

Construction Dispute Resolution in Indonesia

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Abstract

Construction projects involve many parties from different background and interests (e.g. owner, engineer, supplier, consultant, and contractor), thus, conflicts or disputes among the involved parties are common to happen during planning and construction stages. The aim of this paper is to study the practice of construction dispute resolution in Indonesia. A thorough literature review of construction dispute resolution and open ended interviews with 40 participants (i.e. 20 contractors, 10 owners, and 10 neutral parties) were conducted. The most frequently disputes are identified in 4 aspects (i.e. technical, administration, legal, and combination of technical, administration, and legal aspects). In addition, the preferable construction dispute resolutions are discussed based on each dispute perspective. This article concludes that (i) the most frequent disputes occurrence in Indonesia are caused by technical aspects, (ii) negotiation is chosen as the most preferable construction dispute resolution in Indonesia, and (iii) there are four main priorities in construction dispute resolution in Indonesia (Preservation of Relationship, Confidentiality, Neutrality, and Enforceability).

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1. Introduction

Construction projects involve cooperation between owner, consultants, engineers, and contractors. When a construction contract is signed and implemented. There is a chance for disputes or disagreements due to the difference in construction interpretation as well as due to other physical and non-physical at the time of planning and construction of the project (Malak, et. al. 2002). Although disagreement in construction is inevitable, the disagreement should not be ignored. Instead, they should be anticipated in the early construction by accommodating all involved parties. Otherwise, the disagreement will get worsen into disputes and diminish the construction performance as a whole. The aim of this paper is to study the practice of construction dispute resolution in Indonesia. The next section discusses the dispute in construction, followed by construction dispute resolution method, and the law and regulation in Indonesia.

2. Disputes in Construction

2.1. Definition of Disputes

The dispute is a conflict or disagreement between the parties who will be or are having a relationship or partnership (Pribadi, 2003). A dispute is a disagreement that is limited, in most cases can still be solved through the help of a third party as an independent expert, an evaluator or someone could give a professional explanation about the substances (e.g. independent expert, appraiser, and certifier). Dispute can be classified into three (Shahab,1996): 1). Disagreement/ Difference; 2). Argument/ Dispute; 3. Fight

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2.2 Critical Factors of Disputes in Construction

One of the main problems in construction implementation in Indonesia is construction dispute between users of the construction services and the contractor as the construction service provider. The disputes in construction are often happened due to the nature of construction contracts i.e. dynamic and unique.

The factors that set the construction contract apart: the duration of the project is relatively long, complex, as well as the size and the fact that the agreed price and the amount of work carried out is subject to change at any time during the execution of the contract construction. Mitropoulos and Howell (2001) explains that there are basically three root causes of disputes in construction projects, namely: (1) The presence of a factor of uncertainty in every construction project; (2) Problems associated with the construction contract Problems associated with the construction contract; (3) Opportunistic behavior of the parties involved in a construction project.

Ideal conditions for implementing construction is when all the components of the construction contract with a detailed service users are clearly covered in the agreement, the General conditions of the contract, the specific terms of the contract, technical specifications, plans, drawings and a list of the quantity (if any). Construction implementation usually assumes that all the information in the contract in accordance with the actual condition, however, the condition of the known projects during their implementation often does not correspond to that assumption. The discrepancies (e.g. difference on the underground conditions) can inflate project implementation costs, including payments to managing construction, depending on the agreement which has been set in the contract (Soekirno, et al 2007). Several researchers have gathered type of disputes and categorize them into several groups. For instances, Shahab (1996) classify the disputes into four aspects: 1) Technical Aspect; 2) Administration Aspect; 3) Legal Aspect; and 4) Combination of three aspects. Soekirno et al., (2007) group the potential causes of disputes in construction into 3 categories: 1) Technical aspect; 2) Cost aspect; 3) Time aspect.

Meanwhile, among all factors in construction disputes, Ho and Liu (2004) argued that claims are the primary source of problems in the construction industry. Numerous project participants also consider construction claim is one of the most disruptive and unpleasant events of a project.

3. Construction Dispute Resolution

3.1 Dispute Resolution Approaches

In order to solve the problem in construction, the participants are required to have the ability to cooperate and “can do” attitude. So that, the project team can establish an effective dispute settlement mechanism. Then in this case requires (Mitropoulos & Howell, 2001): 1) problem-solving and negotiation skills; 2) Process and policy that pays attention to quality in determining decisions rapidly within the project, and the enhancement of the quick decisions that cannot be resolved in the field. Groton (1997) identify the five different dispute resolution approach, such as:

1. *Forcing*: use one viewpoint alone in the most potential of all parts of the other.
2. *Smoothing*: emphasize the equality over the difference toward the dispute.
3. *Withdrawal*: retreat from reality or potential dispute consensually and withdraw from a situation of dispute.
4. *Compromise*: consider the variety of problems that arise, do the bargaining, and looking for a solution by trying to bring a degree of satisfaction in a dispute.
5. *Problem-solving*: look at the dispute as a problem to be solved than to consider the dispute as a battle to be won in order to achieve customer satisfaction along with a relationship and way out towards the dispute.

Approaches to dispute resolution, when it is linked to the level of both sides activity, it will affect the results that will be achieved, as illustrated in Fig.1. (Abdurrasyid, 2005). The more active in the cooperation process, the higher possibility of both parties to get an amicable settlement. Another thing that both parties should be aware of the cost of selecting construction dispute resolution in order to prevent further cost overrun (Mitropoulos & Howel, 2001).

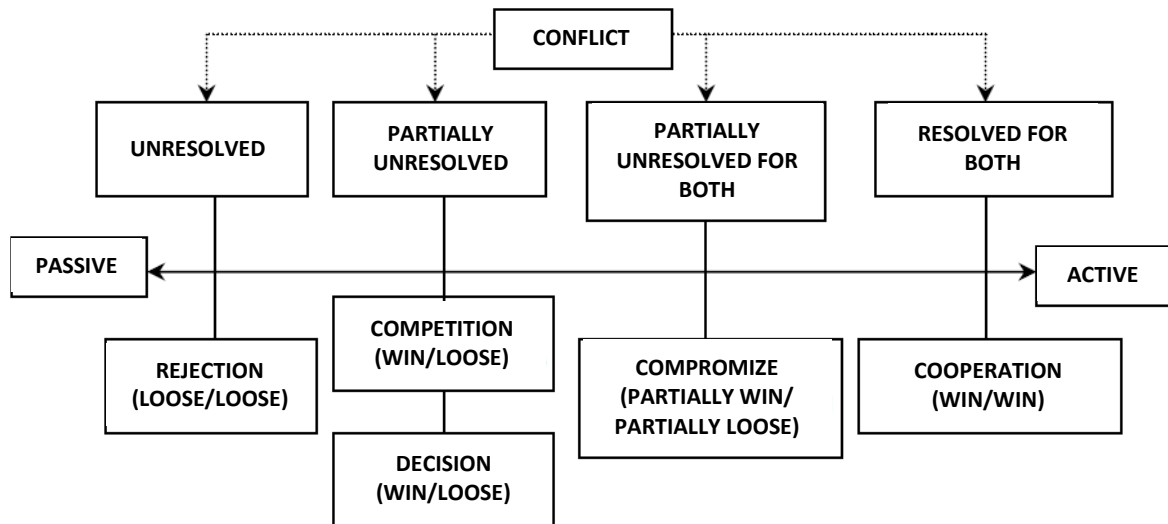


Fig. 1. Approaches to Dispute Resolution

3.2 Construction Dispute Resolution in Indonesia

Construction dispute resolution in Indonesia is regulated with a current and valid legislation, Law No. 18 of 1999 about construction services, and Law No. 30 of 1999 regarding arbitration and alternative dispute resolution. More Law and regulation related to construction dispute resolution can be seen in Table 1. The dispute resolution procedure is divided into two options, namely, through the law, or through alternative dispute resolution/out of Court (extra judicial). Dispute resolution matters discussed in Construction Law No. 18 of 1999 Article 36(1): “Construction dispute resolution can be reached through the Court or outside the Court based on voluntary choice of the parties to the dispute.”

Table 1. Law and Regulation on Construction

No.	Regulations on Construction	Title
1	Instructions of The President of Republic of Indonesia No. 1 of 2015	About the Acceleration of the Implementation of Government Procurement of Goods/Services
2	Instructions of The President of Republic of Indonesia No 54 of 2010	About the Implementation of Government Procurement of Goods/Services
3	Presidential Regulation No 4 of 2015	About the Fourth Change Over Presidential Regulation No 54 of 2010 on the Implementation of Government Procurement of Goods/Services
4	Presidential Regulation No 192 of 2014	About Agency for Financial Supervision and Development
5	Regulation Indonesian Construction Service Development Institution No 10 of 2013	About Registration of Construction Services Business
6	Regulation of the Government of Republic of Indonesia No 29 of 2000	About the Organization of Construction Services
7	Law No 30 of 1999	About Arbitration and Alternative Dispute Resolution
8	Law No 18 of 1999	About Construction Services

Soekirno, et al (2007) summarized construction dispute resolution framework in Indonesia based on general dispute resolution method (see Tabel 2). There are several ways of resolving disputes out of court, namely consulting, arbitration, negotiation, mediation, conciliation or expert judgement. Arbitration and alternative dispute resolution proved to be effective in resolving disputes in general and construction dispute in particular. According to Regulation of the Gov. of Indonesia No 29/2000, Article 52, the settlement is final and binding on the methods of negotiation and mediation. In general construction dispute resolution outside of the country, the decision was a result of negotiation and mediation is not binding (non-binding), but more in the form of informal efforts of the parties to the dispute in resolving the problem with the help of a third party which is considered neutral and is able to help equalize the opinions of both sides to the problem of the disputed claims.

However, an efficient and effective construction dispute resolution is still been formulated by Board of arbitration and alternative dispute resolution Construction Indonesia “*Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia*” (BADAPSKI). Dispute board is one of the construction dispute resolution, which is introduced by the Board of International Federation of Consulting Engineers FIDIC or for the resolution of disputes by a third party with the expectation of an impartial parties to the dispute. The Dispute Board not only acts as the decision maker of the dispute, but also give final decision and the recommendations (Hardjomuljadi, 2015).

Table 2. Comparison of construction dispute resolution framework (Soekirno, et al 2007)

General			Law and regulations in Indonesia		
Dispute Resolution Method		Remark	Dispute Resolution Method	Remark	Institutional/ Individual/ Certification
Litigation	Court	Long time, high costs, are known to the public, the win-lose	Litigation for Criminal and Private Case (Law No. 18/1999 (Article 36 and 37))	Long time, high costs, are known to the public, the win-lose	The District Court, High Court, Supreme Court
Arbitration	Alternative Dispute Resolution	Binding	Arbitration for Private Case (Law No. 30/1999)	The decision is final and binding	The Institute of arbitration (BANI), or Ad Hoc Arbitration
Mini trial		Not binding. Issues reviewed by the competent persons in the field of construction	Conciliation for Private Case Regulation of the Gov. of Indonesia No 29/2000 (Article 52)	The decision is final and binding	Conciliator drafts and formulates the settlement solution to the parties, has a certificate of expertise, and can be assisted by expert appraisers.
Mediation		Cannot resolve a complex problem. Not binding, short-time, low cost	Mediation (Private Case) Regulation of the Gov. of Indonesia No 29/2000 (Article 52)	The decision is final and binding	The mediator as facilitator (only guide, set up meetings and reach an agreement), has a certificate of expertise, can be assisted by expert appraisers.
Partnering		The parties are in a team			
Dispute Review Board		Formed in the early construction. Problems can be resolved from the beginning	Dispute Board (New Law over Law No. 18/1999 about Construction Services)	Formed in the early construction. Problems can be resolved from the beginning	BADAPSKI (Board of Arbitration and Alternative Dispute Resolution Construction Indonesia)
Negotiation	Internal without third party	At the beginning of disputes, directly between the parties, the principle of consultation and consensus.			

4. Research Methodology

A thorough literature review of construction dispute resolution and open ended interviews with 40 participants (i.e. 20 contractors, 10 owners, and 10 neutral parties) were conducted. The study of literature is needed to learn about the use of alternative dispute resolution in construction projects. The study of literature in research is needed to learn about the use of alternative dispute resolution in construction projects tailored to factor – dispute resolution factors and types – types of disputes that occur on a construction project. The study of literature was created as the basis for the creation of a questionnaire. Nine teen factors of construction dispute resolution have been identified from literature review. The study of literature was created as the basis for the creation of a list of interview.

Although open ended interviews were undertaken, some parts of the responses from the participants can be quantified. In the list of interview section 3, participants were asked to indicate the intensity of the occurrence of a dispute and of dispute resolution that is most appropriate to use in resolving disputes with intensity scale (1 to 5) that is of a scale never happens until it happens all the time. This section use semi structure questionnaire to find out the types of disputes that often happen and the resolution of disputes that is often used on construction projects in Surabaya

Descriptive and frequency analyses were employed to find the information from the respondents. These analyses were used to find out the number of voters for each answer and can also show the tendency of respondents to the things asked.

5. Research Findings and Discussion

The group of respondents from contractors consist of the company's Chairman, head of project, project manager, technical director, executing, site manager and operations manager. For the respondent owner consists of City Government, construction manager, project manager, general manager, staff architect, and the Division of engineering. The last but not the least, the respondents of neutral consist of arbitrators, mediators, and judges. The mean graph of dispute resolution factors of each party is shown at Fig. 2.

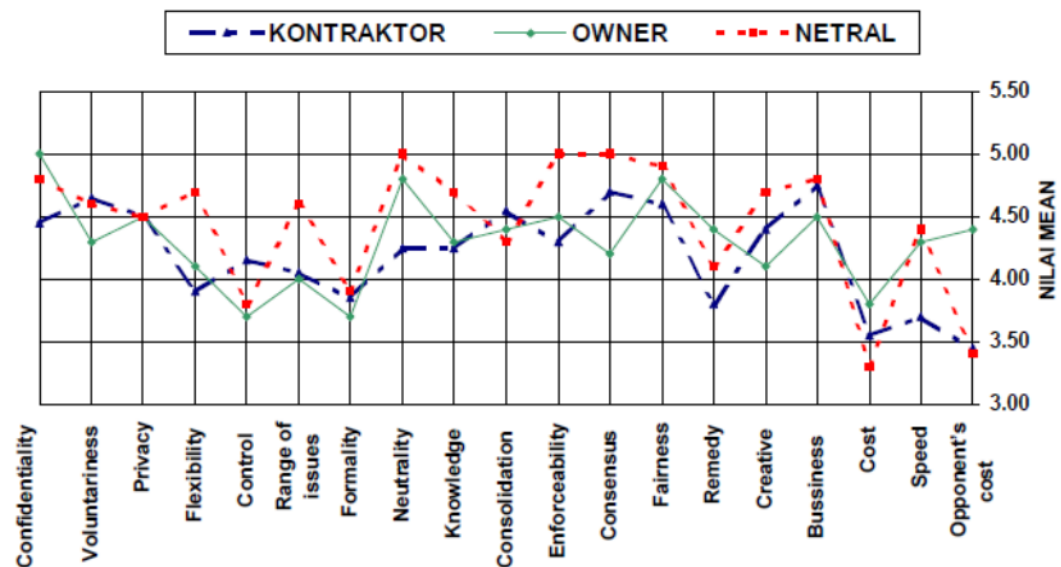


Fig. 2. The Mean graph of dispute resolution factors of each party

The data is analyzed to find out the response from the participants in general about the the most frequently disputes in Surabaya – Indonesia. The highest score of mean value is technical aspect. Nevertheless, Neutral party thought that the most frequent disputes should be from combination aspect (legal, administrative, and technical aspects) as it is an accumulation of problems typically begin in terms of administration but due to technicals problems triggered by the dispute then became inevitable.

The responses of respondents neutral is also corroborated by Shahab (1996), he stated that generally there is no dispute that a purely technical issue or problem administratif or problem. All aspects have always mixed altogether with different weight. Table 3 shows the list of ranking factors of dispute resolution for overall respondents. Group of contractors selects “Preservation of relationship” as the highest factor in construction dispute resolution. While Neutral party choose three factors with the same score of 5 i.e. “Neutrality”, “Enforceability” and “Consensus Agreement”. And Owner group thinks “Confidentiality” is prominent in construction dispute resolution.

Table. 3. List of ranking factors dispute resolution for overall respondents (Contractor, Owner, Neutral Party)

Nilai Mean						
R	Kontraktor		Pihak Netral		Owner	
1	Presevation of relationship	4.75	Neutrality	5.00	Confidentiality	5.00
2	Consensus agreement	4.70	Enforceability	5.00	Neutrality	4.80
3	Voluntariness	4.65	Consensus agreement	5.00	Fairness	4.80
4	Fairness	4.60	Fairness	4.90	Privacy	4.50
5	Consolidation	4.55	Confidentiality	4.80	Enforceability	4.50
6	Privacy	4.50	Presevation of relationship	4.80	Presevation of relationship	4.50
7	Confidentiality	4.45	Flexibility	4.70	Consolidation	4.40
8	Creative agreement	4.40	Knowledge of construction	4.70	Width of remedy	4.40
9	Enforceability	4.30	Creative agreement	4.70	Liabilities to opponent's cost	4.40
10	Knowledge of construction	4.25	Voluntariness	4.60	Voluntariness	4.30
11	Neutrality	4.25	Range of issue	4.60	Knowledge of construction	4.30
12	Control by parties	4.15	Privacy	4.50	Speed to obtain	4.30
13	Range of issue	4.05	Speed to obtain	4.40	Consensus agreement	4.20
14	Flexibility	3.90	Consolidation	4.30	Flexibility	4.10
15	Formality	3.85	Width of remedy	4.10	Creative agreement	4.10
16	Width of remedy	3.80	Formality	3.90	Range of issue	4.00
17	Speed to obtain	3.70	Control by parties	3.80	Cost to obtain	3.80
18	Cost to obtain	3.55	Liabilities to opponent's cost	3.40	Control by parties	3.70
19	Liabilities to opponent's cost	3.45	Cost to obtain	3.30	Formality	3.70

5.1. Preservation of relationship

All contractors are working hard to maintain good business relations which is one of the important elements in any organization. Good relationships are always based on trust, common interest, respect and attempt to keep the commitments of each Party (Cheung et al, 2002). This findings are also supported by some contractors, namely as follows:

- “For the sake of the continuity of projects and good relationship with each party, maintenance business relationships is very important during the process of dispute resolution” (Ronyanto, 2005).
- “The contractor is always the weakest party, therefore good relations with the owner of the project should always be well kept” (Heri, 2005) .

To maintain good relations (preservation of business relationship) in the process of dispute resolution, then the following is a summary of suggestions from some respondents:

1. Strive not to use arbitration and court: many cases have shown that breaking up good relations occur when disputes occur are resolved in line with the average of the arbitration and the courts.
2. Strive not to do confrontation: preservation of business relationship means nothing, if each party does not have the will to compromise, or if they are saddled with the emotional sense. In order to get a win/win situation, both sides must learn to focus on the principal issues and not assume with a feeling of emotion.

3. Behave rationally: it would be easy to think rationally when accompanied by a neutral third party, a person who should always try to avoid a confrontation which heats up during the process of dispute resolution.

5.2. Neutrality

During the process of dispute resolution, neutral party must be independent and should facilitate each party to conduct a thorough completion and should strive to put aside personal interests. Several neutral parties provide their opinion as follows:

- *“Neutrality of third party is very important in the process of construction dispute resolution. It helps the neutral party to solve the disputes professionally”* (Sugeng, 2005).
- *“Mediator should act neutral in handling two disputed customer. Neutrality can build trust on both sides against mediators in bridging to resolve the dispute.”* (Utoyo, 2005)

To obtain a neutral third party in the dispute resolution process on a construction project, then:

1. In the process of problem solving, it is required to select of neutral third parties who meet the selection based on past track record, experience, and professional/academic background.
2. Give the mandate to a neutral party in the form of a written statement had been signed neutral which reads "I, signed below, accept to act fair and impartial one party, and announced that I have no personal interests against the dispute happened".

5.3. Enforceability

In practice, dispute resolution without commitment or goodwill by each individu is impossible. Each dispute is unique, therefore, neutral party has to prepare to create solutions that can be accepted by all parties (competency influences the enforceability of the decision). The recommendation of the respondents as follow:

- *“Enforceability is a power that bind all parties to follow all the agreement that have been made”. The execution power guarantees construction dispute resolution as a whole (final)”*. (Wardono, 2005)
- *“The law enforcement in Indonesia is still weak, thus, enforceability is very important for neutral part in handling the dispute”*. (Mochtar, 2005)

If the enforceability is linked to the Alternative Dispute Resolution (ADR), then there is unlawful ADR practice in Indonesia for the sake of getting the enforceability strategy. In the past, unlawful ADR was practiced and ever growing in the society. Since construction disputes are categorized in civil cases (tort, disagreement, claim, etc), police cannot investigate the construction disputes if there is no criminal case such as accident, riot, robbery, etc. (Sadjijono, 2005). Law 18 of 1999 Article 36(2): “Resolution of disputes outside of the Court referred to in subsection (1) does not apply to criminal acts in implementing construction work as set forth in the book of the law of criminal law. Fig. 3. Shows the flowchart about the Scheme of Unlawful Alternative Dispute Resolution.

5.4. Consensus Agreement

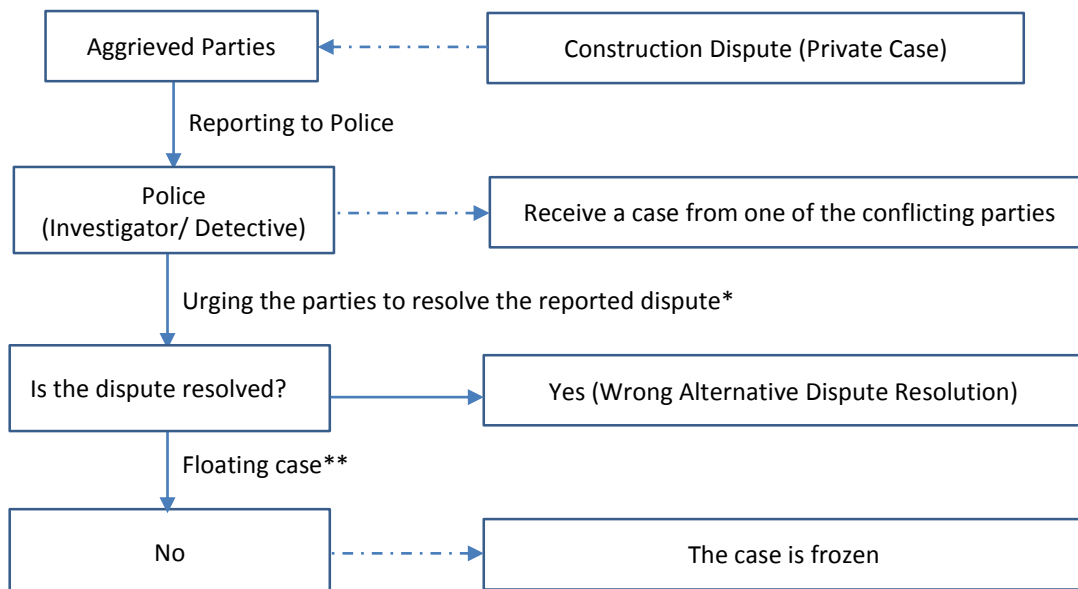
Without the willingness of each party to commit the dispute resolution process, it will be difficult even impossible to get an amicable settlement. Neutral party must ensure that the dispute resolution process is not affected by the hostilities. The neutral parties ensure that the parties should be aware of the interests of each party and should act as facilitators rather than as adjudicator (decision maker in legal case) (Cheung et al, 2002).

The response of the respondents as follow:

- “Mutual agreement in resolving disputes is essential for the sake of dispute resolution to your satisfaction. In the absence of mutual agreement in the final verdict, it is very difficult to mitigate the dispute, although one of the parties still feel less satisfied against the final award.” (Istining, 2005)
- “As for the factors that distinguish is, the Court set out the method of contradiction (adversarial), so that the conflicting parties fight each other until the strongest one will win. While arbitration emphasis on good faith, non-confrontational, and more cooperative” (Suparman, 2004).

In order to gain consensus agreement at the end of construction dispute resolution, then:

1. Neutral party must ensure that the dispute resolution process is not affected by the hostilities.
2. The neutral parties ensure that both parties should be mindful of the interests of each party.
3. A neutral party should act as facilitators rather than as adjudicator (decision maker in legal case).
4. Each party must have the will to accelerate the completion/good faith in dispute resolution.



Notes:

* The police are only entitled to prosecute criminal cases only

**The counterparty know that the police are not supposed handling any private case

Fig. 3. The Scheme of Unlawful Alternative Dispute Resolution

5.5. Confidentiality

Developer/developer/owner contended that the confidentiality is a very important factor because these factors are at the core of the mutual agreement to maintain confidentiality during the process of dispute resolution (Cheung, et al 2002). The responses from the respondents as follow:

- “The agreement for mutual confidentiality is very important because for the sake of maintaining the good name of each party during the dispute resolution process.” (Kasiamal, 2005)

- *“In this case the owner wasn't too concerned with business relationships with contractors, because in the event of a dispute, the owner will use the other contractors in the next project.”* (Sudjarwo, 2005)

Confidentiality can also be a factor preventing the existence of third parties taking advantage of the dispute happening between the two sides. One of them is by keeping the information among themselves about activities during the project progress. (for example, do not send mail to the other party without informing both parties concerned before the set time).

Recommendation from the Owner regarding Confidentiality:

To specify the constraints of confidentiality which must be agreed upon each of the parties in the dispute resolution process (confidentiality), then:

1. House rules (rules) were made in secret with the communication between the parties, and a neutral third party should be prepared as a start in the process of resolving disputes in alternatives.
2. A neutral party is obliged to warn the two sides to keep holding fast to house rule (rules) during the dispute resolution process.

8. Conclusion

The most frequently disputes are identified in 4 aspects (i.e. technical, administration, legal, and combination of technical, administration, and legal aspects). In addition, the preferable construction dispute resolutions are discussed based on each dispute perspective. This article concludes that (i) the most frequent disputes occurrence in Indonesia are caused by technical aspects, (ii) negotiation is chosen as the most preferable construction dispute resolution in Indonesia, and (iii) there are four main priorities in construction dispute resolution in Indonesia (Preservation of Relationship, Confidentiality, Neutrality, and Enforceability).

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