

# Settlement of Contract Business Activities Disputes through Arbitration : Evidence From Construction Service Company

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## Abstract

*Business activities are rife in Indonesia, one of which is the construction services business. The implementation of the construction service business is made by the parties with a construction service contract. In the implementation of construction service contracts, construction service disputes sometimes occur between the parties, both providers and users of construction services which are decided by arbitration, but there are still many arbitral awards that are not in accordance with the principles of fairness, propriety and legal certainty, so that the arbitral award is being filed again for annulment. verdict to court. The problem in this research is why the dispute resolution of construction service contract business activities is important to be resolved through arbitration. The research method used in this research is normative juridical research. The type of research used is normative legal research. This research is a prescriptive analysis. The research data used is secondary data both in the form of primary legal materials, secondary legal materials, and tertiary legal materials and is supported by the results of interviews with informants. Data collection techniques through literature studies and interviews. The findings in this study: 1. Construction is a multidisciplinary activity that must be resolved through arbitration because it does not only have parties in law but is multidisciplinary, so that arbitration in its resolution is more effective; 2. The rights and obligations of the parties must be protected by law. BANI arbitration and rules and procedures; 3. The juridical analysis of the arbitration award in this study deviates, and uses reasons outside the provisions of Article 70 of the Law. Arbitration that is not based on fairness and propriety as well as legal certainty.*

**Keywords:** Construction Service Business, Construction Service Contracts, Arbitration.

## 1. Introduction

Business activities have developed from time to time, so they are often discussed/studied in various forums (national and international). This is because one of the benchmarks for the development and progress of a country is economic development and progress. The cornerstone of a country's economic development and progress is, of course, business activities.[1]

Many business activities are carried out in Indonesia.[2] Broadly speaking, business activities can be grouped into 3 (three) business fields:

Business in the sense of trade (commerce), namely all buying and selling activities carried out by people and entities, both domestically and abroad or between countries with the aim of making a profit. For example: manufacturers, agents, and so on;

Business in the sense of industrial activity (industry), namely the activity of producing or producing goods whose value is more useful than their origin. For example: the forestry industry, mining, and so on;

Business in the sense of service activities, namely activities that provide services, whether carried out by people or entities. For example: hotel services, accountants, and so on.[3]

One of the business activities in terms of services that is mostly carried out in Indonesia is the construction services business. Regarding construction services, the Government has regulated it 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".[4]

In order to provide legal certainty[5] for the parties (construction service users and construction service providers) regarding the rights and obligations of each party, the implementation of a construction service business (construction work/project) is ideally made in a contract (construction work contract). [6] In Article 1 number (8) of Law. Number 2 of 2017, it is determined that:

"Construction work contracts are all contract documents that regulate the legal relationship between service users and service providers in the implementation of construction services".[7]

In the case of implementing a construction project that has been based on a construction work contract/construction contract (in accordance with the provisions of Article 46 Law Number 2 of 2017),[8] there is no room for disputes over construction service contracts between users of construction services and providers of construction services.

With the existence of an agreed contract, it creates an agreement or legal relationship. The legal relationship that occurs is the relationship between users of construction services and construction service providers that give rise to legal consequences in the field of construction services. The legal consequences referred to, namely the emergence of rights and obligations between the parties. The momentum for this consequence has been since the contract was signed between the construction service user and the construction service provider. The elements that must be present in a construction service agreement, namely: 1. the existence of a subject; 2. the existence of an object, namely the provision of construction services; 3. There are documents that regulate the relationship between users of construction services and construction service providers.[9]

With the existence of a contract will give birth to an agreement for the parties. Given how important a contract is, an understanding of matters relating to a contract is necessary, including: What is an agreement, the legal terms of the agreement, the principles of the agreement, the object of the agreement, the term of the agreement, the form of the agreement, the parties involved, the structure and anatomy of making the agreement, dispute resolution and termination of the agreement.[10]

Article 1320 of the Civil Code determines 4 conditions for a valid agreement, namely: There is an agreement between the two parties, the ability to carry out legal actions, the object of the agreement and the existence of a lawful cause.

With the agreement, it is hoped that each individual will keep his promise and carry it out.[11] The agreement gives rise to the rights and obligations of each which must be carried out in good faith, in accordance with the agreed agreements. In this way, what is the goal of making the agreement can be achieved, namely: achieving justice, order and legal certainty.

The position of the parties in the construction service procurement agreement should be equally guaranteed and protected by law so that the purpose of the agreement can be achieved, namely the achievement of justice. However, in practice this is often not the case, construction service users are often in a stronger position, while construction service providers are in a weak position, so they tend to comply with the conditions put forward by construction service users.

The existence of these problems requires a solution so that all parties can accept it well, feel there are benefits, have legal certainty and provide protection for all parties, so that what is the purpose of carrying out the contract can be realized. To overcome the above problems, it is necessary to have a proportional contractual relationship between business people by implementing a win-win solution relationship pattern that reflects a symbiotic relationship of mutualism.[12]

Disputes[13] on the construction service contracts of the parties can be caused by differences/disagreements or other reasons, both physical (addition or change in the scope of a construction project, construction projects not in accordance with bestek) and non-physical (delay in payment for construction services that have been completed carried out by construction service providers due to 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 construction service dispute resolution process is carried out in an inappropriate way. The potential adverse effects that can occur include:

#### Swelling of construction project costs

Cost overrun is the construction cost of a project which at the implementation stage exceeds the project budget set at the initial stage (estimation) resulting in significant losses for the contractor.

#### Construction project delays

Project implementation that is not in accordance with the plan, can result in project delays. In the implementation of construction projects, project delays often occur, which can cause various forms of losses for service providers and service users. Construction service projects do not only belong to the central and regional governments but also to the private sector, where these projects must be completed on time.

#### Decreased credibility and good name of the parties

For contractors, not only can delays cause project cost overruns due to increased project implementation time, it can also result in a decrease in the contractor's credibility in the future. Meanwhile, for owners, delays in the use or operation of construction project results often have the potential to cause disputes and claims between owners and contractors.

Likewise, disputes can result in the stall of the project, which has the effect of not functioning the project according to plan. Then from the budget side it can also hinder the progress of using the budget, while the disbursement of the APBN, APBD and private project budgets is tied to unemployment norms and their disbursement.

With the various potential adverse impacts above, ideally disputes over construction services between the parties bound in a construction contract can be resolved by the parties effectively and efficiently.

Prior to the issuance of the Law. Number 2 of 2017 concerning Construction Services is regulated by the Government in Law Number 18 of 1999 concerning Construction Services (UU. Number 18 of 1999). In general, the 2 (two) laws mandate different philosophies and mechanisms for resolving construction service disputes.

Based on the provisions in the old rules (Article 36 paragraph (1) of Law Number 18 of 1999), there are 2 (two) alternative construction service dispute resolutions:

court (litigation);

out of court (non-litigation).[14]

The concept of Article 36 paragraph (1) of Law. Number 18 of 1999, with the next paragraph paragraph (3) becomes inconsistent.

Article 36 paragraph (3) of Law. Number 18 of 1999, provides an opportunity for dissatisfied parties to continue the settlement of construction service disputes in stages in court. With the provisions of this paragraph, institutions outside the court seem to have lost their teeth and do not have an important role in resolving construction service contract disputes.

UU. Number 2 of 2017, has corrected the weaknesses of the law. Number 18 of 1999, which in fact does not provide legal certainty regarding the settlement of construction service disputes. Based on the provisions of Article 88 of Law. Number 2 of 2017, the settlement of construction service contract disputes has been directed at mechanisms outside the court, namely by way of deliberation, mediation, conciliation, or arbitration.

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The total percentage of settlement through court and out of court, namely:[15]

BANI applications have 7 to 10 problems, around 70%; whereas

Civil lawsuits between 3 to 5 cases around 30%.

The settlement of construction service disputes is directed outside the court with the aim of achieving a "win-win solution". Through the Act. Number 2 of 2017, the Government has encouraged the use of alternative dispute resolution to resolve construction service disputes that occur. Ideally, construction services business activities in Indonesia should be avoided from the "litigious minded" concept of dispute resolution typical of Western society.

Thus, "deliberation to reach consensus" is used as the first step in the construction service dispute resolution mechanism. If deliberations do 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 service disputes that have been determined in Article 88 paragraph (4) of the Law. Number 2 of 2017 (mediation, conciliation, or arbitration), arbitration[16] is the best alternative dispute resolution in resolving construction service disputes when compared to mediation and conciliation.

This assertion is based on several reasons, including:  
The arbitration award is final and binding;  
Confidentiality of the parties is guaranteed/confidential;  
Cheaper/lighter cost;  
The process is simpler and faster; and  
Completed by experts.

Deliberation as an effort to accommodate the interests of the parties is the essence of the concept of alternative dispute resolution processes (outside court). This means that the parties cannot directly choose an arbitration institution if the deliberations are unsuccessful. Arbitration can only be carried out if construction service disputes cannot be resolved through deliberation, mediation and conciliation. The judiciary is not authorized to re-examine cases on which an arbitral award has been handed down, except when there is an unlawful act related to making an arbitral award in bad faith, and if the arbitral award violates public order.

Judicial institutions must respect arbitration institutions, not interfere, and in the implementation of an arbitration award, the role of the court is still needed, for foreign arbitration in the case of requests for execution to district courts. In practice, even though the arbitration arrangements are clear and their implementation can proceed without problems, the execution often encounters obstacles from district courts. Therefore, the problem in this study is why is it important to resolve disputes over construction service contract business activities through arbitration?

## 2. Research Method

The research method used in this research is normative juridical research. The type of research used is normative legal research. Normative legal research is research conducted by examining library data (library research) using secondary data

sources, both in the form of primary legal materials and secondary legal materials as well as tertiary legal materials. Sources of data in this study are secondary data and primary data. Secondary data is in the form of primary legal materials, namely related laws and regulations, secondary legal materials, namely books, journals, and tertiary legal materials, namely the internet. Then it is supported by primary data in the form of data obtained directly from the field by conducting interviews with relevant informants. All data that has been obtained through library research, then it will be sorted in order to obtain various articles of governing legal principles, then systematized so as to produce a classification that is in line with the research problem. Furthermore, the data obtained was analyzed qualitatively deductively to arrive at a conclusion, so that the main issues examined in the study could be answered.

## 3. Discussion

Dispute resolution through Alternative Dispute Resolution (APS) will not guarantee satisfactory results for the parties to the dispute. This means that not all dispute cases, even though they meet the requirements for the Alternative Dispute Resolution (APS) Law, must always be resolved through the Alternative Dispute Resolution (APS) mechanism.

Government Regulation Number 22 of 2020 concerning Regulations for Implementing Law Number 2 of 2017 concerning Construction Services implements the provisions of Article 10, Article 18, Article 25, Article 42 number (6), Article 45, Article 51, Article 65 number (5), Article 67 number (2), Article 82, Article 85 number (4), Article 88 number (7), Article 102 and arrangements for community participation carried out by the construction service community through construction service forums in accordance with the provisions of Article 87 Law Number 2 2017 concerning Construction Services. In the implementation of the contract, various problems may arise in the form of non-compliance, default, or even other disputes that occur between the Parties.

To ensure the successful implementation of the Alternative Dispute Resolution (APS) mechanism, the prerequisites in the form of key success factors must be known. These factors include:[17]

The dispute is still within 'reasonable' limits, the dispute between the parties is still moderate, meaning that hostilities are still within tolerable limits. Fair or moderate size is very relative. For example, if the two sides don't want to meet, it means that the enmity between them is very severe. If the dispute is very severe, the hope of getting a win-win solution (using APS) is difficult or impossible to achieve. Thus, they prefer a settlement with a win-lose solution (through arbitration or court). In such circumstances, settlements through APS may not be able to provide adequate protective controls and influence to produce constructive decisions.

Commitment of the parties, entrepreneurs or business actors in the dispute are indeed determined to resolve disputes through APS, and they accept responsibility for their own decisions and receive legitimacy from APS. The greater the commitment and acceptance of the process from the parties, the greater the ability of the parties to respond positively to settlement through APS.

Sustainability of the settlement relationship through APS always wants a win-win solution. Thus, there must be a desire from the parties to maintain their good relations. For example, two disputing businessmen, one from Indonesia and one from



Japan, wish to continue their business relationship after their dispute ends. With future interests in mind, it drives them not to think about the outcome but also how to achieve it.

The balance of the bargaining position of the parties must have a balance in the bargaining. Although this is sometimes difficult to find, especially if the dispute involves multinational entrepreneurs and local entrepreneurs, where almost all resources are controlled by multinational entrepreneurs. However, these differences should not affect bargaining positions, meaning that one party must not dictate or even intimidate a settlement to be approved.

The process is private and the results are confidential. The parties are aware that, unlike dispute resolution in court, the dispute resolution process through APS is not open to the public. Likewise, the results of dispute resolution are not intended to be known by the public or published to the public, and are even considered to be confidential. So, the goal to be achieved, the most important thing is that the parties reach their dispute resolution with satisfactory results.

In relation to construction services is one of the sectors that has a very strategic role in the economic order of a developing country because it uses construction costs that are quite large and rotates and is distributed to various parties which results in a financial cycle in the economy for the community. Apart from being a medium for other sectors to develop the Construction Services Law, it is also a place of land for workers to work to earn their income and continue their very meaningful life.

We know WaskitaKarya, HutamaKarya, Adhi Karya, NindyaKarya, Wijaya Karya, Housing Development, BrantasA-bipraya and IstakaKarya in the construction sector and YodyaKarya, Virama Karya, Bina Karya, Indah Karya and Indra Karya which are business planners and supervisors. construction and several other state-owned enterprises that are involved in integrated work.

While in the private sector we know Jaya Construction, Total BangunPersada, BumiKarsa, while in consultancy there are many large private companies that are still able to survive to this day. BPHN, in the course of the Construction Services Law, various problems emerged starting from business requirements where business entities as actors are required to have a Business Entity Certificate and Professional Skills Certificate or Work Skills Certificate for individual actors where all these certificates must be registered at the Development Agency. Construction service. (LPJK).[18]

Competition at the auction also arises due to many factors, and from observation is the alleged lack of readiness of the auction committee to work professionally and understand the procedures for procuring construction services. people and only 10% pass.

The next problem is the implementation of construction work which is carried out and supervised by units called Work Units/or Regional Work Units/Commitment Making Officials where there are still many weak quality controls/worrying quality of work, and the construction time is generally still demanding. delay time of construction schedule.[19]

The Construction Services Sector is a community activity to create buildings that function as supports or infrastructure for socio-economic activities in order to realize national development goals. Therefore the implementation of Construction Services must guarantee order and legal certainty.

Law Number 2 of 2017 concerning Construction Services

mandates the establishment of a Government Regulation implementing the Law to follow up on provisions concerning: responsibility and authority (Article 10); type, nature of Classification, Business Services, changes to Classification and Business Services, and Construction Resources Supply Chain Business (Article 18), market segmentation and risk, technology and cost criteria (Article 25); certain conditions for direct appointment and certain value during direct procurement (Article 42 point (6)); selection of Service Providers and determination of Service Providers in the Construction Services work relationship (Article 45); Construction Work Contract (Article 51); obligations and responsibilities of Service Providers for Building Failure (Article 65 point (5)); provision of compensation (Article 67 point (2)); coaching and supervision (Article 82); complaints, lawsuits, and efforts to obtain compensation or compensation (Article 85 point (4)); settlement of disputes (Article 88 number (7)); and procedures for imposing administrative sanctions (Article 102). In addition, in order to clarify the provisions regarding Construction Service forums that have not been regulated in the Law, Government Regulations also contain arrangements regarding the mechanism of community participation carried out by the Construction Services Society through the Construction Services forum (Article 87).

This Government Regulation is intended as a guideline in the Implementation of Construction Services Business in the form of Construction Consultancy Services, Construction Works, and Integrated Construction Works and as a reference in the context of Construction Services business activities.

In addition, this Government Regulation serves as a good guideline for the Central Government, Provincial Governments, Regency/City Regional Governments in the implementation of guidance and supervision of Construction Services.

The Construction Services Society and the community can be involved in the implementation of guidance and supervision of Construction Services. The Construction Services Society as part of the community that has interests and/or activities related to Construction Services such as associations of business entities, professional associations, Service Users, universities, experts, supply chain actors, and Construction observers. The implementation of some of the authority of the Central Government includes the Construction Services Community through one institution.

Meanwhile, the public can participate in supervising the implementation of Construction Services and provide input to the Central Government and/or Regional Governments in the formulation of Construction Services policies. In addition, community participation can be carried out through the Construction Services forum.

Even though the state has provided the judiciary as the first and last place for dispute resolution, for business people the court has not become the right dispute resolution route because it adheres to the win-lose solution concept. Business people need dispute resolution with the concept of a "win-win solution", which is fast and simple. So that the selection of dispute resolution outside the court, namely arbitration, is the right choice for the parties.

The reasons of the parties in resolving the dispute, among others:[20]

Through the courts:

Usually one of the parties is the government;  
The problem is more to civil contracts / agreements.  
Through external arbitration court (BANI):

Problems that arise due to technical construction;  
 There is an Arbitrator Council with a technical background that can adjust the points of concern;  
 Problem handling is more effective and efficient;  
 A clear and measurable trial schedule.  
 Regarding the parties wanting to resolve the dispute, especially to arbitration (BANI) because:[21]  
 Arbitrage more accommodates the needs of business actors;

The characteristics of arbitration are preferred by businessmen to court appeals;

Confidential;

Flexible;

In a multinational business, arbitral awards are not bound by the jurisdiction of a country, so their implementation can be carried out in other countries and applies widely to each country.

The dispute resolution process at BANI is relatively fast, final;

The decision is binding on the parties, then it is closed or confidential so as to maintain the good name of the parties;

If the loser does not want to carry out the decision, then it will be executed immediately in the district court where the respondent is.

Then according to Eko, dispute resolution must be carried out outside the arbitration court, especially BANI, because it is better to have it resolved in arbitration, when we talk about construction, there are lots of construction service disputes, for example the problem of building failure, the technical justification is really very technical. Then if it is brought to court that decides the judge and all the jurists, but in arbitration not all the jurists decide, the arbitrator may be a legal expert, may be a non-jurist, may be an engineer, may be an economist, banker and professional in his field. So why talk about construction, because construction disputes are solved by experts, so they cannot be solved from a legal perspective alone but must be multi-disciplinary.

Many construction service dispute settlements are resolved through arbitration. BANI statistical data shows that around 30% of cases filed at BANI are disputes in the field of construction services.[23]

Construction is an activity that is not simple, is multidisciplinary and is influenced by many interests. It is not surprising that construction disputes are prone to occur. In the records of the Indonesian National Arbitration Board (BANI), construction disputes dominated the 420 cases handled by BANI in the period 1999 to 2016, namely 30.8% of the total cases.[24]

Many construction service disputes are resolved through arbitration because construction service disputes often require a technical understanding that is not possessed by legal persons/practitioners. If the dispute is submitted to arbitration, then the arbitral tribunal can be formed multidisciplinary, consisting of technical people and legal people. This reason makes the settlement of construction service disputes through arbitration more effective and satisfying to all parties.

Regarding legal certainty there is no problem regarding legal certainty. Arbitration awards have the same force as court decisions. Even arbitral awards are final and binding, so that more quickly provide legal certainty.

In terms of law. No. 30 of 1999 regarding legal certainty, that decisions can be executed in the District Court (if not carried out in good faith), that is a form of legal certainty in the arbitration process. If you look at the division of arbitration and court competencies, there is also legal certainty regarding the respective authorities. As in Article 3 of Law. No. 30 of 1999 states that: "The District Court is not authorized to adjudicate disputes between parties who are involved in an arbitration agreement". Likewise in Article 11 of Law no. No. 30 of 1999 states that: "(1) The existence of a written arbitration agreement negates the right of the parties to submit dispute resolution or differences of opinion contained in the agreement to the District Court.

Dispute resolution construction service contracts are important to be resolved through arbitration because through arbitration cases are faster with an average statistic of 3-5 months (maximum 180 days) after the case is concluded, so many vital projects are automatically funded from the APBN, APBD and private projects. not stalled. If a private project is stalled, it will cause bad credit in the banking sector. Therefore, the parties should resolve construction service contract disputes through arbitration because arbitration has its own characteristics which are particularly related to vital object projects. So that the central and regional governments as well as the private sector do not lose out. So the parties should be directed to resolve the dispute through arbitration.

Arbitration in its settlement is also based on freedom of contract (freedom of contract) contained in Article 1338 paragraph (3) of the Civil Code which states that an agreement must be implemented in good faith. The formulation is carried out to give the meaning that an agreement made should from the moment the agreement is closed, the agreement is absolutely not intended to harm the interests of the parties. Article 1338 paragraph (3) of the Civil Code is in line with Article 1339 which states that an agreement does not meet the requirements of good faith and propriety, appropriateness becomes null and void.[25]

There are 5 principles of freedom of contract, namely:[26]

The freedom of the parties to close or not close the contract;

Freedom to determine with whom the parties will conclude the contract;

The freedom of the parties determines the form of the contract;

The freedom of the parties determines the contents of the contract; and

The freedom of the parties determines how to conclude the contract.

Settlement through arbitration is carried out because it is beneficial for business people and for the parties to the dispute regarding construction services.

#### 4. Conclusion

Whereas construction service business activities are not simple and multidisciplinary in nature. Many construction service disputes are resolved through arbitration because construction service disputes often require technical understanding that is not possessed by legal persons or practitioners. If the dispute is submitted to arbitration, then the arbitral tribunal can be formed multidisciplinary, consisting of technical people and legal people. So, this reason makes the settlement of construction service disputes through arbitration more effective and sat-

isfying to all parties. Regarding legal certainty there is no problem regarding legal certainty. Arbitration awards have the same force as court decisions. In fact, arbitral awards are final and binding, so that they provide legal certainty more quickly.

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