

Legal Review of the Authority of the Indonesian Arbitration and Construction Dispute Settlement Board (Badapski) as an Alternative for Dispute Settlement in Indonesia

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ABSTRACT: Indonesia has undertaken extensive development across all sectors. The infrastructure development program currently being developed encompasses various sectors that have a direct impact on improving public welfare, particularly in the road and transportation, oil and gas, electricity, and other sectors. The National Development Program implemented thus far is an effort to create sustainable and continuous development in order to realize a just and prosperous society. With the increasing advancement of development, particularly in the construction sector in Indonesia, on the one hand, it has had a positive impact, but on the other hand, it has resulted in an increase in construction disputes, particularly those resolved through arbitration. Disputes in construction work contracts can provide or open up opportunities for parties to seek their own justification, which can be detrimental to each party, considering that construction contracts generally involve large amounts of capital and the possibility of default is very high. The purpose of this study is to determine whether the position of the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (BADAPSKI) is in accordance with the Law. This paper analyzes using a normative juridical approach with an analytical descriptive method, in which the data obtained is analyzed based on the provisions of legislation related to arbitration, jurisprudence, literature, and other sources related to this research.

KEYWORDS: Authority, Arbitration Board, Indonesian Construction Dispute Resolution Board (Badapski), Alternative Dispute Resolution

INTRODUCTION

Law plays a significant role in social interactions within society. This significant role can be seen in the order, tranquility, and lack of tension within society, as the law regulates, determines rights and obligations, and protects individual and social interests.

In carrying out its role, according to J.F. Glastra Van Loon, law has several crucial functions:

1. Organizing society and regulating social interactions.
2. Resolving disputes.
3. Maintaining and upholding order and regulations, if necessary by force.
4. Maintaining and upholding them.
5. Changing order and regulations to adapt to societal needs.
6. Meeting the demands of justice and legal certainty by realizing the functions mentioned above.

Based on the foregoing, the law must be able to realize justice, its usefulness for social interests, and general legal certainty.

In today's era of globalization, the most prominent characteristic of the economy is its fast-paced nature, driving people into a free market and free competition. The successful implementation of mutually agreed terms is the hope of all parties bound by the agreement. However, in reality, disputes often arise in the implementation of agreements, stemming from differing perceptions and interpretations of the terms of the agreement, as well as actions that can be categorized as breaches of contract and unlawful acts (onrechtmatigedaad).

Indonesia is a country that is aggressively developing its infrastructure, particularly under President Prabowo Subianto's administration. Current infrastructure development programs cover various sectors that have a direct impact on improving public welfare, particularly in the roads and transportation sector, oil and gas, electricity, and other sectors. Infrastructure development is a current priority because it is expected to stimulate national economic growth. This government program has led to numerous construction projects under the current administration. The construction services sector is one of the sectors most prone to disputes because it involves many parties, typically involving large amounts of capital, and providing highly complex services. These services can range from planning, implementation, and supervision consultancy.

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In any business, two contradictory aspects always coexist: the opportunity for profit and the risk of loss. This also applies to the construction services industry. In the construction services industry, the parties enter into an agreement, usually outlined in a contract. A contract is clearly defined as such, according to Article 1338 of the Civil Code (KUHP):

1. All legally made agreements are valid as law for those who make them;
2. An agreement cannot be revoked except by mutual agreement of the parties, or for reasons deemed sufficient by law;
3. An agreement must be executed in good faith.

All legal systems worldwide adhere to the principle of *pacta sunt servanda*, which, according to Black's Law Dictionary, is "Agreement must be kept," the rule that agreements and stipulations contained in treaties must be observed.

Based on the foregoing, it is clear that an agreement must be complied with, as it constitutes a law for the parties who make it (sign it).

Construction contracts themselves are based on Contract Law, where Black's Law Dictionary states that a contract is an agreement between two or more persons that creates an obligation to do or not do a particular thing. According to Law Number 2 of 2017 concerning Construction Services, Article 1 (8) states:

"A Construction Work Contract is the entire contractual document governing the legal relationship between the Service User and the Service Provider in the provision of Construction Services." The contract contains provisions governing the relationship between the Service User and the Service Provider, all of which are written and mutually agreed upon by both parties. In reality, this contract, which is the result of an agreement between the parties, still gives rise to disputes or disputes between the Service Provider and the Service User, usually stemming from differing interpretations of the articles governing the risks that may occur during the project's duration or other physical and non-physical consequences of the project. Disputes in construction work contracts can provide or open up opportunities for the parties to seek their own justifications, which can be detrimental to each party, considering that construction contracts generally involve large amounts of capital and the high possibility of default.

METHODOLOGY

For the success of a good writing that provides an overview and answers to the issues raised, the purpose and benefits of the writing are crucially determined by the method used in this research. Soerjono Soekanto's opinion regarding legal research can be quoted as follows:

"Legal research is essentially a scientific activity based on specific methods, systems, and thinking aimed at studying one or several specific legal phenomena through analysis. Furthermore, an in-depth examination of the legal facts is conducted to determine the implications of the phenomena in question."

The research method used in this paper describes the facts arising from the problem being studied, which will then be analyzed as follows:

1. Problem Approach Method

This research uses normative juridical research, utilizing secondary data as the primary data. Data were obtained through library research, a data collection technique utilizing various literature that can provide a theoretical basis relevant to the problem being discussed, including applicable laws and regulations in Indonesia, scientific works, papers, articles, mass media, and other sources related to legal analysis.

2. Research Specification

The research specification used is descriptive and analytical, systematically describing and outlining all issues and focusing on existing regulations, as applicable laws, in the implementation of mentoring regarding the legal review of the authority of the Indonesian Construction Arbitration and Dispute Resolution Board (BADAPSKI) as an alternative dispute resolution. This research aims to provide a systematic overview of the authority of the Indonesian Construction Arbitration and Dispute Resolution Board (BADAPSKI) as an alternative dispute resolution, particularly in the construction sector.

LITERATURE REVIEW

In social life, particularly in the business world, such as in trade, banking, mining projects, oil and gas, energy, infrastructure, and so on, disputes can arise between individuals, individuals and groups, groups and groups, companies and companies, companies and countries, and countries and countries. In other words, disputes can be public or civil in nature and can occur at local, national, or international levels.

According to Black's Law Dictionary, a dispute is defined as "a conflict or contrivance." In the Big Indonesian Dictionary (KBBI), a dispute is defined as something that can lead to differences of opinion; quarrels; arguments. A dispute occurs between individuals or groups with the same relationship or interest in an object of ownership, which gives rise to legal consequences for one another.

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A conflict is also a situation or condition in which people experience disagreements, whether factual or merely perceptual.

Some expert opinions in the construction field, regarding construction contract disputes, are as stated by Chow, Kok Fong 25: "...difference in position over a matter which is submitted for determination by a tribunal. A dispute does crystallise where one party merely requests another party for more information to explain the items featured in a matter or to allow more time for a more careful consideration of the matter." Another opinion from Kumaraswami: disputes developed from conflict; "serious disagreement and argument about something important" and "a serious difference between two or more beliefs, ideas, or interests." A construction contract dispute, according to the Oxford Dictionary of Law: Dispute is a misunderstanding between two parties, either contractual or non-contractual.

A dispute can be formulated as a situation where one party wants to impose its will on another party who opposes that will and puts up resistance. It can be concluded that this dispute can arise due to differences in perception regarding the validity of a construction claim and/or the amount of the claim. In some cases, unhealthy conditions arise, such as the contractor inflating the amount of the claim submitted in an attempt to cover losses resulting from a low contract price, resulting from a very low bid and solely aimed at winning the project.

A dispute in the construction industry arises when the following process has occurred:

- a. The contractor submits a claim for additional costs, time extensions, or other matters;
- b. The engineer/employer rejects the claim and provides a reason for the rejection, in the form of an Engineer's Determination;
- c. The contractor states that they disagree with the engineer/employer's reason for rejecting the claim.

Only after going through the three stages above does a construction contract dispute officially arise.

The classic or conventional dispute resolution method widely used today is through the courts. This dispute resolution process is considered to have drawbacks, such as being time-consuming, as it involves multiple levels of litigation, including the first instance, appeal, cassation, and even judicial review. This has the added effect of being costly and labor-intensive. Furthermore, court decisions that result in a winner and a loser have the potential to create disharmonious relationships between the disputing parties. Another weakness of resolving disputes through the courts is the widespread negative public perception of courts, such as perceived dishonest and unprofessional practices. Courts are sometimes perceived as extensions of power, prone to corruption, and their decisions are perceived as biased and unfair. The perceived weaknesses of conventional dispute resolution have led to the development of alternative dispute resolution (ADR).

ADRs have long been developed in Western countries such as the United States, the United Kingdom, and Norway, as well as in Eastern countries such as Japan and China. The development of ADRs has grown rapidly for practical, economic, and cultural reasons. Many countries now even position ADRs as the first resort, with courts as the last resort.

The United States, considered the first place to introduce alternative dispute resolution, believes that alternative dispute resolution is necessary for the following reasons:

1. Reducing the backlog of cases in court.
2. Improving public order in the dispute resolution process.
3. Streamlining and expanding access to the courts.
4. Providing opportunities for dispute resolution that results in decisions that are acceptable and satisfactory to all parties.

Cultural reasons also cause people to tend to disregard the courts as a venue for resolving disputes between them. Eastern societies with cultures of mutual trust, such as China, Japan, and Indonesia, traditionally dislike courts. These societies prefer dispute resolution through deliberation, family, and mutual trust. They believe that this approach maintains harmonious relations between the two disputing parties, as neither party feels defeated by the other. This culture can be found in China, Japan, the United States, Scandinavian immigrant communities in the Midwest, the Dutch in Amsterdam, and the Chinese on the West Coast. Conversely, courts are often perceived as places for criminals who disobey the law. Litigating in court can tarnish a good reputation. Therefore, they try to avoid resolving disputes through the courts whenever possible.

Economic reasons are also one of the reasons why alternative dispute resolution is preferred over traditional methods. Alternative dispute resolution is considered less expensive because it avoids stages such as appeals, cassation, or even judicial review.

There are several methods available to resolve construction disputes. In Indonesia, dispute resolution is divided into two types: litigation and non-litigation. Litigation is a form of dispute resolution conducted in general courts, while non-litigation is a form of dispute resolution outside of general courts. This type of dispute resolution generally utilizes a neutral third party. The role of this neutral party, depending on the dispute resolution method chosen, can be facilitation through mediation, evaluation through expert assessment, determination through arbitration, or a combination of these three roles. A neutral third party is not part of the contract, but has obligations to both parties in dispute, and both parties also have obligations to the designated neutral third party. Therefore, a separate contract, commonly called a third-party agreement, is required. This agreement should preferably be a tripartite

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agreement, covering the scope of work, obligations and responsibilities, implementation time, compensation, and direct costs to be reimbursed.

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (ADR), divides non-litigation into two categories: arbitration and alternative dispute resolution. According to Law Number 30 of 1999 which consists of 82 (eighty two) articles, the provisions governing alternative dispute resolution are very few, namely 3 (three) provisions, Article 1 point 10, Article 6 and Article 52, with the note that Article 1 and Article 6 only mention the definition and methods while Article 52 does not specifically regulate alternative dispute resolution but rather other functions of arbitration which are not merely adjudication institutions.

Authority

Law in its original form limits power and seeks to foster balance in social life. Meanwhile, authority connotes the ability to perform a public legal action, or, in juridical terms, the ability to act granted by applicable law to establish legal relationships.

The definition of authority in the General Indonesian Dictionary is the same as authority, namely the right and power to do something. Hasan Shadhily translates authority as the right or power to give orders or act to influence the actions of others so that something is done as desired. Hasan Shadhily further clarifies the translation of authority by providing an understanding of "Delegation of Authority." Delegation of authority is the process of transferring authority from a leader (manager) to subordinates, accompanied by the emergence of responsibility for carrying out specific tasks.

In constitutional interpretation, it can be clearly explained that according to I Dewa Gede Atmadja:

According to the Indonesian constitutional system, a distinction is made between authoritative authority and persuasive authority. Authoritative authority is constitutionally determined, while persuasive authority, on the other hand, is not explicitly constitutional.

Legal Positivism

The definition of legal positivism, according to H.L.A. Hart, is as follows:

1. Law is a command;
2. Analysis of legal concepts is a worthwhile endeavor. Such analysis differs from sociological and historical studies and from critical assessment.
3. Decisions can be logically deduced from pre-existing rules, without the need to refer to social goals, policies, or morality.
4. Moral judgments cannot be upheld and defended by rational reasoning, proof, or testing.
5. Law as enacted, established, or posited, must always be separated from the law as it should be created, as it is intended.

From the perspective of legal positivism theory, "there is no law other than the command of the ruler." The essence of this positive legal school states that legal norms are valid if they are established by an authorized institution or authority and are based on higher rules, not based on moral values.

The positivism school highly values written law. Therefore, this school believes that there are no legal norms outside of positive law; all societal issues are regulated by written law.

In relation to the discussion of the problems in this research, the authority of the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (BADAPSKI) is essentially based on law, namely Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, as well as contracts or agreements between the parties.

RESULTS AND DISCUSSION

In Indonesia, construction dispute resolution is generally conducted through general courts and arbitration. The parties typically choose to resolve construction disputes through general courts if the contract value is not too large, while very large contracts generally resort to arbitration. According to Law Number 30 of 1999, Article 1, paragraph 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 through consultation, negotiation, mediation, conciliation, or expert assessment. Therefore, alternative dispute resolution is consultation, negotiation, mediation, conciliation, or expert assessment, which are very informal in nature. These alternative dispute resolution methods have the following characteristics: a. Private, voluntary, and consensual; b. Cooperative and non-adversarial; c. Flexible and informal; d. Creative; e. Involves the active participation of the parties; f. Aims to maintain good relations. The disputing parties are of the view that the methods stipulated in Article 1 paragraph 10 of Law Number 30 of 1999 have many weaknesses from a legal certainty perspective.

Specifically for construction work contract activities, Law Number 18 of 1999, Article 36 paragraph 1 in conjunction with Government Regulation Number 29 of 2000, as amended by Government Regulation Number 59 of 2010, Article 49, states that out-of-court dispute resolution is, firstly, mediation and conciliation, which can be assisted by expert assessors, and secondly, arbitration. In Government Regulation Number 29 of 2000, Article 52 explains that the written agreement through Article 49

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paragraph (1) a point 1 is final and binding on the parties to be implemented in good faith. Meanwhile, Article 53 paragraph (2) states that for dispute resolution using Article 49 paragraph (1) b, the arbitration decision is final and binding.

Dispute resolution methods in Japan include arbitration (*chusai*), court settlement (*wakai*), and court-connected mediation (*chotei*). In Japan, court-connected mediation does not require a lawyer. The main requirements are that the mediator must be between 40 and 70 years old and possess knowledge and experience relevant to the substance of the dispute. In Japan, construction dispute resolution is carried out by maintaining harmonious relationships and avoiding any loss of face for either party. The resolution is always expected to be a win-win solution, not a win-lose one.

The arbitration institutions authorized to resolve disputes in Indonesia are as follows:

a. Institutional Arbitration

An official institution authorized to conduct arbitration. This institution is permanently established and typically has clear guidelines for conducting arbitration, from the requirements, the request for arbitration to the selection of arbitrators, to the issuance of a decision.

Regarding the resolution of commercial disputes involving companies in Indonesia, the authorized arbitration institutions are as follows:

i. Indonesian National Arbitration Board (BANI)

BANI is an autonomous body established by the government and authorized to conduct arbitration for various commercial, industrial, and financial disputes.

ii. Indonesian National Sharia Arbitration Board (BASYARNAS)

BASYARNAS is an arbitration institution that handles Islamic economic cases, such as banking. This institution was formerly known as the Indonesian Muamallah Arbitration Board (BAMUI) and was established in 1993. It then changed its name to BASYARNAS in 2003.

iii. International Arbitration Institutions

Disputes involving foreign companies or the Indonesian government are usually resolved through international arbitration institutions, including the International Chamber of Commerce (ICC) and the International Center for Settlement of Investment Disputes (ICSID). The ICC, founded in 1923 in Paris, handles international commercial disputes, while the ICSID focuses more on investment disputes and is based in Washington. Disputes resolved in this international arbitration institution include those between companies or investors and countries.

b. Ad-hoc Arbitration

Dispute resolution is carried out by a pre-arranged team appointed by the disputing parties. This type of arbitration process is usually chosen after a dispute has arisen. Once the matter has been processed and an arbitration award has been issued, the ad-hoc team is disbanded.

Based on statistics released by the Indonesian National Arbitration Board (BANI), from 1999 to 2016, there were 470 cases, with the majority being in the construction sector, accounting for approximately 30.8%. The establishment of the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (BADAPSKI) is crucial. According to Minister of Public Works Djoko Kirmanto:

The numerous disputes related to construction contracts in Indonesia have prompted the government to establish the Indonesian Construction Arbitration and Alternative Dispute Resolution Board (BADAPSKI). With BADAPSKI, construction disputes will be better resolved through BADAPSKI than through lengthy court processes. Furthermore, if disputes are resolved through the general BANI (National Agency for Construction and Infrastructure), specific issues related to construction techniques, which are the primary topic of the dispute, cannot be discussed in depth. With the establishment of BADAPSKI, the arbitration process and resolution of construction-related disputes can be expedited because this body consists of individuals with expertise in the construction industry.

The Indonesian Construction Arbitration and Alternative Dispute Resolution Board (BADAPSKI) as a special arbitration body for the construction sector in Indonesia which has declared itself on August 19, 2014 in Jakarta aims to provide answers to the need to be able to provide answers to dispute problems, especially in the construction sector because it has specialization (*lex specialis*) in the construction sector and more competitive financing as well as easier financing methods, for government institutions that are highly dependent on State Budget (APBN) and/or Regional Budget (APBD) funds with the flexibility to not be able to pay upfront administrative costs, but simply by submitting a letter of guarantee, which will be paid after the budget is available or when the arbitration panel's decision is issued, or whichever occurs first.

CONCLUSION AND SUGGESTION

Conclusion:

1. Arbitration, as an extrajudicial institution, has legal authority derived from legal instruments based on national arbitration laws and the agreement of the parties in an agreement containing an arbitration clause. An arbitration clause in an agreement

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grants the arbitration institution absolute authority to resolve disputes arising from the implementation of the agreement, based on Article 3 in conjunction with Article 11 of the Arbitration Law. Regarding arbitration decisions, the District Court is not permitted to examine the reasons or considerations of the arbitration decision, as stipulated in Article 62 paragraph (4), which indicates that the substance of the case is the absolute authority of the arbitration.

2. The legal status of the arbitration decision as regulated in Article 60 of the Arbitration Law, namely that the arbitration decision is final and has permanent legal force and is binding on the parties, in reality it cannot be made a final decision (*inkracht van gewijsde*) because Article 70 of the Arbitration Law still opens up the opportunity for legal action/resistance, namely a request to annul the arbitration decision. The District Court is not permitted to examine the reasons or considerations of the arbitration decision as stipulated in Article 62 paragraph (4) which shows that the substance of the case is the absolute authority of arbitration.
2. The legal status of an arbitration award, as stipulated in Article 60 of the Arbitration Law, namely that the arbitration award is final and has permanent legal force and is binding on the parties, cannot in fact be made a final decision (*inkracht van gewijsde*) because Article 70 of the Arbitration Law still opens the opportunity for legal action/resistance, namely a request to annul the arbitration award.

Suggestions

1. Because arbitration has absolute authority, it is requested that the courts not be permitted to enter the arena or space of deliberation and assessment already made in the arbitration award. This is to prevent the courts from being used by the disputing parties as a forum for stage II disputes.
2. It is requested that the articles regulating the provisions for annulment of arbitration awards in the Arbitration Law be revoked, as they could erode public confidence in arbitration as an alternative dispute resolution institution and create legal uncertainty for parties involved in litigation through arbitration, which has a final, permanent, and binding decision.

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