

THE ROLE OF THE INDONESIAN NATIONAL ARBITRATION BOARD (BANI) IN PROVIDING BINDING OPINIONS TO PREVENT CONSTRUCTION CONTRACT DISPUTES

Prasetyo Efendy¹⁾

¹⁾Master of Construction Law, Pekalongan University, Jl. Sriwijaya No.3, Bendan, Kec.
Pekalongan Bar., Kota Pekalongan, Jawa Tengah, 51119
E-mail: p.efendy@gmail.com

Abstract

As a developing country, Indonesia has actively pursued various development activities. Infrastructure development has continued to grow since the 1998 economic crisis, particularly in the past 20 years. One of the major challenges in construction projects in Indonesia is the occurrence of construction contract disputes between clients and contractors. Disagreements, conflicting interests, and concerns over potential losses often lead to such problems or disputes. As construction activities increase, so too do construction contract disputes. This research employed a literature review method by examining existing literature to understand the concepts, theories, and previous findings related to the research problem. Following Articles 52 and 53 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration institutions can issue binding opinions on matters related to construction contracts. The binding opinion issued by the Indonesian National Arbitration Board (BANI) can resolve disputes and prevent construction contract disputes.

Keywords: *contract, construction, disputes, BANI, binding opinion*

Abstrak

Indonesia merupakan salah satu negara berkembang yang ada di dunia. Namun, Indonesia juga aktif melakukan kegiatan pembangunan di berbagai bidang. Dalam 20 tahun terakhir setelah dihantam krisis ekonomi 1998, pembangunan infrastruktur terus meningkat. Salah satu masalah utama dalam pelaksanaan konstruksi di Indonesia adalah adanya sengketa kontrak konstruksi yang terjadi antara pengguna jasa dengan penyedia jasa. Perbedaan pendapat, benturan kepentingan, hingga rasa takut dirugikan kerap menjadi sebab permasalahan atau sengketa tersebut terjadi. Seiring dengan meningkatnya pelaksanaan konstruksi, maka semakin meningkat pula sengketa kontrak konstruksi yang ada. Metode penelitian yang digunakan pada jurnal ini adalah dengan studi pustaka yang dilakukan dengan meninjau literatur yang sudah ada untuk memahami konsep, teori, dan temuan-temuan sebelumnya yang terkait dengan masalah penelitian yang sedang dibahas. Sesuai dengan Pasal 52 dan 53 Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa, lembaga arbitrase dapat memberikan suatu pendapat yang mengikat (binding opinion) mengenai suatu persoalan berkenaan dengan kontrak konstruksi. Pendapat yang mengikat (binding opinion) yang dikeluarkan oleh Badan Arbitrase Nasional Indonesia (BANI) ini dapat menyelesaikan permasalahan sehingga mencegah terjadinya sengketa kontrak konstruksi.

Kata Kunci: *kontrak, konstruksi, sengketa, BANI, binding opinion*

INTRODUCTION

Indonesia is one of the developing countries in the world. Several factors contribute to Indonesia's status as a developing nation, including its abundant natural resources, yet the quality of human resources (HR) remains lacking, uneven development, and insufficient foreign investment. However, the country has actively engaged in various development sectors, particularly infrastructure. In the past 20 years following the 1998 economic crisis, infrastructure development has experienced significant growth. This infrastructure development is closely tied to construction projects undertaken by both the government and private sector.

The National Medium-Term Development Plan (RPJMN) 2015-2019, the third phase, and the RPJMN 2020-2024, the fourth phase of the National Long-Term Development Plan (RPJPN) 2005-2025, which was established by Law No. 17 of 2007, show an increase in the funding requirements for infrastructure provision.

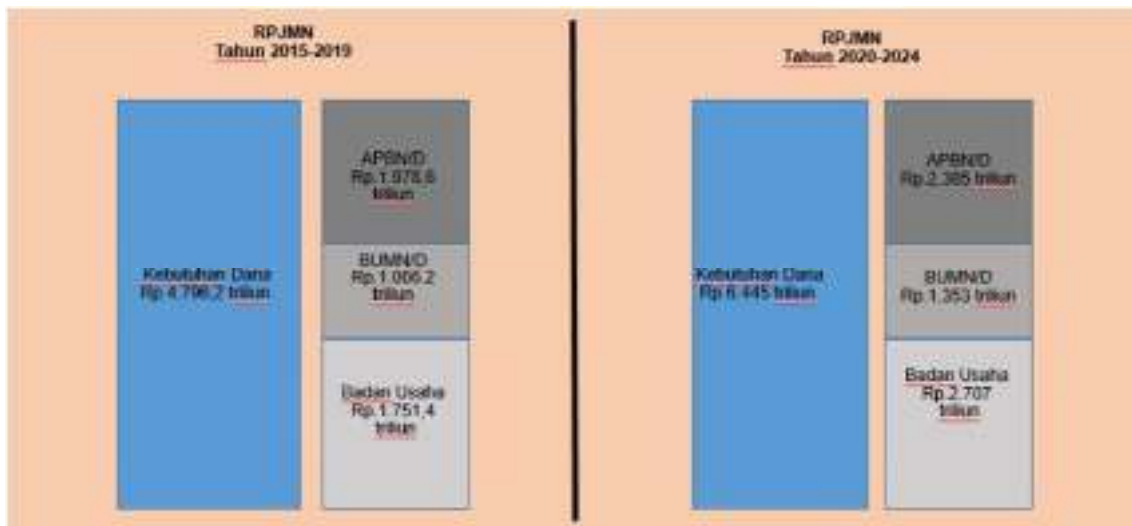


Figure 1. Infrastructure Funding Requirements in the RPJMN
(Source: <https://kpbu.kemenkeu.go.id/>)

The acceleration of infrastructure development in Indonesia needs to be improved, particularly in the form of infrastructure that drives the economy, ensures equitable basic services across Indonesia, and supports the development of various cities in line with urbanization trends. In the RPJMN 2020-2024, infrastructure development is prioritized to support basic services, economic growth, and urban development. This priority will be supported by advancements in the energy and electricity sectors and the implementation of digital transformation, with attention to sustainable development goals, digital transformation, and social and cultural capital.

The construction industry is inherently risky and highly uncertain (Flanagan and Norman, 1993), making it particularly prone to disputes. Larger and longer-duration projects are associated with a higher probability of disputes (Pang, 2011; Gebken, 2006; Love, 2005). One of the most prevalent challenges in Indonesia's construction sector is the occurrence of contract disputes between clients and contractors. As construction activities expand, so do the number and complexity of these disputes.

Professor H. Priyatna Abdurrasyid, in his book *Arbitrase & Alternatif Penyelesaian Sengketa*, on pages 214-215, identifies several common causes of claims in construction projects, including:

1. Incorrect design information
2. Inadequate design information
3. Inadequate site investigation
4. Slow client response
5. Poor Communication
6. Unrealistic time targets
7. Inadequate contract administration
8. Uncontrollable external events
9. Incomplete tender information
10. Unclear risk allocation
11. Lateness-non payment

To effectively manage claims, clients and contractors must ensure everything is well-prepared and accurate, especially the data and circumstances underlying the claim, so that it can be managed correctly and adequately without causing harm to either party, whether the claimant or the defendant. However, not all claims are successfully resolved or satisfied. A dispute has arisen between the contracting parties when a claim is not fulfilled or resolved. It is what is meant by a construction dispute, which occurs within the construction industry. These disputes must be resolved through the legal channels chosen by the parties in the contract, whether through Alternative Dispute Resolution (Consultation, Negotiation, Mediation, Conciliation, Expert Evaluation), Arbitration, or the Courts.

Each non-litigation and litigation dispute resolution method possesses distinct characteristics. Every method has its advantages and disadvantages. Parties can choose

the most effective dispute resolution institution based on their needs and desired outcomes.

According to Articles 52 and 53 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, arbitration institutions may provide a binding opinion on issues related to construction contracts. These binding opinions issued by the Indonesian National Arbitration Board (BANI) can resolve problems and prevent the occurrence of construction contract disputes.

Based on the provisions above, this research investigates how binding opinions concerning Arbitration and Alternative Dispute Resolution can prevent construction contract disputes, as stipulated in Law No. 30 of 1999.

RESEARCH METHODOLOGY

This research employed a literature review methodology. It involved systematically collecting and analyzing existing literature, such as books, journal articles, theses, dissertations, and other publications, to comprehend the concepts, theories, and previous findings related to the research problem. The data collection process included gathering information from various sources, including legislation and literature on the construction industry and contract law. Through this approach, the study aimed to identify existing problems, explore potential solutions, and ultimately conclude.

The types of data used to support the research findings are as follows:

1. Primary legal materials include legislation such as Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
2. Secondary legal materials are scholarly work and research findings relevant to the research topic.
3. Tertiary legal materials: These materials provide information about primary and secondary legal materials.

RESULTS AND DISCUSSION

As construction projects in Indonesia increasingly grow, so does the risk of disputes among project stakeholders. Various dispute-resolution mechanisms have been developed to address these issues. Several approaches can be employed, including

consultation, negotiation, mediation, conciliation, expert evaluation, arbitration, and litigation to resolve disputes.

However, a binding opinion can be an option to resolve issues and prevent disputes from arising. A binding opinion in arbitration is a statement issued by an arbitration institution regarding a specific issue raised by the parties involved in a contract/agreement. This opinion is binding on the parties involved.

Binding opinions are regulated under Chapter V of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, specifically Articles 52 and 53. The text of these articles is as follows:

1. Article 52: "Parties to an agreement may request a binding opinion from an arbitral institution on any legal issue arising from the agreement."
2. Article 53: "The binding opinion referred to in Article 52 cannot be contested through any legal action".

Further explanation in the commentary of Article 52 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution states that, in the absence of a dispute, an arbitration institution may accept a request from the parties in an agreement to provide a binding opinion on an issue related to the agreement. For example, interpreting unclear provisions, additions or amendments to terms due to new circumstances, and other related matters. When the arbitration institution provides its opinion, both parties are bound by it, and any party that acts contrary to the opinion will be considered to have violated the agreement. It is also important to note that the binding opinion cannot be contested through legal action.

Although the concept of a binding opinion can be used by disputing parties, this option is rarely used. An arbitration clause in a contract or agreement is crucial because it reflects the key components of arbitration, such as good faith, peaceful settlement, and the voluntary nature of the parties involved. However, including an arbitration clause is not a primary requirement to issue a binding opinion. The most important factor is the parties' good faith in preventing disputes.

CONCLUSION

In addressing construction contract disputes, it is essential to remember that amicable resolution is preferable to adversarial proceedings. The goal is not to prove who is right

but to resolve the existing issue. There are numerous methods available for resolving disputes within a construction project. A willingness to find common ground and an open-minded approach from all parties involved is essential. Recognizing that timely completion, cost-effectiveness, and adherence to agreed-upon quality standards are the ultimate goals, it becomes evident that disputes can be effectively resolved when all parties are committed to these objectives. Resolving the dispute becomes more challenging if one party fails to fulfill their contractual obligations.

The provision for binding opinions in Indonesia's Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution has effectively prevented potential disputes or conflicts between parties, although its application remains relatively uncommon. This mechanism empowers arbitral institutions to issue binding legal opinions on final contractual matters that cannot be challenged through legal recourse.

However, to ensure the successful implementation of binding opinions, the Indonesian National Arbitration Board (BANI) should provide information and education to parties when applications are filed. Additionally, BANI should guide the parties towards understanding that disputes can be prevented through this mechanism.

REFERENCES

- Abdurrasyid, Priyatna. (2011). *Arbitrase dan Alternatif Penyelesaian Sengketa (APS)*. Jakarta: PT. Fikahati Aneska.
- Biemo, W., Soemardi, & Krishna, S. Pribadi. (2020). *20 Tahun LPJK: Konstruksi Indonesia 2001 - 2020* [PDF document]. Retrieved from https://ftsl.itb.ac.id/wp-content/uploads/sites/8/2022/03/005.C.1.b.2.4-Bab-3-Konstruksi-dalam-Pembangunan-Infrastruktur-dalam-Buku-20-Tahun-LPJK_Lengkap.pdf.
- Flanagan, R., & Norman, G. (1993). *Risk Management And Construction*. London: Blackwell Science, Ltd.
- Gebken, R. (2006). *Quantification of Transactional Dispute Resolution Costs for the U.S. Construction Industry*. Dissertation. University of Texas.
- Ilham, Chairul, & Marpaung, Devi S. H. (2024). *Analisis Perbandingan Arbitrase Dan Alternatif Penyelesaian Sengketa Dalam Perspektif Undang-Undang Nomor 3 Tahun 1999*. *Jurnal Ilmu Hukum dan Humaniora*.
- Love, P., Tse, R. & Edwards, D. (2005). Time-cost Relationships in Australian Building Construction Projects, *Journal of Construction Engineering and Management*, vol. 131.

- Mangei, R. Brenda, Sumakul, Tommy, F., & Pinasang, Ralfie. (2020). *Penyelesaian Sengketa Melalui Badan Arbitrase Nasional Indonesia Ditinjau Dari Undang-Undang Nomor 30 Tahun 1999*. Lex Privatum Vol. VIII/No. 3/Jul-Sep/2020.
- Pang, H.Y. (2011). *Anatomy of Construction Dispute*. Theses. City University of Hong Kong.
- Pusdiklat Sumber Daya Air dan Konstruksi. *Pelatihan Penyelesaian Sengketa Kontrak Konstruksi* [PDF document]. Retrieved from Lecture Notes Online Web site: https://simantu.pu.go.id/epel/edok/abe9e_449096Modul_06_-_Analisis_Penyelesaian_Sengketa_Kontrak_Konstruksi.pdf.
- Rahmat, K. P., & Yasarman. (2024). *Kekuatan Hukum Putusan Badan Arbitrase Nasional Indonesia (BANI) dan Sistem Arbitrase di Masa Depan*. Iblam Law Review.
- Undang-Undang Republik Indonesia Nomor 2 Tahun 2017 Tentang Jasa Konstruksi.
- Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa.