

CHANCE AND DESIRE, THE ROOT OF CONSTRUCTION CLAIMS¹

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ABSTRACT: *In a construction project contract activities, can certainly be differences of opinion over the interpretation of contract clauses that develop into disputes. In the event of any dispute, any party that ultimately wins through the process of arbitration or litigation, the loss will always be in the service user.*

Differences of opinion, where one side feels the contractor services provider must submit a claim to be eligible for doing something or because they feel harmed by the behavior of the service users, all while the service users do not feel obligated to pay because they do not feel or not feel commanded complicate or lead to the existence of barriers to the contractor.

Pre-contract strategy from the service user, which is preparing a general conditions of contract which has been standardized as FIDIC General Conditions of Contract, known as a fair and balanced conditions that can be done to reduce the possibility of filing a claim from the contractor that occurs because of the "opportunity", but the second leading cause of "desire" to get more profits, up to now has not been assessed.

However "lust" This requires special handling, of course, with the development of conscience.

Key words: claims, disputes, conditions of contract, opportunity, desire

ABSTRAK: *Dalam suatu kegiatan kontrak proyek konstruksi, dapat dipastikan akan terjadi perbedaan pendapat atas penafsiran klausula-klausula kontrak yang berkembang menjadi sengketa. Dalam hal terjadi sengketa, pada akhirnya pihak manapun yang menang melalui proses arbitrase atau litigasi, kerugian akan selalu berada di pihak pengguna jasa.*

Perbedaan pendapat, dimana disatu sisi penyedia jasa kontraktor merasa harus mengajukan klaim untuk mendapatkan haknya karena telah mengerjakan sesuatu atau karena merasa dirugikan akibat perilaku pengguna jasa, sebaliknya pihak pengguna jasa merasa tidak wajib membayar karena tidak merasa memerintahkan atau tidak merasa mempersulit atau menyebabkan adanya hambatan bagi pihak kontraktor.

Strategi pra kontrak dari sisi pengguna jasa, yaitu menyiapkan suatu general conditions of contract yang sudah standardized seperti FIDIC General Conditions of Contract yang dikenal sebagai suatu conditions yang fair and balanced dapat dilakukan untuk mengurangi kemungkinan pengajuan klaim dari pihak kontraktor yang terjadi karena adanya "kesempatan", tetapi penyebab kedua yaitu "keinginan" untuk mendapatkan keuntungan lebih, hingga saat ini belum pernah dikaji.

Bagaimanapun juga "keinginan" ini memerlukan penanganan khusus, tentunya dengan pengembangan nurani.

Kata kunci: klaim, sengketa, conditions of contract, kesempatan, keinginan

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1. GENERAL

CONTRACT:

Garner (2004)³: *“Contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”* atau *“a promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law”*.

Martin and Law (2006)⁴: *“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”*.

Chow (2006)⁵: *“Contract is a legally binding agreement formed when one party accepts an offer made by another and which fulfills the conditions”*.

- a. Both parties must have legal capacity to enter into the contract;
- b. The parties must have intended to create legal relations;
- c. It must comply with any legal requirements;
- d. The purpose of the contract must not be illegal;
- e. The terms must be reasonably certain.

Ali et al (1994)⁶: *“Contract is agreement between two parties in the business activities, lending activities etc or agreement with the legal sanction between two or more parties to do or not to do the activities”*.

Tay and Tang (2004)⁷: *“Contract is an agreement which binds the parties concerned”*.

Fulfilling the agreement is also stated in the Holy Quran⁸:

Al Maa'idah QS 5:1 *“O ye who believe! Fulfill (all) obligations.....”*

An Nisaa' QS 4:155: *“(They have incurred divine displeasure), in that they broke their covenant;”*

Al A'raaf QS 7:102 *“Most of them We found not men (true) to their covenant; but most of them We found rebellious and disobedient”*

Al Maa'idah QS 5:1 shows that Al Quran affirms the agreement as something to be fulfilled by the parties. Violation to the agreement is also predicted in Al A'raaf QS 7:102. Any default against the covenant should be imposed by sanction as stated in An Nisaa QS 4:155. In other words, the sanctity of the contract should be appreciated by the parties.

CONSTRUCTION CONTRACT

Garner⁹: *“A contract setting forth the specifications for a building project's construction”*.

Government Regulation of the Republic of Indonesia No 24/2005¹⁰: *“Construction Contract is the agreement between parties on*

³ Bryan A.Garner (2004): *“Black's Law Dictionary”*, Thomson West, hal 341

⁴ Elizabeth A Martin and Jonathan Law (2006): *“Oxford Dictionary of Law”*, Oxford University Press, New York.

⁵ Chow Kok Fong (2006): *“Construction Contracts Dictionary”*, Sweet & Maxwell Asia, Singapore

⁶ Lukman Ali et al (1994): *“Kamus Besar Bahasa Indonesia”* Edisi Kedua, Balai Pustaka, hal 523

⁷ Chaterine Tay Swee Kian and Tang See Chim (2004): *“Contract Law”*, Marshall Cavendish International, hal 19

⁸ Abdullah Yusuf Ali (1997): *The Holy Qur'an*, Saba Islamic Media Sdn.Bhd., Kuala Lumpur.

⁹ Bryan A Garner (2004): *“Black's Law Dictionary”*, Tomson West, hal 343

¹⁰ Peraturan Pemerintah Republik Indonesia No. 24/ 2005: *“Standar Akuntansi Pemerintahan, Akuntansi Konstruksi Dalam Pengerjaan”*, Jakarta, Indonesia

construction of premises or combination which have close dependency one to another or dependent each other in planning, technology and function or main purpose objective.”

John Adriaanse (2007)¹¹: “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”

CLAIM

Garner¹²: “A demand for money, property, or a legal remedy to which one asserts a right”.

Hardjomuljadi et al¹³: “Claim is one’s action demanding something of his right which is lost before and which in his opinion he is entitled to get it back”.

Martin and Law¹⁴: “Claim is a demand for a remedy or ascertain of a right, especially the right to take a particular case to court”..

Government Regulation of the Republic of Indonesia No 24/2005¹⁵: “Claim is a certain amount requested by the contractor to the employer to recover the expenses those are not included in the contract price”.

DISPUTE

Chow, Kok Fong (2006)¹⁶: “...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”.

Kumaraswamy (1997)¹⁷ taken from Collins (1995): disputes developed from conflict; “serious disagreement and argument about something important” dan “a serious difference between two or more beliefs, ideas or interests”.

Disputes may occur due to the different perception on the legitimation and the amount of claim. There is an unhealthy tendency that the contractor enlarges the claim as an effort to overcome the low contract price he offers in order to get the project.

Good faith and fairness as seen in the Holy Quran¹⁸:

Ar Rahmaan QS 55:9 “So establish weight with justice and fall not short in the balance.”

Asy Syu’raa QS 26:181 “Give just measure, and cause no loss (to others by fraud).”

Asy Syu’raa QS 26:182 “ And weigh with scales true and upright.”

Asy Syu’raa QS 26:183 “ And withhold not things justly due to men, nor do evil in the land, working mischief.”

2. CONSTRUCTION CLAIM

¹¹ John Adriaanse (2007): “Construction Contract Law”

¹² Garner, Bryan A (2004): “Black’s Law Dictionary”, Thomson West, hal 264

¹³ Hardjomuljadi, Sarwono; Abdulkadir, Ariono; Takei, Masaru (2006): “Strategi Klaim Konstruksi Berdasarkan FIDIC Conditions of Contract”, Pola Grade, Jakarta

¹⁴ Martin, Elizabeth A and Law, Jonathan (2006): “Oxford Dictionary of Law”, Oxford University Press, New York

¹⁵ Peraturan Pemerintah Republik Indonesia No. 24/ 2005: “Standar Akuntansi Pemerintahan, Akuntansi Konstruksi Dalam Pengerjaan”, Jakarta, Indonesia

¹⁶ Chow, Kok Fong (2006): “Construction Contracts Dictionary”, hal 116

¹⁷ Kumaraswamy, Mohan (1997): “Conflict, claims and disputes in construction”, Blacwell Science, hal 96

¹⁸ Abdullah Yusuf Ali (1997): *The Holy Qur’an*, Saba Islamic Media Sdn.Bhd., Kuala Lumpur

2.1 GENERAL

When globalization reaches all business sectors, the competition in the construction industry sector will become harder since there will come many foreign competitors with higher technical and contractual capability compared with Indonesian contractors and consultants.

Why this happens? There are some causal factors, one of them is the lack of big projects using international standard in its technical requirements and contractual requirements as well. Handicap in English language especially contractual English mostly used in the international contracts is one of the problems to overcome.

In handling international contract which involves three parties i.e. the employer, the engineer and the contractor, claims developed into disputes are due to negligence, carelessness and lack of contractual ability among the parties in the construction service.

The increasing in contract price is due to the design changes causing the changes in volume of work and completion time also because of claim submission from the contractor. Additional Contract Price could be classified into three groups, i.e. variation order, price adjustment with price escalation formulae and claim.

Abdurrasyid¹⁹ said that more than half of arbitration cases in Badan Arbitrase Nasional Indonesia (BANI) are construction cases.

Why construction claims and disputes occurred?

Construction claims occur due to two things, first is the “desire” and second is the “chance”.

Contractor’s desire to get the fairness in avoiding the loss and contractor’s effort to get bigger profit are human.

Desire: is something comes from individual’s inner and cannot be organised from outside.

Al A’raaf QS 7:176 “If it had been Our Will. We should have elevated him with Our Signs; but he inclined to the earth, and followed his own vain desires.....”

Al Kahfi QS 18:28 “.....; and let not thine eyes pass beyond them, seeking the pomp and glitter of his life; nor obey any whose heart We have permitted to neglect the remembrance of Us, one who follows his own desire, whose case has gone beyond all bounds”.

Chance: is an opportunity to get something and actually depends on the existing system. Chance may motivate somebody who has no intention before but will use it by its presence.

In the course of a construction contract, some occurrence which may affect and potentially become the construction claims could be classified as follows:

Contract : contractual problems due to different interpretation, ambiguity clauses, etc.

Event or circumstance: something occurred due to physical construction, performance, natural condition, etc.

The writer will now discuss “what” as the dominant causal factor of construction claims and disputes and will then try to make deeper observation on “why”.

¹⁹ Abdurrasyid, Priyatna (2008): “*Seminar Breakthrough of Solution*”, Departemen Pekerjaan Umum-Lembaga Pengembangan Jasa Konstruksi -Asosiasi Kontraktor Indonesia, 19 November 2008.

The occurrence of contractor's claims which then developed into disputes are caused by simple or complex factors. Many occurrences become dominant causal factors of claims and disputes in the construction business.

High frequency problems are related to different interpretation of the contract, either technically or contractually. It can be classified into, first is the event or circumstance creating disruption to the execution of the work, second is the capability of the parties in handling contractual problems especially the general conditions of contract, third is the attitude of the parties which includes credibility, integrity and professionalism.

It should be understood that the contractor has to invest his resources, especially his financial resources to complete the work and that is why the contractor always makes his best effort to recover his investment before or at the completion of the work.

The consultant and the employer usually pay attention only on the budgeting as far as the time, volume, quality and cost are still within the range of the available budget. They agree the payment of contractor's claim as far as it is required and the budget is available.

From the contractor's point of view, the aim in submitting the claims is merely the effort to protect the contractor's profit and not for any other reasons as what Takei²⁰ said that a contractor cannot be considered as mastering a good project management including how to maintain the profit or minimize the loss if he does not know how to submit his claims.

Hardjomuljadi et al (2006)²¹, there are two types of construction claims i.e:

a. **Contractual claims** are the construction claims where the contractor is specifically or clearly entitled for payment by reimbursement and have a legal basis as stated in the contract, for example claims based on:

- FIDIC General Conditions of Contract 2nd Edition and 3rd Edition Clause 12 Adverse Physical Condition
- FIDIC General Conditions of Contract 4th Edition Clause 12.2 Not Foreseeable Physical Obstruction or Condition
- FIDIC General Conditions of Contract MDB Harmonised Edition Clause 4.12 Unforeseeable Physical Condition

This type of claim is **claimable** and **reimbursable**

b. **Non Contractual Claims** are the construction claims those settlements are not specifically stated in the contract, for example claim due to the changes in foreign exchange. The synonym is **Ex-Gratia Claim** or construction claims those are merely settled by the employer's good will.

This type of claim is **claimable** but **not always reimbursable**.

Construction claims can be submitted by both parties either the contractor and the employer, but only the contractor's claims to be discussed later considering the more significant frequency, number and effect.

²⁰ Takei, Masaru (2004): "*The Principles of Construction Claims Under International Contracts*", Takei International Inc., Tokyo.

²¹ Hardjomuljadi, Sarwono; Abdulkadir, Ariono; Takei, Masaru (2006): "*Strategi Klaim Konstruksi Berdasarkan FIDIC Conditions of Contract*", Pola Grade, Jakarta

2.2. SEQUENCES IN CONSTRUCTION CLAIMS SUBMISSION

The correct sequences in construction claims submission according to Kululanga²² (2001) are as follows:

A. IDENTIFICATION

The identification of construction claims includes the timely and accurate detection of claims and this is the most important stage of construction claims process. Easton²³ said that some potential and priceless construction claims vanished due to the mistakes in the identification process. It means that the sensitivity to the causal factors has the important role besides the particular skill requirement. It is not enough by just sharpening the sense of sensitivity of the construction manager but the contract management and administration need to be structured

B. NOTIFICATION

The notification of construction claim is a notification that claim is going to be submitted and includes the notice to the employer that there there is a potential problem. Time constraint in claim submission is a determinant. Sawyer²⁴ (1990) said, the typical condition of contract such as "notice on the potential claim shall be submitted as early as possible and not more than 28 days" is to be fulfilled first before the substance of claim is considered by the claimed party.

The first notice shall be brief, clear, simple, in good manner and cooperative. It describes the problems and notifies other party the potential additional time and cost.

C. EVALUATION

The evaluation includes the seeking of legal and contract basis as the ground of the claim submission. The evaluation shall include the estimation on the amount of potential claims and this may require investigation by interviewing the project site staffs. The main source may come from the minutes of meeting, project archives, videos, memos, etc as the supporting data of time and cost elements of the claims.

D. DOCUMENTATION

Documentation of construction claims is a compilation of facts that shows the chronology of construction claims. The claimed party will easily break a claim which is not supported by the accurate records or usually called the contemporary record²⁵. Documentation includes the records of occurrences, minutes of meetings and other supporting records as the base of the claim submission. Once it is found and proven that there is inaccuracy in part of the claim, the accuracy of the whole claim will be doubted.

E. PRESENTATION

Construction claim shall be presented in a reasonable, organised and factual manner. So, a claim shall be submitted in a clear form and extends that a condition of contract has been broken. A contractor shall then point out that a loss has been suffered due to the employer's

²² Kululanga, G.K (2001): "Construction Contractors Claim Process Framework", Journal of Constuction Engineering and Management, July 2001, hal 309-313

²³ Easton, G.R (1989) : "Construction Claims", Department of Civil Engineering, Loughborough University,UK

²⁴ Sawyer, J.G and Gillot, C.A (1990): "The FIDIC Digest: Contractual relationship responsibilities and claims the fourth edition of FIDIC Conditions".Thomas Telford, London,UK

²⁵ FIDIC (2006): "General Conditions of Contract MDB Harmonised Edition", FIDIC, Switzerland

action. Corbett²⁶ (1991) proposed to separate the presentation into two sections, i.e. the right and the amount. The first section shall describe the legal and factual basis whereas the latter shall describe the estimation of claim amount, in case that the claim is accepted.

2.3 PHYSICAL CAUSAL FACTORS OF CONSTRUCTION CLAIM

According to Barrie dan Paulson (1992)²⁷, additional cost to the construct price occurs if there are changes in scope of works, either formal change (ordered by the engineer) or variation order (proposed by the engineer or the employer). Variation order is a document signed by both parties bound in a contract as the compensation to the contractor due to changes, additional works, delays or other circumstances those have impacts to the cost and completion time.

Barrie and Paulson (1992), besides variation order, there is also constructive change order, a change that is not instructed but required to complete the work or part of the work, for example if the employer insists the contractor to complete the work or part of the work in accordance to the date stated in the contract, the contractor is entitled to take into account all efforts required to complete the work considering that the employer's request cannot be fulfilled if only relies on the resources scheduled in the contract and more over the contractor will be entitled for an extension of time.

Barrie and Paulson (1992), *Formal Change* atau *Variation Order* issued by the Engineer are related to²⁸:

- delay in access to the site

- delay in furnishing approved construction drawings
- delay in furnishing owner-furnished items
- defect in plans or specifications including error and omission
- major design changes
- many minor design changes
- scope additions
- scope deletions
- schedule improvement directives
- accelerations directive
- suspension of Works
- interference by owner or his designated representative
- nonperformance by owner
- termination of contract
- conflicting contract clauses
- slow or inadequate response to submittal and request for information

Barrie and Paulson (1992)²⁹, claims could be divided in 4 categories:

- design and specification changes and addition
- change site conditions
- delay claim
- accelerations, impact and effect, and ripple effect of above delays and changes

Related to these changes, Barnard (2005)³⁰ said, "*Constructive changes may arise from many of the causes, including differing site conditions, deficient and defective contract specifications, defective inspection, misinterpretation of the contract, constructive acceleration*". Constructive changes occurred due to many causal factors, i.e. differing site conditions, incomplete and inaccurate contract specification, over inspection, contract

²⁶ Corbett, E.C (1991): "*FIDIC 4th : A Practical Legal Guide*", Sweet & Maxwell, London, UK

²⁷ Barrie, Donald S & Paulson, Boyd C; "*Professional Construction Management*", McGraw Hill, hal 453

²⁸ Ibid, hal 453

²⁹ Barrie, Donald S & Paulson, Boyd C; "*Professional Construction Management*", McGraw Hill, hal 454

³⁰ Barnard, Philip D. (2005): "*Staking Your Claim: Effective Claim Resolution*", AACE International Transaction, hal CDR.02.3

misinterpretation and constructive acceleration.

Hanvey (2005)³¹: *"One of the most common issues impacting construction projects is inadequate or incomplete design documents."*

Arditi and Patel (1989)³²: *"Most of the typical claims are caused by factors differing site conditions"*.

Fisk (2003)³³: *"Differing site conditions is the one of the most misunderstood of all contract provisions, and the one that is frequently the cause of large contractor claims for additional work and change orders"*.

Changes caused by such condition was also supported by Barrie and Paulson (1992)³⁴ *"Changed conditions occur when the actual physical conditions or other jobsite condition prove different from those foreseeable from the plans and specifications"*.

The terminology of unforeseeable physical conditions³⁵, latent conditions³⁶ atau adverse physical conditions³⁷ are interesting issues to discuss. The capability to interpret the contract and the knowledge on civil engineering working method are required. This decision may consequently raise a lengthy argument.

Shapiro (2004)³⁸: *"The major project risk that we are all too familiar include the following: cost escalations, time for completion and delays, change the scope, geotechnical and site related problems, negligence both in design and construction"*. These are the most frequent project risks, i.e. cost escalation, completion time and delay, changing scope of works, geotechnical problems and related site problems, design mistakes and improper workmanship.

Corbett (1991)³⁹: *"The Engineer may be reluctant to grant time or costs for such good fortune but if the Contractor had to bring to site different equipment to replace the rock blasting arrangements he had prepared, these may nevertheless be a claim"*. In Corbett's opinion, different site conditions can not be used as the ground of a claim. It can be used as the ground of a claim if it affects the contractor's effort in conducting the work or there must be special countermeasures to cope with the different site conditions, for example by changing of the equipment and/or changing the working method.

From the literatures and surveys, the writer tries to classify the causal factors of construction claim and disputes:

According to Bu-Bshait (1990)⁴⁰, typical causal factors of contractor's construction claim are:

- *poor project planning*
- *scope changes*
- *constructive change orders*

³¹ Hanvey, Christopher L (2005): *"Design Documents and Design-Related Claims"*, paper presented at Lorman Seminar

³² Arditi, David & Patel, Bhupendra K (1989): *"Project Management"*, Butterworth & Co (Publishers) Ltd, Vol 7 No 3, hal 142.

³³ Edward R Fisk (2003): *"Construction Project Administration"*, Prentice Hall

³⁴ Barrie, Donald S & Paulson, Boyd C. (1992) *"Professional Construction Management"*, McGraw Hill, hal 453.

³⁵ FIDIC (2006): *"General Conditions of Contract for Construction"*, MDB Harmonised Edition

³⁶ Standard Australia (1997 amended 2005): *"General Conditions of Contract"*, AS-4000 Edition

³⁷ Building and Construction Authority, Singapore (2006): *"Public Sector Standard Conditions of Contract for Construction Works"*, PSSCOC-2006

³⁸ Shapiro, Bryan (2004): *"Construction Claims and Contracting Strategies"*, a paper presented at Saphiro Hankinson & Knutson Project Management Wisdom Joint Seminar, Vancouver

³⁹ Corbett, E.C.(1991); *"FIDIC 4th, A Practical Legal Guide"*, Sweet & Maxwell, hal 121

⁴⁰ Bu-Bshait, Khaled & Manzanera, Ignacio (1990): *"Claim Management"*, Butterworth-Heinemann Ltd, hal 222.

- *errors and omission*
- *acceleration and expediting*
- *work suspension and stoppages*
- *site access or availability*
- *other contractor's interference and delays*
- *strikes and Act of God*
- *low bidders*

Typical causal factors of employer's construction claims to the contractor are:

- *materials out of specification*
- *defective work*
- *property damage*
- *Contractor's late completion*

Kumaraswamy (1997)⁴¹, based on his survey, described the big ten of causal factors raising disputes:

- variations due to site conditions
- variations due to client changes
- variations due to design errors
- unforeseen ground conditions
- ambiguities in contract documents
- variations due to external events
- interference with utility lines
- exceptional inclement weather
- delayed site possession
- delayed design information

Based on his survey and the event or circumstance, the classification of construction claims and disputes were:

- inaccurate design information
- inadequate design information
- inadequate site investigations
- slow client response/ decision
- poor communications
- unrealistic time targets
- inadequate contract administration

- uncontrollable external events
- incomplete tender information
- unclear risk allocation

Zaneldin (2006)⁴², based on his survey in the United Arab Emirates, discovered that the typical contractor's construction claims and disputes were:

- changes claims
- extra works claim
- delay claims
- different site conditions claims
- accelerations claims
- contract ambiguity claims

Zaneldin discovered the dominant causal factors of claims:

- change or variation orders
- delay caused by owner
- oral change orders by owner
- delay in payment by owner
- low price of contract due to high competition
- changes in material and labor costs
- owner personality
- variations in quantity
- subcontracting problems
- delayed caused by contractor

Arditi (1989)⁴³ stated that the most frequent construction claims were due to:

- differing site conditions
- change orders
- delays
- impact and ripple effects of delays
- inspection problems

⁴¹ Kumaraswamy, Mohan M (1997): "*Conflicts, claims and disputes in construction*", Blackwell Science Ltd, hal 95-111

⁴² Zaneldin, Essam K (2006): "*Construction claims in United Arab Emirates: Types, Causes and Frequency*", Elsevier Ltd, hal 453-459

⁴³ Arditi, David and Patel, Bhupendra K (1989) : "*Expert system for claim management in construction projects*", Butterworth & Co Ltd, hal 141-146

- owner furnished items
- difference in the interpretation of plans and specifications
- unfulfilled duties
- accelerations
- inefficiency and disruption

Wideman (2005)⁴⁴ stated that construction claims could be classified as follows:

- changed conditions claims
- additional works claims
- delays claims
- contract time claims

Based on the survey by Sudirman (2006)⁴⁵, the major events causing construction claims are:

- unforeseen subsurface conditions of geology
- unforeseen subsurface conditions of ground water
- third parties delays
- poor site management and supervision
- low speed of decision making involving all project teams
- delayed site access

Claims categorized by Barrie dan Paulson⁴⁶ were as follows:

- design and specification changes and additions
- changed site conditions
- delay claims
- acceleration, impact and effect, and ripple effect of above delays and changes

According to Barrie dan Paulson (1992), the main causal factors of claims were:

- delay in access to the site
- delay on furnishing approved for construction design drawings or clarifications
- delay in furnishing owner furnished items
- defect in plans or specifications including errors and omissions
- major design changes
- scope additions or deletions
- accelerations directives
- unforeseen changed and physical site underground or other conditions
- regulatory agency change
- change in the Law

Different opinions between the contractor and the employer were classified by Fisk⁴⁷ as follows:

- owner caused delays in the work
- owner ordered scheduling changes
- constructive changes
- differing site conditions
- unusually severe weather conditions
- acceleration of the work; loss of productivity
- suspension of the work; termination
- failure to agree on change order pricing
- conflicts in plans and specifications
- miscellaneous problems

In general, construction claims were classified by Fisk (2003) as follows:

- differing site conditions
- errors and omission in plans and specs
- changes instituted by regulatory agencies

⁴⁴ Wideman, R.Max (2005): *"Project Cost Control: The Way it Works"*, AEW Services, Vancouver

⁴⁵ Sudirman, Weddy Bernadi (2006): *"Project Risk Management in Hydropower Plant Projects: A Case Study from State-owned Electricity Company – PT PLN (Persero)"*, Indonesia

⁴⁶ Barrie, Donald S and Paulson Boyd C (1992): *"Professional Construction Management"*, McGraw Hill Inc, New York, hal 449 - 459

⁴⁷ Fisk Edward K (2003) : *"Construction Project Administration"*, Prentice Hall, New Jersey, hal 515 - 533

- design changes
- overrun/underrun in quantities beyond the limits
- factors affecting time of completion

There were two types of claim settlement, first was the group who adopted amicable settlement by issuing formal variation order and paid the contractor and second was the group who settled the claims through more formal way, i.e. mediation or even litigation where the agreed amount was then paid and classified as claims.

Why claims which usually ended as disputes should be avoided by both parties? Bieniawski (1984)⁴⁸ said, *".....large claims and litigation in many countries which has brought both the owners and contractors to the point where nobody gains and everybody loses".* .

Priyatna Abdurasyid (2002)⁴⁹: *"claims and disputes are two words those are often heard recently in the business of construction service in Indonesia, "..... related to a countable amount or an amount of several rupiahs up to huge amount"*.

Chow, Kok Fong (2006)⁵⁰: *"Dispute is 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)⁵¹: *".....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 can not say that there is a dispute or difference"*.

From the literature study carried out by the writer, an interesting issue that has not ever been discussed or observed was that the tailor made General Conditions of Contract was prepared to protect the employer's interest but finally caused a lengthy construction claims and disputes.

The tailor made General Conditions of Contract was often used and in a glance sided to the employer by the presence of the "unilateral" clauses. The tailor made contract is actually less fair and balanced, in smaller scale, the negative impact is the tiresome process from arbitration to litigation due to claims and disputes those raised and required big efforts.

In larger scale, the negative impact is the weakening of national construction industry by the unfairness of the tailor made contract to the national contractors. The weakened national contractors will affect their financial performance in fulfilling their banking obligation. On the other side, international contractors work for international projects financed by international loan and based on standardized fair and balanced international contract. This situation should be coped with the issuance of a national standardized contract and if this is not possible at the moment, there should be a regulation to force the use of a fair and balanced and internationally recognized standardized contract. In this paper it is suggested that the contract clauses is developed before signing as a pre-contract strategy to minimize the potential claims becoming disputes.

2.4 NON-PHYSICAL CAUSAL FACTORS OF CONSTRUCTION CLAIM

⁴⁸ Bieniawski, Z.T. (1984): *"Rock Mechanic Design in Mining and Tunneling"*, A.A.Balkema, hal 45

⁴⁹ H. Priyatna Abdurasyid (2002): *"Arbitrase & Alternatif Penyelesaian Sengketa"*, hal 5

⁵⁰ Chow, Kok Fong (2006): *"Construction Contracts Dictionary"*, hal 116

⁵¹ Chow, Kok Fong (2006): *"Construction Contracts Dictionary"*, hal 117

The contractor's desire as the non-physical causal factor is difficult to handle whatever the effort is.

Al Ma'idah QS 5:13 *"But because of their breach of their covenant. We cursed them, and made their heart grows hard; they change the words from their (right) places and forget a good part of the message that was sent them, nor wilt thou cease to find them-barring a few-ever bent on (new) deceits: but forgive them, and overlook (their misdeeds): for God loveth those who are kind"*.

Al Baqarah QS 2:16 *"These are they who are bartered Guidance for error: but their traffic is profitless, and they have lost true direction"*.

Ali Imran QS 3:77 *"As for those who sell the faith they owe to God and their own plighted word for a small price, they shall have no portion in the Hereafter: nor will God (deign to) speak to them or look at them on the day of Judgment, nor will He cleanse them (of sin): they shall have a grievous penalty"*.

Even though reminded by the above verses, the desire to get something easily draws the abandonment of fairness, whereas the Hadits stated that if two people fought with swords, both the winner and loser would be thrown into hell.

The need and desire to get everything with minimum effort and the spirit to always become the winner as well can not be rectified. It should be realized that the construction claim and disputes will always exist even though tactics and strategy to become the winner are developed to more sophisticated way.

The best way to minimize the bad desire is by reminding people that everything comes from God Almighty and that everything in this world

happens only by His will, no matter how sophisticated the tactics and strategy are.

The An Najm verses below should be used as a guidance to improve human's awareness.

An Najm QS 53:24 *"Nay, shall man have (just) anything he hankers after?"*

An Najm QS 53:39 *"That man can have nothing but what he strives for";*

An Najm QS 53:41 *"Then will he be rewarded with a reward complete";*

3. CONCLUSION

Root of the claim causal factors is the chance and desire those have been existed since the beginning of the world.

People always desire to become a winner in any aspect of live, no matter there is a hadits of Rasulullah saying that if two people were fighting with sword and one of them was killed, the spirit of the killed (the loser) as well as the killer (the winner) will go to the hell. Why? Rasulullah said that because both the killed and the killer had a desire to kill each other.

In the implementation of a construction contract, the best thing is that each party should not hunt for other party's mistake but cooperate in completing the work without harming other party.

As a conclusion, a fair and balanced conditions of contract is really a must in developing the construction industry in Indonesia.

Refer to Al Baqarah QS 2:188 *"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property."*

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