KONTRAK KONSTRUKSI DAN
ALTERNATIF PENYELESAIAN SENGKETA KONSTRUKSI

Kementerian Pekerjaan Umum dan Perumahan Rakyat
Direktorat Jenderal Bina Konstruksi
7 Oktober 2015

Indonesian Centre for Arbitration and Alternative Dispute Resolution for Construction (BADAPSKI)

Federation Internationale des Ingenieurs-Conseils (FIDIC)

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1. Construction Contract
2. Construction Claim
3. Construction Dispute

Federation Internationale des Ingenieurs-Conseils (FIDIC)

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In a judgement by Lord Wensleydale in 1861 said—
“The question is not what the parties to a deed or other documents may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and disregard of which often leads to erroneous conclusions”.

…………………we must also remember in those days it was common place to have employers squeezing main contractors, main contractors squeezing subcontractors and suppliers and so on down the line.

Justice of Supreme Court, Quentin Loh (2014), Singapore
CONSTRUCTION CONTRACT

An agreement between two or more parties creating obligations that are enforceable or otherwise recognisable at law. (Brian Garner et al: Black’s Law Dictionary).

Contract is a legally binding agreement formed when one party accepts an offer made by another and which fulfills the conditions. (Chow, Kok Fong (2006): Construction Contract Dictionary)

Contract is a legally binding agreement. Agreement arises as a result of offer and acceptance, but a number of other requirements must be satisfied for an agreement to be legally binding. (Martin and Law (2006): Oxford Dictionary of Law)

A variety of factors makes a construction contract different from most other types of contracts. These include the length of the project, its complexity, its size and the fact that the price agreed and the amount of work done may change as it proceeds (John Adriaanse (2010): Construction Contract Law)

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Burgerliches Gesetzbuch (German Civil Code-BGB) dan juga Verdingungsordnung fur Bauleistungen (Construction Contract Procedures-VOB), Kontrak konstruksi merupakan suatu kontrak yang khusus yang dikenal sebagai “Werkvertrag”. Perbedaan Werkvertrag dengan kontrak yang lain adalah karena kontrak bukan merupakan perjanjian sederhana yang merupakan pertukaran antara barang dan uang, tetapi pihak penyedia jasa harus memberikan layanan jasa berupa “membuat sesuatu” sesuai dengan yang diperjanjikan dengan kinerja yang akan dinilai sukses atau tidaknya berdasarkan kriteria yang telah disepakati kedua belah pihak sebelumnya. dan pihak pengguna jasa memberi imbalan pembayaran untuk itu.

(Wolfgang Rosener, Gerhard Dorner (2005): An Analysis of International Construction Contracts.)
CONSTRUCTION CONTRACT

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STRAIGHTFORWARD PROJECT

EMPLOYER DESIGN

CONTRACTOR DESIGN

DISCUSS IN DETAIL

Employer’s requirements with the contractor, and negotiate a modified FIDIC Contract

Fixed price - lump sum
Little employer involvement
No major unforeseen risks

Plant and/or high unforeseen risks

Maintenance

No

Yes

No

Yes

No

Yes

No

Yes
CONSTRUCTION CONTRACT

FIDIC Conditions of Contract
for Construction

FIDIC Conditions of Contract
for EPC/Turnkey Projects

FIDIC Conditions of Contract
for Plant and Design Build

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Sub-Clause 14.1 The Contract Price

(a) the Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] and be subject to adjustment in accordance with the Contract.


Sub-Clause 14.1 The Contract Price

(a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract

(Conditions of Contract for Plant Design Build 1999)

Sub-Clause 14.1 The Contract Price

Unless otherwise stated in the Particular Conditions:

(a) payment of the Works shall be made on the basis of the lump sum Contract Price, subject to adjustments in accordance with the Contract;

(Conditions of Contract for EPC/Turnkey Projects -1999)

The above sub-clause shows that the Contract Price in EPC Contract is “fixed contract price”, means that in case there are some works necessary to be done on completing the Work (Constructive Change Order), such cost “shall be added to the contract price” and not “shall be included in the Contract Price” as for the cost of additional work in the Construction Contract.

Indonesian Centre for Arbitration and Alternative Dispute Resolution for Construction (BADAPSKI)
Sub-Clause 14.1
The Contract Price

Unless otherwise stated in the Particular Conditions:
(a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract;
(b) the Contractor shall pay all taxes, duties and fees required to be paid by him under the Contract, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-Clause 13.7 [Adjustments for Changes in Legislation];
(c) any quantities which may be set out in a Schedule are estimated quantities and are not to be taken as the actual and correct quantities of the Works which the Contractor is required to execute; and
(d) any quantities or price data which may be set out in a Schedule shall be used for the purposes stated in the Schedule and may be inapplicable for other purposes.
However, if any part of the Works is to be paid according to quantity supplied or work done, the provisions for measurement and evaluation shall be as stated in the Particular Conditions. The Contract Price shall be determined accordingly, subject to adjustments in accordance with the Contract.
Sub-Clause 2.1
Right of Access to the Site
If the Contractor suffers delay and/or incurs Cost as a result of the Employer withholding access to the Site, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.

Sub-Clause 4.24
Fossils
If the Contractor shall, upon discovery of any Fossils shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.

Sub-Clause 7.4
Testing
If the Contractor suffers delay and/or incurs Cost as a result of the Employer withholding access to the Site, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.

Sub-Clause 8.9
Consequences of Suspension
If the Contractor suffers delay and/or incurs Cost as a result of the Employer withholding access to the Site, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.

Sub-Clause 10.3
Interference with Tests on Completion
If the Contractor suffers delay and/or incurs Cost as a result of the Employer withholding access to the Site, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.

Sub-Clause 13.7
Adjustments for Changes in Legislation
If the Contractor suffers (or will suffer) delay and/or incurs Cost as a result of the Employer withholding access to the Site, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be added to the Contract Price.
CONSTRUCTION CLAIM

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**CONSTRUCTION CLAIM**


Martin and Law (2006) “Claim is a demand for a remedy or ascertain of a right, especially the right to take a particular case to court”.

Gambaran sederhana adalah seseorang yang mempergunakan jasa angkutan udara akan menyerahkan bagasinya kepada perusahaan penerbangan untuk selanjutnya mengklaim kembali bagasinya (baggage claim) pada saat sampai ditempat tujuan penerbangan

CONSTRUCTION CLAIM

Faktor 1.1 Constructive Change Order

Faktor 1.2 Variation Order

Faktor 1.3: Inadequate site investigation

Faktor 2.1 Oral Change Order by Employer

Faktor 2.2 Possession of Site and Availability

Faktor 3.1 Changes in Design

Faktor 3.2 Subsurface conditions of geology

Faktor 3.3 Other Contractors Interference and Delay

Faktor 3.4 Inefficiency and Disruption

Hasil survey 2009

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CONSTRUCTION CLAIM

Figure 02: Causal Factors of Claims and Disputes in HEPP (2014)

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The Latest Development in Civil Engineering (LDCE): a book is to honor the 80th Birthday of Professor Wiratman Wangsadinata
Figure 03: Causal Factors of Claims and Disputes in Road Projects (2014)

Indonesian Centre for Arbitration and Alternative Dispute Resolution for Construction (BADAPSKI)
CONSTRUCTION CLAIM

CONSTRUCTION DISPUTE

CONSTRUCTION DISPUTE

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CONSTRUCTION DISPUTE

Indonesian Centre for Arbitration and Alternative Dispute Resolution for Construction (BADAPSKI)

The Latest Development in Civil Engineering (LDCE): a book to honor the 80th Birthday of Professor Wiratman Wanasadinata

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Chow, Kok Fong (2006): “Construction Contracts Dictionary”. “……….. difference in position over a matter which is submitted for determination by a tribunal. A dispute does crystallise where a party merely requests another party for more information to explain the items featured in a matter or to allow more time for a more careful consideration of the matter”.

Lord Denning MR (1965) “………. a dispute or difference to arise under a construction contract, there must be in the first place be a claim by the contractor. Until that claim is rejected, you cannot say that there is a dispute or difference”.

Ahmad Ali, Kamus Besar Bahasa Indonesia, (Jakarta: Balai Pustaka) Pertentangan atau konflik, konflik berarti adanya oposisi atau pertentangan antara orang orang, kelompok-kelompok, atau organisasi-organisasi terhadap satu obyek permasalahan”.

Based on the questionnaire distributed to 25 Employer Staff, 15 Engineer Staff and 25 Contractor Staff

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CONSTRUCTION DISPUTES

Indonesian Centre for Arbitration and Alternative Dispute Resolution for Construction (BADAPSKI)

LAW No 30 Year 1999 Article 10

FIDIC MDB HARMONISED EDITION 2006

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The Persero Saga

The story begins in February 2006, when PT Perusahaan Gas Negara (Persero) Tbk (PNG), an Indonesian state-owned company, awarded a contract to a joint venture called CRW Joint Operation (CRW) for the design, supply and installation of 196 km of pipeline and optical cable as part of the South Sumatra - West Java Gas Pipeline Project in Indonesia. The contract price was around US$ 35.7 million, and the contract was based on the FIDIC 1999 Red Book conditions including the usual provision for appointment of a DAB.

It is perhaps significant that an experienced three-member DAB (Toshihiko Omoto, Sarwono Hardjomuljadi and Peter Chapman) was duly appointed at the commencement of the project, but was apparently discharged after just three months in order to save cost. A single member DAB was then appointed until two years after the contract, in February 2008, by which time numerous disputes had already arisen between the parties.

By May 2008, the new DAB had already made two decisions in favour of CRW on disputes referred up to that time. One of those decisions, for payment of approximately US$ 5.9 million, was accepted by PNG. The other related to a claim that was withdrawn by CRW after PNG gave notice of dissatisfaction in respect of the DAB’s decision.

Further disputes were then referred to the DAB, and in November 2008 CRW obtained a decision which awarded a sum of over US$ 17 million. PNG promptly responded with a notice of dissatisfaction, and the ensuing six and a half years have seen a protracted legal battle between the parties, with CRW seeing – and PNG strongly resisting – the enforcement of the DAB’s third decision through arbitration and court proceedings in Singapore.

At the end of the battle, in May 2015, CRW has at last secured a judgement from Singapore’s highest court, the Singapore Court of Appeal (SGCA), confirming the validity of an interim arbitration award that had been...
Dispute Boards: East vs. West

Editor's note: This paper was presented at the American College of Construction Lawyers/Canadian College of Construction Lawyers in October of 2012, with the intention of contrasting the status of Dispute Boards in the country of their origin, the USA, and in countries across the Atlantic Ocean, all the way to the Asian cities of Hong Kong and Singapore. In the same vein, there was a parallel intention to speculate regarding the future of Dispute Boards outside the USA.

By Gordon L. Jaynes

Broadly speaking, despite the fact that Dispute Boards in the USA typically make non-binding “Recommendations,” they have a remarkable record of assisting contract parties to avoid further dispute arenas, such as litigation or arbitration. If the Recommendations are not accepted as written, it seems they enable the parties to resume negotiations and settle amicably. This is record which has led to the adoption of Dispute Boards by many government agencies in the USA.

There has been much speculation regarding why comparable success had not been achieved in countries in the East of the USA. Some commentators have suggested that it is the high cost of litigation and arbitration in the USA which accounts for much of the success of Dispute Boards there; however, speaking as an observer of the cost of litigation and arbitration in East of the USA, this suggestion seems to me questionable: litigation and arbitration of construction disputes is not cheap East of the USA.

This paper suggests there are three principal problem areas which are restraining a more successful use of Dispute Boards in the East: in alphabetical order, they are Education, Cost, and Philosophy.

Education: The acceptance of Dispute Boards in the USA has been a gradual process, beginning with a tunneling project in 1975. Gradually, and in large part through the “missionary” efforts of those involved, Dispute Boards that make non-binding Recommendations.

Philosophy:
An Eastern expression comes to mind: When facing a strong wind, one should bend with the wise bamboo. In those circumstance where it is difficult or impossible to establish binding decisions that are effective, let’s try binding decisions that are effective, let’s try

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CASE 1 Silver book,
Contracted USD 10,000 for simple WC type 1 (squatting closet)

Because of health problem, Employer intend to change the WC become type 2.

Employer:
Contractor have to follow up the employer’s request with their own expense, ref Sub Clause 4.12.

Contractor:
Employer have to pay the additional cost ref 1Sub Clause 13.1; 13.3
CASE 2
Construction of jetty based on the design prepared by the contractor with reference to document submitted by the Employer at tender time.

During construction period the Contractor get additional data on the sea water level, which is 20 meter additional length needed to reach the location with the water depth required to allow ship to enter.

Employer:
Contractor have to construct the additional length with their own expense, ref Sub Clause 4.12.

Contractor:
Employer have to pay the additional cost ref 1Sub Clause 13.1; 13.3

Since agreement can not be reached, the Contractor construct the jetty as what their design with the understanding the design made based on the information to tenderer prepared by the Employer,

The Jetty completed but not in function
CASE 3:
Road construction include some bridges which have been designed with the pile foundation. During the construction stage it was found that the length of the pile needed to reach the hard ground is about 25 meter, 10 meter longer than the contractor’s design, which was based on the information given by the Employer as information to tenderer received by the Contractor.

The Contractor is silent and does not submit any claim concerning neither additional length of the piles, nor the inaccurate investigation result from the Employer.

Finally the Contractor submit progress payment, attached with working drawing signed by the Engineer on behalf of the Employer.

Employer:
Wrong conduct: Claim on payment rejected because “design by the contractor and the contract is lumpsum”. Sub-Clause 4.12

Employer:
The correct rejection based on the Yellow Book should be: “The Contractor was not submit the notification of claim in due time as stipulated in the contract”. Clause 20

Contractor:
Confident with their claim, with the understanding that the approval on the working drawings identical with the order or the approval on design change, so it could be considered as variation order. Sub-Clause 13.1 and 13.2

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PENDIRIAN BADAN ARBITRASE DAN ALTERNATIF PENYELESAIAN SENGKETA KONSTRUKSI INDONESIA

Kami yang bertandatangan di bawah ini menyatakan:

DEKLARASI BADAN ARBITRASE DAN ALTERNATIF PENYELESAIAN SENGKETA KONSTRUKSI INDONESIA
Jakarta, 19 Agustus 2014

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