

## The Settlement of Construction Disputes Through Dispute Councils From the Perspective of Legal Certainty In Indonesia

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**ABSTRACT:** This research differs from the practice of business activity in the construction services industry, which may lead to construction disputes. The settlement of construction disputes is a consensus based on the basic principle of debate. If the discussions between the parties do not reach an agreement, the parties may take measures to resolve the dispute through the dispute council. Because the standard governing the disputes committee was not fully regulated, they did not comply with the principle of legal certainty. Therefore, further research was needed to establish a theoretical basis for regulating the disputes committee in settling construction disputes. This research is a standard legal research using a legal regulatory, conceptual, and comparative approach. The research results show that the ideal concept of resolving construction disputes through a dispute council based on the value of legal certainty is to establish that the position of the dispute council is a special court that has the authority to resolve construction disputes under construction services agreements. To realize the position of the Court of Disputation as a special court, it must be based on the creation of philosophical values, the creation of legislative regulations, and the creation of the institutional structure of the Court of Disputation.

**KEYWORDS-** Construction Disputes, Dispute Council, Special Court

### I. INTRODUCTION

With a view to the establishment of the State of Indonesia in 1945, it is recognized that the establishment of the State of Indonesia aims to protect the entire Indonesian nation and the entire homeland of Indonesia by promoting the general welfare, educating the nation's life, and contributing to the implementation of world order based on independence, lasting peace, and social justice. The accomplishment of these state purposes is certainly the direction of government administration policies in the life of the nation and state in Indonesia.

The efforts to realize the state goals mentioned above, one of which is carried out by the Government in encouraging and determining development efforts that can accelerate the improvement of general welfare for the community, as well as being part of efforts to facilitate the thrust of increasing the intelligence of the nation's life in Indonesia. To realize the implementation of equitable and democratic development, the Government and DPR need to make arrangements in the form of laws for the implementation of development in Indonesia so that the implementation of development, whether carried out by the Government or the involvement of the private sector as part of efforts to improve the community's economy can be legally supported in the implementation and will be able to be integrated in a planned and comprehensive manner as part of national development efforts.

One of the laws that was formed to become a legal basis for implementing this national development is Law Number 2 of 2017 concerning construction services. The construction services sector is one of the strategic sectors that supports the achievement of national development. This strategic position can be seen from the relationship between the construction services sector and other sectors. Construction services are essential to forming construction products because they become an arena for meetings between service providers and users. The service provider area includes several significant factors that influence the development of the construction sector, such as business actors, employees, and supply chains, which determine the success of providing construction services that drive socio-economic growth. Hence, developing construction services becomes an essential and strategic public agenda when looking at rapid globalization and liberalization, poverty and inequality, democratization, regional autonomy, and damage and natural disasters. Moreover, the development of construction services also cannot be separated from the context of the ongoing political, cultural, economic, and bureaucratic transformation process(1).

In response to the essential function of the construction services sector that will ideally involve these construction actors, Law Number 2 Year 2017 on Construction Services should be able to ensure order and legal certainty for the implementation of construction services. However, in practice, it will not necessarily be fulfilled. This is because following construction activities involving many actors will be leaned on relatively broad construction service activities, including construction consulting and construction work services. It is certainly possible that construction disputes will occur between service providers and users of construction services during the implementation of construction services.

According to Priatna Abdurrasyid, construction disputes can also be caused by the following matters:(2)

1. *Unfair risk allocation*
2. *Unclear risk allocation*
3. *Unclear risk time/cost/quality by client*
4. *Uncontrollable external events*
5. *Adversarial-industry culture*
6. *Unrealistic tender pricing*
7. *Inappropriate contract type*
8. *Lack of competence of project participants*
9. *Lack of professionalism of project participants*
10. *Client's lack of information or decisiveness*
11. *Unrealistic information expectations by contractors*

In connection with this construction dispute, the resolution of this construction dispute can be done through litigation (court) and non-litigation processes (3). The alternative of resolving disputes through the courts, the procedures, and processes follow the provisions of the Civil Procedure Code (4). According to Article 88 of Law Number 2 Year 2017 on Construction Services, disputes that occur in construction contracts are resolved with the basic principle of deliberation to reach a consensus. If the parties' deliberations cannot reach an agreement, the parties take the stages of dispute resolution efforts stated in the Construction Work Contract, which include mediation, conciliation, and arbitration. If the Construction Works Contract does not include clauses relating to dispute resolution efforts, the parties shall take the following steps. When encountering a dispute, then the parties must make a written agreement concerning the dispute resolution procedure that will be chosen. The existence of the choice of construction dispute resolution efforts is based on the characteristics of the construction services themselves, where the dispute resolution process is carried out inappropriately. It will result in the freezing of construction project costs and the cessation of project work for a certain time, and it is even possible that the dispute will continue to develop into a criminal case (5).

Article 88, paragraph (5) and paragraph (6) of Law Number 2, the Year 2017 regulate that:

- (5) Besides the dispute resolution efforts as referred to in paragraph (4) point A and point b, the parties may form a dispute board;
- (6) In the case of dispute resolution efforts carried out by forming a dispute board, as referred to in paragraph (5), the selection of the membership of the dispute board shall be carried out based on the principle of professionalism and not be part of one of the parties.

The establishment of the Dispute Council, as envisioned by Law No. 2/2017 is the juridical basis for the establishment of the Dispute Council in settling construction services disputes in Indonesia. Even if the Dispute Council is only regulated in two-paragraph provisions, at least the legality of the Dispute Council has been recognized by Law. This kind of norming, certainly at the level of application of legal objectives, will not fulfill the ideal norming.

According to Johni Najwan, the purpose of Law is to maintain social regulation and order in society. Thus, the function of Law is emphasized more as an instrument of social control. However, in a more modern society, the purpose of the Law has been expanded as a tool for building social life (social engineering). Therefore, the Law should be built as an integral part of the culture, not as a social institution that is autonomous or separate from other aspects of culture, such as politics, economics, systems, religion, kinship, and social structure. This character has not been fulfilled by the norms that the Dispute Council has regulated.

The regulation of the characteristics of the Dispute Council stipulated in Law No. 2 Year 2017 has clearly shown that the Dispute Council is only one of the temporary organ options chosen by the disputing parties to resolve the construction disputes between the parties. This arrangement has emphasized that the Dispute Board is part of the construction dispute resolution efforts outside the court (non-litigation).

In the position as a temporary organ given the authority to resolve construction disputes outside the court (non-litigation), of course the question will be asked, whether Alternative Dispute Resolution outside the court through Mediation, Conciliation, and Arbitration as regulated under Article 88 paragraph (4) of Law Number 2 Year 2017 concerning Construction Services is not sufficient to be an option for resolving construction disputes outside the court (non-litigation). Hence, the Dispute Board emerged as an option for

dispute resolution efforts other than dispute resolution, as referred to in the provisions of Article 88 paragraph (4) of Law Number 2 Year 2017.

The arrangement certainly requires further study to examine the position of temporary organs and the characteristics of the options inherent in the Dispute Council as an effort to resolve construction disputes so that the norms governing the existence of the Dispute Council will be able to become norms that provide legal certainty in efforts to resolve construction dispute problems that occur in Indonesia. The regulation that is only regulated in two paragraphs contained in one article does not fulfill the principle of legal certainty in the regulation of construction dispute resolution conducted by the Dispute Board. The requirement for a clear and definite legal basis contained in the legislation is a necessary legal consequence to provide legal certainty to the dispute resolution carried out by the Dispute Board. Hence, a study to realize the legal certainty of construction dispute resolution conducted by the Dispute Board is needed to provide a theoretical basis for further preparation to concretize the regulation of the Dispute Board in the settlement of construction disputes that can guarantee the principle of legal certainty.

Based on the phenomenon explained earlier, the researchers formulated one research question, as follows:

*How is the ideal concept of construction dispute resolution through the Dispute Council based on the value of legal certainty?*

## II. METHODOLOGY

The research related to the resolution of construction disputes through the Dispute Council from the perspective of legal certainty in Indonesia is included in normative juridical research, by analyzing the ideal concept of construction dispute resolution through the Dispute Council based on legal certainty. The research approach used in this research is statutory, concept, and comparative.

The legal materials in this research consist of primary, secondary, and tertiary legal materials, all related to the resolution of construction disputes through the Dispute Council from the perspective of legal certainty in Indonesia. All legal materials are collected through a literature study. The legal material collected through the literature study is then arranged systematically to be discussed and analyzed qualitatively, not using statistical data, and presented in descriptive form. It aims to answer the problems discussed, and the results are presented as articles.

## III. DISCUSSION

Efforts to realize the fulfillment of the value of legal certainty and justice in the settlement of construction disputes conducted through the Dispute Council are carried out by reconstructing the position of the Dispute Council. this has been regulated in the current legislation, as follows:

1. Law No.2 of 2017 on the Construction Services;
2. The Government Regulation No. 22 of 2020 on the Implementation Regulations of Law No. 2 of 2017 on Construction Services which has been amended through Government Regulation No. 14 of 2021 on Amendments to Government Regulation No. 22 of 2020 on the Implementation Regulations of Law No. 2 of 2017 on Construction Services;
3. Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services;
4. The Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 11 of 2021 concerning Procedures and Technical Guidelines for the Construction Dispute Board.

These laws and regulations have positioned the position of the Dispute Board in the settlement of construction disputes as an alternative to out-of-court or non-litigation dispute resolution.

This position of the Dispute Board has resulted in the value of legal certainty in the settlement of construction disputes conducted by the Dispute Board tending to be unfulfilled. The Dispute Council has similarities with dispute resolution through the Mediation and Conciliation stages. The researchers then believe that the Dispute Council needs to be reconstructed institutionally to position the Dispute Council no longer as an alternative dispute resolution outside the court but as a Special Court that has the competence to adjudicate in the settlement of construction disputes. which it aims to provide legal certainty in dispute resolution through the Dispute Council.

The regulation of construction dispute resolution through the Dispute Council in Indonesia. Which it is not based on the value of legal certainty. The researchers believe that it will have several negative impacts, which include:

### 1) *The Uncertainty*

The legal certainty is an important principle in Law that provides confidence that the Law will be applied consistently and reliably. Laws and regulations governing the settlement of construction disputes through the Dispute Council are not regulated in specific laws and regulations. But they are part of the general material arrangements related to Construction Services. The content material that is

regulated when viewed in Law Number 2 Year 2017 concerning Construction Services only provides regulation and recognition that in addition to resolving construction disputes through Mediation and Conciliation, settlement through the Dispute Council can also be carried out. However, further arrangements for dispute resolution through the Dispute Board have been delegated to lower laws and regulations.

Currently, the regulation on the settlement of construction disputes through the Dispute Board is further regulated in the form of a Government Regulation, namely the Government Regulation No. 22 of 2020. But the regulation contained in the Government Regulation does not provide complete arrangements relating to the settlement of construction disputes through the Dispute Board. Especially when the existing legal norms are related to the settlement of construction disputes. The Dispute Board emphasizes the great authority of the appointed Dispute Board to prepare the implementation of the tasks inherent in the Dispute Board. The authority is then outlined in the Tripartite dispute settlement agreement, which is mutually agreed upon between the relevant parties along with the Dispute Board. This arrangement does not fulfill the value of legal certainty, indeed it will result in the decision or verdict issued by the Dispute Board when performing the task of resolving the construction dispute becoming unpredictable, resulting in the parties to the dispute being unsure of how the Law will be applied in resolving the dispute. Furthermore, the existing norms in the laws and regulations governing construction dispute resolution provides that if the parties object to the decision issued by the Dispute Board, the settlement will be carried out through the Arbitration stage. This arrangement will result in the settlement of construction disputes through the Dispute Board, causing uncertainty for the parties regarding resolving disputes.

2) *No Legal Certainty of Dispute Settlement Procedures*

Legal certainty certainly requires a clear regulation of the guidelines or procedural Law in resolving a dispute. The complete and clear absence of guidelines or procedural laws governing the resolution of construction disputes in the construction dispute legislation through the Dispute Board will certainly result in no norms that can be used to assess whether the Dispute Board in carrying out its duties. the Law also serves as a material study of whether the Dispute Board has resolved the construction dispute and has carried out its duties following the guidelines or procedural laws that have been regulated. Therefore, in the absence of such guidelines or procedural Law, the Dispute Council can act in accordance with the ability and subjective judgment of the Dispute Council. When this happens, the disputing parties will have no room to assess the dispute resolution implementation carried out by the Dispute Council. This condition will obviously result in the parties not knowing their rights and obligations concerning the dispute resolution process carried out by the Dispute Council.

3) *The Dispute Board's Decision Tends to be Based on Subjective Considerations*

Without a strong legal basis regarding the principles, stages, and requirements in the settlement of construction disputes through the Dispute Council regulated in this legislation. It certainly can result in decisions in the settlement of construction disputes being more likely to be based on subjective considerations, feelings, or preferences of the parties involved rather than objective laws and facts. Especially when the laws and regulations, in this case Law Number 2 Year 2017 and Government Regulation Number 22 Year 2020, do not provide regulations related to the requirements to be appointed as a member of the Dispute Board. then by itself it is very possible that there are cases regarding the appointment of someone to become a member of the Dispute Board who does not have the ability to resolve construction disputes in accordance with the principles of dispute resolution in general and knowledge in the existing construction sector. If this happens, the decision issued on the resolution of the construction dispute may be a subjective judgment within the limits of the Dispute Board's ability and knowledge.

4) *Tendency of Abuse*

Legal uncertainty regarding the regulation of construction disputes carried out through the Dispute Board will lead to a tendency for abuse in the process of carrying out the duties of the Dispute Board itself. Especially when viewed in the content material regulated in Law Number 2 of 2017 and Government Regulation Number 22 of 2020 and its amendments, namely Government Regulation Number 14 of 2021, there is no regulation related to the supervision of the implementation of the duties of the Dispute Board. This arrangement will tend to lead to abuse of the Dispute Council's duties in the process of implementing the Dispute Council's duties in dispute resolution. Especially when seen from the space of the Dispute Board to relate and communicate with the parties in the Construction Services agreement. In accordance with the implementation of its duties, it also takes action to prevent construction disputes. Then of course the intensity of the relationship and communication carried out by the Disputes Council is likely to be utilized by certain parties in the Construction Services agreement. In this case they will also try to take advantage of legal uncertainty for their own benefit.

5) *Distrust of the System*

If the construction dispute resolution process is not based on legal certainty, it will also have a negative impact on the parties' distrust in the legal system and the dispute resolution process carried out by the Dispute Board itself. Since construction dispute resolution through the Dispute Board in the current legislation is a dispute resolution option determined by the agreement of the parties. Therefore, this condition can reduce the interest of the parties in the Construction Services agreement in using the Dispute Board to resolve the construction disputes experienced.

In response to the previous explanation, it is necessary to regulate the settlement of construction disputes through the Dispute Council, which can be based on the value of legal certainty. This value must be positioned as a Special Court with the competence to adjudicate in settling construction disputes.

The term justice is often juxtaposed with the term court. Despite being derived from the same root word "fair", these two terms have different meanings. Based on R. Subekti and R. Tjitrosodibio, a court (rechtbank or court) is a institution that carries out justice, examining and deciding legal disputes and law violations / legislation. Meanwhile, the judiciary (rechtspraak or judicary) is everything related to the state's duty to uphold Law and justice (6). In line with this view, Sjahan Basah, believes that the use of the term court actually refers to the institution or forum that provides justice. Meanwhile, the justice refers to the process of providing justice in order to uphold the Law or "het rechtspreken"(7).

In the sociological perspective, the court institution is a multi-functional institution and is a place for "record keeping", "site of administrative processing", "ceremonial changes of status", "settlement negotiation", "mediations and arbitration" and "warfare". Satjipto Rahardjo said that the judiciary is actually a place to resolve legal issues so that they do not develop into conflicts that endanger public security and order. However, this function will only be effective if the court has 4 (four) prerequisites namely:

- a. The community's belief that in such a place they will receive the justice they need;
- b. Public belief that the court is an institution that expresses the values of honesty, incorruptibility and other core values;
- c. The cost and time they spent was not in vain;
- d. The court is the place where people can obtain legal protection.

Furthermore, according to RochmatSoemitro the elements that are needed in order to be said to be a court include: (8)

- a. The existence of an abstract rule of Law that binds the public;
- b. There is a concrete legal dispute;
- c. The existence of at least two parties;
- d. The availability of a judicial apparatus authorized to adjudicate disputes.

The elements described previously by Sjahan Basah are added to one element so that the judiciary does not only contain four elements but becomes five elements. It is adding the fifth element namely "the existence of formal law in the context of applying the law (rechtstoepassing) and finding the law (rechtsvinding)" "in concreto" to ensure that the material Law is obeyed"(7). The addition of this fifth element according to Sjahan Basah is based on ensuring the implementation of what is called the previous judicial elements (namely from a to d), so that formal Law is needed to apply the Law (rechtstoepassing) and find the Law (rechtsvinding) "in concreto" to ensure the adherence to material Law. In other words, the judiciary without material Law will be paralyzed. It will not know what it will do. Otherwise, the judiciary without formal Law will be wild (can act as it pleases). This is because there are no clear boundaries in exercising its authority.

Suppose the elements described previously are used as a theoretical basis for assessing what constitutes a Special Court. In that case, it can be stated that a Special Court can be categorized as such if it performs a judicial function, namely examining and deciding on legal disputes and violations of Law or legislation.

In Indonesia in 2004, a law on judicial power was issued, i.e. Law No. 4 of 2004, which in its nature replaced Law No. 14 of 1970 as amended by Law No. 35 of 1999. The Judicial Environment under the new Law No. 4 of 2004 is the same as that under the old Judicial Power Law. In the context of special courts, the term special court only appears in Law Number 4 Year 2004, namely in Article 15 paragraph (1) which states that, "..... Special courts can only be established in one of the judicial environments.....".

The establishment of the special court itself is outlined in the Explanation of Article 15 Paragraph (1) stated, "what is meant by special courts in this provision, among others, are Juvenile Courts, Commercial Courts, Human Rights Courts, Corruption Courts, Industrial Relations Courts within the general judicial system, and Tax Courts within the Administrative Court". Meanwhile, Article 15 paragraph (2) of Law No. 4 Year 2004, makes an exception for Islamic sharia courts in NAD Province, particularly because Islamic sharia courts are located in two judicial spheres, namely in the general judiciary and religious judiciary. Article 15(2) of Law No. 4 of 2004 clearly states if:

“The Islamic court in Nangroe Aceh Darussalam Province is a special court within the religious judiciary insofar as its authority concerns the authority of the religious judiciary. It is also a special court within the general judiciary insofar as its authority concerns the authority of the general judiciary.”

Starting from the nature and reasons for the establishment of the Special Courts stated before, the jurisdiction of each of these bodies is in line with its specificity. However, with the exception of the Tax Court, the procedural Law used is the general procedural Law unless otherwise stipulated by the respective laws governing it. This is for example regulated in the Commercial Court under Article 299 of Law No. 37 of 2004; the Industrial Relations Court under Article 57 of Law No. 2 of 2004; the Fisheries Court under Article 62 of Law No. 30 of 2002 on the Corruption Eradication Commission and Article 26 of Law No. 31 of 1999 on Corruption Eradication; the Human Rights Court under Article 10 of Law No. 26 of 2000; and the Juvenile Court under Article 40 of Law No. 3 of 1997. Islamic Sharia Court of Nangroe Aceh Darussalam Province as stipulated in Article 58 of Qanun No. 10/2002.

Furthermore, the enactment of Law No. 48 of 2009 on Judicial Power, which was promulgated on October 29, 2009, has revoked the validity of Law No. 4 of 2004 on Judicial Power, so that legally based on the provisions of Article 62 of Law No. 48 of 2009. It is stated that "When this Law comes into force, Law No. 4 of 2004 on Judicial Power (State Gazette of the Republic of Indonesia of 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358) is revoked and declared invalid".

The General Elucidation section of Law No. 48/2009 elaborates that:

"In essence, Law No. 4/2004 on Judicial Power is in accordance with the above amendments to the 1945 Constitution of the Republic of Indonesia, however, the substance of the Law does not comprehensively regulate the exercise of judicial power. It is an independent power exercised by a Supreme Court and the judicial bodies under it in the general judicial system, religious judicial system, military judicial system, state administrative judicial system, and by a Constitutional Court, to administer justice in order to uphold Law and justice."

In adhering to the comprehensive regulation, this Law also fulfill the decision of the Constitutional Court No. 005/PUU/2006, which annulled Article 34 of Law No. 4/2004 on Judicial Power. One of its rulings has invalidated Article 34 of Law No. 4/2004 on Judicial Power. The Constitutional Court decision has also invalidated provisions related to the supervision of judges in Law Number 22/2004 on the Judicial Commission. In line with this regard, to strengthen the administration of judicial power and realize an integrated justice system, Law No. 4/2004 on Judicial Power as the basis for the administration of judicial power needs to be replaced.”

By relying on the purpose described above, the regulation of special courts contained in Law No. 48 of 2009 does not change significantly from what has been regulated in Law No. 4 of 2004. In such a position, the legal principles of regulating special courts through Law No. 48 of 2009 are still similar to what was previously regulated through Law No. 4 of 2004. However, the changes contained in Law No. 48 of 2009 still occur in relation to these special courts, namely only in relation to the placement of article numbers and the affirmation of the definition of Special Courts. Which it was previously not expressly regulated in Law No. 4 of 2004 to then be given explicit regulation in Law No. 48 of 2009.

Regulations relating to special courts are stipulated in Law No. 48 of 2009, which includes:

- 1) Article 1 point 8, which provides that: Special Courts are courts that have the authority to examine, hear and decide on certain cases that can only be established in one of the judicial bodies under the Supreme Court as regulated by Law.
- 2) Article 25(1) provides for the regulation of:
  - (1) Judicial bodies under the Supreme Court
  - (2) include judicial bodies within the general courts, religious courts, military courts, and state administrative courts.
  - (3) As referred to in paragraph (1), the public courts are authorized to examine, hear, and decide criminal and civil cases per the provisions of laws and regulations.
  - (4) Religious courts as referred to in paragraph (1)
  - (5) Religious courts as referred to in paragraph (1), are authorized to examine, hear, decide, and settle cases between people who are Muslims in accordance with the provisions of laws and regulations.
  - (6) As referred to in paragraph (1), the military court is authorized to examine, try, and decide cases of military crimes per the provisions of laws and regulations.
  - (7) As referred to in paragraph (1), the state administrative court is authorized to examine, hear, decide, and resolve state administrative disputes per the provisions of laws and regulations.
- 3) Article 27 provides arrangements for:
  - (1) Special courts can only be established in one of the judicial circles under the Supreme Court as referred to in Article 25.

(2) The provisions concerning the establishment of special courts as referred to in paragraph (1) shall be regulated by Law.

4) Explanation of Article 27 paragraph (1) states:

What is referred to as "special courts" include juvenile courts, commercial courts, human rights courts, corruption courts, industrial relations courts, fisheries courts within the general judicial system, and tax courts within the state administrative judicial system.

Referring to the provisions of the aforementioned articles, it is clear that the regulation of special courts in Law No. 48 of 2009 does not have any significant changes from what has been regulated in Law No. 4 of 2004.

Furthermore, concerning the legal construction of the Dispute Board as a Special Court in the settlement of construction disputes in line with the value framework of legal certainty and justice. However, the researchers believe that it should be based on the following principles:

### 1. The Construction of Philosophical Value

In the philosophical sense, the judiciary is closely related to the implementation of its function in providing justice as a form of law formation and law enforcement process. In this context, the court must be able to form laws and enforce laws that guarantee legal certainty to realize justice in dispute resolution. It also must provide guarantees for the fulfillment of justice for the parties involved in the dispute.

Based on the aforementioned philosophical values, the idea of positioning the Dispute Board as a Special Court that is given the competence to adjudicate in relation to construction dispute resolution must be able to guarantee that the dispute resolution carried out by the Dispute Board must guarantee the fulfillment of fair legal certainty for the parties to the dispute.

In achieving the fulfillment of the value of fair legal certainty in the settlement of construction disputes, the establishment of a Special Court is the basic idea. The construction dispute clearly has the characteristics of a dispute that cannot necessarily be understood and understood by judges who are general in nature or who only have general knowledge and focus on legal knowledge. The construction characteristics that require separate knowledge and scientific fields are part of the demand for the settlement of construction disputes through court channels to be resolved through a Special Court. Which it is then attached to certain specificities so that with this specificity, it will be able to realize the fulfillment of the value of legal certainty with justice.

The establishment of Special Courts, including Tax Courts, Water Courts, Commercial Courts, Juvenile Courts, Human Rights Courts, Corruption Courts, and Shariyah Courts clearly shows the specialization inherent in these Special Courts. Therefore, with this specialization, efforts to fulfill equitable legal certainty will be fulfilled.

### 2. The Construction of Laws and Regulations

In the Constitution of 1945, Article 24 of the Third Amendment to the Constitution of 1945, it is recognized that no provision explicitly states the Special Court constitutionally. Hence, the provisions of Article 24 paragraph (1) state that "Judicial power is an independent power to administer justice to uphold law and justice". This provision does not imply the existence of a Special Court. Likewise, when looking at the provisions of paragraph (2) of Article 24 of the Third Amendment to the 1945 Constitution, it was stated that "Judicial power shall be exercised by a Supreme Court and different judicial bodies under it in the general judicial sphere, religious judicial sphere, military judicial sphere, state administrative judicial sphere, and by a Constitutional Court". This provision also does not provide for the Special Court. However, if viewed in the provisions of Article 24 paragraph (3) of the Third Amendment to the 1945 Constitution, it is declared that "**Other institutions** whose functions are related to the judicial power are regulated by law". In response to this case, then a question arises concerning "Can the use of the term "other bodies" be stated as leading to what is meant by a Special Court?" In answering this question, the researchers consider that by starting from the definition of judiciary and court as stated earlier, it is known that Article 24 of the Third Amendment to the 1945 Constitution, regulates the court or institution that conducts the judiciary, namely:

- a. The Supreme Court;
- b. The Constitutional Court;
- c. The different judicial bodies thereunder;
- d. Other institutions.

The provision mentioned above clearly does not mention "Special Courts". Point 3, where it is known that the different judicial bodies under the Supreme Court are within the general judicial sphere, religious judicial sphere, military judicial sphere, and state administrative judicial sphere. The question that arises is whether when institutions or courts of a general nature carry out the general judiciary. Therefore, can the institutions that organize the judiciary in the religious, military, and state administrative spheres be categorized as a form of "Special Court"? Isn't the word "general" terminologically often juxtaposed with "special", so that when the religious judicial environment, the state administrative judicial environment, and the military judicial environment will specifically adjudicate issues related to the competence of their

respective authorities. Can it therefore be said that the Special Court is constitutionally possible to be carried out only in the three judicial environments, i.e. the religious, military, and state administrative judicial environments? How about "other bodies" as contained in the provisions of Article 24 paragraph (3) of the Third Amendment to the 1945 Constitution, does it also refer to the Special Court? In response to the above question, the researchers are concerned that the Special Court does not have a constitutionally sound basis. If examined literally, it can clearly be said that no provisions in the 1945 Constitution regulate the Special Court. However, when analyzing the Special Court in terms of interpretation of the use of the term general court along with several other judicial circles, the term Special Court is possible. Nevertheless, the limitation must be on the three judicial spheres other than the general judiciary: the religious, military and state administrative courts. It means that its applicability is between these three environments. Therefore, if there is a Special Court outside the three judicial spheres mentioned above, this is clearly contradictory or unconstitutional in the author's view.

When the Third Amendment of the 1945 Constitution was passed, the provisions of Article 24, paragraph (2), did not explicitly regulate the forms of courts. However, it only provided regulations on the types of judicial circles. Thus the legislators were free through the provisions of Article 24A paragraph (5) of the Third Amendment of the 1945 Constitution to carry out the types and forms of the judicial bodies. Therefore, the Special Court is possible as long as the judicial bodies established by the legislators are in the religious, military and state administrative courts. However, if the Special Court is established outside the religious, military, and state administrative courts, then the Special Court can be declared unconstitutional.

However, what if a Special Court exists within the general judicial system? Is it possible for this to happen? The researchers considered that if seen in terms of the terminology of the use of the term, it will clearly be contradictory. Since the general judicial environment has a general scope of authority, it is not a special one. Therefore, the researchers viewed that the institution conducts trials in the general judicial environment should be a court that is not special, but it is possible to hear cases or disputes that are general. However, what does the general judicial environment mean?

In response to the issue mentioned earlier, the 1945 Constitution does not explicitly regulate this matter. Nevertheless, following the provisions of Article 24A paragraph (5) of the Third Amendment to the 1945 Constitution which authorizes the legislature to regulate or determine it further, the limitations of the regulation of the public courts can be seen in the laws that regulate this matter. Based on Law No. 2 of 1986 in conjunction with Law No. 8 of 2004 on the Amendment to Law No. 2 of 1986 on General Courts, it is known that according to Article 2, the General Court is one of the executors of judicial power for the people seeking justice in general. The general public are Indonesian citizens or non-Indonesian citizens who seek justice in the courts in Indonesia.

This understanding is very simple, however, following the legal form that contains the general court, which is contained in the Law, it can be interpreted that juridically the definition of the general court is as intended from the provisions of Article 2 of the Law on General Courts. According to this definition, the general meaning shows that this court has the substance of its scope of authority to provide justice for the people in general. The legal consequence, based on the author's view, is that in the character of this general judicial understanding, there can't be special matters. Hence the existence of special courts within the general judicial environment, in the author's view, is not possible because it is contrary to the juridical understanding of the General Judiciary itself.

Furthermore, the operation of judicial power in the general judicial environment is carried out by the District Court as the court of first instance, the High Court as the court of appeal, and the Supreme Court as the highest state court. The District Court based on the provisions of Article 50 of Law Number 2 of 1986 in this case is tasked and authorized to examine hear, decide and resolve criminal cases and civil cases at the first level. By this arrangement, it is clear that the types of cases included in this general judicial environment. However, according to the elucidation of Article 8 of Law No. 2 of 1986, specialization courts can also be established within the general judicial environment, such as road traffic courts, children's courts, and economic courts.

Based on this arrangement, a statement can be drawn that the general judicial environment is not general, but it is also possible to specialize. The question that arises about this arrangement is whether the possibility of specialization is in line with the meaning of the definition of public courts as previously described by the author. In the author's view, does the opportunity for specialization arrangements here not have a special meaning that applies separately? However, the possibility of such specialization only applies or is possible within the scope of the general judiciary itself, meaning that if the question arises, what kind of specialization is possible within the general judiciary? In the view of the author, the meaning of the specialization must remain within the scope of criminal and civil cases.

If the court is outside the scope of criminal and civil cases, it is clear that this will contradict the character of the notion of public justice itself. Based on the aforementioned, it can be stated that the general judiciary



here actually does not only mean that etymologically it must be general. However, the general use here is also possible for specialization, as long as the specialization remains in the general judicial environment. Is it constitutionally possible to provide such an arrangement as stipulated under Law Number 2 of 1986 in conjunction with Law Number 8 of 2004? In the perspective of the researchers, as long as it is regulated by Law, and the regulation does not contradict the express provisions of the 1945 Constitution, then it is possible to do so.

Furthermore, what about the "other institutions", as stipulated in paragraph 3 of Article 24 of the Third Amendment to the 1945 Constitution? In contrast to this provision, the researchers believe that the other agencies mentioned in the report are not referring to the Special Court. If the first paragraph of paragraph 2 of article 24 of the Third Amendment to the 1945 Constitution uses the term "jurisdiction" as previously described, it is clear whether the institution is a judicial institution, and the addition of the term "jurisdiction" is, in the author's view, a sign of identity in the interpretation of the term "organ" in article 24 of paragraph 3 of the Third Amendment to the 1945 Constitution. Additionally, the researcher believe that other institution, as provided for in paragraph 3 of article 24 of Article 3 of the Third Amendment of the 1945 Constitution do not refer to the concept of judicial institutions, but to only those whose functions are related to judicial authority. The use of the term "related" here also means that the function of judicial powers is not the function of "other bodies", but the function of judicial powers is related to the function of these "other bodies". Denny Indrayana, in his writings, gave an example of other institutions that have judicial powers, namely the Commission for the Elimination of Corruption, an independent commission with judicial powers(9). Additionally, the Commission for the Elimination of Corruption, the National Police of Indonesia, the Office of the Attorney General of Indonesia and the Judicial Commission are other bodies that relate to the administrative and judicial powers of the Republic of Indonesia, namely in the field of the application of the Law and the Law based on Pancasila for the implementation of the rule of Law.

In response to the previous explanation, the Special Court has no constitutional basis, as the 1945 Constitution explicitly states. However, suppose the provisions of Article 24A paragraph 2 of the Third Amendment of the 1945 Constitution and Article 24A paragraph 5 of the 1945 Constitution are interpreted. In that case, the Special Court may be established under certain requirements, as the author has already pointed out. These specific requirements must be met in its entirety to establish a special court, which means that if they are not met in its entirety, the establishment or existence of a special court can be declared constitutionally unconstitutional.

In response to the previous explanation, it is known that under the Third Amendment to the Constitution of 1945, Special Courts can be established in four judicial circles under the jurisdiction of the Supreme Court, following Article 24 (2) and Article 24A(5). Based on the above requirements must be met in the reconstruction of the laws and regulations governing the Disputes Committee in the settlement of construction disputes and, following that, a separate law will be enacted specifically regulating the construction courts and the construction disputes committee. The name of the Special Court for this Court must be given to add a word construction to show the existing specificity. However, the use of the word construction is obligatory as a special court's specificity, no matter whether the name is Construction Court or Construction Court.

### 3. *The Construction of Institutional Structure*

In relation to the construction of the institutional structure of the Special Court, namely in this case the Construction Court or Construction Dispute Board, the Special Court must structurally be located in one of the judicial circles, namely the general court, religious court, military court, or state administrative court, and is under the Supreme Court. The establishment of Specialized Courts with this structure is not contrary to the 1945 Constitution.

Based on the above description, the question arises is why the Special Court, namely the Construction Court or the Construction Dispute Board, should be under the Supreme Court? For this question, the researchers think that two reasons can be used as a theoretical basis for the justification of the argument, as follows:

- a. Juridically, based on the arrangements contained in the 1945 Constitution, it is known that the Supreme Court is the sole holder of judicial power, which oversees four judicial circles. It is known that in addition to the Supreme Court, the Constitutional Court is also known as the holder of judicial power in Indonesia. However, unlike the Supreme Court, the Constitutional Court, according to the 1945 Constitution, does not oversee several judicial bodies that exercise judicial power. In such a position, it can be identified that if the Supreme Court has several judicial bodies that are under the subordination of the Supreme Court, this is not the case with the Constitutional Court. In exercising the judicial power, the Constitutional Court works as a single institution without any subordination relationship at the lower level. Therefore, discussing the position of the scope of the special court, in this case the Construction Court or Construction Dispute Board, then following the juridical arrangements above, it

can be identified that the Construction Court or Construction Dispute Board may be under the Supreme Court.

- b. Structurally, as explained by the researcher previously, the establishment of Special Courts is possible as long as they are located within the general, military, religious or state administrative courts. The four judicial circles are expressly through the provisions of Article 24 paragraph (2) of the Third Amendment to the 1945 Constitution, which is under the Supreme Court. Based on this arrangement, the Construction Court or Construction Dispute Board must automatically be under the Supreme Court. However, it should be recognized that the structure under the Supreme Court does not mean that the special court is a different judicial environment or equal to the four existing judicial environments. In other words, the special court is structurally a direct subordinate of the Supreme Court. Instead, the meaning under the Supreme Court only indicates that the special court must be under the judicial power that culminates in the Supreme Court. Therefore, the structural hierarchy follows the position or location of the special court, whether it is in the general, religious, military or state administrative courts. According to the author's opinion, the Construction Court or Construction Dispute Board will be located in the general court environment, which is related to the resolution of construction disputes, namely disputes born or arising from conflicts between the parties bound by the Construction Services agreement.

In this structural position under the general judicial environment, the supervision and guidance carried out by the Construction Court or Construction Dispute Board in the implementation of the duties and judicial functions will hierarchically follow the general judicial environment.

The structural construction inherent in the Commission of Disputes in the function of adjudication of construction disputes, as mentioned above, is certainly within the scope of realizing the value of the legal certainty in the function of adjudication. This legal certainty will be fulfilled by a clear institutional structure and arrangements regulated by the Construction Court or the Construction Disputes Commission. The justice function of this judicial function will be fulfilled through the regulation of procedural Law and other legal remedies that are regulated as a form of fulfilling the rights of the parties to the dispute in obtaining justice for construction disputes they experience. Even if a hierarchy of court functions is conducted at the first, appeal and cassation levels in the mechanisms of ordinary legal remedies. However, due to the characteristics of the Special Court, of course, a specific type of legal solution can minimize the weaknesses of dispute resolution through litigation or through existing courts.

#### IV. CONCLUSION

According to the discussion that has been carried out to answer the problem of this study, the following conclusions are drawn as follows:

An ideal concept of construction dispute resolution through the Dispute Council based on the value of legal certainty is done by positioning the Construction Dispute Council as a Special Court that is given the competence to adjudicate construction disputes that occur in construction service agreements. To realize the position of the Construction Dispute Board as a Special Court, it should be based on the construction of philosophical values, the construction of laws and regulations, and the construction of the institutional structure of the Dispute Board.

Based on the explanation of the conclusions that have been explained previously, there are several recommendations formulated by the researchers, *firstly*; reconstructing the laws and regulations governing the settlement of construction disputes through the Dispute Board; *secondly*, it is necessary to establish a Law on the Construction Court or Construction Dispute Board which has the position of a Special Court; *thirdly*, it is necessary to construct the institution of the Construction Court or Construction Dispute Board as a Special Court which is in the general judicial environment and is under the authority of the Supreme Court.

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