

ALTERNATIVE CONSTRUCTION DISPUTE RESOLUTION THROUGH DISPUTE RESOLUTION BOARD IN INDONESIA - STAGES AND LESSONS LEARNED

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Abstract

This research discusses the importance of construction dispute resolution mechanisms, particularly through the Dispute Board (DB), in preventing and resolving conflicts efficiently. Construction disputes often arise due to differences in perception of the scope of work, unclear technical specifications, late payment, and force majeure. The litigation process is often time-consuming, expensive, and inadequate as judges do not always have construction expertise. Alternative dispute resolution such as mediation, conciliation and arbitration have their own limitations, ranging from non-binding results to dissatisfaction with the arbitrator's decision. The Dispute Board, which has been implemented in international projects, offers a preventive and effective approach by involving an independent team established at the outset of the contract. The DB's decision, which can be provisional or final, enables dispute resolution without the need for litigation. This study uses a literature review method, referring to FIDIC standards, to evaluate the effectiveness of DB in the Indonesian context. The research found that the use of DB can improve time and cost efficiency, although its implementation still faces challenges, including a lack of certified human resources. The results of this study confirm the relevance of DB as a fairer, faster, and more flexible alternative to traditional dispute resolution methods.

Keywords: *Construction Dispute Board, Construction Disputes, Alternative Dispute Resolution, Time and Cost Efficiency, FIDIC Standard*

Abstrak

Penelitian ini membahas pentingnya mekanisme penyelesaian sengketa konstruksi, khususnya melalui Dispute Board (DB), dalam mencegah dan menyelesaikan konflik secara efisien. Sengketa konstruksi sering kali timbul akibat perbedaan persepsi tentang ruang lingkup pekerjaan, spesifikasi teknis yang tidak jelas, keterlambatan pembayaran, dan force majeure. Proses litigasi sering memakan waktu lama, mahal, dan tidak memadai karena hakim tidak selalu memiliki keahlian konstruksi. Alternatif penyelesaian sengketa seperti mediasi, konsiliasi, dan arbitrase memiliki keterbatasan masing-masing, mulai dari hasil yang tidak mengikat hingga ketidakpuasan dengan keputusan arbitrator. Dispute Board, yang telah diterapkan dalam proyek internasional, menawarkan pendekatan preventif dan efektif dengan melibatkan tim independen yang dibentuk sejak awal kontrak. Keputusan DB, yang bisa bersifat sementara atau final, memungkinkan penyelesaian sengketa tanpa perlu litigasi. Penelitian ini menggunakan metode tinjauan pustaka, merujuk pada standar FIDIC, untuk mengevaluasi efektivitas DB dalam konteks Indonesia. Penelitian ini menemukan bahwa penggunaan DB dapat meningkatkan efisiensi waktu dan biaya, meskipun pelaksanaannya masih menghadapi tantangan, termasuk kurangnya sumber daya manusia bersertifikat. Hasil penelitian ini mengkonfirmasi relevansi DB sebagai alternatif yang lebih adil, cepat, dan fleksibel dibandingkan metode penyelesaian sengketa tradisional.

Kata kunci: *Dispute Board Konstruksi, Sengketa Konstruksi, Alternatif Penyelesaian Sengketa, Efisiensi Waktu dan Biaya, Standar FIDIC*

INTRODUCTION

Construction work tends to undergo many adjustments or changes in its implementation. In the implementation of construction service contracts, it is undeniable that problems or disputes often arise between the Service Provider and the Service User. Therefore, it is necessary to have a Construction Work Contract as a whole contract document that regulates the legal relationship between Service Users and Service Providers in the implementation of Construction Services. In the implementation of the contract, problems or disputes often arise which, among others, are caused by: differences in perceptions of the scope of work, incomplete / unclear technical specifications that can have an impact on not achieving quality fulfillment, timeliness of work, delays in payment, disagreements on price adjustments (cost escalation), quantity calculation methods, work progress, delays in decision making and facing unforeseen circumstances (force majeure or force majeure) which cause additional costs or changes in the scope of work.

Dispute resolution in Indonesia is through litigation / lawsuit to the court and non-litigation / alternative dispute resolution. Alternative dispute resolution outside the court through Law (UU) Number 2 Year 2017 concerning Construction Services Chapter XI Dispute Resolution according to article 88 paragraph (4) Stages of dispute resolution efforts include mediation, conciliation and arbitration. Article 88 paragraph (5) In addition to dispute resolution efforts as referred to in paragraph (4) letter a and letter b, the parties can form a Dispute Council.

The process of resolving disputes through litigation / lawsuit to the court is less able to embrace common interests, the settlement time is relatively slow, requires expensive costs, and can cause hostility between the parties to the dispute. In resolving disputes through litigation, the disputing parties will submit themselves to the state judicial body. In this process, the disputing parties must undergo a legal judicial process in accordance with the provisions stipulated in the Law. If one of the parties is not satisfied with the judicial decision, the party has the right to appeal to a higher level until it reaches the Supreme Court. This makes the dispute resolution process through litigation long and costly. In addition, dispute resolution through litigation handled by non-experts in the construction field often results in unfair decisions.

The dispute resolution process through non-litigation channels can be carried out

in several ways, including mediation, conciliation and arbitration. Mediation according to Government Regulation (PP) Number 22 of 2020 is an effort to resolve disputes by involving a third party who acts as an advisor (mediator). This mediator helps the parties to the dispute reach an agreement peacefully and without favoring one of the parties. The mediation process emphasizes communication and cooperation to find a win-win solution. The mediation process is conducted without going to court and aims to maintain the efficiency of time, costs, and maintain good relations between the disputing parties in the scope of construction services.

Another non-litigation dispute resolution process is through conciliation. Conciliation according to Government Regulation (PP) Number 22 of 2020 is an effort to resolve disputes by involving a third party (conciliator) who intervenes actively. The conciliator is a third party who is neutral and trusted by all parties to the dispute because the conciliation process does not only facilitate meetings between the parties, but also provides suggestions for solutions based on facts and settlement mechanisms. However, in terms of legal force, the conciliator's input and solutions do not constitute a legally enforceable decision so there still needs to be a binding agreement between the parties on the recommendations made by the conciliator. If the parties do not find an agreement from the conciliator's recommendations then the parties can proceed to other methods such as arbitration or litigation.

Arbitration according to Law No. 30 of 1999 is a way of resolving a civil dispute outside the public courts based on an arbitration agreement made in writing by the parties to the dispute. Arbitration involves a third party, namely an arbitrator or arbitration panel that acts as a decision maker. The arbitration award is final and binding on the parties, this decision cannot be changed without all parties agreeing to reopen the case. In accordance with Article 3 of Law No. 30 of 1999, the district court is not authorized to hear disputes between parties that have been bound by an arbitration agreement. This article strengthens the position of arbitration as a dispute resolution forum that is separate from the public court system.

The conventional way of resolving disputes is no longer attractive. The decision of the dispute in Court is entirely the authority of the Judge, where the Judge is often not an expert in the field of construction. The litigation process also takes a long time, because the losing party often appeals to the High Court, Cassation and even Judicial

Review to the Supreme Court. Meanwhile, Mediation and Conciliation settlement is difficult to find an agreement due to the strong subjectivity of the parties. Mediators find it difficult to find common ground without the authority to provide solutions, while Conciliators find it difficult to find agreements because the solutions they propose are not binding. Settlement in Arbitration is difficult to predict because the parties do not participate in decision-making, so there is often rejection of the results. Therefore, the idea of a Dispute Resolution Board is the right step.

Dispute Board (DB) is a dispute resolution mechanism in construction projects that involves the establishment of an independent team agreed by the parties at the outset of the construction contract. The main objective of the Dispute Board is to prevent disputes and resolve disputes efficiently. This dispute prevention function is something that previous dispute resolution alternatives do not have.

Based on this background, this proceeding will examine the position of the Dispute Board in construction dispute resolution and examine the effectiveness of dispute resolution through the Dispute Board and Litigation or Arbitration in Indonesia.

RESEARCH METHODS

The research method used in this study is a literature review, which aims to collect, evaluate, and synthesize existing studies, valid sources such as FIDIC regarding the role of the Dispute Board in the resolution of construction disputes as well as the stages in the use of the Dispute Board in terms of the FIDIC Conditions of Contract 2017 to serve as a guide and learning in the application of the Dispute Board to Construction Contracts in Indonesia.

RESULTS AND DISCUSSION

Development of Dispute Board in Indonesia

The Construction Dispute Board evolved to meet the need in the construction industry for quick, cost-effective, informal and impartial resolution of construction disputes. The Construction Dispute Board originated in the United States, where its first recorded use was on the Boudry Dam Project in Washington in 1960 (Cyril Chern, 2011). Currently the Dispute Board exists in 4 regions namely Region 1 (US, Canada & The Caribbeans), Region 2 (Africa, Asia, Europe), Region 3 (Australia & New

Zealand), Region 4 (Latin America) (DRBF website).

The Construction Dispute Board according to PP number 14 of 2021 is an individual or team formed based on the agreement of the parties, since the beginning of the implementation of the construction work contract to prevent and resolve disputes. As for the explanation of Law Number 2 of 2017 concerning Construction Services in article 88 Paragraph (5) What is meant by "dispute board, is a team formed based on the agreement of the parties since the binding of Construction Services to prevent and handle disputes that occur in the implementation of the Construction work Contract. In government regulations and construction services laws related to the Construction Dispute Board, this only contains the definition of the Construction Dispute Board but has not yet explained its work procedures in detail.

Construction Dispute Board in Indonesia is used in projects funded by international institutions such as the World Bank, Asian Development Bank (ADB), or other multilateral financing institutions that require the use of Construction Dispute Board in the contract documents. In Indonesia, the Construction Disputes Board is starting to be adopted through standard contracts referring to international documents such as FIDIC (International Federation of Consulting Engineers), which are often used in large projects. FIDIC has provisions on the establishment of DRB as part of the dispute resolution mechanism.

There have been various developments in the form of Construction Dispute Board (DRBF, 2020) starting with Dispute Review Board (DRB) to; Dispute Adjudication Board (DAB) in FIDIC Condition of Contract 1999; Combined Dispute Board (CDB) in some countries; Dispute Board (DB) in FIDIC Condition of Contract - Harmonized Edition 2006 & 2010, which further became Dispute Avoidance and Adjudication Board (DAAB) in FIDIC Condition of Contract 2017. Broadly speaking, the main differences of the changes to the FIDIC Construction Dispute Board based on the nature of the decision are as follows:

Table 1.

The different changes of the Construction Disputes Council in FIDIC based on the nature of its decisions

Board Type	Nature of Decision	Main Focus
Dispute Review Board	<i>Non-binding</i> (recommendation)	Consensus resolution
Dispute Adjudication	Temporary <i>binding</i>	Binding decision for project

Board Type	Nature of Decision	Main Focus
Board		sustainability
Combined Dispute Board	<i>Non-binding and binding</i>	Flexibility in solving methods
Dispute Avoidance and Adjudication Board	Temporary <i>binding</i> + prevention	Dispute prevention and adjudication where necessary

Construction Dispute Board Constitution

The Construction Dispute Board refers to FIDIC (Federation Internationale des Ingenieurs-Conseils) depending on the scale of the project and the requirements of the contract. The Construction Dispute Board shall consist of, as stated in the contract, one or three suitably qualified persons ("members"), each of whom shall be fluent in the language of communication specified in the contract and shall have professional experience in the type of construction included in the work and interpreting the contractual documents. If not specified in the contract and otherwise the parties do not agree, the Construction Disputes Board shall consist of three persons.

FIDIC allows flexibility in determining the number of Construction Disputes Board members according to the nature of the project and agreed by the parties to the contract. In small projects the number of members of the Construction Disputes Board can be just one (Single Board). For large or complex projects the number of members may be up to three (Three Member Board), where the dispute may involve multiple disciplines. For a three- member Construction Dispute Board, each party must nominate one person for the other party to approve. The first two members must recommend and the parties must agree on a third member, who will act as chair. On very large projects, the number of members of the Construction Disputes Board can be more than three (odd number) which includes a number of additional experts to ensure all technical, financial or legal aspects are properly addressed. Members of the Construction Dispute Board should be independent, have technical expertise relevant to the project, and be selected with the consent of both parties.

The appointment of the Construction Dispute Board is set out in the construction contract clause. It is also possible for the contract to impose Construction Disputes Board guidelines from specific institutions, e.g. FIDIC, CIArb, ICC, JICA, DRBF, RICS etc. Construction Dispute Board members should be appointed within 28 days of

the Contractor receiving the Letter of Acceptance, unless otherwise stated in the contract (FIDIC 2017). Ideally, appointments are made before the Letter of Acceptance is issued. Each member of the Construction Dispute Board must sign the Construction Dispute Board Agreement (Tripartite Agreement) with both parties. The Tripartite Agreement covers the Working Guidelines, rights, obligations and responsibilities. FIDIC provides a sample form for this Tripartite Agreement.

The relevance of establishing a Construction Dispute Board in Indonesia is hampered by the lack of human resources who are certified and recognized by national and international Construction Dispute Board institutions such as the Dispute Resolution Board Foundation (DRBF) and Dispute Board Federation (DBF). For this reason, it is important to encourage the improvement of training programs for prospective members of the Construction Dispute Board to meet international standards. Given that the use of Construction Dispute Boards has been widely applied in contracts in Indonesia that use funding from the World Bank, Asian Development Bank (ADB) or other funding from other international institutions that require the use of Construction Dispute Boards in their contractual.

Fees for members of the Construction Dispute Board shall be agreed upon and set forth in the Dispute Board Agreement, including expert fees that may be required by the Construction Dispute Board. The amount of payment is to be split in half for each party. The estimated amount of fees for the Construction Disputes Board with three members ranges from 0.05% to 0.3% of the total project contract value. This value is still smaller when compared to resolving disputes through the court or arbitration process which can take longer.

The parties may agree to replace members of the Construction Dispute Board if one member is incapacitated or unable to continue his/her duties for some reason, such as death or other incapacity. If there is a replacement, the replacement member must be suitably qualified and agreed by both parties. The appointment of Construction Dispute Board members may be terminated by mutual agreement of both Parties, but not by the Service User or Service Provider unilaterally.

The term of the Dispute Board (including the appointment of each member) will expire as per FIDIC 2017 on one of the following dates:

1. on the date the termination would have been effective, or deemed to have been

effective, under Sub-Clause 14.12 [Termination]; or

2. 28 days after DAAB renders its decision on all Disputes referred to it under Sub-Clause 21.4 [Obtaining DAAB Decision] before such dismissal becomes effective, which is longer.

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DAAB (including the appointment of each member) shall expire 28 days after:

1. DAAB gives its decision on all Disputes that have been referred to it (under Sub-Clause 21.4 [Obtaining DAAB Decision]) within 224 days after the date of termination; or
2. the date when both Parties reach final agreement on all issues (including payment) related to the termination, which comes first.

Dispute Prevention

The pre-appointed Construction Dispute Board (Letter of Acceptance) works throughout the duration of the project, with regular visits to the project site to monitor progress and identify potential issues before they become major disputes. This process ensures that the DB has a deep understanding of the project and can make more informed and relevant decisions.

Where there is a potential dispute, both parties may jointly request (in writing, with a copy to the Engineer) the Construction Disputes Board to provide assistance and/or informally discuss and attempt to resolve any problems or disputes that may arise between them during the performance of the Contract. If DB becomes aware of any problem or dispute, DB may invite both Parties to submit such joint request. Such joint request may be made at any time, except during the time the Engineer is performing his duties under Sub- Clause 3.7 [Agreement or Determination] regarding the matter in question or dispute, unless both Parties agree otherwise.

Whenever there is a request for recommendation from the Service User or Service Provider, on the issue or disagreement encountered, DB will review the relevant documents/data/information (site visit if required), meeting/hearing with the service user and service provider and provide informal recommendations to prevent disputes. Neither Party is bound to act on the advice given during such informal meetings, and DB is not bound to any future dispute resolution process or decision by the views or

advice given during the informal assistance process, whether orally or in writing.

Construction Disputes Board Decision

The entire dispute resolution process by DB is governed by Sub-Clause 21.4, which provides detailed procedures regarding how disputes are referred, decisions are made, and how dissatisfaction with those decisions are addressed. Each step in this process, from the referral of the dispute, the obligations of the parties, to the making of the decision, aims to provide a clear and enforceable decision in dealing with disputes arising during the performance of the contract.

a. Referral of Disputes to the Construction Disputes Board

If a dispute arises between the User and the Service Provider, either Party may refer the dispute to DB for a decision. The dispute referral must be made within the prescribed time after the issuance of the Notice of Dissatisfaction (NOD), which applies if Sub- Clause 3.7 [Agreement or Determination] applies. This referral must be made within 42 days after the NOD is issued. If the referral is not made within this time limit, the NOD is deemed expired and invalid. The dispute referral must state that the dispute is being referred in accordance with Sub-Clause 21.4 and contain a description of the dispute. This referral shall be in writing and a copy provided to the other Party and the Engineer. For a three-person DB, a referral is deemed accepted by the DB when it is received by the chair of the DB. Referral of a dispute to the DB may also interrupt the running of a limitation or expiration period, except where prohibited by law.

b. Obligations of Parties After Referral

Both Parties shall promptly provide DB with all such information, access to the Site, and reasonable facilities, as DB may require in making a decision on the dispute. Unless the Contract has been canceled or terminated, both Parties shall continue to perform their obligations under the Contract.

c. Construction Disputes Board Decision

DB is obliged to resolve and provide a decision within 84 days of receiving the dispute referral or within a period agreed by both Parties. If at the end of this period any invoices remain unpaid by either party, DB is not obliged to provide a decision until such invoices are paid in full. Once payment is received, DB will provide a decision as quickly as possible. DB's decision shall be given in writing with clear

reasons and copied to both Parties and the Engineer. The decision is binding on both Parties, who are obliged to comply with the decision regardless of whether or not there is a NOD against the decision. The Owner is responsible for the Engineer's compliance with DB's decision.

If DB's decision requires the payment of a sum of money from either Party, then the amount shall be paid immediately without the need for any other certification or notice. However, if there are reasonable grounds to believe that the payee will not be able to recover the money if the decision is reversed, DB may request a guarantee from the payee. DB proceedings are not considered arbitration and DB does not act as an arbitrator.

d. Dissatisfaction with DB Decision

If a Party is dissatisfied with the DB's decision, it may provide a NOD to the other Party within 28 days of receiving the DB's decision. The NOD should state that it is a "Notice of Dissatisfaction with DB Decision" and state the reasons for dissatisfaction.

If DB does not provide a decision within the prescribed period, then the dissatisfied Party may provide a NOD within 28 days after the end of such period. Except as provided in Sub-Clause 3.7.5 [Dissatisfaction with Determination of Engineer], Sub-Clause 21.7 [Failure to Comply with DB Decision], and Sub-Clause 21.8 [No DB], neither Party shall be entitled to arbitrate the dispute unless a NOD has been given.

If no NOD is provided within 28 days of receiving DB's decision, then the decision becomes final and binding for both Parties.

If the dissatisfied Party only disagrees with a specific part of the DB's decision, that part should be clearly identified in the NOD. That part will be considered separate from the other parts of the decision that are still valid.

Amicable Settlement

If a Notice of Dissatisfaction (NOD) is given under Sub-Clause 21.4, both Parties shall attempt to amicably resolve the dispute before arbitration is commenced. However, unless otherwise agreed, arbitration may commence after 28 days from the service of the NOD, even if there has been no attempt at amicable settlement.

Arbitration

If the dispute is not resolved amicably and subject to certain provisions in the contract, then disputes for which the DB's decision is not final and binding will be resolved through international arbitration. Unless otherwise agreed, the arbitration will follow the rules of the International Chamber of Commerce and may involve one or three arbitrators appointed in accordance with those rules. The arbitration will be conducted in the language specified in the contract.

The Arbitrator has the authority to review the decision of DB or the Engineer, except for decisions that are final and binding. The Engineer may also be called as a witness in the arbitration. The Arbitrator may consider the extent to which a Party failed to cooperate in the establishment of the DB when deciding on the costs of the arbitration.

Parties to the arbitration will not be limited to evidence or arguments that have been presented to the DB previously. Decisions of DB that have not been finalized are still admissible as evidence in the arbitration. The arbitration may be initiated either before or after completion of the work. The obligations of the Parties, the Engineer and DB remain in force during the arbitration proceedings. If the arbitration results in a payment decision, the amount due shall become due immediately without the need for further certification or notice.

Failure to Meet DB Decisions

If a Party does not comply with a DB decision, the other Party may refer the matter directly to arbitration without following the normal procedures for obtaining a DB decision or an amicable settlement. The arbitral tribunal has the power to order provisional or interim measures, including an order to enforce a DB decision that has not been complied with. If the DB decision is binding but not final, the interim measures or provisions taken by the arbitration shall take effect on the condition that the Parties' rights remain protected until the dispute is resolved by a final award. In addition, the arbitration may order damages or other relief as part of the enforcement of DB's decision.

No DB in Place

In the event of a dispute between the Parties relating to the Contract or the performance of the Works, and no DB has been established (either because the DB's

term of office has expired or any other reason):

1. Sub-Clause 21.4 [Obtaining DB Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply; and
2. The dispute may be referred directly by either Party to arbitration under Sub-Clause 21.6 [Arbitration] without prejudice to any other rights of that Party.

CONCLUSION

Construction dispute resolution in Indonesia has significant challenges, especially in the litigation process which is slow, expensive, and less effective due to judges' lack of understanding of the construction field. Alternatives, such as mediation, conciliation, and arbitration, while faster and more flexible, have limitations in producing binding decisions acceptable to all parties.

The Dispute Board (DB) offers a more effective solution with a preventive approach and temporary or final binding settlements. The DB is established at the outset of the construction contract to monitor, prevent, and resolve potential conflicts during project implementation. This mechanism has been widely applied in international projects, especially those funded by multilateral institutions such as the World Bank and Asian Development Bank.

The study shows that DB implementation in Indonesia is still constrained by the lack of certified human resources and incomplete regulations related to DB work procedures. Nevertheless, DB offers many benefits, including time and cost efficiency, flexibility, and the ability to maintain good relationships between parties. This research emphasizes the need to strengthen national capacity in establishing DBs through training, certification, and adoption of international standards such as FIDIC to improve the effectiveness of construction dispute resolution in Indonesia.

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