

Legal protection of the rights and obligations of the parties in the settlement of construction service contract disputes through Arbitrase

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Abstract

Business activities rife in Indonesia, one of which is the construction services business. The implementation of the construction services business is made by the parties with a construction services contract. In the implementation of construction service contracts, sometimes there are construction service disputes between the parties, both providers and users of construction services, which are decided through arbitration, but there are still many arbitration awards that are not in accordance with the principles of Justice, propriety and certainty so that the arbitration award is applied for cancellation of the decision to the court. Therefore, it needs to be studied in this study. The findings in this study are . The rights and obligations of the parties must be protected by law. Arbitration and BANI rules and procedures.

Keywords: Legal Protection, Construction, Arbitrase

1. INTRODUCTION

Dispute resolution in construction services activities can be done through litigation (court) and non-litigation. Non-litigation dispute resolution it is a matter of law and conscience, the law can be won and the conscience of the people is also subject to abide by the agreement voluntarily without any The Lost Ones (. Each party is given the freedom to determine and agree on the mechanism for resolving construction disputes that occur. In general, dispute resolution through the litigation process tends to generate new problems because of its win lose, unresponsive, time consuming litigation process, and open to the public. The litigation process also requires time, cost, coupled with technical reasons, namely the accumulation of the number of cases in court. Financial institutions are considered to be so burdened by the increasing number, types, and types of cases that must be resolved which is not comparable to the ability of dispute resolution by the court. For that we need an alternative dispute resolution faster, efficient and effective.

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The regulation of dispute resolution through arbitration is contained in Law No. 30 of 1999 concerning arbitration and Alternative Dispute Resolution (AAPS act). The legal basis for the parties to choose arbitration in resolving disputes, is also provided for in the legislation No. 48 of 2009 on Judicial Power. In Article 58, it is stated that attempts to resolve civil disputes can be made outside the state courts through arbitration or Alternative Dispute Resolution.

Arbitration is an institutional form, not only tasked with resolving differences or disputes or disputes that occur between the parties to the basic agreement, but can provide consultation in the form of legal opinions at the request of the parties to the agreement. The legal opinion of the arbitral institution is included in the meaning or form of the decision of the arbitral institution. In arbitration, the arbitrator acts as a judge in the arbitral tribunal, as well as a permanent judge in the tribunal even if only for the case being dealt with.

Arbitration in dispute resolution that can be chosen by the parties to resolve the dispute, can be ad hoc arbitration and institutional arbitration. Ad hoc arbitrations are not related to any of the arbitral bodies, which means that these arbitrations do not have their own rules of procedure, both regarding the appointment of their arbitrators and the procedure for examining disputes. Arbitrary ad hoc, following the rules of procedure specified in the legislation. While institutional arbitration is an institution or institutionalized arbitration body established and attached to a particular institution. The nature of this arbitration is permanent and deliberately established to resolve disputes, and generally has its own procedures and procedures for examining disputes, and if it is resolved, this arbitration will not end.

In principle, the parties who have agreed to enter into an arbitration agreement and submit their dispute resolution process through arbitration, are bound to obey and implement the arbitration award. But not all arbitral awards can be accepted by the parties and carried out voluntarily. Parties who are dissatisfied with the arbitration award make other efforts through the courts, so that the arbitration award does not have legal certainty. Legal certainty here is certainty regarding the protection granted to individuals against the arbitrariness of other individuals, judges and administration / government.

Therefore, based on then be up in the air, it's interesting to see this investigation is the legal protection of the rights and obligations of the parties in the settlement of construction services contract disputes through Arbitrase.

2. RESEARCH METHOD

The research method used in this study is normative juridical research. The type of research used is normative legal research this research is prescriptive analysis. Research approach used: 1. Legal approach; 2. Conceptual approach; 3. The philosophy; 4. Comparative Law; 5. Historical approach; 6. Case approach. The research Data used is secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials and supported by informant interviews. Data collection techniques through literature studies and interviews.

3. RESULT AND ANALYSIS

Along with the development of many emerging era of business transactions new business transactions. But more and more new business transactions are emerging is certainly potentially give birth to conflicts/disputes between the parties. Any dispute that occurs certainly requires quick resolution and resolution. Because allowing business disputes to be resolved too late will result in the development of inefficient economic development, productivity decreases, the business world regresses, and production costs increase. This will certainly harm consumers and hinder the improvement of welfare and social progress of workers.

Badan arbitral Nasional Indonesia (BANI Arbitration Center) is an independent institution that provides a variety of services related to arbitration, mediation, and other forms of out-of-court dispute resolution.

BANI was established in 1977 by the Indonesian Chamber of Commerce and Industry (KADIN) through Decree Number SKEP/152/DPH/1977 dated November 30, 1977 and is managed and supervised by the Board of Directors and Advisory Board consisting of community leaders and the business sector. BANI is based in Jakarta and has representatives in several major cities in Indonesia, namely Surabaya, Bandung, Medan, Denpasar, Palembang, Pontianak and Jambi.

In providing the necessary institutional support to act autonomously and independently in the enforcement of law and Justice, BANI has developed its own rules and procedures, including time limits within which arbitral tribunals must render verdicts. These rules apply to domestic and international arbitrations conducted in Indonesia. Currently, BANI has more than 100 arbitrators from various professions, both Indonesian and foreign nationals.

In Indonesia, interest in resolving disputes through arbitration began to increase since the promulgation of Law No. 30 of 1999 on arbitration and Alternative Dispute Resolution (Arbitration Law). This development is in line with the direction of globalization, where out-of-court dispute resolution has become the choice of business people to resolve their business disputes. In

addition to the characteristics of fast, efficient and complete, arbitration adheres to the principle of win-win solution, and is not long-winded because there is no institution of Appeal and Cassation.

The cost of arbitration is also more measurable, as the process is faster. Another advantage of arbitration is that its decisions are necessarily (final) and binding (binding), in addition to its confidential nature (confidential), where the proceedings and arbitration awards are not published.

Based on the principle of reciprocity, foreign arbitral awards involving foreign companies can be carried out in Indonesia, as well as Indonesian arbitration awards involving foreign companies will be able to be carried out abroad.

BANI is a co-founder and member of the Asia Pacific Regional Arbitration Group (APRAG). BANI is also one of the founders of the Regional Arbitrators Institutes Forum (RAIF). BANI is a member of the International Council for Commercial Arbitration (ICCA).

In order to develop international arbitration and various forms of Alternative Dispute Resolution (ADR) in the commercial field between entrepreneurs in the countries concerned, BANI has entered into cooperation agreements with various institutions in several countries. These institutions include:

1. The Japan Commercial Arbitration Association (JCAA);
2. The Netherlands Arbitration Institute (NAI);
3. The Korean Commercial Arbitration Board (KCAB);
4. Australian Centre for International Commercial Arbitration (ACICA);
5. The Philippines Dispute Resolution Centre (PDRC);
6. Hong Kong International Arbitration Centre (HKIAC);
7. The Foundation for International Commercial Arbitration dan Alternative Dispute Resolution (SICA-FICA);
8. The Singapore Institute of Arbitrators (SIArb);
9. Arbitration of Association of Brunei Darussalam (AABD)
10. Kuala Lumpur Regional Centre for Arbitration (KLRCA);
11. The Belgian Centre for Arbitration and Mediation (CEPANI).

The most convenient and simple way of dispute resolution is Settlement by the parties themselves. This can be pursued through deliberation or negotiation efforts between the two disputing parties. Another way that can be taken is to resolve the dispute with the help of a neutral third party, or through a mediation process. If it is not completed through this process, it can be done through the institution whose task is to resolve disputes.

The official institution for resolving disputes provided by the state or litigation is the court, while those provided by private or non-litigation

institutions are Arbitration. Dispute resolution outside the judiciary is also called Alternative Dispute Resolution (ADR) or in Indonesian terms translated as Alternative Dispute Resolution (APS). Settlement of economic/business disputes through alternative dispute resolution mechanisms is considered more appropriate than settlement through the court. This is because APS has several advantages that are very suitable for the business world.

In addition, dispute resolution can also be done conventionally through litigation of the judicial system (Ordinary Court). Litigation settlement is well known not only in Indonesia, even in America known as ADR (Alternative Dispute Resolution) which includes negotiation, mediation, and arbitration. There are a number of ways in which a dispute can be resolved by the parties to the dispute, namely: a. Through informal agreements; b. By conciliation; c. Through arbitration; d. Through the courts.

But among the various alternatives to dispute resolution that exist, arbitration can be applied to business problems. For entrepreneurs, arbitration is the most attractive option in order to resolve disputes in accordance with their wishes and needs. Arbitrage is the simultaneous buying and selling of the same goods in two or more markets in the hope of making a profit on the difference in price.

Arbitration has several advantages that can be concluded through a general explanation of Law No. 30 of 1999 on arbitration and Alternative Dispute Resolution can be read several advantages of dispute resolution through arbitration compared to judicial institutions. The advantages are as follows: 1. Confidentiality of the parties; 2. Delays caused by procedural and administrative matters can be avoided; 3. the parties may select arbitrators who are experienced, have sufficient background regarding the disputed matter. fair and just; 4. the parties may determine the legal options for the resolution of the problem; 5. the parties may choose the place of holding the arbitration.

Experts also expressed their opinion on the advantages of Arbitration. According To Prof. Subject to the world of Commerce or business, dispute resolution through arbitration or refereeing, has several advantages, namely that it can be done quickly, by experts, and in secret. While HM N Purwosutjipto expressed the importance of judicial referee (arbitration) are: 1. Dispute resolution can be done quickly. 2. The referees are made up of those experts in the disputed field, who are expected to be able to make a decision that satisfies the parties.

The decision will be more in accordance with the feeling of Justice of the parties with all the differences of understanding, disagreements, conflicts and business disputes that often occur, this cannot be allowed in a row and must be resolved satisfactorily like all parties, although each

society has its own search to resolve it both juridically and non-juridically, however, the development of the, beneficial and provide a sense of security and justice for the parties, one of the popular ways today is the way of dispute resolution through arbitration.

The development of economic and business activities, it is impossible to avoid the occurrence of disputes (dispute) between the parties involved in it. The existence of this dispute can have an impact on inefficient economic development, decreased productivity, sterility of the business world, and increased production costs. Investment opportunities by business people will be greater if the Indonesian state can provide guarantees that business dispute resolution in Indonesia can be taken effectively and efficiently.

With the development of the business world in all fields, it definitely requires the name of the law to bridge to regulate and protect the interests of business people. Obstacles that often arise in relation to the business world is the problem of legal protection and legal certainty in developing countries such as Indonesia, which developed countries are considered inadequate for them.

These constraints become increasingly complex and complicated, if we consider the diversity of laws that exist and apply in this world, where each country has its own uniqueness, which may be on one side of the law contrary to other countries. The problem, which was initially Civil, can sometimes lead to quite serious disputes between countries.

Therefore, international cooperation is needed, which is generally set out in the form of conventions, treaties, and others, which aim to harmonize the rules, and legal norms are diverse. The purpose of this study is to analyze the position of the National Arbitration Board in the Indonesian judicial system, therefore based on this research it can be concluded that the position of BANI is as one of the Quasi/Quasijudicial judicial institutions.

In Article 1 Number 1 of Law Number 30 of 1999, as well as seeing the development of Arbitration in Indonesia, arbitration gained momentum with the formation of BANI. The decision of the BANI institution only has executorial power after obtaining an order to run from the District Court of the respondent's domicile.

Arbitration is derived from Latin, namely from the word *arbitrare* which means the power to resolve a case according to discretion. There are several definitions of Arbitration that are defined by scholars, including the following: Abdulkadir Muhammad, said that arbitration is a private judicial body outside the general judicial environment, which is known specifically in the corporate world. Arbitration is a voluntarily selected and self-determined judiciary by the parties of the entrepreneur to the dispute.

Settlement of disputes outside the state court is a free will can be set forth in a written agreement they made before and after the dispute in accordance with the principle of freedom of contract in civil law. The subsection states that arbitration is a settlement or termination of a dispute by a referee or referees based on the agreement that they will submit to or obey the decision to be given by the referee or referees they choose or appoint.

In Indonesia, according to the parties' dispute resolution process, there are several ways that can usually be chosen such as: through litigation (court) or through non-litigation (mediation, conciliation, negotiation, consultation, expert valuation, and arbitration). With regard to arbitration or arbitration institutions, in fact it already exists and has been practiced for centuries. In this country, arbitration has also been already known as one of the alternatives of public dispute resolution through non litigation.

Arbitrations are created from clauses that they have drawn up in contracts that they have already agreed to. Thus, the parties involved in the points of the contract can be resolved using the dispute method. Therefore, this article will discuss the appropriate options regarding dispute resolution through arbitration in the law/legal system in Indonesia. From the above notions it can be concluded that arbitration is a way of resolving disputes between the parties carried out by referees outside the judiciary based on agreements, either before or after the dispute.

In an agreement between the parties or a business relationship, there is always the possibility of a dispute arising. Disputes that occur are often related to how to implement the clauses of the agreement, what is the content of the agreement or due to other things beyond those stipulated in the agreement. In Indonesia, in the dispute resolution process of the parties, there are several ways that can usually be chosen, among others, through litigation (court) or non-litigation (mediation, negotiation, conciliation, consultation, expert assessment, and arbitration). Talk about arbitration or arbitration institutions, in fact, has existed and been practiced for centuries (even first introduced by the Greeks before Christ).

In Indonesia itself, arbitration has also been recognized by the public as an alternative to dispute resolution through non-litigation channels. The exact definition of what arbitration is, there are still so many differences of opinion. However, these differences of opinion do not eliminate the meaning of arbitration as an alternative to dispute resolution, but rather provide a different concept of Arbitration. This gives an idea that resolving disputes through arbitration is the most preferred way by business actors because it is considered the most compatible way with the needs in the business world.

Institutional arbitration is an institution or arbitration body that is permanent, so it is also called a permanent arbitral body. The point is that

in addition to being managed and organized permanently, its existence is also continuous for an indefinite period.

Procedures for the submission of national and international corporate dispute resolution between companies that are legal entities and non-legal entities through BANI by registering a letter of request for dispute resolution at the BANI Secretariat containing an arbitration clause made in writing stating the subject matter of the dispute, the name and residence of the parties and the residence of the referees and if the parties do not include an arbitration clause in the agreement then the dispute arising between them cannot be resolved through arbitration. A condition that must exist if the dispute can be resolved through arbitration is the existence of an arbitration clause stating that all disputes arising from this agreement will be resolved at the first and last instance in accordance with the BANI rules by an arbitrator appointed in accordance with these rules. And also the agreement or agreement of the parties to resolve the dispute through arbitration.

There is a dispute or not, the institution still stands and will not dissolve, even after the dispute has been resolved. The purpose of this arbitration was established in order to provide an alternative means of dispute resolution outside the courts. Institutional arbitration is generally chosen by the parties before the dispute occurs, which is set forth in the arbitration agreement that is final and binding, and meets the sense of Justice. BAPMI offers three types of dispute resolution that can be chosen by the parties, namely: binding opinion, mediation, and Arbitration.

1. Indonesian National Arbitration Board on December 3, 1977, on the initiative of Prof. R. Subekti, SH (former Chief Justice), Harjono Tjitrosobono, SH (Chairman of the Indonesian Advocates Association), and A.J. Abubakar, SH established the Indonesian National Arbitration Board (BANI) as an autonomous and independent commercial dispute resolution institution. BANI is a peradilan institution that has a free, autonomous, and independent status. The purpose of the establishment of this institution is to provide a fair and speedy settlement of civil disputes arising on matters of Trade, Industry, and finance. BANI is based in Jakarta and has representative offices in several major cities in Indonesia, among others: Surabaya, Denpasar, Bandung, Medan, Pontianak, Palembang, and Batam.
2. The Indonesian capital market Arbitration Board based on the support of Bapepam-LK and several companies such as PT Bursa Efek Jakarta (IDX), PT Bursa Efek Surabaya (BES), PT Kliring Penjaminan Efek Indonesia (KPEI), and PT Kustodian Sentral Efek Indonesia (KSEI) and 17 associations in the Indonesian capital market environment made a joint agreement to establish an arbitration institution which was later

named the Indonesian capital market Arbitration Board (BAPMI). The purpose of the establishment of this institution is inseparable from the desire of Indonesian capital market players to have an out-of-court dispute resolution institution especially in the field of capital markets handled by people who understand the capital market, with a fast and cheap process, final and binding decisions, and fulfill a sense of Justice. BAPMI offers three types of dispute resolution that can be chosen by the parties, namely: binding opinion, mediation, and Arbitration.

3. On November 7, 2008, PT Bursa Berjangka Jakarta (BBI), PT Kliring Berjangka Indonesia/ persero (KBI), Asosiasi Brokang Berjangka Indonesia (APBI) and Ikatan Perusahaan Perdagangan Berjangka Indonesia (IP2BI), facilitated and fully supported by the Commodity Futures Trading Supervisory Agency (BAPPEBTI), signed the deed of establishment of the Commodity Futures Trading Arbitration Board (BAKTI) at the main Auditorium of the Ministry of trade, witnessed by the Minister of trade. The purpose of the establishment of this institution is as one form of legal protection to the public and Commodity Futures Trading market participants through the provision of fair dispute resolution facilities, simpler and faster than the court. BAKTI is an independent and independent body that facilitates the settlement of civil disputes in the field of Commodity Futures Trading.
4. National Sharia Arbitration Board (Basyarnas). This institution was inaugurated on October 21, 1993 under the name Badan arbitral Muamalat Indonesia (BAMUI). The inauguration was marked by the signing of the notars deed of Yudo Paripurno, SH by the Central Mui Leadership Council represented by KH Hasan Basri and HS Prodjokusumo (Chairman and General Secretary of the Mui Leadership Council). As witnesses, they signed a notarial deed, among others: HM Sedjono (Chairman of MUI) and H. Zainulbahar Noor, SE (President Director of Bank Muamalat Indonesia). On December 24, 2003, upon the decision of the Board of Directors of the Indonesian Ulema Council number Kep-09/MUI/XII/2003 the name of the Indonesian Muamalat Arbitration Board (BAMUI) was changed to the National Sharia Arbitration Board (BASYARNAS). The purpose of the establishment of this institution is to resolve disputes or civil disputes with principles that prioritize peace efforts, resolve business disputes whose operations use Islamic law as a basis, and provide a fair and fast settlement in disputes arising in the field of Trade, Industry, Services, and others.
5. Arbitration and Mediation Board of Intellectual Property Rights on April 19, 2012, established an arbitration and Mediation Board of

Intellectual Property Rights (BAM HKI) based in Jakarta. This institution provides dispute resolution services that are adjudicative, namely arbitration and non-adjudicative including mediation, negotiation, and conciliation for disputes arising from commercial transactions or relationships involving IPR. BAM HKI is a form of dispute resolution that helps resolve disputes outside the court. Fields that can be handled by BAM IPR include patents, brands, Geographic indications, copyright, Industrial Design, Integrated circuit layout design, trade secrets, Plant Varieties, and other fields related to IPR. With the existence of several arbitration bodies in Indonesia above, business people can choose as desired by including arbitration dispute resolution options in the clauses in the agreements they make. If the parties choose to resolve the dispute through non-litigation.

According to Eko, related to the legal protection of the rights and obligations of the parties in the settlement of construction service contract disputes, namely in exploring the issue of execution of state protection or guarantees against arbitration decisions, an understanding that although Arbitration for dispute resolution outside the court in the sense that the court must withdraw and must refuse if there is a dispute tied to the arbitrage agreement in it, but the District Court as a representative of the state in this case does not mean that he is passive, he remains a provider of Arbitration support, the trick is mainly for arbitrations that are held adhoc, then the District Court has a supporting function such as appointing arbitrators, if there are parties who do not appoint arbitrators, the District Court appoints arbitrators. So, the District Court must still support arbitration in a formal sense. Speaking of protecting rights and obligations, the District Court must guarantee the implementation of the arbitration decision if for example it is not implemented voluntarily, how they must accept the application for execution of the arbitration award that has been issued and they will help to implement it, so that is the state guarantee related to the implementation of the rights and obligations of the parties in the arbitration award and still the District Court has the function to support the arbitration process including support in the implementation of the arbitration award if it is not implemented voluntarily.

Likewise, according to Azwir, legal protection for service providers is still weak, so that service users in resolving disputes are not optimal or not through arbitration mechanisms or binding expert opinions, and finally payment for disputes occurs. If any dispute that can no longer be resolved internally or bipartitionally is immediately registered with BANI, losses or costs can be minimized for settlement before the end of the fiscal year.

Legal protection of the rights and obligations of the parties is in accordance with the provisions of the rules and procedures of the BANI and the law. Arbitration. The rights of the parties such as getting a decision according to law, justice and propriety (Article 56 paragraph (1) of the law. Arbitration) further has the right to determine the choice of applicable law and so forth, while the obligation of the parties is to pay the arbitration fee, maintain the principle of confidentiality and execute the decision and others. Where the rights and obligations of the parties are protected by law. Arbitration and BANI rules and procedures. BANI's arbitrator duties are completed after the verdict is registered in the District Court where the respondent is.

The positive impact of settlement through arbitration projects funded by the central and local governments and the private sector has benefits for the people of Indonesia because each has a time limit or the current fiscal year. These projects have a period of time stipulated in the construction agreement if the project is late then the aggrieved is the central government and the private sector.

4. CONCLUSION

Legal protection of the rights and obligations of the parties in the settlement of construction service contract disputes through arbitration is in accordance with the provisions and procedures of BANI and UU. Arbitration. The right of the parties to obtain a decision in accordance with the law, justice and propriety are then entitled to determine the choice of applicable law, while the obligation of the parties is to pay the arbitration fee, maintain the principle of confidentiality and implement the decision. Where the rights and obligations of the parties shall be protected by law. Arbitration and BANI rules and procedures.

REFERENCE

- Al-Hafiz, Kusbianto, Ariman Sitompul, Protection Of The Parties In The Implementation Of The Ship Lease Agreement (Case Study Decision No.231 / Rev.G / 2020 / PN.JKT.UTR). *International Asia Of Law and Money Laundering (IAML)*, 2(2), 92-104, 2023, <https://doi.org/10.59712/iaml.v2i2.64>
- BANI, "BANI Arbitration Center", dimuat dalam halaman <https://baniarbitration.org>, diakses pada tanggal 20 April 2022, pukul 18.00 WIB.
- Frans Hendra Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional & Internasional*, (Jakarta : Sinar Grafika, 2013), pp. 41.
- Hasil Wawancara dengan Bapak Dr. Azwir Agus, S.H., M.Hum, selaku Sekretaris BANI Medan.

- Hasil Wawancara dengan Bapak Eko Dwi Prasetyo, S.H., M.H, selaku Sekretaris I BANI Jakarta.
- Jimmy Joses Sembiring, *Cara Menyelesaikan Sengketa di Luar Pengadilan*, Edisi Pertama Cetakan Pertama, (Jakarta : Transmedia Pustaka, 2011), pp. 56.
- Ngatino A Rahmat Rosyadi, *Arbitrase dalam Perspektif Islam dan Hukum Positif*, (Bandung : Citra Aditya Bakti, 2002), pp. 67-68.
- Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan*, (Bandung : Citra Aditya Bakti, 2013), pp. 165.
- rham Rahman, *Analisis Pasal 59 Angka (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman Di Bidang Arbitrase Syariah*, Jurnal, Vol. 3, No. 1, 2014, pp. 2.
- Rusli Tami. *Keterbatasan Badan Penyelesaian Sengketa Konsumen dalam Penyelesaian Sengketa Konsumen*, Masalah-Masalah Hukum, Nomor 2, 2014, pp. 233-239.
- Sabela Gayo, Ariman Sitompul, *The Use of Mediation as an Alternative Health Dispute Resolution*. Hong Kong Journal of Social Sciences, 2022.
- Suyud Margono, *ADR dan Arbitrase: Proses Pelembagaan dan Aspek Hukum*, (Jakarta : Ghalia Indonesia, 2004), pp. 12.