



Position of Dispute Board in Construction Dispute Resolution in Indonesia

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Abstract

This article discusses criticism regarding the use of construction dispute boards in Indonesia as a choice of forms of construction dispute resolution, both from the institutional aspect and aspects of authority, process, and follow-up of the agreement as regulated in the Regulation of the Minister Public Works and Housing Number 11 of 2021 concerning governance, methods, and technical instructions of the Construction Dispute Board. The use of settlement through the construction dispute board is a new perspective in the world of construction. This new view will be the answer to the problem, or it can be a waste for the construction parties. This study aims to identify the characteristics and things that need to be anticipated in the use of construction dispute boards so that service users or employers with contractors can get the best possible benefits in construction service work. The method of this research is to examine the construction dispute board regulations in Indonesia and abroad.

Keywords: Construction Dispute Board, Construction Services, Contract, Loan, FIDIC

Introduction

Two years ago, on April 1, 2021, the regulations regarding the construction dispute board were just published. This regulation is Regulation of the Minister Public Works and Housing (MPWH) Number 11 of 2021 concerning procedures and technical instructions for the Construction Dispute Board. The construction dispute Board itself was originally a way of international dispute resolution initiated by FIDIC (Fédération Internationale Des Ingénieurs-Conseils), an international association of engineers that makes standard construction documents used in many countries. Previously, the words construction dispute board were mentioned in Article 88 Paragraph 5 of Law Number 2 of 2017 concerning Construction Services, but it was not explained in detail what and how the implementation of the dispute board was. This was referred to again in Article 85 of Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services, which states that provisions regarding the construction dispute board are regulated by ministerial regulations that carry out government affairs in the field of public works and public housing. Construction Dispute Board expert services are also mentioned as one of the consulting services. Also, the criteria for the Construction Dispute Board experts were not explained in detail. If traced from the date of promulgation of the Construction Services Law, namely January 12, 2017, until the promulgation of the Ministerial Regulation regarding the Construction Dispute Board dated April 1, 2021, it means that there have been four years of legal vacuum. If it can be assumed for four years, projects in Indonesia use the construction dispute board resolution option derived from the standard

interpretation of FIDIC documents. This Ministerial Regulation is intended as a guideline for establishing a Dispute Board for ministries, agencies, regional apparatuses, and providers in preventing and resolving contract disputes. The Dispute Board was intentionally formed from the start of the binding of construction services, long before a dispute arose. On the other hand, the services of arbitrators, mediators, and conciliators are only needed after construction disputes arise. Thus, the Construction Dispute Board should better understand the characteristics of disputes because they have taken part in "supervising" the implementation of a construction work contract¹. Based on the background description above, the legal issues in this paper are formulated in the form of a research title, namely, Position of Dispute Board in Construction Dispute Resolution in Indonesia.

Research Method

To answer the research questions, this study uses normative methods² by conducting documentary studies to obtain secondary data³. Legal materials obtained include primary legal materials⁴, such as the Construction Services Act, Regulation of the Minister Public Works and Housing (MPWH) Concerning Procedures and Technical Instructions for the Construction Dispute Board, and FIDIC Document Standards, as well as secondary legal materials⁵ in the form of books and journal articles relevant to the topic. The data collection method uses a documentary study of the legal materials previously mentioned. Data analysis uses qualitative analysis, which involves grouping similar information into categories. Furthermore, the conclusions will be presented descriptively to provide a clearer and more focused understanding of the research results.

Discussion

The use of the Dispute Board is only carried out for the procurement of construction works or integrated construction works where part or all of the funds come from domestic and foreign loans or grants received by the government and/or regional governments, unless otherwise stipulated in a foreign loan agreement or foreign grant agreement. country. In a sense, the dispute board cannot be applied to the procurement of regular construction services, even though it is stated in Article 85 of Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services.

1. Institutional Dispute Board

The Dispute Board is an individual or team formed based on the agreement of the parties since the beginning of the implementation of the contract to prevent and resolve disputes. The number of members of the construction dispute board is an odd number of at most 3 (three) people, meaning that 1 (one) person is also allowed. Similar to arbitration, in the case of using a Dispute Board totaling 3 (three) people, both the service user and the service provider propose the name of 1 (one) candidate for Dispute Board member, and then two candidate members of the Dispute Board who have been proposed by the service user and provider choose one other member to serve as chairman. Prior to the contract, the parties made the Dispute Board Work Agreement in advance, a tripartite engagement document that regulates the legal relationship between the service user, provider, and dispute board members in the implementation of construction services. In a tripartite agreement, the construction dispute board is in the form of an

¹ Lature, Karolus Elwinman. 2018. "Analisis Penyelesaian Sengketa Konstruksi Di Indonesia." Jurnal Legislasi Indonesia Vol 15, No 3 Pg. 219

² Soerjono Soekanto and Sri Mamudji, Penelitian Hukum Normatif, 8th ed. (Jakarta: Grafindo Persada, 2004).

³ Soerjono Soekanto, Pengantar Penelitian Hukum (Jakarta: Universitas Indonesia Press, 1986)

⁴ Ibid.

⁵ Ibid.

umbrella contract. An umbrella contract for nonconstruction consulting services is used to bind a nonconstruction consulting service provider within a certain period of time to provide services where the time cannot be determined and may not bind the budget. Nonconstruction consulting service providers bound by an umbrella contract are nonconstruction consulting service providers who have met or passed the stipulated requirements. *In the event that efforts to resolve disputes are made by forming a dispute board, the selection of dispute board membership is carried out based on the principle of professionalism and not being part of either party. The use of the Dispute Board is carried out after the Construction Services engagement*⁶.

The requirements to become a Dispute Board include being an Indonesian citizen, fluent in the language stipulated in the contract and work agreement of the Dispute Board, not directly or indirectly related to service users and providers, and meeting the required qualifications. Then qualified individuals have professional experience in interpreting contractual documents; have an understanding of the interpretation of contracts and regulations; and/or have experience and/or understanding of the technical aspects of the work according to the contract.

The human resources of the Dispute Board, when interpreted from the Rules, are anyone who meets the requirements and has these qualifications, meaning that there is no clause stipulating that a member of the Dispute Board must be a member of one of the designated organizations or associations; for example, the arbitrator must be a member of the National Arbitration Board Indonesia (BANI). Even so, internationally for a long time there has been an association of Dispute Board experts united in the Dispute Resolution Board Foundation (DRBF), and in Indonesia there is Perkumpulan Ahli Dewan Sengketa Konstruksi (DSK), an association formed in 2020 and chaired by Prof. Sarwono Hardjomuljadi, an expert on construction contracts from Indonesia who also has roles in FIDIC and DRBF. This association aims to gather experts who have the qualifications to become Dispute Board members so that both service users and service providers are not confused about choosing Dispute Board members. It is still a question whether the dispute board oversees construction contracts, whether the construction dispute board, in carrying out its duties and functions, tends to overlap with the field supervisor consultant, and whether the construction dispute board tends to be an extension of the field supervisor consultant in observing the progress of administrative documents.

Regarding the budget, there are direct personnel and non-personnel costs. Personnel direct costs include retainer costs, attendance fees at hearings, attendance fees during field visits and/or incidental field visits, and/or attendance fees at the internal meeting of the Dispute Board. If there is no dispute in the course of the construction work, the parties are still obliged to pay a retainer or monthly fee to the Dispute Board, which is also obliged to make a report. The service user determines the procurement preparation document, which can contain the use of the dispute board, meaning that anything related to the budget must be considered. In the attachment to Regulation of the MPWH Number 11 of 2021 Concerning Procedures and Technical Instructions for the Construction Dispute Board, the terms of use are provided, one of which is prepared to help the service user calculate the budget requirements for the Dispute Board. Members will get payments for direct personnel costs and non-personnel direct costs. The imposition of a fee for the Dispute Board Work Agreement of 50% from the service user and 50% from the provider is something that needs to be anticipated. There is still a need to create a 1-door payment system by service users (service users and contractors), and where there is a tendency for bureaucratic rigidity from the service user, the budget for the construction dispute board will be borne by the relevant law firm. What's more, after the SPPBJ has been carried out, the costs incurred must have been agreed upon and included in the agreement clause (in the format of the dispute board agreement in MPWH

⁶ N. Budi Arianto Wijaya, S.H, dkk. ASPEK HUKUM JASA KONSTRUKSI (Berdasarkan UU No 2 Tahun 2017 Tentang Jasa Konstruksi, PP No 22 Tahun 2020 Tentang Jasa Konstruksi, dan sudah disesuaikan dengan perubahan yang ada pada UU No 11 Tahun 2020 Tentang Cipta Kerja) Pg.236

Ministerial Regulation). This is to avoid any default on payment of consulting services. *In order to support the use of Dispute Board (DB), all the cost incurred should be included in the loan from the international lender, since so far, some of the loan has not been included yet for the costs of using Dispute Board (DB).*⁷

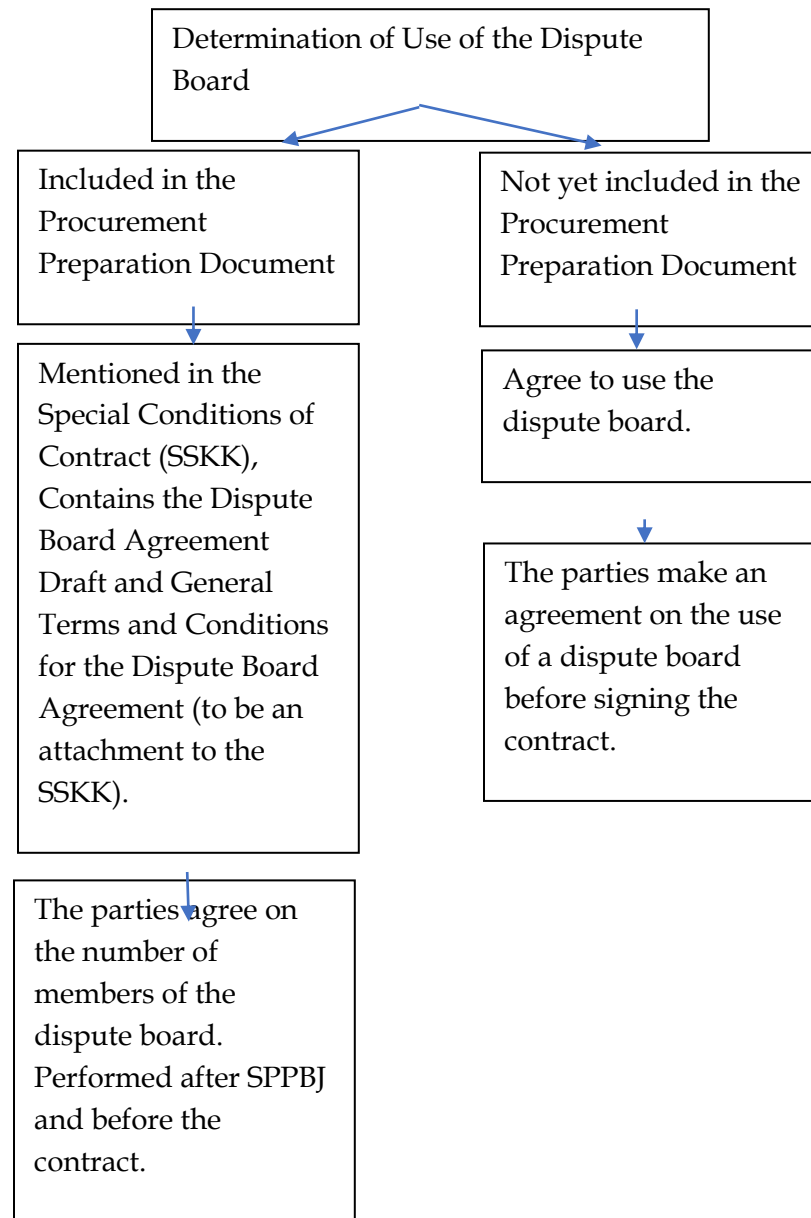


Figure 1. Flow of Dispute Board Determination

⁷ Hardjomuljadi, Sarwono. 2017. "Dispute Board as the Alternative Dispute Resolution for Construction in Indonesia Based on the Law No 2 Year 2017." *Jurnal Teknologi (Sciences & Engineering)* 1-20. Pg.19

2. The Power of the Dispute Board Decisions

The decision of the dispute board can still be rejected by either party. Although the Dispute Board's formal decision is final and binding, there is a provision that within 28 (twenty eight) calendar days from the Dispute Board's formal decision, the Service User and/or Provider may submit a Notice of objection to the decision.

In Article 23 paragraph (3) Regulation of the MPWH Number 11 of 2021 states that in the event of an objection to the entire formal decision of the Dispute Board, Service Users and Providers may take other dispute resolution measures in accordance with statutory provisions. Article 20.6 of the Conditions of Contract for Construction FIDIC Pinkbook MDB Harmonized Edition⁸ states that unless otherwise stated in the Special Requirements, disputes that are not resolved amicably and cause the decision of the Dispute Board (if any) to be not final and not yet binding on both Parties, must finally be resolved through arbitration. Unless otherwise agreed by both parties:

- (a) for contracts with foreign contractors, international arbitration by proceedings conducted by the agency designated in the Contract Data, conducted in accordance with the arbitration rules of the designated agency, if any, or in accordance with the arbitration rules of UNCITRAL, at the institution's choice appointed,
- (b) the place of arbitration must be the city where the head office of the arbitral institution is located,
- (c) the arbitration must be conducted in the language of the communication set out in Sub-Clause 1.4 [Law and Language], and
- (d) for contracts with local contractors, arbitration by examination process is carried out in accordance with the laws of the Employer's country.

FIDIC regulates legal remedies after the construction dispute board is resolved by international arbitration when contracting with foreign contractors, of which the closest institutional member to Indonesia is the Singapore International Arbitration Center (SIAC). *Meanwhile, the parties can submit to Badan Arbitrase Nasional Indonesia (BANI) in the case of dissatisfaction with the board's decision. During the field research, the dispute board completed its duties within 3 years from 2015 to 2018, and the decision was accepted by the parties using the win-win solution principle. Although this was a long period, no problems were raised after the completion of the project⁹.*

The decision of the dispute Board has no executable power; there are still other legal remedies after the dispute Board, which can give rise to a dualism of decisions (dispute Board and other legal remedies). In Article 23 paragraph 4 of the Regulation of the MPWH Number 11 of 2021, it states that in the case of objections to some formal decisions of the Dispute Board, parts of the formal decisions that are not given a notification of objections are final and binding and must be implemented immediately by the service user and/or provider. In the event that the service user and/or provider submit a notification of objections to some of the decisions, they may take other efforts to resolve disputes in accordance with the provisions of laws and regulations. Of course, other legal remedies must have permanent legal force and execution power, namely the use of litigation (court) settlements or through non-litigation (arbitration) in the form of a compromise deed or a special agreement containing the settlement of disputes arising by

⁸ Fédération Internationale Des Ingénieurs-Conseils. (2006). Conditions of Contract for Construction, MDB Harmonised Edition, FIDIC. Geneva, Switzerland.

⁹ Fitriyanti, Fadia, and Emil Adly. 2022. "Lessons Learned in the Use of Dispute Boards to the Settlement of Construction Service Disputes." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*. Pg. 13

submitting to arbitration. This compromise deed was made by both parties in a written deed (or also in an authentic deed drawn up before a notary¹⁰).

3. Execution of Dispute Board Decisions

Although the construction dispute board's decision is final and binding, there is no clause whereby the decision must be registered with the court to be executed. In a sense, the use of a construction dispute board is very dependent on the good faith of the service user and service provider in complying with each contract clause. Article 1338, paragraph n dispute board's decision is final and binding, there is no clause whereby the decision must be registered with the court to be executed. In a sense, the use of a construction dispute board is very dependent on the good faith of the service user and service provider in complying with each contract clause. Article 1338, paragraph 1, stipulates that "all agreements made legally apply as laws for those who make them." The principle of *pacta sunt servanda*. On the one hand, a construction dispute board is similar to arbitration because it has a pattern, but on the other hand, this character is similar to alternative dispute resolution (consultation, negotiation, mediation, conciliation, or expert judgment). Therefore, a dispute settlement agreement through a construction dispute board must make the best use of the dispute board's role as a recommendation provider, because if there is a protracted disagreement, it can actually lead to a waste of budget because one of the parties proceeds to the next legal remedy. Besides that, the dispute board has the advantage of a settlement time of 84 days, which is faster than other dispute settlements. Unlike an arbitral award in which the parties do not voluntarily enforce the award, the award is enforced based on an order from the Head of the District Court at the request of one of the parties to the dispute. The dispute board does not have this clause.

DBs were already mentioned in FIDIC Conditions of Contract: MDB Harmonised Edition (FIDIC 2010). However, in Indonesia there is still some reluctance to use DBs for construction works; this matter is being studied in this paper. DBs issue a determination within 84 days according to FIDIC conditions of contract; within 90 days according to the International Chamber of Commerce (ICC) standard (ICC 2015); and within 84 days according to the Japan International Cooperation Agency (JICA 2012), the Institution of Civil Engineers (ICE) (ICE 2012), and the Chartered Institute of Arbitrators (CIARB 2014). The time required to resolve a dispute with a DB is shorter than the time required for arbitration which needs 184 days; in addition, in some arbitration cases, the dissatisfied party will bring the case to litigation, which is more complicated and time consuming¹¹.

¹⁰ MPN Jannah, DN Musjtar. 2019. *Penyelesaian Sengketa Wanprestasi Akibat Keterlambatan Pelaksanaan Perjanjian Konstruksi Bangunan*. Vol. 3 No. 2 (2019): UIR Law Review. Pg. 47

¹¹ Hardjomuljadi, Sarwono. 2020. "Use of Dispute Avoidance and Adjudication Boards." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Pg. 16

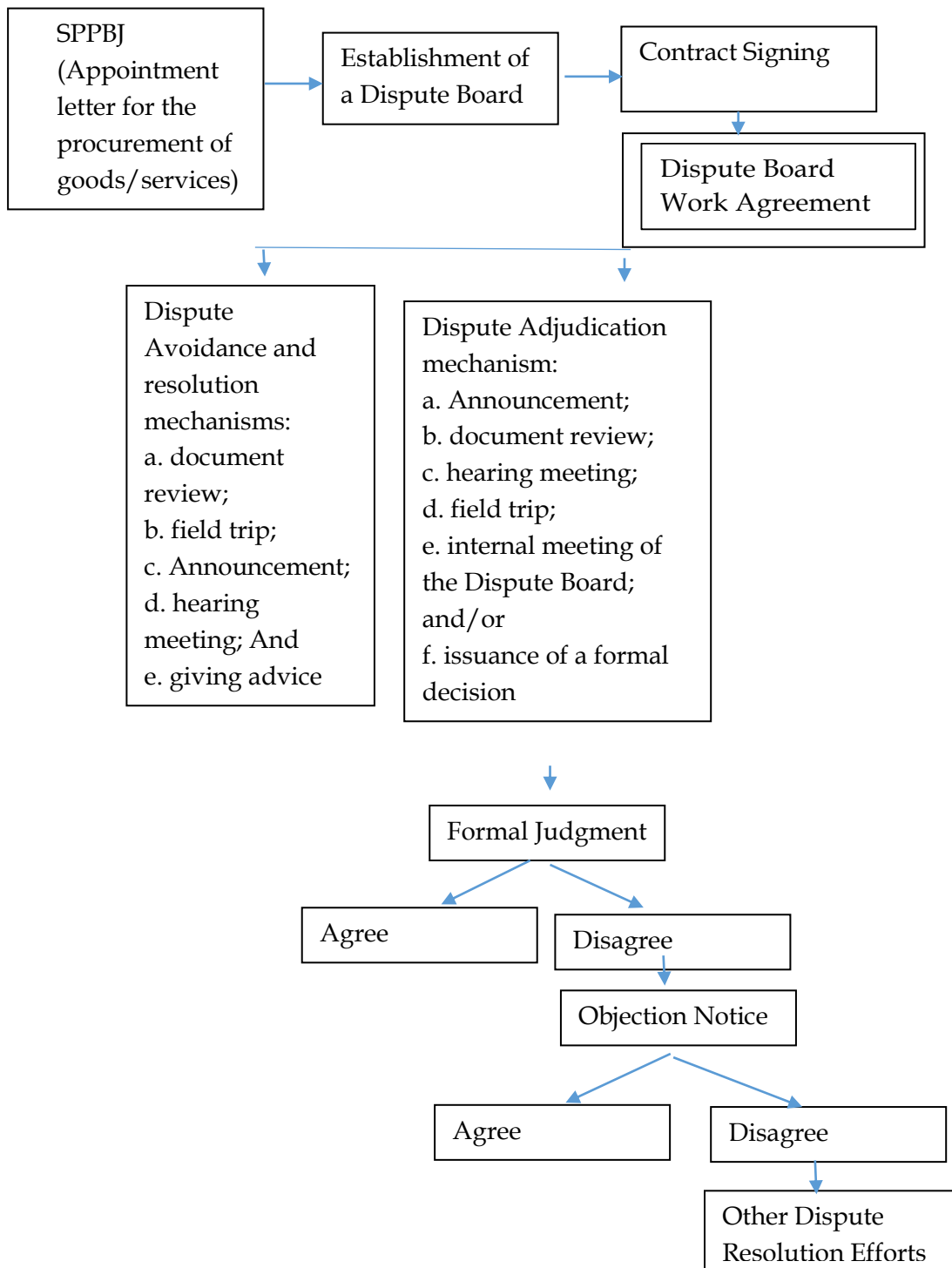


Figure 2. Construction Dispute Board Mechanism Flow

4. The Construction Dispute Board is Not an Alternative to Dispute Resolution

Even though the construction dispute board is a non-litigation construction dispute resolution option, in Indonesian regulations, nomenclature-wise, it is not an alternative dispute resolution. In order to avoid misinterpretation, in Law No. 30 of 1999 concerning arbitration and alternative dispute resolution,

what is referred to as alternative dispute resolution is consultation, negotiation, mediation, conciliation, or expert judgment. The construction dispute board has its own patterns for acting as a decision-maker and recommendation provider. *DAB has four primary functions; the first is conducting periodic site visits to construction activities to understand the details. The second is to understand the latest information related to activities, development of projects, work results, and problems in the field, while the third is to encourage the resolution of disputes between the parties. Fourth, after a dispute is submitted to DAB, the adjudicator conducts a trial and completes their authority to give a decision professionally by paying attention to the given time*¹². The Dispute Board is very close to countries that adhere to the common law principle by prioritizing the good faith of both parties in dealing with disputes. Even in the standard FIDIC documents, dispute settlement is only divided into two parts: the dispute board and arbitration.

5. Even Though It Has Been Regulated in a Ministerial Regulation, The Construction Dispute Board is an Option

In practice, the Construction Dispute Board is an option. There are two ways to determine the use of a dispute board. The first is that the service user can stipulate procurement preparation documents that may contain the use of the Board. In the event that it is agreed to use the Dispute Board, the service user and the provider agree on the number of members of the Dispute Board and the requirements needed after the issuance of the letter of appointment of the goods or services provider and before signing the Contract.

Procurement preparation documents include technical specifications, terms of reference, detailed engineering design (DED), contract design, DIPA, RUP package ID, service usage time, market analysis, and sector-specific readiness criteria. If the service user determines the dispute board as a form of dispute resolution, it must be stated in writing in the technical specifications or terms of reference. The Procurement Preparation Document, with the option of using the Dispute Board, contains the Dispute Board Work Agreement Draft and the General Terms of the Dispute Board Work Agreement as part of the Draft Construction Work Contract or Integrated Construction Work and becomes an attachment to the Specific Terms of the Contract. Whereas secondarily, after being determined as the winner, in the event that the service user and the provider agree to use the dispute board but it has not been included in the procurement preparation document, the service user and the provider make an agreement for the use of the dispute board prior to signing the contract.

In Appendix 1 of the Regulation of the Government Goods and Services Procurement Policy Agency (LKPP) Number 1 of 2022 concerning Guidelines for the Implementation of International Procurement of Goods and Services, it is determined that in the event that the winner of the procurement is a national business actor, the contract documents shall be made in Indonesian, whereas in the event that the winner of the procurement is a foreign business actor, the contract documents are made in Indonesian and English. This raises the question of whether, if the lender is a foreign bank that in the contract adopts standard documents from FIDIC and the winner of the procurement is a national business actor, both the contract and the dispute board agreement are also made in Indonesian, including the terms in them, or whether they instead use the model agreement of the tripartite work of the dispute board issued by LKPP.

6. The Ecosystem Continues to Grow

Dispute boards are still not very popular for use in dispute resolution options. Massive socialization is needed to convey the advantages of using a construction dispute board where this

¹² Owen, G. 2015. The working of the dispute adjudication board (DAB) under new FIDIC 1999 (new red book). Accessed April 9, 2023. <http://fidic.org/sites/default/files/11%20DAB.pdf>.

ecosystem has only started to form since 2021. Human resources are still limited, and interpretations vary, so we still need to find best practices for this use. *In Indonesia, people have difficulties to accept decision by other parties, it is proven from the people performance on facing the decision of the court, arbitration and Dispute Board (decision) people mostly will appeal to the higher institution. More than 90 % of the samples taken from the decision of Supreme Court of Indonesia, it could be found that most of the construction projects will be filed to the court, even if it has been decided by the arbitration tribunal*¹³.

However, construction services business activities in Indonesia must avoid the "litigious-minded" concept of dispute resolution typical of Western society¹⁴. However, what is most influential in resolving disputes is the legal certainty factor for the two respondents studied (users and service providers), while other things that support it are from the perspective of the owner and consultant, and the sustainability of the project is a matter of concern apart from legal certainty. Meanwhile, from the contractor's point of view, the relationship is the thing that is most guarded in the dispute resolution process¹⁵.

Conclusion

The issuance of Regulation of the MPWH Number 11 of 2021 Concerning Procedures and Technical Instructions for the Construction Dispute Board indicates that the dispute resolution options in accordance with Law Number 2 of 2017 concerning Construction Services and their amendments can be applied even though there are several notes. What needs to be anticipated from the construction dispute board is related to understanding how new regulations can affect the use of the construction dispute board, starting from aspects of language, scope, budget, institutions, decisions, and ecosystems. How to harmonize every regulation that regulates construction contracts so that in resolving disputes there are no differences in interpretation, overlapping regulations, or even errors in applying construction work documents between service users and service providers. The human resources of the Dispute Board, when interpreted from the Rules, are anyone who meets the requirements and has these qualifications, meaning that there is no clause stipulating that members of the Dispute Board must be members of one of the designated organizations or associations. The decision of the dispute board can still be rejected by either party. Although the formal decision of the Dispute Board is final and binding, There is no clause where the decision must be registered with the court to be executed. In a sense, the use of a construction dispute board is very dependent on the good faith of the service user and service provider in complying with each contract clause. In this case, the dispute board agreement is in the standard format of the MPWH Regulation and the dispute board agreement of the lender/MDB Harmonized Edition issued by the *Federation Internationale des Ingenieurs-Conseils* (FIDIC), with the words and terms used having the same meaning as specified in the General Terms of the Dispute Board Agreement.

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¹³ Ibid, Hardjomuljadi, Sarwono. 2017. Pg.18

¹⁴ Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, Jakarta: Kencana, 2015. Pg.3

¹⁵ Ismanto, Hadi, and Sarwono Hardjomuljadi. 2018. "Analisis Pengaruh Dewan Sengketa & Arbitrase Terhadap Penyelesaian Sengketa Konstruksi Berdasarkan Fidic Condition of Contract 2017." *Jurnal Konstruksia* 10. Pg. 83

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Legislation

Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services

Regulation of the Government Goods and Services Procurement Policy, Agency Number 1 of 2022, concerning Guidelines for Implementation of International Procurement of Goods and Services

Regulation of the MPWH Number 11 of 2021 concerning procedures and technical instructions for the Construction Dispute Board

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