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The Role Of Arbitration In Construction Dispute Resolution: Legal Perspectives And Practices In Various Countries

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Abstract
Arbitration is one of the alternative dispute resolution methods that is increasingly popular in the construction field, given the complexity and dynamics of construction projects that often lead to conflicts. in a business relationship or agreement, each party must be prepared to face the possibility of conflict. Disputes often arise due to differences in interpretation regarding clauses or provisions in the agreement, or other factors. Dispute resolution through the courts often leads to new problems, slow processes, high costs, and can create hostility between the parties to the dispute. Therefore, many choose out-of-court dispute resolution. This research aims to analyze the role of arbitration in construction dispute resolution, by examining the legal perspectives and practices in various countries. In the legal context, arbitration offers advantages such as time efficiency, cost, and confidentiality, as well as flexibility in the selection of arbitrators with specialized skills. Indonesian practice demonstrates various approaches and regulations that affect the effectiveness of arbitration in resolving construction disputes. The study also explores the challenges faced, such as the recognition and enforcement of arbitral awards, as well as the comparison between arbitration and litigation. As such, this study is expected to provide greater insight into the role and relevance of arbitration in resolving construction disputes in the modern era.

I. INTRODUCTION

Indonesia is categorized as a developing country currently undertaking development across various sectors, both physical and non-physical. The goal of these efforts is to improve the welfare of all Indonesian citizens, both materially and spiritually, in a just and equitable manner. This is done to achieve prosperity for the entire population. Development in Indonesia heavily relies on the participation of all levels of society, meaning it must be implemented equitably. One of the main focuses of development is the economic sector, which includes physical infrastructure such as office buildings, housing, ports, industries, roads, and bridges.

In this context, clear regulations are required, both from a legal and technical perspective, which need to be developed and improved in their implementation. Although no one desires disputes, in business relations or contracts, every party must be prepared to face the possibility of conflict arising. Disputes often emerge due to differences in interpretation of clauses or provisions in the contract, or other factors.

Resolving disputes through litigation often leads to new problems, such as slow processes, high costs, and the potential to create hostility between the disputing parties. Therefore, many opt for out-of-court dispute resolution (Mahmudah, 2022). In Law No. 2 of 2017 on Construction Services, Article 88 provides alternatives for out-of-court dispute resolution through mediation, conciliation, and arbitration. If arbitration is not accepted by one or both parties, the Government Regulation on Construction Services, namely Government Regulation No. 29 of 2000, amended by Government Regulation No. 14 of 2021, stipulates in Article 23 (h) paragraph (2) that the resolution may proceed through the courts according to the applicable Civil Procedure Law.

Thus, both in the Construction Services Law and its implementing regulations, there is a commonality that out-of-court dispute resolution is an alternative, not the primary means of resolving disputes. Additionally, in the Arbitration Law, Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, Article 64 states, "Arbitration awards, once issued with an

enforcement order by the District Court Chair, shall be executed in accordance with the implementation of civil case rulings that have permanent legal force." This indicates that dispute resolution may still end up in District Court if it cannot be resolved through alternative dispute resolution methods (Zuliana & Haryanto, 2024).

Through the National Medium-Term Development Plan program, the Indonesian government is committed to prioritizing the acceleration of infrastructure development and construction as one of the drivers of the national economy. Between 2015 and 2017, the Indonesian government allocated development funds amounting to Rp 990 trillion. This has made Indonesia the fourth-largest construction market in Asia, following China, Japan, and India, and the largest in Southeast Asia.

Thanks to these achievements, Indonesia has become an attractive country for foreign construction companies to operate and expand their businesses. The Construction Services Law No. 2 of 2017 (UUJK) provides opportunities for foreign companies to participate in national construction projects that meet the criteria of high risk, high technology, and high cost, by forming joint ventures or cooperation with local companies. The construction services sector is highly prone to disputes, as activities in the construction services unit involve complex and multidisciplinary services, ranging from design to construction and testing before operations begin.

Therefore, it is not surprising that claims between parties can lead to conflicts, such as building damage or the failure of the construction service provider to complete obligations within the agreed timeframe. According to Hikmahanto, dispute resolution processes including construction disputes through arbitration as an alternative resolution have proven to be effective. This is the background for the establishment of BADAPSKI, the Indonesian Arbitration and Alternative Dispute Resolution Body for Construction Services. Dispute resolution for contracts conducted through BADAPSKI, whether for domestic funds or foreign grants/loans, is handled by arbitrators with deep understanding of the construction industry (Anggraeny et al., 2021).

II. RESEARCH METHODS

In this research, the type of research used is normative research, which examines secondary documents such as legislation, court decisions on specific cases, as well as legal theories and opinions from previous researchers. This study presents data collected from various sources, organized into structured words. The approach used in this research is a conceptual approach, which focuses on doctrines that have developed within the legal field, as well as a statute approach, which aims to discuss legal views from both Islamic law and positive law perspectives, along with their regulations in the legal world.

The data collection technique was carried out by gathering various sources, including books, articles, and the latest journals to ensure the research remains relevant. Furthermore, a deductive framework was used to analyze the research findings and answer the questions that form the foundation of the study. The aim of this research is to provide a perspective on the Role of Arbitration in Construction Dispute Resolution: A Legal and Practical Perspective in Various Countries (Huda & S HI, 2021).

III. RESULTS AND DISCUSSION

A. Dispute Resolution by Arbitration Institutions from a Legal Perspective BANI Dispute Resolution Procedure Based on Law Number 30 of 1999

Every institution, in carrying out its operational activities, is equipped with rights, obligations, authority, and procedural regulations. This also applies to BANI (Badan Arbitrase Nasional Indonesia), which is an institutional arbitration body that has its own authority, rules, and procedures established as its procedural law (MUNIROH, 2021). BANI is an independent institution that provides various services related to arbitration, mediation, and other methods of out-of-court dispute resolution. It was established on December 3, 1977, at the initiative of three prominent legal experts: Soebekti, Haryono Tjitrosoebono, and Priyatna Abdurrasyid. BANI is managed under the supervision of a Board of Directors and an Advisory Board consisting of public figures and representatives from the business sector. BANI is based in Jakarta and has representatives in several major cities in Indonesia, including Surabaya, Bandung, Pontianak, Denpasar, Palembang, Medan, and Batam.

Currently, BANI has more than 100 arbitrators from diverse professional backgrounds, with 30% of them being foreign arbitrators. Until now, BANI remains the oldest institutional arbitration body in Indonesia (LAMID, 2020). BANI offers dispute resolution services through arbitration and other alternative dispute resolution methods, such as

negotiation, mediation, conciliation, as well as providing binding opinions according to BANI's procedural rules or other rules agreed upon by the involved parties. Generally, BANI was established with the following objectives:

1. To participate in the effort of upholding the law in Indonesia by organizing dispute resolution in the industrial and financial sectors through arbitration and other alternative dispute resolution methods within the framework of the prevailing laws and regulations.
2. To provide dispute resolution services through arbitration or other binding alternative methods, in accordance with BANI's procedural rules or other rules agreed upon by the interested parties.
3. To act autonomously and independently in the enforcement of law and justice.
4. To conduct studies, research, as well as training or educational programs related to arbitration and alternative dispute resolution (Muskibah & Hidayah, 2021).

In Indonesia, the interest in resolving disputes through arbitration began to show an increase after the enactment of Law Number 30 of 1999 on Arbitration and General Alternative Dispute Resolution (Arbitration Law). The government formulated Law Number 30 of 1999 as the latest provision regulating arbitration institutions, which was enacted on August 12, 1999, with the aim of replacing the regulations on arbitration institutions that were no longer in line with the times.

Thus, the provisions on arbitration contained in Article 615 of the RV, Article 377 of the HR, and Article 705 of the RBG, were declared invalid. Therefore, the procedural law applied by arbitration institutions such as BANI now refers to Law Number 30 of 1999. If the parties in an agreement agree in writing to an arbitration clause, which is the agreement to resolve any disputes arising between them regarding the agreement through arbitration before the Indonesian National Arbitration Board (BANI), or choose to use BANI's procedural rules, then the dispute will be resolved under BANI's administration, while still taking into account the specific provisions agreed upon in writing by the parties, as long as they do not conflict with mandatory laws and BANI's policies. BANI's arbitration procedure is also regulated in Law No. 30 of 1999, Article 2, which states: "These Procedural Rules apply to arbitrations conducted by BANI. By referring disputes to BANI and choosing BANI's Procedural Rules for dispute resolution, the parties in the agreement or dispute are deemed to have agreed to waive court proceedings related to the agreement or dispute and will enforce any decision made by the Arbitration Tribunal based on BANI's Procedural Rules."

Furthermore, the provisions regarding BANI are also regulated in Article 3 of Law Number 30 of 1999, which states: "The District Court does not have the authority to hear disputes between parties bound by an arbitration agreement." Disputes that can be resolved through BANI arbitration include:

a) Disputes that, according to laws and regulations, can be settled amicably;
b) Disputes regarding rights that are fully controlled by the disputing parties in accordance with applicable laws and regulations;
c) Disputes in the field of trade; and
d) Disputes between the applicant and the respondent bound by the Arbitration Agreement.

The procedure for initiating a BANI arbitration request is also regulated in Law No. 30 of 1999 in Article 6 regarding the steps to initiate a request, which states:

1. BANI arbitration procedures begin with the registration and submission of an arbitration request by the party seeking to initiate the arbitration process (the Applicant) to the BANI secretariat.
2. Appointment of arbitrators. In the arbitration request, the applicant and the respondent may appoint an arbitrator or delegate the appointment to the Chairman of BANI.
3. Costs. The arbitration request must be accompanied by payment of registration and administrative fees in accordance with the provisions set by BANI. Administrative costs include fees for the secretariat, case examination fees, arbitrator fees, and tribunal secretary fees (Mangei, 2020).

B. Arbitration In Construction Dispute Resolution In Indonesia And Abroad

The development of law in resolving disputes in the construction sector in Indonesia is extensive when viewed from various aspects of the disputes. This process began with the advent of the reform era in Indonesia in 1999 and continued until 2017, during which new regulations specifically related to the legal

development of dispute resolution in Indonesia emerged. One aspect of legal development that I would like to discuss here is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. I also want to relate the connection between dispute resolution development and law, especially concerning construction dispute resolution through arbitration, as well as a review of Law No. 2 of 2017 concerning Construction Services. The legal development in construction disputes is shaped by society's needs for continuous social change. Arbitration law functions as a means to build and renew the construction climate in Indonesia.

The Central Statistics Agency (BPS) reports that equitable development positively impacts other sectors, such as food security in every region, fulfilling national electricity and energy needs, improving educational and health facilities, ensuring adequate transportation routes for goods and services, and enhancing tourism appeal. The role of these sectors can be seen in job absorption, capital investment, the number of infrastructure and building projects, reciprocal relationships with supporting sectors, and as facilitators in the movement and growth of goods and services (Mayangsari et al., 2020).

Construction work contracts are part of the law of obligations regulated in Book III of the Civil Code (KUH Perdata). Article 1320 of the Civil Code states four requirements that must be met for an agreement to be considered valid: there must be an agreement between the parties involved, the parties must have the capacity to enter into an obligation, there must be a specific object, and there must be a lawful cause. The agreement in the contract must encompass the essential or substantive matters agreed upon and must be reached without coercion, deceit, or error. Thus, all provisions contained in Book III of the Civil Code also apply to construction work contracts, as long as there are no other regulations set forth in the Construction Services Law (UU JAKON).

The legal subjects in construction work contracts consist of the service users and the providers of construction services, which can be public legal entities, private legal entities, or individuals. Public legal entities (personne morale) have the authority to issue public policies, both binding and non-binding on the general public. On the other hand, private legal entities do not have the authority to issue binding public policies. However, when the state acts as a private legal entity, that is, as a service user, and establishes a legal relationship with the service provider in a construction service procurement contract, this legal relationship will be subject to the provisions of private law as regulated in Book III of the Civil Code. Book III of the Civil Code adheres to an open system, meaning it grants extensive freedom to the parties to arrange their contractual relationships (Sinaga, 2021).

The provisions in Book III of the Civil Code are complementary law, meaning the parties have the freedom to utilize or disregard these provisions. If the parties do not regulate a certain matter, then that matter will be subject to the provisions in Book III of the Civil Code. The term construction contract or agreement is often referred to as a procurement agreement. This procurement agreement is regulated in Article 1601 b of the Civil Code, and its application depends on whether there are provisions regarding the matter in the Construction Services Law (UU JAKON). Construction work contracts can be classified into three categories:

Government Version: Typically, each department has its own standards. The common standard used is from the Ministry of Public Works. Even the Ministry of Public Works has more than one standard as each directorate general has different standards. However, since 2007, the Ministerial Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Service Procurement has been established, eliminating conflicting standards among directorates general.

National Private Version: This version varies widely according to the preferences of service users or project owners. Sometimes, they adopt standards from the Department or even take parts of contract systems from abroad such as FIDIC (Federation Internationale des Ingenieurs Conseils), JCT (Joint Contract Tribunal), or AIA (American Institute of Architects).

However, because of this mixed approach, this version of contracts becomes unfocused and highly prone to disputes. With the existence of Ministerial Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Service Procurement, the reference used in contract standards follows this Ministerial Regulation. If changes are made, adjustments will be conducted according to the needs of each party without drastically altering the standards set by the government.

Foreign Private Version: This version is generally used by foreign service users or project owners who implement contracts using the FIDIC or JCT systems. However, if these foreign private

companies carry out construction work in Indonesia, the standards applied must comply with government regulations set forth in Ministerial Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Service Procurement. Each contract must clearly include matters that must be implemented by the parties, and if not fulfilled, there will be legal consequences for them.

Based on Article 47 of the Construction Services Law (UU JAKON), construction work contracts must include the identities of the parties, details of the work, warranty periods, rights and obligations, use of construction labor, payment methods, provisions regarding defaults, dispute resolution, contract termination, force majeure, construction failure, worker protection, third-party protection, environmental aspects, guarantees against risks, and legal responsibilities in carrying out construction work or as a result of construction failure, as well as dispute resolution options. One clause that must be included in construction work contracts according to Article 47 of the Construction Services Law (UU JAKON) is the dispute resolution clause. This clause includes the forum of choice for resolving disputes that may arise from construction services. The dispute resolution clause states that if a dispute arises, it will be resolved through deliberation; if an agreement cannot be reached, it may proceed through mediation, conciliation, arbitration, or the establishment of a dispute board. If all these methods fail, dispute resolution will be conducted through the courts. An arbitration agreement is essentially a clause contained in the contract that stipulates that if a dispute arises, the parties agree to resolve it through arbitration. This clause serves as evidence for resolving construction disputes through arbitration and also overrides the court's authority to adjudicate the dispute in question. This is in accordance with the provisions of Articles 3 and 11 paragraph (1) of the Arbitration and Alternative Dispute Resolution Law (UU AAPS), which states that the district court does not have jurisdiction to adjudicate parties bound by an arbitration agreement.

Thus, the arbitration agreement provides absolute competence to the parties to determine their preferred dispute resolution method. The arbitration agreement is directed towards the methods and institutions authorized to resolve disputes or differences arising between the contracting parties. Therefore, the arbitration agreement focuses on resolving disputes that arise from the contract. The parties may agree that disputes arising from the agreement will not be taken to the judiciary but will be resolved by a neutral private institution. Thus, the arbitration agreement does not address the execution of the agreement but rather the procedure for resolving disputes arising from that agreement (Nurhayati, 2019).

The development of law in resolving disputes in the construction sector in Indonesia is extensive when viewed from various aspects of its disputes. This process began with the entry of the reform era in Indonesia in 1999 and continued until 2017, during which new legislation specifically related to the development of dispute resolution law in Indonesia emerged. One aspect of legal development that I would like to discuss here is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. I also want to relate the relationship between dispute resolution development and the law, particularly regarding the resolution of construction disputes through arbitration, and to review Law No. 2 of 2017 concerning Construction Services. The development of law in disputes in the construction field is shaped according to the community's needs for ongoing social changes. Arbitration law serves as a means to build and renew the construction climate in Indonesia.

The Central Statistics Agency (BPS) reported that equitable development has a positive impact on other sectors, such as food security in every region, national electricity and energy needs fulfillment, improvements in education and health facilities, adequate access to roads for the transportation of goods and services, and increased tourism appeal. The role of these sectors can be seen from employment absorption, investment, the number of infrastructure and building projects, reciprocal relationships with supporting sectors, and as facilitators in the movement and growth of goods and services (Mayangsari et al., 2020). Construction work contracts are part of the law of obligations regulated in Book III of the Civil Code (KUH Perdata).

Article 1320 of the Civil Code states four requirements that must be met for an agreement to be considered valid: the existence of an agreement between the parties involved, the capacity to enter into an obligation, the existence of a specific object, and the existence of a lawful cause. The agreement in the contract must cover the essential or material terms agreed upon and must be reached without coercion, fraud, or

mistake. Thus, all provisions contained in Book III of the Civil Code also apply to construction work contracts, as long as there are no other regulations stipulated in the Construction Services Law (UU JAKON). The legal subjects in construction work contracts consist of the service users and construction service providers, which can be public legal entities, private legal entities, or individuals. Public legal entities (personne morale) have the authority to issue public policies, whether binding or non-binding to the public. On the other hand, private legal entities do not have the authority to issue binding public policies. However, when the state acts as a private legal entity, that is, as a service user, and establishes a legal relationship with the service provider in a construction service procurement contract, that legal relationship will be subject to the provisions of private law regulated in Book III of the Civil Code.

Book III of the Civil Code adopts an open system, meaning it provides the broadest freedom to the parties to regulate their contractual relationship. (Hadi Ismanto & Sarwono Hardjomuljadi, 2018) The provisions in Book III of the Civil Code are supplementary law, meaning that parties have the freedom to use or set aside these provisions. If the parties do not regulate a particular matter, then it will be subject to the provisions contained in Book III of the Civil Code. The term construction contract or agreement is often referred to as a subcontract agreement. This subcontract agreement is regulated in Article 1601b of the Civil Code, and its application depends on whether there is regulation regarding that provision in the Construction Services Law (UU JAKON). Construction work contracts can be classified into three categories.

1) Government Version: Typically, each department has its own standards. The commonly used standard is from the Ministry of Public Works. In fact, the Ministry of Public Works has more than one standard because each directorate general has different standards. However, since 2007, the Minister of Public Works Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Services Procurement has been established, eliminating the existence of conflicting standards among directorate generals.
2) National Private Version: This version varies significantly according to the preferences of the service users or project owners. Sometimes, they adopt standards from the department or even take parts of contract systems from abroad, such as FIDIC (Fédération Internationale des Ingénieurs-Conseils), JCT (Joint Contract Tribunal), or AIA (American Institute of Architects). However, due to the partial adoption, this contract version becomes unfocused and highly susceptible to disputes. With the establishment of the Minister of Public Works Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Services Procurement, the reference used in contract standards follows this regulation. If changes occur, adjustments are made according to the needs of each party without drastically altering the standards set by the government.
3) Foreign Private Version: This is generally used by foreign service users or project owners who implement contracts based on the FIDIC or JCT systems. However, if the foreign private company undertakes construction work in Indonesia, the standards used must comply with the government regulations as stipulated in the Minister of Public Works Regulation No. 43/PRT/M/2007 on Standards and Guidelines for Construction Services Procurement. Every contract must explicitly include mandatory obligations for the parties involved, and if not fulfilled, there will be legal consequences for them. According to Article 47 of the Construction Service Law (UU JAKON), construction work contracts must include the identities of the parties, job details, warranty periods, rights and obligations, use of construction labor, payment methods, provisions regarding default, dispute resolution, contract termination, force majeure, building failure, worker protection, protection for third parties, environmental aspects, risk guarantees, and legal liability in the execution of construction work or as a result of building failures, as well as dispute

resolution options. One clause that must be included in construction work contracts as per Article 47 of UU JAKON is the dispute resolution clause. This clause encompasses the chosen forum for resolving disputes that may arise from construction services. The dispute resolution clause states that if a dispute occurs, it will be resolved through deliberation; if an agreement is not reached, it may proceed through mediation, conciliation, arbitration, or the establishment of a dispute board. If all these methods fail, dispute resolution will be carried out through the courts. An arbitration agreement is essentially a clause within the contract that stipulates that if a dispute arises, the parties agree to resolve it through arbitration. This clause serves as evidence to resolve construction disputes through arbitration and also excludes the authority of the courts to adjudicate the relevant disputes. This is in line with the provisions of Article 3 and Article 11 paragraph (1) of the Arbitration and Alternative Dispute Resolution Law (UU AAPS), which state that the district court does not have the authority to adjudicate parties bound by an arbitration agreement.

Thus, the arbitration agreement provides absolute competence to the parties to determine their preferred dispute resolution method. The arbitration agreement is directed towards the method and institutions authorized to resolve disputes or differences that arise between the parties involved. Therefore, the arbitration agreement focuses on resolving disputes arising from contracts. The parties can agree that disputes arising from the agreement are not brought to judicial bodies but are resolved by a neutral private institution. Thus, the arbitration agreement does not address the execution of the agreement but rather the procedures for resolving disputes arising from the agreement (Mayangsari et al., 2020).

IV. CONCLUSION AND SUGGESTIONS

A. Conclusion

The resolution of disputes in construction contracts in Indonesia indicates that there is a clear legal framework governing the relationships between the parties involved. Construction contracts, as part of the law of obligations regulated in the Indonesian Civil Code (KUH Perdata), require the existence of a valid agreement that encompasses various essential elements such as the identities of the parties, job details, rights and obligations, and mechanisms for dispute resolution. According to the Construction Service Law and the Minister of Public Works Regulation No. 43/PRT/M/2007, the contract must include a dispute resolution clause, which provides the parties with the option to resolve disputes through arbitration, mediation, or other forums before resorting to the courts. The existence of arbitration as an alternative dispute resolution offers advantages to the parties by avoiding lengthy and costly litigation processes and providing flexibility in determining the resolution method. Thus, the legal development in dispute resolution within the construction sector in Indonesia is becoming increasingly mature, in line with the need for a system that is responsive to social and industrial developments. This reflects progress in creating a better and more efficient construction climate by minimizing the potential for disputes and providing effective resolution channels.

B. Suggestion

Further research should comprehensively discuss foreign construction arbitration in more detail.

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