

ARBITRASE SEBAGAI SOLUSI PENYELESAIAN KLAIM BIAYA KONSTRUKSI AKIBAT PEMBERIAN PERPANJANGAN WAKTU

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Abstract

Complexities in the implementation of construction projects often encounter conditions of dispute due to differences in understanding between the project owner and the contractor regarding the contract agreement. This dispute condition often leads to the emergence of construction claims. One of the construction claim is a cost claim resulting from a time extension being granted. These cost disputes include overhead costs, price adjustments, performance guarantee extension costs, equipment demurrage costs, equipment idle costs.. This dispute occurred because in the contract clause, the provisions related to cost settlement due to the extension of time was not stated clearly, giving rise to a dispute between the parties, so that an Alternative Dispute Resolution (APS) was needed, one of the APS chosen and used by the parties to resolve this dispute is Arbitration. Arbitration has several advantages, including the parties being able to choose their own arbitrator so that the quality of the decision will be more guaranteed, decision making will be faster, there will be confidentiality of the arbitration award and the relationship between the parties will be maintained. Arbitrator will examine the problem looking at the contractual, statutory, technical aspects and also the supporting data required. The results of this arbitration in several construction projects, both in the form of Binding Opinion and Procedural Arbitration, have proven to be effective as an effort to speed up the resolution of construction disputes because the results are binding so that the parties can use the arbitration results as material for amending the Contract Agreement.

Keywords: *project, dispute, claims, APS, Arbitration, Binding*

Abstrak

Kompleksitas dalam pelaksanaan proyek konstruksi sering kali menemui kondisi sengketa akibat perbedaan pemahaman antara pemilik proyek dan kontraktor mengenai perjanjian kontrak. Kondisi sengketa ini sering kali menyebabkan munculnya klaim konstruksi. Salah satu klaim konstruksi adalah klaim biaya yang timbul akibat perpanjangan waktu yang diberikan. Sengketa biaya ini meliputi biaya overhead, penyesuaian harga, biaya perpanjangan jaminan kinerja, biaya demurrage peralatan, biaya idle peralatan. Sengketa ini terjadi karena dalam klausul kontrak, ketentuan terkait penyelesaian biaya akibat perpanjangan waktu tidak dinyatakan dengan jelas, sehingga menimbulkan sengketa antara pihak-pihak, sehingga dibutuhkan Alternatif Penyelesaian Sengketa (APS). Salah satu APS yang dipilih dan digunakan oleh para pihak untuk menyelesaikan sengketa ini adalah Arbitrase. Arbitrase memiliki beberapa keunggulan, antara lain para pihak dapat memilih arbiter sendiri sehingga kualitas keputusan akan lebih terjamin, pengambilan keputusan akan lebih cepat, terdapat kerahasiaan putusan arbitrase dan hubungan antara para pihak akan tetap terjaga. Arbiter akan memeriksa masalah dengan melihat aspek kontraktual, peraturan perundang-undangan, teknis serta data pendukung yang diperlukan. Hasil arbitrase pada beberapa proyek konstruksi, baik berupa Pendapat Mengikat maupun Arbitrase Prosedural, terbukti efektif sebagai upaya mempercepat penyelesaian sengketa konstruksi karena hasilnya mengikat sehingga para pihak dapat menggunakan hasil arbitrase sebagai bahan untuk mengubah Perjanjian Kontrak.

Kata kunci: *proyek, sengketa, klaim, APS, Arbitrase, Mengikat*

INTRODUCTION

The Construction Agreement Contract is an agreement between the Project Owner and the Contractor who agrees on the Construction of Buildings/Facilities to be carried out by the Contractor within a certain period of time, specifications and values as well as other conditions agreed upon and stated in the Construction Agreement Contract.

There are many internal and external obstacles that cause projects to experience delays in completion that do not comply with the duration agreed in the Construction Contract Agreement. Referring to one of the Construction Agreement Contracts, judging from the cause of the problem, if the problem is caused by the contractor's internal factors, then the contractor is not entitled to an extension of the project completion time and the contractor can even be subject to the Liquidated Damage article with the value specified in the Contract Agreement. On the contrary, when it is proven that there are external obstacles beyond the Contractor's control, such as Force Majeure conditions (natural disasters, community blockades, social problems) or there are obstacles or errors or breaches of contract from the Project Owner, then the Contractor has the right to obtain an extension of the project completion time.

Along the way, it turned out that the impact of granting an extension of time was to increase costs for completing the project. These costs include direct costs (price adjustments), indirect costs (overhead), costs for extending performance guarantees, equipment demurrage costs, and so on. In several construction contracts, the provisions regarding handling the cost impacts resulting from this time extension have not been stated, giving rise to disputes between the parties which ultimately give rise to cost disputes/claims submitted by the Contractor to the Work Owner. Claims can occur due to differences in understanding with the initial agreement stated in the construction contract (Hayati et al., Evaluation of Construction Claims from the Perspective of Main Contractors and Subcontractors (Ilham Abadi, Jati Utomo, Sukamta) 159 2019). A claim has the potential to become a dispute if one party considers that there has been a violation of their rights by the other party (Ariani et al., 2018).

To resolve disputes, the parties have the freedom to choose what dispute resolution forum they will choose. The principle of freedom of the parties (*partij vrijheid*) is recognized in the legal system in force in Indonesia. This can be found in Article 1338

paragraph (1) of the Civil Code which determines that "all agreements made legally apply as law for those who make them". Theoretically, there are two forums that parties can choose to resolve disputes, namely through court (litigation) or outside court (non-litigation). The legal basis for parties to choose a forum to resolve business disputes is also clearly regulated in Law No. 48 of 1999 concerning Judicial Power. Article 58 states: "Efforts to resolve civil disputes can be carried out outside state courts through arbitration or alternative dispute resolution." Based on Article 58 of Law No. 48 of 2009 concerning Judicial Power above, it can be seen that the parties are given the freedom to choose dispute resolution, either through a court forum or alternative dispute resolution.

One alternative dispute resolution that the parties can choose is through an arbitration mechanism. Arbitration as a mechanism for resolving disputes outside of court is actually not something new in the legal system in Indonesia. Moreover, with the promulgation of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (ADR) which is contained in the Republic of Indonesia State Gazette Number 3872, the urgency of arbitration as an alternative dispute resolution has increasingly been actualized. Based on Law Number 2 of 2017 concerning Construction Services, dispute resolution in the construction sector is regulated in detail with the aim of providing an effective and fair resolution mechanism for all parties involved.

Seeing the complexity of the types of cost claims submitted by contractors, it is necessary to examine what types of cost claims could be the impact of granting an extension of time, as well as whether arbitration is an effective way to resolve these cost disputes/claims. The aim of this research is to find out why arbitration is an option as a solution for resolving cost disputes resulting from granting time extensions.

METODOLOGY

The research method used is the normative legal method, namely legal research that examines applicable regulations, and is known as library research, namely research in which library materials or documentary materials can be traced or researched and analyzed to obtain opinions and/or insights from experts who have researched them. or write about resolving claim disputes through arbitration. In this case, normative legal research is used to examine applicable regulations, namely in this case the Civil Code, Arbitration and Alternative Dispute Resolution Law No. 30 of 1999, Construction

Services Law no. 2 of 2017 and other related laws and regulations. This normative legal research is carried out by collecting primary data, namely related project data and legal materials as relevant secondary data. The various information and data obtained in this research will then be analyzed using content analysis methods, as well as statutory regulations, and then conclusions will be drawn.

RESULTS AND DISCUSSION

Contract agreements in the construction industry are part of the form of engagement, which was introduced in Article 1320 of the Civil Code which lists four prerequisites for an engagement, namely for a specific purpose, the ability of the parties to make an agreement, the agreement of the parties, referring to the content and purpose of the agreement. In essence, the agreement must agree or agree on the most important matters or materials agreed upon, where the agreement must be achieved without coercion, control and fraud. A Construction Cooperation Agreement is made between the service provider and the service user. Both parties have a reciprocal relationship as outlined in the contract, where with this agreement both parties can clarify their rights and obligations. Therefore, the Cooperation Agreement is made so that the status of the document is valid and legally binding. The value of the agreement, duration of work, job specifications are some of the achievements that must be achieved in the agreement.

In carrying out work, things that often arise are delays in completing projects that exceed the target time in the agreement. Referring to one of the Construction Agreement Contracts, judging from the cause of the problem, if the problem is caused by the contractor's internal factors, then the contractor is not entitled to an extension of the project completion time and the contractor can even be subject to the Liquidated Damage article with the value specified in the Contract Agreement. On the contrary, when it is proven that there are external obstacles beyond the Contractor's control, such as Force Majeure conditions (natural disasters, community blockades, social problems) or there are obstacles or errors or breaches of contract from the Project Owner, then the Contractor has the right to obtain an extension of the project completion time. To facilitate understanding, here the author uses the case of a power plant project where the project completion time which is usually referred to is the Commercial Operation Date (COD).

The illustration in Figure 1 shows the emergence of disputes related to project completion time.

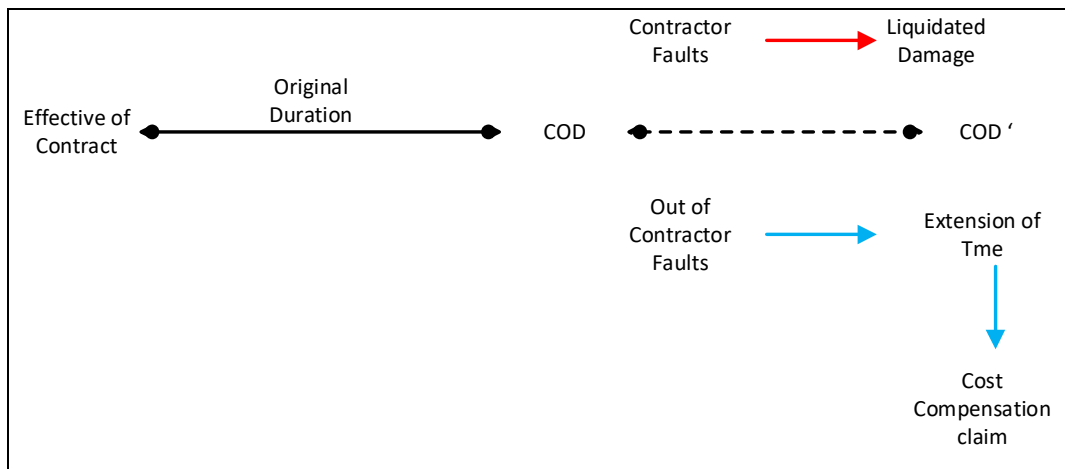


Figure 1. Contractual Conditions related to Project Completion Time

For contract articles related to Liquidated Damaged, Force Majeure, Extension of Time Claims, in general, these are clearly stated in the contract agreement clauses. The next problem is that with the granting of an extension of time, the Contractor submits a Cost claim. The cost claims submitted include:

1. Direct Cost Claims (Price Adjustment), for compensation or changes in payment value on ongoing contracts, due to changes in the price of materials, labor, or other relevant factors during the implementation of the contract. This price adjustment usually occurs in multi-year contracts.
2. Indirect Cost Claims (Overhead), for compensation submitted by certain parties (usually contractors) to cover indirect costs arising from disruptions, delays or changes in project implementation.
3. Cost of extending the performance bond, compensation submitted by the contractor to cover additional costs due to the extension of the validity period of the performance bond, caused by changes in the project schedule, such as delays or extensions of the completion time, which are not caused by the contractor's fault or negligence.
4. Equipment demourage fee, to compensate for additional costs incurred due to delays in unloading or loading goods beyond the time agreed upon in the ship charter, freight forwarding, or other means of transportation rental agreement. This fee is usually charged to the party responsible for the delay.
5. Equipment idle cost, to compensate for costs incurred by the contractor for the use, rental, or loss of productivity of equipment during project implementation. occurs

when there is a change or condition that causes additional costs related to equipment, such as delays, changes in the scope of work, or temporary suspension of the project.

Table 1 Case Study Results for Claims for Costs Due to Granting Extension of Time

No	Claim for Costs Due to Granting of Extension of Time	Projects
1	Direct Cost Claims (Price Adjustment)	4
2	Indirect Cost Claims (Overhead	5
3	Cost of extending the performance bond	2
4	Equipment demourage fee	2
5	Equipment idle cost	2

Given the condition that most of the contract agreements do not yet have a contractual clause for handling cost claims due to extension of time, this gives rise to cost disputes/claims submitted by the Contractor to the Work Owner. Claims can occur due to differences in understanding with the initial agreement stated in the construction contract (Hayati et al., Evaluation of Construction Claims in the Perspective of Main Contractors and Subcontractors (Ilham Abadi, Jati Utomo, Sukamta) 159 2019). Claims have the potential to become disputes if one party considers that there has been a violation of their rights by the other party (Ariani et al., 2018).

In accordance with Article 1339 of the Civil Code: "Agreement is not only binding for matters expressly stated therein but also for anything that according to the nature of the agreement is required by propriety, custom or law". Referring to Article 88 of the Construction Services Law No. 2 of 2017, in the event that the construction contract does not regulate dispute resolution arrangements, the disputing parties must make a written agreement to choose a dispute resolution procedure. Furthermore, Article 93 of Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services states that the stages of efforts to resolve construction disputes include mediation, conciliation, and arbitration. And referring to the clause of the Agreement contract regarding Settlement of Dispute: *"If any dispute of referrence relateng to the techncal matters or interpretation of the Contract Shaal arise between the Pwner and the Contractor in connection with or arising out of the Contract ofr the carrying out of the Works, whether during the progress of the works or after the termination abandonment or breach of the Contract, which cannot be settked by agreement between the parties to the dispute, such dispute or difference shall be submitted to the arbitration as hereinafter provided."* Therefore, dispute resolution through arbitration can be chosen as an Alternative Dispute Resolution (ADR) ways.

In general, arbitration is a process in which two or more parties submit their dispute to one or more impartial persons (called arbitrators) to obtain a final and binding decision. From this definition, there are three things that must be met, namely: the existence of a dispute; agreement to submit to a third party; and a final and binding decision will be made. Meanwhile, Article 1 point 1 of Law Number 30 of 1999 states: "Arbitration is a method of resolving a civil dispute outside the general courts based on an arbitration agreement made in writing by the disputing parties". From the definition of Article 1 point 1, it is also known that the basis of arbitration is an agreement between the parties themselves, which is based on the principle of freedom of contract. This is in accordance with the provisions of Article 1338 of the Civil Code, which states that what has been agreed upon by the parties binds them as law. Benefits of Dispute Resolution through Arbitration:

1. **Speed of Process:** Arbitration is generally faster than litigation. This shorter process allows the parties to quickly reach a settlement and move forward with the construction project without being hampered by a protracted legal process.
2. **Confidentiality:** The arbitration process is closed, so the information discussed is not made public. This is important in the construction industry where reputation and confidentiality of business information are of great concern.
3. **Flexibility and Selection of Arbitrators:** The parties can choose arbitrators who have specific expertise in the field of construction, so that the decisions taken better understand the technical and legal context of the dispute at hand.
4. **Appropriate Application of Law:** Arbitration allows for the application of law that is more in accordance with the provisions of the contract and applicable laws, so that the resulting decision is more relevant and fair to all parties.

Arbitration is suitable for resolving this case, where the basic principles applied by this arbitration are:

1. **Principle of Autonomy of the Parties.** Where the parties agree to determine what law to use (choice of law), what procedural law, the nature of confidentiality, trial schedule, place and language, the arbitrator and the term of the decision.
2. **Principle of Competence-Competence.** Based on the authority arising from the appointment by the parties to the Arbitrators, the Arbitration Institution in this case the arbitrators have the authority to judge themselves what is within their competence.

3. Post Sunt Servanda Principle. The principle states that the agreement produced in a contract is binding on the parties like a law and must be implemented in good faith. This principle originates and develops in the law of agreements or contracts.
4. Principle of Good Faith. This principle is parallel to the principle of *pacta sunt servanda* which must be implemented by the parties before, during and after the Arbitration process is carried out.
5. Principle of Efficiency. Implementation of Arbitration Decisions. Article 48 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (APS) regulates time efficiency: “Examination of a dispute must be completed within a maximum of 180 (one hundred and eighty) days since the Arbitrator or Arbitration Panel is formed”.
6. The principle of *Audi et Alteram Partem*. This principle is found in Article 29 of Law Number 30 of 1999 which states that the disputing parties have the same rights and opportunities to express their opinions in the Arbitration process (*audi et alteram partem*).
7. Private and Confidential Principle. The private and confidential principle is an attraction in itself for selecting an Arbitration Forum. Arbitration Law Number 30 of 1999 regulates this principle in article 27 which reads:⁴³ “All dispute hearings are conducted in private”.
8. Separability Principle. This principle can be found in Article 10 (f) and (h) of Law Number 30 of 1999 which states that an arbitration agreement is not void due to the enactment of the terms of the termination of the principal obligation; or the termination or cancellation of the principal agreement. The principle of separability stipulates that an agreement containing an Arbitration clause constitutes two separate agreements from the principal agreement. Therefore, an agreement containing an Arbitration clause constitutes two separate agreements: The principal agreement concerning the commercial rights and obligations of the parties and, The secondary agreement containing obligations to resolve any disputes between the parties through Arbitration.
9. Final Principle. This principle can be found in Article 60 of Law Number 30 of 1999 which states that the arbitration decision is final and has permanent legal force and is binding on the parties.

10. Principle of Fair and Equitable Treatment. This principle requires fair and equal treatment to be given to the parties. This principle requires the neutrality of the arbitrator or arbitration panel not to give more preferential treatment to one of the parties. This principle can be found in Article V (1) (b) of the New York Convention and Article 18 of the UNCITRAL Model Law.

In Indonesia, there are two types of alternative dispute resolution through arbitration bodies, namely institutional arbitration and ad hoc arbitration. One of Indonesia's institutional arbitration systems is organized by the Indonesian National Arbitration Board (BANI).

According to Law Number 30 of 1999 Article 52 states: "The parties to an agreement have the right to request a binding opinion from the Arbitration Institution on certain legal relationships of an agreement." In this discussion, the author's scope is related to the results of the BANI Binding Opinion on several dispute issues for cost claims due to extension of time, based on normative law and also valid data/documents/evidence, then there are several binding opinion (BO) results seen in Table 2 BANI Binding Results for Claims for Costs Due to Extension of Time.

Table 2. BANI Binding Results for Cost Claims due to Extension of Time

No	Klaim Biaya	Conclusion	Noted
1	Direct Cost Claims (Price Adjustment)	Accepted	During the extension period, provide valid evidence for the direct costs of completing the remaining work.
2	Indirect Cost Claims (Overhead)	Accepted	During the extension period, provide valid evidence for indirect costs (office rent, fuel, remuneration, etc.) incurred by the contractor.
3	Cost of extending the performance bond	Accepted	During the extension period, valid evidence of payment of the extended performance guarantee must be provided.
4	Equipment demourage fee	Accepted	Completed with valid evidence related to demurrage claims
5	Equipment idle cost	Accepted	Completed with valid evidence regarding equipment idle and equipment idle costs/losses

Furthermore, according to Article 53 of Law Number 30 of 1999, it states: "A binding opinion as referred to in Article 52 cannot be challenged through any legal efforts." In the final part of the BO results, it is also stated that the BO results are registered with the Registrar of the District Court in the relevant area. Based on these conditions, with the good faith of the parties, it is hoped that the dispute that occurred has been answered with the BO Results from the Arbitration Institution that have been agreed upon by the parties, these BO results can be a reference for the formulation of Amendments to

the Contract Agreement in an effort to resolve disputes or claims that have been submitted by the parties.

CONCLUSION

Construction Agreement Contract is an agreement between the Project Owner and the Contractor who agrees on the Construction of Buildings/Facilities to be carried out by the Contractor within a certain period of time, specifications and value as well as other agreed provisions.

Dispute issues that cause construction disputes/claims due to the absence of contract clauses for handling several claim disputes in this case are cost claims due to the granting of an extension of time can be made through Arbitration in accordance with Article 88 of the Construction Services Law No. 2 of 2017, in the event that the construction contract does not regulate dispute resolution arrangements, the disputing parties must make a written agreement to choose a dispute resolution procedure and Article 52 states: "The Parties to an agreement have the right to request a binding opinion from the Arbitration Institution regarding certain legal relationships of an agreement."

Based on the Binding Opinion Results of the BANI institution for several cost claim issues due to the granting of an extension of time, namely overhead costs, price adjustment costs, time extension costs, equipment idle costs, demurrage costs can be accepted during the extension period provided that valid evidence for the cost value is provided.

Settlement through arbitration has the advantage that the quality of the decision will be more guaranteed, the decision making is faster, there is confidentiality of the arbitration decision and the relationship between the parties will be maintained. In addition, according to Article 53 of Law Number 30 of 1999, it states: "Regarding the binding opinion as referred to in Article 52, no objection can be made through any legal efforts." So with the good faith of the parties, it is hoped that the dispute that occurred has been answered with the existence of the BO Results from the Arbitration Institution that has been agreed upon by the parties, the results of this BO can be a reference for the formulation of the Amendment to the Contract agreement in an effort to resolve disputes or claims that have been submitted by the parties.

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