

THE DISPUTE SETTLEMENT OF GOVERNMENTAL CONSTRUCTION WITH FOREIGN BUSINESS ENTITIES IN A CONTRACT OF CONSTRUCTION INFRASTRUCTURE SUPPLY^Ω

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Abstract

Infrastructure is important and substantial in economic development in Indonesia. The limitations of state revenue to build new infrastructure oblige the government to utilize and fabricate the combination of funding sources in giving public service corporate to foreign entities. This paper discusses the dispute over the Completion of the Construction Contract between the Government and Foreign Parties. The research method used is normative legal research and through a conceptual approach, legislation. The complex implementation of the construction infrastructure supply contract has to be minimized to avoid claiming construction which leads to construction dispute. The issue of Regulation of Indonesia Number 2 Year 2017 on Construction Service has arranged the regulation of construction dispute settlement. According to Article 47, one of the dispute settlements of construction is Dispute Board. There is a legal vacuum in the implementation of its construction service regulation proven by the absence of advanced regulation on the form and procedure of Dispute Board.

Keywords: dispute settlement, construction contract, dispute board

Abstrak

Infrastruktur merupakan faktor penting dalam pembangunan ekonomi di Indonesia. Permasalahan yang dihadapi oleh Pemerintah adalah keterbatasan anggaran Negara untuk membangun infrastruktur baru. Tulisan ini membahas tentang perselisihan Penyelesaian Kontrak Konstruksi antara Pemerintah dan Pihak Asing. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan konseptual, perundang-undangan. Pemerintah harus memanfaatkan dan merekayasa kombinasi sumber-sumber pembiayaan dalam memberikan pelayanan publik dengan Pihak Asing. Kompleksitas pelaksanaan pada kontrak konstruksi penyediaan infrastruktur, wajib untuk diminimalisir agar tidak terjadi klaim konstruksi yang dapat berakibat pada sengketa konstruksi. Lahirnya UU Nomor 2 Tahun 2017 tentang Jasa Konstruksi telah mengatur mengenai Penyelesaian Sengketa Konstruksi. Berdasarkan Pasal 47 UU Jasa Konstruksi, dinyatakan bahwa salah satu penyelesaian sengketa konstruksi adalah Dewan Sengketa. Implementasi dari UU Jasa Konstruksi ini, masih terdapat kekosongan hukum, terbukti dari belum adanya aturan lebih lanjut mengenai bentuk dan prosedur dari Dewan Sengketa.

Kata kunci: penyelesaian sengketa, kontrak konstruksi, dewan sengketa.

Introduction

One of the ways to increase national economy is by improving infrastructure public service facilities in Indonesia. Infrastructure is perceived as the key element in increasing national economic growth. It happens due to the infrastructure's role in the establishment of invest-

ment climate excellence in a particular country.

The problem the Indonesian government encounter in materializing public facilities availability is the limited budget to develop new infrastructures. Government's capacity in funding infrastructure project is very limited. The regulations on infrastructure project and construction service also need revising to be more dynamic and flexible according to the recent infrastructure necessity. This condition requires go-

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vernment to use the combination of funding sources in providing both domestic and foreign public services.¹

In regards to this, the government needs to create a policy and legal framework to increase foreign participation including foreign government and private sector. The cooperation between government and foreign party must consider national interest, people prosperity, public safety, maintain environment sustainability and national sovereignty.² The cooperation will become a basic need to accelerate regional development especially in developing facilities to support public services.³ This cooperation aims to make government capable to meet people's needs and improve regional potency so that the local government increase their competitiveness at national or international level.

The complexity of construction contract in the cooperation of infrastructure supply is still considered unfair and imbalance for stakeholders (service provider and user). It occurs since during the drafting process of construction contract, the position of the service provider is weaker than the service user. The service provider is highly demanded to fulfill the concept of the contract arranged by service user. In Construction Service Law, the rights and obligations of all parties (Service provider and user) are well mentioned. Nevertheless, the position of service user is more dominant and flexible in drafting the contract. Consequently, it is disadvantageous to service provider.

The project of infrastructure supply does not always run smoothly. There are requirements within the contract of construction project that the service provider and user should fulfill. When one of the requirements is not fulfilled, it will emerge a claim on the contract. Thus, construction contracts in Indonesia have

adopted some provisions in international contract based on *Federation Internationale des Ingenieurs Conseils* (hereafter called FIDIC) to create fair and balance contract and minimize the claims on construction dispute cases. FIDIC is a type of construction contract which is used as guidelines for international society in conducting construction contract between government and foreign party.

In Indonesia, regulation on construction project service has been arranged in Law Number 2 Year 2017 on Construction Service. The regulation on dispute settlement within this law has adopted a lot the provision in FIDIC. It is explained in Article 88 Construction Service Law which state there is settlement effort through Dispute Board. The implementation of the Dispute Board as ruled in Construction Service Law is still legal vacuum due to the absence of advanced regulations which arrange form, requirement, and procedure of Dispute Board. This is the problem which will be examined by the researcher, Dispute Settlement of Construction Contract between Government and Foreign Party.

Research Method

This research is normative research. To answer the problems of this research, the researcher uses conceptual and statute approaches, then analysis is carried out qualitatively.

Discussion

Dispute Characteristics on Construction Contract

The cooperation between government and foreign party is a construction project on national development. It relates to the factors and parties which influence the project as well as particular characteristics that cause many risks within the project implementation. For instance, in the management field, there are risks related to the technical field and implementation also those related to contract and law field. These factors may cause the construction project is apt to conflict.

Construction dispute is a dispute which occurs between the parties in a running con-

¹ Bappenas, *Infrastruktur Indonesia: Sebelum, Selama dan Pasca Krisis*, Jakarta: Kementerian Negara Perencanaan Pembangunan Nasional, 2003, p. 28.

² *Ibid*, p. 29.

³ Zainal Asikin, "Perjanjian Kerjasama Antara Pemerintah dan Swasta dalam Penyediaan Infrastruktur Publik", *Mimbar Hukum*, Vol. 25 No. 1, February, 2013.

tract. The construction dispute also may happen due to the failure of a party to fulfil its obligation within the contract.⁴ This default violates law. Furthermore, this dispute occurs because of the claim filed by one of the parties is not responded very well by the other.

Construction claim happens in the implementation of an agreed construction project. Construction claim is also a result of contract implementation which does not run smoothly due to the different interpretation on the clauses of the contract and as a result of default. According to Black's Law Dictionary, a claim is a demand for money, property, or a legal remedy to which one asserts a right. Practically, in the construction project done by the government, dispute occurs since the government as the user hardly uses their rights. The government always tries to not file any claim and formally will refuse any claims filed by the contractor. Thus, it makes a long dispute between government as the user with the service provider.

Many experts of construction evaluate that the main cause of claim is the existence of different interpretation on the clause in the contract. Several factors which may cause claim and dispute on construction project are as follows: different interpretation, variation change, inaccurate design information, imperfect location investigation, weather, illogical target time, incomplete contract administrative, *force majeure*, incomplete risk allocation, late payment, and etc.

Infrastructure privatization presents significant risk shared between public and private partners. There is a reward and responsibility with the risk allocated accordingly.⁵ According to Marques and Berg⁶ risk allocation is one of the main obstacles in designing the cooperation

agreement of Public Private Partnerships and that is also the main cause of the failure on the private participation implementation in the project of Public Private Partnerships. Risk allocation between principal and stakeholder can be configured with the desired contract form and government's policy.⁷ However if the obligation is not fulfilled by the parties, either service user or service provider based on the contract, then this might cause a breach. Accordingly, it must be noticed that claim on the construction project is caused by parties who do not comprehend the contract content well which causes repeated misinterpretation to dispute.

Filing Construction Claim

In the construction project, contract has important role in supporting the process to accommodate both parties interests. In its implementation, it takes deep understanding to comprehend the contract. It aims to avoid misinterpretation within both parties which can cause a claim in construction.

Claim in the construction dispute happens as one party breaches the contract or defaults. Essentially, claim is common in a construction contract. The filing of construction claim can be based on the following issues: delay, disruption, changed conditions, changes conditions of scope and circumstances, and termination.⁸ The definition of *delay* in the construction contract is ineffective time allotment which causes some other activities are postponed or cannot be done on time based on the agreed schedule.

In the construction contract, time is one of the three main criteria on the construction project management beside cost and construction quality. The time framework in the construction project can be divided into three aspects: time for completion, defect liability

⁴ Baso Juherman, *Karakteristik Penyelesaian Sengketa Kontrak dalam Pengadaan Jasa Konstruksi Pemerintah*, Surabaya: Faculty of Law Universitas Narotama.

⁵ Sri Suwitri, Et.AL., "Pelayanan Publik: Public-Private Partnership Percepatan Infrastruktur Di Indonesia 2005-2009", *Dialogue. JIAKP*, Vol. 2 No. 3, September 2005, p. 961-978.

⁶ Marques R.C and Berg, S, "Risk, Contracts, and Private-Sector Participation in Infrastructure", *Journal of Construction Engineering and Management*, Vol. 137, 2011, p. 925-932.

⁷ Michael Regan, "Public infrastructure procurement: A comparative analysis of adversarial and non-adversarial contracting methods-Working for better procurement outcomes", *Public Infrastructure Bulletin*, Vol. 1 Issue 8, September 24th 2012.

⁸ Andi Asnudin, "Klaim Jasa Konstruksi Kasus Sulawesi Tengah", *SMARTek Journal*, Vol. 4 No. 2, May 2006, p. 77-87.

completion, and aspect related to the specific duration.⁹

Late due to claim can cause the cost increase and other related impact because there are changes in the implementation method, performance, change upon working phase, and new work which affect the efficiency and disruption. The increase of the cost affect the contract price. This would then also affect the change of the plan that cannot be achieved based on the agreement among parties in the contract.

In the construction claim file, the parties who want to file claim generally identify each issue, identify which party is responsible, and prove the disadvantages it causes. Construction claim demanded rapid solution to avoid the increase of the cost, time, and the regress of the credibility.¹⁰ When construction claim is not finished, then this could cause the construction dispute.

In the construction service, there are 3 parts of dispute, they are:¹¹ *Precontractual Dispute* (Dispute occurs prior to the contractual agreement), *Contractual Dispute* (Dispute happens at the moment of the construction being implemented), and *Pascacontractual Dispute* (Dispute happens after the building operated of at the process of the construction treatment). Dispute happens between government as the service user with foreign corporation as the service provider could have been solved by deliberation and avoid the dispute solving through litigation if possible. This is regulated in the constitution number 2 year 2017 on Construction Service.

Model of Dispute Settlement in the Construction Contract of the Infrastructure Supply Based on Legislation in Indonesia

⁹ Wiwie Yulianti Tumembow, Et.AL., "Analisis Kontrak Kerja Owner Terhadap Kontraktor", *Civil Static Journal*, Vol. 4 No. 5, May 2016, p.. 341-348

¹⁰ Galih Adya Taurano dan Sarwono Hardjomuljadi, *Analisis Faktor Penyebab Klaim pada Proyek Konstruksi Yang Menggunakan FIDIC Conditions of Contract for Plant and Design Build*, *Constructia Journal*, Vol. 5 No. 1, December 2013.

¹¹ Bambang Poerdyatmono, "Alternatif Penyelesaian Sengketa Jasa Konstruksi", *Civil Engineering Journal*, Vol. 8 No. 1, October 2007.

In general, dispute settlement is divided into two, through the court and outside the court or non court. Dispute settlement through the court is called litigation, and the non court is called *alternative dispute resolution (ADR)*.¹² In a dispute, the settlement cannot be settled by just filing it to the court, but there would be an effort of the settlement done by the parties to solve the dispute.

Dispute in the construction project must not be ignored because it brings about big impact negatively till the discontinuance of the construction activity. Therefore, the settlement of the dispute must be done as soon as possible by using the competent third party.

In Indonesia, regulation on the alternative of dispute settlement is regulated in the constitution Number 30 Year 1999 on Arbitration and Alternative of Dispute Settlement, Legislation Number 29 Year 2000 on the Implementation of Construction Service, and constitution Number 2 Year 2017 on Construction Service.

Based on the regulation Number 30 Year 1999, the dispute settlement that can be done by the parties are as follows: Consultation, Negotiation, Mediation, Conciliation, and Arbitration. Based on the legislation Number 29 Year 2000 on the Implementation of Construction Service, effort that can be done by the parties are Mediation, Conciliation, and Arbitration.

In 2017, government has established Regulation Number 2 Year 2017 on Construction Service. Based on the Regulation Number 2 Year 2017, options to solve the dispute is obliged to be put in the Construction Work Contract. This is also stated in the Article 88 on the Regulation of Construction Service. If the parties do not put the option of the dispute settlement effort, then the parties is obliged to put the option in written as one unity with the construction work contract.

The Main principle in solving the dispute settlement in the regulation of Construction Service is an agreement from the negotiation. In

¹² Salim HS dan Idris Abdulah, "Penyelesaian Sengketa Tambang: Studi Kasus antara Masyarakat SAMAWA dengan PT Newmont Nusa Tenggara", *Mimbar Hukum*, Vol. 24 No. 3, October 2012.

the Regulation Number 2 Year 2017 on Construction Service, the steps in settling the dispute the parties can take are as follows: Mediation, Conciliation, Arbitration and Dispute Council.

In some legislation rules on the construction dispute settlement, the parties can choose dispute resolution efforts based on Law No. 2 Year 2017 on Construction Service. It is caused by *lex specialis derogat legi generalis* principle, Law Construction Service is the regulation which is more special rather than Law Number 30 Year 1999 on Arbitrary and Dispute Resolution Alternative. Law Number 2 Year 2017 concerning Construction Service also has higher position than Government Regulation Number 29 Year 2000 concerning the Implementation of Construction Service based on Indonesia legislation hierarchy in Law Number 12 Year 2011 concerning the Establishment of Regulation.

Based on the explanation above, the following statements are explanations of the resolution efforts of construction dispute as stated in Law Number 2 Year 2017 concerning Construction Service: *first*, mediation. Mediation is a dispute resolution in which the third party facilitates the discussion between the other parties in order to reach the agreement. Binding mediation is a dispute resolution way in which the third party facilitate the discussion between the two dispute parties to meet the agreement. Mediation is a negotiation between the two parties or more with the help of neutral party who does not have authority to make decision with the intention to settle the dispute.

Second, conciliation. Conciliation is a dispute resolution by the intervention of third party (conciliator) who actively arranges and formulates the steps of settlement, which later will be offered to the dispute parties. If the dispute parties cannot make a decision, then the conciliator proposes a resolution or way out from the dispute. However, the conciliator has no authority to make decision but recommendation and the implementation based on the good will from the dispute parties itself.

Third, arbitration. Arbitration is an adversarial dispute resolution which is done

through dispute resolution institution. In this case, there are two kinds of institutions: the one prepared by the state or called as court, and the one that is prepared by non-governmental (private) or called as arbitration. Dispute resolution through arbitration will result a decision. In Indonesia, the governing regulation is Law Number 30 Year 1999 concerning Arbitration or Dispute Resolution Alternative. Dispute resolution through arbitrary can only be done towards the resolution that is commercial dispute in accordance with that is stated in Article 5 paragraph (1) Law Number 30 Year 1999. In this dispute resolution process, arbitration cannot examine and decide the dispute without being based on arbitration agreement made in written. This is in accordance with the important element that is ruled in Article 1 paragraph (3) Law Number 30 Year 1999.

In Indonesia, there are 6 (six) institutional arbitration: Indonesian National Board of Arbitration (BANI), National Sharia Board of Arbitration (Basyarnas), Indonesian Capital Market Arbitration (BAPMI), Indonesian Commodity Futures of Arbitration (BAKTI), Indonesian Mediation Insurance Board (BMAI), and Indonesian Construction Dispute Resolution of Arbitration (BADAPSKI). Through arbitration, it will result in final decision that cannot be appeal even though law effort in form of cancellation or the implementation of arbitration award can be applied. It makes dispute resolution through arbitration is considered faster than through court. The other benefit of arbitration is the decision is neutral and done by the experts in their field.

The deficiency of arbitration is that it is permanent and cannot be found easily in every region. It is only permanent in big cities. It is obviously different from court which basically exists in every region and city in Indonesia. Moreover, arbitration process and procedure is not easy. People who use arbitration way are limited in some people, especially business people who are experts or middle up class.

Fourth, dispute council. Dispute council is enlisted in Article 88 paragraph (5) Number 2 Year 2017 on Construction Service. In Construct-

ion Service Law, dispute council has not been regulated in further. The regulation of dispute council firstly found in FIDIC. In FIDIC, dispute council is formed based on agreement from the parties since construction contract signing. It usually consists of three experts that are engineer and/or construction law who has training specialization to manage dispute council. In practice, most of dispute council who succeed are dispute council who is not originated from the same state in which the project is done, thus it will avoid corruption.

Table 1. Type of council

Dispute Review Board	Dispute Adjudication Board	Joint Dispute Council
DRB issues a recommendation in which opinion is not binding	DAB issues binding decision	A CDB usually issues recommendations but can also issue Decision, but if a party asks and no other party opposes.
If there is no party expresses dissatisfaction of the recommendation in specified time period, obedience is a must.	The party must obey the decision right away.	-
If a party express dissatisfaction in certain things in specified time period, the party can use arbitration, if so provided or court. The party is not required to obey the recommendation in waiting decision by arbitration or court	If a party express dissatisfaction in specified time period, can file the dispute to final resolution through arbitration or court, but those parties are still exist and in contract bind to obey the decision	-

Based on the definition above, according to the writer, the most effective effort of construction dispute resolution is through dispute council (Dispute Adjudication Board). The benefit from Dispute Council is that it is formed by the par-

ties at the signing contract, Dispute Council Decision (Dispute Adjudication Board) is binding, it consists of three expert people from construction and law. From various effort of dispute resolution based on Law Number 2 Year 2017 concerning Construction Service, then the most efficient effort which can minimize the occurrence of dispute is through Dispute Council.

Conclusion

Dispute resolution regulated in Construction Service Law is resolution through deliberation and consensus by prioritizing the dispute resolution not through the court. Yet it is important to notice the regulation in Article 47 paragraph (1) Construction Service Law. This regulation has accommodated many regulations in FIDIC Conditions of Contract. However in practice, some regulations about dispute council have no further explanation as follow-up from Construction Service Law. This must be followed up immediately by Government, so there will be no legal vacuum for party in construction field.

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