

*Research Article***Authority of the Dispute Council in the Resolution of Construction Disputes in Indonesia**Nurindria Naharista Vidyapramatya<sup>1</sup>, Emmy Latifah<sup>2\*</sup>, Elfia Farida<sup>3</sup>, Antonius Alexander Tigor<sup>4</sup><sup>1,2</sup>Faculty of Law, Universitas Sebelas Maret, Indonesia<sup>3</sup>Faculty of Law, Universitas Diponegoro, Indonesia<sup>4</sup>Doctoral Program in Society Technology and Culture, Universitat Oberta de Catalunya, Spain

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**ABSTRACT**

The Dispute Council is a construction dispute resolution forum mandated by Law Number 2 of 2017 concerning Construction Services. The existence of the Dispute Council as a construction dispute resolution forum is actually not much different from other alternative dispute resolution forums, such as negotiation, mediation, and arbitration. However, the Construction Services Law mandates that a Dispute Council be formed by the parties simultaneously with the preparation of a construction work contract. In practice, decisions made by the Dispute Council are often not final and binding if one of the parties is not willing to implement the decision of the Dispute Council. This study aimed to compare the effectiveness of the authorities between the Dispute Council and other alternative dispute resolution forums. This research was normative research. The data used were secondary data consisting of primary, secondary, and tertiary legal materials. The data collection technique used literature study, and the data analysis technique used qualitative analysis. The results of the research show that the dispute resolution process with the Dispute Council is ineffective because it takes a long time. Parties who do not want to implement the decision of the Dispute Council will continue the dispute resolution process to arbitration. In fact, when the arbitration process fails, the dispute is submitted to court. This situation becomes more effective and saves time when the resolution of construction disputes directly uses arbitration without going through the Dispute Council first.

**Keywords: Dispute Council; Construction Work Contract; Construction Work; Construction Disputes.**

**A. INTRODUCTION**

Based on Article 1 Number 3 of Law Number 2 of 2017 concerning Construction Services, the definition of construction work is "...all or part of the activities which include the construction, operation, maintenance, demolition, and rebuilding of a building". Construction work is carried out by a service provider with the process of procuring goods or services carried out by service user and followed by the signing of an

agreement between the provider and the user of the construction service so that a legal relationship arises between the parties contained in the construction work contract. Based on Article 1 number 6 of the Construction Services Law, construction service providers are providers providing constructions services, while users of construction services are owners or employers who use construction services. This is regulated in Article 1 point 5 of the Construction Services

Law. The definition of a construction work contract in the Construction Services Law is the entire contract document that regulates the legal relationship between service users and providers in the implementation of construction services. Indonesia uses a standard construction work contract that refers to Law Number 2 of 2017 concerning Construction Services and uses the conditions of contract for construction issued by FIDIC. The FIDIC stands for *the Federation Internationale Des Ingenieurs - Conseils* (International Federation of Consulting Engineers) (Adriansyah et al., 2016), and it is an organization whose members are associations of engineers from various countries that have issued various standard forms of documents and contract requirements (conditions of contract) for civil works projects (civil engineering construction) since 1957 which is continuously revised and improved according to developments in the construction industry (Jaya, Putera, & Simanjuntak, 2020). This standard can be used in Indonesia because it does not conflict with Indonesian legislation, especially the Construction Services Law (Sari, 2019).

Implementation of construction work does not always run smoothly. There are frequently the things that the parties do not want to happen in its implementation, and in the end it turns into a claim and is submitted to be a dispute between the parties (Sakate, & Dhawale, 2017). Some examples of claims in the implementation of construction work are: unpaid claims due to delays in payment, delays in completion of

construction work, different understanding of contract documents, or lack of financial support received by service users resulting in delays in administrative tasks (Shah, Bhatt, & Bhavsar, 2014). If all of these are not immediately resolved by the parties, it will certainly be a dispute and hinder the completion of construction work (Kisi, Kayastha, & Chitrakar, 2023). Thus, when entering into a contract, the parties need to negotiate and agree on how to anticipate delays and disturbance claims that will be handled when they arise during construction phases (Aibinu, 2009).

Resolution of construction disputes as mandated in Article 88 of Law Number 2 of 2017 concerning Construction Services is non-litigation or using Alternative Dispute Resolution, such as mediation, negotiation, conciliation, and arbitration. In addition, it can form a dispute resolution forum called the "Dispute Council". Further arrangements regarding the technical implementation of the Dispute Council are contained in the Regulation of the Minister of Public Works and House Works Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council.

The Dispute Council has preventive and repressive functions. The Dispute Council is formed at the same time when the parties drafted a construction work contract. It is intended that the members of the Dispute Council can follow the project work process from the start to prevent disputes. It is a preventive function of the Dispute Council. If a dispute occurs, the Dispute Council's

task is to resolve the dispute, and this is a repressive function of the Dispute Council.

The decision of the Disputes Council is not final and binding when one of the parties is not ready to implement the decision. In accordance with the mandated in the standard of construction service in the FIDIC's Condition of Contract of Construction, if one of the parties is not willing to implement the decision of the Dispute Council, the resolution of the dispute can be brought to arbitration. Furthermore, if arbitration fails to resolve the dispute, the dispute will be submitted to court. This situation makes the construction dispute resolution mechanism take a long time and incur a lot of costs.

Furthermore, this research compared the effectiveness of the authorities between the Dispute Council and other alternative dispute resolution forums in resolving construction disputes in Indonesia. This needs to be investigated since the Dispute Council has authorities which are not much different from existing alternative dispute resolution forums, such as negotiation, mediation, or arbitration.

#### **a. Legal certainty**

Gustav Radbruch argues that there are three objectives of law; justice, benefit and legal certainty. Legal certainty is a condition in which law may serve as a rule that must be obeyed (Prayogo, 2016).

According to Gustav Radbruch, there are four basic matters related to the definition of legal certainty: 1.The law is positive, meaning positive law is legislation; 2.The law is based on facts,

meaning the law is based on facts; 3.Facts must be formulated in a clear way so as to avoid misunderstanding and are easy to implement; 4.Positive law cannot be easily changed.

#### **b. Legal Effectiveness**

The theory of legal effectiveness, according to Soerjono Soekanto, whether a law is effective or not, is determined by 5 (five) factors: (Soekanto, 2008): 1.The legal factor (law); 2.Factors of law enforcement, which are the parties that form or apply the law; 3.Factors of facilities or the facilities that support law enforcement; 4.Community factors, which are the environments where the law applies or is applied; 5.Cultural factors, as a result of work, creation of taste based on human initiative in social life.

The Dispute Council was first used in Indonesia in 2006, in a dispute between PT Perusahaan Gas Negara (PT. PGN) and the CRW Joint Operation. The CRW Joint Operation is a tripartite collaboration involving PT Citra Panji Manunggal, PT Remaja Bangun Kencana Kontraktor, and PT Winatek Widita. The project undertaken was a construction work of onshore gas transmission pipelines. The dispute occurred when there was a request for payment by the CRW Joint Operation to PT. PGN.

In the contract made between PT. PGN and the CRW Joint Operation, they agreed that when a dispute arises between the parties, it is resolved through the Dispute Council. After listening to the chronology of the dispute, the Dispute Council then gave several decisions which resulted in dissatisfaction from PT. PGN.

The dissatisfaction occurred because, in the decision, PT. PGN was asked to pay the CRW Joint Operation. Finally, the CRW Joint Operation brought this dispute to the arbitration forum. The arbitral tribunal issued a decision stating that the decision of the Dispute Council is binding on the parties, and PT. PGN is obliged to pay CRW Joint Operation based on the contract (Ean J, 2010).

Based on this case, it can be seen that actually the decision of the Dispute Council which is not final and binding made the parties resolve the dispute to arbitration in accordance with the statutory regulations. This results in the longer resolution, time consuming, and costly. Therefore, this study compared the effectiveness of the authorities between the Dispute Council and other alternative dispute resolution forums in resolving construction disputes in Indonesia. This needs to be studied because the Dispute Council is a dispute resolution forum that is still new in Indonesia. The purpose of this research was to compare the effectiveness of the authorities between the Dispute Council and other alternative dispute resolution forums.

Judging from the presence of scientific work literatures in the form of books, theses, journals, or other papers that studied construction dispute resolution, particularly regarding the roles of the Dispute Council. Based on these papers, the authors found that there were several papers that were considered to have relevance to the ideas, insights, or themes raised by the authors. In this case the researchers recognized the matters that had been researched and those that

had not been researched so that there was no duplication of research. From the search that had been conducted, the existing studies are:

The Journal of Notary Law, ACTA COMITAS, Volume 5 Number 2, written by I Made Wisnu Suyoga and Yohanes Usfunan in 2020 entitled "Construction Work Contract Dispute Resolution through Adjudication and Comparison with Arbitration". The focus of this research was to compare the dispute resolution mechanisms between Adjudication and Arbitration, and the results of Adjudication have the advantage of not only being able to resolve but also to prevent disputes (Suyoga, & Usfunan, 2020).

The Construction Journal, Volume 10 Number 1, written by Hadi Ismanto and Sarwono Hardjomuljadi in 2018 entitled "Analysis of the Effect of Dispute and Arbitration Councils on Construction Dispute Resolution Based on the 2017 FIDIC Conditions of Contract". This research focused on analyzing the factors that are considered and the most dominant in resolving disputes both in arbitration and the Dispute Council (Ismanto, & Hardjomuljadi, 2018).

The Journal of Technology Issues, STT Mandala, Volume 6 Number 1, written by Nurcaweda Riztria Adinda in 2013 entitled "Dispute Council to Avoid Disputes in Construction Projects". The focus of this research was to explain alternative construction dispute resolution that is more effective than the Arbitration Institution (BANI) (Adinda, 2013).

The Journal of Legal Affairs and Dispute Resolution in Engineering and Construction,

Volume 14 Issue 1 ASCE, written by Fadia Fitriyanti and Emil Adly in 2022 entitled "Lessons Learned in the Use of Dispute Councils to the Resolution of Construction Service Disputes". The author focused on the use of the Dispute Council in the Jakarta MRT case and the mechanism of the Dispute Council in the Government Regulation Number 22 of 2020 (Fitriyanti, & Adly, 2022).

The Journal of Legal Affairs and Dispute Resolution in Engineering and Construction Volume 15 Issue 1 ASCE, written by Krishna Kisi, Rujan Kayastha, and Yogendra Chitrakar in 2023 entitled "Construction Claims and Payment Disputes Analysis: Alternative Dispute Resolution to Litigation". The focus of this research was to examine the resolution of construction disputes for the construction of physical infrastructure in Nepal. The parties resolved disputes through litigation channels, which had previously been resolved with alternative dispute resolution forums (Kisi, Kayastha, & Chitrakar, 2023).

Some of these studies have their own characteristics and focus of study which are different from this research. This research focused more on comparing the effectiveness of the authorities of the Dispute Council in resolving construction disputes in Indonesia with the Alternative Dispute Resolution forums that have already existed beforehand.

## B. RESEARCH METHODS

This research was normative legal research (Ibrahim, 2006). The approaches used

in this study were statutory, case and conceptual approaches (Nasution, 2008). The statutory approach was carried out by examining all regulations and laws related to the legal issues under the study. The case approach was carried out by examining the cases related to the issues at hand which have become court decisions with permanent force. Then, the conceptual approach brought up interesting objects from the point of view of practical knowledge and could be used to identify existing principles, doctrines, and views so that new ideas may emerge (Marzuki, 2019). The data collection techniques were carried out by means of literature or document studies to collect secondary data related to the issues studied by studying primary, secondary, and tertiary legal materials. After that, the data obtained was then analyzed using a qualitative analysis approach. Qualitative analysis is the observation of the data obtained and connecting each of the data obtained with the legal provisions related to the problem investigated based on inductive logic (Abdussamad, 2021).

## C. RESULTS AND DISCUSSION

### 1. Construction Dispute Concept

Dispute is a conflict or controversy caused by differences of opinion, quarrels, conflicts, and disputes (Boboy, Santoso, & Irawati, 2020). Mitropoulos and Howell, as quoted by Suntana S. Djatnika, argue that one of the root causes that causes disputes in construction work is the uncertainty factor (Djatnika, 2018b). Construction disputes are events that arise because of a claim

(Ismanto, & Hardjomuljadi, 2018). According to Priyatna Abdurrasyid, the causes of the claim are: (Abdurrasyid, 2011): a.Delayed design information; b.Inadequate design information; c.Inadequate site investigation; d.Slow client response; e.Poor communication; f.Unrealistic time targets; g.Inadequate contract administration; h.Uncontrollable external events; i.Incomplete tender information; j.Unclear risk allocation; k.Lateness – non-payment.

Furthermore, construction disputes can be caused by internal and external factors. According to The Project Management Body of Knowledge (PMBOK) regarding the factors causing construction disputes it is stated that (Project Management Institute, 2008):

“...internal risks are the matters that the project team can control or influence, such as staff assignments and cost estimates. External risks are the matters beyond the control or influence of the project team, such as market shifts or government action.”

The factors that trigger construction disputes can be internal and external factors. Internal factors are the causes of disputes from the user or service provider side in which one party does not carry out part or all of the obligations set out in the contract or what is called a default (Djatnika, 2018b). In other hand, external factors and force majeure are the emergence of disputes caused by the conditions that cannot be controlled by the parties, such as unstable economic and security conditions, socio-cultural and political changes, government policies and natural or weather conditions that

result in changes in costs, quality, and time (Djatnika, 2018b).

Construction disputes can also be caused by the choice of the dispute resolution. The absence of a choice will lead to lengthy dispute resolution. Disputes may have arisen, but the parties have not decided which resolution forum to use. Most construction disputes can be resolved through several Alternative Dispute Resolution options through negotiation, mediation, conciliation and expert opinion. (Utama, & Irsan, 2018).

To avoid and resolve disputes, there are various ways that can be taken. One way is through the "law". The form of law can be seen in written agreements (contracts), judicial power institutions, or alternative dispute resolution mechanisms (Lature, 2018).

## 2. Construction Dispute Resolution

The occurrence of dispute can result in a loss of time, costs, energy and the possibility of getting a penalty in the form of a fine (Djatnika, 2018a). Efforts are made to prevent disputes from occurring by mitigating them. Dispute resolution steps are to avoid (avoidance); to reduce the impact that occurs (mitigation); and to accept the consequences of the dispute (acceptance). (Project Management Institute, 2008). Dispute mitigation can basically be applied by choosing to avoid, reduce, or accept so that the impacts are minimal or small (Djatnika, 2018a). The steps made to avoid disputes are to eliminate the causes of disputes. In general, not all causes of

disputes can be eliminated. However, for some disputes, the cause can be eliminated or reduced.

According to the K and M Business Law quoted by Suntana S. Djatnika, the majority of disputes that occur on construction projects are a direct result of incomplete designs, lack of information, excessive changes implemented after the construction project took place or delays in approving additional work (Djatnika, 2018a). Although construction disputes can arise from a number of factors, some of the more common reasons for disagreement are: (1) expectations that do not match reality; (2) poor risk allocation; (3) lack of communication; (4) unclear contracts; and (5) failed to address the problems that arise (Ilma et al., 2020).

Users and service providers may avoid most of these problems with proper planning and communication. One of the best ways to avoid construction disputes is to understand the contract. The parties should review the terms and conditions of the contract with a construction litigation attorney before signing. The important thing that must be considered is paying attention to contract clauses related to payment terms, adjudication clauses, variation and extension of time clauses, and the deadline for issuing a notification of dispute. A clear contract is very important in resolving disputes (Djatnika, 2018a).

The purpose of mitigating construction disputes is to reduce the losses that occur to the parties and overcome the impacts that occur when a dispute arises. The impact is the stopping or not completing the project which is the object of

the construction work contract. The consequences of stopping or not completing this construction project do not only affect the parties but also the people who will use the project. The examples that often occur are in bridge or toll road construction projects. Mitigation measures are also useful for reducing the costs to be incurred. The concept of dispute mitigation has something to do with economic theory and cost and benefit analysis which are applied to find the most economical solution (Djatnika, 2018a).

Law Number 2 of 2017 concerning Construction Services states that the construction dispute resolution process is to use a non-litigation process. This is stated in Article 88 which adheres to the principle of deliberation to reach consensus. When unable to reach an agreement in deliberation, the parties can take the resolution process that has been agreed upon in the construction work contract. Efforts that can be made are by using mediation, conciliation, or arbitration. In addition, the parties can also appoint a Dispute Council to resolve disputes that arise between them. In the field of construction, the parties often experience disputes. The Dispute Council is an alternative to settling construction disputes out of court (Agdas, & Ellis, 2013). The difficulty in deciding which methodology best suits the needs of an entity depends on the type of dispute, the relationship of the parties, and other factors that are not known until the dispute arose (Harmon, 2003).

Most of the concepts of alternative dispute resolution forums are to reach a "win-win solution"

decision. Mediation is a form or way of resolving disputes out of court involving another person or a third party as a mediator. The mediator's job is only to help the disputing parties in solving problems and do not have the authority to make decisions. The mediator is present to help the parties reach an agreement that can only be decided by the parties to the dispute. Negotiation efforts are to seek peace between the parties to the dispute by discussing the solution without the involvement of a third party. Conciliation is the same as mediation, which is a process of resolving disputes out of court between disputing parties by involving a neutral and impartial third party. The third party in conciliation is called the conciliator. The task of the conciliator is as a facilitator to communicate between the disputing parties so that they can find a solution that satisfies the parties. Meanwhile, arbitration is a method of resolving disputes involving one or more neutral third parties which are usually approved by the parties to the dispute and have a binding decision. The Dispute Council is a team formed based on the agreement of the parties since the binding of construction services or at the time of making a construction work contract.

### **3. Dispute Council Concept and Dispute Resolution Procedure in the Dispute Council**

The definition of the Dispute Council in the elucidation of Article 88 paragraph 5 of the Construction Services Law 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 construction contracts. The Construction Council is usually established before a dispute and is included in the construction work contract. The Dispute Council can be said to be successful when it can resolve all disputes simultaneously during the construction project (Harmon, 2009). The Dispute Council is an independent council consisting of one to three people whose job is to assist the parties in avoiding and resolving disputes quickly at an affordable cost and acceptable to the parties (Adinda, 2013). The main task of the Dispute Council is to avoid differences of opinion before it develops into a dispute, while making decisions or recommendations to resolve disputes is an additional task of the Dispute Council in the field of construction (Hardjomuljadi, 2020). The appointment of the Dispute Council is set forth in the construction service contract clauses and constitutes a tripartite contract of the Dispute Council.

Dispute resolution using the Dispute Council has many advantages compared to litigation dispute resolution forums. First, in terms of financing, the use of the Dispute Council as a dispute resolution forum reduces costs. The parties do not need to incur high costs because there are no administrative costs, and the costs incurred are only to pay the honoraria of the members of the Dispute Council. Second, in terms of completion time, the involvement of the Dispute Council speeds up the time for resolution of disputes because the members of the Dispute



Council have been formed since the beginning of the construction work contract with the main task to oversee the implementation of the contract and to resolve disputes that may arise. This makes the Dispute Council more in control of the dispute situation when in the end a dispute does arise between the parties. Third, viewed from the relationship between the parties after the decision on the dispute, by using the Dispute Council as a dispute resolution forum, the decision issued is expected to be in the form of a "win-win solution" decision so that the relationship between the parties can still run well and construction projects can still go on (Hardjomuljadi, 2020).

The process of the Dispute Council in making decisions is based on the principle of justice. When within twenty-eight calendar days there is no objection from both parties to the decision issued by the Dispute Council, the decision of the Dispute Council is final and binding on the parties. This is stated in Article 95 of Government Regulation Number 22 of 2020 concerning Regulation Implementation of the Construction Services Law. The working period of the Dispute Council is during the contract period or until it is terminated based on the provisions in the tripartite agreement. Article 96 paragraph 1 of the Government Regulation Number 22 of 2020 concerning Regulations for the Implementation of the Construction Services Law explains that the costs incurred for the Dispute Council are fully borne by the parties in equivalent amount.

The use of the Dispute Council is carried out for integrated construction work in which part

or all of the funds are sourced from domestic loans received by the central and regional governments or for integrated construction work partially or wholly financed from foreign loans unless stipulated in the foreign loan agreement. This is regulated in Article 4 of the Regulation of the Minister of Public Works and Public Housing Number 11 of 2020 concerning Procedures and Technical Instructions for the Construction Dispute Council. In carrying out its duties, to prevent and resolve disputes, the Dispute Council carries out the activities such as compiling schedules and agendas to control projects periodically agreed with the parties, reviewing contract documents, making recommendations for improvements to all contract documents to avoid disputes, hearing opinions from both parties in the event of a dispute, drawing up decisions to resolve disputes, and making reports on the implementation of tasks and periodic reports sent to the parties. This is explained in Article 6 paragraph 2 of the Regulation of the Minister of Public Works and Public Housing Number 11 of 2020 concerning Procedures and Technical Instructions of the Construction Dispute Council.

In 1995, the World Bank issued the Standard Bidding Documents for the Procurement of Works (SBD-W) or a new Standard Bidding Document for the Procurement of Works which stipulates that disputes that occur are submitted to the Dispute Council not to engineers. The SBD-W allows disputes to be referred to engineers when the project contract is less than US\$50 million. The Dispute Council under the SBD-W

issues recommendations that are not binding on the parties. When one of the parties does not accept the recommendation of the Dispute Council, the dispute resolution process must use arbitration process to obtain a final and binding decision (Dorgan, 2005). Then, The Federation Internationale Des Ingenieurs Conseils (FIDIC) introduced a dispute handling body or Dispute Council in various terms of the contract (Dorgan, 2005):

- a. In 1995, the FIDIC published new contract terms for Design or Build and Turnkey (or “the Orange Book”), which do not provide for an engineer to review and decide disputes. Instead, the dispute must be referred to the Dispute Council.
- b. The FIDIC was followed by the Supplements to the Red Book, in 1996, and to the Conditions of Electrical and Mechanical Works Contracts, 3rd Edition (or as it is commonly called “the Yellow Book”), in 1997 both offer the option of referring disputes to the Council. Dispute.
- c. In 1999, the FIDIC published a new model series of “rainbow contracts”, including the contract terms for construction (or often called “the Red Book”), the contract terms for manufacture and design-build (“the Yellow Book”), the contract terms for projects engineering, procurement, and construction (EPC) or Turnkey (“the Silver Book”), and the short contract forms (“the Green Book”). The conditions of these contracts all provide for the referral of disputes to the Dispute Council.

The FIDIC requires that any disputes arise to be referred to the Dispute Council at a much lower cost and in a much shorter time than arbitration (FIDIC, 2019). The Dispute Council can also help the parties avoid disputes. When one of the parties is dissatisfied with the decision of the Dispute Council, the dissatisfied party can issue a letter of notification of dissatisfaction. Then, the dispute resolution process proceeds to arbitration after the end of the peaceful resolution period. Arbitration proceedings may be postponed until the project is completed to avoid perceived disruption by project members. Meanwhile, the parties already have a provisional decision on the occurring dispute (FIDIC, 2019).

The Dispute Council Law is independent and impartial, and it can also resolve disputes in real time or at that time so that the parties can plan further activities (FIDIC, 2019). The scope stipulated in the Contract Requirements book for the Implementation of Harmonized Edition Multilateral Development Bank (MDB) Construction published by FIDIC describes the procedures for the appointment of the Dispute Council, the circumstances in which there is a failure to agree on the members of the Dispute Council, the failure to comply with the decision of the Dispute Council, and explaining the expiration time of the appointment of the Dispute Council (FIDIC, 2006).

The Dispute Council is not an assignment within an institution or organization such as arbitration, but rather an individual service usually consisting of one or three members. The Dispute

Council is needed especially for complex work or the projects that require high technology and risks. The parties select and agree on the candidate members of the Dispute Council to be appointed as the members of the Dispute Council. When the members of the Dispute Council consist of three persons, the appointment process is for each party to appoint one person as a candidate for the member of the Dispute Council who has fulfilled the terms and conditions. Then, the candidates for members of the Dispute Council elect one more person to become chairman. The requirements for becoming a Dispute Council practitioner are explained in Article 26 of Regulation of the Minister of Public Works and Public Housing Number 11 of 2021 concerning Procedures and Technical Instructions for a Dispute Council: Indonesian citizen, fluent in the language used in construction work contracts and agreements, not having a legal relationship directly or indirectly with the parties, and meeting the required qualifications. Apart from having to meet the requirements, the members of the Dispute Council must also meet the qualifications and conditions stipulated in the Ministerial Regulation; the council members must have an understanding of construction projects; be able to interpret contracts; and understand the legal aspects of contracts.

A significant difference between the Dispute Council and other dispute resolution alternatives is that the Dispute Council is appointed at the commencement of the project prior to the occurrence of a dispute. Therefore,

the Dispute Council has two functions; preventive and repressive functions. It is said to have a preventive function because the Dispute Council can prevent disputes from occurring in a project by conducting regular site visits to locations and being actively involved during the project. The repressive function of the Dispute Council is to resolve disputes that occur by issuing a neutral, impartial decision to one of the parties, and this decision is expected to be carried out by the parties.

The decision made by the Dispute Council is not final and binding. When one of the parties disagrees with the decision of the Dispute Council, the party can bring the dispute to arbitration. This has been regulated in the FIDIC's Conditions of Contract of Construction standard construction service contracts. In using the Dispute Council as an effort to resolve construction disputes, it is expected that the results obtained will be maximum, final, and binding so that there is no need for further efforts to other alternative dispute resolution forums, so this is related to legal certainty. The Dispute Council prioritizes values including upholding good relations between the parties, legal certainty, and the sustainability of the project is considered by the parties (Fitriyanti, & Adly, 2022).

The theory of legal certainty can be interpreted as having clarity and firmness regarding the application of law in society, while the decisions of the Dispute Council which are not final and binding result in ambiguity in the

positions of the winning and losing parties. According to Gustav Radbruch, there are four basic things related to the meaning of legal certainty: 1. The law is positive, meaning positive law is legislation; 2. The law is based on facts, meaning the law is based on facts; 3. Facts must be formulated in a clear way so as to avoid misunderstanding and are easy to implement; 4. Positive law cannot be easily changed.

Gustav Radbruch's opinion is based on his view that legal certainty is the certainty of the law. Legal certainty is a product of law or more specifically of legislation. Based on this opinion, positive law that regulates human interests in society must always be obeyed. In addition to the existence of laws and regulations, Pancasila basically refers to two main meanings; the understanding of Pancasila as a way of life and as the foundation of the State. Furthermore, based on its basic understanding, Pancasila functions as a static and fundamental foundation and dynamic guide and binder that can unite the Indonesian people (Hangabei et al., 2021). The government plays a role in regulating, supervising and controlling to create a conducive system that is interconnected with one another (Ayunda, 2022).

From the analysis regarding the regulation governing the Dispute Council contained in the Regulation of the Minister of Public Works and Public Housing Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council, the regulation serves as the guidelines or legal basis for the use

of the Dispute Council. As statutory regulations, this ministerial regulation must be obeyed by the community. Chapter 23 in this ministerial regulation explains that when the parties object to the formal decision of the Dispute Council, they can take other dispute resolution efforts in accordance with statutory regulations. This is also regulated in the FIDIC's requirements document regulations on construction work contract in which the FIDIC is the largest international representative body established from national associations of consultants. In this regulation, what is meant by other dispute resolution efforts is by using arbitration. The purpose of establishing the Dispute Council is to make the resolution of construction disputes more efficient, fast and cost-effective. However, with this provision, the essence of the Dispute Council's objectives is not realized so that the position of the Dispute Council is the same as other alternative dispute resolutions with its decisions that are not final and binding and can be reached by further dispute resolution efforts. In addition, the decisions of the Dispute Council do not have a certainty either.

#### **4. Authorities of the Dispute Council in Resolving Construction Disputes**

Alternative Dispute Resolution in Indonesia has been regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Article 1 point 10 explains that there are various ways of alternative dispute resolution; negotiation, mediation, conciliation, or expert judgment.

Negotiation in the Big Indonesian Dictionary is a process of bargaining by negotiating to reach a mutual agreement between one party and another party (Ministry of Education and Culture, 2017). Basically, negotiation is an attempt to find peace between the disputing parties in accordance with Article 6 paragraph (2) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

In contrast to negotiation, mediation process involves another person or a third party as a mediator. Mediator acts as a facilitator, and mediator's task is only to assist the disputing parties in solving problems and does not have the authority to make decisions. Basically, mediation is a way of resolving disputes by the parties by which the parties can determine or appoint a third party to act as an intermediary or mediator.

Conciliation is a process of resolving disputes out of court between disputing parties involving a neutral and impartial third party. The third party in conciliation is called conciliator. Conciliator's role is limited to carrying out actions such as arranging the time and place for the parties to the dispute to meet, directing the topic of conversation, and carrying messages from one party to the other. Then, the tasks of mediator, in addition to the same tasks that can be performed by conciliator, are suggesting solutions to dispute resolution, and conciliator does not have that authority (Rosita, 2017).

The definition of arbitration according to R. Subekti is a resolution or termination of dispute by a judge or judges based on an agreement that the

parties will submit to or obey the decision given by the judge they choose (Subekti, 1992). Juridically, the notion of arbitration is regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in Article 1 point 1, that arbitration is a method of resolving a civil dispute out of the general court based on an arbitration agreement made in writing by disputing parties. It can be concluded that the notion of arbitration is a way of resolving civil disputes out of the general court based on a written agreement that has been entered into by the parties to the dispute, both before and after the dispute. The party that resolves the dispute is called an arbitrator chosen by the parties (Muskibah, 2018).

Each non-litigation dispute resolution has different characteristics. Each method also has advantages and disadvantages. This can be adjusted by the parties by choosing a dispute resolution institution that is most effective in resolving disputes and profitable for the parties.

The role of the Dispute Council in Indonesia was used for the first time in a dispute between PT. Perusahaan Gas Negara (PGN) with the CRW Joint Operation, which is a tripartite collaboration involving PT. Citra Panji Manunggal, PT. Remaja Bangun Kencana Kontraktor, and PT. Winatek Widita. The project undertaken was the construction of an onshore gas transmission pipeline in 2006. Based on a contract made on February 28, 2006, PGN involved CRW as the party with the task of designing, purchasing, installing, testing and pre-commissioning a pipeline with a diameter of 36 inch and fiber optic

cable from Grissik to Pagardewa in Indonesia (Ean J, 2010).

Disputes began to occur when there was a request for payment by the CRW Joint Operation. Pursuant to sub-Clause 20.4 of the terms of the contract. The parties refer dispute resolution to the Dispute Council that has been appointed by the parties. The Dispute Council consists of three members; Prof. Sarwono Hardjomuljadi from Indonesia appointed by PT. PGN and Peter H. J. Chapman from America appointed by the contractor or the CRW Joint Operation. Furthermore, Prof. Sarwono and Peter appointed one person as a chairman, and Prof. Dr. Toshihiko Omoto from Japan was selected by them. The Dispute Council listened to the chronology of the dispute that occurred between the parties and made several decisions; all of which were accepted by PT. PGN, except for the decision handed down on November 25, 2008 which contained an order to PT. PGN to pay US\$17,298,834.57 to the CRW Joint Operation. PT. PGN thought that this amount is greater than the claims submitted by the CRW Joint Operation. Therefore, PT. PGN submitted a letter of dissatisfaction or the Notice of Dissatisfaction (NOD) (Ean J, 2010).

The PGN's resolution efforts were not reciprocated by the CRW Joint Operation. On February 13, 2009, the CRW Joint Operation submitted a request for arbitration to the International Chamber of Commerce (ICC) Court which, according to CRW Joint Operation, was in accordance with the terms of the contract. Based

on the decision of the arbitral tribunal from the ICC, even though PT. PGN had provided a statement of dissatisfaction, PT. PGN had to carry out its obligation to pay US\$17,298,834.57 to the CRW Joint Operation based on the decision of the Dispute Council. The arbitral tribunal considered two issues; first, whether the CRW Joint Operation was entitled to an immediate payment of US\$17,298,834.57, and second, whether PT. PGN had the right to ask the arbitral tribunal to open, review, and revise the decision of the Dispute Council (Ean J, 2010).

On November 24, 2009, the majority of the members of the arbitral tribunal issued a decision stating that the decision of the Dispute Council was binding on the parties, and PT. PGN was obliged to immediately make payments to the CRW Joint Operation in accordance with the contract. In the leading textbook written by Baker, Mellors, Chalmers and Lavers, entitled the FIDIC Contracts: Law and Practice. It is stated that (Ean J, 2010):

“Enforcement of Dispute Council Rulings

9.164 although the decision of the Dispute Council is binding on the parties and they are required to do so promptly until a party can refuse to enforce it. When the Dispute Council renders a decision, the following possible results may occur:

- (i) Neither party gives notice of dissatisfaction, so the decision is final and binding and both parties accept and implement it.
- (ii) Neither party gives notice of dissatisfaction, so the decision is final and binding until one of the parties or both refuses to carry out the decision.
- (iii) Either party or both gives notice of dissatisfaction and either party or both refuses to implement the decision.

9.165 In result (i), there is clearly no need for either party to enforce the award. However, in results (ii) and (iii), failure to comply with the award after it becomes binding may be enforced by reference to arbitration.”

This is also emphasized in the 2006 FIDIC General Conditions of Contract MDB Harmonized Edition book in sub-Clause 20.7; in the event that one party fails to comply with the final and binding decision of the Dispute Council, the other party obtains without prejudice to his rights, referring failure to arbitration.

The special feature of sub-Clause 20.6 is that, before the submission of a dispute to arbitration, the dispute must first be referred to the Dispute Council. In this case, the dispute that the CRW Joint Operation wishes to bring to arbitration court was to resolve the issue of whether the CRW Joint Operation was entitled to immediate payment by PT. PGN of the amount determined in the decision of the Dispute Council. This was not only a distinct dispute, but also a dispute that the CRW Joint Operation seeking arbitration had not been referred to the Dispute Council and fell out of the scope of sub-Clause 20.6 of the terms of the contract. Therefore, the arbitral tribunal and its award went beyond the scope of the arbitration agreement. The authority of the arbitral tribunal pursuant to sub-Clause 20.6 is that arbitrator shall have full authority to open, review, and revise certificates, rulings, instructions, opinions or expert judgments, and any decision of the Dispute Council relevant to the dispute (Ean J, 2010).

Based on this case, it can be seen that, in fact, the decision of the Dispute Council at the beginning had reached a meeting point. Even though a resolution had been carried out in arbitration, the resulting decision remained the same. PT. PGN was required to pay US\$17,298,834.57 to the CRW Joint Operation immediately. Therefore, it can be seen that by using resolution through the Dispute Council alone the dispute can be resolved. However, with the existence of a regulation that when one party does not accept or is dissatisfied with the decision of the Dispute Council, it can make efforts to resolve disputes by arbitration. Then, this mechanism is the same as the existing Alternative Dispute Resolution efforts.

The government's decision to include a construction dispute resolution forum using the Dispute Council in Law Number 2 of 2017 concerning Construction Services is inappropriate because of the similarity of the authorities and duties of the Dispute Council with the Alternative Dispute Resolution forum that has already existed beforehand.

The theory of legal effectiveness, according to Soerjono Soekanto, is whether a law is effective or not is determined by 5 (five) factors (Soekanto, 2008): 1. The legal factor (law). The measure of effectiveness in this case is that the existing regulations regarding certain areas of life are sufficiently systematic; the existing regulations concerning certain areas of life are sufficiently synchronous; there is no conflict, qualitatively and quantitatively; the regulations governing certain

areas of life are in place and sufficient; and the issuance of certain regulations is in accordance with existing juridical requirements; 2. Law enforcement factors; the parties that form and apply the law. The law enforcement apparatus in question are the police, prosecutors, judiciary and correctional institutions. Determining whether a legal performance is effective or not can be seen from the officials who are reliable in carrying out their duties properly. Reliability here includes professional skills and good mentality; 3. Facility factors or facilities that support law enforcement. Means and facilities are used as the tools to achieve legal effectiveness. These facilities must clearly be the part that contributes to the smooth running of the apparatus' tasks at their work location; 4. Community factors; the environment where the law applies or is applied. This can provide an understanding that community discipline and obedience depend on the motivation that appears internally; 5. Cultural factors; as a result of work, creation of taste based on human initiative in social life.

The use of the Dispute Council in the international world is very commonly used, especially in construction projects. In fact, the Dispute Council is considered to be an effective dispute resolution institution, both in preventing disputes and resolving disputes when disputes do occur between the parties. The Dispute Resolution Council Foundation (DRBF) is a non-profit organization dedicated to promoting dispute prevention and resolution worldwide using the Dispute Council. The DRBF published several

performance records of Dispute Councils in the world as follows (Setiowibowo, 2021): 1. There were 2,800 construction contracts in the world that used the services of the DRBF practitioners with 98% of the decisions of the Dispute Council approved by the parties and only 2% of the results of the Dispute Council proceeded to arbitration or court. The DRBF also carried out assignments in Indonesia in the contract for the Australian Embassy Building in Jakarta in 2013-2015, the Jakarta Integrated Capital City (MRT) contract in 2014-2020 and in the West Java Patimban I Port contract in 2018-2020; 2. There were 500 International Competitive Bidding (ICB) contracts in Honduras in 1980-1999 in which the Dispute Council was able to resolve more than 1,600 disputes and not more than 20 disputes went to arbitration; 3. There were 75 Florida Department Transportation contracts in 2003 in which there were 60 contracts without using the Dispute Council and 15 contracts using the Dispute Council. What happened was that the contracts using the Dispute Council's involvement extended less time for project work than the contracts that did not use the Dispute Council, 18% and 19.2% respectively. In addition, the contracts that use the Dispute Council incurred less additional costs than the contracts that did not use the Dispute Council by 12.1% and 17.9% respectively; 4. The study on the results of the Dispute Council on the Asian Development Bank (ADB) project in 2018, out of 237 recommendations for preventing disputes, only 22 developed into disputes, and 37 out of 512



decisions of the Dispute Council continued to arbitration; 5. In The Channel Tunnel Project in 1986-1992, there were 17 disputes resolved by the Dispute Council, and there were three disputes which proceeded to arbitration and courts; 6. At the Sidney Desalination Water Plant in 2007-2010, the recommendations issued by the Dispute Council was proven successful in preventing disputes.

The roles of the Dispute Council are to prevent and resolve disputes that arise after the parties agree to use the Dispute Council in the Construction Services engagement clause and to make a tripartite Dispute Council agreement. This has been explained in Article 94 paragraph (1) of the Government Regulation Number 22 of 2020 concerning Regulations for Implementing Law Number 2 of 2017 concerning Construction Services. The members of the Dispute Council in the case of PT. PGN and the CRW Joint Operation had been selected at the time of forming the contract at the beginning of the project, so the Dispute Council's preventive role in this case was that the Dispute Council could prevent disputes from occurring and could prevent the occurrence of possibilities that led to conflicts. The method used by the members of the Dispute Council was to hold a meeting with the parties to discuss the matter so that it did not become a major conflict. In this case, the Dispute Council had discussed the existence of the payment obligations made by PT. PGN to the CRW Joint Operation. However, PT. PGN did not pay heed to this, so a dispute ensued.

PT. PGN was considered to commit a breach of contract because it did not fulfill its obligations (Al-Tawil, 2014). Because a dispute had occurred, the Dispute Council tried to resolve it by issuing a decision which was a form of the role of the Dispute Council in a repressive manner. The result of the decision of the Dispute Council was that PGN was required to pay US\$17,298,834.57 to the CRW Joint Operation. This decision was based on an agreement or contract agreed upon by both parties. Nevertheless, PT. PGN was dissatisfied with the decision and issued a letter of dissatisfaction.

Then, the CRW Joint Operation, which did not receive it, brought this dispute to the arbitration body by asking whether the CRW Joint Operation had the right to the payment made by PT. PGN amounting to US\$17,298,834.57 in accordance with the decision of the Dispute Council or not. This is regulated in the FIDIC General Conditions of Contract MDB Harmonised Edition 2006 in sub-Clause 20.7, in the event that one party fails to comply with the final and binding decision of the Dispute Council, the other party obtains without prejudice to his rights, referring failure to arbitration. The arbitration council decided that PT. PGN was indeed obliged to pay a total of US\$17,298,834.57 to the CRW Joint Operation. When there is dissatisfaction by one of the parties, this decision must first be delegated to the arbitral body because the Dispute Council does not have the authority to execute the decision (Rachenjantono, 2008). After being

brought to the arbitral body the decision is brought to court to be executed.

This process seems to take a long time compared to when the parties directly resolve the dispute through arbitration. This means that the existence of the authority of the Dispute Council as a construction dispute resolution forum becomes ineffective when one of the parties does not want to implement the Dispute Council's decision. This situation becomes more effective and saves time when the resolution of construction disputes directly uses arbitration without going through the Dispute Council first.

#### D. CONCLUSION

The first time Indonesia used the services of the Dispute Council was in 2006 in the case of PT Perusahaan Gas Negara (PT. PGN) and the CRW Joint Operation which involved PT Citra Panji Manunggal, PT Remaja Bangun Kencana Kontraktor, and PT Winatek Widita. Their project was the construction of an onshore gas transmission pipeline. The dispute began to occur when there was a request from the CRW Joint Operation payment. The parties immediately brought it to the Dispute Council, and then the Dispute Council issued a decision in which one of the decisions was unacceptable to the PT. PGN. Furthermore, PT. PGN provided a statement of dissatisfaction and the CRW Joint Operation took the case to an arbitration in Singapore. The decision that was not approved by PT. PGN was that PT. PGN had to pay the CRW Joint Operation in the amount of US\$17,298,834.57.

After the CRW Joint Operation brought this case to the arbitration, the arbitral tribunal gave the same decision as the decision issued by the Dispute Council that PT. PGN still had to pay US\$17,298,834.57 to the CRW Joint Operation. The Dispute Council had carried out a preventive role to prevent disputes from occurring by holding meetings with both parties. However, PT. PGN did not pay attention to this, so the dispute still occurred. To resolve the dispute, the Dispute Council made a decision which showed its repressive role. Judging from this case, the decision of the Dispute Council which is not final and binding does not have a certainty because efforts can still be made to proceed to arbitration. Therefore, the authority of the Dispute Council is not effective because it is the same as other Alternative Dispute Resolution forums. This process also seems to take a long time compared to when the parties directly resolve disputes through arbitration.

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