

# DISPUTE BOARD AS AN ALTERNATIVE FOR CONSTRUCTION DISPUTE SETTLEMENT IN SUTT DEVELOPMENT CONTRACTS AT PT PLN (PERSERO)

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## Abstract

Transmission construction projects have very complex problems and difficulties due to the very dynamic type of work combining various types of interrelated engineering and non-engineering work, this results in frequent disputes where the applicable Contract or the Agreement itself does not have a clear way to resolve the problem and makes the parties firmly defend their respective arguments. This raises more complicated problems and is often resolved in a simple way which can actually cause conflict in the future, even causing legal problems when an audit occurs. Through the construction services law no. 2 of 2017 article 88 it has been stated that alternative dispute resolution can be through the formation of a dispute council. This needs to be changed in the type of transmission construction contract within the PT PLN (Persero) environment considering that Disputes are difficult to avoid when they have a direct impact on the project. Changes need to be made immediately to every transmission construction contract within the PT PLN (Persero) environment.

**Keywords:** *Contract, Dispute, Cost, Resolution, Method*

## Abstrak

Proyek konstruksi transmisi memiliki permasalahan dan kesulitan yang sangat kompleks karena jenis pekerjaan yang sangat dinamis menggabungkan berbagai jenis pekerjaan teknik dan non-teknik yang saling terkait, hal ini mengakibatkan sering terjadinya sengketa dimana Kontrak yang berlaku atau Perjanjian itu sendiri tidak memiliki cara yang jelas untuk menyelesaikan masalah dan membuat para pihak dengan tegas mempertahankan argumen masing-masing. Hal ini menimbulkan masalah yang lebih rumit dan sering diselesaikan dengan cara sederhana yang sebenarnya dapat menimbulkan konflik di masa mendatang, bahkan menimbulkan masalah hukum ketika terjadi audit. Melalui Undang-Undang Jasa Konstruksi No. 2 Tahun 2017 pasal 88 telah dinyatakan bahwa penyelesaian sengketa alternatif dapat dilakukan melalui pembentukan dewan sengketa. Hal ini perlu diubah dalam jenis kontrak konstruksi transmisi dalam lingkungan PT PLN (Persero) mengingat bahwa Sengketa sulit dihindari ketika berdampak langsung pada proyek. Perubahan perlu segera dilakukan pada setiap kontrak konstruksi transmisi dalam lingkungan PT PLN (Persero).

**Kata Kunci:** *Kontrak, Sengketa, Biaya, Penyelesaian, Metode*

## INTRODUCTION

Based on the Decree of the Minister of Energy and Mineral Resources of the Republic of Indonesia, Number 188.K/HK.02/MEM.L/2021 Concerning the Ratification of the Electricity Supply Business Plan of PT Perusahaan Listrik Negara (Persero) for 2021 to 2030, it is known that the average projected growth in electricity needs is 4.9%

which will be met by the planned construction of a Power Plant of 40,575 Megawatts, a Transmission Network of 47,723 Circuit Kilometers and a Substation of 76,662 MVA.

Perusahaan Listrik Negara (PLN) is an Indonesian state-owned company tasked with supplying electricity to the Indonesian people. PLN's total power generation capacity at the end of 2019 increased to 43,856.58 MW generated by 5,987 power plants. The company holds a monopoly on electricity distribution in Indonesia, with a Transmission Line of 58,959.05 km and a Distribution Line of 979,855.37 km. In Indonesia, PLN is the largest state-owned company by assets. The Republic of Indonesia owns 100 percent of PLN's shares.

In order to fulfill the development program as targeted in the RUPTL, PT PLN (Persero) carries out the procurement process for development projects throughout Indonesia, both Power Plant, Transmission and Substation development projects, which are funded by various sources, both APLN, APBN and Loans.

The large number of development projects within PT PLN (Persero) also has an impact on the emergence of various problems in the implementation of work projects, one of which is the SUTT Network Transmission development project.

Network Transmission development work is very susceptible to various problems that have an impact on disputes in the implementation of its contractual, this is due to differences in interpretation from both parties, both in terms of physical work and contractual. In resolving Disputes in the Transmission Network work Contract at PT PLN (Persero).

In Indonesia there are 2 types of dispute resolution in Indonesia, namely Litigation and Non-Litigation. Litigation is a form of dispute resolution through a trial in a general court. While Non-Litigation according to Law Number 30 of 1999 is divided into 2, namely Arbitration and Alternative Dispute Resolution.

Transmission Construction Work Contracts at PT PLN (Persero) usually only accommodate Non-Litigation settlements in the form of submission to Arbitration, but in practice due to the Contractor's lack of knowledge of the Arbitration process, the dispute is not processed further, so that the dispute can have an impact on the duration of the work completion and even cause legal problems in the future.

Through this research, the author hopes to contribute to providing an understanding of ADR as a form of dispute resolution outside the general court Non-Litigation, which

has advantages that are more in line with the time period for the implementation of the work, compared to Arbitration.

## **RESEARCH METODOLOGY**

In compiling these Proceedings, the author compiled the following methods:

The type of research is qualitative and normative juridical which views law as a binding rule, through case studies and history that occurred in the Transmission Development Contract in the environment of PT PLN (Persero) South Sumatra Project Implementation Unit 3 (PLN UPP SBS 3)

The research approach is qualitative and a statutory approach, namely all legal products that have binding force, through correspondence data between PT PLN (Persero) South Sumatra Project Implementation Unit 3 (PLN UPP SBS 3) when corresponding with the related Work Implementation Contractor, along with the laws and regulations used as a reference for the letter.

The types of resources used are in the form of Laws, Presidential Regulations, Letters from the Ministry of Finance, Letters from the Regional Government, and Legal Studies which are used as references in the letter.

Data Collection Technique uses document studies, both internal PLN documents and external PLN documents in the form of Laws, Presidential Regulations, Legal Studies and Journals.

The analysis is carried out prescriptively. The nature of the analysis in this study is intended to provide arguments for the results of the research that has been carried out. Argumentation here is carried out by researchers to provide prescriptions or assessments regarding right or wrong or what should be according to law regarding the facts and legal events from the research results.

## **RESULTS AND DISCUSSION**

Construction service work has a risk factor with a higher level of uncertainty compared to other industries (Flanagan and Norman, 1993). This is a trigger for disputes. The greater the value and duration of a project, the higher the probability of a dispute (Pang, 2011; Gebken, 2006; Love, 2005).

There are various causes of disputes, but in general disputes occur due to actions outside the scope of the contract or default by one of the parties. In addition to actions and defaults, Construction Disputes can be caused by the following:

1. Inaccurate design information
2. Incomplete design information
3. Incomplete Site Investigation
4. Slow reaction of one of the parties in responding to conditions
5. Poor communication
6. Unrealistic time targets
7. Imperfect Contract Administration
8. Uncontrolled external events
9. Incomplete tender information

In some literature, other factors causing Disputes include:

1. Delays in Work caused by the Job Owner. This delay is referred to as Compensable Delay which occurs because the reason for the delay is not written in the Contract, so that the Job Owner (Owner/Employer) must provide additional time or money as compensation for his/her mistake.
2. Changes to the Schedule ordered by the Job Owner. This Schedule Change can be in the form of work acceleration or work delays.
3. Changes or Modifications to the contents of the contract that are informal in nature originating from the Planner or Job Owner (Owner/Employer).
4. Differences in field conditions caused by changes in conditions in the field that are not predicted to occur, for example physical conditions underground.
5. Documented changes in weather conditions outside the season and causing the work to be unable to be completed.
6. Failure to make a price agreement due to changes in work orders.
7. Conflicts in the design and specifications of products that are no longer produced.
8. Contract stalling, changes to contract scope, work outside the scope of the contract, use of the project before final handover and failure to pay by the Owner/Employer.

In the Transmission construction work contract at PT PLN (Persero), disputes or often referred to as disputes often occur regarding how to implement the clauses of the

agreement, what the contents of the agreement are or caused by other things outside those regulated in the agreement.

The following are some causes of disputes:

1. Differences in Contract Interpretation
  - a. Controversy
  - b. Misunderstanding
  - c. Disagreement
2. Breach of contract
  - a. Validity or invalidity of the agreement
  - b. Validity or invalidity of the agreement
  - c. Termination of the agreement
  - d. Claims for compensation for breach of contract or unlawful acts

Based on the Contract in force at PT PLN (Persero), for Transmission construction work, it is stated that dispute resolution is carried out through Arbitration, as explained in Figure 1 below.

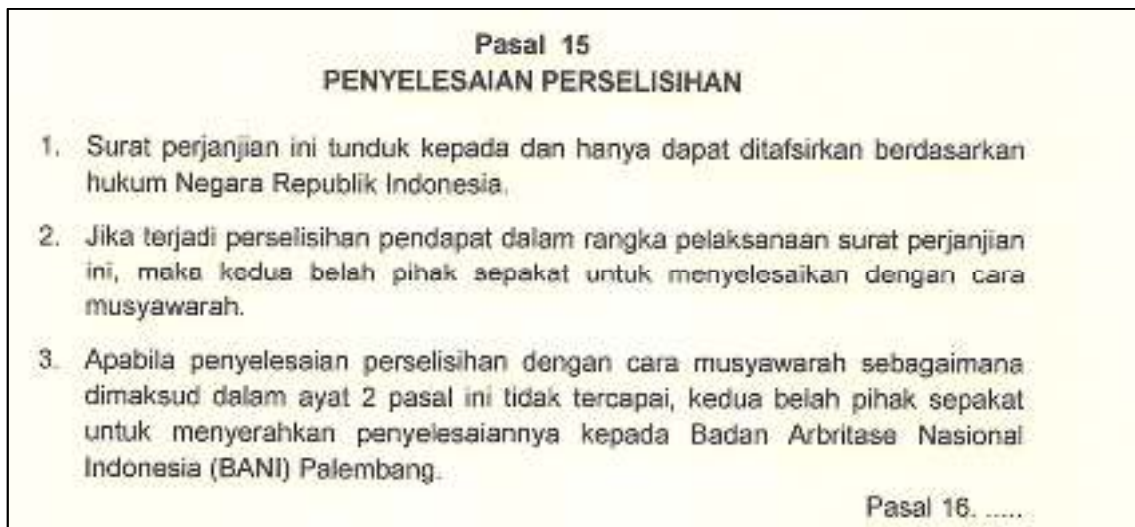


Figure.1 Example of Dispute resolution articles in Transmission Construction Work Contracts within PT PLN (Persero)

In practice, the settlement process is carried out or processed when the work is completed, so that it often has an impact on the settlement that is protracted during the implementation period, which results in the emergence of Claims, EOT and even unilateral termination of the Contract due to disputes that have not been resolved. Based on the settlement method, there are 7 types of Dispute resolution, namely:

## **1. Mediation**

Mediation generally means a ‘facilitative’ process where the mediator helps the parties to make a deal. This should not be confused with an ‘evaluative’ process (more commonly called ‘conciliation’), where the mediator, at the end of the process, gives an assessment of what the outcome should be if no deal has been made. Where parties do in fact want an evaluative process, a simple solution is to try mediation first, as this is quicker and cheaper than any evaluative process and, if that fails, to try an early neutral evaluation (ENE). The success rate is extremely high, depending on the precise type of dispute and the skill of the particular mediator.

## **2. Early Neutral Evaluation (ENE)**

This process involves a preliminary assessment of the likely outcome of the various issues in dispute. The evaluation is designed to serve as a basis for further negotiation and, hopefully, to avoid litigation or arbitration. An independent person is appointed by the parties, and that evaluator expresses an opinion on the merits of the issues raised. The opinion is non-binding, but the parties receive an unbiased evaluation of their relative strengths, and guidance as to the likely outcome if they proceed to court or arbitration. Indeed, even if you are already in court you can use a TCC judge to conduct an ENE, and if the case is not settled you can continue to trial with a different judge.

## **3. Adjudication**

This procedure is undoubtedly the most exciting new development in construction dispute resolution. Statutory adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996 (hereafter ‘the Act’) and came into force in May 1998. The payment provisions in the Act are coupled with an adjudication procedure which allows for a fast-track of a dispute determination within 28 days, unless a longer period is agreed. It is even in certain World Bank funded projects the contract terms provide for adjudication.

## **4. Dispute Boards/ Panels**

Dispute boards (DBs) involve a procedure whereby a panel of three engineers/ lawyers (sometimes just one) is appointed at the outset of a project. The DB visits the project site several times a year and deals with any incipient disputes. This generally avoids a dispute crystallizing into an arbitration. FIDIC has included the

DB procedure in its standard forms for some time. The Paris-based International Chamber of Commerce (ICC) has produced a well-received set of DB rules which offer a variety of procedures. In essence, the DB procedure amounts to serial adjudication. Each time the board makes a decision it is similar to an adjudicator producing a decision, and is, generally, temporarily binding unless either party challenges it by commencing arbitration within a stipulated time limit. If there is no challenge in that way, then the decision of the DB becomes binding.

## **5. Expert Determination**

Although little used, the popularity of expert determination is growing as construction professionals realize that it can provide a satisfactory outcome where there is a particular technical issue. If the procedure has not been written into the contract it can only be used if both parties agree to it. If it is used, then it is generally only suitable for a single issue, or for a handful of associated issues, of a particular type. Experts are subject to little court control as their decisions are generally not open to appeal.

## **6. Arbitration**

Arbitration has the advantage over litigation that it is entirely confidential, so that the parties involved do not have to expose themselves or their dispute to public scrutiny. However, the costs overall are generally similar to those incurred in court litigation because similar procedures are used.

## **7. Court Litigation**

Court litigation means trials in the TCC (Technology & Construction Court). The principal TCC is in London, but specialist TCC judges also sit in the main English provincial centres.

Based on the Indonesian Construction Services Law No. 2 of 2017 Article 88, it is stated that the dispute resolution mechanism can be carried out through the Dispute Board, which is in line with the provisions stipulated in the FIDIC Pink Book Clause 20.2 Dispute Board.

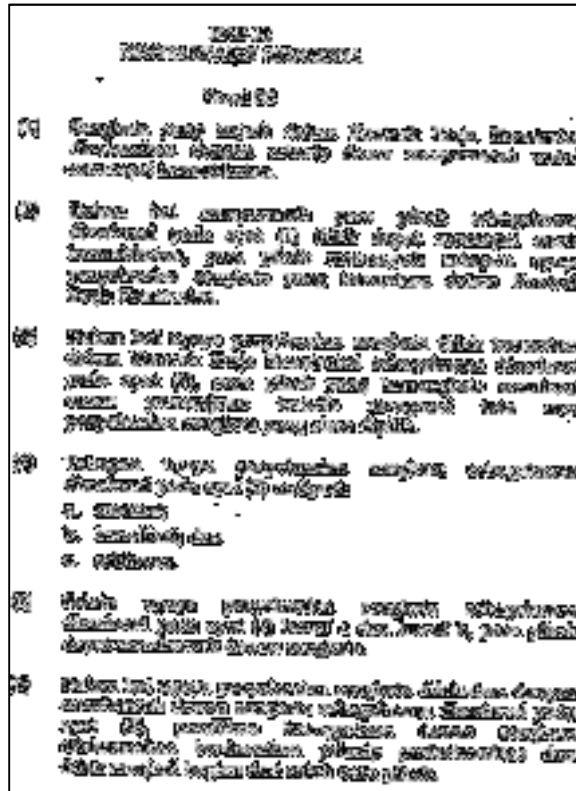


Figure 2. Construction Services Law No. 2 of 2017

Dispute board (DB) is a group of experts that helps parties resolve disagreements or disputes that arise during the implementation of a contract. DBs are commonly used in construction projects, but they can also be used in other areas, such as research and development, intellectual property, and shareholder agreements. There is two kinds of Dispute Board, ad-hoc DB and Standing DB.

An *ad-hoc* DB comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the DB has issued its decision on that dispute. The FIDIC Conditions of Contract for Plant and Design-Build (“Yellow Book”) and the FIDIC Conditions of Contract for EPC/Turnkey Projects (“Silver Book”) include the wording required for this *ad-hoc* DB procedure.

As previously noted, an *ad-hoc* board is not appointed until a dispute has arisen. The board is thus not in place to provide any advice to the parties. Once a party has notified the intent to request a DB decision it will take several months for the parties to select and agree on the DB members, to agree the terms and conditions of appointment and to make the appointments. Thereafter, even when the appointment is made, the DB will still need time to become conversant with the project, the contract and the matters in question.

The time taken for the establishment of *ad-hoc* DBs is not conducive to soonest resolution of the dispute. In addition, as the *ad-hoc* DB is not available to provide advice and/or opinion, it may be that simple issues are “elevated” to the status of a dispute, thus the “preventative” aspect of dispute avoidance is lost in this form of arrangement. The perceived advantage of an *ad-hoc* DB is that there is a financial saving as only when a dispute is referred will the costs of the DB Members and incidental costs be incurred.

A Standing DB also comprises one or three members and is appointed and convened at the beginning of the project and is obliged to become acquainted with the project, the contract and the parties and to undertake site visits to gain knowledge of matters occurring on the project.

The Standing DB is available to provide advice and opinions on matters that may otherwise be elevated to disputes. If a dispute is referred to the DB, the members are well equipped to start work on the matter immediately and should be able to provide a decision within the periods defined in the Contract and the DB Agreement.

The perceived major disadvantage of a Standing DB is that there is a chance that no matters will be referred to the DB. However, even though no disputes are referred both Parties are obliged to pay to retain the DB Members and for periodic site visits. These regular costs are significant should the contract be of long duration.

Tabel 1.  
Summary of Key Differences Between Forms of Dispute Board

Item	<i>Ad Hoc</i> Dispute Board	Standing Dispute Board
The process of assigning DB members	The appointment is undertaken when Dispute is notified by either Party. Typically, after a Determination has been made and one or other of the Parties notifies dissatisfaction.	Appointment is done at the beginning of the project within a period defined in the Conditions of Contract and remain in place until the expiration of Defects Notification Period.
DB member Availability	DB members are not tied to the Project. Therefore, their appointment and the time for establishment of the DB depends on availability	DB members are contracted to the Project by the DB Agreement and are available to provide opinions and feedback regarding project issues that occur between Employer and Contractor  DB members are better prepared to start the evaluation of any dispute immediately as they are required to visit the Project regularly and be cognizant of ongoing issues. Therefore, the process of evaluation may be faster.

Item	<i>Ad Hoc</i> Dispute Board	Standing Dispute Board
Cost	<p>Component costs are limited to non regular cost, such as Site visit fees, airfares, daily fee during site visit, drafting fee and decision reviewing.</p> <p>The periods for review and thus cost may be longer as the Members need to become conversant of the issues</p>	<p>The cost components consist of:</p> <p><b>Non regular cost</b> Such as:, Board Hearing visits, review of submissions drafting fee and decision reviewing for each dispute referred</p> <p><b>And</b></p> <p><b>Regular cost</b> Such as monthly retainer fee for each member and Site visit fees, airfares, daily fee during site visit for regular visit costs.</p>
Time for Evaluation/ Determination	<p>Potentially longer because the requirement to establish the DB for each dispute.</p> <p>In addition, the time required to become conversant with the issue may mean that the determinations take longer.</p>	<p>Faster because the members are already be familiar with the contract, the project and the personnel when a dispute is referred to them. Therefore, they are able to deal with the dispute in an informed, efficient and timely manner because there is no learning curve.</p>

## CONCLUSIONS

The current contract then the dispute resolution process is carried out at the end of the work contract, so it is very risky to lose data or personnel who are directly involved when the dispute process occurs.

If the Contract accommodates the Dispute Board, the resolution process can be carried out faster without having to potentially lose data, so this can provide certainty for the parties regarding the follow-up of the dispute.

PT PLN (Persero) as the Government Company, As the Importance of The Law Enforcement and Good Corporate Governance especially in State Owned Company which have many regulated auditor. The Dispute Settlement should have legal basis.

The addition of a clause on dispute resolution using a Dispute Board in the Transmission Construction Work Contract within PT PLN (Persero) is very necessary to provide certainty for both parties in completing the work.

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