

Transformation of Construction Contract Dispute Settlement Through Dispute Adjudication Board

Faizal Kurniawan¹, Laila Andaretna², Michael Budianto³, Ridho Septarianto⁴, Prawitra Thalib⁵

{faizal@fh.unair.ac.id, laila.maghfira.andaretna-2019@fh.unair.ac.id, michael.christian.budianto-2019@fh.unair.ac.id, ridho.septarianto@fh.unair.ac.id, Prawitra@fh.unair.ac.id}

Faculty of Law Universitas Airlangga, , Indonesia

Abstract. The expansion of infrastructure in Indonesia parallels the growth of disputes over construction projects. The issuance of Law Number 2 Year 2017 on Construction Services mandates the existence of a Dispute Board to curb the escalation of construction disputes. However, its implementation remains unpopular. Addressing the said issue, this doctrinal research paper utilizes juridical-normative research methods with statute, conceptual, and comparative approaches. This paper aims to reform Indonesia's construction contract regime, by determining the role of the Dispute Adjudication Board ("DAB") in resolving construction disputes. It outlines the regulation of DAB along with its comparison, the intersection of provisions pertaining to it, and efforts to harmonize DAB with other dispute resolution forums in Indonesia. Finally, the benefits of DAB are that it is cost-effective and efficient which accommodates the complex nature of construction projects, thereby promoting uniformity, legal certainty, and the efficiency of Indonesia's construction dispute resolution mechanisms.

Keywords: Construction Contract; Dispute Adjudication Board; Alternative Dispute Settlement.

1. Introduction

Disputes that arise as a result of the implementation of construction contracts are unavoidable when construction is the central aspect of infrastructure development. Disputes between construction service users and construction service providers are caused by a number of factors, including the dynamic nature of construction contracts, the short duration of the project, the number of jobs, and other uncertainty factors. When a conflict arises, it must be addressed by both repressive and preventive measures to prevent the conflict from escalating. Construction disputes are distinct in and of themselves. This is due in part to the presence of claims in the construction industry; resolving disputes is frequently one of the issues that must be addressed to facilitate construction activities. Construction disputes can arise if claims are not properly processed.

Law Number 2 of 2017 on Construction Services mandates and legitimizes the existence of the Construction Dispute Board in order to curb the escalation of construction disputes. In

Indonesia, dispute resolution has been regulated, and the government is concentrating on strengthening these regulations. In Indonesia, the use of the Dispute Board remains unpopular. Therefore, the promotion of the Dispute Adjudication Board is necessary to accommodate the complex nature of construction projects, thereby promoting uniformity, legal certainty, and the efficiency of Indonesia's construction dispute resolution mechanisms.

The objective of this research paper is to reform Indonesia's construction contract regime. On the basis of this context, it is necessary to conduct a more comprehensive study with a focus on several topics, including the regulation of the Dispute Adjudication Board in Indonesia, a comparison of the Dispute Adjudication Board with other countries, and efforts to harmonize the Dispute Adjudication Board in Indonesia with other dispute resolution institutions in Indonesia in order to achieve legal certainty.

This research is a legal research that researches a process to find rules and legal principles in order to answer the legal issues. The approaches used in this research are conceptual approach, statute approach, and comparative approach. First, the statute approach is carried out to analyze the form and substance of the relevant laws and regulations. Second, the conceptual approach is carried out to explore the doctrines or principles that exist in the science of law. Third, comparative approach by making comparisons with other countries that have the same legal system as Indonesia, setting and setting up construction contract disputes. This comparison laid out to find out the arrangements, substance, procedures for implementation and arrangements in other countries. The primary legal material used is the legislation in Indonesia. In addition, researchers use books, scientific journals, and articles on online media as secondary legal materials.

2. Result and Discussions

2.1 Legal Framework for Construction Contract Dispute Settlement in Indonesia

2.1.1 Characteristics of Private and Public Construction Contracts in Indonesia

Construction contracts can be classified into 2 (two) groups, namely: private and public construction contracts.[1] Private construction contracts are carried out by private individuals or legal entities without government interference. The legal relationship between the Construction Service Provider and the Construction Planner is referred to as an agreement to perform services (Article 1601 of Indonesian Civil Code), which typically spelled out in a letter of planning work agreement. There are two types of private construction contracts in Indonesia: national contracts and foreign contracts. Foreign service users/project owners typically use contracts with the *Federation Internationale des Ingénieurs Conseils* or *International Federation of Consulting Engineers* (FIDIC) or Joint Contract Tribunals (JCT).[2] However, for the foreign private sector to perform construction work in Indonesia, government standards are used, as last regulated in Regulation of the Minister of Public Works and Public Housing Number 31 of 2015 concerning the Third Amendment to the Minister of Public Works Regulation Number 7 of 2011 concerning Standard and Guidelines for Procurement of Construction Works and Consulting Services.

Moreover, private construction contracts in the national private sector can vary based on the Service User's and Project Owner's preferences. It is possible to utilize government

specifications or a foreign contracting system, such as FIDIC, JCT, or AIA.[3] However, as these standards are partially or entirely inconsistently implemented, the characteristics and features of these private construction contracts are inconsistent and prone to dispute. Regulation of the Minister of Public Works and Public Housing Number 31 of 2015 governs the standards for private construction contracts in accordance. In the event that the contract for construction services is modified or altered, it is tailored to the needs of each party without requiring significant deviations from government standards.[4]

On the other hand, public construction contracts are government construction contracts resulting from the government's procurement of goods and services in the performance of State administration duties. In addition to the private sector, the government is involved in the legal relationship between the parties to the construction contract through the procurement of goods and services. Public construction contracts establish between the government and its obligation to provide, construct, and maintain public facilities a contractual relationship. Despite the fact that it is essentially a contract, the public element typically predominates as it contains rules for providers of goods and services.

Public legal arrangements are a characteristic of public construction contracts. It include policies for the procurement of goods and services, implementation, prevention, and handling of crimes within the framework of the procurement of goods and services, conspiracy, supervision, inspection, and control of goods and services, as well as legal development efforts in the procurement of goods and services and others, such as the Regional Regulator. According to Colin Turpin, contracts involving elements of the government are generally understood as contracts whose party is the government and whose purpose is the procurement of goods and services. Thus, the government's position in a contract, also known as a government contract, is as a subject.

Public construction contracting is more multifaceted and has distinct characteristics. It contains elements of both public and private law. As stated previously, the public element of public construction contracts has always distinguished them from private or commercial contracts in general. In government procurement contracts, private contract norms and principles apply concurrently because payment obligations include elements of state finances such as the State budget or local government budget, loans, or foreign grants.

2.1.2 Regulation Regarding Dispute Resolution of Private and Public Construction Contracts

2.1.2.1 Law Number 2 of 2017 concerning Construction Service

Article 1 number 1 outlines the definition of construction services, which includes construction consulting services and/or construction works. This regulation specified that construction consulting is a service that includes evaluation, planning, design, supervision, and management of a building's construction implementation. Whereas, construction work as the entirety or a portion of building construction, operation, maintenance, demolition, and reconstruction. Construction Work Contract, which refers to the entire contract document that governs the legal relationship between the Service User and the Service Provider in the provision of Construction Services which based on the existence of an offer and acceptance and is then stated in a contract document whose form can be adapted to the applicable laws, regulations, and development needs.

This law also regulates the existence of the Dispute Adjudication Board, which was established at the outset of the construction contract in accordance with Article 88, paragraphs (1) and (2) of Law Number 2 of 2017 on Construction Services. Generally, construction disputes in construction work contracts are resolved using the fundamental principle of reaching consensus through deliberation. Article 88, paragraph 4, outlines the stages of dispute resolution efforts, which include mediation, conciliation, arbitration, and the establishment of a Dispute Board, if this is unsuccessful. The purpose of the Construction Dispute Board is to reduce the rate of construction disputes arising from construction work contracts. In Indonesia, however, the existence of the Dispute Adjudication Board is still not widely known.

2.1.2.2 Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions

There are two types of dispute resolution in Indonesia: litigation and non-litigation. Disputes involving litigation are resolved in court, whereas disputes not involving litigation are resolved outside of court. According to this law, resolution is divided into two categories: (1) arbitration and (2) alternative dispute resolution. Furthermore, there are two types of alternative dispute resolution: adjudication alternatives (negotiation and mediation) and litigation alternatives (negotiation, mediation and arbitration). If it relates to Construction Services Law No. 2 of 2017, Article 88, paragraph 4, states that the stages of efforts to resolve construction disputes can include mediation, conciliation, and the Dispute Board (after failing to reach consensus). This law defines arbitration as a method of resolving a civil dispute outside of the general court based on a written arbitration agreement executed by the disputing parties. The presence of an arbitration agreement can revoke the District Court's jurisdiction to hear disputes between parties bound by the arbitration agreement (Articles 3 and 11), which are governed in full by Article 9. There is no explicit definition of mediation and conciliation in the law. Nevertheless, according to Article 1 paragraph 7 of Supreme Court Regulation Number 1 of 2008, mediation is a method for resolving disputes through a negotiation process to reach an agreement between the parties with the assistance of a Mediator. In the meantime, conciliation is a reconciliation effort that occurs prior to a court hearing (litigation), and it must be led by an expert who is knowledgeable and experienced in the delivery of construction services.

2.1.2.3 Law Number 28 of 2022 concerning Building

According to Article 34 of this law, building administrators include building owners, building users, and construction service providers. In addition, the Elucidation of this Law states that the embodiment of buildings cannot be separated from the role of construction service providers in the field of construction services, both as planners, implementers, supervisors, or construction management, as well as development services, including technical review service providers. Consequently, building regulation and the arrangement of construction services in accordance with laws and regulations must go hand in hand. Thus, the construction services regulation in this regulation is consistent with the Law on Construction Services.

2.1.2.4 Law Number 11 of 2020 concerning Job Creation

Several provisions pertaining to Construction Services have been amended under this Law, specifically regarding the authority of the Central Government and Regional Government over Construction Services businesses. It is also mandatory for every construction service business to obtain a Business License; and to have a Business Entity. Article 44 stipulates that it is illegal

for service users to utilize service providers associated with public-interest construction without first engaging in competitive bidding, selection, or the use of electronic catalogs.

2.1.2.5 Government Regulation Number 14 of 2021

Articles 52 and Article 185 letter b of Law 11 of 2020 on Job Creation mandate the creation of a Government Regulation amending Government Regulation 22 of 2020 on the implementation of Law 2 of 2017 on Construction Services. Some of the modifications to Government Regulation No. 14 of 2021 can be found in Article 1, which states in number 55 that the Construction Work Contract is the entire Contract document that governs the legal relationship between the Service User and the Service Provider in the execution of Construction Services. Where the previous definition of Construction Work Contract was omitted from Government Regulation Number 22 of 2020. Other alterations to Article 1 include sections governing associations of construction service business entities (section 11), professional associations of construction services (section 12), construction services licensing (section 19), and electronically integrated licensing (section 20).

2.1.3 Types of Construction Contracts Dispute

Construction projects involve intricate phases and procedures. Typically, construction contracts include the terms of validity or the validity of an engagement, followed by the terms of time, i.e. the conditions that limit the validity of the contract, and the terms of completeness, which specify which conditions must be met by one or both parties. Among the principles guiding construction contract implementation are honesty and fairness, benefits, equality, harmony, balance, professionalism, independence, security and safety, freedom, sustainable development, and environmental awareness. Construction contracts can also be categorized by the type of compensation (lump sum, unit price, additional fees for service fees, combined lump sum and unit price, alliances), the duration of construction work (one year and multiple years), and the method of payment.

In practice, the types of construction disputes include construction delays, differences in contract interpretations, a lack of managerial skills, unnoticed claims, tardiness of payment, poor maintenance work by service users, and a possible lack of funds. Disputes may also result from discrepancies between the planned image, technical specification, and bill of quantity. Other types of disputes may arise as a result of the actions of project owners, planning consultants, supervising consultants, and external factors such as *force majeure*. [5]

Based on the studies conducted by Sarwono Hardjomuljadi, there are several types of construction disputes, such as lack of available work place, picture that is not yet finalized, testing, delay in testing of construction work, termination of work, delay in payment, and consequences of work termination. Hence, it can be concluded that there are four groups of construction dispute types: [6]

- 1) Payment dispute, which is a type of dispute resulting from changes in contractual value, prices, and installment value.
- 2) Time dispute, which is caused by changes in time frame within a contract, schedule, and payment time.
- 3) Work scope dispute, which is caused by changes in types of work, work volume, quality of work, and work method.
- 4) Mixed dispute, which is a mixture of all the aforementioned disputes.

2.1.4 Construction Contract Dispute Resolution Forums in Indonesia

In accordance with Law Number 2 Year 2017 concerning Construction Services (“Construction Services Law”), there are several stages of dispute settlement. In principle, disputes that occurred are settled through deliberation to achieve consensus. If such deliberation did not achieve consensus, disputing parties may settle their dispute as written in the Construction Contract. In this respect, Construction Contracts must possess elaboration pertaining to dispute settlement. This is governed under Article 47 number 1(h) of the Construction Services Law.[8] Further, in the Article’s explanation, available dispute settlement forums are deliberation, mediation, arbitration, or court.¹

However, in cases where dispute settlement is not governed by the Construction Contract, parties must form a written agreement regarding the agreed stages for dispute settlement. In this framework, what is meant by “stages” are the required steps consisting of mediation, conciliation, and arbitration. The usage of the word “and” in the law signifies that there should be a certain method to be followed. Thus, disputing parties cannot settle their dispute in an arbitration forum without first going through mediation and conciliation.[9] Aside from the already regulated dispute settlement forums, disputing parties may also establish a dispute board.[10] Hence, it can be concluded that there are five forums of dispute settlement that are stipulated in the Construction Services Law which are national court, mediation, conciliation, arbitration, and dispute board.

2.1.4.1 Mediation

Mediation is a dispute settlement forum that includes third parties acting as an adviser. Usually, mediation is conducted at the beginning of a dispute. Third parties or mediators must be impartial and accepted by the disputing parties. However, in settling a dispute, mediators may only give their insight and opinion pertaining to the conflict. Hence, a consensus or agreement is to be made by the disputing parties. [7]

As a third party chosen by the parties, a mediator is obliged to carry out their work in accordance with the parties’ will. However, mediators are not authorized to compel the disputing parties but rather only provide them with insights pertaining to the conflict. In doing their work, mediators can establish the facts of the case, weaknesses, and strengths of each party and subsequently try to arrange a settlement proposal that will be discussed by the parties. In this sense, a mediator must organize a conducive environment so that disputing parties may initiate a profitable consensus. [6]

The benefits of mediation are flexible, cheap, efficient, and secrecy.[8] Flexibility because the parties can adjust the mediation process according to their needs and wants. Further, mediation is relatively cheap compared to other adjudicative dispute settlement forums. [9] Additionally, the mediation process is expeditious in comparison to other dispute settlement forums. This is because a mediator is not to represent one of the parties or deliver a legally binding verdict. Another reason is a substantial amount of cases accumulating in court often causes an undue delay. Finally, mediation is conducted in secrecy, differing from court proceedings that are usually open to the public.

¹ Article 47, Law Number 2 of 2017 concerning Construction Services

However, mediation also has some shortcomings. First, mediation can only be effective if the disputing parties have an intention to form a consensus. In cases where only one party is trying to establish a consensus while the other party does not have the same intention, mediation cannot work effectively. Second, in cases where disputing parties do not possess good faith. For example, one of the parties intentionally conducted mediation just to buy some time to comprehend the other party's weaknesses. Lastly, when a consensus as a result of mediation is achieved, there is no right to appeal.[10]

2.1.4.2 Conciliation

Conciliation is a means of dispute settlement that includes third parties (conciliators) who conduct interventions in an active manner.[12] In settling disputes, the conciliator is impartial and authorized to state their opinions openly. However, conciliators are not authorized to make decisions in a dispute as making decisions is the domain of the disputing parties themselves. In events where there is a decision, disputing parties will establish an agreement.

Although there are some similarities with mediation, in conciliation, conciliators tend to be more active than mediators because they conscientiously suggest their opinion and draft conditions for agreement between disputing parties. This is different from mediation where mediators only bridge the interests of the parties without giving advice on how to settle the dispute.

When conciliation ends, conciliators are obliged to propose an agreement signed by disputing parties or to draft a report in cases where conciliation fails. In spite of the fact that conciliation is flexible, cheap, and efficient, the result of conciliation is not binding hence parties can drift from its decision, especially when they do not possess good faith.[13]

2.1.4.3 Arbitration

Arbitration as a form of dispute settlement is governed under Article 88 number 4 of the Construction Services Law and further under Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution ("ADR Law").[14] Referring to article 1 of ADR Law, arbitration is a means of settlement for civil disputes outside of court that is based upon an arbitration agreement written by the disputing parties. There are two types of arbitration: *ad hoc* arbitration and institutional arbitration. In *ad hoc* arbitration, an arbitration proceeding is formed temporarily and incidentally to investigate and decide a specific case limited to a certain amount of time.[14] However, institutional arbitration is a permanent arbitration. In other words, the existence of an arbitration institution is not dependent on a certain case or dispute. For example, the Indonesian Arbitration Body ("BANI") is an institutional arbitration. Until the end of 2018, BANI had handled 27,09% of all construction dispute cases ranging from 2014-2018 (Hussey Umar, 2019).[15]

Arbitrators in an arbitration proceeding are authorized to examine as well as convey a decision to settle a dispute.[16] The existence of an arbitration decision is final and binding to the disputing parties.[17] This is somewhat different from mediation and conciliation which is not binding. However, due to its final nature, there is no right to appeal in arbitration. In fact, courts no longer have jurisdiction when disputing parties are bound to an arbitration agreement.[18] There are some benefits to choosing arbitration as a form of settlement. First, the secrecy of the proceeding is guaranteed. Second, arbitrators are experts in their fields, especially in business

disputes. Third, disputing parties may decide the place of arbitration and choose the arbitrator themselves. Lastly, arbitration decisions are final and binding.[19] However, there exist weaknesses such as difficulties in recognition of foreign arbitration awards and the necessity of an execution order from the Court, in cases where one of the parties refuses to comply with the arbitration award.

In terms of construction disputes, arbitration possesses some characteristics such as arbitration shall be made based on the consent of the parties, the decisions made by the parties are not affected by the government, arbitration awards are final and binding, and arbitration uses adjudicatory procedures. [20]

2.1.4.4 Dispute Adjudication Board

Dispute boards can be persons or teams that are established according to the agreement of parties at the beginning of a construction contract to prevent and resolve disputes. Dispute boards are formed to create a cheap, expeditious, and profitable way of dispute settlement. Aside from settling disputes, the dispute board is also obliged to prevent disputes in conducting construction work. Generally, dispute boards are also known as Dispute Adjudication Board (“DAB”).

However, DAB works when a dispute is submitted to a third party who subsequently establishes a binding decision and can be carried out by the parties even if there is an ongoing construction process.[21] In the FIDIC regulation, it is stipulated that DAB consists of three individuals with law or engineering backgrounds. The functions of DAB are to conduct visits to construction projects, comprehend the details of construction work, update on the development of construction work, accommodate the resolution of conflict between parties, and establish a decision professionally, not exceeding the agreed time frame.[23] In Indonesia, DAB is adopted by Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia (BADAPSKI) which forms a dispute board, consisting of a dispute review board, DAB, and a combined dispute board. The benefits of DAB are cheap, efficient, flexible, and more freedom given to the disputing parties.

2.2 Construction Contract Dispute Settlement Forums

2.2.1 Regulation of the Dispute Adjudication Board in Indonesia

As with the Construction Law, Government Regulation Number 22 of 2020 recognises that construction dispute resolution must include the following stages: (i) mediation; (ii) conciliation; and (iii) arbitration. Additionally, the Dispute Boards are frequently utilized in large construction projects to assist parties in resolving or avoiding disputes and, ideally, in preventing the escalation of such conflicts. In line with the contractual nature of dispute boards, parties have considerable latitude to agree on a formulation that is suitable for their particular project. In practice, there are three types of dispute boards,[24] which are:

1. Dispute Adjudication Boards, which issue decisions that must be immediately complied with;
2. Dispute Review Boards, which issue recommendations that are not binding on the parties; and
3. Combined/Hybrid Dispute Boards, which, depending on the discretion granted, may issue recommendations or binding decisions.

In Indonesia, the rule regarding the Dispute Adjudication Board can be found in several regulations, including the Construction Law which mandates the establishment of a Dispute Board. By classification, the Dispute Board in Indonesia is a Dispute Adjudication Board with the authority to issue binding decisions. The DAB is obligated to treat the Employer and the Contractor fairly and impartially, and to adopt procedures that are appropriate to the dispute, thereby avoiding unnecessary delay and expense. Indonesia's legal frameworks under Article 5 and Article 88 of Law on Construction Services and Article 93-96 of Government Regulation Number 22 of 2020 pertaining to Implementing Regulations of Law Number 2 of 2017 pertaining to Construction Services outline several characteristics of the DAB as follows:

- 1) The DAB is defined to be either a person or team established according to the parties' agreement. It must consist of an uneven number of members that are experienced, respected, impartial and independent.
- 2) The funding for the DAB is the responsibility of the parties.
- 3) In addition to the mediation and conciliation process outlined in Government Regulation Number 22 of 2020, it is optional to choose the DAB as a forum.
- 4) The DAB's standard operating procedure will include becoming acquainted with the project's details and the construction methods to be used, as well as becoming acquainted with the contract documentation, which will serve as its distinguishing feature in comparison to other types of forums. The DAB members are provided with the contract documents, plans and specifications and become familiar with the project procedures and the participants and are kept abreast of job progress and developments. During regular site visits, the DAB meets with the Employer's and Contractor's representatives and encourages the resolution of disputes at the job level.
- 5) The DAB serves two functions as a dispute avoidance and dispute resolution. First, the DAB can be established prior to the occurrence of any disputes, such as at the beginning or during the course of a construction project, as a preventative mechanism to monitor and ensure the project's smooth execution. They are able to make regular site visits and, using a "hands-on" approach, provide workable solutions to complex issues before parties become polarized. Second, once a dispute has arisen, the DAB can be formed to provide the disputing parties with a satisfactory solution.
- 6) The parties shall enter into a tripartite agreement, it is defined as a contract between the contracting parties and the DAB's board members. This agreement has no standard form; it varies depending on the parties, the project, and the type of DAB. The board member is prohibited from assigning or subcontracting the agreement without the parties' prior consent. The following sections comprise the general substance of this tripartite agreement: Information on the parties and members; situation of the parties and purpose of the DAB; validity period and the scope of work; DAB procedures and terms of reference;

payment terms and conditions; as well as disputes and governing law.[25]

- 7) Any decision made by the DAB is final and binding on the contracting parties, unless an objection is filed within 28 days, in which case the dispute must be resolved in accordance with the Construction Services Law. If neither party serves a notice of dissatisfaction within the 28-day period, the decision will become final and binding on both parties.

2.2.2 Comparison of the Dispute Adjudication Board in Indonesia with Other Countries

Dispute boards were first used in the United States in the 1970s on the Eisenhower tunnel project, and later expanded on international projects in the 1980s for the Honduras El Cajon Dam construction.[26] Dispute boards have evolved over the last fifty years into an efficient and increasingly popular method of resolving disputes in the construction industry due to their low-cost services and the DAB resolve the parties' disputes within a reasonable timeframe. DABs are currently operational in many countries,[27] such as in the United States and the United Kingdom. The law of the country where the contract is executed (or the country chosen by the parties) and which ultimately governs its execution serves as the basis for the dispute board's decisions.

In the United Kingdom, the Housing Grants Construction and Regeneration Act of 1996 mandates the availability of adjudication for almost all construction contract disputes.[27] Consequently, the establishment of the DAB conforms to the statutory mandate for adjudication. The Act governs the use of dispute boards in the United Kingdom and it contains a number of mandatory provisions that cannot be removed by the parties to a contract. In contrast to the UK, as well as Honduras and Peru,[28] there is typically no supporting statute in Indonesia that regulates the proceedings of the dispute board.

2.2.3 Intersection of Provisions Regarding the Dispute Adjudication Board with Dispute Resolution Services in Government Procurement of Goods/Services

2.2.3.1 Governing Provisions

2.2.3.1.1 Law Number 2 of 2017 on Construction Services

The Construction Services Law mandates the Dispute Board to settle disputes arising from construction work contracts. The purpose of the Dispute Board is to complete the stages of dispute resolution mechanism outlined under Article 88, paragraphs (4) and (5) of the Construction Services Law, wherein a Dispute Board may be formed by the parties to a Construction Contract. Despite the fact that procurement is mentioned in the Construction Services Law, Dispute Resolution Services in Procurement and Services are not mentioned.

2.2.3.1.2 Government Regulation Number 22 of 2022 concerning No. 22 of 2020 concerning Construction Services

The Government Regulation Number 22 of 2020 regarding Implementing Regulations of Law Number 2 of 2017 regarding Construction Services was promulgated on April 23, 2020 and introduced significant changes to the implementation of Indonesia's Construction Services Law. Under this regulation, the Dispute Council is also specifically regulated in Article 94, where its authority is to prevent and resolve disputes that arise after the parties agree to use the Dispute

Council in the Construction Services engagement and make a tripartite Dispute Council agreement. Consequently, the essence of the Dispute Council as defined by this government regulation is to resolve disputes within the scope of the Construction Services contract. Even though this government regulation deals extensively with procurement, there is no mention of the Dispute Resolution Service in Procurement.

2.2.3.1.3 Presidential Regulation Number 12 of 2021 concerning Government Procurement of Goods/Services

Article 85 of this presidential regulation stipulates that contract disputes between the parties during the implementation of contracts may be settled through contract dispute resolution services, arbitration, Construction Dispute Board, or court settlements. This article describes how the Dispute Board provides alternatives as dispute resolution services in addition to contract dispute resolution services. Under this regulation, the Construction Dispute Board's provisions are governed by a ministerial regulation that governs government affairs in the public works and public housing fields. As stated in Article 85 paragraph (2), contract dispute settlement services are organized by the Government Goods/Services Procurement Policy Agency (LKPP or Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah)". However, if we refer to LKPP, then Government Goods/Services Procurement Contract Dispute Settlement Services or LPSK are governed by Government Goods/Services Procurement Policy Agency Regulation Number 18 of 2018.

2.2.3.2 Scope and Position

According to the general provisions of Government Regulation Number 18 of 2018, the definition of Procurement Contract Dispute Settlement Services (also known as Layanan Penyelesaian Sengketa Kontrak or LPSK) are services established as an alternative method of resolving Government Goods/Services Procurement Contract Disputes. This type of dispute arises between the owner of the work and the executor of the work that is bound by a contractual relationship in the procurement of government goods/services from the signing of the contract until the end of the contract for the procurement of government goods/services. Based on its nature, the use of LPSK can begin from the signing of the contract, until the end of the procurement contract. Meanwhile, in terms of the essence of the Dispute Council, its formation is an agreement between the parties from the beginning of the contract to prevent and resolve disputes. In contrast, the LPSK in the aforementioned LKPP regulations does not include the function of the Dispute Resolution Service as an effort to prevent disputes from arising.

Under Article 3 paragraph (1) of the Regulation on LPSD, the scope of the Procurement Contract Dispute Resolution Services includes three components: mediation, conciliation, and arbitration, all of which are carried out in stages. The LKPP Deputy for Legal Affairs and Dispute Settlement organizes the Procurement Contract Dispute Settlement Service. The Function and Authority of this Dispute Resolution Service, as stated in Article 7 of this Institutional Regulation, is to settle procurement contract disputes.

In essence, the intersection of the provisions pertaining to the Dispute Council and the Dispute Resolution Service in Procurement can be found normatively through Presidential Regulation Number 12 of 2021, specifically in Article 85, where both the Procurement Contract Dispute Resolution Service and the Construction Dispute Board are positioned as stages of efforts to resolve contract disputes between PPK and Providers during the contract's implementation.

2.2.4 Harmonization of the Dispute Adjudication Board in Indonesia with Other Dispute Resolution Forums in Indonesia

In Moh. Hasan Wargakusumah's book, the National Law Development Agency defines legal Harmonization as a scientific activity to achieve a written harmonization process that targets philosophical, sociological, economic, and legal values.[29] According to L. M. Gandhi, harmonization of law includes adjustments to laws and regulations, government decisions, judges' decisions, the legal system and legal principles with the aim of increasing legal unity, legal certainty, justice, and comparability, usefulness and clarity of law.[30] Harmonization establishes the legal reasoning underlying the preparation of legal system harmonization, which consists of:

- 1) Components of legal substance consisting of statutory regulations, unwritten law including customary law, jurisprudence, and the legal principles that underlie it;
- 2) Components of the legal structure and its institutions which consists of various institutional bodies or public institutions with authorized officials;
- 3) Components of legal culture which consists of the attitudes and behavior of officials and citizens with respect to other components in the process of organizing social life.[31]

Based on these factors, harmonization can be interpreted as a process of harmony in the implementation and enforcement of laws and regulations to resolve differences, conflicts, and irregularities between legal rules in regulations or between laws and regulations as subsystems of a legal system, so that harmonious, balanced, harmonious, integrated, and consistent laws are formed in order to achieve legal certainty.

Regulations governing the Dispute Council in Indonesia, as well as those governing other dispute resolution institutions in Indonesia, must be harmonized to prevent overlap and the emergence of legal uncertainty due to disparities in interpretation and application. As previously described, efforts to resolve disputes in Construction Services are governed by Article 88 paragraph (4) of the Construction Services Law, which includes mediation, conciliation, and arbitration. In addition to mediation and conciliation, paragraph two of the article includes provisions for the Dispute Council as a dispute resolution step. The question is why the Dispute Board is not included in the same paragraph as mediation, conciliation, and arbitration, specifically Article 88 (4). Consequently, the norms contained in this rule are still imprecise with regard to the Dispute Council's role as a stage in efforts to resolve disputes. A norm with unclear boundaries that permits multiple interpretations indicates legal uncertainty.

In paragraph (3) of Article 93 of Government Regulation Number 22 of 2020, the Dispute Board is not listed alongside mediation, conciliation, and arbitration, but rather in a separate paragraph. Therefore, it is open to a question as to whether the Dispute Board is a substitute for other dispute resolution stages. Whereas, under Article 93 paragraphs (1) and (3), mediation, conciliation, and arbitration are methods for resolving construction disputes. However, paragraph (3) states that "*in addition to attempting to resolve disputes through Mediation and Conciliation as described in paragraph (1), the parties may appoint a Dispute Board.*" This implies that, if the substance of Article 93 paragraph (3) of the government regulation is examined, only mediation and conciliation are required, then the parties can appoint the Dispute Council. As the position of arbitration is not stated in paragraph (3), as if arbitration can be replaced by the Dispute Board, it becomes open to multiple interpretations, so the implication is that after mediation and conciliation, the parties have two other options for resolving the dispute. Consequently, it is necessary to confirm the Dispute Board's position in the government regulation concerning the phases of construction dispute resolution settlement.

In addition to the aforementioned loophole, the current legal framework indicates a legal uncertainty. As stipulated under the Elucidation of Article 47 paragraph (1) letter H of Government Regulation Number 22 of 2020, it is explained that "*Disputes are settled through, among others, deliberation, mediation, arbitration, or courts*". There is nothing in the substance of the explanation that mentions the Dispute Council, and in fact there is a court, where the court is never mentioned in the contents of the article regarding the stages of dispute resolution efforts. In addition to the previously mentioned loophole, the current legal framework demonstrates legal uncertainty. According to the Elucidation of Article 47 paragraph (1) letter H of Government Regulation Number 22 of 2020, "*Disputes are resolved through, among other methods, deliberation, mediation, arbitration, and courts.*" There is no mention of the Dispute Board in the Elucidation and the existence of the court has never been included in the stages of dispute resolution settlement in any provision under this regulation.

Article 85 of Presidential Regulation No. 12 of 2021 addresses the intersection between contract dispute resolution services and the Dispute Council, as described in the previous section. However, the said provision does not provide clear boundaries regarding the types of contract disputes that can be resolved by the Construction Dispute Board but only outlines contract disputes between the PPK and the Provider in the execution of the contract, and the Construction Dispute Board's authority. Due to the ambiguity of these norms, additional harmonization efforts are required to harmonize norms related to construction dispute resolution, particularly with regard to the position of the Dispute Board.

According to the analysis, an ongoing effort is required to harmonize the legal substance of the existing dispute settlement body and its function in resolving construction contract disputes. The first has to do with the intersection between the Dispute Board and contract dispute resolution services in procurement. In addition to the position and scope of procurement dispute resolution services, it is necessary to emphasize the position of the Construction Dispute Board in Article 85 paragraph (1) that only intended for dispute resolution within the scope of Construction Services with the objective to avoid confusion in the selection of dispute resolution for procurement contracts. Upon clarification, the desired outcome is to establish a better legal framework in understanding that the Construction Dispute Board in Government Procurement of Goods/Services refers to the Dispute Board established by Law Number 2 of 2017 concerning Construction Services.

Second, it is crucial to harmonize the position of the Dispute Board, arbitration, and the court by clarifying the rules in Article 88, paragraph (4) of the Construction Services Law. Article 88 should be amended to include the phrase "stages of efforts to settle disputes outside of court," which includes mediation, conciliation, and arbitration (4). Given that paragraph (5) includes the Dispute Council as an alternative to mediation and conciliation, it may be necessary to include the Dispute Board as an alternative to arbitration in paragraph (4). In order for subsequent provisions to read: "*The steps for resolving disputes outside of court, as mentioned in paragraph (2), include: a. mediation; b. conciliation; and c. arbitration or through the Dispute Board.*"

For the following paragraph, under Article 88 paragraph (5), it is necessary to incorporate the preferred nature of arbitration and the Dispute Board by highlighting the alternative or cumulative nature of both forums as an alternative dispute settlement outside of court in the case of a construction work contract. Similarly, in Article 93, paragraphs (1) and (3) of Government Regulation Number 22 of 2020, the position of the Dispute Board is identical to that of other settlement mechanisms. Additionally, the government regulation needs to conform to a higher regulation based on the hierarchy of law, such as the Construction Services Law. Therefore, the

Dispute Board's position to replace arbitration must be specified and clarified in this government regulation.

Thus, once the position of the Dispute Board is clarified as one of the stages of efforts to resolve construction disputes in addition to mediation and conciliation, as well as an alternative to arbitration, it will avoid multiple interpretations and ambiguity of norms that result in legal uncertainty in its implementation in the future.

3. Conclusion

Construction contracts can be classified into two types, namely private and public construction contracts. Private construction contracts can utilize specifications based on the parties preferences, while public construction contracts often relate with government procurement of goods and services and hence should comply with certain rules, due to its public nature. Provisions that regulates dispute resolution of private and public construction contracts are Law Number 2 of 2017 concerning Construction Service, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions, Law Number 28 of 2022 concerning Building, Law Number 11 of 2020 concerning Job Creation, and Government Regulation Number 14 of 2021.

As construction processes involve intricate phases and procedures, they are prone to disputes. In practice, types of construction disputes can be categorized into four groups. First, payment dispute, which is a type of dispute resulting from changes in contractual value, prices, and installment value. Second, time dispute, which is caused by changes in time frame within a contract, schedule, and payment time. Third, work scope dispute, which is caused by changes in types of work, work volume, quality of work, and work method. Lastly, mixed dispute, which is a mixture of all the aforementioned disputes.

In situations where dispute arises, parties must decide a forum to resolve the occurring conflict. In this framework, there are five dispute resolution forums that are governed by Law Number 2 Year 2017 (Construction Law), namely national court, mediation, conciliation, arbitration, and dispute board. In this paper, we argue that dispute boards, particularly Dispute Adjudication Board (DAB), is the most profitable forum for dispute resolution. In Indonesia, DAB can be found in several regulations, including the Construction Law which regulates the establishment of a Dispute Board. The Dispute Board in Indonesia has the authority to issue binding decisions. Comparatively, dispute boards are also utilized in the United States and the United Kingdom, which are an increasingly popular method for resolving disputes due to their punctuality and low cost services.

Furthermore, there is an intersection of provisions between DAB with Dispute Resolution Services in Government Procurement of Goods/Services. The intersection of provisions can be found in the Presidential Regulation Number 12 of 2021 where both the Procurement Contract Dispute Resolution Service and the Construction Dispute Board are positioned as stages of efforts to resolve contract disputes between PPK and Providers during the contract's implementation. Due to the intersection of rules, there is an urgency to harmonize regulations pertaining to DAB with other dispute resolution services in Indonesia. In this sense, a harmonization of legal substance and the position of Dispute Board in the Construction Law is needed. Finally, we conclude that DAB is a better forum for dispute settlement as they are less expensive compared to arbitration and are generally quicker. In terms of costs, dispute boards' costs are shared equally among disputing parties. Furthermore, DAB allows the disputing parties to first comply with the decision made without disrupting the performance of the contract.

References

- [1] Yasin, M.: *Understanding Construction Contracts in Indonesia* (2006)
- [2] Djatnika, S.: *Construction Work Contracts: Procedures for Contracting Construction and Dispute Resolution (Handout Workshop)* (2018)
- [3] Center for Water Resources and Construction Education and Training.: *Introduction to Contract Law Module: Basic Level Construction Contract Law Training*. Ministry of Public Works and Public Housing (2016)
- [4] Law Number 2 of 2017 concerning Construction Services
- [5] Lature, K.: *Analysis of Construction Dispute Resolution in Indonesia*. Indonesian Legislation Journal. Vol. 15 (2018)
- [6] Government Regulation Number 22 of 2022 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services
- [7] Firmansyah, T.: *Construction Service Dispute Resolution Using APBN in Aceh*. Media Syari'ah. Vol. 21 (2019)
- [8] Lestari, R.: *Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi Di Pengadilan Dan Di Luar Pengadilan Di Indonesia*. Vol. 3 (2013)
- [9] Shamir, Y.: *Alternative Dispute Resolution Approaches and Their Application*. No.7 (2002)
- [10] Ponte, L.: *Alternative Dispute Resolution in Business*. West Educational Publishing Company (1991)
- [11] BPSDM Research and Development Center for Natural Resources and Construction Module 6.: *Introduction to the Completion of Construction Work Contracts* (2019)
- [12] Muskibah., Hidayah, L.: *Penyelesaian Sengketa Konstruksi Melalui Arbitrase Berdasarkan Peraturan Perundang Undangan* (2021)
- [13] Usman, R.: *Options for Settlement of Dispute Out of Court*. PT Citra Aditya Bakti (2013)
- [14] Saifudin, E.: *Alternative Dispute Resolution and Arbitration*. Intrans Publishing (2018)
- [15] Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions
- [16] BP Lawyers 'Menyoal Kekurangan dan Kelebihan Arbitrase di Indonesia' (2 March 2017) <<https://bplawyers.co.id/2017/03/02/menyoal-kelahan-dan-kekurangan-arbitrase-di-indonesia/>>.
- [17] Tampongangoy, G.: *Arbitrase Merupakan Upaya Hukum Dalam Penyelesaian Sengketa Dagang Internasional*. Vol 3 (2015)
- [18] Imam, Suyogi 'Empat Karakteristik Arbitrase Dalam Penyelesaian Sengketa Konstruksi', *ET Asia* (23 January 2020) <<https://et-asia.com/empat-karakteristik-arbitrase/>>.
- [19] Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Board.
- [20] Elucidation of Article 88 paragraph 5, Law Number 2 of 2017 concerning Construction Services.
- [21] Venoit, W.K.: *International Construction Law: A guide for Cross-Border Transactions and Legal Disputes*. p. 287. American Bar Association Publishing, Chicago (2009)
- [22] Owen, G.: *The Working of the Dispute Board (DAB) Under New FIDIC 1999 Red Book*. (2003)
- [23] Baltag, C., Vasile, C.: *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*. (2019)
- [24] Owen, G.: *The Working of the Dispute Board (DAB) Under New FIDIC 1999 Red Book*. (2003)

- [25] Ly, D., P. Gélinas, P.: Dispute Prevention and Settlement through Expert Determination and Dispute Boards.(2017)
- [26] Tan, Y.: Large-Scale Construction Project Management: Understanding Legal and Contract Requirements. p. 173 (2020)
- [27] Chapman, P.: Dispute Boards (1999)
- [28] Chern, C.: Chern on Dispute Boards: Practice and Procedure. (2015)
- [29]Aceris Law LLC ‘Dispute Boards and International Construction Arbitration’ (7 June 2020) <https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/#_ftn4>.
- [30] Safudin, E.: Harmonization of Law in Legal Antinomy (Analysis of the Application of Article 20 paragraph 2 Letter B of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power). 2017 (2020)
- [31] L.M, Gandhi.: Harmonization of Law Towards Responsive Law. (2011)
- [32] Budoyo, S.: The Concept of Systematic Steps to Harmonization of Laws in the Formation of Regulations Legislation. Vol. 4 (2014)