry of a third party in a hearing by appealing to the court to join a party, a plaintiff or a defendant;
2. *Tussenkomst* (Article 279 to 282 Rv), i.e the entry of a third party in the examination of a case to defend its own interests;
3. *Vrijwaring* (Article 70 to 76 Rv), i.e withdrawal of a third party by the defendant as the third party is the defendant of the defendant's debt.

In *voeging* and *tussenkomst* forms of intervention, initiative to intervene exists in the third party. To become a party in hearing, the third party should file an intervention suit to court before or at the time of conclusion, upon the intervention suit, court will notify the plaintiff and the defendant as well as order them to respond in an incidental hearing.<sup>2</sup> Decisions concerning the allowance or rejection of a third party for intervention are terminated by a judge in an incidental decision.

In the form of *vrijwaring*, the entry of a third party is not on the initiative of the third party itself, yet withdrawn by the plaintiff or the defendant. In *vrijwaring*, a third party is domiciled as a guarantor of the plaintiff or defendant's engagement. The Defendant may ask the judge to withdraw his guarantor in a hearing in case the defendant's first answer.<sup>3</sup> While the plaintiff, if at the time of filing the lawsuit has not entered the guarantor, may request to the judge to withdraw the guarantor at the time of delivery of the reply.<sup>4</sup> An application to withdraw a third party as a guarantor, either by the defendant or the plaintiff, must be filed within the stipulated time, in case of the stipulated time the application will be refused and the proceeding of the case proceeds.<sup>5</sup> An application to include a guarantor in a court hearing shall be terminated in an interlocutory order, and for that reason a third party as a guarantor shall be called to appear at the hearing with a written invitation accompanied by a copy of the lawsuit.<sup>6</sup> A third party withdrawn in a case due to his position as a guarantor must be present at the hearing.<sup>7</sup>

---

<sup>2</sup> Article 279 (2) Rv.

<sup>3</sup> Article 70(1) Rv.

<sup>4</sup> Article 70(3) Rv.

<sup>5</sup> Article 71 Rv.

<sup>6</sup> Article 70 (5) Rv.

<sup>7</sup> Article 76 Rv.

In addition to the three forms of intervention based on the existence of third-party interests in the subject matter, there is a third-party intervention known as *amicus curiae*. *Amicus curiae* intervention, literally means court companions, is not based on the interests of third parties on the subject matter, yet third parties are concerned to provide information or guidance for judge on specific issues that judge is expected to decide the case properly.<sup>8</sup> Generally, *amicus curiae* is an NGO or individual who has a mission on a particular issue being examined in court. While *amicus curiae* is a well-known practice of trial in courts in common law system countries,<sup>9</sup> it is currently followed Indonesia, despite no legal provisions governing it, as *amicus curiae* in the case of *Soeharto against Time Magazine*,<sup>10</sup> and a review in the state administration case between *Joko Prianto et al. Against the Governor of Central Java and PT Semen Gresik*.<sup>11</sup>

In principle, arbitration only bind parties agreeing to the arbitration agreement. Such parties may sue other party or be prosecuted in arbitration forum. In Law No. 30/1999 it is possible for a third party, who is not bound by an arbitration agreement, to enter into a hearing in arbitration. Article 30 of Law No. 30/1999 entitles third parties to intervene in arbitration if they meet the following requirements:

1. The third party has an interest related to the principal matter of the case;
2. Such intervention is agreed upon by the parties; and
3. The intervention is approved by arbitrator or arbitral tribunal.

From the formulation of the article, it can be concluded that the initiative to intervene is on a third party. Third parties who have an interest in the principal of the case may intervene to become parties to a case hearing as long as it is agreed upon by the parties and approved by the arbitrator. Intervention as referred to in

---

<sup>8</sup> Supriyadi W. Eddyono.[*et.al*]. *Amicus Curiae (Sahabat Pengadilan) Dalam Kasus Florence Sihombing* (Institut for Criminal Justice Reform 2015).[4].

<sup>9</sup> *ibid.*

<sup>10</sup> Ali, 'Amicus Curiae Dipakai Membantu Perkara PK' (2008) <hukumonline.com> accessed 10 August 2016.

<sup>11</sup> Request for review of the appeal ruling of the Surabaya State Administrative High Court Number 135 / B / 2015 / PT.TUN.SBY. See: Andi Muttaqien, 'Pertimbangan Hakim Keliru, Warga Rembang Ajukan Peninjauan Kembali' (*Institute for Policy Studies and Advocacy*) <Elsam.or.id> accessed 10 August 2016.

Article 30 of Law No. 30/1999 is known as the voluntary third-party intervention, in this intervention model applied to multiple-party contract types that have mutually related interests; yet only two or more parties are bound by arbitration agreement, while the third party is not bound by arbitration agreement. Under such circumstances, the arbitrator needs to establish his jurisdiction over a third party without violating the principle of party autonomy and the principle of consensualism on which arbitration is based.<sup>12</sup>

There are provisions for voluntary involvement of third parties in some arbitration proceedings on arbitration institutions in the examination of cases. In Article 22.1 (h) the LCIA, rules are regulated as follows:

“Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but neither case only after giving the parties a reasonable opportunity to state their views: ...

(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration”.

Furthermore in Article 24.1 SIAC Rules, as amended in 2013, the following provisions concerning third party involvement should be fulfilled: “In addition and not in derogation of the powers of conferred by any applicable law of the arbitration, the Tribunal shall have the power to:... (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them”.

The two provisions indicate that there are several aspects to be considered; first, involvement of a third party must be based on a request from one of the parties related to the arbitration agreement, or from the third party itself. The consent to arbitrate by a third party and the parties beforehand must be stated in writing form as a concrete form of the principle of consensualism prevailing in arbitration. In addition

---

<sup>12</sup> Keechang Kim and Jason Mitchenson, ‘Voluntary Third Party Intervention in International Arbitration for Construction Dispute: A Contextual Approach to Jurisdictional Issues’ (2013) 30 *Journal of International Arbitration*. [407-430].

to any form of intervention set out in the provisions of the Civil Procedure Code or Arbitration Law, the involvement of third parties not the signing of arbitration agreements may be due to several reasons including subrogation, novation, and inheritance. Under Indonesian Arbitration Law, the provisions concerning the transfer of arbitration agreements to third parties due to subrogation, novation and inheritance are regulated in Article 10 of Law No. 30/1999 as follows:

“An arbitration agreement does not become void due to the circumstances mentioned below.

- a. The death of one party;
- b. Bankruptcy of one party;
- c. novation;
- d. Insolvency of one party;
- e. inheritance;
- f. Enactment of the requirement for the removal of the main engagement;
- g. When the exercise of the agreement is transferred to a third party with the consent of the party creating the arbitration agreement; or
- h. Termination or nullification of the principal agreement”.

The provision of Article 10 of Law No. 30/1999 is the penance of the separability doctrine, a doctrine that teaches that arbitration agreements should always be considered separate from the principal agreement; the cancellation or abolition of the principal agreement does not by law remove or cancel the arbitration agreement. The provision in Article 10 letter a and b Law No. 30/1999 implies that the arbitration agreement will be resumed by the heirs of the heirs who have agreed on an arbitration agreement, this is because inheritance is the common right (*algemeene titel*) which transfer all rights and obligations to the heirs to the heirs and takes place by law. The provision of Article 10 Sub-Article f of Law No. 30/1999 regarding that the arbitration agreement is not vanished due to the enactment of the requirement of the removal of the main commitment, where under the provisions of Article 1381 BW, the terms of termination of the commitment are as follows: “Removal due to: payment, cash payment offer followed by storage or depository, debt renewal, debt or compensation encounter, debt mixing, debt relief, loss of goods owed, negligence or cancellation, enactment of cancellation conditions set forth in Chapter I Book III, and due to expiration incorporated in separate chapters”.

In Article 1400 BW, subrogation as the mechanism of the transfer of the engagement after the payment, occurs due to contract or due to law if a third party pays the creditor and takes over the creditor's receivable. Further, the renewal of debts in Article 1413 BW can occur due to renewal of the engagement in which the old debt is removed and replaced by a new debt, or a new debtor is appointed to replace the old debtor, or the newly appointed creditors to replace the old creditors, the last two types of innovation are referred to as subjective novation. Neither subrogation nor novation is a requirement for the removal of engagement, yet based on the doctrine of separability set out in Article 10 of Law No. 30/1999 arbitration agreements will still apply and move on to third parties due to subrogation or novation.

### **Implementation of Piercing the Corporate Veil Doctrine to Attract Third Parties in Case Review in Arbitration**

Privity of contract doctrine applicable in the arbitration agreement shall have power that only the parties bound to the arbitration agreement may claim or be prosecuted in the arbitration forum. A treaty agreed upon by the parties may not result in a gain or loss to a third party. The involvement of a third party who does not enter into an arbitration agreement, in a case hearing, cannot be justified as it can violate the principle of confidentiality applicable in the arbitration.

### **Performance of doctrine piercing the corporate veil**

Juridical recognition of company as an independent legal subject and the protection afforded to shareholders through the limited liability principle is a general legal principle applicable in both the common law and civil law. However, the enforcement of this principle is not absolute, ie through the principle of piercing the corporate veil. This principle then develop doctrines of agency, fraud, estoppels, unjust enrichment, ultra vires and breach of fiduciary duty.<sup>13</sup>

---

<sup>13</sup> Sulistiowati, *Tanggung Jawab Hukum Pada Perusahaan Grup di Indonesia* (Erlangga 2013).



However, there is no uniformity in determining the action of piercing the corporate veil. Agency Doctrine is the longest established doctrine in accounting for piercing the corporate veil, in the case of *Smith, Stone and Knight Ltd V Birmingham Corporation* (1934), the judge ruled that holding company may seek redress in its subsidiary for damages suffered,<sup>14</sup> as long as the subsidiary acts as the “agent” of the holding company. Indicator of the accountability can be seen from the following points:

1. Are the profits earned are also the profits of the holding company?
2. Is the person appointed to manage the company is a person appointed by the holding company?
3. Is the holding company a controller of all subsidiary business activities?
4. Does the holding company interfere in any management actions and company ownership?
5. Are the controls conducted by the holding company carried out constantly and permanently?
6. Are the benefits derived from the direction and expertise of the holding company?

If the answers obtained from these questions are positive responses, agency principle applies in the company in a relationship involving the group of companies.

Responding to the agency doctrine applied in UK, development in corporate law related to piercing the corporate veil and the implementation of alter ego within the company has emerged. Subsidiary is an independent legal entity, not only a subsidiary while holding company is also an independent legal entity. Thus, if there is any liability for any legal action against parties or third parties, it is not automatically that other party should be responsible based on the agency principle. The main point to be proven is the fact that the holding company holds full control over its subsidiaries, thus subsidiary does not have any independency at all. When related with the provisions of law in Indonesia on elements of establishment of the company; in this case if the existence of 2 shareholders who will establish a company in the future is not fulfilled then the liability of the company is purely fully up to full accountability of the owner of the company. For example, when

---

<sup>14</sup> Anil Hargovan and Jason Harris, ‘Piercing the Corporate Veil in Canada: A Comparative Analysis’ <<http://ssrn.com/abstract=980366>> accessed 11 August 2016.

at the beginning of the establishment there are 2 shareholders. For example, there are 2 shareholders at the establishment, yet later on, one of its shareholders dies or sells its shares to the other shareholders; leaving the company with only one shareholder,<sup>15</sup> then the shareholder holds responsibility for all legal actions of the company. In the case of *Adams V. Cape Industries plc*,<sup>16</sup> the judge's decision stated that:

“Importantly, the Court stated that “outside of particular contracts or statutes, the only ground for lifting the veil is that the subsidiary was a mere façade or sham”. In this case, the mere fact that Cape wished to shift liability from one company to another company in the group did not mean that the establishment of the latter was a mere sham or façade”.<sup>17</sup>

This understanding is later known as quasi-agency principle; which is when a company is only used as a “puppet” for the benefit of another company. In analyzing this, there should be a review of shareholders, i.e whether he is a “person” who is a legal entity or individual. If a legal entity, in this case is a company performing a role as a shareholder in a subsidiary, there is an interest involved in the investment of such capital. In group companies, the holding company establishes, operates, and dissolves subsidiaries as part of corporate strategy, specifically in support of the group's business objectives as an economic entity, hence there must be a broader analysis of the meaning of independent legal entities.

### **Piercing the corporate veil Vs. Alter Ego in the liability of a company**

The notion of Alter ego doctrine is such unity of ownership and interest that the two affiliated corporations have ceased to be separate<sup>18</sup> or a merger between ownership and interest between two affiliated companies that should be separate. The following example in Bhopal case is a reference:

“The Bhopal Disaster gives us a good view of the potential risk of conducting

---

<sup>15</sup> In this case means that the intended shareholder is a legal entity. Because of the person's definition as the founder, when this person's form is interpreted as a legal entity, a group company is formed.

<sup>16</sup> Anil Hargovan, *Op.Cit.*[5].

<sup>17</sup> *ibid.*[6].

<sup>18</sup> Lutter, ‘Book Review: Enterprise Law Corp.V. Entity Law’ (1990) 38 *The American Journal of Comparative Law*. [949-968].

business in a developing country. The incident revolves around Union Carbide Corporation (UCC), a US Chemical Company with plants operating in India since 1969. In 1984, a toxic gas unknowingly released from the plant had taken the life of 3800 Indian people overnight<sup>1</sup>. The devastating news had aroused much concern from the local residents and international community, with first reaction that UCC should be held primarily responsible for the disastrous consequence of the gas leakage<sup>2</sup>. According to UCC, it has taken actions to provide immediate and continuing aid to the victims<sup>3</sup>. As investigation went along, the Indian government, however, put up restriction of access to key evidences and witnesses of the incident and maintained strongly that UCC's negligence is the leading cause of the event. The case was finally settled with UCC's payment of US\$470 Million to the Indian Government, and the compensation was reported to be partially held by the government and not fully distributed to the victims until 2004, when it claimed all cases had been cleared. Individual lawsuits staged by Indian victims against UCC, on the other hand, continue and have remained unsettled till today".

The judge in the case released the verdict that UCC was not responsible directly or responsibly as "agent" that the piercing the corporate veil principle could not be applied.

This then encourages the development of analysis related to alter ego doctrine.

"The alter egodocctrine, sometimes also called the company's directing mind and will doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each case being cited differently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law's intention or knowledge as an ingredient of the cause of action or defence.

The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. Their minds are its mind; their intention is its intention; their knowledge is its knowledge".

Doctrine of Alter Ego was first confirmed by Viscount Haldane LC, in England in 1915. Moving from the fiduciary duty doctrine of the company, which was a legal body of fiction, thus requires the organs of the company to carry out its business activities.

"where he called a director of a company 'active spirit', 'directing mind of the company', 'life and soul of the company', (a company's) 'active and directing will', and held that person's (being a natural person) action was the very action of the company".

It was stated as under:

"My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its acting and directing Will must consequently

be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and Will of the corporation, the very ego and center of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. ... Mr. Lennard, therefore, was the natural person to come on behalf of the owners (the company) and give evidence not only about the events ... but also about his position and as to whether or not he was the life and soul of the company? For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself”.

As we identify that shareholders are legal entities, i.e companies, shareholder’s liability also involves controlling shareholder thus the first to identify is whether there is a conflict of interest involving the shareholder.

### **Regulation of Group Companies in Indonesia**

The existence of Multinational Corporations or multinational companies or better known in Indonesia as a group company requires a review from various perspectives, such as law, economics, economics-sociology and a combination of several related sciences. In terms of legal science the form of group companies is still known as a single company in several countries. Whereas the economic and financial realities of this group company are proven to have the sole responsibility and control of the holding company.<sup>19</sup> The legal act of the holding company to establish, operate, and dissolve a subsidiary is a strategic part of the corporation in support of the group’s corporate business objectives jointly executed between the holding company and its subsidiaries.

In Indonesia, regulation of group companies has not provided juridical recognition of group companies as independent legal entities, as set forth in the Company Law No. 1 of 1995 and in Law No. 40 of 2007. The legitimacy granted

---

<sup>19</sup> This is as seen in the consolidated financial statements of PT. Indofood Tbk: [http://www.idx.co.id/Portals/0/StaticData/NewsAndAnnouncement/ANNOUNCEMENTSTOCK/From\\_EREP/201403/8890649b3e\\_f961da6a41.pdf](http://www.idx.co.id/Portals/0/StaticData/NewsAndAnnouncement/ANNOUNCEMENTSTOCK/From_EREP/201403/8890649b3e_f961da6a41.pdf).

by the Limited Liability Company law is legitimacy for a company to engage in legal action to own shares in another company at the time of establishment or acquisition of the company for the purpose of controlling the company. Under such conditions if there is a relationship between the subsidiary and the holding company. Implementation of influence within a group enterprise may reduce the rights or dominating rights of other enterprises, irrespective of the construction of the enterprise as an independent legal entity.

Discussion related to multinational companies (hereinafter referred to as MNC) is always associated with the existence of investment activities undertaken in various jurisdictions with the application of different corporate laws in accordance with its jurisdiction. The emergence of MNC in various countries is for the expansion of business and minimizes production costs through the event to reduce labor costs, raw materials and taxes. Engagement between companies can be seen through various forms such as the existence of contracts, share ownership, or the relationship in the composition of the board of directors or control companies.

One such corporate structure is Keiretsu's Japanese composition. In its arrangement there is a complex arrangement of cross stock ownership among companies.<sup>20</sup> Coordination from the company is obtained through coordination meetings of the directors of the company. In Japan this form of Keiretsu consists of one holding company and at least one subsidiary whose share ownership by the parent company in its subsidiary company is at least 50%, hence there is no possibility of independence from the subsidiary company.<sup>21</sup>

The legal issues relating to holding and subsidiary status, especially those in the form of MNC, encompass various legal aspects related to the arrangements of companies and group companies. More specific discussion of conflict of law will be important for it relates to the situation of the fact of involvement of foreign elements, especially if the company operates in several different jurisdictions. The

---

<sup>20</sup> Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press 2000).[39].

<sup>21</sup> *ibid.*

foreign elements are “This foreign element may be an event which has occurred in foreign country...if the parties cannot resolve their differences amicably, then three main types of questions may arise in such cases”.<sup>22</sup> The issues referred to in the above quote are jurisdiction, legal choice and enforcement of foreign judgment.

Conflicts of arrangement in MNC are motivated by corporate law, especially in the existence of concession theory and incorporation theory. The outline of this debate is the establishment location and the real place in which the company runs its business. The main element of the existence of conflict of law is the presence of foreign elements. Thus, to solve problems related to conflict of law is to use several methods as follows:

#### **Territorial Focus: Vested**

Initial identification of this method is to analyze the country of origin the rights and obligations of the parties arise.<sup>23</sup> This is known as ‘vested’. A vested approach should identify action or treatment that causes the right to vested.

#### **Lex Fori**

Lex fori approach is an approach of using forum of law with an approach, proper law for proper forum. The use of lex fori will gain the same results and reasons as legal choice method.

#### **New Territorialism**

The use of “the vortex of the event” principle is an option taken by parties by taking into account the interests of those parties who have chosen the law established to create legal certainty. These methods can be implemented when accompanied by the use of legal instruments as follows:

- a. International conventions, whether in the form of hard law, soft law or directive;
- b. National law of a state, chosen based on the identification of the incorporation

---

<sup>22</sup> Abba J. Mayss, *Principles of Conflict of Laws* (Cavendish 1999).[1].

<sup>23</sup> Peter Hay, *Conflict of Law* (West Publisher 1994).[161].

theory, the domicile and resident of the enterprise, the determination of the place where central management originates, internal management;

c. Contract.

In presence of a conflict of law related to regulation or the existence of legal problems in the company related to the company and its subsidiary, the above considerations based on the interests of the parties will be considered in solving the problem. In general, conflict of law in this MNC will arise in relation to insolvency or bankruptcy of the company, finance related to the assets of the company, the responsibility of the board of directors of the company in relation to the direction of the holding company.

### **Conclusion**

As a form of agreement, arbitration agreement applies principles of the treaty law. Principle of consensualism which requires that the arbitration agreement must come from the agreement of the parties bringing implications of the validity of *pacta sunt servanda*. *Pacta sunt servanda* binds the parties to commit to settling disputes through arbitration. Arbitration agreement also applies the principle of privity of contract resulting only the parties bound by the arbitration agreement having the legal standing to file the arbitration request, as well as only those who are bound by arbitration agreements that may be prosecuted in the arbitration forum.

Modern corporations recognize group companies or holding companies, a corporate structure in which there are holding companies and subsidiaries. Doctrine of the independence of a limited liability company limits the parent's liability to a subsidiary's legal deeds, they should be regarded as a separate entity. A company controlled by a parent company unlawfully, resulting in a loss to another company raises a claim to the parent company to be accountable for the loss. In such a situation the doctrine of the independence of a limited liability company can be distorted by the application of the doctrine of piercing the corporate veil that allows the holding company to be held accountable.

The enforcement of the privity of contract doctrine on t arbitration agreement may be ruled out, thus one party on arbitration agreement may request arbitrator to

have holding company/shareholder of the requested party be withdrawn as a party in the case hearing. In such situations, arbitrator shall test by applying the criteria of piercing the corporate veil, if holding company's conduct meets the criteria then the holding/applicant's engagement may be granted, therefore, holding company/shareholder and subsidiary shall be considered as one entity, subsidiary is the Alter ego of the holding company. If subsidiary is an alter ego of the holding company, the legal act of a subsidiary shall be regarded as the act of the holding law of the company, including agreeing to arbitration agreement.

### **Bibliography**

#### **Books**

Abla J. Mayss, *Principles of Conflict of Laws* (Cavendish 1999).

Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press 2000).

Peter Hay, *Conflict of Law* (West Publisher 1994).

Sulistiowati, *Tanggung Jawab Hukum Pada Perusahaan Grup Di Indonesia* (Erlangga 2013).

Supriyadi W. Eddyono [et.al]., *Amicus Curiae (Sahabat Pengadilan) Dalam Kasus Florence Sihombing* (Institut for Criminal Justice Reform 2015).

#### **Journals**

Lutter, 'Book Review: Enterprise Law Corp.V. Entity Law' (1990) 38 *The American Journal of Comparative Law*.

Mitchenson KK and J, 'Voluntary Third Party Intervention in International Arbitration for Construction Dispute: A Contextual Approach to Jurisdictional Issues' (2013) 30 *Journal of International Arbitration*.

#### **Websites**

Ali, 'Amicus Curiae Dipakai Membantu Perkara PK' (2008) <hukumonline.com> accessed 10 August 2016.

Andi Muttaqien, 'Pertimbangan Hakim Keliru, Warga Rembang Ajukan Peninjauan



Kembali' (*Institute for Policy Studies and Advocacy*) <Elsam.or.id> accessed 10 August 2016.

Anil Hargovan and Jason Harris, 'Piercing the Corporate Veil in Canada: A Comparative Analysis' <<http://ssrn.com/abstract=980366>> accessed 11 August 2016.

**HOW TO CITE:** Y. Sogar Simamora, Sujayadi dan Yuniarti 'Binding Effect of Arbitration Clause to Third Parties: Privity of Contract Doctrine vs. Piercing the Corporate Veil' (2018) 33 *Yuridika*.