

JURIDICAL ANALYSIS OF DISPUTE SETTLEMENT OF THE CONSTRUCTION CONTRACT THROUGH ARBITRATION TO REALIZE PROTECTION AND LEGAL CERTAINTY

Dianoc Rica¹, Ramon Nofrial², Darwis Anatami³, Fadlan⁴, Erniyanti⁵

¹ Student, Master In Law, Universitas Batam, Batam, Indonesia

^{2,3,4,5} Lecture, Faculty of Law, Universitas Batam, Batam, Indonesia

ABSTRACT

Contracts for the use of construction services are inseparable from legal issues when the parties make a breach of an agreed agreement, the disputes that occur require a solution to resolve them, because these legal disputes have an impact on time, cost, and hinder the contribution of the construction sector in economic growth. This study aims to find out what are the obstacles in resolving construction service disputes, how to resolve the legal consequences of construction disputes and how to resolve disputes through arbitration. Besides that, this research also uses empirical juridical research methods using primary data, secondary data, namely primary legal materials and secondary legal materials and tertiary data. The study results show the background of the problem, namely construction disputes that can resolve construction contract problems through arbitration legal remedies in accordance with the rules in Indonesia in Article 88 of Law Number 2 of 2017 concerning Construction Services including: Mediation, Conciliation and Arbitration. The comparison between adjudication and arbitration in its function as a construction work contract dispute resolution can be described simply, that adjudication is a dispute resolution mechanism that has similarities in characteristics to arbitration. However, the adjudication mechanism is actually simpler than arbitration, then if the dispute resolution is not stated in the construction work contract, then the parties with written approval will regulate the dispute resolution procedure chosen.

Keyword: *Contracts, construction services, disputes, arbitration and non-litigation*

1. Introduction

In the current developments that have entered the era of the industrial revolution 4.0, people working in the industrial sector in general and especially people working in the construction service sector are encouraged to continue to follow the dynamics of current technological developments. Seeing the development of Batam City with the smart city concept echoed by Batam is closely related to the spirit of the industrial revolution 4.0. Moreover, Batam also has KEK Nongsa Digital Park, which is also engaged in information technology investment. Thus, the existence of an intelligent city is an excellent step to support the investment ecosystem in the city of Batam.

The construction services sector, amid its current development, is faced with ever-greater demands and pressures. As a driving force for national development, conceptually, it must show exemplary performance from time to time to reflect a good level of industrial soundness. In general, each project consists of an initial (design), middle (implementation), and final (handover) process. And usually, a project has four (4) main stages, namely, initiation, planning, performance, and closing; in each location, there are planning, procurement, implementation, and involve various parties with various particular expertise. So that these conditions can cause construction projects to be complex in the form of soil conditions, concrete tests, weather, materials, utilities, local subcontractors, labor conditions, and technology; this complexity suspected as one of the causes of low work performance and effectiveness, including the emergence of an increase in potential conflicts [1].

The processes for conducting procurement are often interrelated and sequential so that the effectiveness and efficiency of the procurement process have a significant impact on the success or failure of the project. Therefore, the many methods can result in the complexity of choosing the form of procurement, which can cause significant losses and potential shortcomings for the owner, often resulting in poor project performance. In implementing project completion, many factors cause project delays, and the factors that arise in each project are different, both state-owned and private-owned projects. Factors that potentially cause delays in project implementation include labor, materials, equipment, field conditions, managerial, financial, rainfall intensity, economic conditions, and work accidents [1].

On-time, good quality, and correct cost are the parameters that support the smooth running of each project. The planning of each project always refers to the estimates that existed at the time the plan where the development was made, therefore a problem arises if there is a discrepancy and dissimilarity between the methods that have been planned and the actual results so that the impact that often occurs in the field is the emergence of delays in project implementation time. This affects the increase in the cost of implementing the project [2].

Based on this background, the researcher is interested in conducting research with the title "Juridical Analysis of Dispute Resolution of Construction Contracts Through Arbitration," where a research study was conducted at Sakti Nusantara Lawfirm. (Office of Advocat Sakti Nusantara) In Batam.

2. Research Methods

This type of research is normative juridical research. Because this research aimed to analyze legal principles, rules, and doctrines by using secondary data supported by primary data. This research is descriptive. Descriptive, which aims to provide an overview of the facts and an accurate analysis of the applicable laws and regulations related to legal theories and construction failures in the procurement of Government Goods/Services. Furthermore, I will comment and provide suggestions to find a solution for completion. This research uses the statutory approach (statute approach), conceptual approach (conceptual approach), and case approach (case approach) [3].

This research uses statute approach, conceptual approach, and case approach. The statute approach examines all laws and regulations related to the legal issues being handled. The conceptual approach moves from the views and doctrines that develop in the science of law. Views/doctrines will clarify ideas by providing legal notions, concepts, and principles relevant to the problem. This study uses secondary data as the main data source. Primary data from interviews with related parties in the Batam City Public Works Office, Riau Archipelago Province, support it. Data collection techniques used in this study are [4]

- a. Library research is the single method used in normative legal research. This information can be obtained from statutory regulations and articles. Then it is described and connected so that it can be presented in more systematic writing to answer the problems that have been formula. Secondary legal materials, namely the results of legal research and opinions of legal experts, and collecting tertiary legal materials, namely legal documents, legal books, legal magazines, and the internet.
- b. Field Research is data collection directly into the field using data collection techniques. The aim is to answer the formulation of the problem in this study. Data collection techniques in this study used interviews with informants. The informant here is Mr. Ir. Endra Mayendra, S.H., M.Kn., M.Sc position at LKPP Giver of LKPP Procurement Expert Information, LKPP advisor and Arbitrator in Batam City - Riau Archipelago Province. Next, Mr. Indra Sakti S.H., M.H. (lawyer) Sakti Nusantara Lawfirm Batam City - Riau Archipelago Province, also assisted by Mr. Muhammad Arifin (Arbitrator Jakarta). At the same time, the data collection tool used in this research is a document study, which is a tool for solving problems by tracing written sources that have been made before. This study also uses an interview guide which contains questions systematically to obtain information related to the formulation of the problem.

3. Literature Rivew

a. Agreement Definition

The agreement is one of the sources of engagement. In everyday life, humans often make agreements either intentionally or unintentionally. The agreement is a relationship that occurs between the parties involved. Article 1313 of the Civil Code explains that a deal is "A contract is an act in which one person or more binds himself to one or more other people [5].

b. Definition of Contracts and Norms of Standard Manual Guidelines.

A contract is an event where a person promises to another person, or two people promise each other to do something. This event creates a relationship between the two people, which is called an agreement. Therefore, the contract must fulfill the following elements there are parties, and there are agreements, there are goals, there are achievements, there are certain forms, and there are certain conditions [5].

c. Definition of Construction Work

It is part of construction services, including construction service actors, construction service businesses, and construction work. According to Article 1 of Law, number 2 of 2017 concerning Construction Services, construction consulting services, and construction work provided. In Articles 1604 to 1615 of the Civil Code, the third book concerning commitments, in part six concerning job chartering, the term contractor is used for construction work [6].

d. Legal Certainty Theory (Grand Theory) [7]

According to the theory of legal certainty from Gustav Radbruch, as previously stated in chapter 1 in the framework of legal theory, where the law must contain 3 (three) things, namely:

- 1) Principle of Legal Certainty, this principle reviews from a juridical point of view.
- 2) The Principle of Legal Justice. This principle is reviewed from a philosophical point of view, where justice is equal rights for all people before a court.
- 3) Principle of Legal Benefits

4. Result

a. Settlement of Disputes Over Construction Contracts Through Arbitration Legal Measures in Legal Protection and Certainty

1) Non-technically [6]

Developments in construction services, most activities include things that are very loaded with conditions known as VUCA, namely:

- a) Volatility (the rate of fluctuation or change is considerable)
- b) Uncertainty (high uncertainty)
- c) Complexity (problems that are not simple involve many factors and many parameters)
- d) Ambiguity (unclear, minimal data and information)

Where is the VUCA level, especially in developing countries like Indonesia. The national construction sector is one sector that is naturally loaded with VUCA. The construction sector must complete projects in a physical/natural environment, which always differs from task to task. The project's scope is often not defined in a sufficiently mature way, and the wishes of the owner are fickle, involving many interests which are sometimes conflicting. Private service users have the potential to fail to pay, service users, in this case, the government, are late in spending, the public feels disturbed, and so on. The government is a service user, a regulator, a facilitator, and as a mouthpiece for change with a specific purpose. Of course, this can lead to an imbalance of roles between users and service providers, which is a challenge for national construction service business entities.

In this regard, to realize national development that applies the principles of sustainable construction or sustainable development, it is implied by three (3) balanced aspects, namely economic, social and environmental, as well as taking into account costs, quality/quality, and time. These three criteria continue to be considered throughout the stages of the construction project cycle. To deal with potential problems and construction disputes, the parties make a written agreement called a contract or agreement letter. The meaning of a contract is simply an agreement between the parties who can make it in the form and conditions that are by applicable law and form an obligation before the court [6].

More specifically, in Law No. 2 of 2017 concerning Construction Services, Article 1 paragraph (8) states [8]:

The construction work contract is the document that regulates the legal relationship between the service user and the goods/services provider or the executor of the self-management.

Seeing how important a contract is, notable experts are needed to handle all construction contract issues in construction companies. The expert is called a contract manager, whose job is to keep a construction contract functioning as it should. A construction contract has the following four (4) roles:

- a) Creating a relationship with legal force (legal relationship)
- b) Distributing risk.
- c) State all the parties' rights, obligations, and responsibilities.

d) State all events, conditions, and contractual procedures.

By understanding the role of the contract above, it is expected that both parties can draw up and negotiate better and more balanced construction contracts. Without understanding and mastering the contract, it isn't easy to maintain the interests and main objectives of carrying out construction work.

2) Technically

Technically there are types of contracts based on payment consisting of lump sum contracts, unit price contracts, combined lump sum and unit price contracts, turnkey contracts, or percentages. Judging from the type of contract based on this payment, it only consists of two parts: the lump sum and the unit price.

Lump sum contract, based on Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods and Services. (State Gazette of the Republic of Indonesia Year 2018, number 33). Regarding Procurement of Goods and Services describes that a lump sum contract is a contract for the procurement of goods/services or the completion of all work within a specific time limit with a definite and fixed price and all risks that may occur in the process of completing work are entirely borne by the goods/services provider.

This contract system is more appropriate for purchasing goods with clear examples or types of construction work whereby the volume for each element/type of work can be identified with certainty based on the plan drawings and technical specifications. The binding price in this system contract is the total bid price, with the following conditions [9]:

- a) The total price is specific and fixed, making price adjustments impossible.
- b) All risks are entirely borne by the service/goods provider.
- c) Payment is based on the stages of the product/output produced by the contents of the contract.
- d) The nature of work is output-oriented.
- e) The total bidding price is binding.

To draw up a draft construction contract containing a letter of agreement, having the general terms of the contract and the specific terms of the contract selected from the standard contracts by taking into account at least the following [10]:

- a) Contract type
- b) Scope of work
- c) Work Output
- d) Job Difficulties and Risks
- e) Implementation time
- f) The maintenance period for construction work.
- g) Payment method.
- h) Work result calculation system.
- i) Advance Amount.
- j) Form and terms of the guarantee.
- k) Fine amount.
- l) Contract dispute resolution options.

b. Remedies Through Arbitration

In a business relationship or agreement, there is always the possibility of a dispute. Disputes that need to be anticipated include how to implement clauses in trade, banking, construction service projects, infrastructure, and so on, which are carried out through a litigation process. In the litigation process, the parties are mutually opposed to each other. Besides, that litigation dispute resolution is the final means after different alternative dispute resolutions do not produce results. With the increase in construction business relations, it is necessary to have an efficient, effective, and fast dispute-resolution system so that in the face of trade liberalization in the field of construction services, there is an institution that is acceptable to the business world and has the capability of a system to resolve disputes quickly and at low cost. In addition to litigation dispute resolution, there is an alternative dispute resolution, arbitration [11].

For entrepreneurs, arbitration is the most attractive option to resolve disputes according to their wishes and needs. They agree to resolve their dispute in the debate by appointing one or several arbitrators. Several principles can be learned from the formulation of the definition, namely [12]:

- 1) The principle of agreement means the agreement of the parties to resolve the dispute amicably or by contract to appoint one or several arbitrators.

- 2) The principle of deliberation is that every dispute is resolved by consideration between the arbitrator and the parties or between the arbitrator himself.
- 3) The principle of limitation, namely the existence of regulations in the settlement of disputes through arbitration, is limited to conflicts in the field of business and personal rights, which the parties can fully control.
- 4) The principle is final and binding; the arbitral award is a final decision that other legal remedies cannot follow.

In general, arbitral institutions have advantages compared to judicial institutions because arbitration guarantees the confidentiality of disputes between parties, and delays in arbitration can be avoided due to procedural and administrative matters. Therefore, the parties may appoint one person or several persons as arbitrators by fulfilling the following conditions:

- 1) Capable of taking legal action;
- 2) The minimum age is 35 years
- 3) do not have a family relationship by blood or marriage up to the second degree with one of the parties to the dispute
- 4) has no financial interest or other interest in the arbitral award; and
- 5) have experience and actively mastered in their field for at least 15 years.

c. Positive Law Theory (Middle Theory)

In connection with the positive law theory (middle theory), the researcher examines this study using the approach of John Austin, stating that law is an order from the ruler of the country. In essence, the law has a position that is in the element of order. So therefore, the law has 4 (four) characteristics of positive flow, namely:

- 1) Command
- 2) Sanctions
- 3) Duty
- 4) Sovereignty

d. Barriers or Constraints in the Agreement

First, it was conveyed that the settlement of disputes through the courts is the oldest method of dispute resolution in the world. The court is an organ or body that carries out the duties or functions of the judiciary. The judiciary body's task is to examine, adjudicate, and settle every case submitted. Settlement of disputes through courts tends to be avoided, especially in disputes related to business (construction). The reasons are [13]:

- 1) Settlement of civil disputes through courts is deemed ineffective and inefficient;
- 2) Judges often do not understand the substance of the problem;
- 3) Dispute resolution through court requires a long settlement time. There is no guarantee that dispute resolution can dash.

Construction dispute resolution focuses on timely completion. Dispute resolution through the courts, which is still protracted, makes the courts, not the right choice in resolving business construction) disputes. Settlement of business disputes should be done through dispute resolution methods outside the court, such as Arbitration. Settlement of business (building) disputes needs to be done quickly and simply while still wanting to obtain binding legal force from the settlement in the form of a judge's decision that guarantees legal certainty [14].

The parties prefer dispute resolution through arbitration to settle disputes related to business (construction); this is because arbitration has several advantages, including the parties having the freedom to determine the procedural law or the nature of the arbitral award in principle, final, and binding. The arbitral award is a decision binding on the parties, and simple or direct procedures (procedures) can be implemented because, in principle, arbitral awards are final and binding. Still, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution provides an opportunity for parties who do not accept an arbitral award to annul the arbitral award. However, even though the final and binding principle of an arbitral award is legally born based on an agreement, its very existence depends on the parties' good faith. A party with good faith in arbitration will voluntarily accept and enforce an arbitral award even if the award is not in his favor. Conversely, a party that does not have good intentions will tend to refuse the implementation of the arbitral award or even look for reasons to cancel the arbitral award when it is felt that the arbitral award is not in its favor [12].

5. Conclusions

- a. The contract for construction services is inseparable from legal issues. When the parties default on the agreement that has been agreed upon, the dispute that occurs requires a solution to resolve it. And it can be identified that there are 3 (three) causal factors, namely, the uncertainty factor in each construction project, the relationship factor with the construction contract, and the opportunistic behavior factor of the parties involved in a construction project.
- b. One of the alternative methods of settlement of construction contract disputes is carried out by arbitration. Where the Arbitration method is to resolve problems formed through contracts and involve experts in the field of construction.
- c. The advantages of resolving disputes over construction contracts by way of arbitration are as follows:
 - 1) Freedom to choose judges (arbitrators)
 - 2) Freedom to choose the place, procedural law, and substantive law
 - 3) Confidentiality
 - 4) The parties determine the purpose or task of the arbitration
 - 5) Fixed timeline for completion
 - 6) Lower cost of litigation
 - 7) The nature of the decision is final and binding
- d. Barriers to settling disputes over construction contracts by way of arbitration are as follows:
 - 1) Implementation must be based on the agreement of the parties
 - 2) The losing party is often reluctant to carry out the decision
 - 3) Decisions can be challenged before the court
- e. Arbitration solutions to the parties, namely:
 - 1) The parties expected to have good faith in solving the problem.
 - 2) The parties are expected to act professionally and proportionally to resolve disputes in the public interest.
 - 3) The parties are expected to voluntarily comply with and accept arbitration decisions' results.
 - 4) The Parties are obliged to carry out the commitments that have been agreed upon. If not adhered to, the arbitrator may apply to the court to become a bailiff in executing the agreed decision.

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