

Extra-Judicial Dispute Resolution and the Realization of Justice in the Indonesia Legal System

A. Dardiri Hasyim

Universitas Nabdlatul Ulama, Surakarta

Email: dardiri_hasyim@ymail.com

Abstract: Arbitration in Indonesia is governed by the Civil Code and Law No. 30 of 1999 on Arbitration. However, there are indications of disharmony between the provisions in both laws, especially related to the fulfilment of the rights of justice seekers outside the court. This paper seeks to examine the fulfilment of rights of justice seekers outside the courts contained in Law No. 30 of 1999 and in the Civil Code. This study concluded that Law No. 30 of 1999 contains 6 (six) points of fulfilment of rights in the settlement of disputes outside the court, namely: the right to choose arbitration; the right to choose a mediator/arbitrator; the right to argue; the right to determine the event of dispute resolution; the right to a verdict; and the right to deny the verdict. In contrast, some articles in the Civil Code are not in line with the provisions of Law No. 30 of 1999 given some regulations accompanying the Civil Code related to the settlement of disputes outside the court, namely: *Reglement op de Rechtsvordering (Rv)* and *Rechtsreglement Buitengewesten (RBg)*. Therefore, new regulations are needed to respond to the modern development.

Keywords : *fulfilment of rights; arbitration; civil code; law no. 30 of 1999*

Abstrak: Arbitrase di Indonesia didasarkan pada KUHPerduta dan UU No. 30 Tahun 1999 tentang Arbitrase. Namun demikian, terdapat indikasi adanya ketidakselarasan antara ketentuan yang ada dalam keduanya terkait pemenuhan hak para pencari keadilan di luar pengadilan. Tulisan ini berupaya mengkaji konsep pemenuhan hak bagi para pencari keadilan di luar pengadilan yang terdapat dalam UU No 30 tahun 1999 dan juga KUHPerduta. Dari kajian yang telah dilakukan diperoleh kesimpulan bahwa terdapat 6 (enam) poin pemenuhan hak dalam penyelesaian sengketa di luar pengadilan yang tertuang dalam UU No. 30 Tahun 1999, yaitu: hak memilih arbitrase; hak memilih mediator/arbitrator; hak berpendapat; hak menentukan acara penyelesaian sengketa; hak mendapat putusan; dan hak menyanggah putusan. Di sisi lain, terdapat pasal-pasal dalam KUHPerduta yang belum selaras dengan tuntutan UU No. 30 Tahun 1999 dikarenakan telah ada peraturan yang menyertai KUHPerduta berkaitan dengan penyelesaian sengketa di luar pengadilan, yaitu: *Reglement op de Rechtsvordering (Rv)* dan *Rechtsreglement Buitengewesten*

(RBg). Untuk itulah diperlukan peraturan baru yang mampu menjawab perkembangan zaman.

Kata kunci: *pemenuhan hak; arbitrase; KUHPerdata; UU No. 30 Tahun 1999*

Introduction

Civil law is the law governing the legal relationship between one person with another within the community, which focuses on individual interests to (personal).¹ The function of civil law is to regulate and define the community in the Association so that people can know each other and respect the rights and obligations between each other, so that the interests of each person can be assured and well maintained best foot forward.² The law is not merely just as guidelines to read, seen or known to be, but rather to be implemented and adhered to.³ Every interaction and transaction in the community involving two or more parties with an Alliance or agreement is definitely potentially posing a conflict. The conflict can be crisscrossed opinions or interests that could end up with a lawsuit or lawsuits. A lawsuit and/or lawsuits will be a long process, the cost and effort.⁴ The conflict is essentially a causal effect, where the occurrence of a human interaction in life demands the existence of similarities and differences. The concept of difference is what can give birth dispute, conflicts, or conflicts. Humans are social creatures, so it requires interaction, and interaction can give rise to problems in personal as well as the community itself. to address these problems in this case law has a very important role. Husni calls the conflict as a condition in which one party wants another party to do or not do as desirable, but that other parties reject the desire.⁵

¹ Riduan Syahrani, *Seluk-Beluk dan Asas-Asas Hukum Perdata* (Bandung: Alumni, 2000), p. 2.

² Suhardana, *Hukum Perdata I: Buku Panduan Mahasiswa* (Gramedia Pustaka Utama, 1992), p. 7–8.

³ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, 7th ed. (Yogyakarta: Liberty, 2002), p. 1.

⁴ Sri Redjeki Hartono, *Hukum Ekonomi Indonesia* (Malang: Bayumedia Publishing, 2007), p. 181.

⁵ Lalu Husni, *Penyelesaian Perselisihan Hubungan Industrial melalui Pengadilan dan di Luar Pengadilan* (Jakarta: Raja Grafindo Persada, 2004), p. 2.

A settlement process which is fast, accurate, cost-effective and with secure legal decision is important and desired by parties involved in a dispute. One of the best ways is that if the parties involved have an agreement and acting in good faith to execute the agreement related to the completion of the dispute. The deal then leads to the process of dispute resolution outside the court (non-litigation). In addition, there is also a dispute settlement conducted through the court (litigation). One of the processes of dispute resolution outside the court is through arbitration. Resolution of disputes by arbitration in Indonesia is based on the Law No. 30 of 1999 on arbitration, which is the settlement of civil disputes outside the public courts based on the Arbitration Agreement made in writing by the parties involved. A settlement through arbitration is closed in nature and can reduce the length of time, cost and effort.

The law gives options on how to resolve disputes that arise between the two factions; first is by settling through the court (litigation) and second is through a dispute resolution outside the court (non-litigation). The term arbitrage is derived from the Latin word *arbitrari* which means a settlement or termination of the dispute by a judge (arbiter) or judges (arbitrators) based on an agreement that they abide and obey.⁶ According to Rachmad Usman, the word arbitration is derived from *arbitrare* (Latin), *arbitrage* (Dutch), arbitration (English), *Schiedspruch* (German) and *arbitrage* (France) which means the power to get things done according to the wisdom or peace by the arbitrator or umpire.⁷

Purwosutjipto interprets the term arbitration (English) or *arbitrage* (Dutch) with refereeing. Then the refereeing is defined as a justice of peace in which the parties agree that their dispute about private right that could be fully examined and judged by an impartial adjudicator, appointed by the parties by the impartial judge, appointed by the parties themselves and the decision is binding on both parties.⁸ Furthermore, Purwosutjipto also noted the importance of judicial

⁶ Mariam Darus Badruzaman, *Peranan BAMUI dalam Pembangunan Hukum Nasional* (Jakarta: : Pradnya Paramita, 1994), p. 58.

⁷ Rachmad Usman, *Hukum Arbitrase Nasional* (Jakarta: PT Gramedia, 2002), p. 1.

⁸ H. M. N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia*, vol. 1 (Jakarta: Djambatan, 1992), p. 1.

arbiter (arbitration), namely: *first*, dispute resolution can be implemented quickly; *second*, the referees consist of skilled people in the art of the dispute, who are expected to make decisions that satisfy both parties; *third*, decisions will be more in keeping with the sense of justice of the parties; and *fourth*, the referees' judicial verdict is confidential, so the public does not know about the weaknesses of the companies concerned. The secretive nature of the arbitration decision is desired by businessmen.⁹

The non-litigation paradigm in achieving justice prioritizes consensus approach, seeks to bring together the interests of the disputants and aims to get the result of dispute resolution towards a win-win solution. Susanti Adi lays out some things that should be noted in the development of arbitration in General: *first*, arbitration is a form of dispute resolution most formal before litigation. The explanation of the Law No. 30 of 1999 mentions that the arbitration stipulated in this act constitutes a means of resolving a dispute outside the General court based on the written agreement of the disputing party. But not all disputes can be resolved by arbitration, but only disputes regarding rights under the law are fully controlled by the parties who dispute on the basis of their said agreement. It is intended to keep lest the resolution of disputes through arbitration become protracted. Unlike the state court process in which the its verdict of the parties can still appealed and appeal, then in the process of dispute resolution through arbitration is not open the legal effort appeal or reconsideration. This is due to the presence of a pragmatic view towards arbitration. Before, the Foundation of the court system is "the first and the last resort" in dispute resolution. The Court with a variety of law shows that formal and rigid has directed on formalistic systems, technical and expensive cost. *Second*, various views against the Court have encouraged businessmen to give birth to a new dispute resolution processes that accommodate weaknesses litigation. The speed of development of trade that led to free trade and free competition in a global competition requires greater efficiency and

⁹ *Ibid.*, p. 2. Arbiter have the same function like a judge on litigation. Read Gatot P. Soemartono, *Arbitrase dan Mediasi di Indonesia* (Jakarta: PT Gramedia, 2006), p. 24; Abbas calls the arbitrator is required to have the skills to find the final solution that can resolve the dispute of the parties. Read Syahrizal Abbas, *Mediasi dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional*, 1st ed. (Jakarta: Kencana, 2011), p. 15–16.

effectiveness. *Third*, principles for the future held by the parties in dispute should be able to satisfy the justice that is responsive.¹⁰

Article 1 paragraph 1 of the Law No. 30 of 1999 stipulates that: arbitration is the way of the settlement of civil disputes outside the public courts based on the arbitration agreement made in writing by the parties to the dispute. In some ways, it is similar to the arbitration system of litigation dispute resolution because the end result is equally shaped decision containing a statement of winning or losing. Dispute resolution through arbitration according to Gatot Soemartono is always based on the following assumptions: *first*, more quickly because an award is final and binding, thus saving energy, time and expense; *second*, conducted by experts in their fields, because arbitration provides experts in the specific field to which the question of the disputed claims, so the result (the verdict) is more responsive; and *third*, in strict confidence is assured because the vetting process and the award is not open to the public, so that the business activities are not influenced.¹¹

Settlement through arbitration in Indonesia started in 2007 with the enactment of the Law No. 5 of 1968 regarding the agreement of the Convention on the Settlement of Disputes between States and Foreigners on Investment. The Law No. 25 of 2007 is a form of ratification of the Convention on the International Centre for the Settlement of Investment Disputes between States and Nationals of other States (ICSID). Then the regulations governing arbitration emerged, which is the Law No. 30 of 1999 on Arbitration. The Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution was passed on August 12, 1999, containing 82 chapters with the following classifications: Chapter I: General Provisions (Article 1-5); Chapter II: Alternative Dispute Resolution (Article 6); Chapter III: Terms of Arbitration, Appointment of Arbitrators and Dissenter Rights (Article 7-26);

¹⁰ Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya* (Jakarta: Prenadamedia, 2015), p. 77.

¹¹ Gatot Soemartono, "Finalitas Putusan Arbiter Internasional: Analisis Pasal 52 Konvensi ICSID," *Jurnal Ilmiah Ilmu Hukum ERA HUKUM* Year IV, no. 13 (1997): p. 5; One of the advantages of arbitration according to Witanto is the existence of dissenting opinion. Witanto, *Hukum Acara Mediasi* (Bandung: Alfabeta, 2012), p. 13.

Chapter IV: Applicable occasions before the Arbitration Tribunal (Article 27-51); Chapter V: Opinions and Arbitral (Article 52-58); Chapter VI: Implementation of the Arbitral (Article 59-69); Chapter VII: Cancellation of Arbitral (chapters 70-72); Chapter VIII: The End Task of Arbiter (chapters 73-75); Chapter IX: Fee of Arbitration (chapters 76-77); Chapter X: Transitional Provisions (chapters 78-80); and Chapter XI: Final Provisions (chapters 81-82).

Law No. 30 of 1999 contains a few things from the process of alternative dispute resolution, which Huala Adolf can be interpreted and spelled out, first, the dispute is based on elements of goodwill; Second, the settlement through the Court ruled out.¹² Article 5 of the Law No. 30 of 1999 stipulates that: “The disputes that can be resolved through arbitration is in the field of trade and the rights under the laws and regulations which are fully controlled by the parties involved”. This shows that all parties must join in resolving the problems. In relations to trade, both parties always want everything that has been agreed and poured into an agreement can be met and implemented properly, that is, in accordance with the purpose of the agreement in the contract. This supports the notion that the expected trade agreement will establish a good relationship which may last for a long period of time, as well as prevent potential disputes.

Civil Law is one area of the law governing the relationships between individuals in a society with a particular channel. Civil law is also known as private law or civil law. In the perspective of history, the Civil Code currently in force in Indonesia, cannot be separated from the history of European Private Law. In 1804, Napoleon initiated to compile a set of Civil Code which contains of rules called *Code Civil des Francais* which can also be called the *Code Napoleon*, since the Code Civil des Francais is a part of the Code Napoleon.¹³ Civil Code (BW) was announced on April 30, 1847 Statblat: S.1847-23 and became effective on May 1, 1848. Civil Law in force in Indonesia, according to Dardiri Hasyim can be said to be plural, that there are

¹² Huala Adolf, *Pengkajian Hukum tentang Arbitrase Negara-Negara ASEAN* (Jakarta: Badan Pembinaan Hukum Nasional, Departemen Hukum dan Hak Asasi Manusia RI, 2009), p. 28–30.

¹³ Komariah, *Hukum Perdata* (Penerbitan Universitas Muhammadiyah Malang, 2003), 12.

many-divisions, one of which is the classification of the population of Indonesia.¹⁴ With many discussions in the Civil Code as stipulated in 1993 articles, the fulfilment of the rights of those seeking justice outside the court in compliance with the Act No. 30 of 1999 should also be open for discussion.

Arbitration arranged in Law No. 30 of 1999 should be appreciated. This is because the arbitration in this law is a way of settling a dispute outside the general court based on a written agreement from the party to the dispute. On the other hand, revisions to Law no. 30 of 1999 is indispensable, and should consider the existing international arbitration rules, whose arrangements are already more advanced than Law no. 30 Year 1999. In this case the Convention of the Recognition and Enforcement of Foreign Arbitral Award, the Convention on the Settlement of Foreign Countries and Foreigners on the Investment of the Settlement of Investment Dispute Between State and National of Order State - ICSID), and The UNCITRAL Model Law on International Commercial Arbitration of 1985 which was amended in 2006 should be one of the main references in the improvement of arbitration rules in Indonesia, since the Model Law UNCITRAL has been widely adopted by many countries from all continents in the world as a rule of law.

Based on the background that has been presented, the problems can be formulated as follows: *first*, how is the presence of the contents of Law No. 30 of 1999 in the Civil Code? *Secondly*, how is the fulfilment of the rights in the Civil Code for justice seekers outside the court in compliance with Act No. 30 of 1999?; *Third*, why is the existence of the articles in the Civil Code not in accordance with the demands of the Law No. 30 of 1999?

Arbitration as an Extra-Judicial Resolution in The Indonesian System: The Law No. 30 of 1999

One of arbitration institutions in Indonesia which has the authority to resolve disputes on trade is *Badan Arbitrase Nasional Indonesia* (BANI-The Indonesian National Arbitration Board). As an illustration, since established in 1977, out of hundreds of cases that

¹⁴ Dardiri Hasyim, *Amandemen KUHPerdara dalam Kerangka Sistem Hukum Nasional* (Surakarta: UNS Press and UNIBA Press, 2004), p. 67-74.

went to BANI, only 11 cases were cancelled from the court. Out of 11 requests of cancellation, three cases were withdrawn, seven were defeated, and one is still hanging. The compliance of the parties to implement the decision of BANI is 99.9 percent. This indicates the participation and appreciation of the community, especially parties involved in the dispute to BANI. From its beginning until ten years after, BANI has handled 27 cases. In the second ten years, i.e., 1987-1996, it increased to 56 cases. BANI then flooded with case for the third phase of ten years, which was in 1997-2006, with as many as 215 cases. In 2007 cases handled declined to 26 cases. Here is a list of types of cases handled by BANI in the period of 2003-2007:¹⁵

Table 1:

List of BANI Case Type in 2003-2007

| CASE TYPE | % |
|------------------------------|----------|
| Construction | 37 |
| Purchase | 18 |
| Lease | 12 |
| Investment | 10 |
| Finance | 5 |
| Oil and Gas | 4 |
| Intellectual Property Rights | 3 |
| Energy | 2 |
| Mining | 1 |
| Telecommunications | 1 |
| Land | 1 |
| Environment | 1 |
| Other | 1 |

From the time span of 2003 to 2007, the cases that were closed in less than 90 days are as much as 39 percent, within 90 to 150 days are 35 percent and within 150 to 180 days are 14 percent. The longest is settled in 180 days with the percentage of 12 percent. In general, in

¹⁵ "Berdamailah di BANI," hukumonline.com, October 2, 2008, <https://www.hukumonline.com/berita/baca/hol20204/berdamailah-di-bani/>.

the view of the Civil Code, it can be said that arbitration is essentially an extension of the principle of freedom of contract, the arrangements made legally valid as law for those who made it, as stated in Article 1338 paragraph 1 of the Civil Code, "All agreements made in accordance with the applicable laws as laws for those who make it. Agreement is irrevocably apart with the agreement of both parties, or for the reasons specified by the Law. Agreement must be implemented in good faith."

Article 5 paragraph 2 provides a negative formulation that disputes that cannot be resolved through arbitration are disputes that according to the legislation cannot be held peace upon as stipulated in the Civil Code Book III of the eighteenth chapter, namely: Article 1851 stating that peace is an agreement which contains that by handing over, promising or holding an item, both parties end a case that is being examined by the court or prevent a case when it is made in writing. Furthermore, in Article 1852, it is said that in order to establish peace, one must be authorized to give up his right to the matters embodied in the peace. Article 1853 emphasizes that peace can be held concerning civil interests arising from a crime or offense. In this regard, peace shall not prevent the Prosecutor to prosecute the crime or the offense concerned. Meanwhile, in Article 1854, it says that peace only concerns the matter contained in it; the release of all rights and demands written therein must be interpreted as long as the rights and demands are related to the dispute which is the cause of peace. The articles indicate that in an agreement between the parties or a business relationship, there is always a possibility of a dispute arising. Disputes that occur are often related to how to enforce clauses of the treaty, the contents of the agreement or anything other than those stipulated in the agreement.

The Rights of Justice Seekers Covered in the Law of Arbitration

The fulfilment of rights and obligations between parties is intended to ensure that the parties who have reached an agreement to enter into a trade agreement can establish a lasting relationship, so that it can take place for the long term, and prevent the possibility of a dispute. Purwosutjipto translates the term arbitration (English) or *arbitrage* (Dutch) by refereeing. Then the refereeing is defined as a peace justice in which the parties agree that their disputes over private

rights which they may be entirely controlled shall be examined and tried by an impartial judge, appointed by the parties by an impartial judge appointed by the parties themselves and the verdict binds both parties.¹⁶

Based on the identification of the author's done against the articles of Law No. 30 of 1999, 25 (twenty five) rights of parties involved in the settlement of disputes outside the court are to: a) elect or refuse arbitration as a solution to the settlement of disputes (Articles 2 and 7) ; b) settle trade disputes (article 5); c) using a mediator (article 6, paragraph 3); d) use alternative dispute settlement institutions (art. 6, paragraph 9); e) exclude other party's right to file a dispute resolution to the District Court (article 11, paragraph 1); f) submit an application to the Chief of the District Court to appoint the arbitrator (article 13, paragraph 2); g) approve the arbiter's withdrawal request (article 19, paragraph 3); h) have the right to disobey the arbitrator (articles 22 through 26); i) deny the right to denial of the arbitrator of the other party (article 25, paragraph 1); j) use Indonesian (article 28); k) equal opportunity to express their views (article 29, paragraph 1); l) can be represented by its proxy (article 29, paragraph 2); m) involve a third party (article 30); n) be free to determine arbitration proceedings (article 31, paragraph 1); o) elect national or international arbitration (article 34); p) determine the place of arbitration (article 37 paragraph 1); q) explain in writing their respective positions (article 46, paragraph 2); r) request a binding opinion from the arbitration body on certain legal relations of an agreement (article 52); s) obtain an arbitral award (article 55); t) file an application to the arbitrator or arbitral panel to make corrections to administrative misconduct and or to add or subtract a judicial appeal (article 58); u) accept the execution of the decision (article 61); v) get the verdict examined by the District Court (article 62 paragraph 2); w) apply for the enforcement of an international arbitral award to the District Court (article 66); x) appeal to the Supreme Court (article 68); and y) file an application for the cancellation of the arbitral award (article 70).

Similar to the above, the arbitration among the community of economists, Sri Redjeki Hartono said that essentially has its own distinctive characteristics arising from the experience of the economic

¹⁶ Purwosutjipto, *Pengertian pokok ...*, 1: p. 1.

activities throughout history. Thus, there are a couple of things and habits that are held by fellow economists, among others, trying to keep the belief among the perpetrators, although arising cross opinions. In the framework of good relations of mutual benefit in the long run, an opinion of the cross can be muted and landfilled, so it maintains mutually beneficial business relationships and foster a better relationship.¹⁷ Suyud Margono also says the same thing that the arbitration agreement is an initial step in keeping good name so it needed a further agreement is contained in document.¹⁸

The identification of such rights when seen in the perspective of the dispute resolution process can be concluded as follows:

Table 2:

Identification of Fulfilment of Rights in the Act No. 30 of 1999

| No | Identification of Fulfilment of Rights | Description |
|----|--|---|
| 1 | Selection of arbitration | <ul style="list-style-type: none"> • Choose or reject arbitration as a dispute resolution solution (Article 2.7) • dispute resolution is in the field of trade (Article 5) • use a mediator (Article 6 (3)) • use of alternative dispute resolution institutions (Article 6 (9)) • eliminate the right of other parties to file a dispute to the District Court (Article 11 (1)) |
| 2 | Mediator/arbiter | <ul style="list-style-type: none"> • apply to the Chairman of the Court to appoint the arbitrator (Article 13 (2)) • approve the withdrawal request of the arbitrator (Article 19 (3)) • have the right of refusal to the |

¹⁷ Hartono, *Hukum Ekonomi Indonesia*, p. 182–83.

¹⁸ Suyud Margono, *Alternative Dispute Resolution & Arbitrase Proses Pelembagaan dan Aspek Hukum* (Bogor: Ghalia Indonesia, 2004), p. 117.

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|---|-----------------------------|--|
| | | <p>arbitrators (Article 22-26)</p> <ul style="list-style-type: none"> • reject the arbiter of right of refusal to the other party (Article 25 (1)) |
| 3 | Expressing opinion | <ul style="list-style-type: none"> • use Indonesian (Article 28) • equal opportunity to express their own opinion (Article 29 (1)) • represented by proxies (Article 29 (2)) • engage with third parties (Article 30) • explain in writing each conviction (Article 46 (2)) • invoke binding advisory opinion from the arbitration institution on specific legal relationship of an agreement (Article 52) |
| 4 | Event of dispute resolution | <ul style="list-style-type: none"> • freely specify the event of arbitration (Article 31 (1)) • choose a national or international arbitration (Article 34) • determine the place of arbitration (Article 37 (1)) |
| 5 | Obtaining a verdict | <ul style="list-style-type: none"> • obtain an arbitral verdict (article 55) • accept the implementation of the verdict (Article 61) |
| 6 | Challenging the verdict | <ul style="list-style-type: none"> • apply to the arbitrator or the arbitral tribunal to correct administrative errors or add or subtract something from the decision indictment (Article 58) • get a decision from the examination of the District Court (Article 62 (2)) • apply for the enforcement of international arbitration to the District Court (Article 66) • appeal to the Supreme Court (Article 68) |

| | | |
|--|--|---|
| | | <ul style="list-style-type: none"> • apply for cancellation of the arbitral award (article 70) |
|--|--|---|

Thus, it can be said that there are six main points in the identification of the fulfilment of the rights in dispute resolution outside the court, namely: the right to apply arbitration; the right to choose a mediator/arbitrator; the right to argue; the right to specify the event of dispute resolution; the right to receive a decision; and the right to refute the verdict.

Meanwhile, based on the identification that I have made on Civil Code's articles, there are 17 articles about the rights of those seeking justice outside the court, with details: Book I = 0 article; Book II = 1 article; Book III = 12 articles; and Book IV = 4 articles. The identification of these articles is as follows: *first*, each holder of an immovable item, may ask the District Court where it is located, to be declared his own. The statutory provisions on civil procedural law govern how to make such a request (article 621). Secondly, only tradable goods are subject to approval (article 1332). Third, all agreements made in accordance with the law shall apply as laws to those who make them. The Agreement shall not be withdrawn other than by agreement of both parties, or for reasons prescribed by law. Consent must be done in good faith (article 1338).

Fourth, consent not only binds to what is expressly defined therein, but also all things which by its nature of consent are prosecuted under justice, custom, or law (art 1339). Fifth, in order for a legal deposit, there is no need for attorney and a Judge (art. 1406). Sixth, if the goods owed are destroyed, they can no longer be traded, or disappear outside the debtor's faults, the debtor, if he has rights or claims for compensation, is required to grant such rights and claims to the creditor (art 1445). Seventh, both parties, with special agreements may extend or reduce the obligations established by this law and they may even agree that the seller is not obligated to bear anything (article 1493). Eighth, for the creditors to the seller, he may use the privilege, to enforce lawful rights (article 1525).

Ninth, the formulation of power formulated in general only covers actions relating to management. To transfer goods or to lay down a mortgage on it, to make a peace, or to take other actions that can only be done by an owner, a power of attorney with firm words

(article 1796) is required. Tenth, peace can be canceled if there has been a mistake about the person concerned or the subject of the dispute. Peace can be nullified in any case, if fraud or coercion has been committed (art 1859).

Eleventh, the cancellation of peace may be requested, if the peace is held due to a fallacy of the sitting of a matter on a void of rights, unless the parties have made a peace of innocence with a strict statement (article 1860). Twelfth, peace concerning a dispute that has ended with a decision of the Judge has obtained a definite legal force, but not known by both parties or any one, is void. If an unknown decision can still be appealed, then the peace concerning the dispute is valid (article 1862). Thirteenth, in a peaceful situation, a mistake in counting must be corrected (article 1864). Fourteenth, any person claiming to have a right, or appointing an event to affirm his right or to deny any right of another, shall prove the existence of that right or the incident (article 1865).

Fifteenth, evidentiary tools include: written evidence; witness evidence; conjecture; recognition; oath (article 1866). Sixteenth, the judge's decision on a person's legal position, imposed on a person who, by law, is authorized to refute the claim, applies to anyone (article 1920). Seventeenth, good faith must always be considered, and whoever makes a claim on the basis of bad faith, must prove it (article 1965). Related to goodwill in the arbitration, Susanti Adi said that arbitration is a form of procedures how to resolve disputes arising so as to achieve a particular result are final and binding, through agreement of the parties in making an agreement (*arbitration clause/arbitration agreement*).¹⁹

The seventeen identifications of the right of the Civil Code when viewed in the perspective of Identification of Fulfilment of Rights in Law No. 30 of 1999 can be concluded as follows:

¹⁹ Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, p. 81–84.

Table 3:

Identification of Rights from the Civil Code in the Perspective of Act No. 30 of 1999

| No | Identification of Fulfilment of Rights | Description |
|----|--|---|
| 1 | Selection of arbitration | <ul style="list-style-type: none"> • Only a tradable item that can be the subject of an agreement (Article 1332) • To be a legitimate saving, attorneys and Judges are not needed (Article 1406) • If the owed goods destroyed, it can no longer be traded, or missing out due to the error of the debtor, then the debtor, if s/he has the right or redress regarding those goods, s/he is required to give the right and the claim to the creditor (Article 1445) • Both parties, with special agreements may extend or reduce the obligations stipulated by this law and they are even allowed to hold a mandatory agreement that the seller does not bear any obligations anything whatsoever (Article 1493) • The good faith shall always be presumed to exist, and the people who file a lawsuit on the grounds of bad faith, must prove it (Article 1965) |
| 2 | Mediator/arbiter | - |
| 3 | Expressing opinion | <ul style="list-style-type: none"> • Every person who claims to have a right, or designate an event to affirm one's rights or to deny the rights of others, should prove the existence of such rights or events (Article 1865) • Evidence includes: written evidence; the evidence of witnesses; presupposition; |

| | | |
|---|-----------------------------|---|
| | | recognition; oath (Article 1866) |
| 4 | Means of dispute resolution | <ul style="list-style-type: none"> • Each owner of realty can apply to the District Court where the item is located to be declared as his own. The provisions of legislation on civil procedure set how to file such request (Article 621) • All agreements are made in accordance with the applicable laws as laws for those who make it. The agreement is irrevocably apart with the agreement of both parties, or for the reasons specified by legislation. The agreement must be implemented in good faith (Article 1338) • The binding agreement is not only what is explicitly set out therein, but also everything an agreement is required for, by their nature based on justice, customs, or laws (Article 1339) • The authorization which is formulated in general terms only includes measures concerning the maintenance. To transfer goods or putting a mortgage on it, to make a peace, or take other actions that can only be done by an owner, need a power of attorney with a clear statement (Article 1796) |
| 5 | Obtaining verdict | <ul style="list-style-type: none"> • Peace regarding the dispute that has ended with a judge's decision has certain legal force, but if unknown to either or neither sides, it is cancelled. If the decision that is not known can be appealed, then the peace of the dispute in question is legal (Article 1862) |
| 6 | Challenging the verdict | <ul style="list-style-type: none"> • For the creditors to the seller, they can use the privilege, to carry out the demands of rights through the law |

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| | | <p>(Article 1525)</p> <ul style="list-style-type: none"> • However, peace can be canceled if there has been a mistake of the person concerned or a point of contention. The peace can be canceled in all things, if they have done a fraud or coercion (Article 1859) • Similarly, the cancellation of a peace can be requested, if the peace is held due to an error concerning the dispute, unless the parties have made peace about it with the assertion of nullification (Article 1860) • In a peace, a mistake in counting should be corrected (Article 1864) • The judge's decision about a person's legal position, which is imposed on the person who is authorized by law to deny the claims, is applicable to any person (Article 1920) |
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Therefore, the articles in the Civil Code do not all meet the 6 (six) main points in identifying the fulfilment of rights in the settlement of disputes outside the court as set forth in Law No. 30 of 1999 (table 2). Identification of the fulfilment of rights not contained in the Civil Code is the right to choose a mediator/arbitrator.

More discussions about dispute resolution outside the court are contained in the *Reglement op de Rechtsvordering (Rv)* which is the Book of the Law of Civil Procedure. This is understandable given the current Civil Code was first enacted in tandem with the implementation of *Reglement op de Rechtsvordering (Rv)*. Hariyani mention since the beginning (Netherlands colonial period), the regulation has already hinted that the Court is not efficient and effective because it is very old and it cost him dearly. For that is the necessary middle way.²⁰

²⁰ Iswi Hariyani, *Prosedur Mengurus HAKI yang Benar* (Jakarta: PT. Suka Buku, 2010), p. 26.

The provisions on the settlement of dispute are contained in Articles 615 to 651 in the *Rv* which regulates certain aspects as follows: arbitration agreements and appointment of arbitrators (Article 615-623); examination in the arbitral panel (Articles 624-630); arbitral award (Articles 631-640); efforts on the arbitral award (Articles 641-647); and the ending of the arbitration event (Articles 648-651).

The failure of the Realization of the Right to Mediation and its Roots

Conflict is basically a gap between the desired condition and the reality. That is why a real solution is needed to resolve the conflict so that it does not drag on and to ensure that there is no future conflict. Husni calls conflict as a condition whereby one party wants the other to do or not do as desired, but the other party rejects to do so.²¹

Before the Law 30 of 1999 was passed, the provision of arbitration as one of the forms of dispute resolution was set forth in the Articles 615 to 651 of the *Rv* for Indonesian people who were part European or equal to them. In the Dutch colonial rule, there were three division of population groups with different legal system and courts, namely *Bumiputera* (indigenous people) applied Customary law with *Landraad* court and procedural law in an updated Indonesia Regulation (*Het Herzijene Indonesich Reglement/HIR*), and for the Eastern foreigners and European foreigners applied the *Burgerlijke Wetboek* or BW or Civil Code, and the *Wetboek van Koophandel* or *WvK* or Book of the Commercial Law with the *Rv* procedural law. Arbitration in Indonesia according to Sudiarto identified with trade disputes, then arbitration is more towards the discussion of the regulation, and not an absolute becomes the field of civil liability.²² Hasyim mention historically juridical, legal basis of arbitration in Indonesia is mainly related to the colonial law based on article II of the constitution of 1945 the Transitional Rules specify that “all rules still apply, directly over the Yet, according to the new constitution was held.” So, it is with *RV* and *HIR* are enacted at the time of the colonial Netherlands

²¹ Husni, *Penyelesaian Perselisihan ...*, 2.

²² Sudiarto, *Mengenal Arbitrase: Salah Satu Alternatif Penyelesaian Sengketa Bisnis* (Jakarta: PT Raja Grafindo Persada, 2004), 41.

East Indies still applies, because up to this point have not held the new substitutes in accordance with the 1945 constitution Transition.²³

The provisions governing arbitration are contained in the Code of Civil Proceedings (Reglement of de Gergerlijke Rechtsvordering) contained in S. 184-52 junto S. 1849-63. RV is essentially a code of civil event law that applies to European groups. Meanwhile, the Civil Code of Law Act for the Bumiputra Group is HIR (for Java and Madura) and RBG (outside Java and Madura). However, pursuant to Article 377 HIR and section 705 RBG, the provisions of the arbitration contained in the RV shall also apply to the Bumiputra group. The articles of the RV governing arbitration are from chapters 615 to section 651, which include five parts, namely: The following: Article 615-623 on the approval of arbitration and the appointment of arbitrators; Article 624-630 on the examination of the case in front of arbitration; Article 631-640 on arbitration; Article 641-647 on remedies against arbitral Awards; and article 648-651 on the expiration of arbitration matters. Meanwhile, the law of the Civil Code that applies to the Bumiputra group is HIR/Herziene Indonesisch Reglement (for Java and Madura) and RBG (for outside Java and Madura) is essentially not directly speaking of arbitration, but in chapters 377 HR and section 70 RBG mentioned that, "where the Bumiputra and eastern foreign people would require their dispute to be decided by arbitration, then they obliged to abide by the court rules for the case that applies to Europeans". This indicates the goodwill of the Dutch in respecting and appreciating the legality of dispute resolution by arbitration, given that everyone has the same group and equals.²⁴

The implicit provision of arbitration is contained in Article 377 of *HIR* and Article 705 of *Reglemen* for the regions outside Java and Madura or *Rechtsreglement buitengewesten (RBg)*. It mentions that if Indonesian or Orientals want their disputes settled by the arbitrator, the court shall comply with the regulations applicable to the Europeans. Article 377 of *HIR* and Article 705 of *RBg* indicate a process of dispute resolution through arbitration, and the arbitrator is granted the authority to make a decision.

²³ Dardiri Hasyim, *Hukum Arbitrase* (Surakarta: UNS Press, 2016), 5.

²⁴ *Ibid.*, p. 20.

The Enactment of the Law No. 30 of 1999, based on Article 81, the provision of arbitration referred to in Article 615 to Article 651 of Civil Procedure *Reglemen* (*Reglement of de Rechtsvordering, Staatsblad 1847: 52*) and Article 377 of the New Indonesian *Reglement* (*Het Herzijene Indonesisch Reglement, Staatsblad 1941: 44*) and Article 705 *Reglement* Events to Regions outside Java and Madura (*Rechtsreglement buitengewesten, Staatsblad 1927: 227*) shall not apply. This makes sense considering the regulation's age that is no longer in line with the changing times.²⁵

Thus, we can say that the background of why the existence of the articles of the Civil Code is not in tune with the indictment of the Law No. 30 of 1999 is due to the existing regulatory rules that accompany the Civil Code relating to dispute resolution outside the court, namely: *Reglement op de Rechtsvordering (Rv)* and *Rechtsreglement buitengewesten (RBg)*, as follows:

Table 4:

Double Regulatory Arbitration

| Reglement op de Rechtsvordering (Rv) | Rechtsreglement Buitengewesten (RBg) | Law No. 30 of 1999 |
|---|---|---|
| Article 615-623: arbitration agreement and appointment of arbitrators | Article 705: Provisions of the arbitration contained in the RV shall also apply to the Bumiputra group | <ul style="list-style-type: none"> • Article 6: arbitration • Article 7-26: arbitration terms, appointment of arbitrators, and the rights |
| Article 624-630: examination in the arbitral tribunal | Article 154: The mediation procedure based on RBg, violation of it then results in a null and void decision | Article 27-51: events that apply before the arbitral tribunal |
| Article 631-640: | | <ul style="list-style-type: none"> • • Article 52-58: |

²⁵ *Ibid.*, p. 10.

| | | |
|--|--|---|
| arbitration award | | opinion and arbitration award <ul style="list-style-type: none"> • Article 59-69: implementation of the arbitration award |
| Article 641-647: efforts on the arbitral award | | Article 70-72: annulment of arbitration award |
| Article 648-651: expiration of the arbitration event | | Article 73-75: termination of arbitrator's duties |

To that, new regulations are required. It should be capable of responding to the changing times. It starts from the Act No. 5 of 1968 on Ratification Consent for the Convention on the Settlement of Disputes Between States and Foreign Residents Concerning Investment or the ratification of the "International Convention On the Settlement of Investment Disputes Between States and Nationals of Other States and Presidential Decree No. 34 of 1981 about the Ratification of "Convention On the Recognition and Enforcement of Foreign Arbitral Awards" which is also known as the New York Convention (1958). It is the Convention on the Recognition and Implementation of Arbitral Awards of Foreign Affairs, which was held on June 10, 1958 in New York, which was initiated by the United Nations.

Conclusion

Referring to the formulation of the problem in this study, it can be concluded that: first, in general, in the view of the Civil Code, it can be said that arbitration is essentially an extension of the principle of freedom of contract, the arrangements made legally valid as law for those who make it, as stated in Article 1338 of the Civil Code number 1, "All agreements are made in accordance with applicable laws as laws for those who make it. Agreement is irrevocably apart with the

agreement of both parties, or for the reasons specified by the Laws. The agreement must be implemented in good faith." This is consistent with the notion of arbitration contained in article 1 point 1 of the Law No. 30 of 1999.

Secondly, there are six main points in the identification of the fulfilment of the rights in dispute resolution outside the court as stipulated in the Law No. 30, 1999, namely: the right to vote arbitration; the right to choose a mediator/arbitrator; the right to argue; the right to specify the event of dispute resolution; right to receive a decision; and the right to refute the verdict. Not all of the articles of the Civil Code meet the six main points in the identification of the fulfilment of the rights in dispute resolution outside the court. The identification that is not contained in the Civil Code is the right to choose a mediator/arbitrator.

Third, the background of why the existence of the articles of the Civil Code is not in tune with the indictment of the Law No. 30 of 1999 is due to the existing regulatory rules that accompany the Civil Code relating to the dispute resolution outside the court, namely: *Reglement op de Rechtsvordering (Rv)* and *Rechtsreglement buitengewesten (RBg)*. For that, new regulations are needed which can address the changing of times.

The revision of the Law No. 30 of 1999 is necessary, and we have to pay attention to the existing rules of international arbitration, which are more advanced compared to the Law No. 30 of 1999. In this case, the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Award), the Convention on the Settlement of Investment Dispute Between State and National of Order State - ICSID, and the UNCITRAL Model Law on International Commercial arbitration of 1985 which have been through an amendment in 2006 should be one of the main references in the completion of arbitration rules in Indonesia, considering the Model Law UNCITRAL which has been widely adopted by many countries from all over the world as a law. The revision of Law No. 30 of 1999 makes sense because it tends to use *Reglement op de Rechtsvordering (Rv)* as the main reference.

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