

JURIDICAL OVERVIEW ALTERNATIVE DISPUTE RESOLUTION IN INDONESIA: LEGAL FRAMEWORK

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Abstract

The construction industry has used private dispute resolution techniques longer than most industries. Formal legal remedies are much slower and inflexible in the context of a fast-moving activity such as construction project. The methods of dispute resolution in Indonesia can be divided into two categories based on the method carried out within the court or litigation and carried out outside of the court which can be divided into two subcategories, namely arbitration and alternative dispute resolutions (ADR). This research is a normative juridical study through a statute approach. The statutory approach is carried out by reviewing and analysing laws and regulations related to alternative dispute resolution. The aims of this research are to review the legal framework of ADR in Indonesia and to identify challenges and suggest areas for improvement. The result is ADR methods such as mediation, negotiation, and conciliation remain underutilized in Indonesia. Several factors contribute to this, including limited public awareness and insufficient socialization of these methods, as well as a deeply ingrained culture of litigation.

Keywords: *dispute, alternative dispute resolution, legal framework, construction*

INTRODUCTION

The construction industry has used private dispute resolution techniques longer than most industries. Formal legal remedies are much slower and inflexible in the context of a fast-moving activity such as construction project. The process of resolving disputes through the courts, also known as litigation, results in win-lose decisions that have not been able to embrace common interests, and this tends to cause new problems, slow settlements, require high costs, and can cause hostility between the parties to the dispute.

The methods of dispute resolution in Indonesia can be divided into two categories based on the method carried out within the court or litigation and carried out outside of the court which can be divided into two subcategories, namely arbitration and alternative dispute resolutions (ADR). Arbitration and ADR are governed under the same regulation,

namely the Law No. 30 of 1999 concerning Arbitration and ADR. There are several rules governing alternative dispute resolution such as Law No.2 of 2017 concerning Construction Services and Government Regulation No. 22 of 2020.

The adoption of alternative dispute resolution (ADR) methods, such as mediation, negotiation, and conciliation, remains limited in Indonesia despite their potential for efficient and cost-effective dispute settlement. This underutilization stems from several challenges, including a lack of public awareness, a strong cultural preference for litigation, and doubts about the neutrality and effectiveness of ADR processes. Moreover, insufficient competency among ADR practitioners and inadequate regulatory implementation further impedes its growth. The objectives of this research are to review the legal framework of ADR in Indonesia and to identify challenges and suggest areas for improvement.

METHODOLOGY

This research is a normative juridical study through a statute approach. The statute approach is carried out by reviewing and analysing laws and regulations related to alternative dispute resolution. This research collects data by conducting literature studies or secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials.

Primary legal materials include laws and regulations, namely Law No.2 of 2017 concerning Construction Services, Government Regulation No. 22 of 2020 concerning Implementation Regulations of Law No. 2 of 2017 concerning Construction Services, Law No. 30 of 1999 Arbitration and Alternative Dispute Resolutions, and Law Number 48 Year 2009 on Judicial Authority.

Secondary legal materials used are literature books, articles and recent legal journals, while tertiary legal materials are in the form of legal dictionaries (Black's Law Dictionary). The analysis used in this research is a qualitative analysis that provides a description and explains the object of research (descriptive).

RESULTS AND DISCUSSION

Alternative Dispute Resolution (ADR) is general term for a range of dispute resolution techniques that are used as an alternative to litigation. The construction sector began using these techniques earlier than any other industry sector. While arbitration is the most widely used ADR technique, there are another technique such as mediation, negotiation, conciliation, and dispute board.

Negotiation

Definition of negotiation in Black’s Law Dictionary is “A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation involves complete autonomy for the parties involved, without the intervention of third parties.” (Garner, 2009)

In the law, negotiation is placed as the first way to resolve disputes. It is the cheapest and most discreet way compared to other methods. In negotiation, no third party is required, but it is possible that other parties such as experts or consultants can be represented.

Mediation

According to Black's Law Dictionary, the definition of mediation is “A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” (Garner, 2009).

Mediation is conducted when it is difficult for the parties to reach an agreement through negotiation. Mediation involves a neutral third party as mediator. The mediator cannot impose his/her opinion on the parties.

Conciliation

In Black’s Law Dictionary, conciliation defined as “A settlement of a dispute in an agreeable manner. A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved.” (Garner, 2009).

Conciliation is almost similar with mediation, where the disputing parties convene to resolve the dispute with a neutral third party following a failure of negotiation. The third party in conciliation (conciliator) must take an active part by providing opinions as

well as advice based on the circumstances of the dispute. Conciliation has more significant role in reaching an agreement compared to a mediator. Similar to negotiation and mediation, successful conciliation results in a written agreement which is deemed final and binding to the disputing parties.

Arbitration

Arbitration according to Black’s Law Dictionary is “A method of dispute resolution involving one or more neutral third parties who are usually agreed to by disputing parties and whose decision is binding.” (Garner, 2009)

Where the parties choose to settle a dispute by arbitration after the dispute has arisen, the agreement to do so shall be made in a written agreement signed by the parties. Disputes that can be resolved through arbitration are only disputes in the field of trade and concerning rights which according to the laws and regulations are fully controlled by the disputing party. Disputes that cannot be resolved through arbitration are disputes that according to laws and regulations cannot be reconciled. Arbitration is far less time-consuming than litigation as there can only be one arbitral award. Arbitral awards shall be final and binding upon the parties with a permanent legal force.

Dispute Board

Based on Government Regulation No. 22/2020 concerning Implementation Regulations of Law No. 2 of 2017 concerning Construction Services Regulation of the Minister of Public Works and Public Housing Number 11/2021, The Construction Dispute Board, hereinafter referred to as the Dispute Board, is an individual or team formed by agreement of the parties, from the beginning of the implementation of the Contract to prevent and resolve disputes.

Regulation about Alternative Dispute Resolution in Indonesia

In Indonesia, arbitration and ADR are regulated under the same regulation the Law of the Republic of Indonesia No. 30 of 1999 concerning Arbitration and ADR. Under this

regulation, ADR refers to several methods of resolution outside of the court, such as negotiation, mediation, and conciliation.

If we look further, the provision does not provide much clarity on what and how Alternative Dispute Resolution is, in fact it raises many questions and issues. For example, there is no further explanation of what is meant by settlement by negotiation or mediation. In Law No. 30/1999, there is no definition of consultation, negotiation, mediation, conciliation, and expert judgement. In fact, each of these means of settlement needs to be regulated in detail to avoid errors of subjectivity in interpretation. From 82 Articles contained in Law Number 30 Year 1999, only one article, namely Article 6, explains superficially about the dispute resolution process through Alternative Dispute Resolution.

Based on the applicable provisions, there are some sources of law that can be used as a legal basis in resolving construction contract disputes which will be explained respectively throughout this article.

Law No.2/2017 concerning Construction Services (Chapter XI Article 88)

In Chapter XI about dispute resolution Article 88 (Number 1-3) defined about disputes that occur in Construction Works Contracts are resolved with the basic principle of deliberation to reach consensus. In the event that the deliberations of the parties cannot reach an agreement, the parties take the stages of dispute resolution efforts listed in the Construction Work Contract. In the event that dispute resolution efforts are not listed in the Construction Work Contract, the parties to the dispute shall make a written agreement regarding the dispute resolution procedures to be selected.

The stages of dispute resolution include mediation, conciliation, and arbitration. In addition to the dispute resolution, the parties may form a dispute board (Article 88 Number 4-5). Further provisions regarding dispute resolution are regulated in government regulations.

Government Regulation No. 22/2020 concerning Implementation Regulations of Law No. 2 of 2017 concerning Construction Services (Article 91 to 96)

In article 91(2), dispute resolution in the implementation of Construction Services is carried out with the principles of fast, cheap, legal certainty, maintaining good relations and the case cannot be opened to the public, unless otherwise determined by the parties and / or the court.

Deliberation for dispute resolution is conducted based on the good faith of the parties. In the event that the deliberation does not result in an agreement, the dispute resolution is continued with Mediation.

Article 93 states that stages of Construction dispute resolution efforts include Mediation, Conciliation, and arbitration. In addition to the dispute resolution efforts through Mediation and Conciliation, the parties may appoint a Dispute Board. The Dispute Board has a function as an effort to prevent as well as resolve settlement of Construction disputes (article 94-96).

Regulation of the Minister of Public Works and Public Housing Number 11/2021

This regulation contains the Procedures and Technical Guidelines for the Construction Disputes Board. There are 41 articles in this regulation that contains authority and duties of the dispute board, mechanism of dispute resolution, dispute board requirements, and dispute board commissioning.

Law No. 30/1999 Arbitration and Alternative Dispute Resolutions,

According to Article 1 number 1 of Law No. 30/1999, “arbitration is a way of resolving a civil dispute outside the public courts based on an arbitration agreement made in writing by the parties to the dispute”. In the Article 1 number 10, “Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgement.”

In Chapter II Article 6, it explains about alternative dispute resolution.

Law Number 48/2009 on Judicial Authority

In Article 58 to 61 written about arbitration and alternative dispute resolution. Alternative dispute resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by way of consultation, negotiation, mediation, conciliation, or expert judgement. Dispute settlement through alternative dispute resolution shall result in a written agreement that shall be final and binding on the parties to be implemented by the parties.

CONCLUSIONS AND RECOMMENDATIONS

Although there are some methods of resolution outside of the court, such as negotiation, mediation, conciliation, and dispute board, it's still not popular. Some benefits of ADR are cheaper compared to litigation (cost-effective), faster than litigation (time saving), preserves relationships between the parties, and confidentiality. ADR offers significant benefits for the construction industry, its effectiveness in Indonesia is limited by enforcement challenges, lack of expertise, and accessibility issues. Reforms targeting these challenges, along with better integration of ADR in construction contracts and broader adoption of international standards, are essential to unlocking ADR's full potential in Indonesia's construction sector.

Some improvements are needed in Indonesian legislation, namely a more in-depth and detailed explanation of the definition, procedures of several alternative dispute resolution, considering that in Law 30 of 1999 there is only 1 article regarding alternative dispute resolution out of a total of 82 articles. This is very important to avoid misinterpretation that can delay dispute resolution. In addition, socialisation of alternative dispute resolution is also needed, which can be done through training or seminars.

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