

# UNDERSTANDING ALTERNATIVE CONSTRUCTION DISPUTE RESOLUTIONS IN COMMON LAW AND CIVIL LAW COUNTRIES

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## Abstract

Construction work is now carried out on an international scale, and involves many parties from various countries. Dispute resolution in construction contracts is often a challenge because it involves various parties with different interests. Disputes that arise can be caused by differences in contract interpretation, changes in working conditions, or non-conformity of work results with agreed specifications. Dispute resolution methods through Litigation and Non-Litigation are alternative solutions, especially for disputes in the construction sector that require fast and professional resolution. This paper discusses alternative mechanisms for resolving construction disputes through non-litigation as an option for resolving construction work contract disputes in Indonesia (Civil Law) and in America (Common Law), including its advantages and challenges. The approach used is the method of analyzing relevant laws and regulations. The results show that alternative construction contract dispute resolution through non-litigation offers various advantage. Different Arbitrase procedure in Common Law and Civil Law Countries, but the same procedure for Dispute Board.

**Keywords :** *Dispute Resolution, Construction Contract, Non Litigation, Civil Law, Common Law*

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Construction work is now carried out on an international scale, and involves many parties from various countries. Dispute resolution in construction contracts is often a challenge because it involves various parties with different interests. Disputes that arise can be caused by differences in contract interpretation, changes in working conditions, or non-conformity of work results with agreed specifications. Dispute resolution methods through Litigation and Non-Litigation are alternative solutions, especially for disputes in the construction sector that require fast and professional resolution. This paper discusses alternative mechanisms for resolving construction disputes through non-litigation as an option for resolving construction work contract disputes in Indonesia (Civil Law) and in America (Common Law), including its advantages and challenges. The approach used is the method of analyzing relevant laws and regulations. The results show that alternative construction contract dispute resolution through non-litigation offers various advantage. Different Arbitrase procedure in Common Law and Civil Law Countries, but the same procedure for Dispute Board.

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## INTRODUCTION

Construction sector is sector with full of challenges and has high complexity. In construction projects which is involving various parties, disputes may arise that can hinder project progress and impact costs. Therefore, the Government should be aware of

the intensity of construction sector development, because it could potentially trigger an increase in disputes, because construction disputes are still a serious problem in the implementation of construction work.

Alternative dispute resolution in the construction sector has a new paradigm since the legislation on construction services, release Law Number 2 of 2017. The main priority is carried out by taking a dispute resolution method Non-Litigation, which is the resolution of disputes that occur between the parties in the construction contract is prioritized using the principle of deliberation to reach a consensus as regulated in Article 88 number (1). This means that settlement carried out when there is negligence or default on the construction work of the parties can resolve it through deliberation and consensus to obtain results that are mutually agreed upon.

In resolving construction issues, the parties can take several stages as stated in the construction contract. These stages are explicitly regulated in Law Number 2 of 2017 Article 88 Number (4) which stipulates that the stages of dispute resolution efforts as referred to in number (2) state that if in the case of deliberation the parties do not reach an agreement, then in resolving it the parties can use the procedures stated in the construction law including mediation, conciliation and arbitration.

Trade cooperation is currently not limited by state and legal boundaries, it can be done by all business actors anywhere. Considering that in this world there are two law systems, Common Law and Civil Law, it is necessary to compromise, what if a dispute occurs between business actors who have different law systems? This study will discuss non-litigation legal settlement with Arbitration in Common Law and Civil Law Countries.

## **RESEARCH METHODOLOGY**

The type of research is normative legal research. The problem approach used in this study is legislation approach. The collection of legal materials is carried out by recording and documenting primary legal materials, such as laws and regulations, secondary legal materials such as books, articles. Analysis of legal materials using the deductive method, namely from general to specific.

## RESULTS AND DISCUSSION

### 1. *Legal Basis for Non-Litigation Dispute Resolution in Indonesia (Civil Law)*

In accordance with Law no. 2 of 2017, Article 88, concerning the settlement of Construction Disputes, it is determined to use *non-litigation* channels, that is:

- a. Deliberation for consensus,
- b. Mediation
- c. Conciliation
- d. Arbitrase
- e. Dispute Council

The settlement of points a, b, c will not be discussed in this article.

### 2. *Review of Dispute Resolution through Arbitration and Dispute Board in Indonesia using Civil Law*

#### a. Arbitration

Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (AAPS Law), is the legal basis for the use of Arbitration to resolve disputes, especially in trading. Construction dispute resolution through arbitration involves a process in which the disputing parties agree to introduce their cases to arbitration. Arbitration consists of independent arbitrators or experts who have the authority to hear evidence from both parties and make binding decisions regarding the existing dispute, the decision of which is final and binding.

#### b. Dispute Board

Construction dispute resolution through a dispute board involves a panel or board consisting of independent experts or professionals who are appointed to resolve disputes arising in a construction project. The legal basis is Law Number 2 of 2017, Article 88 paragraph (5), dispute resolution can be carried out using the Dispute Council, and is explained in the Regulation of the Minister of Public Works and Public Housing Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council. This dispute council usually has binding decisions and provides advice or decisions related to conflicts that arise between parties involved in a construction project. The decision-making of this dispute council can reduce the need for litigation or courts, and provide faster and more efficient dispute resolution.

## ***2.1. Dispute Resolution Procedures by Arbitration in Indonesia (Civil law)***

1. Must be preceded by a written agreement of the parties to carry out the settlement using an arbitration institution. The parties agree and bind themselves to resolve disputes that will occur by arbitration before a real dispute occurs by adding this clause to the main agreement.
2. All examinations, investigations in the trial until the decision is issued by the Arbitration are carried out in private, in accordance with Article 27, Law Number 30 of 1999.
3. The Applicant can be represented by a Legal Counsel, pay 50% of the court costs; submit an Arbitration request; Determine the schedule for the first hearing. Furthermore, the Arbitration Secretariat will submit an Arbitration request to the Respondent, and summon the Respondent to settle 50% of the court costs.
4. Selection of Arbitrators, in accordance with Article 15, Law Number 30 of 1999. Carried out by the parties. The Applicant appoints one Arbitrator, the Respondent appoints one Arbitrator, both Arbitrators appoint the third Arbitrator. If the Respondent does not appoint an Arbitrator within 30 days, then the Applicant's Arbitrator will become the sole Arbitrator. If within 14 days the two Arbitrators from the applicant and the respondent do not appoint a third Arbitrator, then they can ask the court to determine the third Arbitrator, the appointment by the Court cannot be revoked. After the Arbitrators are determined by the Arbitration institution, the Arbitrators may no longer have any contact with the Applicant or the Respondent. The Arbitrator may not be a judge, prosecutor, clerk, or other judicial official.
5. The choice of law, forum and settlement procedure is in the hands of the parties. The applicable law in resolving disputes is the Indonesian Civil Law, but Arbitration tends to use *ex aequo et bono*, namely on the basis of propriety and justice, because business continuity is prioritized. If the Applicant does not request a decision on the basis of *ex aequo et bono*, then the Arbitration will use the applicable Law.
6. The Arbitration Decision is final and binding. The Arbitration Decision is final & binding (*Inkracht van gewijsde*), which is a final decision that has permanent force and is binding on the parties (Article 60 of Law Number 30 of 1999). If

there is an administrative error in the decision that is handed down, the parties within 14 days from the date the decision is handed down are given the right to request a correction to the decision.

7. Settlement is relatively short, 180 days, compared to the litigation process.
8. Execution of the Arbitration decision at the District Court. Although Arbitration is an institution that resolves disputes outside the court, the execution of the Arbitration decision must be carried out by the District Court (Article 62 of Law Number 30 of 1999). The Arbitration Decision will be registered at the District Court at the Respondent's domicile.

## ***2.2. Dispute Resolution Procedure with Dispute Board in Indonesia (Civil law)***

The use of Dispute Board is carried out for:

1. procurement of construction work or integrated construction work which is partly or wholly funded by domestic loans or domestic grants received by the government and/or regional government;
2. procurement of construction work or integrated construction workation that is partly or wholly financed by foreign loans or foreign grants, unless otherwise stipulated in the foreign loan agreement or foreign grant agreement

Formed through a Dispute Council Agreement, with a work period in accordance with the provisions in the Work Agreement; In the event that the use of the Dispute Council is agreed upon, the Employer and Employee agree on the number of members of the Dispute Council with the requirements needed after the issuance of the letter of appointment of the goods/service provider and before signing the Contract; The number of members of the Dispute Council is an odd number, a maximum of 3 (three) people.

*The work procedures include the Dispute Council including:*

1. The mechanism for preventing and resolving disputes as referred to in Article 8 paragraph (2) letter a of PUPR Ministerial Regulation no. 11 of 2021, is carried out through:
  - a. document review; carried out on documents issued during the working period of the Dispute Council Work Agreement, copies of existing documents in accordance with the Contract, progress of Contract implementation, and the needs of the Dispute Council.

- b. field visits; periodic and incidental
  - c. Notification; information submitted by the Dispute Board to Employer and Employee in the event of a potential dispute after conducting a document review and/or field visit or information submitted by the Employer and Employee to the Dispute Board in the event of differences of opinion and/or interpretation of the provisions and implementation of the Contract and the potential for a Dispute.
  - d. hearing; conducted by the Dispute Board after receiving or submitting a Notification
  - e. provision of advice, conducted based on data from document review, hearing, periodic field visits and/or incidental field visits. With the note that the advice produced is a non-binding professional consideration; cannot be used to resolve other disputes.
2. The Dispute resolution mechanism is carried out through:
- a. Notification; is information submitted by the the Employer and Employee in the event of a Dispute. Attaching the cause and chronology of the Dispute and supporting data related to the Dispute.
  - b. document review; conducted by the Dispute Board after receiving the Notification
  - c. hearing; conducted after document review and
  - d. field visit; to obtain data on the conditions of the Contract implementation when the Dispute occurs.
  - e. internal meeting of the Dispute Council; discussing the results found based on the hearing and/or field visit;

For the Issuance of a formal Decision, it will be signed by all members of the Dispute Council; and submitted through the Notification of Service Users and Service Providers; and submitted no later than 42 (forty-two) calendar days from the date of the hearing.

### ***3. Use of Arbitration in the United States (Common Law)***

The Common Law system is used by England along with many countries in the world that are influenced by England such as the United States, Canada, India, and Australia. The difference with civil law, related to the formulation of the application

letter with the common law approach, especially in the United States, begins with a brief and clear statement of claim in writing the application letter. The assumption adopted by the United States is that the document only needs to include an outline of the facts and their legal basis. Which of these descriptions is sufficient to provide the information needed by the opponent to begin preparing a defense, and that the description will later be developed in a series of arbitration processes through the discoveries that will be held.

The common law practice of seeking supporting evidence after a request has been made has a more substantial impact than the arguments presented in the initial request. The practice tends to expect liberal discovery to occur after the commencement of the case examination.

There are many differences in the evidentiary stage of international arbitration within the scope of the common law and civil law legal systems based on the IBA Rules and the Prague Rules. The Prague Rules, which apply the civil law legal system, are characterized predominantly by a proactive role towards the arbitral tribunal's power during the trial process by emphasizing efficient and document-based dispute resolution efforts. Meanwhile, the IBA Rules, which apply the common law legal system, have also embraced several approaches to the civil law legal system and emphasize full control over the arbitral tribunal in a trial. However, it also still pays attention to the process of document discovery, requires the presence of witnesses to give testimony, hear expert testimony, and the process of examination and cross-examination is held on an ongoing basis.

#### ***4. Use of Dispute Boards in America (Common Law)***

Generally there are two types of Dispute Boards, Standing Dispute Boards which are established as part of the original contract, and Ad Hoc Dispute Boards which are formed when there is a dispute. These Dispute Boards generally consist of three members who have the appropriate expertise and are mutually agreed upon by the parties before being appointed. If they are part of the Standing Dispute Board, they usually visit the project site regularly whenever there is a dispute. For Ad Hoc Dispute Boards, they can visit the project site as part of the process to resolve the dispute. The advantage of using a Standing Dispute Board is that the board members are familiar with the project and it is easier for them to make decisions.

## CONCLUSION

1. The use of Arbitration as an alternative to resolving construction disputes through non-litigation channels has advantages that accommodate the needs of business people, such as confidentiality, fast resolution time, and relatively inexpensive costs. For Arbitration in Common Law Countries, there is a difference with Civil Law in the document request process, at the beginning of the investigation
2. While the Dispute Council in Common Law and Civil Law as an alternative to resolving construction disputes through non-litigation channels has the same process, has the advantage of preventing disputes and has been assisted since the beginning of the project.
3. There needs to be awareness for business actors/business actors to resolve disputes through non-litigation because it can produce a win-win solution, fast resolution, is closed, the confidentiality of the dispute is maintained, the dispute is resolved, the settlement period has been determined.
4. There needs to be a regulation regarding the implementation of a non-litigation decision so that it can be implemented directly without first registering the decision with the District Court Clerk. So that the resulting decision can be final, binding and legally binding.

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