

CHAPTER ONE

INTRODUCTION

A. Background

Indonesia has made significant progress in recent years in terms of infrastructure development. The construction services sector makes a substantial and vital contribution to the Indonesia's economic growth.¹ In the case of the Covid-19 pandemic in the second quarter of 2020, BPS No.64 / 08 / Th. From the first quarter of 2018, XXIII had a negative trend of 5.06 on August 5, 2020. The second quarter of 2018 was the high point (5.27). Unfortunately, it suffered a significant fall in the second quarter of 2020, with negative results (-5.32).² Meanwhile, compared to the industry, trade, and agriculture, the construction's GDP is the fourth highest.

Water Resources (SDA), roads and bridges, and housing to settlements are just a few national strategic projects with a budget of 75.6 trillion rupiahs.³ Implementing high-value projects is consistent with contractors competing against one another and cooperating to complete the project. Several disputes such as finance, time, work scope, and other combined disputes, including

¹ Makmuri A, "Infrastructure and inequality: An empirical evidence from Indonesia", *Economic Journal of Emerging Markets*, Vol. 9, No. 9 (2017), P. 29–39.

²BPS, 2020, *Berita Resmi Statistik*, retrieved from: <https://www.bps.go.id/press-release/2020/08/05/272/berita-resmi-statistik.html>, accessed on (November 11, 4:15 P.M).

³ Prasetyo, B. A., Priyarsono, D. S., & Mulatsih, S, "Infrastructure, economic growth and inequality in Indonesia Land Borders", *Economic Journal of Emerging Markets*, Vol. 5, No. 2 (2013), P. 99–108.

changes in costs, time, the scope of works, and administrative challenges, are typical problems in the construction contracting process.⁴

Contract is an important element in making an agreement, based on article 1313 of the Civil Code, a contract is an act where one or more people bind themselves to one or more people.⁵ In order for an agreement to be valid according to law, it must fulfill the conditions for the validity of an agreement as stipulated in Article 1320 of the Civil Code, including: the existence of an agreement between the two parties, the ability to enter into an engagement, a certain subject matter, and lawful reasons.⁶ On the other hand, according to civil law theory, there are several legal principles of engagement which are reflected in the articles in the Civil Code, one of which is the principle of freedom of contract. The principle of freedom of contract in this case is that all parties are free to enter into an engagement relationship with any party they wish. The freedom in question is the freedom to determine the terms, implementation and form of the contract. The principle of freedom of contract is concluded from the provisions of Article 1338 paragraph (1) of the Civil Code that all contractual agreements made legally apply as law for those who make them.⁷ In various sectors the agreement must be prioritized, one example is in the construction sector which is very prone to disputes.

⁴ E. Cakmak, P.I. Cakmak, "an analysis of causes of disputes in the construction industry using analytical network process", *Procedia Soc. Behav. Sci.*, Vol. 109, No. 5 (2014), 183–187.

⁵ Article 1313 of the Civil Code concerning the definition of a contract

⁶ Article 1320 of the Civil Code concerning the conditions for a valid agreement

⁷ Article 1338 paragraph (1) of the Civil Code concerning the principle of freedom of contract

Construction disputes can emerge from various factors, including differences in rules and contract documents, such as lumpsum contract provisions, price adjustments, fines, and time extensions. There is also land, work scope, field conditions, materials or equipment, workers, and plans or technical specifications to consider.⁸

Therefore, the Government has made efforts through the Ministry of Public Works and Public Housing by issuing PUPR Ministerial Regulation Number 14 of 2020 and its explanation as a revision of applicable laws and regulations starting from Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Law Number 2 of 2017 concerning Construction Services, Presidential Decree Number 12 of 2021 concerning Government Procurement of Goods / Services, and the latest Government Regulations Number 14 of 2021 concerning Implementation Regulation of Law Number 2 of 2017 concerning Construction Services.

However, it does not imply that those government's policies have solved Indonesia's construction project issues. The applicable national standards do not use in all construction projects. Many infrastructure projects, especially those financed with loan funding, always follow international standards in their implementation (foreign grant).⁹

⁸ Wicaksono, R. G., Gawei, A. P., & Puspasari, V. H., "Identifikasi Faktor-Faktor Yang Berpotensi Menjadi Penyebab Timbulnya Sengketa Pada Proyek Konstruksi di Kota Palangka Raya", *Jurnal Teknik*, Vol. 2, No. 2 (2019), P. 168-176.

⁹ S.H. Choi, Y.S. Kim, "Priority analysis of dispute factors in overseas construction based on FIDIC contract conditions", *KSCE J. Civ. Eng.*, Vol. 20, No. 6 (2016), P. 1-10.

The International Federation of Engineers and Consultants (FIDIC) was created in 1913 by France, Belgium, and Switzerland in Lausanne, Switzerland.¹⁰ Because its scope follows the construction project's objectives and ensures equal rights and obligations for contractor and employer, the FIDIC standard is comprehensive and adequate. That is why the term "fair and balanced" is associated with the FIDIC characteristics. The FIDIC contract is a globally recognized standard contract.¹¹ Various lender institutions, including the World Bank, Japan Bank for International Cooperation (JBIC), Asian Development Bank (Asian Development Bank), ASEAN Development Bank (ADB), Islamic Development Bank (IsDB), and others, demand this standard contract. FIDIC contracts come in a variety of forms. The FIDIC Condition of Contract for Construction, FIDIC Condition of Contract for Engineering Procurement, Constructions (EPC) / turnkey project, FIDIC Condition Contract for Plant and Design-Build, and FIDIC Short Form of Contract is the most often utilized FIDIC contracts in Indonesia. The FIDIC Condition of Contract for Construction will be employed in this study, which is relevant to the construction of buildings.¹²

Furthermore, according to FIDIC, the most capable party is in charge of the risk obligations.¹³ In addition, the contract contains additional information

¹⁰Wilter, 2020, *International Federation of Consulting Engineer*, Retrieved from <https://wilter.co.id/international-federation-of-consulting-engineers/>, accessed on (April 28, 02.15 P.M).

¹¹ Hardjomuljadi. S, "Pemahaman Kontrak Konstruksi Internasional Terhadap Tantangan Era Globalisasi", *Jurnal Konstruksia*, Vol. 2, No. 1 (2010), P. 1-7

¹² Charret D, et al, 2017, *Conditions of Contract for Construction*, Geneva, FIDIC

¹³ Rompas, L. M., 2008, "Kajian Tentang Penerapan Kontrak FIDIC Pada Perusahaan PT.Adhi Karya (Persero) Tbk", (Thesis, Program Pasca Sarjana Teknik Sipil Universitas Indonesia)

about the contractor and the employer's general responsibilities. Contractors who are required to work following the conditions of the agreement are responsible for the results of their construction work. Work has also been set up for the employer to represent the employer as quality control in planning and handing overwork. These conditions are also spelled out in the agreement between owner and contractor.¹⁴

One of the fascinating aspects of FIDIC is that there are cases that must be addressed in the event of a dispute between the two parties (contractor and employer) based on acceptable international standards (in this case, FIDIC). On the other hand, contractors and employers must adhere to Indonesian national requirements. Not only that, it is increasingly difficult when the government also carries out the audit process of planning, implementation, supervision, and finance through existing institutions. Given two double standards in the implementation process, one of these discrepancies requires immediate correction.¹⁵

Hence, this research focuses on critical concerns in dispute resolution involving employer and contractor. FIDIC should be investigated further in order to uncover dispute resolution mechanisms that refer to national standards. To make construction dispute resolution procedures easier, comparisons between national and international norms are offered. The common thread of the standard construction contract dispute resolution is one of the solutions offered

¹⁴ Hardjomuljadi Sarwono, 2014, *Buku Kesatu-Pengantar Kontrak Konstruksi; FIDIC Condition of Contract*, Bandung, Logoz Publishing.

¹⁵ Hardjomuljadi, Sarwono, 2016, *Buku Ketiga Alternatif Penyelesaian Sengketa Konstruksi di Indonesia; FIDIC Condition of Contract*, Bandung, Logoz Publishing.

and a legal framework for employer and contractor if the steps taken for dispute resolution are deadlocked.

The findings of this study discuss the resolution of construction disputes based on FIDIC contract standards in general and arbitration through the Indonesian National Arbitration Board (BANI) refers to the applicable procedural law, particularly laws and regulations related to construction in Indonesia.¹⁶ Meanwhile, the United Nations International Trade Law Commission (UNCITRAL) exists on a global scale. UNCITRAL is a United Nations commission that promotes international trade and commercial law.¹⁷ Because it uses ad hoc arbitration, UNCITRAL has procedural law or dispute resolution procedures even though it is not an arbitration institution. The parties can choose those three arbitrators in the ad hoc arbitration method if they agree as each of the Ad hoc has its own set of qualities. When a dispute is settled down, the three arbitrators are dissolved.¹⁸

B. Research Problems

1. How to resolve construction project disputes through *Federation Internationale Des Ingenieurs Conseils* (FIDIC)?
2. What are the stages of the dispute mechanism through arbitration in FIDIC?

¹⁶ Fitriyanti F, "The National and Sharia Arbitrations: A comparative study", *Media Hukum*, Vol. 20, No.1 (2013), P. 171-181.

¹⁷ Arbitration rule of UNCITRAL (United Nation Commission on International Trade Law).

¹⁸ Patricia D. Galloway, "Engineer's Study Notes For Understanding The Arbitration Process", *Journal of Legal Affairs and Dispute Resolution in Engineering And Construction*, Vol. 3, No. 2 (2011), P. 71-78.

C. Objective of Research

1. To analyze the completion of construction project based on *Federation Internationale Des Ingenieurs Conseils* (FIDIC);
2. To identify the stages of the dispute mechanism through arbitration at FIDIC.

D. Benefit of Research

This research is expected to provide benefits for theoretical and practical aspects including:

1. Theoretical Aspects
 - a. Expanding the treasury of knowledge in the field of construction dispute resolution in Indonesia;
 - b. Contributing thoughts, enriching concepts, and theories to science in the field of construction contracts.
2. Practical Aspects
 - a. As a benchmarking in construction dispute settlement analysis with FIDIC international standards;
 - b. As a consideration in making construction contract dispute decisions based on international contracts (FIDIC).