

LEGAL CERTAINTY OF THE DISPUTE BOARD AS A METHOD OF DISPUTE RESOLUTION FOR CONSTRUCTION WORK CONTRACTS IN INDONESIA

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Abstract

The research carried out is juridical-normative legal research on the emergence of new legal rules or norms for emergence of method of “**Dispute Board**” as a method for dispute resolution in construction work contracts based on in Law Number 2 of 2017 regarding Construction Services. From the study it was concluded that Dispute Board as one of Alternative Dispute Resolution (ADR) can replace mediation and conciliation with the main role/function for dispute avoidance because it must be appointed at the beginning of the contract and provides a dispute decision if a dispute has occurred. In terms of legal certainty, with the regulation of the Dispute Boards in the Indonesian Laws and Regulations, the Dispute Boards process in construction projects now has a legal certainty and protection. However, it still has several weaknesses including the uncertainty of interpretation (multi-interpretation), regulatory conflicts, incomplete provisions, and inconsistency of provisions.

Key Words

Dispute Board, Construction Work Contract, FIDIC, DAAB.

INTRODUCTION

In Law Number 2 of 2017 concerning Construction Services in Article 88 paragraph (6) of the regulation regarding the stages of dispute resolution, a new term "Dispute Council" is created as the preferred method of dispute resolution for construction work contracts which had never previously been raised in the Construction Services Act which (Law No. 18/1999) as well as in Law No. 30/1999 which generally regulates Alternative Dispute Resolution (“APS”) methods in Indonesia.

The term Dispute Council, was first discovered as a translation of the term Dispute Adjudication Board (DAB) in the Indonesian translation book of the construction work contract standards issued by the Federation International Des Ingenieurs Conseils/FIDIC (hereinafter referred to as "FIDIC Construction Contracts"), namely the Standard Contract Construction of the FIDIC Multilateral Development Bank (MDB) Harmonized 2010 edition, which is one version of the construction work contract model that is often used in Indonesia for projects sourced from foreign loans. Several other FIDIC Construction Contract standards are also widely used in construction projects in Indonesia, both in the Government, BUMN, National and Foreign Private sectors. This first edition has been updated with the second edition of the 2017 FIDIC Rainbow Series Second Edition standard (hereinafter referred to as “2017 FIDIC Construction Contract”) issued by FIDIC in the same year as Law Number 2 Year 2017 concerning Construction Services.

So before the enactment of Law Number 2 of 2017 concerning Construction Services which contains the Dispute Board method, the Dispute Adjudication Board/DAB method (which is the source of the adaptation of the Dispute Council term) based on the use of the FIDIC Construction Contract, actually there have been construction projects using it for a long time. Indonesia, where there have also been several studies that examine some of the results of these studies have also become material for the author's thoughts in conducting this research. Some of these studies were carried out prior to the existence of a more detailed arrangement on this Dispute Board based on a Government Regulation which became the implementing regulation of Law Number 2 of 2017 concerning Construction Services. Therefore, it becomes interesting to conduct a more in-depth juridical study of this Dispute Council after all the regulations are published by the Government.

RESEARCH METHOD

The research carried out by the author is a juridical-normative legal research whose data sources come from legal norms contained in laws and regulations, as well as legal norms that exist in society. The Dispute Council as a construction work contract dispute resolution method is reviewed in a normative juridical manner which focuses on the Statute approach, comparative and conceptual approach (comparative and conceptual approach) with the Federation International Des Ingenieurs Conseils/FIDIC Construction Contract standards. The study refers to the theory of contract law, alternative dispute resolution theory and legal certainty theory to examine the regulation of the use

of the Dispute Board.

RESULTS AND DISCUSSION

1. Construction Work Contracts and Stages of Dispute Resolution of Construction Work Contracts

The contract is a form of agreement between the parties to bind themselves with the aim of achieving a mutually understood goal. The main source of the contract is consensus, which in Indonesian law refers to Article 1338 paragraph (1) of the Civil Code (hereinafter referred to as the "KUHPerdata").

Meanwhile, according to Salim (2003), what is meant by contract law is "the whole of the legal rules governing legal relations between two or more parties based on an agreement to cause legal consequences. Contract Law in Indonesia is still based on regulations that were originally drafted by the Dutch colonial government which was translated in Book III of the Civil Code which according to R. Subekti (1985) is basically based on an open system, namely the parties are free to make contracts with anyone, agree on terms and conditions. the conditions, the method of implementation, including the form of the contract. as long as it does not violate the legal terms of the contract. Moeljatno (2008) explained that based on Article 1320 of the Civil Code, the conditions for a legally valid contract are: a. There is an agreement of both parties; b. The subject must be competent to perform legal actions; c. The existence of the object of the agreement (achievement) to be realized; and D. There are reasons that are lawful and do not conflict with the law. Furthermore, Salim (2003) summarizes that Contract Law includes 5 main principles that must be applied in making contracts, which are the basis of contract law theory, namely: (i) Freedom of contract; (ii) Consensualism; (iii) Pacta sunt servanda; (iv) good faith; and (v) Personality.

So based on the Civil Code as the main law that regulates civil relations in Indonesia, the substance and form of the agreement can adjust to the interests of the parties as long as it does not violate prohibited things. Therefore, the context of the choice of dispute resolution can also be adjusted to the agreement and needs of the parties. In this context, the Civil Code also provides freedom for construction industry players to be able to choose the form and substance of the construction work contract, including the choice of dispute resolution method that is considered suitable for this industry.

Construction work contracts in Indonesia must comply with the applicable laws and regulations specifically regarding Construction Services, namely Law Number 2 of 2017 concerning Construction Services and Government Regulation Government Regulation Number 22 of 2020 in conjunction with Number 14 of 2021 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services. In the Act Article 1 paragraph (8) is defined that: "*Construction Work Contract is the entire contract document that regulates the legal relationship between service users and service providers/contractors in the implementation of construction services.*"

Contracts related to construction have different characteristics from contracts in general due to the length of implementation time, complexity, project scale and fluctuating prices due to various factors (John Adriaanse, 2010). This specificity also occurs in terms of not only the exchange of goods or services, but also there are many criteria that can determine the achievements and outcomes of the contract agreed upon by the parties (Rosener and Domer, 2005). According to Pena-Mora, Sosa and McCone (2003) construction work contracts for the implementation of construction services are very complex, multidisciplinary and involve many parties. with the peculiarities of construction projects that none of the construction projects are exactly the same as each other, it is easy for disputes to arise in construction.

This is what makes construction work contracts require special arrangements, including dispute resolution methods in order to protect existing stakeholders and in accordance with the specifics of implementation and development of the industry. As stated by James P. Groton and Stanley P. Sklar (2015) in the history of its development the construction service industry uses private dispute resolution which takes longer than other industries.

Likewise in Indonesia, with the enactment of Law Number 2 of 2017 concerning Construction Services, in order to achieve the power of accelerating infrastructure development with the potential to experience disputes, disputes or legal problems, the Government encourages the settlement of construction work contract disputes with alternative pathways without going through a trial, namely referring to in Article 88 paragraph (4) of Law Number 2 of 2017 concerning Construction Services which regulates the stages of efforts to resolve disputes over construction work contracts through alternative dispute resolution routes, starting from mediation, conciliation and arbitration.

The use of the word "and" should be interpreted as a dispute resolution mechanism in stages rather than being used as an alternative option. So it can be interpreted that the settlement of construction work contract disputes must be carried out according to the stages stipulated in Article 88

paragraph (4). It is not allowed to jump to the next stage if the initial stage has not been carried out and also if there is an agreement and settlement at one stage then it is not continued at the next stage.

Furthermore, in Article 88 paragraph (5) of Law Number 2 of 2017 concerning Construction Services which states that in addition to the mediation and conciliation stages, the parties can form a Dispute Council. From this provision it can be interpreted that the Dispute Board is equivalent to mediation and conciliation efforts and can simplify the stages of the dispute resolution process in order to achieve faster results by combining these 2 stages, although it is not stated expressly *verbis*.

Furthermore, the use of the Dispute Council is regulated in more detail in Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services which defines the Dispute Council as an individual or team formed based on the agreement of the parties, since the beginning of the implementation of the Construction work contract for prevent and resolve disputes. Article 93 paragraph (4) of this Government Regulation stipulates that the Dispute Council as such has a function as an effort to prevent as well as settle construction disputes.

The term Dispute Board is a translation of the term DAB which is used specifically for Construction Contracts. FIDIC is a form of Dispute Board (DB) which has been widely used internationally as APS in the construction industry. Specifically for DAB in FIDIC Construction Contracts, Gwyn Owen and Brian Totterdill (2008) explain that DAB is a forum created from the start of the project to avoid disputes by resolving them first if there are controversies between the parties that may arise during the contract period. Then if a dispute cannot be avoided, the DAB is tasked with regulating the dispute trial process and issuing its decision. Another opinion about the DAB in the FIDIC Construction Contract from Mark Goodrich (2016) who concludes from the opinions of scholars and their arrangements in the FIDIC Construction Contract that the DAB is a forum consisting of between one and three impartial and independent professionals appointed by the contracted party for the duration of the contract. construction to adjudicate disputes or resolve any controversies to avoid further disputes.

2. Comparison of the Dispute Board Concept Based on the FIDIC Construction Contract with Indonesian Legislation

In Indonesia, there is no standard construction work contract which contains detailed arrangements/articles related to the Dispute Council. So that the FIDIC Construction Contract standard which contains details of the Dispute Board arrangement is used as the basis for a concept that is compared to analyze the role and legal certainty aspects of the Dispute Board based on the Indonesian Laws and Regulations, namely:

- a. Law Number 2 Year 2017 concerning Construction Services, Chapter XI Dispute Resolution, Article 88 paragraph (5)-(7);
- b. Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services: Article 1, and Part Seven Paragraph 3: Articles 91-96; and
- c. Public Works and Public Housing Regulation Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council.

For the analysis of this research, the study material is the Rainbow Series Standard Contract Suite, the 2nd edition of 2017 (2017 FIDIC Construction Contract) which uses the concept of establishing a Standing DB under the name Dispute Avoidance/Adjudication Board (DAAB). in its three standard contract books. This selection is because the 2017 FIDIC Construction Contract with Standing DB was issued in the same year as the inclusion of the Dispute Council rules in Law Number 2 of 2017 concerning Construction Services.

The discussion on the comparison of Standing DAB with the Dispute Board setting in the Laws and Regulations, among others, became the focus of the author based on the formulation of the problem determined, namely: arrangements related to the appointment and establishment of the DAAB, the implementation of avoidance and dispute resolution by the DAAB, as well as the implementation of the DAAB decision, which obtained several differences. main as follows:

- a. Compared to the arrangement in the 2017 FIDIC Construction Contract, which clearly stipulates the period of formation of the DAAB at the beginning of the contract, which is 28 days from the binding of the construction contract. The Legislation does not contain the duration which has the potential to cause multiple interpretations regarding the certainty of the time for the formation of the Dispute Council.
- b. In the 2017 FIDIC Construction Contract, the principle of appointing each DAAB member must be based on the unanimous agreement of the parties, while in the Public Works and Public Housing Regulation Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council there is no mechanism that each party can reject the candidate's proposal from the other party so that it can be interpreted implicitly that he must agree to it. This

has the potential to assume that the candidate chosen by one party is placed as the representative of the party who nominated him.

- c. The vacuum of setting the mechanism for the appointment/formation of the Dispute Board in the event that the parties fail to agree on it, while this is clearly regulated in the 2017 FIDIC Construction Contract where the appointment is left to the FIDIC President and the nature of the appointment is binding on the parties.
- d. The 2017 FIDIC Construction Contract stipulates that the nature of the DAAB decision is a provisional binding decision which must be implemented first by the parties regardless of any objections to the decision. While in Indonesia the nature of the decision of the Dispute Board is final and binding on the condition that there is no objection/rejection from the disputing parties to the decision.
- e. The 2017 FIDIC Construction Contract stipulates that in the event of failure to implement the DAAB's decision, the other party may refer this failure to be enforced/implemented directly to arbitration, without having to request further DAAB decisions or attempt a resolution by deliberation again. Meanwhile, if based on the laws and regulations in Indonesia, the failure to implement the Dispute Board's decision can mean that a dispute resolution cannot be obtained so that the parties must take the next stage, namely through the arbitration process. However, there is no firm provision for submitting to arbitration whether to re-examine the dispute or just to enforce the implementation of the Dispute Board's decision as stipulated in the 2017 FIDIC Construction Contract.

3. The Role of the Dispute Board in the Settlement of Disputes on Construction Work Contracts

In principle, APS processes such as mediation and conciliation as regulated in Law Number 2 of 2017 concerning Construction Services and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution compared to the Dispute Board process have the same characteristics, especially the intervention of other independent parties, who are not part of the disputing parties and are impartial to the disputing parties as Rachmadi Usman (2012) argued about mediation.

Based on Law Number 30 of 1999 concerning Arbitration and Alternative APS Dispute Resolution, which are regulated therein, including mediation and conciliation which are also mentioned as stages of dispute resolution for construction work contracts in Law Number 2 of 2017 concerning Construction Services, the process is established and the process begins after the dispute it happened.

Meanwhile, the Dispute Council was formed from the beginning of the implementation of the construction work contract to prevent and resolve disputes, as can be understood from the Elucidation of Article 88 paragraph (5) of Law Number 2 of 2017 concerning Construction Services as well as from the definition of the Dispute Council mentioned in Article 1 point 30 in Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services.

More details regarding the tasks of the Dispute Council are regulated in Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services Article 94 paragraphs (1) and (3) that the Dispute Council has the authority to prevent and resolve disputes arising after the parties agree use the Dispute Board in the Construction Services engagement clause and make a tripartite Dispute Board agreement, with at least the following tasks: a. prevent disputes between the parties; b. resolve disputes through the provision of professional considerations of certain aspects as needed; or c. resolve disputes through the formulation of formal conclusions as outlined in the decision of the Dispute Board.

So, when compared to the mediation process with the implementation of the Dispute Board, the role and function of the Dispute Board is wider and more active with its function in preventing disputes from occurring from the start of the contract and during the project implementation and its authority in giving decisions on disputes that are final and binding on the parties. does not exist in the mediation process because the mediator only acts as an advisor. Likewise, unlike the conciliator who is only authorized to provide recommendations and decisions on disputes are still taken by the parties, the Dispute Council has the authority to make decisions that can be final and binding on the parties, as stated in Government Regulation Number 22 of 2020 concerning Regulations Implementing Laws Number 2 of 2017 concerning Construction Services Article 95 paragraph (2).

The difference between the Dispute Board compared to the arbitration process is mainly in its formation which is formed based on the agreement of the parties since the beginning of the binding of Construction Services. So that the role of preventing and mediating disputes that occur in the implementation of construction work contracts is also different from arbitration. The process of submitting and reviewing the facts of the dispute while it is still under construction in the Dispute Council process is the advantage of the Dispute Council which is expected that the Indonesian construction industry can resolve problems quickly and accurately so as to ensure the continuity and completion of the project is not hampered. The Dispute Council also has the duty and authority to issue

decisions on disputes as arbitrators issue decisions in arbitration proceedings. However, on the decision of the Dispute Council, the disputing parties may reject the substance of the decision of the Dispute Council, or it can be said that the nature of the decision is not completely final and binding on the parties. This is also a difference when compared to arbitration decisions which are legally regulated to be final, binding and have permanent legal force. Meanwhile, the decision of the Dispute Board is not legally binding because its refusal is possible and must then be processed to the arbitration stage to obtain a final decision.

From the comparative study between mediation, conciliation and arbitration with the Dispute Board above, it can be concluded that the role of the Dispute Board as one of the APS in construction work contract disputes can in principle replace the stages of mediation and conciliation as stipulated in Article 88 paragraph (5) of the Law. Law Number 2 of 2017 concerning Construction Services because there are several characteristics of the process and the same objectives, including involving an independent party who has a function as an intermediary and providing recommendations with a flexible and confidential process (cannot be disclosed to the public) based on theory APS according to Ralf Dahrendorf (1958) and Suyud Margono (2000) is consensus or cooperative. The difference is that the Dispute Council has a special role and function which is concluded from the definition provided for in the laws and regulations in Indonesia that the Dispute Council is formed based on the agreement of the parties from the beginning of the binding of the construction work contract to prevent and resolve disputes that occur during the implementation of the construction work contract as well as to play a role in providing a dispute resolution decision that can bind the parties as long as there is no objection from one of the parties or the parties. However, the dispute resolution decision issued by the Dispute Council does not have permanent legal force and does not have executive power such as an arbitration award because one of the parties or the parties can file an objection and reject the decision.

In the event that the Dispute Board is chosen as the stage of dispute resolution as an alternative to the mediation and conciliation stage, it is based on the agreement (consensus) of the parties so that its use must be included in the provisions of the construction work contract. This is in accordance with the theory of contract law, namely the freedom of contract as stated in Article 1338 paragraph (1) of the Civil Code, which basically provides freedom for the parties to determine the content and form of the agreement in accordance with applicable law as long as it does not violate the legal terms of the contract.

4. Legal Assurance of the Dispute Board on the Settlement of Disputes on Construction Work Contracts

With the inclusion of the Dispute Council as one of the dispute resolution options in the implementation of construction work contracts through Law Number 2 of 2017 concerning Construction Services and all its implementing rules, it refers to the theory of legal certainty according to Hans Kelsen and Utrecht. the law on the use of the Dispute Board (including the use of DAB/DAAB under the FIDIC Construction Contract) in the settlement of construction work contract disputes in Indonesia.

Legal certainty on decisions issued by the Dispute Council has also been regulated based on Government Regulation Number 22 of 2020 Article 95 paragraph (2) which is final and binding on the parties as long as there is no objection from either party or the parties within 28 (twenty) days. eight) days after the decision is issued. This arrangement is in line with the principle of Pacta Sunt Servanda which is also the embodiment of Article 1338 paragraph (1) of the Civil Code, namely a construction contract agreement that contains a dispute resolution process through the Dispute Council, the parties give jurisdiction to the Dispute Council to determine a decision on the dispute between them and therefore the decision as long as there are no objections must be recognized as final and binding on the parties, which acts as law for those who make it.

However, if examined from the limitations of the definition of legal certainty further according to Jan Michiel Otto described by Satjipto Rahardjo (2012) and Nusrhasan Ismail (2007), the Dispute Council arrangement based on the laws and regulations in Indonesia still has several weaknesses in terms of legal certainty. To ensure that the implementation is concretely appropriate as mandated by Law Number 2 of 2017 concerning Construction Services, among others, there are still uncertain interpretations (multi-interpretations), regulatory conflicts, incomplete arrangements and inconsistencies in their arrangements, namely: (a) The concept of dispute resolution by the Dispute Board especially which has a role/function of dispute prevention not yet included in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution so that there is uncertainty about the Dispute Board as one of the APS; (b) The potential for uncertainty in the interpretation of the regulations in Government Regulation Number 22 of 2020 regarding the time of its formation, whether only the Standing type can be formed or can be formed with the Ad-hoc type; (c) There are no regulations implementing procedures for the use of the Dispute Board that apply to all construction service sectors; (d) There is no strict duration limit for when the Dispute Board must be formed; (e) The absence of regulation of the mechanism for the appointment/formation of the Dispute Council in the event that the parties fail to agree on it; (f) Potential regulatory conflicts between existing laws and

regulations regarding the principle of appointing members; (g) The legal position/position of the decision of the Dispute Board in the dispute resolution process in arbitration is not yet clear; (h) There is no regulation on the method and period of implementation of the Dispute Board's decision; and (i) legal uncertainty over the legal execution and enforcement of the Dispute Board's decision in Indonesia.

CONCLUSION

The Dispute Board in Indonesia is an Alternative Dispute Resolution (APS) method specifically for the settlement of construction work contract disputes that can replace the mediation and conciliation stages, formed from the beginning of the binding of construction services based on the principle of freedom of contract and on the will/agreement of the parties (consensualism) written in the contract. construction work so that it has a major role to avoid disputes and at the same time provide decisions on dispute resolution.

In terms of legal certainty, with the regulation of the Dispute Council in the Indonesian Legislation, the Dispute Council process in construction projects now has aspects of legal certainty and protection. However, the regulation of the Dispute Council based on the laws and regulations in Indonesia still has several weaknesses in terms of legal certainty to ensure that its implementation is concretely correct as mandated by Law Number 2 of 2017 including the uncertainty of interpretation (multi-interpretation), regulatory conflicts, incomplete regulations. and inconsistencies in the settings.

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