



Arbitration as an alternative dispute resolution for land disputes based on Indonesian regulation

Deny Haspada^a, Faculty of Law, Universitas Langlangbuana, Email:

^adenmuter@yahoo.com

Indonesia is a big country and stretches from Sabang to Merauke. Such a significantly large land area creates many disputes. Settlement of these disputes can be achieved in a variety of ways but chiefly through the courts or through alternative dispute resolution, such as arbitration. Arbitration is expected to quickly resolve land disputes, especially in light of a growing number of land disputes requiring resolution through arbitration.

Keywords: *Arbitration, Land dispute.*

Background

The Republic of Indonesia (RI) or the Unitary State of the Republic of Indonesia (NKRI), is a country in Southeast Asia that is crossed by the equator, between the continents of Asia and Australia and the Pacific Ocean and Indian Ocean . Indonesia is the largest archipelago country in the world consisting of 17,504 islands (Van Der Kroef, 1951). The alternative name commonly used is Nusantara . (Van Der Kroef, 1951). With a population of nearly 270,054,853 people in 2018 (Government of Indonesia.2010), Indonesia is the fourth most populous country in the world and a country with the largest Muslim population, with more than 230 million followers Wikipedia, n.d; Damaryanti, Hendrik, & Annurdi, 2017. Indonesia has a very large land area stretching from Sabang to Merauke.

Indonesia's vast territory consists of land and sea. Land is a source of life for living things, whether human, animal, or plants. Humans live and live on land and use the land for a source of life by growing plants that produce food. Given the importance of land, natural resources that are very useful for many people and, as such, needs to be regulated by government. Land

is the basic capital of development. In general, people's lives depend on the benefits the land provides and a lasting relationship between the state and people is a must. The Indonesian nation is agrarian nation and has a very important position in the context of organising life and human life (Maria, 2009). In order for harmonious living, protections are needed for community interests. This can be realised if there are guidelines, rules or standards adhered to by the community. At a fundamental level, land rights are very meaningful and a sign of one's existence, freedom and dignity (Budi, 2003). Therefore, Law Number 5 of 1960 concerns Basic Regulations on Agrarian Principles (UUPA) and Article 33, Paragraph 3 of the 1945 Constitution states that 'the earth and water and the natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people.' Humans are social creatures (*zoon politicon*) and need each other. Within a reciprocal relationship, social difficulties arise in the form of conflicts. With the onset of conflict, the law plays an important role in resolving that conflict (Nurnaningsih, 2011).

Broadly speaking, the type of cases concerning conflict over land use can be divided into five groups (Edi, 2000):

1. Cases related to people's cultivation of plantation lands, forestry and other areas;
2. Cases related to violations of land reform regulations;
3. Cases related to the excess of the provision of land for plantations;
4. Civil disputes relating to land issues; and
5. Disputes regarding customary land.

(Lutfi, 2002) shows that disputes over land are complex and multi-layered. Land disputes cause conflict and this conflict often occurs between others and is caused by:

1. An unequal and uneven land ownership/control;
2. A discrepancy in the use of agricultural and non-agricultural land;
3. A lack of alignment for economically weak people;
4. A lack of recognition of indigenous land rights (*ulayat* rights);
5. A weak position of community holders of land rights in land acquisition and;
6. The process of issuing certificates that include:
 - a. The process of issuing land certificates is long and expensive,
 - b. Fake certificate,
 - c. Certificate overlapping (overlapping),
 - d. Revocation of certificate.

Settlement of land disputes can be resolved in various ways. Settlement can be done through court proceedings or through external processes separate to the courts . The litigation process

results in an adversarial agreement that does not embrace the common interest, tends to cause new problems and is slow in its resolution (Rusmadi, 991). The use of external out-of-court dispute resolution institutions is applied in the State of Indonesia. Its use was established via Law Number 30 of 1999. It concerns Arbitration and Alternative Dispute Resolution and has provided several peaceful settlement options (PPS) that can be taken by parties to settle disputes or their civil dissent. This can be achieved regardless of the utilisation of consultation, negotiation, mediation, conciliation, or expert judgment institutions (Boniface, 2016; Umam, 2010)

With regard to Article 1.10 of Law Number 30 of 1999, alternative dispute resolution consists of settling out of court. The following provides definitions of resolution processes (Frans, 2011):

1. Consultation is an action that is 'personal' between a certain party (client) with another party who is a consultant, where the consultant gives his opinion to the client in accordance with the needs and needs of his client;
2. Negotiation is an effort to resolve disputes between parties without going through a court process with the aim of reaching mutual agreement on the basis of more harmonious and creative cooperation;
3. Mediation is a way of resolving disputes through a negotiation process to obtain the agreement of the parties with the assistance of the mediator;
4. Conciliation is via intermediary who will act as a conciliator with the agreement of the parties by seeking acceptable solutions;
5. Expert judgment is an expert opinion on a matter that is technical in nature and in accordance with their area of expertise and;
6. Arbitration is a way to settle a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute.

According to the Regulation on Agrarian Affairs Number 11 of 2016 and regarding the Settlement of Land Cases as set out in Article 4, it is stated that the settlement of land disputes through non-litigation is carried out by the National Land Agency (BPN). The National Land Agency resolves land disputes through mediation channels. Mediation conducted via the Minister is set out in Agrarian No. 11 of 2016. It concerns the settlement of land disputes according to Article 4 and states that settlement through non-litigation can be resolved if the case is not the first to go to court settlement. The resolutions are achieved by:

1. Initiatives from the Ministry of Agriculture and Spatial Planning / Land Agency ("Ministry"); or
2. Public complaints.



Alternative Settlement of Land Disputes in Indonesia

The Indonesian language dictionary, published by the Department of National Education and Culture, defines land as the surface or top layer of the earth (Mohammad, 2005). Land rights are regulated in Article 16 of the Basic Agrarian Law, namely ownership, building, lease, and opening rights as well as the right to collect forest products. Other temporary rights are stipulated in Article 53, namely lien, production sharing, passenger and agricultural land lease rights.

The following provides a definition of land rights as regulated in the Basic Agrarian Law:

Definition of Property Rights

Property rights are hereditary, strong and fulfilled rights that people can have on land and in keeping with the provisions of Article 6 (social functioning). Property rights can be transferred and are transferrable (Article 20). In the Basic Agrarian Law, land ownership rights are regulated in Article 20 to 27 of the Basic Agrarian Law.

Definition of Cultivation Rights

Cultivation rights are directly controlled by the state for specified period of time and concern agricultural, fisheries and animal husbandry companies. The rights are regulated in Articles 28-34 of the Loga Jo. Article 2-18 Government Regulation Number 40 of 1996 (Umar, 2013).

Definition of Building Rights

Building rights are the rights to build and own buildings on someone else's land for a maximum of 30 years. These rights can be extended for a further 20 years (Article 35 of the Basic Agrarian Law). Building rights are regulated in Articles 35-40 of the Basic Agrarian Law jo . Article 19-38 PP No. 40 of 1996

Definition of Usage Rights

Usage rights are the rights to use and/or collect products from land that is directly controlled by the state or belonging to another person. Usage rights are in place for an indefinite period of time (Article 41 of the Basic Agrarian Law).

Definition of Rental Rights

Lease rights are the rights to use someone else's land for building purposes by paying rent to the owner (Article 44 of the Basic Agrarian Law).

Definition of Rights to Open Land and Collect Forest Products

The rights to open land and the collection of forestry products is a right derived from customary law in connection with the existence of customary rights. The right to open land and to collect forestry products can only be owned by Indonesian citizens and is regulated by Government Regulation (Article 46 of the Basic Agrarian Law).

Temporary Rights

Temporary rights are land rights that are regulated in Article 53 of the Basic Agrarian Law. These temporary land rights are detrimental to pawning landowners and tenants. Temporary land rights include liens pledges of agricultural land and the notion of "selling pledges" of land that originate from customary law. Selling a pawn is the surrender of a piece of land by the owner to another party. This is done by paying money to the landowner with an agreement that the land will be returned. So, these rights are removed from land law or national agrarian law (Umar, 2013).

Disputes occur between one party and another or between one party and various parties and come about because of something of value, whether in the form of money or objects (Salim, 2012). In Dutch a dispute is referred to as 'geding' or process. There is no unified, expert view of the term's use and application. There are experts who use the term and some who use the term conflict. Both terms are often used by experts. Richard L. Abel uses the term dispute from the point of view of an incompatibility between the parties about something of value. Something of value is interpreted as something that has a price or cost. On the other hand, Daen G. Pruitt and Jeffrey Z. Rubin use the term conflict. Conflict is determined from a difference in interests or an agreement not being reached by both parties. What is meant by different interests centres on the different need or needs of each party (Salim, 2012).

With regards to a definition of land conflict, Article 1.3 of the Ministry of ATR Regulation No.11 / 2016, defines land conflict (Hukumclick, 2018) as 'disputes between individuals, groups, groups, organizations, legal entities, or institutions that have a tendency or have a broad impact. There are ten types or cases of land disputes, namely:

1. Land tenure without rights: namely differences in perceptions, values, or opinions, interests regarding the status of tenure on certain lands that are not or

- have not been clung to (state land), or un-rights that have been bound by certain parties;
2. Border disputes, i.e. differences, values of importance regarding the location, boundaries and plots of land recognised by one party that have been established by the National Land Agency of the Republic of Indonesia and those still in the process of determining borders;
 3. Inheritance disputes, namely differences in perceptions, values or opinions, interests regarding the status of control over certain land originating from inheritance;
 4. Selling repeatedly, namely differences in perception, values or opinions, interests regarding the status of control over a certain land obtained from buying and selling to more than one person;
 5. A double certificate, namely differences in perceptions, values or opinions and interests regarding a certain parcel of land that have a certificate of land rights;
 6. A surrogate certificate, namely differences in perceptions, values or opinions and, interests regarding certain parcels of land that have been issued along with certificates of substitute land rights;
 7. Counterfeit deed of sale, that is, different perceptions, values or opinions, and interests regarding certain parcels of land due to the presence of counterfeit Deeds of Sale;
 8. Mistakes in the designation of boundaries, specifically differences of opinion and value of interests regarding the location, boundaries and land recognised by one party and determined by the National Defense Agency of the Republic of Indonesia;
 9. Overlapping, explicitly differences in opinion and value of interests regarding the location, boundaries and area of land recognised by a certain party because there of overlapping boundaries of land ownership.
 10. Court Decisions, i.e differences in perceptions, values or opinions and interests regarding judicial decisions about the subject or object of land rights or; regarding certain land rights issuance procedures (Trimulyahati., 2013).

Out-of-court dispute resolution, as regulated in Law No.39 of 1999, concerns Arbitration and Alternative Dispute Resolution. Arbitration and resolution can be carried out through the following methods (Priyatna, 2002):

Negotiation

Negotiation is one way to resolve disputes and is widely used by various parties to solve problems or disputes. Negotiation is a form of dispute resolution conducted outside the court by parties or proxies. Negotiation is without assistance from other parties by way of



deliberation or negotiation and seeks solutions considered fair between parties. The outcome is a settlement and a compromise that is not legally binding. In general, negotiations are used in straightforward, uncomplicated disputes where the parties, in good faith, are willing to sit together to resolve their problem.

Conciliation

Conciliation is the main control of social conflict. This control is realised through certain institutions that enable the growth of discussion and decision making. Through conciliation, land conflicts are resolved through parliament, where both parties discuss and openly debate to reach an agreement (Priyatna, 2002). Conciliation is the resolution of conflict, including land conflicts, mediated by one or more neutral conciliators chosen by agreement of the parties. The conciliator must be registered with an office authorised to deal with land matters, for example in the BPN Office. The conciliator must be able to settle the dispute no later than thirty days after receiving a request for resolution. At the first opportunity of the settlement, the conciliator is required to reconcile the parties. If a peace agreement occurs, then a joint agreement is made and then registered in the court where the agreement is made. If one party does not adhere to the agreement, the other party may submit an application for execution in the court where the collective agreement was lodged.

Mediation

Mediation provides a consensus between the two parties through the use of a neutral third party. In resolving the conflict through mediation, both sides agree to seek advice from a third party. Conflict resolution is managed by one or several expert advisors or through a mediator. A third party is neutral (impartial) and independent and cannot be swayed or influenced by other parties. With regards to mediation, Gunawan Wijaya is of the opinion that mediators, as parties outside the case and who do not have the authority to force, are obliged to bring together the parties in order to seek input on the subject matter at issue (Gunawan, 2001; Yazici, 2016)

Arbitration

In an arbitration settlement, both parties agree to obtain a legal decision as a solution to the conflict. The role of resolving conflicts is via an arbitrator or Arbitration Council. In addition to the three types of conflict control that have been described, the National Land Agency is also the Government Agency for Implementing National Land Policies. Article 33 Paragraph 3 of the 1945 Constitution states that 'the state is the party that controls and manages the land to the maximum extent possible for the prosperity of the people.' Based on these provisions,



the State's National Land Agency is seen as an extension of the State in terms of land tenure and management for the prosperity of the people.

The establishment of BPN (Land Department) is based on Presidential Decree No. 26 of 1988. BPN organisation and work procedures were formed based on BPN Decree No.11 / KBPN / 19 88 jo BPN Decree No. 1 of 1989 concerning BPN Organization and Work Procedure in Provinces and Regencies / Municipalities. The purpose of the National Land Agency is to create a land management system in Indonesia. The government appoints the Directorate General of Agrarian Affairs of the Department of Home Affairs to become a Non-Departmental Government Institution. The task of the National Land Agency is to manage and develop good land administration. The functions of BPN institutions are to:

- a. formulate wisdom
- b. undertake land tenure planning and management;
- c. formulate policies and plans for regulating land ownership with the principle of land having a social function;
- d. carry out measurement and mapping and land registration;
- e. carry out the management of land rights;
- f. carry out research and development in the field of land

Settlement of Land Disputes through Abstract in Indonesia

The terms 'conflict' and 'dispute' are a part of daily life in Indonesia. There are different views about the meaning of conflict and dispute as expressed by experts. Conflict is between the parties and, if not resolved properly, can disrupt relations between the parties concerned. A conflict changes or develops into a dispute when the aggrieved party has expressed dissatisfaction or concern, either directly to the party that is considered to be the cause of the loss or to another party (Rahmadi, 2003). As long as the parties can resolve the conflict properly, it will not become a dispute, but if it happens otherwise, and the parties cannot reach agreement on a solution to solve the problem, a dispute will arise (Maria, 2001).

The use and application of 'conflict' and 'dispute' as definitions in the land sector gave birth to the terms land conflict and land disputes. Conflict over land or land dispute can be defined as a 'dispute or disagreement that makes (right) of land as an object of dispute'. The exercise of rights (and obligations) in a legal relationship is often the source of land disputes land, that is, if someone's rights granted by material law are violated, someone's interests protected by material law are denied (Sudikno, 1993) Boedi Harsono, views land disputes from a judicial point of view (Boedi, 1996):

1. disputes concerning land parcels;
2. disputes regarding the area of land;
3. disputes regarding the status of his land: state land or land rights;
4. disputes regarding rights holders;
5. disputes regarding the rights that burden them;
6. dispute concerning the transfer of rights;
7. disputes regarding designation of locations and determination of their extent for a government or private project;
8. dispute regarding land release / acquisition;
9. disputes regarding land clearing;
10. dispute regarding compensation, severance pay or other compensation;
11. dispute concerning the cancellation of their rights;
12. dispute regarding revocation of rights;
13. dispute concerning the granting of his rights;
14. dispute concerning the issuance of the certificate;
15. disputes concerning the means of proving the existence of rights or legal actions committed; and other disputes.

Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution explains arbitration as a way to settle a civil dispute outside the general court and based on an arbitration agreement made in writing by the parties to the dispute. According to R. Subekti, arbitration is a settlement, or termination of a dispute, by a referee or referees. It is based on an agreement that they will submit to or obey and given by the referee or the referees they choose or appoint.

The following general principles of arbitration include:

1. The principle of the final and binding arbitration decision. This is clearly stipulated in article 60 of Law No. 30 T ear 1999 on Arbitration and Alternative Dispute Resolution. Chapter VI, regarding the enforcement of arbitration, states: ‘the arbitral award is final and has the force of permanent law and is binding on the parties.’
2. The principle of reciprocity is reflected in the provisions of Article 66a, Law No. 30 of 1999. It concerns Arbitration and Alternative Dispute Resolution and states that ‘international arbitration awards are only recognised and can be carried out in the jurisdiction of Indonesia (Review Team, 2010; Ambikai, & Ishan, 2016)
3. The principle of public order is reflected in provisions of article 66c, Law No.30 of 1999. It stipulates that ‘an international arbitration award can only

be carried out in Indonesia limited to provisions that do not conflict with public order.’

4. The principle of separability is an agreement made by the parties. The parties may enter an arbitration agreement in the form of an arbitration class, which is part of the agreement or separate to the one made. So, if a principal agreement is cancelled, it does not make the arbitration clause contained in the principal agreement to become annulled. Rather, the arbitration class must continue to be implemented. The arbitration clause is independent to the fulfillment of obligations or other commitments in the agreement and, hence, the principle of separability applies (Gunawan, 2002).

With regards to the object of arbitration, Article 5 of Law Number 30 of 1999 reads: ‘disputes that can be resolved through arbitration are only disputes in the field of trade. and regarding rights which, according to the laws and regulations, are fully controlled by the parties to the dispute.’ Article 5, Paragraph (2) states that ‘disputes which cannot be resolved through arbitration are disputes which, according to the laws and regulations, cannot be made peace”.

Conclusion and Recommendations

The use of arbitration in land disputes is an option rather than settling in court. It is hoped that settlement of the land disputes with the arbitration commissions will be resolved faster than those subjected to court proceedings. Land disputes provide great discussion, especially in light of an increasing number of disputes over land. Disputes centred on unclear and vague rights are becoming more prevalent and numerous.



REFERENCES

- Boedi, H. (1996). Settlement of land disputes in accordance with the provisions in the LoGA. *Paper was presented in the Anniversary Seminar of LoGA XXXVI, 1996, organized by the Office of the State Minister for Agrarian Affairs / Head of BPN, Jakarta.*
- Budi, H. (2003). *Indonesian Agrarian Law, History of the Formation of the Basic Agrarian Law, Contents and Implementation*. Jakarta: Djambatan.
- Damaryanti, H., Hendrik, and Annurdi. (2017). Remission for the corruptor (Between the human right and the spirit for eradication corruption). *Journal of Advanced Research in Social Sciences and Humanities*, 2(6), 358-362
- Edi, A. (2000). *Civil Procedure Law in the Mediation Perspective (ADR) in Indonesia*, Yogyakarta: Graha Ilmu.
- Frans, H. W. (2011). *National and International Arbitration Dispute Resolution Law*, Sinar Grafika.
- Government of Indonesia. (2010). Retrieved from: www.bps.go.id/website/pdf_publicasi/watermark_Proyeksi%20Population%20Indonesia%202010-2035.pdf
- Gunawan, W. (2001). *Alternative Dispute Resolution*. PT Raja Grafindo Persada, Jakarta.
- Gunawan, W. (2002). *Series of Legal Aspects in Business; Arbitration VS Court Issues of Competence (Absolut)*. That Never Done
- Hukumclick. (2018). Retrieved from: <https://hukumclick.wordpress.com/2018/08/26/type-type-cases-first/>
- Lutfi, I. N. (2002). *Land Conflict (Agraria) Towards Agrarian Justice*. Bandung: AKATIGA Foundation.
- Maria, S. W. (2009). *Sumardjono Land in the Perspective of Economic, Social and Cultural Rights*. Jakarta: Kompas.
- Merdeka. (n.d). Retrieved from: <https://www.merdeka.com/peristiwa/from-17504-pulau-di-indonesia-16056-has-verified-pbb.html>
- Mohammad, H. (2005). *National Land Law In the Perspective of the Unitary State*. Media Abadi, Yogyakarta.



- Nurnaningsih, A. (2011). *Alternative Mediation of Civil Dispute Settlement in the Court*. Jakarta: PT Rajagrafindo Persada.
- Priyatna, A. (2002). *Arbitration & Alternative Dispute Resolution*. Fikahati Aneska, Jakarta.
- Rahmadi, U. (2003). *Aspects of Banking Law in Indonesia*. Pt. Gramedia Reader.
- Review Team. (2010). *Arbitration Legal Issues Online* (Jakarta: Bphn-Kemenkumham Ri).
- Rusmadi, M. (1991). *Settlement of Legal Disputes Over Land*. Bandung: Alumni.
- Salim (2012). *Mining Dispute Resolution Law in Indonesia*, Mataram: Pustaka Reka Cipta.
- Sudikno, M. (1993). *Indonesian Civil Procedure Law*. Yogyakarta: Liberty
- Trimulyahati. (2013). Retrieved from: <https://trimulyahati.blogspot.com/2013/11/handling-cases-fishing.html>
- Umam, K. (2010). *Settlement of Out-of- Court Disputes*. Yogyakarta: Yustisia Library
- Umar, S. S. (2013). *Introduction to Indonesian Law*. Jakarta: Sinar Grafika.
- Van Der Kroef, J. M. (1951). The term Indonesia: Its origin and usage. *Journal of the American Oriental Society*, 71(3), 166-171.
- Wikipedia. (n.d). Retrieved from: https://id.wikipedia.org/wiki/DList_negara_urut_expanding_region
- Wikipedia. (n.d). Retrieved from: <https://id.wikipedia.org/wiki/Indonesia>
- Yazici, H. (2016). The art of opera in Turkey within the scope of culture-art policies. *International Journal of Humanities, Arts and Social Sciences*, 2(5), 159-164.