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Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan Surabaya, 60286 Indonesia, +6231-5023151/5023252
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id
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Binding Power of Dispute Board Judgment in Construction Dispute Settlement

Lintang Yudhantaka, Yohanes Sogar Simamora and Ghansham Anand
lintang.yudhantaka@gmail.com
Universitas Airlangga

Abstract
Construction work in its implementation is carried out based on a contract. If there are problems in carrying out construction work, a dispute between the parties, in this case the service user and the service provider, will occur. Indonesia Law No. 2/2017 about Construction Services (hereafter called UU 2/2017) provides a new dispute resolution model option if problems occur in the construction sector, namely through the Dispute Board. The Dispute Board was created by the International Federation of Consulting Engineers / Federation Internationale des Ingenieurs-Conseils or FIDIC which was adopted into UU 2/2017. However, the regulation regarding the Dispute Board in UU 2/2017 needs to be studied further, especially regarding the nature of the final binding decision, because it still raises problems in its implementation. The purpose of this study is to examine the development of dispute resolution in the field of construction and the implementation of the final and binding nature of dispute board decisions. This study employed legal research methods with a conceptual and statute approach. The results of this study found that construction disputes can be resolved through litigation or non-litigation. The presence of the Dispute Board still does not provide legal certainty for the parties because the nature of the decision is final and binding but is not supported by an implementation mechanism.
Keywords: Contract; Dispute Resolution; Dispute Board.

Introduction

Infrastructural development in big cities has been rapidly increasing every year, thanks to the allure of popular attractions as well as the functional purposes of government, trade and industry. For developing countries, particularly Indonesia, infrastructural and human resource development are foundational to the process of becoming a developed country, due to consequences such as (i) absorbing massive amounts of manpower over long periods of time; (ii) increasing the distribution of income; (iii) and stimulating

production in other sectors.[1] Therefore, developing infrastructure during periods of poor economic conditions is necessary for positive impacts.[2]

Some infrastructural developments include the construction of buildings, roads, bridges, rails, train bridges, tunnels, waterworks and drainages, sanitation structures, aeroplane runways, harbours, power plants, transmission and distribution buildings, as well as communication network buildings. Construction activities involve building planning, preparation, execution, demolition, and reparation/ renovation.[3] All those kinds of infrastructural developments are construction works. Based on Article 1 Number 3 of Indonesia Law No. 2/2017 about Construction Services (hereafter called UU 2/2017), construction work refers to the entirety or parts of activities that involve constructing, operating, maintaining, demolishing, and reconstructing a building.

The execution of construction activities occurs under a contract or agreement. As mentioned in Article 1313 *Burgerlijk Wetboek* (later called BW), the term *contract* refers to "a deed through which one or more people engage themselves to one or more other people". In short, the contracting parties engage to accomplish particular performances. Parties in construction services include service users (e.g., the project owner) and service providers e.g., the contractor). If one of the contracting parties fails to accomplish their performance, they are considered to be in default or breach of contract.

Contract default is the violation of any agreed-upon terms and conditions of a binding contract.[4] Someone is considered to have breached a contract if he does not accomplish his agreed obligation or his attitude can be blamed on him.[5] This contract violation is commonly called a *breach of contract*.[6] In *Black's Law*

[1] Agus G Kartasasmita, 'Makalah Pengadaan Barang Dan Jasa Menurut Pelaku Usaha' (2006).[2].

[2] Y Sogar Simamora,[et. al.], *Aspek Kontraktual Dalam Kerjasama Pemerintah Dan Badan Usaha* (Inteligensia Media 2018).[2].

[3] BPS, 'Konstruksi Dalam Angka 2020' (2020).[3].

[4] Wirjono Prodjodikoro, *Azas-Azas Hukum Perjanjian* (3rd edn, Mandar Maju 2000).[49].

[5] J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Undang-Undang* (1st edn, Citra Aditya Bakti 2001).[30].

[6] Munir Fuadi, *Hukum Kontrak:(Dari Sudut Pandang Hukum Bisnis)* (Citra Aditya Bakti 2001).[87].

Dictionary, *Breach of Contract* is defined as '*violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance'*.[7]

Construction is one sector that has been impacted by the Covid-19 pandemic. For example, PT Waskita Karya (limited company) Tbk incurred losses of up to 7.3 trillion in 2020. By contrast, PT Adhi Karya (limited company) Tbk. had a profit correction of up to 96.39%.[8] Potential obstructions to the performance of a contract can include delay in execution, rescheduling, work suspension and termination, failure to pay service providers, abnormal increases in material prices, and lack of project administration.[9] This leads to disputes/conflicts among the contracting parties, the service user and the provider.[10]

Disputes can be settled through litigation or non-litigation approaches. Non-litigation is generally preferred in construction disputes, as has been apparent since the establishment of UU 2/2017, especially article 88. The article states that construction disputes should be solved under the principle of deliberation to reach a consensus. In the case of failure to reach any consensus, further stages of dispute settlement including mediation, conciliation, and arbitration can be implemented. Furthermore, UJ 2/2017 also establishes a new model of dispute settlement which is through the Dispute Board. This idea was adopted from the *International Federation of Consulting Engineers* / *Federation Internationale des Ingenieurs-Conseils* or FIDIC.[11]

However, the regulation of the Dispute Board in UU 2/2017 requires further discussion, in particular concerning the final and binding nature of its judgments

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[7] Bryan A Garner, *Black's Law Dictionary,(Black's Law Dictionary* (Standard, Thomson Reuters 2019).[225].

[8] M Richard, 'Sektor Konstruksi Kena Hantaman Pandemi, Begini Prospek Kreditnya Menurut Bankir' (*Finansial Bisnis*, 2021) <https://finansial.bisnis.com/read/20210406/90/1377467/sektor-konstruksi-kena-hantaman-pandemi-begini-prospek-kreditnya-menurut-bankir> accessed 20 July 2022.

[9] *ibid*.

[10] Bambang Sugeng Ariadi Subagyono, Zahry Vandawati Chumaida and Mochamad Kevin Romadhona, 'Enforcement of Consumer Rights Through Dispute Settlement Resolution Agency to Improve the Consumer Satisfaction Index In Indonesia' (2022) 37 Yuridika.[673].

[11] Hadi Ismanto and Sarwono Hardjomuljadi, 'Analisis Pengaruh Dewan Sengketa & Arbitrase Terhadap Penyelesaian Sengketa Konstruksi Berdasarkan FIDIC Condition of Contract 2017' (2019) 10 Konstruksia.[73].

as mentioned in Government Regulation No. 22/2020 about the Implementing Regulation of UU 2/2017 about Construction Service (PP 22/2020), and The Regulation of Public Works and Public Housing Minister No. 11/2021 about the Technical Instructions and Procedures of Construction Dispute Board (hereafter called *Permen PUPR 11/2021*). Overall, this study focused on discussing the binding power of judgments by the Dispute Board. Based on the description above, this article will discuss the development of dispute resolution in the field of construction and the implementation of the final and binding nature of dispute board decisions.[12]

The Development of Dispute Settlement in the Construction Sector

The current legal assurances for construction services in Indonesia operate under UU 2/2017.[13] The establishment of this regulation revoked UU 18/1999 which previously regulated construction services. In general, those two regulations mandated different philosophies (spirit) and mechanisms of dispute settlement. The former (i.e., UU 18/1999) provided two alternative methods of dispute settlement: through litigation or non-litigation. Article 36 subsection (1) of UU 18/1999 asserted that:

> *"Dispute settlement within construction services could be accomplished through either litigation or non-litigation methods, depending on what the contracting parties had decided".*

The non-litigation way, in this case, was through arbitration by a third party such as a national or international ad-hoc or institution, mediation, conciliation, or expert judge. The appointment of the third party could be made either before or after the dispute and it must be mentioned in a contract. This clause was mentioned in Article 37 subsection (2) of UU 18/1999.

Furthermore, the term "or" in Article 36 subsection (1) of UU 18/1999 should be considered to imply that the methods are optional, not cumulative. However, Article 36 subsection (3) of UU 18/1999 sets out that if one of the disputing parties were dissatisfied with the result of the non-litigation settlement, they could file

[12] Subagyono, Chumaida and Romadhona (n 10).

[13] Dina Sunyowati and others, 'Can Big Data Achieve Environmental Justice?' (2022) 19 Indonesian Journal of International Law.[6].

a case through the litigation route. This Article allowed dissatisfied parties to go through an escalating dispute settlement so that the alternative properties previously described became invalid. Hence, the procedures of dispute settlement outlined in UU 18/1999 referred to the mechanism of settlement as a "*win-win solution*". It was undeniable that such mechanisms led to the supreme judicial institution, the Supreme Court.[14]

As UU 18/1999 was unable to meet the demands for good governance and the dynamics of construction service development, it was necessary to improve the regulation in this sector. To this end, the government established a new regulation called UU 2/2017. This rule reflected enthusiasm for dispute settlement under the principle of deliberation to reach a consensus, as is asserted in Article 88 subsection (1) of UU 2/2017. Article 5 subsection (2) letter *c* of UU 2/2017 mentioned that the government has the authority to promote *alternative dispute resolution* by non-litigation means for the sake of construction services implementation. The establishment of UU 2/2017 was intended to lead any dispute settlement in the construction sector through non-litigation routes in order to reach a "*win-win solution*".

Article 88 of UU 2/2017 regulated the mechanism of dispute settlement in stages. The first stage is deliberation between the disputing parties. If this fails to reach a consensus, further steps as mentioned in the Contract of Construction Services might be taken. Moreover, UU 18/1999 also asserted that if the Contract of Construction Services did not contain any further steps, they might make a further written clause of agreement (contract).[15] A Contract of Construction Services is a form of contract specific to work in the construction services.[16] Next, the stages of dispute settlement as outlined by UU 2/2017 involve mediation, conciliation, and arbitration. Another amendment related to dispute settlement by UU 2/2017 was the

[14] Karolus E Lature, 'Analisis Penyelesaian Sengketa Konstruksi Di Indonesia' (2018) 15 Jurnal Legislasi Indonesia.[211].

[15] Agus Yudha Hernoko and others, 'Urgensi Pemahaman Perancangan Kontrak Dalam Pengembangan Dan Pengelolaan Obyek Wisata Di Desa Kare, Kabupaten Madiun' (2022) 2 Jurnal Dedikasi Hukum.[231].

[16] Yohanes Sogar Simamora, *Hukum Perjanjian: Prinsip Hukum Kontrak Pengadaan Barang Dan Jasa Oleh Pemerintah* (LaksBang 2009).[253].

establishment of a new mechanism of resolution that engaged a third party called the Dispute Board.

Further definition of the Dispute Board can be seen in Article 1 subsection (30) of Government Regulation No. 22/2020 about the Mechanism of UU 2/2017 regarding Construction Services. This article refers to any individuals or teams organised by consensus among the parties since a contract of construction services is created to avoid and solve any possible disputes among them. The possibility of referring to the Dispute Board is agreed upon before the beginning of the execution of the construction service contract, long before any dispute occurs. Otherwise, mediation, conciliation, and arbitration could be agreed upon either before or after the dispute began. The sole purpose of organising a dispute board at the start of a construction service contract is to ensure that all parties have a comprehensive understanding of the contract. Thus, in the event of potential quarrels among contracting parties, the Dispute Board might fulfil its function to avoid any possible conflicts, provide professional considerations, or even carry out resolutions under Article 94 subsection (3) of PP 22/2020, if a dispute persists.

However, we need to consider Article 47 subsection (1) letter *h* of UU 2/2017 as well. It says that:

> *"Construction Service Contracts, at a minimum, need to involve terms of: h. dispute settlement, containing regulations on the mechanism of dispute settlement due to any dissent".*

Next, the explanation of Article 47 subsection (1) letter *h* of UU 2/2017 is as follows:

> *"Dispute settlement contains regulations on the procedures of dispute settlement due to any dissent in terms of definition, interpretation, or implementation of any kinds of agreed-upon terms and conditions in the Construction Service Contract as well as any stipulations of place and resolution methods.*
> *The resolution can be reached through various ways including deliberation, mediation, arbitration, or even litigation."*

This explanation suggests an inconsistency in UU 2/2017. Compared to its predecessor (i.e., UU 18/1999), the lex explicitly explains that disputes in the construction sector could be settled through either litigation or non-litigation routes. However, this former rule was then amended by UU 2/2017, of which Article 88

subsection (1) asserted that any dispute about construction services could be settled under the principle of deliberation to reach a possible consensus among parties. The explanation of Article 47 subsection (1) letter *h* of UU 2/2017 still provides the chance for parties to engage in litigation. Therefore, UU 2/2017 continues to permit legal actions of dispute settlement through litigation, although its body does not mention this term.[17]

The Implementation of the Final and Binding Nature of the Dispute Board's Judgment

The previous chapter explained that UU 2/2017 introduced a new mechanism of dispute settlement for construction services through the Dispute Board. However, this legislation did not explain it in detail. Further explanation of the Dispute Board was issued in PP 22/2020 and Permen PUPR 11/2021. The ministry of PUPR currently uses the Dispute Board for their dispute settlement in order to simplify the process, reach positive results in a cheaper and faster way, and prioritise *win-win solution*s.[18]

The simplification could be seen in the technical rules in Article 16 of Permen PUPR 11/2021, which explains that in the case of a dispute or conflict among parties, the mechanism of resolution should be through notification, document review, hearings, meetings, field trips, internal meetings by the Dispute Board, and/or the establishment of a formal judgment. However, this simplification of the process does not provide any legal assurances in terms of its implementation. This is clear from Article 22 subsection (2) of Permen PUPR 11/2021 jo. Article 95 subsection (2) of PP 22/2020 explains that, if no objection is received in 28 (twenty-eight) calendar days, the Dispute Board's judgment would be considered final and binding

[17] Siti Yuniarti, 'Penyelesaian Sengketa Konstruksi Pasca Revisi UU Jasa Konstruksi' (*BINUS Law*, 2017) <https://business-law.binus.ac.id/2017/02/28/penyelesaian-sengketa-konstruksi-pasca-revisi-uu-jasa-konstruksi/> accessed 21 July 2022.

[18] Badan Pengembangan Sumber Daya Manusia, 'Dewan Sengketa Sederhanakan Proses Penyelesaian Sengketa' (2019) <https://bpsdm.pu.go.id/bacaberita-dewan-sengketa-sederhanakan-proses--penyelesaian-sengketa-1> accessed 21 July 2022.

for both parties. No further explanation is provided about the implementation of this final and binding nature, either UU 2/2017, PP 22/2020, or Permen PUPR 11/2021.

By comparison, arbitration judgment is also of a final and binding nature, as mentioned in Article 60 of UU 30/1999 about Arbitration and Alternative Dispute Settlement. This property is its main and fundamental character.[19] Furthermore, the next article asserts that in cases where the disputing parties do not perform the arbitration judgment of their own free will, it would be carried out under the order of the District Court Chairman following an appeal by one of the disputing parties. This is possible as UU 30/1999 regulates the mechanism of arbitration judgment registration to the District Court to grant it executorial power.

The purpose of registering an arbitration judgment, particularly in Indonesia, is to attempt to prevent one of the disputing parties from refusing to perform the clauses of judgment and to allow the injured party to ask the District Court for help in executing the judgement. Such execution is unnecessary if both disputing parties perform the clauses of the judgment of their own accord. In other words, the execution is a *last resort* judgment, the implementation of which should be under the principles of humanity and justice as contained in the values of Pancasila.[20]

Article 195 subsection (1) HIR[21] or Article 206 subsection (1) Rbg[22] state that the execution of judgments is by order of the District Court Chairman (*Op last on Leiding Van den Van Voor Zitter Van den Lardrard*), indicating that the Chairman of District Court has the authority to establish and lead executions.[23] By contrast,

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[19] Y Sogar Simamora, 'Penyelesaian Sengketa Kontrak Komersial Melalui Forum Arbitrase Dalam Era Masyarakat Ekonomi ASEAN (MEA)' (2016) 8 Indonesia Arbitration Quarterly Newsletter.[7].

[20] Panusunan Harahap, 'Eksekutabilitas Putusan Arbitrase Oleh Lembaga Peradilan/the Executability of Arbitration Award by Judicial Institutions' (2018) 7 Jurnal Hukum dan Peradilan. [127].

[21] 'Het Herziene Indonesisch Reglement (HIR) or Indonesia Updated Reglement (i.e., RID) (RID) S 1941 No.44 Applied for Java and Madura Was the Main Source of Indonesia Civil Procedural Law under Article II of Transitional Rules of The Constitution 1945'.

[22] 'Reglement Voor de Buitengewesten (Rbg.) or Overseas Regional Reglement (RDS) S 1927 No.227. Similar to HIR, This Applied for Outside Java and Madura'.

[23] Yanuar Putra Erwin, 'Kajian Yuridis Mengenai Pelaksanaan Eksekusi Dalam Pengadilan Hubungan Industrial (Juridical Study Of The Execution Of Industrial Relations Court)' (2015) 12 Jurnal Legislasi Indonesia.[12].

arbitration institutions have no authority to execute their own judgments due to the fact that, *first*, they are not state institutions with public authority that could be applied by force to all parties; *second*, they have no legal basis to execute their own judgment; and *third*, they have no bailiffs (*deurwaarder*) as would be found in judiciaries whose function was carrying out actions dealing with executions.[24]

Meanwhile, there is no further explanation of the Dispute Board's judgments and whether or not they should be registered with the court. However, the previous chapter already mentioned that the Dispute Board's judgment was final and binding. This means that the judgment cannot be appealed, referred to the court of cassation, or reviewed and that the judgment was contracted among disputing parties.[25] If this is also the definition of final and binding for the Dispute Board's judgements, there need to be explicit mechanisms of execution. A judgment will be final and binding if no objection is lodged by either of the disputing parties within 28 (twenty-eight) calendar days. However, due to the Dispute Board's lack of authority or executorial title, failure on the part of one party to carry out the clauses of judgment would result in the violation of another party's rights. The execution of the judgment continues to have no legal assurances despite its final and binding nature.

Conclusion

Before the establishment of UU 2/2017, the regulation of construction services was under UU 18/1999, which provided two alternative routes (i.e., litigation and non-litigation) of dispute settlement. As limitations were still found in UU 18/1999, the Government established UU 2/2017 that encouraged deliberation to reach a consensus among parties. In addition, UU 2/2017 also established a new mechanism of dispute settlement called the Dispute Board, although the explanatory notes for Article 47 subsection (1) letter *h* of UU 2/2017 still mention a legal action of dispute

[24] Harahap (n 20).

[25] I Made Widnyana, *Alternatif Penyelesaian Sengketa (ADR)* (Fikahati Aneska bekerja sama dengan BANI (Badan Arbitrase Nasional Indonesia) 2009) [245] and M Husseyn Umar, *BANI Dan Penyelesaian Sengketa* (PT Fikahati Aneska bekerjasama dengan BANI Arbitration Center (Badan … 2013).[6].

settlement through litigation. This indicates that UU 2/2017 is not fully committed to deliberation to reach a consensus.

The presence of the Dispute Board still provides no legal assurance for all parties, due to the fact that although the judgment by the Dispute Board is final and binding, there is no enforcement mechanism. An arbitration judgment must be registered to the District Court to have an executorial title, as the District Court has the authority to execute a judgment. There is no clarity as to whether or not a Dispute Board judgment should be registered to the District Court. Therefore, it is necessary to carry out further studies regarding the regulation of Dispute Board judgment execution for the sake of legal assurance among all parties.

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