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Dispute Board in Construction Services: A manifestation of the principles of quick, simple, and affordable dispute resolution

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Abstract
Dispute Board (DB) was formed in the latest Construction Law to resolve construction disputes, however the regulation of DB in the Construction Law is far from adequate in manifesting the principle of quick, simple, and affordable dispute resolution. Few norms have manifested the principle by giving no opportunities to resolve disputes through litigation and regulate period to file an objection towards DB's decisions. However, there are few of criticism: (1) The concept of DB is unclear, (2) no period for the DB to make decisions, (3) the decision of BD can be contested.

Keywords: Dispute Board; Construction Law; Dispute Resolution.

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1.0 Introduction

The general explanation of Law Number 2 of 2017 concerning Construction Services as amended by Article 52 of Law Number 11 of 2020 concerning Job Creation (Construction Law) states that the construction services sector is a community activity in realizing buildings that function as supporters or infrastructure for social and economic activities of the community and support the realization of national development goals. In addition, construction services also play a role in supporting the growth and development of various goods and services industries and broadly supporting the national economy (Wibowo, 2019, p.2). However, the rapid development of construction work has the potential to trigger an increase in disputes. Conventionally, dispute resolution is usually carried out by litigation or dispute resolution before a court where the position of the disputing parties is very antagonistic (opposite each other) (Sariono & Wibawanto, 2006, p.246). The method that is considered "conventional" has been criticized a lot because it is considered overloaded, a waste of time, very expensive, unresponsive to the public interest, over-formalistic and over-technically which is contrary to the principle of fast dispute resolution, simple, and affordable (Nasution & Simorangkir, 2010, p.4). Therefore, in order to fulfill the need of fast, simple, and affordable dispute resolutions, the latest Construction Law created a body called Dispute Board (DB). The existence of DB is a concrete manifestation of the principle of lex semper debit remedium (the law always provides the best medicine) (Putra & Aryani, 2019, p.15)

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The position of the DB in Construction Law can be seen in Article 88 paragraph (5) which states that: "In addition to the dispute resolution efforts as referred to in paragraph (4) letters a and b, the parties may form a dispute board." Furthermore, in the explanation of Article 88 paragraph (5) of the Construction Law, it is regulated that: "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 mediate disputes that occur in the implementation of the Construction Work Contract." Even though such body already exist, the regulation is limited. This conditions can create "grey area" that could be use by parties with bad faith to take advantage from their contract partner.

Based on the background stated, this paper will examine the position of the DB in the resolution of construction services and its relation to the principles of quick, simple, and affordable dispute resolution, that goes with the title: "Dispute Board In Construction Services in: A Manifestation Of The Principles Of Quick, Simple, And Affordable Dispute Resolution." The research question is the principle of quick, simple, and affordable dispute resolution in construction services through DB. By examing DB in Indonesia, hopefully the author will be able to provide a reccomendations regarding further provisions of the DB in Indonesia

2.0 Literature Review

Several articles are similar to this article, so to ensure that this article is original, we will describe similar articles:

1. Karolus E. Lature's article entitled: "Analysis of Construction Dispute Resolution in Indonesia" published in the Indonesian Legislation Journal, which legal issue is the normative analysis of the philosophy and mechanism for resolving construction disputes in Indonesia after the issuance of Law no. 2 of 2017 concerning Construction Services. Both of the articles are analyzing the dispute resolution in construction, but the difference is this article only focus on resolution through the Dispute Board (Lature, 2018).
2. Hadi Ismanto and Sarwono Hardjomuljadi's article entitled: "Analysis of the Influence of the Dispute Board and Arbitration on Construction Dispute Settlement based on the FIDIC Condition of Contract 2017" published in Konstruksia Journal, which legal issue is the best way to resolve construction dispute, DB or Arbitrarion (Ismanto, 2019). Both of the articles are analyzing the dispute resolution in construction, while this article only focus on examining DB.

3.0 Methodology

This research is a legal research which according to Peter Mahmud Marzuki is a process to find the rule of law, legal principles, and legal doctrines to answer the legal issues faced (Marzuki, 2017, p.35). This legal research is using statute and conceptual approaches. The legal materials used are primary legal materials in the form of laws, namely Law Number 2 of 2017 concerning Construction Services, Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services, etc., meanwhile secondary legal materials come in the form of doctrines. The legal materials are then analyzed using analogy, interpretation and *a contrario* method.

4.0 Findings

A dispute resolution clause is a mandatory thing in a construction contract. This is in accordance with the provisions of Article 47 Paragraph (1) letter p Construction Law, which requires a construction work contract to at least contain one of the options for resolving construction disputes. In addition, in Article 23 Paragraph (1) letter h Construction Law, regulates that the construction work contract made by the Construction Service Provider (Provider) must at least contain one of the clauses for dispute resolution, namely alternative dispute resolution e.g arbitration; and settlement through the court in accordance with the applicable civil procedural law.

The old and new Construction Law have different philosophy when it comes to dispute resolutions. The old rules (Construction Law 1999) provide two alternative dispute resolutions. This is confirmed in Article 36 point (1) which reads: "The settlement of construction service disputes can be reached through the courts or out of court based on the voluntary choice of the disputing parties." The word "or" in the article should emphasize alternative dispute resolution mechanisms, not cumulative. This means that both parties to the dispute may not choose to proceed with legal action to the litigation institution if they are not satisfied with the decision given by the non-litigation institution that they have chosen from the start. Vice versa, they are also not allowed to proceed with non-litigation legal action if they are not satisfied with the decision given by the litigation institution.

However, the above concept has been deviated by Article 36 number (3) of the Construction Law 1999. This article provides an opportunity for dissatisfied parties to continue to settle disputes in stages. Article 36 point (3) of the Construction Law 1999 reads: "If an out-of-court dispute resolution effort is chosen, a lawsuit through court can only be taken if the effort is declared unsuccessful by one of the disputing parties." With the opening of legal action to the court, the decisions made by non-litigation institutions seem to have lost their teeth. The resulting decision is not final and binding. In other words, the dispute resolution mechanism in the 1999 Construction Services Law is not purely alternative in nature, in fact, it is dominantly leading to litigation.

Finally, the new construction services law (Construction Law) corrects these weaknesses. Dispute resolution is directed to non-litigation mechanisms. This is evidenced by the absence of the word "court" as a rule in the article that specifically regulates the settlement of construction disputes. The following are the regulations related to dispute resolution in Construction Law, namely in Chapter XI Article 88 which reads:

(1) Disputes that occur in the Construction Work Contract are resolved with the basic principle of parley to reach consensus.

(2) In the event that the parley of the parties as referred to in paragraph (1) cannot reach an agreement, the parties shall take the stages of dispute resolution efforts as stated in the Construction Work Contract.
(3) In the event that the dispute resolution effort is not stated in the Construction Work Contract as referred to in paragraph (2), the parties to the dispute shall make a written agreement regarding the dispute resolution procedure to be chosen.
(4) The stages of dispute resolution efforts as referred to in paragraph (2) include: a. mediation; b. conciliation; and c. arbitration.
(5) In addition to the dispute resolution efforts as referred to in paragraph (4) letter a and letter b, the parties may form a dispute board.
(6) In the event that dispute resolution efforts are carried out by establishing a dispute board as referred to in paragraph (5), the election of the dispute board member shall be carried out based on the principle of professionalism and shall not be part of either party.
(7) Further provisions regarding dispute resolution as referred to in paragraph (l) shall be regulated in a Government Regulation.

The spirit to resolve through mediation and consensus on the Construction Law was supported by the appearance of a statement in public that the Construction Law did not provide space for resolving disputes or disputes through the courts (litigation) (Daryono, 2017).*

In the explanation of Article 88 paragraph (5) of the Construction Law, it is stipulated that: "the dispute board is a team formed based on the agreement of the parties since the binding of construction services to prevent and mediate disputes that occur in the implementation of the construction work contract." The explanation of Article 88 paragraph (5) of the Construction Law was also slightly refined in Article 1 number 34 of Government Regulation Number 14 of 2021 concerning Amendments to Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services (GR 14 /2021) which states, that: "The dispute board is an individual or team (bold by the author) formed based on the agreement of the parties since the binding of construction services to prevent and mediate disputes that occur in the implementation of the construction work contract". From GR 14/2021, it can be seen that in its development the DB does not have to be a team, but can be individual

DB is further regulated in Paragraph 3 of Government Regulation Number 22 of 2020 concerning Implementing Regulations of Law Number 2 of 2017 concerning Construction Services (GR 22/2020) in Articles 94 to 96. In Article 94 of GR 22/2020, it is regulated that:
(1) The authority of the Dispute Board to prevent and resolve disputes arises after the parties agree to use the Dispute Board in the clauses of the Construction Services engagement and make a tripartite Dispute Board agreement.
(2) The tripartite Dispute Board agreement as referred to in paragraph (1) is inseparable from the Construction Services engagement signed by the parties and the Dispute Board.
(3) The Dispute Board shall at least have the following duties: a. prevents disputes between the parties; b. resolve disputes through the provision of professional judgment. certain aspects as needed; or c. resolve disputes through the formulation of formal conclusions as outlined in the decision of the Dispute Board.
(4) The establishment of the Dispute Board as referred to in Article 93 paragraph (3) shall be outlined in a Construction work contract whose funds are the responsibility of the parties. (5) The Dispute Board as referred to in Article 93 paragraph (3), has an odd number.

From the provisions of Article 94 of GR 22/2020, it can be understood that the authority of the DB in resolving this dispute is born from the agreement. Thus, it can be said that DB is a manifestation of the principle of freedom of contract related to the choice of forum, the parties cannot deny the agreement which incidentally is also in accordance with the principle of pacta sun servanda.

Furthermore, in Article 95 of GR 22/2020, it is regulated that in the event that there are no objections within a period of 28 calendar days, the decision of the Dispute Board is final and binding on both parties. But if there are objections by one of the parties, the parties shall the the next stages of the dispute resolutions, namely mediation, conciliation, and arbitration.

5.0 Discussion

If observed, Construction Law stipulates in a limited way the dispute resolution efforts listed in the Construction Work Contract. These efforts only include mediation, conciliation, and arbitration (vide. Article 88 paragraph [3] Construction Law). The word "and" should be interpreted as a tiered dispute resolution mechanism, not an alternative option. This means that the parties cannot directly choose the arbitration institution if the mediation is not successful. Arbitration can only be carried out if the construction dispute is not successfully resolved by mediation, and conciliation.

Another change that can be observed in the Construction Law is the additional 'third party' services. Previously, Construction Law 1999 stipulates that out of court dispute resolution (non-litigation) can use the services of a third party, which includes: arbitrator services at national and international arbitration or ad-hoc arbitration institutions, mediator services at mediation institutions, conciliator services at conciliation institutions, and expert appraiser services (see Article 37 of the Construction Law 1999). To complete the variation of the 'third party', DB was also presented at Construction Law. Based on the explanation above, a table of discrepancies regarding dispute resolution between the old and new construction law was obtained.

* in a seminar 'The Role and Development of Arbitration: Alternative Dispute Resolution on Construction Dispute' in Jakarta, May 16th 2017, Yaya Supriatna (Director of Institutional Development and Construction Services Resources Directorate General of Construction Development Ministry of Public Works and Public Housing) stated that Construction Law was made so that contract parties don't resolve dispute in court.

Table 1. Discrepancies regarding dispute resolution between the old and new construction law

Indicator	Construction Law 1999	Construction Law 2017
Domination	Litigation dispute resolution	Non-litigation dispute resolution
Existence of DB	Non-existent	Existent

The existence of the provisions of Article 95 GR 22/2020 can be considered as the main evidence that the settlement of construction service disputes through DB reflects the principles of fast, simple, and affordable dispute resolution. On the one hand, based on Article 95 paragraph (2) of GR 22/2020 there is a time limit for objections in the form of 28 days after the decision of the DB which incidentally is quite fast and provides certainty of the settlement period for the parties (Nugraha, Izzaty, Anira, 2020, p.9.)

One of the characteristics of the DB that distinguishes it from other alternative dispute resolution is to prevent disputes from occurring. This is explicitly regulated in Article 94(3) letter a of GR 22/2020 and in Article 6(1) letter a of the MRDB, which stipulates that the DB has the task of preventing disputes between the parties.The MRDB provides a fairly comprehensive arrangement regarding the working mechanism of the DB. Article 8 of the MRDB stipulates that the DB works in accordance with the work procedures in the DB work agreement which consists of: 1) dispute prevention and resolution mechanisms; and 2) Dispute resolution mechanism. Then Article 9 of the MRDB further stipulates the dispute prevention mechanism includes document review, field trip, announcement, hearings and advice. From the explanation above, the DB mechanism to prevent disputes has been clearly regulated in the MRDB.

Regarding the DB regulation in Construction Law, two things that can be criticized. The first one is regarding the provisions of Article 95 paragraph (3) of GR 22/2020 which stipulates that when the parties/one of the parties object to the decision of the DB, then the parties is allowed to take the next stage of dispute resolution efforts which are mediation, conciliation, and arbitration (Kurniawan et.al., 2020, p. 50). This provision is the same as back to square one. There should be an attempt to object only when all parties object to the DB's decision. The second one is that there should be a period of settlement through the DB, for example a maximum of 28 days after the dispute, the DB must make a decision so that it will better reflect the principles of fast, simple, and affordable dispute resolution.

The concept of resolving construction disputes using a DB institution, although it is relatively new to the Indonesian construction world, is a dispute resolution concept that has existed for quite a long time . DB is a general term that includes: dispute review board, dispute adjudication board, and combined disputed board which is a combination of dispute review board and dispute adjudication board (Chern, 2015, p.4-5). The main differences between the three types of dispute boards are:

Table 2. Differentiation of Dispute Board

Dispute Review Board	Dispute Adjudication Board	Combined Dispute Board
the nature of the decision is not binding if there are parties who are not satisfied with the results of the decision	The nature of the resulting decision is binding but not final, parties who object can take further dispute resolution to an arbitration institution. The Fédération Internationale des Ingénieurs-Conseils (FIDIC) Construction Contract Standard adopted this concept (Muljadi, 2020, p.2).	Whereas in a combined disputed board, the board will issue recommendations on the dispute, but it is also allowed to issue a decision if requested by the parties and no one has any objections (Muljadi, 2020,p.2).

If we compare it, regulation of the DB in the Construction Law is, indeed, far from adequate. The term DB itself indicates a vague concept, so it needs to be clarified, including arrangements regarding its duties and authorities also need to be regulated. Hopefully, the noble purpose of the Construction Law to resolve disputes through parley can be achieved through the establishment of a DB that is more clear and directed.

6.0 Conclusions & Recommendations

In Indonesia, apart from mediation, consolidation, and arbitration, there are alternative dispute resolution mechanisms with different characteristic which can be established starting from the beginning of the contract, long before the construction dispute occurs, namely the Dispute Board. DB can be used as a dispute resolution in private, as well as government construction work. The superiority of DB is to prevent a dispute from occurring through document review, field trips, announcements, hearings, and giving advice. But if Construction Law and International Law are being compared, it can be seen that the regulation of the DB in the Construction Law is far from adequate. Few norms have manifested the principle of quick, simple, and affordable dispute resolution by giving no opportunities to resolve disputes through litigation and having a period to file an objection towards DB's decisions. However, there are three points of criticism: (1) the concept of DA itself shows a lack of clarity in the concept, so it needs to be clarified, (2) no time limit for the DB to make decisions, (3) the option to solve disputes through mediation, conciliation, or arbitration is still available for the unsatisfied party, which is just the same as going back to square one. As a closing statement, writers would like to recommend the providing of time limit for DB in giving decision, also additional conditions to file an objection towards DB only when all parties object to the decision (not just one of the parties). In addition, for further research, it is important to adjust the concept of DB in Indonesia with the concept of DB in FIDIC.

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Paper Contribution to Related Field of Study

Hopefully the result of this article can elaborate the weakness from the existing regulations regarding DB and also give formula for further regulations regarding DB. In the future, the legislator can use this paper as a source of law to improve the existing regulations.

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