

THE DEVELOPMENT OF ANATOMY OF CONSTRUCTION DISPUTE

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The advancement of the construction industry in Indonesia is often not accompanied with adequate infrastructure system, especially in terms of regulations and legal system. The enactment of Law no 80–1999 has contributed to the expansion of construction market by allowing the private sector, including those from overseas, to play bigger roles in the industry. Although strongly acknowledged by stakeholders in the industry, the progress made by the government and the practitioner in the industry to response to the needs for more appropriate actions to cope with this ever increasingly complex system has been very slow. The dynamic of the construction industry in the region has changed the formerly rigid government-dominated construction sector to become an intricate one. The impact of such dynamic in the industry has been apparent. In particular, construction disputes have been experiencing changing in the dynamic of the way the disputes were handled; from the traditional litigation approach toward modern alternative dispute resolution mechanism. While litigation remains the dominant construction dispute resolution mechanism, non-litigation approaches such as arbitration and dispute review board are beginning to gain recognition in industry. This paper presents a study on the development of anatomy of construction dispute in Indonesia, which will serve as a framework for analyzing the dynamic of construction disputes in Indonesia. Such a framework will help to identify factors affecting construction dispute mechanism, from the initiation of disputes to the resolution. The anatomy is developed based on analysis of construction dispute cases that have been recorded in judicial courts as well as from Indonesian Arbitration Board.

Keywords: Indonesia, Construction industry, Dispute resolution framework.

1 INTRODUCTION

In a construction project there are two parties that is equally have agreed to put off each other in a form of agreement, providing services known-named construction contract. In the implementation of the construction contract, conflict often arise. For example, costs arising as a result of change of work, etc. The conflict resulted one party submits a request (claims) against the other party. If the claim isn't facilitated, then the dispute will arise (Yasin 2002). Construction industries have risk factors with the level of uncertainty higher than in other industries (Flanagan and Norman 1993). Construction dispute most commonly caused by three factors (Pang 2011): (a) task factors; (b) contract factors; and (c) human factors. The greater value and duration of the a project, will increasingly higher probability of the dispute occurrence (Pang 2011, Gebken 2006, Love 2005). Dispute incurs a loss to warring parties, which is: (a) *Cost and Time* (Allen, 2010); (b) *Productivity* (New South Wales Department of Commerce, 2008; Econtech, 2008); and (c) *Popularity and Relation* (Gebken, 2006; Love, 2005).

2 THE HANDLING OF CONSTRUCTION DISPUTE

In facing construction dispute, there are two efforts that can be made (Kumaraswamy 1997): *dispute resolution and dispute prevention*. Dispute resolution in the construction project which is quite popular in Indonesia is through arbitration/BANI (Badan Arbitrase Nasional Indonesia). This can be showed by the increasing number of cases of 56 cases (1987-1996) became the 215 cases (1997-2006), in which 40% of that number are cases of construction, as shown by Figure 1. In effort to prevent dispute, there are several way that can be done, i.e., (1) through the efforts of an agreement between the parties prior to the execution of the project (e.g., partnering, alliancing, early contractor involvement, etc. (Love 2005)), and (2) development of dispute knowledge (e.g., identification of dispute characteristic (Shin 2000) and arrangement of construction dispute (Pang 2011)).

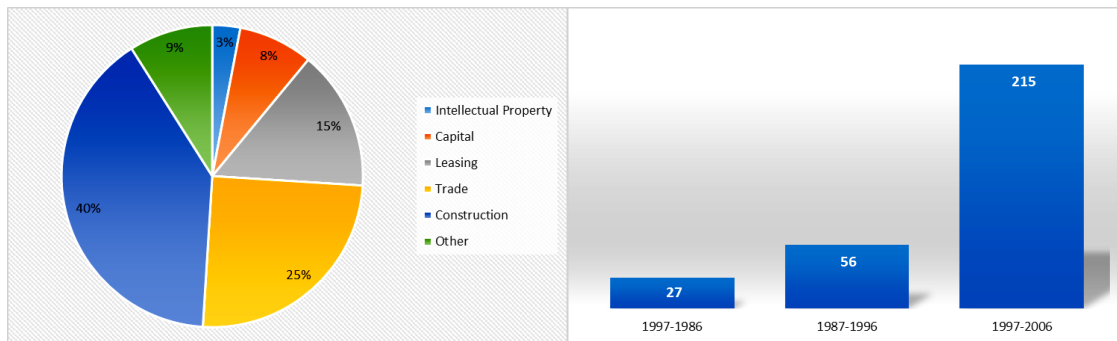


Figure 1. The number and type of cases were registered in the BANI (BANI Arbitration Center).

3 RESEARCH RATIONALITY

Disputes that occur during the execution of the construction, is an issue that must be resolved. When the potential dispute emerged as a new issue, and supported by anatomical exploration about the dispute, will support the understanding of a dispute and produce solutions in the form of identification of potential disputes, a better strategy, negotiation, dispute resolution in a better situation, and avoid the occurrence of a dispute. The development of dispute knowledge can be done through the development of anatomy, in the form of in-depth study of the structure and the mechanism construction of the dispute cases. Research on the anatomy of a construction dispute ever conducted by Pang (2011), focuses on the causes of construction disputes, while the study of anatomical concepts construction dispute thoroughly, including the process of the main three aspects, i.e., (a) causes of construction disputes anatomy, (b) construction dispute process anatomy, and (c) construction dispute resolution anatomy; has not yet been done. It can be seen from Figure 2. Research with object study in Indonesia is rarely done. It showed that dispute knowledge has not been well-developing in Indonesia. It is interesting to do further studies through preliminary studies about the description of construction disputes that occur in Indonesia. The purpose of this research is to get a preliminary picture of the anatomy of construction disputes in Indonesia.

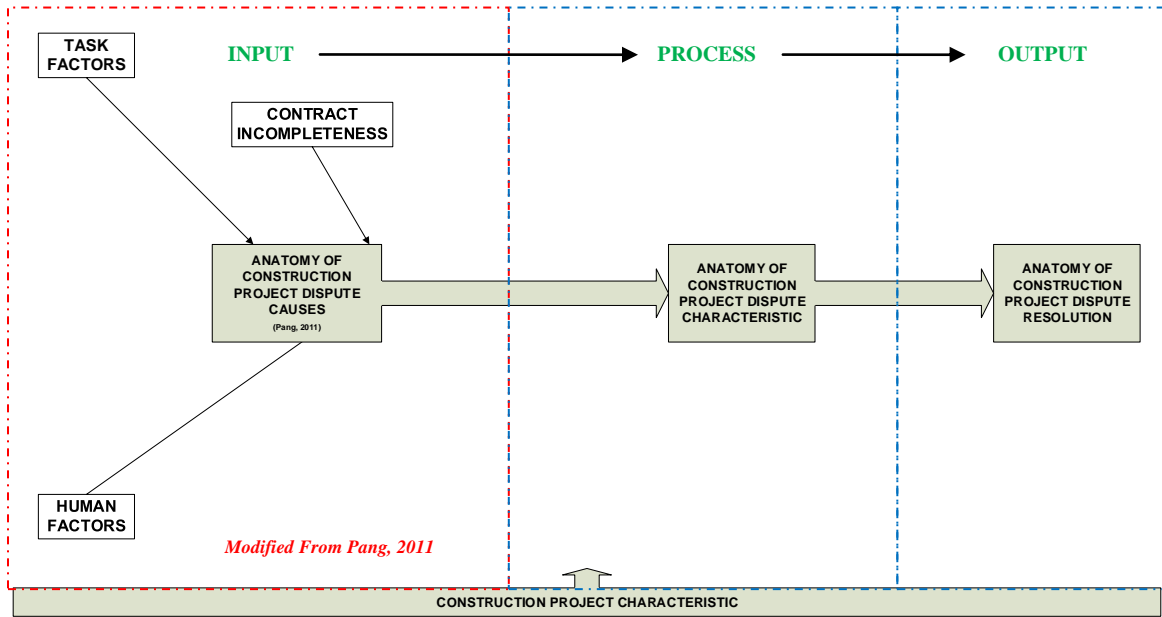


Figure 2. A conceptual description of the anatomy of construction disputes (modified from Pang, 2011).

4 A PRELIMINARY STUDY : THE DEVELOPMENT OF ANATOMY OF CONSTRUCTION DISPUTE IN INDONESIA

A preliminary study of case studies carried out, in order to get a simple overview of the disputes on a construction project in Indonesia. Case studies carried out by doing a search of fourteen cases (nine cases is the decision of the arbitration and five cases is the decision of the Supreme Court). There are fourteen cases were reviewed, including seven cases of building projects, one case of housing/residential building projects, three cases of heavy engineering building construction projects, and three cases of industrial building projects. These fourteen cases reflects different type of cases and their dispute settlement, that occurred in Indonesia. Research will be conducted through a descriptive qualitative study of some cases disputes in construction projects in Indonesia, through the review of documents, and then be prepared to describe the fact of the dispute regarding the phenomenon that occur in industrial construction in Indonesia.

4.1 Findings

The parties involved include disputes of BUMN/local government private parties, local private parties, and foreign private parties. The projects varied between years 1992 until 2010. Implementation time varied starting from 48 (forty eight) days until 1,451 (one thousand four hundred and fifty one) days. Dispute resolution times varied from 35 (thirty five) days until 2,889 (two thousand eight hundred and eighty nine) days. The value of the projects varied from USD. 85.000,- until USD. 16.270.000,-. Claims ranged from USD. 15.000,- until USD. 14.820.000,-. Values obtained ranged from USD. 6.000,- until USD. 13.250.000,-. Dispute resolution is implemented at the level of the negotiations until Supreme Court. The type of contract used Fixed Lump Sump Price and the Unit Price. Payment used Monthly Payment and Contractor's Full Pre Financed.

4.1.1 Cause of construction dispute

The cause of the occurrence of a dispute in cases that are reviewed:

- a. Task Factors : (i) External Factors, consist of (a) natural causes, i.e., weather factor; and (b) interventions, i.e., monetary crisis and the increase of fuel price; (ii) Internal Factors), consist of (a) changes, i.e., acceleration demand, contract termination, work termination, change desain, and change volume; (b) delays, i.e., delays of work; (c) incomplete informations, i.e., delays approval design and delays in work progress report; (d) late/non payment, i.e., delays of payment, payment problem from main contractor to sub contractor, and non payment; (e) defective works, i.e., the use of labor that does not fit the job qualifications, the work is not according to specifications, and low achievement. Internal Factors are causative factors most frequently occurring disputes, where a common pattern is the occurrence of a change of work resulted in jobs being late and the difference in calculation of the volume at the end of the job.
- b. Human Factors : Behavioral Factors, consisting of evation of obligation, i.e., the difference calculation, the difference in the volume of realization of payments with the achievements of the work, and the lack of agreement in adjustment the price.

The result showed the pattern about the cause of construction dispute, that is when there is a change of work, then it will result in delay of work. At the time of the preparation of addendum contracts, there is a difference in perception (e.g., difference calculation volume of work), that will cause problem in payment. These finding is equal to occurring in the Nigeria (Olanrewaju 2014). Unfair behavior of the parties to a construction contract agreement and psychological defense mechanisms have been also identified as likely causes of conflicts in the construction industry (Mitkus 2014).

4.1.2 Comparison of the value of the project, the value of claims, and the value obtained with the parties

Based on the preliminary studies, it can be seen that the highest ratio of comparison between the value obtained with the value of the project, is found in POV Project at Jakarta, because the process of settlement of the dispute protracted until 1,290 (one thousand two hundred ninety) days. The interesting result shown in the second rank of the comparison between the value of the claim with the value granted i.e.,LPG Cilacap Refinery Project, which is valued at USD. 16.270.000,-. The project has a highest value among projects and the parties are local government parties and foreign private parties. The value of claims filed is USD. 14.973.000, or is equal to 90,52% of the contract value and the value granted is USD. 13.250.000,-, or is equal to 78,40% of the contract value, or the value of the% 86,1 registration demands. The study found the correlation between the value of the contract, the fee which is claimed, and the cost which is granted, with the parties to the dispute, where the value of the claim and the value of the granted, which is filed by a foreign contractor, approaches the value of the contract This shows the weakness of the claim and dispute management system of Indonesia. Foreigners bid low at the time of the quote, but at the time of implementation, they sought to make a claim, and bring it to the level of dispute. The offender who committed the strategy referred to as claim artist.

4.1.2 Comparison of implementation time and dispute resolution time

The highest ratio between dispute settlement with implementation time is presented on PP Project at Jatinangor, which amounted to 680.69% (dispute resolution time 6,8x compared to

implementation time). The smallest ratio between dispute settlement with implementation time, is presented on Refinery of LPG Project at Cilacap, which amounted to 8.20% (dispute resolution time 0,08x compared to implementation time). The longest dispute resolution time caused by continuing the process started from arbitration, District Court, and ultimately to the Supreme Court in cassation level. Table 1 shows a diagram of the ratio a comparison between dispute resolution and implementation time.

Table 1. Ratio between dispute resolution time/value.

PROJECT NAME	A	B	C	D	E	F	G	H	I	J	K
A. Ratio : Time Settlement of Dispute / Time of Execution Work	681%	632%	154%	73%	64%	52%	49%	23%	18%	10%	8%
B. Ratio : The Claim / Project Value	66%	n/a	n/a	152%	3%	n/a	114%	27%	n/a	1602%	91%
B. Ratio : Value Granted / Project Value	0%	n/a	n/a	21%	3%	n/a	21%	13%	n/a	317%	78%
D. Dispute Resolution											
Negotiation											√
Mediation											
BANI Negotiation			√		√		√	√	√		
BANI Mediation				√		√	√	√			
Arbitration	√	√		√	√		√			√	√
District Court	√	√									
Supreme Court	√	√									
E. Ownership											
Client	Local Private	Local Private	Local Private	Local Private	Local Private	Local Private	Local Private	Local Governor	Local Private	Local Governor	Local Governor
Contractor	Local Governor	Local Governor	Foreign Private	Local Private	Local Private	Foreign Private	Local Private	Local Governor	Local Private	Local Private	Foreign Private

note :

A = PP Project at Jatinangor

B = Condominium Project at Jakarta

C = Hook Up and Work Modification PGF Project at Java Sea

D = SS II Project Renovation at Jakarta

E = Revitalizing J Market Project at Jakarta

F = WCAB Reclamation Project at Jakarta

G = Plumbing NDD LPG Project at Riau

H = International Airport Project at Lombok

I = BCS Project at Batam

J = POV Project at Jakarta

K = Refinery Project at Cilacap

The shortest dispute resolution time is caused by the attempt of internal negotiation between the parties to the dispute at the early phase of dispute resolution, although in the end, the dispute resolved through arbitration lines. It can be seen that there is a tendency where dispute resolution in construction projects pursued through litigation, the path takes longer compared to the resolution of disputes in construction projects is through the path of arbitration. With the negotiations at the beginning of the dispute resolution process, it will shorten the time of dispute resolution. Besides that, it can be seen that on the highest ratio, a dispute occurred between local private parties with the local government parties, while for the lowest ratio, a dispute occurred between the local government parties with foreign private parties. This shows that foreign private parties, has a better dispute resolution management, where dispute resolution is done early by negotiation, although in the end the dispute settled through the arbitration. The other thing that was found was the existence of an agreement resolving disputes in some cases, where the dispute resolution process occurs through negotiation and mediation at the arbitration level (hybrid arbitration), where the parties to the dispute involving foreign private party. This method of dispute resolution by mediation is not too popular in Indonesia. These findings are equal to the

ones occurring in England and Scotland (Trushell 2016, Gregory-Stevens 2016). This also shows that foreign private party has a better awareness about dispute resolution. When the resolution is done at a lower level, it will bring advantages to all parties to the dispute. The main results of this are that, in addition to litigation being more expensive in money and time than ADR methods (Gill 2016). Diagram of the ratio a comparison between dispute resolution and implementation time/value can be seen in Table 1.

5 CONCLUSION

Based on a review on 14 (fourteen) case of dispute on the construction project then found the existence of a particular pattern relating to the anatomy of a construction dispute : (1) The result showed the pattern about the cause of construction dispute, that is when there is a change of work, then it will result in delay of work. At the time of the preparation of addendum contracts, there is a difference in perception (e.g., difference calculation volume of work), that will cause problem in payment. (2) In addition, it found the correlation between the value of the contract, the fee is claimed, and the cost is granted, with the parties to the dispute, where the value of the claim and the value of the granted, filed by a foreign contractor approaches the value of the contract; and (3) Besides, it is found also the relatedness of time settlement of the dispute and time the construction execution, with a method of settlement of the dispute, where dispute resolution through the litigation, takes longer compared to the resolution through the arbitration.

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