

Process of Dispute Resolution in Construction Projects through Arbitration

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ABSTRACT

The construction industry has a level of complexity and competitive, in which participants with different views in talent and knowledge level of the cooperation process of construction. In the construction industry, due to differences in perception between the project participants, conflict is inevitable. If the conflict is not managed properly, they quickly turn into a dispute. Dispute resolution can be done by appointing an arbitrator of the arbitration board. Evaluation process of dispute resolution in construction projects through a risk-based arbitration is performed to improve the performance of the Indonesian National Arbitration Board. Literature study and expert judgment used to determine the level of risk event that might occur. Causes of risks and impacts that occur as a result of risk is also examined. The lack number of competent arbitrator can resulting in losses for both parties is the highest frequency and effects. Until this time, the dispute still cannot be resolved in a fair and timely.

KEYWORDS: Project, Construction, Risk, Performance, Process, Arbitration.

INTRODUCTION

Claim construction have a major influence in the implementation of projects such as the cost and time. An effective claim management system is needed [1]. The heavy influence of the claims can cause impact of not complete the project or other projects. Application of proper claims management system will greatly assist in the claims process. The process of settlement of disputes through the courts or commonly referred to as a litigation settlement with conservative manner.

Lack of understanding of the claims made against the stakeholders of the construction industry are afraid, the claim should not be avoided and can be managed properly. In principle claim, it is a demand for someone to regain their rights. The unavailability of relevant documents and negotiating conflicts that arise between the owner and contractor makes a claim that is turned into a dispute is resolved through the courts or arbitration[2].

In development, emerging dispute resolution process by working out of court. Agreement dispute settlement established through a contract in which the parties to the dispute appoint the arbitrator of the arbitration board to settle disputes. The final decision of the arbitration is binding. Arbitration is an alternative that is faster and cheaper to resolve claims and thus more desirable than through the courts [3]. However, in practice it is not always the case, it is important to evaluate the process of dispute resolution in construction projects through the Indonesian National Arbitration Board (BANI).

Claim Resolution

Construction claims management can be interpreted as a process of seeking approval (dealing) for controlling and searching for consideration or changes by one of the parties involved in the construction process [4]. Construction Claims Management is a process to control claims. Along with the increasing number of substantial construction claims at this time, the implementation of effective management and construction claims are absolutely necessary [7].

The researcher [5] identified that the results confirmed that the most important source of the dispute is a contract management 74.04%, the second is a contract document 71.49%, the third is financial problems 67.80%, the fourth is the problem associated with the project 63.92% and lowest are other sources (e.g. force majeure) 61.58% .

In Law No.30/1999 of mediation and alternative dispute resolution provides that the completion of the mediation conducted before through arbitration. Parties who wish to use a third party as a mediator or arbitrator may appoint a third party by yourself or follow the process of a special institution that organizes the settlement of disputes through Alternative Dispute Resolution. UU No.30/1999 regulate dispute resolution outside the court approved by the parties to the dispute as set forth in a written agreement. Before admission into the arbitration process, the parties tried to organize other alternative dispute resolution, such as negotiation, mediation and conciliation. Arbitration is the preferred alternative dispute resolution method in international construction contracts because it saves time and money and prevents litigation under foreign laws [6].

Claim Resolution Process

Claims resolution process can be resolved by negotiation, mediation, arbitration and litigation. According to [6], there are several methods in settling claims, consist of:

1. Negotiation-Negotiations are communication/meetings between disputing parties (usually the owner and contractor representatives) that can help achieve early resolution of the dispute. Project owners tend to spend a lot of time in studying the claims and corrective actions. If no resolution is reached, the settlement claims must get out of this method and proceed to mediation or arbitration.
2. Mediation-When negotiation fails, the parties can resolve their claims by appointing a mediator. The mediator's role is to bring the parties together in an effort to reach an agreement to resolve the dispute. The mediator may clarify or elaborate on dissent. This helps each side understand the other side's positions. The mediator can advise and propose the final solution. As a mediator, however, does not have the power to issue a final decision. The parties to the dispute, therefore, not required to accept the mediator’s decision.
3. Arbitration-If the disputing parties cannot resolve claims and use negotiation or mediation, the disputing parties may conduct the arbitration process as a solution. Although, they are reluctant to use arbitration as a solution to resolve the dispute. With the appointment of arbitrators, each party tries to convince the arbiter of the truth of his position and to each have a full opportunity to propose case. After the hearing, the arbitrator makes a final decision.
4. Litigation-If the disputing parties do not agree on the arbitrator or the arbitrators is not agreed to performing their duties or if no impediment to proceed with the case there is no agreement between the parties in this case, the parties can file a claim to the court case. This is a last resort and the decision is final, which binding on both parties.

Arbitration Process

Arbitration is a process of resolution like a trial without a jury. In general, arbitration is a private and confidential hearing. The parties tell their sides of the story to the arbitrator in a setting that is less formal than a court hearing. In an evaluative, the arbitrator is like a judge who serves as fact-finder and decision-maker, providing the parties with an assessment of the merits of some or all aspects of the case. The purpose is to assess and decide the dispute. Arbitrators may be attorneys or business executives and professionals who are experts in the subject matter of their disputes. Many commercial contract containing chapters that using arbitration as a claims resolution. Many construction contracts using arbitration clauses to avoid litigation in foreign courts [13]. Securities arbitration is an area that growing stable. Since the decision of the united states supreme court, in 1987, arbitration become the most widely used means of resolving disputes in the securities industry [8].

According to [8], some reasons for the success of arbitration are:

- Arbitration takes less time and better productivity, the arbitrator is an expert with the problem in construction law (contractual and managerial approach).
- The parties have the same opportunity to agree on who will decide their case. Dispute can be heard much more quickly in arbitration than if placed on a court.
- Arbitration is cheaper than on a court. Arbitration provides quick, inexpensive decisions and allows the prevailing party to recover costs.
- The decisions are final and this is one of arbitration’s primary benefits.
- Arbitration awards are final, binding, legally enforceable and can be made public record.

The arbitration process consists of:

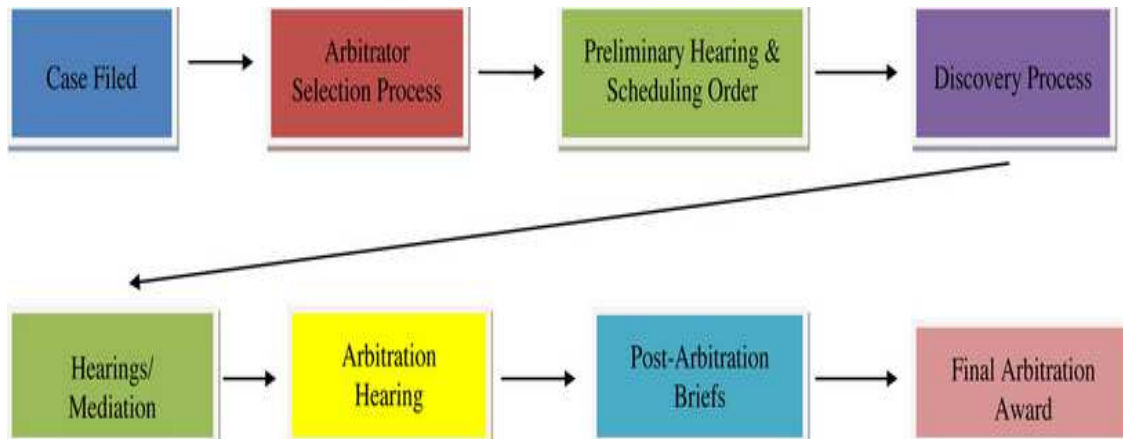


Figure 1: Arbitration process

The arbitration process include:

- File a claim: A claimant initiates an arbitration by filing a statement of claim that specifies the relevant facts and remedies requested.
- Answer a claim: A respondent responds to an arbitration claim by filing an answer that specifies the relevant facts and available defences to the statement of claim.
- Arbitrator selection: Arbitrator selection is the process in which the parties receive lists of potential arbitrators and select the panel to hear their case.
- Prehearing conferences: Prior to the hearing, the arbitrators and parties meet telephonically to schedule hearing dates and resolve preliminary issues.
- Discovery: Discovery is the exchange of documents and information in preparation for the hearing.
- Hearings: The parties and arbitrators meet in person to conduct the hearing in which the parties present arguments and evidence in support of their respective cases.
- Decision and awards: After the conclusion of the hearing, the arbitrators deliberate the facts of the case and render a written decision called an award.

Risk Management in Arbitration

Arbitrage can resolve disputes more quickly than the courts. This is because their statements in legislation thus only deadline for the settlement of disputes in arbitration. Therefore, arbitration often used by construction services practitioners are involved in a dispute to seek justice. At this time, there will be a lot of contractual relationships involving the parties come from different legal backgrounds which allows the existence of differences in the understanding on a contract or agreement. Therefore, the legal aspects can significantly affect the performance of the process carried out by arbitration. In the process, wherever possible arbitration always have to minimization both material and moral damages [10].

According to [9], many opportunities in the international construction and contractors are faced with many challenges and difficulties when moving to international markets. Many external risks associated with risk contained in the contract clause. The research suggest to use of a particular method of dispute resolution depends on the expected risk in the project and help international contractors in the selection of appropriate methods of dispute resolution. There are two steps to improve the arbitration process, which is based on a risk management.

Plan Risk Response

Risk is the possibility that the impact and interaction events may turn out differently than anticipated. Each process involves some kind of risk. The most common approach to plan risk analysis following these steps: risk identification, risk assessment and risk response. The general method that most often used in considering the risk factors are classified according to the source by using a hierarchical structure [8].

Risk response plan is a process created to make the choice of action to improve the opportunities and minimize resistance at project target. Risk response plan carried out in accordance with the priority risks. In this study conducted at the risk response activities and processes that affect the performance of dispute resolution into a plan for improving the performance of arbitration. Risk response should be approved expert and responsible for such risk. Risk response is divided into two: positive and negative. For the negative risks, the thing to do is to avoidance, transfer, mitigation and acceptance. As for the positive risk, the following is done that exploit, share, enhance and acceptance [11].

Control Risk

Control risk is the process of implementation of the risk response, oversees the process minimize risk and identify new emerging risks, and evaluate the risk management process on the project. In controlling these risks can be done with reassessment of risk, audit risk, performance measurement and analysis.

RESULTS AND DISCUSSION

In carrying out the process of an activity must always there is a risk in it. It is also common in the construction process of dispute resolution through arbitration in the Indonesian national arbitration board (BANI). From the data of what had happened, conducted a survey to obtain arbitration process in which the risk is the greatest value. Identification using the law of the constitution of the republic of Indonesia 1945 [14] and the Indonesian board of arbitration procedure regulations (BANI) [15]. It can be concluded that there are 12 indicators or stages in the arbitration process in Indonesia. The questionnaire was distributed to 30 responses obtained the 10 indicators that allow it to happen risks in the arbitration process, and there are 8 indicators of risk where the possibility of more than 50% by 13 the number of variables.

Table 1: Risk event in arbitration

Risk Event in Arbitration	Score (%)	Rank
The dispute cannot be resolved in a fair and timely	93	1
The decision is not up to each party	87	2
No growth of online dispute resolution/online dispute resolution	83	3
Payment verification process takes	80	4
The results of the examination application file submitted by the late disputes secretary BANI	77	5
Sued the arbitrators and arbitration institutions concerned to civil courts	73	6
The signing of an arbitrary decision by the arbitrator hindered because of busy	70	7
Registration file and request for arbitration of the applicant was rejected but indirectly confirmed by the secretariat BANI	70	7
Secretariat calculations less transparently inform the fee payable for the inspection and or the arbitral tribunal	60	8
Chairman of the panel of not closing the trial while the evidence, testimony and the trial would suffice	56	9
Rejection of the demands dissenter conducted by the district court, where one party is not approved by the other parties and the arbitrator concerned is not willing to resign	56	9
The absence of substitute arbitrator	53	10
Absence of corresponding secretary of the applicant's expectations	53	11

Obtained from the risk event, then conducted a survey to determine the cause of these risks and their impact on the parties concerned. From the results of this study found that the cause of the highest risk in the arbitration process is the lack number of number of competent arbitrators which resulting in losses to both parties.

Table 2: Risk cause and impact in arbitration

Risk Cause	Risk Impact	Rank
Lack number of competent arbitrators.	Disadvantages of parties	1
Arbitration with the lack of communication between parties.	Disadvantages of parties	2
The absence of the norm of relevant on this issue.	Disadvantages of Arbitration Board, as of date in the dispute resolution system	3
Payment is not directly verified in real time.	The disadvantage of the applicant	4
The absence of sanctions against the process time.	The disadvantage of the applicant	5
Procedure cancellation request is not regulated by law No.30/1999. There is a gap/other ways to apply for judicial review back, resulting arbitration award is not absolute.	Disadvantages of one party	6
The absence of sanctions against the process.	Disadvantages of parties	7
BANI secretariat late to confirm rejection.	The disadvantage of the applicant	7
The secretariat informed the parties costs to be paid in the examination or the arbitral tribunal.	Disadvantages of parties	8
The absence of sanctions against the process.	Disadvantages of parties	9
According to article 25 paragraph 1, the district court did not verify with the arbitrator being challenged.	Disadvantages of parties	9
Lack number of arbitrators.	Disadvantages of parties	10
The lack of numbers and capabilities of the corresponding secretary.	The disadvantage of the applicant	11

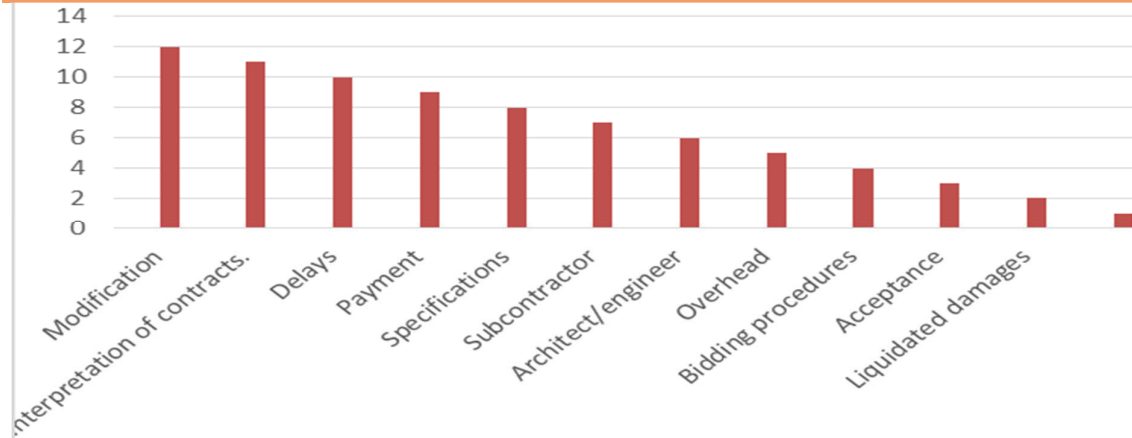


Figure 1: Causes of construction disputes

Figure 1 describes that the causes of disputes as reported based on respondent was identified that causes due to “modifikation” and “ interpretation of contract”. Besides that, disputes also arises due to the factors of “delays”, “payment” and “specifications”. Other than that, subcontractos, architect/engineer, overhead, bidding procedures, acceptance and liquidated damage also considered as the factors of conflict.

CONCLUSION

The heavy influence of the claims can cause no impact on the completion of the project or other projects. Application of proper claims management system will greatly assist in the claims process. This study aimed to evaluate the process of dispute resolution in construction projects that have been implemented in Indonesian National Arbitration Board (BANI), then make improvements by using comparative studies and risk management that occurs in any arbitration process.

This study will analyze the risk factors that affect the output at each stage of the arbitration process. The method used in this study varied, namely the study of literature and expert judgment method. In this study will be presented:

1. Identification of activity of dispute resolution process in the arbitration.
2. Identify the output on every process of claim settlement construction in the arbitration.
3. Identify the risk factors that may occur in the activity in the arbitration process that could derail output target and influence the process at Indonesian National Arbitration Board (BANI).
4. Identifying the risk cause and risk effect when the risk event occurs
5. Identify the causes of disputes in construction process.

Dispute continually arises because someone failed to count the cost at the beginning when the cost should have been defined. Contractual disputes include definition, interpretation and clarification of the contract. Contractual issues cause a significant portion of disputes in many projects. Based on research was indicated that the sources of construction disputes are mainly related to contractual matters, including variation, extension of time, payment, quality of technical specifications, availability of information, administration and management, unrealistic client expectation and determination.

Technical disputes due to uncertainty are considered as the most common issues in project operations. Uncertainty is the difference between the amount of information required to do the task and the amount of information already processed by the organization. The amount of information needed depends on the task complexity that is the number of different factors that have to be coordinated or performance requirements such as time or budget constraints. The uncertainty may lead to unrealistic owner expectation such as unrealistic contract duration, late instructions or information from architect or engineer, overdesign, inadequate site or soil investigation report, error and incomplete technical specifications and many others

Arbitration has much offered in the resolution of disputes. Arbitration can be more expeditious and less costly than court actions. It is private and confidential and it may permit the parties to achieve mutually beneficial resolutions that could not be ordered by a court [12].

In general, based on literature and survey result shows that arbitration is the most preferred alternative claim resolution when dealing with almost all of the risks listed can identified and minimally. Although in practice there are still many difficulties in the process of arbitration, by evaluating the arbitration process-based risk management, the difficulties can be reduced or avoided. So that, a claim will be more easily resolved.

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