

Arbitration Agreement according to Indonesian Law

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Abstract

Without an arbitration agreement, the parties cannot proceed to arbitration to resolve their dispute. This article is a description of the requirements for the validity of an arbitration agreement according to Indonesian law, namely in Law no. 30 of 1999 by comparing it with the arbitration requirements according to Reglement of de Burgelijke Rechtsvordering, amendment to law in the Netherlands, and also according to UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law on International Commercial Arbitration) 1985 which is internationally recognized.

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1. INTRODUCTION

Alternative Dispute Resolution is a way to resolve disputes outside of court. Methods that parties can choose to resolve their disputes other than court include negotiation, conciliation, consultation, expert assessment, mediation and arbitration.

In Indonesia, the legal framework for Alternative Dispute Resolution is regulated in Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (UU No. 30/1999). Article 1 paragraph 10 Law no. 30/1999 provides a definition of Alternative Dispute Resolution as institutions for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlement outside of court by means of consultation, negotiation, mediation, conciliation or expert assessment. Article 6 paragraph 1 states that civil disputes or differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by excluding litigation settlement in the District Court.

Article 1 paragraph 1 Law no. 30/1999 defines arbitration as a method of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. From article 1 paragraph 1, it can be seen that an arbitration agreement is a prerequisite for the arbitration process.

Redfern and Hunter (2004) state that an arbitration agreement is the foundation stone of commercial arbitration because it records the parties' agreement to submit to arbitration, an agreement that is mandatory for any dispute resolution process outside of court. Article 11 Law no. 30/1999 reads:

“(1) The existence of a written arbitration agreement eliminates the rights of the parties to submit dispute resolution or differences of opinion contained in the agreement to the District Court.

(2) *The District Court is obliged to refuse and will not intervene in a dispute resolution that has been determined through arbitration, except in certain cases stipulated in this Law.*”

Therefore, if the parties already have an arbitration agreement, it means that the parties waive their right to submit their dispute to the District Court.

The District Court is obliged to refuse to handle the dispute, except for certain cases. Only disputes regarding subjective rights that are fully controlled by the parties can be submitted to arbitration. In Indonesia, the most prominent arbitration institution is the Indonesian National Arbitration Board.

This article will discuss the terms of an arbitration agreement according to Indonesian law and see whether there is any influence from Dutch law and international practice in the formulation of the terms of the arbitration agreement. In the discussion, writing This will compare the requirements in Law no. 30/1999 with previously applicable law, namely the Reglement of de Burgelijke Rechtsvordering which has been in effect in Indonesia since the Dutch colonial era, and also by comparing with the terms of the arbitration agreement according to Dutch law which was amended in 1986 and the terms of the arbitration agreement according to UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law on International Commercial Arbitration) in 1985. These two laws were issued before Law no. 30/1999.

2. FRAMEWORK

1. Reglement of de Burgelijke Rechtsvordering (RV)

Reglement of de Burgelijke Rechtsvordering (RV) is a law that has been in effect in Indonesia since the Dutch colonial era. In the book Mrs. Girsang (1992), stated that after Indonesia's independence, based on article II, the Transitional Rules of the 1945 Constitution in conjunction with article 377 HIR, the regulations regulated in the RV still apply for the examination of arbitration cases in Indonesia. In memory of the explanation of article 3(1) of Law no. 14/1970 stated: "Settlement of cases outside of court on the basis of peace or through referees (arbitration) is still permitted."

According to RV, the first basis for arbitration is an arbitration agreement, namely an agreement between 2 (two) people/parties involved in a dispute to submit the dispute to an arbitrator/arbitrators. There are 2 (two) ways to submit dispute resolution to arbitration:

- a. The parties can bind themselves to each other to submit the resolution of disputes that may arise in the future to arbitration (article 615 paragraph 3 RV). An agreement containing such a clause is called a *pactum de compromittendo*, namely by making an agreement containing such a clause. RV does not explicitly state whether the creation of this form of arbitration clause must be in writing, but in practice the courts tend to tend towards requiring it to be in writing.
- b. By making a separate agreement (in writing) containing an agreement to submit the existing dispute to arbitration (article 618 RV), or what is called a deed of compromise. This form of compromise deed must be written and signed by both parties or made in front of a notary. This compromise deed contains, among other things:
 - i. Disputed matters;
 - ii. Names and places of the parties;
 - iii. Name and place of residence (position of the arbitrators with whom they agreed);
 - iv. The number of arbitrators must be odd.

In article 618 paragraph 3 RV, it is stated that if the compromise deed does not meet the provisions mentioned above then the arbitration agreement is declared void.

2. UNCITRAL Model Law 1985

UNCITRAL (United Nations Commission on International Trade Law) is a UN commission that focuses on the field of international trade law. UNCITRAL is a legal body with universal membership that specializes in reform law commercial in the world. UNCITRAL's aim is to modernize and harmonize international business regulations.

In matters of arbitration, UNCITRAL issued two Model Laws regarding **International Commercial Arbitration**, the first in 1985, and the second is the 2006 Model Law version which is a modification of the 1985 Model Law. This article will only focus on the 1985 Model Law version, which was issued before Law no. 30 of 1999.

Requirements regarding arbitration agreements in the UNCITRAL Model Law are set out in chapter 7, which when translated into Indonesian reads:

"Article 7. Definition and form of arbitration agreement

“Arbitration agreement” is an agreement by the parties to submit to arbitration for all disputes or specific disputes that have arisen or will arise between them relating to certain legal relationships, whether contractual or not. An arbitration agreement can be in the form of an arbitration clause in a contract or as a separate agreement.

The arbitration agreement must be in writing. An agreement is written if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other forms of telecommunications recording the existence of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is stated. by one party and not denied by the other party. A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference in question is such as to make the clause part of the agreement.”

3. Rv Amendment in the Netherlands

Mrs. Girsang (1992) explained that starting December 1 1986, in the Netherlands the New Arbitration Regulations as contained in Wetboek van Burgelijke Rechtsvordering (Rv) Book IV articles 1020-1076 came into effect, to replace the previous regulations (RV), which were made in in 1838 and is considered obsolete (verouderd) because it cannot be applied to international developments in the field of arbitration.

The amended RV sets out a number of conditions regarding the permissibility of arbitration, namely:

1. Arbitration must be based on the agreement of the parties concerned.

Arbitration can only occur if there is an agreement between the parties to submit their dispute to a Particular Judge (Arbiter) instead of an ordinary Judge. If the arbitrator has the authority to resolve a dispute, then the judge may not interfere anymore. This agreement according to article 1021 Rv must be in writing. Even the simplest writing is sufficient, for example a letter, telex or telegram.

A written statement can be deemed invalid according to article 1052 paragraph 2 Rv if one of the parties, when advancing his lawsuit before the arbitrators, the opposing party does not raise an objection and the objection must be submitted before there is an answer to the main case regarding the absence of an arbitration clause.

It can be seen that this position is the same as the UNCITRAL Model Law.

2. Only disputes regarding matters within the parties' free authority can be submitted to an arbitrator (article 1020 Rv). Therefore, divorce issues, for example, cannot be brought to arbitration.
3. What can be accepted in arbitration are only disputes (geschillen) and the following as mentioned in article 1020 paragraph 4 Rv.

4. UU no. 30/1999

In 1999, Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The enactment of this law replaces RV regulations that have existed since the Dutch era. So, with the existence of Law no. 30/1999, the RV regulations no longer apply in Indonesia. Matters regarding the requirements of the arbitration agreement in Law no. 30/1999, regulated in the First Part of Chapter III, especially Article 7 and Article 9:

- i. Article 7 reads:

"The parties can agree that a dispute that has occurred or will occur between them will be resolved through arbitration."

- ii. Article 9 reads:

“(1) In the event that the parties choose to resolve the dispute through arbitration after the dispute has occurred, agreement regarding this matter must be made in a written agreement signed by the parties.

(2) In the event that the parties are unable to sign a written agreement as intended in paragraph (1), the written agreement must be made in the form of a notarial deed.

- (3) *The written agreement as intended in paragraph (1) must contain:*
- a. *disputed issues;*
 - b. *full name and place of residence of the parties;*
 - c. *full name and place of residence of the arbitrator or arbitration panel;*
 - d. *the place where the arbitrator or arbitration panel will make a decision;*
 - e. *secretary's full name;*
 - f. *dispute resolution period;*
 - g. *statement of willingness from the arbitrator; And*
 - h. *a statement of the willingness of the disputing party to bear all costs necessary for resolving the dispute through arbitration.*
- (4) *Written agreements that do not contain the matters referred to in paragraph (3) are null and void by law."*

3. RESULTS AND DISCUSSION

Valid Terms of Agreement according to Indonesian Law

According to the Indonesian Arbitration Guide, an arbitration agreement according to Indonesian law must be in written form and apart from that it must also meet the requirements of the legal terms of the agreement as regulated in the Civil Code (KUHPPerdata) in Article 1320 and following. This is understood because the principles of the arbitration agreement must also comply with the principles of agreements according to Indonesian law, which are regulated in the Civil Code.

Article 1320 of the Civil Code regulates the legal conditions for an agreement according to Indonesian law, where there are four conditions for an agreement to be considered valid, namely:

1. There is agreement from all binding parties;
2. There is the ability of the parties to create an agreement;
3. The existence of a certain thing;
4. There is a legitimate cause.

The following articles in the Civil Code, namely articles 1321 to article 1337 of the Civil Code explain each requirement in article 1320, namely by explaining whether it is agreed, capable, certain things and lawful causes.

Terms of Arbitration Agreement

The articles governing arbitration agreements are regulated in articles 7 and 9 of Law no. 30/1999. Article 7 reads:

"The parties can agree that a dispute that has occurred or will occur between them will be resolved through arbitration."

Article 7 only provides that an agreement to arbitrate can be agreed to by the parties before the dispute occurs, in words *"will happen"* or after a dispute occurs, namely from words *"dispute that occurred"* in article 7.

The Indonesian Arbitration Guide explains that including an arbitration clause in another agreement by making reference to the original agreement that has an arbitration clause in Indonesia will not ordinarily be considered sufficient to fulfill the requirements for an arbitration agreement. So, it seems to be concluded that according to Indonesian law, the best practice in entering into an arbitration agreement before a dispute occurs is to make it in writing and make it one of the clauses in the agreement.

UU no. 30/1999 includes special requirements for arbitration agreements agreed to by parties after a dispute occurs. This is regulated in article 9, which reads:

- "(1) In the event that the parties choose to resolve the dispute through arbitration after the dispute has occurred, agreement regarding this matter must be made in a written agreement signed by the parties.*
- (2) In the event that the parties are unable to sign a written agreement as intended in paragraph (1), the written agreement must be made in the form of a notarial deed.*

- (3) The written agreement as intended in paragraph (1) must contain:
- a. *disputed issues;*
 - b. *full name and place of residence of the parties;*
 - c. *full name and place of residence of the arbitrator or arbitration panel;*
 - d. *the place where the arbitrator or arbitration panel will make a decision;*
 - e. *secretary's full name;*
 - f. *dispute resolution period;*
 - g. *statement of willingness from the arbitrator; And*
 - h. *a statement of the willingness of the disputing party to bear all costs necessary for resolving the dispute through arbitration.*
- (4) *Written agreements that do not contain the matters referred to in paragraph (3) are null and void by law.*“

Article 9 paragraphs (1) and (2) Law no. 30/1999 stipulates that an arbitration agreement after a dispute occurs must be in written form and signed by the parties or made in the form of a notarial deed. The contents of the arbitration agreement agreed upon after a dispute occurs must contain the following: (a) the issue in dispute; (b) the full name and residence of the parties, (c) the full name and residence of the arbitrator or arbitration panel; (d) the place where the arbitrator or arbitration panel will make the decision. In arbitration terminology, this is usually translated as the seat of arbitration; (e) full name of the secretary; (f) dispute resolution period; (g) statement of willingness of the arbitrator; and (h) a statement of the willingness of the disputing party to bear all costs necessary for resolving the dispute through arbitration. The parties must fulfill every requirement stated in article 9 paragraph (3) of Law no. 30/1999, because if not, the consequence will be that the agreement is considered void according to Indonesian law (Article 9 paragraph (4) Law No. 30/1999).

Comparison of the RV, the RV Amendment in the Netherlands and the UNCITRAL Model Law

If compared with the law in force in Indonesia before Law No.30/1999, namely RV, it can be concluded that Law No.30/1999 did not make many changes from the previous law. Articles 7 and 9 of Law No.30/1999 are almost a reflection of the regulations regarding the requirements of arbitration agreements in RV. The difference between Law no. 30/1999 and RV are details of what must be included in an arbitration agreement after a dispute occurs. To make it easier, the comparison will be carried out in the following table:

The terms of the arbitration agreement after a dispute occurs		
	According to Article 618 RV	According to Article 9 of Law no. 30/1999
Form of agreement	Written and signed by all parties or made before a notary	Written and signed by the parties or made in the form of a notarial deed
Details to be included in the agreement	<ol style="list-style-type: none"> i. Disputed matters; ii. Names and places of the parties; iii. Name and place of residence (position of the arbitrators with whom they agreed; iv. The number of arbitrators must be odd. 	<ol style="list-style-type: none"> a. <i>disputed issues;</i> b. <i>full name and place of residence of the parties;</i> c. <i>full name and place of residence of the arbitrator or arbitration panel;</i> d. <i>the place where the arbitrator or</i>

		<p>arbitration panel will make a decision;</p> <p>e. secretary's full name;</p> <p>f. dispute resolution period;</p> <p>g. statement of willingness from the arbitrator; And</p> <p>h. a statement of the willingness of the disputing party to bear all costs necessary for resolving the dispute through arbitration.</p>
Effects if all the details above are not met	The arbitration agreement was declared void	The arbitration agreement is deemed null and void

From the table above, it can be seen that Law no. 30/1999 can be said to only add new requirements to the arbitration agreement that was agreed upon after the dispute occurred because the first 3 things mentioned in Article 9 paragraph 3 are the same as the requirements in RV, Law no. 30/1999 'only' adds sub-clauses (c) to (h). Otherwise, the rules can be said to be the same:

- a. The agreement must be signed by the parties or in the form of a notarial deed or made before a notary;
- b. An arbitration agreement made after a dispute has occurred must contain the details stated by law, otherwise the arbitration agreement will be deemed/declared null and void.

The drafter of Law no. 30/1999 does not seem to be influenced at all by the amendment to the law in the Netherlands, which changed the requirements regarding arbitration agreements in Rv because the old regulations were considered obsolete (verouderd). The RV, which was amended in 1986, appears to follow many of the recommendations of the UNCITRAL Model Law issued in 1985, because there are no longer any requirements regarding arbitration agreements that occur after a dispute occurs, and arbitration agreements must be in writing, but can be in the simplest form, such as a letter, telex or telegram. This is more in line with the 1985 UNCITRAL Model Law, which explains that:

“[A]n agreement is in writing if it is contained in a document signed by the parties or in an exchange of correspondence, telex, telegram or other form of telecommunications recording the existence of the agreement, or in an exchange of statements of claim and defense where the existence of an agreement stated by one party and not denied by the other party. A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference in question is such as to make the clause part of the agreement.”

The formulators of Law No.30/1999 also do not appear to have been influenced at all by the terms of the arbitration agreement formulated by the 1985 UNCITRAL Model Law. Drafter of Law no. 30/1999 seems to pay little heed to existing international arbitration practices. That the Netherlands amended its arbitration regulations in 1986 because the previous regulations were deemed not applicable to international developments in the field of arbitration had no effect at all in Indonesia. Drafter of Law no. 30/1999 appears to be based only on the arbitration requirements

contained in the RV which were formulated during the Dutch colonial era. So, the requirements for an arbitration agreement are in the law. No. 30/1999 is very different from current international arbitration practice.

4. CONCLUSIONS AND SUGGESTIONS

In 1999, Indonesia finally had special legislation that regulates arbitration and alternative dispute resolution, namely Law no. 30/1999. Regarding the terms of the arbitration agreement, it seems that the drafters of Law no. 30/1999 only bases itself on the existing arbitration regulations in the previous law, namely *Reglement of de Burgelijke Rechtsvordering* (RV) which has been in effect in Indonesia since the Dutch colonial era. So the requirements regarding arbitration agreements in Law no. 30/1999 does not reflect the latest developments in international arbitration practice, which can be seen from the UNCITRAL Model Law.

UNCITRAL issues Model Law regarding International Commercial Arbitration for the first time in 1985. In 1986, The Netherlands amended its law, which was considered outdated, so that it could be applied to international developments in the field of arbitration. These legal amendments include changing the rules regarding the terms of arbitration agreements. However, Indonesia does not seem to be affected at all by international developments.

It would be even better if there were amendments to Law no. 30/1999, especially regarding the requirements of arbitration agreements, so that they can be more in line with international arbitration practice. Indonesia might consider adopting the UNCITRAL Legal Model regarding International Commercial Arbitration into Indonesian law.

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