

MEDIATION AS A MODEL FOR DISPUTE SETTLEMENT ON CONSTRUCTION WORK CONTRACT IN INDONESIA

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Abstract

As one of the essential elements in national development activities, activity of Construction Services needs to be based on statutory regulations which are clear, effective and adequate. This is important because in practice disputes often arise which involves Construction Services parties, especially disputes arising from Construction Work Contract. In Indonesia, Construction Disputes are mostly resolved through litigation or arbitration, which are considered less efficient in terms of business interests. Adjudicative decisions are considered less accommodating the business needs of the Construction Services' parties because they often ended the relationship and potentially disrupted cooperation in the future. By using the judicial normative method, this Research intended to examine Mediation as a resolution mechanism of Construction Disputes with Construction Settlement Agreement as the output that provides a win-win solution for disputed parties based on good faith of each party. The legal materials used are laws and regulations, courts' verdicts, journals and also law books. The result of this Research concluded that Mediation in Indonesia was still an alternative, so that it was only considered as a stage that needed to be passed before finally choosing a solution through arbitration or litigation. In developed countries, Mediation has become one of the options for resolving businesses disputes, including on the Construction Services area, which provides quite satisfactory results for the disputing parties, especially from the aspect of sustainability of business relationships in the future. This Research recommends the need for Mediators in Mediation to always have a neutral position in order to assist and escort the disputing parties to find agreement of settlement according to their own will and ability, so that the Construction Settlement Agreement can be executed immediately. For this reason, Indonesia needs to carry out reformation related to Mediation, both in the form of regulations and institutions as well as the legal culture of the community of Construction Services.

Keywords: *Mediation, Construction Disputes, Win-Win Solution.*

1. INTRODUCTION

One form of state responsibility in the context of realizing general welfare is through national development activities, both physical and non-physical. In this case, the construction services sector plays a major and critical role in constructing the infrastructure for the community's social and economic activities, as well as supporting the growth and development of numerous industrial goods and services required for the delivery of construction services. Considering the role of construction services, it can be said that construction services broadly support the national economy.

In order to achieve the goal of construction services that can support the national economy, as well as the development of construction services sector which is increasingly complex due to the increasing competition in construction services both at the national and international levels, the Government and the House of Representatives (DPR) have enacted Law Number 2 Year 2017 concerning Construction Services (hereinafter UUK).

The UUJK is expected to guarantee order and legal certainty, especially protection for service users, service providers, construction workers, and the construction service community.

As the implementation of one of its legislative ratios, UUJK contains strict and definite regulations in fulfilling technical aspects and contract administration aspects, thus meeting legal demands that arise in empirical practice in society and the dynamics of legislation related to the implementation of construction services. The UUJK also contains regulations regarding the qualifications of the construction service business; construction services business services; division of responsibilities and accountability between the central government and local governments in the implementation of construction services; strengthening standards of security, safety, health, and sustainability in the implementation of construction services; comprehensive arrangement of construction workers, both local and foreign construction workers; the establishment of an integrated construction service information system; and changes in the institutional paradigm as the participation of the construction service community in the implementation of construction services; and the abolition of criminal provisions by emphasizing administrative sanctions and civil aspects in the event of a dispute between the parties.

Disputes in the construction business activities, as well as in other businesses, are unavoidable. However, the resolution of construction disputes is different from other business disputes. In construction, even if there is a dispute, the development and the construction process must not be stopped, instead it must keep on continue. If it stops, it will hinder the progress development, and might cause significant losses. Thus, an effective and efficient dispute resolution process that does not interfere with the construction process is needed.

UUJK has strictly regulated the mechanism for resolving construction disputes. Article 88 of the UUJK stipulates that in the event of a dispute, the parties shall resolve it by deliberation and consensus. If consensus is not reached, the parties can resolve it through the stages of dispute resolution, namely: conciliation, mediation, and arbitration. In addition to the three stages of dispute resolution, the litigating parties can also form a dispute council to resolve disputes that occur.

Of the several forms of construction dispute resolution, the Author views that the dispute resolution mechanism through mediation is the best. Because, in addition to being a fast and confidential process, dispute resolution through mediation also places great importance on a harmonious relationship between the disputing parties. This is in accordance with the spirit or business principles in general, the construction service business in particular. Given the importance of an effective and efficient settlement mechanism in ending construction disputes, this study aims to answer the following three problems:

1. What are the arrangements regarding the settlement of Construction Disputes arising from Construction Work Contracts in Indonesia?
2. How is the implementation of the Mediation process as a Construction Dispute resolution model?

3. What are the arrangements regarding the settlement of Construction Disputes that can guarantee the principle of efficiency and the principle of fairness in the Construction Peace Agreement as a result of Mediation?

To address the three (three) research questions above, the Author uses normative juridical law research methods. In addition, to support the method used, the author also uses several approaches, namely: statute approach, theoretical and conceptual, comparative approach, particularly with Singapore, and case approach. The cases used are in the form of court decisions, as well as decisions of arbitration institutions.

2. RESEARCH METHODS

A mixture of the statutory methodology (Statute methodology), conceptual approach (Conceptual Approach), and analytical approach (Analytical Approach) was used to perform normative juridical research (doctrinal). According to Johnny Ibrahim, a statutory approach will always be employed in normative legal research and a combination of approaches because normative legal research is founded on study done on already-existing legal sources. The author's research and this theory are relevant since they both emphasize what the rule of law entails.

3. ANALYSIS AND DISCUSSION

3.1. Construction Dispute Resolution Arrangements

The implementation of construction services has been specifically regulated through the UUJK. According to UUJK, the construction service there are 3 (three) types of construction service businesses, namely: construction consulting service business, construction work business, and integrated construction work business. These three types of businesses are interrelated, where one business chain will involve many parties. In general, the parties involved in the construction business are divided into two major groups, namely: service providers and service users (Article 39 paragraph (1) UUJK), both of which might be in the form of an individual business or a business entity.

In practice, according to AD Austen and RH Neale, there are five key parties participating in global construction management, namely: clients, users, designers, implementers, and authorities.¹ Relations between groups or parties involved in cross construction processes must be bound by a construction contract. Construction work contracts have two characteristics, namely those related to technical requirements, and characteristics related to administration. In addition, the construction work

¹) Sulistijo Sidarto Mulyo, *Proyek Infrastruktur & Sengketa Konstruksi*, Depok: Prenada Media Group, 2018, hal. 12.

contract must contain 3 (three) aspects, namely: technical aspects, legal aspects, and banking aspects.

Like contracts in general, construction business contracts are also inseparable from disputes. Construction disputes usually occur because of a breach of contract or an unlawful act. Potential conflicts can occur in technical aspects such as changes in the scope of work; changes in field conditions; shortage of materials and/or equipment; personnel limitations; planning drawings and/or technical specifications that are not clear/complete. Potential disputes can also occur in terms of time, namely: delays in the execution of work; acceleration of work completion time; or delay in completion of work. In addition, disputes can also occur regarding costs, such as: savings, or late payments.

UUJK has set up a separate mechanism for resolving construction work contract disputes. Uniquely, UUJK encourages the settlement of construction work contract disputes to be resolved through a non-litigation mechanism.² This encouragement occurs because the settlement process through litigation is very ineffective and inefficient.

Article 88 of the UUJK stipulates that in the event of a dispute, the parties shall resolve it by deliberation and consensus. If consensus is not reached, the parties can resolve it through the stages of dispute resolution, namely: conciliation, mediation, and arbitration.³ In addition to the three stages of dispute resolution, the litigating parties can also form a dispute council to resolve disputes that occur.⁴ The stipulation in Article 88 of the UUJK is very clear that there is no room to settle construction cases through the courts. However, in practice, the parties continue to resolve construction cases through the courts, whether civil, criminal, or state administrative.

Several civil cases of construction work contracts that were resolved through the courts, namely: Case Number 521/Pdt.G/2020/PN.Jkt.Brt; case no. 428/Pdt.G/2020/PN Jkt.Utr; case no. 401/PDT/2021/PT.DKI. While the case of State Administration (TUN) is illustrated by case number: 50/G/2020/PTUN.Mtr; 14/G/2019/PTUN.PDG; and 14/G/2019/PTUN.PDG.

Another interesting matter is, based on UUJK on the settlement of construction services disputes is to prioritize administrative over criminal sanctions. However, in practice, construction services disputes are still brought to the criminal realm, rather than being resolved through non-litigation procedure. The following cases will provide a clear picture of the many cases of construction services being drawn into the criminal realm, namely: pretrial case Number 2/Pid.Pra/2021/PN Pal; case Number 7/Pid.Pra/2021/PN Pal and case No. 8/Pid.Pre/2021/PN Pal.

There are several lessons to be learned about the settlement of construction cases from the decisions above. Firstly, although Article 88 of the UUJK has limited the stages of dispute resolution efforts, it turns out that in practice, the parties can still

²) Law of the Republic of Indonesia Number 2 of 2017 concerning Construction Services, Article 88.

³) Ibid.

⁴) Ibid.

deviate from the limitation of these stages. The litigation process through the court is regulated in the agreement.

Secondly, by choosing a settlement through the courts, the dispute resolution process is not effective and efficient, and it damages good relations. In fact, the principles of dispute resolution for the implementation of Construction Services are fast, cheap, with legal certainty, maintaining good relations and the case cannot be opened to the public, unless determined otherwise by the parties and/or the court.

Thirdly, another lesson from this decision is the debate over the absolute competence of the investigator if one of the disputing parties is a state administrative official. Another lesson from the case above is that, mediation regulated in the UUK is only one of the stage of dispute resolution for construction service contracts, which in practice is only applied as a formality requirement. In the case above, even though the mediation has not been completed, the Plaintiff has filed a lawsuit to the court. The initiation of settlement disputes in court resulted because the parties include a litigation dispute resolution clause in the work contract.

The occurrence of construction dispute resolution through the courts is caused by inconsistent regulations in the UUK, namely related to the use of terminology and stages of dispute resolution. Article 88 of the UUK uses the term "dispute settlement"⁵ while Article 47 paragraph (1) letter h uses the term "discord settlement"⁶. There is no further explanation regarding the difference between the two terms in UUK. In fact, there are differences between the two terms in the stages of case settlement.

Based on Article 88, the stages of dispute resolution in the event that the parties fail to reach consensus are mediation, conciliation and arbitration. There is no opportunity for the parties to take the case to court. However, when referring to the explanation of Article 47 paragraph (1) letter h, the stages of discord resolution include deliberation, mediation, arbitration, or the Court⁷. The regulation on the explanation of Article 47 paragraph (1) letter h above provides an opportunity for the disputing parties to take the construction case to court, which is philosophically very avoided by the UUK.

3.2. Implementation of the Mediation Process as a Construction Dispute Resolution Model

One of the important changes to the 2017 UUK is to encourage the settlement of construction disputes out of court. In UUK 1999 Article 36 paragraph (1) stipulates that the settlement of construction service disputes can be settled in court or out of court.⁸ The 2017 UUK amended these provisions, and stipulates that disputes over construction services are resolved by consensus (Article 88 paragraph (1) of the 2017

⁵) Ibid.

⁶) Ibid, Article 47, Point (1), Sub-Point h.

⁷) Explanation of the Law of the Republic of Indonesia Number 2 of 2017 concerning Construction Services, Part II, Article 47, Point (1), Sub-Point h.

⁸) Law of the Republic of Indonesia Number 18 of 1999 concerning Construction Services, Article 36.

UUJK). If there is no consensus, dispute resolution is carried out through conciliation, mediation and arbitration (Article 88 paragraph (4) UUJK 2017).

The approach of dispute resolution arrangements in the 2017 UUJK is already appropriate and in accordance with the principles and objectives of construction services. However, the regulation of Article 88 of the UUJK resulted in settlement through mediation being only considered as a formality before the case resolved through arbitration. Many construction service providers have not maximized mediation. In fact, when compared to dispute resolution through litigation and even arbitration, dispute resolution through mediation is more cost-effective.

Settlement through court is very detrimental to the parties. Because, apart from being open to public, settlement through the courts also takes a long time and requires relatively large costs. Meanwhile, the settlement through arbitration, in addition to the high cost of the arbitrator and administration, the arbitration award is also often filed for cancellation through the court. In addition, the arbitration award is also win-lose.

Settlement through mediation is superior and cost-effective because through mediation confidentiality is maintained. In addition, good relations between the parties are also maintained because the final outcome of the mediation is not a win-lose decision, but a win-win solution. The advantages of mediation are inseparable from the five principles of mediation, namely: confidentiality, volunteerism, empowerment, neutrality, and a unique solution.

The most advantageous thing about mediation compared to other ADR mechanisms is that a harmonious relationship is maintained. In a business such as construction services, fostering a harmonious relationship is very important and needs to be maintained in order to sustain business cooperation. Dispute resolution through mediation has also been deeply rooted in Indonesian society. It can even be said that the dispute resolution mechanism through mediation is the philosophy and identity of the Indonesian nation. Thus, encouraging mediation as the main mechanism in dispute resolution is the right step.

However, in practice, people are more likely to choose to resolve disputes through arbitration courts. According to Susanti Adi Nugroho, there are 5 (five) basic reasons that result in the lack of success of alternative dispute resolution including mediation, namely⁹⁾: lack of socialization; the ability of the mediator is not yet good; institutionalization has not developed; the role of judges, where judges in Indonesia are not equipped to carry out mediation, the ability of judges to make peace is still lacking, or the case is complex; The role of lawyers/advocates who do not support mediation.

3.3.Application of Efficiency Principles and Fairness Principles in Construction Peace Agreements as a Result of Mediation

⁹⁾ Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, Jakarta: Kencana, 2015, hal. 67-72.

The results of the mediation process carried out by the disputing parties and the mediator are basically stated in a Construction Peace Agreement. In addition to being efficient, the parties are still able to maintain and align their interests and maintain the continuity of the ongoing cooperation. The Peace Construction Agreement also applies the principle of justice where the positions and interests of the parties are maintained and accommodated in a balanced manner. To be sure, the decisions taken did not win one party only.

The Singapore Convention explains that the results of mediation as outlined in a settlement agreement have significant advantages for the disputing parties, having the meaning of a written agreement, the contents of which are recorded in a certain form. The Singapore Convention further states that in the event that the terms related to a written settlement agreement are made through electronic communication, the information contained in it can be accessed for future reference.¹⁰

The Singapore Convention explicitly confirms the scope of application of the settlement agreement in Article 1, which reads:

- a) At least two parties to the settlement agreement have their places of business in different States; or
- b) The State in which the parties to the settlement agreement have their places of business is different from either:
 - (i). The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - (ii). The State with which the subject matter of the settlement agreement is most closely connected.¹¹

In addition to the design of the peace agreement as formulated above, the existence of an independent mediation institution is also very important. One of the causes of the unpopularity of mediation in the settlement of construction service disputes is the unavailability of a special institution to mediate. In practice in Indonesia so far, mediation is usually carried out by a mediator provided by the arbitration institution or a mediator provided by the court.

In other nations, such as United States and Singapore, mediation institutions operate independently. In the United States, Federal Mediation and Conciliation Services is one of the mediation institution, which was founded in 1947 until now still provides mediation services.¹² In Singapore, there are several mediation institutions such as Singapore Mediation Center (SMC) and Singapore International Mediation Center (SIMC).

Regarding SIMC in Singapore, in the process of resolving disputes through non-litigation channels, the hybrid settlement method (Arb-Med-Arb or widely known as

¹⁰) United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018, Article 2 No. 2.

¹¹) Ibid., Article 1 No. 1.

¹²) Konstantin Veropaev, Mediation in CIS Countries: Russian and Kazakhstani Experience, dalam Asian Dispute Review Journal, January 2022, hal. 13

“AMA Protocol”¹³) is actively applied. Since its launch in 2014, the Singapore International Arbitration Centre (SIAC) – Singapore International Mediation Centre (SIMC) “Arb-Med-Arb” Protocol (AMA Protocol) has been lauded for bringing the benefits of mediation to disputes referred to arbitration in Singapore.¹⁴ That means Mediation is already considered to have an important role and that is why Singapore already has, at least, one large Mediation Institution that has been recognized internationally such as SIMC which closely collaborates with SIAC (Singapore International Arbitration Center), which is also already very well known on the international level with impeccable reputation.¹⁵

Countries such as Russia and Kazakhstan have also realized the importance of establishing mediation institutions to support economic development.¹⁶ In Indonesia itself, there are already several mediation institution such as Pusat Mediasi Nasional (PMN), Pusat Mediasi Indonesia Universitas Gadjah Mada (PMI UGM), mediation institution for financial sector, bank sector, insurance sector. But there is still no special institution that serves mediation, specifically in the field of construction services. Meanwhile mediation itself has existed for a long time and has even become the identity of the Indonesian nation itself. Therefore, it is necessary to form a special institution to resolve disputes over construction services through mediation.

Institutions that provide construction service mediation must be independent and act autonomously, and are not formed for profit. Mediators who are members of the institution may not have an interest in a case being handled. The mediation institution was established specifically to handle construction service cases, so that the mediators who are members of it must have sufficient knowledge and experience in the construction sector, and have a mediator certificate.

In addition to the mediator, the mediation institution should also form an advisory board whose function is to supervise the institution as well as the mediator and the management. Another addition, the mediation institution that is formed must also have a board dean who will manage the day-to-day organization. Based on the criteria above, the best legal form of a mediation institution is a legal entity and member-based institution, so it is more appropriate to take the form of an association legal entity.

The functions of the construction services mediation institution are expected to provide:

1. Organizing mediation services in cases in the field of construction work contracts.
2. Provide facilities for negotiation, conciliation and mediation.

¹³) <https://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>, website accessed on April 27th, 2023, 17:20 WIB.

¹⁴) <https://lawgazette.com.sg/feature/kinks-in-the-siac-simc-arb-med-arb-protocol/>, website accessed on April 27th, 2023, 17:24 WIB.

¹⁵) <https://conventuslaw.com/report/singapore-siac-is-most-preferred-arbitral/>, website accessed on April 27th, 2023, 17:27 WIB.

¹⁶) Konstantin Veropaev, loc. cit.

3. Conduct studies and research as well as training in negotiation and mediation skills
4. Functions to accredit and underwrite the mediator council.
5. Provide consultancy services to prevent disputes, manage disputes and mediate the parties to the dispute.
6. Promote mediation.
7. Providing experts in the field of construction services.

However, this mediation mechanism cannot immediately be standardized to be implemented. For this reason, regulatory reform and institutional arrangements are needed, as well as the creation of a conducive climate for the growth and development of the legal culture of the Construction Services community. The direction is that they need to be aware of the importance, benefits and advantages of the Mediation mechanism in resolving Construction Disputes.

4. CONCLUSION

The direction of the settlement of construction work contract disputes as regulated in the 2017 UUK is correct, namely directing non-litigation settlements. This is different from the provisions in the 1999 UUK which still directs dispute resolution through the courts. However, the dispute resolution provisions in the 2017 UUK still need to be corrected, especially the contradictions in the nomenclature of "dispute resolution" in Article 88 and the term "discord settlement" as regulated in Article 47 of the UUK. The confusion of the two articles has an impact on inconsistency in the resolution of construction disputes, and creates legal uncertainty. Mediation has not become the main choice, due to less strict regulations and also because construction service actors have not realized the benefits of mediation. Mediation has not been well socialized.

Therefore, the government needs to re-synchronize Article 88 and Article 47 of the UUK, or at least provide an explanation of the difference between dispute resolution and discord resolution. Article 47 of the UUK needs to be amended and the regulation must be in line with Article 88, namely directing the settlement of construction disputes in a non-litigation manner. In addition, considering that the benefits of mediation are very large compared to conciliation and arbitration, changes to the UUK should be directed so that the settlement of construction disputes prioritizes deliberation and mediation.

In addition, one of the things that needs and must be done by the Government is to create and issue Mediation Regulations that regulate not only Mediation in Courts (which is currently regulated through Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts), but also regulates Mediation to resolve disputes outside the Court. This is very much needed to encourage the increased use of Mediation by the disputing parties as a reliable alternative, has clear rules, and is legally binding, even if the Mediation is held outside the Court.

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