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Arbitration In Legal Remediesn Against Dispute Resolution Construction Service Contract

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Abstract
The purpose of this research is to find out what are the advantages and deficiencies in problem solving through arbitration and how the process dispute resolution through arbitration in construction contract disputes. By using research methods juridical normative, it can be concluded, that: 1. Arbitration is the way settlement of a civil dispute in outside the general court based on arbitration agreements made written by the parties to the dispute. 2. The existence of a written agreement negates the right of the parties to apply resolution of disputes or disagreements what's included in the agreement state court.

Keywords: Arbitration, Settlement Dispute, Construction Services Contract

1. INTRODUCTION

One of the business activities in the sense of services that are widely carried out in Indonesia is the construction services business. Regarding construction services, the government has regulated in Law Number 2 of 2017 concerning construction services (UU. Number 2 Of 2017). In Article 1 Number (1) of Law Number 2 of 2017, it is determined that: "Construction services are construction consulting services and / or construction work"(Safnul, 2023).

In order to provide legal certainty for the parties (construction service users and construction service providers) regarding the rights and obligations of each party, the implementation of the construction service business (construction work/project) should ideally be made in a contract (construction work contract). In Article 1 Number (8) of the act. Number 2 of 2017, determined that: "Construction work contract is the entire contract document that regulates the legal relationship between service users and service providers in the implementation of construction services".

In the case of the implementation of a construction project that has been based on a construction work contract/construction contract (in accordance with the provisions of Article 46 of the law. No. 2 of 2017), does not cover

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the gap in the occurrence of construction service contract disputes between construction service users and construction service providers.

In the presence of an agreed contract gives rise to an engagement or legal relationship. The legal relationship that occurs is the relationship between users of construction services and providers of construction services that cause legal consequences in the field of construction services. Legal consequences are meant, namely the emergence of rights and obligations between the parties. The Momentum arising from this is since the contract was signed by construction service users with construction service providers. Elements that must be present in the construction services agreement, namely: 1. the subject; 2. the existence of the object, namely the provision of construction services; 3. the existence of documents governing the relationship between users of construction services with construction service providers (Astiti & Tarantang, 2019) .

Construction service contract dispute the parties can be caused by differences / disagreements or other causes, both physical (addition or change in the scope of construction projects, construction projects do not fit bestek) and non-physical (late payment of construction services that have been completed by construction service providers because of unrealized credit from banking institutions, natural conditions, economic conditions, political conditions, and so on).

Construction projects have the potential to experience adverse impacts if the dispute resolution process of construction services is carried out with a path that is not suitable. Potential adverse effects that can be caused, among others: 1. Cost of construction; 2.Delays in construction projects; 3.Decreased credibility and good name of the parties.(Raharjo, 2008)

With the various potential adverse effects above, ideally the construction service dispute of the parties bound in a construction contract, can be resolved by both parties effectively and efficiently. Before the publication of the act. No. 2 of 2017 concerning construction services regulated by the government in Law No. 18 of 1999 concerning construction services (UU. No. 18 Of 1999). In general, the 2 (two) laws mandate different philosophies and dispute resolution mechanisms for construction services Hadi Ismanto and Sarwono Hardjomuljadi, “Analisis Pengaruh Dewan Sengketa & Arbitrase Terhadap Sengketa Konstruksi Berdasarkan Fidic Condition of Contract 2017,” Jurnal Konstruksia 10 (2018): 73–86.

Settlement of construction services disputes is directed out of court with the aim of achieving a”win-win solution". Through the U. Number 2 of 2017, the government has encouraged the use of alternative dispute resolution to resolve disputes over construction services that occur. Ideally, construction services business activities in Indonesia should be avoided from the concept of dispute resolution that is “litigious minded” typical of Western society.

Thus “ "deliberation to reach a consensus" is used as the first step in the dispute resolution mechanism of construction services. If the deliberation does not reach a consensus, then the parties turn to efforts to resolve construction service disputes that have been agreed upon and specified in the construction work contract (mediation, conciliation, or arbitration). From the 3 (three) stages of alternative efforts to resolve construction services disputes that have been determined in Article 88 paragraph (4) of the law. Number 2 of 2017 (mediation, conciliation, or arbitration), arbitration is the best dispute resolution alternative in resolving construction service disputes when compared to mediation and conciliation.

The assertion is based on several reasons, among others:

1. The arbitral award is final and binding;
2. Confidentiality of the parties is more secure/confidential;
3. Cheaper/lighter cost;
4. The process is simpler and faster; and
5. Settled by its members.

Deliberation as an effort to accommodate the interests of the parties is the core of the concept of Alternative Dispute Resolution Process (out of court). This means that the parties cannot directly choose an arbitration institution if the deliberations are unsuccessful. New arbitration can be done if the dispute construction services are not successfully resolved by deliberation, mediation, and conciliation. The judiciary is not authorized to re-examine the case that has been handed down an arbitration decision, except if there is an unlawful act related to the decision to make an arbitration decision in bad faith, and if the arbitration decision violates public order. Based on the description of the above background authors are interested in studying more deeply about: Arbitration in legal remediesn Against dispute resolution Construction Service Contract.

2. RESEARCH METHOD

The type of legal research method used in this study is a normative research method.In normative research secondary data as a source of information can be primary legal ma-terial, secondary legal materials, and tertiary legal materials. The specification of this research is specifically to analyze the implementation of legal principles, namely researchon written positive law or research on legal methods that live in society. The method willbe applied that approach to legislation (Statute Approach) and Case Approach. Case research in normative legal research aims to study legal norms or rules carried out in legal practice.

The technique of collecting data using literature studies (normative legal research) which focuses on secondary data, the authors researched the laws and government regulations relating to this research. Then conducted interviews with informants, especially the public relations department of the

Financial Transaction Reports and Analysis Center and the profession to obtain information to add to the lack of complete secondary data. Data collection tools in normative juridical research are derived from secondary data to obtain concepts, theories, and information and conceptual thinking from previous researchers in the form of legislation, scientific work, journals, and others.

Making procedures and data collection in this study conducted in two ways: by studying the literature and interviews with key informants such as lawyers, and prosecutors and service providers finance. Data analysis technique begins with an examination of the data done the collected data then conducts direct and directed interviews and then analyzes the data qualitatively, the data obtained is systematically compiled and then analyzed qualitatively in the form of rules. The process of legal analysis is linked to the theo retical framework to be able to answer the formulation of the problem under study.

3. RESULT AND ANALYSIS

A. Execution Of The Arbitral Award National

The arbitral award is final and have permanent legal force and binding on the parties, in question by being final is that the decision arbitration cannot be appealed, Cassation, or judicial review. Inside terms of implementation of the decision, this should implemented within a 30-day grace period commencing from the date of decision, where is the original sheet or copy auntentik the arbitral award is awarded and registered by the arbitrator or his authority to the district court clerk and by the clerk is given a note which is Registration Act.(Gayo, 2022)

The arbitrator or his / her power of attorney shall submit verdict and original sheet appointment as arbitrator or copy authenticated to the court clerk state. In the case of the arbitrator or his authority failure to submit both documents then based on Law No. 30 1999 was not implemented. In the case of enforcement orders, the chairman of the District Court must first check whether the decision arbitration meets the following criteria :

1. The parties agree that the dispute between them will be settled arbitrarily.
2. Consent to complete disputes through arbitration only disputes in the field of trade and about the rights under the law and legislation.
3. Disputes that can be resolved through arbitration only disputes in trade and about rights which according to laws and regulations legislation.
4. Other disputes that can be resolved arbitration is not in contrast to the confusion and public order.

The execution of the arbitral award shall be only in the event of an arbitral award has been in accordance with the agreement arbitration and

meet the requirements there is in Law No. 30 of 1999 and not contrary to morality and public order.

B. Dispute Resolution Mechanism Through Arbitration

One of the alternative dispute resolution mechanisms (APS) which is a form of legal action recognized by law where one or more parties submit their dispute disagreement disagreement with one or more parties to one person (arbitrator) or more (arbitrator-arbitrator Assembly) professional experts, who will act as a judge / private court that will apply the applicable state legal procedures or apply the peace legal procedures that have been agreed upon by the parties in advance to arrive at a final and binding decision. It is therefore said that arbitration is the law of procedure and the law of the parties.(Sitompul, 2022)

Furthermore, juridically, the definition of Arbitration has been formulated in Article 1 Number 1 of Law Number 30 of 1999as previously stated, namely "arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute".(Ilma et al., 2020)

From the various notions mentioned above, it can be concluded that arbitration is a way of resolving civil disputes outside the general court based on written agreements that have been held by the parties to the dispute, both before and after the dispute. The party that resolves the dispute is called the arbitrator chosen by the parties to the dispute.

Arbitration in Indonesia was originally regulated under the Reglement op de Burgelijke Rechtsvordering (RV), which is a product of the Dutch government. The provisions in the RV are still valid after Indonesia gained independence due to the transitional regulations in the 1945 Constitution. However, with the enactment of Law No. 30 of 1999 on arbitration and Alternative Dispute Resolution, the arbitration provisions in RV are declared no longer valid.

In accordance with Law No. 30 of 1999, the dispute resolution mechanism of construction services through arbitration follows the provisions set forth in this law. There are conditions that must be met before the construction services dispute resolution process through arbitration begins, first the need for a valid arbitration agreement between the construction service user and the construction service provider. The second requirement is that disputes that occur between construction service users and construction service providers must be disputes that can be resolved through arbitration.

An arbitration agreement is said to be valid if it meets the provisions regarding the terms of the validity of the agreement contained in Article 1320 of the Civil Code, namely: agreement of the parties; ability to make agreements a certain thing.there is a good reason.

The subjective terms of the arbitration agreement are seen from the necessity that the arbitration agreement is made by those who by law are considered capable and have the authority to enter into the agreement. While the objective terms in the arbitration agreement is seen from the object of the arbitration agreement is only for disputes in the field of trade and about the rights under the law and the rules of law are fully controlled by the parties to the dispute.

Furthermore, the second condition is that disputes that can be resolved through arbitration under Article 5 Paragraph (1) of Law Number 30 of 1999 are disputes in the field of trade and rights which according to laws and regulations are fully controlled by the parties to the dispute. In the explanation of Article 66 letter b of Law Number 30 of 1999, it is mentioned that the scope of trade includes activities in the fields of Commerce, Banking, Finance, Investment, Industry, and intellectual property rights. Construction services business is included in the field of industry, therefore construction service disputes can be resolved through arbitration.

C. Construction Services Dispute Settlement Mechanism Through Arbitration

The dispute resolution mechanism of construction services through arbitration is as follows:

1. Notification Stage
2. Stages of selection and appointment of arbitrators
3. Stage of examination of the dispute and the verdict

The examination of disputes in arbitration is carried out in writing, an oral examination may be carried out if agreed by the parties or deemed necessary by the arbitrator or arbitral tribunal. Then the venue of the arbitration shall be determined by the arbitrator or arbitral tribunal, unless otherwise determined by the parties themselves.The provisions regarding the place of Arbitration are regulated in Article 37 paragraph (1) of Law Number 30 of 1999.(Andi Bagulu, 2019)

This provision on the venue of arbitration is especially important when there are elements of foreign law and the dispute becomes a civil international law dispute. If the parties do not determine the place of Arbitration themselves, the arbitrator may determine the place of Arbitration.The place where the arbitration takes place may determine the law to be used to examine the dispute. However, if the parties to the arbitration agreement have determined the choice of law of a particular country as the law to be used in the settlement, the law chosen by the parties will be enforced.

In accordance with Article 27 of Law No. 30 of 1999, “All dispute examinations by arbitrators or arbitral tribunals are conducted behind closed doors”. The closed nature is to affirm the confidential nature of

dispute resolution through arbitration, namely that everything that happens through arbitration examination should not be broadcast to the public or the Press by each party.

This is in contrast to the Civil Procedure provisions in force in the District Court, which in principle are open to the public. This means that in the examination of civil cases in the district court, everyone is allowed to attend to follow the course of the trial. Formally, this principle provides opportunities for social control and provides protection of human rights in the field of justice, and this principle aims to ensure a fair and objective judicial process and the realization of impartial judicial decisions.

Then, in Article 28 of Law Number 30 of 1999,it is stated that "the language used in all arbitration proceedings is Indonesian, except for the agreement of the arbitrator or the arbitral tribunal, the parties may choose another language to be used".Furthermore, in Article 29 of Law No. 30 of 1999 mentioned:(1)the parties to the dispute have the same rights and opportunities in expressing their respective opinions.2) the parties to the dispute may be represented by his powers by a special power of attorney.

Thus, the provisions in Article 28 and Article 29 of Law No. 30 of 1999 require that the language used in the arbitration examination is Indonesian, the use of other languages is possible but with the approval of the arbitrator or the arbitral tribunal. And the parties to the dispute have the same right to express an opinion as well as to be represented by its authority.

Article 48 of Law No. 30 of 1999 stipulates that basically the examination of disputes in arbitration must be carried out within a maximum of 180 days from the time the arbitrator or arbitral tribunal is formed. By agreement of the parties and if necessary, the period may be extended. In Article 33 of Law Number 30 of 1999, it is affirmed that the arbitrator or arbitral tribunal is authorized to extend the term of its duties if:

1. An application is made by one of the parties on certain special matters, for example, due to an intermediate claim or an isidentil claim outside the subject matter of the dispute such as an application for bail as referred to in the Civil Procedure Code.
2. As a result of the provisional decision or other interim decision
3. Deemed necessary by the arbitrator or arbitral tribunal for the purposes of the examination.

In the examination of a dispute, the arbitrator or arbitral tribunal or at the request of the parties may bring one or more witnesses or one or more expert witnesses to be heard. Then the parties have the right to request a binding opinion from the arbitration institution on certain legal relations of an agreement. For example, regarding the interpretation of unclear provisions, additions or changes to provisions related to the emergence of new circumstances. This opinion cannot be challenged through any legal means.(Rizky, Rafieqah Nalar and Mahardika, 2023)

The decision in the examination of the dispute by arbitration shall be rendered within a maximum period of thirty (30) days after the examination is closed. Within fourteen (14) days after the award is received, the parties may submit corrections to the arbitrator or arbitral tribunal against administrative errors e.g. corrections due to typing errors, writing names, addresses and others, but do not change the substance of the award.

The decision taken by the arbitrator or arbitral tribunal is based on the provisions of the law, or based on justice and propriety. In the event that the arbitrator is given the freedom to give a decision based on justice and propriety, the laws and regulations can be set aside unless the rules of law are coercive. Conversely, if the arbitrator is not authorized to give a decision based on justice and propriety, then the arbitrator can only give a decision based on material law rules as done by the judge.

For arbitration costs under Article 76 of Law No. 30 of 1999, determined by the arbitrator, and the costs are charged to the losing party, except in the case of claims only partially granted, the arbitration costs are charged to the parties in balance. The costs of the arbitration include the arbitrator's fee, travel and other expenses incurred by the arbitrator, the costs of witnesses and / or expert witnesses required in the examination of the dispute, and administrative costs.(Aulia et al., 2023)

The arbitrator's freedom in determining arbitration fees depends on the arbitration agreement. The arbitrator is not obliged to give a reason if he sets the fee in a different way from the usual rules set by an institution such as BANI, which sets the arbitration fee in a separate list and attached to the rules of arbitration procedure. There must therefore be a clear agreement between the parties to the dispute and the arbitrator as to the cost of the arbitration. Furthermore, the arbitrator is also entitled to additional costs if the agreed arbitration time needs to be extended.

Dispute resolution mechanism through arbitration above can be stated, that the arbitration process has advantages when compared to dispute resolution through the courts. Rachmadi Usman said there are 5 (five) advantages of dispute resolution through arbitration, namely:(Priambodo, 2021)

1. Guaranteed confidentiality of disputes of the parties.
2. Delays caused by procedural and administrative matters can be avoided.
3. The parties may choose an arbitrator who, in their opinion, has sufficient knowledge, experience, background on the disputed matter, and is honest and fair.
4. The parties may determine the choice of law to resolve their issue as well as the process and venue of the arbitration.
5. Arbitration award is a decision that binds the parties by means of simple procedures (procedures) or can be implemented.

4. CONCLUSION

Dispute resolution through arbitration, is one way of dispute resolution outside the court. The dispute resolution mechanism starts from the stage of notification and answer to the parties, then followed by the selection and appointment of arbitrators, and ends with the examination and verdict. All of these stages show that dispute resolution through arbitration has advantages compared to settlement through the court. The advantages are the presence offreedom of the parties to determine the arbitrator, the guarantee of confidentiality of the parties due to the fact that the settlement of disputes is carried out behind closed doors. Furthermore, the parties can determine the place of Arbitration and choice of law in dispute resolution, and the dispute resolution process is faster, which can be resolved no more than 180 days. as well as 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 is 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.

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