



Legal Protection of the Parties in Construction Agreements

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Abstract

Construction agreements in Indonesia are an important legal instrument that often faces challenges due to the complexity of regulations and the potential imbalance of power between parties. This study aims to analyze the legal framework governing construction agreements in Indonesia and identify the importance of dispute resolution in the context of construction projects. This research uses a literature study to analyze the legal framework governing construction agreements, including the Civil Code, Law Number 2 of 2017 on Construction Services and Government Regulation Number 17 of 2013. This analysis reveals the importance of dispute resolution, especially through arbitration, as an effective mechanism to address conflicts in construction projects. The role of legal consultants with expertise in construction law is also crucial in guiding stakeholders in drafting agreements that protect the interests of each party and minimize legal risks. This study emphasizes the need for careful attention to legal protection in construction agreements to ensure fairness and the success of the project.

Keywords: Construction Agreements; Legal Protection; Construction Law

A. Introduction

Humans, being inherently social beings, engage in interactions that lead to the formation of agreements, whether in commerce or non-economic endeavors such as socio-religious projects. These agreements involve parties, which can be individuals, companies, organizations, or other entities, collaborating to fulfill shared goals.¹ Legal protection for weaker parties becomes crucial to ensure justice in agreements where power imbalances exist.²

¹ Xavier Castañer and Nuno Oliveira, "Collaboration, Coordination, and Cooperation Among Organizations: Establishing the Distinctive Meanings of These Terms Through a Systematic Literature Review," *Journal of Management* 46 (2020): 965–1001, <https://doi.org/10.1177/0149206320901565>

² Fajar Rachmad, Dwi Miarsa, Krisnadi Nasution & Endang Prasetyawati, Theory Analysis of Justice Against Good-Faith Buyers in Freedom of Contract, *Ius Positum (Journal of Legal Theory & Law Enforcement)* 1 (2022): 4.

Weak parties, often lacking experience or resources, can include consumers, employees, or tenants. This legal concept aims to prevent stronger parties from exploiting the vulnerable by implementing regulations or laws that offer specific safeguards.³ Examples include regulations governing credit or rental contracts, minimum wage laws, and consumer protection laws. Through legal protection, the goal is to minimize power abuses and promote fair access to justice for all parties involved in an agreement.⁴

Several contract theories proposed by legal and philosophical experts offer frameworks for understanding the foundation of agreements. The Voluntarism theory emphasizes agreements based on free will and mutual consent, highlighting voluntary participation without coercion.⁵ Construtivism theory suggests that agreements stem from social construction, shaped by societal norms and obligations. Utilitarianism theory posits that agreements aim for mutually beneficial goals, ensuring advantages for all parties. Kantianism theory stresses moral principles, advocating adherence to universal moral rules and consideration of all parties' interests.⁶ In construction agreements, additional theories include Pragmatism, emphasizing practicality and project stakeholder benefits; Risk theory, urging consideration of potential project risks; and Relational theory, viewing agreements as interdependent relationships. Disputes may arise, requiring proper understanding and clear resolution mechanisms.⁷ Legal theories, such as Contract Legal Theory, Civil Law Theory, Criminal Law Theory, Natural Law Theory, and International Law Theory, can be employed for resolution. Choosing the right legal theory is crucial for a just resolution. Dispute resolution methods include negotiation, mediation, arbitration, and court resolution.

The debtor is declared in default by means of a warrant, a similar deed, or based on the strength of the agreement itself, namely if the agreement results in the debtor being deemed to be in default after the specified period of time has passed, as intended in Article 1238 of the Indonesian Civil Code. According to the provisions of this article, the debtor is considered to

³ Gabe Mythen and Samantha Weston, "Interrogating the Deployment of 'Risk' and 'Vulnerability' in the Context of Early Intervention Initiatives to Prevent Child Sexual Exploitation," *Health, Risk & Society* 25 (2023): 9–27, <https://doi.org/10.1080/13698575.2022.2150750>

⁴ Sarah Devaney, "Justice for All? Impeding the Villainization of Human Trafficking Victims via the Expansion of Vacatur Laws," *Pepperdine Law Review* 49 (2021): 1.

⁵ Simona Ljupcho, Mo Naumovska, Ljupcho Naumovski, and Simona Naumovska, "ASEAN Journal of Community Volunteerism in Civil Society: The World Experience and the Media," *ASEAN Journal of Community Engagement* 6 (2022): 98–125.

⁶ Alessandro Ferrara, "Moral Duties and Juridical Duties: The Ambiguity of Legal Ethics Considered Through the Prism of Kant's Metaphysics of Morals," *German Law Journal* 23 (2022): 117–29, <https://doi.org/10.1017/glj.2022.5>

⁷ Louis Tremblay Thibault, Tom Sarry, and Abdelhakim Senhaji Hafid, "Blockchain Scaling Using Rollups: A Comprehensive Survey," *IEEE Access* 10 (August 2022): 93039–54, <https://doi.org/10.1109/ACCESS.2022.3200051>

be in default if there is already a warrant or similar deed.⁸ Usually referred to as a subpoena, order or deed such as a certain warrant (*ingebrekestelling*). What is meant by subpoena is a notification of a statement from the creditor to the debtor which requires that the performance must be completed immediately or within a certain time as stated in the notification.

The District Court carries out the summons. Then the District Court, through the intermediary of the Bailiff, delivers the warning letter to the debtor, accompanied by a report on its delivery. Article 1243 of the Civil Code states that "Compensation for costs, losses and interest due to non-fulfillment of an obligation begins to be mandatory, if the debtor, even though he has been declared negligent, still fails to fulfill the obligation, or if something must be given or done within a period of time that has been stated." In this article it is explained that the debtor is obliged to pay compensation, after being declared negligent he still does not fulfill this achievement. If the debtor gives something or does something but it has exceeded the time specified in the agreement, the debtor must pay compensation.⁹

In Article 1244 of the Civil Code, the debtor must pay compensation consisting of costs, losses and interest. Article 1244 which reads in full: "The debtor must be punished to compensate costs, losses and interest, if he cannot prove that the non-performance of the agreement or the inappropriate timing of the agreement was caused by something unforeseen, which cannot be accounted for by him, even though he has no bad intentions." Reimbursement of costs, losses and interest must be paid by the debtor to the creditor if the debtor cannot prove that the non-fulfillment of the obligation or performance was the result of an unexpected event (*overmacht*) or force majeure.¹⁰ Article 1245 of the Civil Code states that "There is no compensation for costs, losses and interest if due to compelling circumstances or because of things that happen by chance, the debtor is prevented from providing or doing something that is required, or performs an act that is prohibited for him." There is no reimbursement for costs, losses and interest if the debtor can prove that the non-fulfillment of the obligation or performance was the result of an unforeseen event or force majeure.

Prof. Subekti explains that for a circumstance to be considered "compelling," it must not only be beyond the debtor's control and forceful but also an unforeseeable condition at the time

⁸ Sulmarty and Moh. Saleh, "Legal Consequences of Breach in Investment Agreements without Notary Deed Based on Islamic Law Perspective," *Mizan: Journal of Islamic Law* 6 (2022): 349–462.

⁹ Yati Nurhayati, Mohd Zamre Mohd Zahir, Muhammad Hatta, Muhammad Hendri Yanova, and Parman Komarudin, "Breach of Contract: A Comparison Between Indonesian and Malaysian Contract Law," *International Journal of Law, Environment & Natural Resources* 2 (2022): 33–45, <https://doi.org/10.51749/injurlens.v2i1.21>

¹⁰ Eko Rial Nugroho, Mahrus Ali, Rohidin, Jawahir Thontowi, and Karimatul Ummah, "Framing the Covid-19 Pandemic as a Force Majeure Clause to Escape Debtor's Liability," *International Journal of Law & Political Studies* 5 (2023): 16–21, <https://doi.org/10.32996/ijlps.2023.5.1.3>

of agreement, with risks not borne by the debtor.¹¹ In Article 1246 of the Civil Code, costs, compensation, and interest claimed by creditors should encompass actual losses, foregone profits, and interest. Article 1247 further limits the debtor's obligation to compensate for expected losses at the time of agreement, unless fraud is involved. Articles 1247 and 1248 establish two limitations on losses: those anticipated during agreement and those directly resulting from default. According to Article 1249, “parties have the freedom to determine compensation in contracts, stipulating that agreed-upon sums must not exceed or fall below the specified amount”. Fines, as defined in Article 1249, “involve predetermined promises linked to debtor non-compliance, serving either as compensation for creditor losses or as motivation for debtors to fulfill their obligations”. To provide legal certainty, a construction agreement serves as the legal basis that governs the relationship between the parties involved in a construction project, such as contractors, project owners, and subcontractors. Each party must be clear about their rights and obligations, as well as the steps that can be taken in the event of a dispute. This helps create legal certainty for all parties involved. This study aims to analyze the legal framework governing construction agreements in Indonesia and identify the importance of dispute resolution in the context of construction projects. To achieve the research objectives, a literature review was used to analyze various relevant regulations, including the Civil Code, Law Number 2 of 2017 on Construction Services and Government Regulation Number 17 of 2013.

B. Discussion

B. 1. Legal Protection in Construction Agreements

Legal protection in construction agreements is governed by various laws and government regulations, including the Civil Code, Law Number 2 of 2017 on Construction Services, Law Number 20 of 2008 on Micro, Small, and Medium Enterprises (MSMEs), Government Regulation Number 17 of 2013 on the Implementation of Law Number 20 of 2008 on MSMEs, Presidential Decree Number 16 of 2018 on Government Procurement of Goods/Services, and Policy Institute for Procurement of Goods/Services Regulation Number 9 of 2018 on Guidelines for Implementing Procurement of Goods/Services Through Providers. Dispute resolution efforts in construction services are primarily directed towards arbitration.

¹¹ Bagya Agung Prabowo and Nurjihad, “The Legal Interpretation of the State of Musytari’s Force Majeure on the Murabahah: Financing Contract Post Presidential Decree No. 12 of 2020,” *International Journal of Law & Political Studies* 5 (2023): 46–54. <https://doi.org/10.32996/ijlps.2023.5.1.6>.

Hermawan states that construction agreements, as legally binding documents, form the essential foundation of the relationship between project owners, contractors, subcontractors, and other involved parties, making them indispensable to the functioning of the construction industry.¹² Given the inherent complexity of construction law, it becomes crucial for the parties involved in these agreements to ensure that they have adequate legal protections in place to safeguard their rights and obligations. Legal consultants who specialize in construction law play a vital role in this process by offering guidance, leveraging their in-depth knowledge of legal regulations, contract requirements, and the potential legal risks associated with construction projects.¹³

Legal protection in construction agreements, facilitated by legal consultants, encompasses critical aspects. Aloisi states that legal counsel is instrumental in the drafting and review of construction agreements to ensure that they incorporate all relevant legal provisions and include necessary safeguards that protect all parties involved.¹⁴ In addition to this, consultants help identify potential legal risks that may arise throughout the course of construction, such as delays in the project timeline, breaches of contract, or unforeseen circumstances that could affect project completion. By anticipating these potential issues, legal consultants assist in incorporating dispute resolution mechanisms within the agreements, as well as ensuring that adequate financial planning is in place to handle any contingencies. Furthermore, legal consultants play a significant role in negotiating agreements that are fair, transparent, and mutually beneficial, ensuring that the legal rights and interests of all stakeholders are fully protected. In an industry that is inherently complex, fraught with legal intricacies, and subject to changing regulations, competent legal consultants make a critical contribution by helping to mitigate risks, ensuring compliance with relevant laws, and fostering long-term, sustainable working relationships among all parties.

Construction contracts, as detailed in Article 46 of Law Number 2 of 2017, are binding, prohibiting unilateral changes. Thirteen essential items are mandated, including party identities, job descriptions, coverage/maintenance periods, expert staff details, rights and obligations, payment methods, breach of contract rules, dispute resolution clauses, termination conditions, force majeure qualifications, building failure clauses, worker protection clauses,

¹² Anis W. Hermawan, "Improving Tax Compliance of the Construction Sector in Indonesia: A Juridical Perspective," *Scientia Business Law Review* 1 (2022): 1–6.

¹³ Kaisa Huhta and Seita Romppanen, "Comparing Legal Disciplines as an Approach to Understanding the Role of Law in Decarbonizing Societies," *Transnational Environmental Law* 3 (2023): 649–70, <https://doi.org/10.1017/S204710252300016X>

¹⁴ Antonio Aloisi, "Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead," *European Labour Law Journal* 13 (2022): 4–29, <https://doi.org/10.1177/20319525211062557>

and environmental obligation fulfillment clauses. According to Mirzaee et al., despite the robust legal framework that governs construction contracts, numerous issues continue to arise, often due to a lack of understanding of the terms and conditions, leading to delayed completion, imperfect implementation, or even the premature termination of contracts.¹⁵ The principle of legal certainty is a core concept within the legal system, and it plays a crucial role in providing protection within construction agreements. For this principle to be effective, all parties involved must have a thorough understanding of the relevant legal principles in construction contracts, the proper procedures for contract termination, and the broader context of Construction Law as a whole. Legal certainty, in this context, refers to the need for a legal environment that is clear, stable, and understandable, where the rights and obligations of all parties are respected, ensuring that all contractual agreements are enforceable and that disputes can be resolved efficiently.

B. 2. Dispute Resolution in Construction Agreements

Disputes the disputes typically involve multiple parties, including Service Users, Service Providers, Sub-Service Providers, Material Suppliers, and sometimes even external entities that may be affected by or have an interest in the project. Commonly, the issues in dispute revolve around requests for additional time, fees, or compensation, which can arise for a multitude of reasons. The complexity of these disputes is often compounded by the diverse types, categories, and underlying causes of the issues that contribute to the disagreement.¹⁶ The resolution process involves claims structures and procedures, incorporating factual, legal, and cost analyses. In a construction agreement context, both parties can initiate claims against each other, covering aspects such as additional time, compensation, or concessions. However, unresolved disputes can lead to claims, incurring additional costs and jeopardizing the credibility of the involved parties. Dispute resolution through deliberation is preferable to filing claims, aiming not to establish who is right but to address existing problems.

Numerous methods exist for resolving construction disputes, including negotiation, mediation, arbitration, and litigation. Negotiation involves direct discussions between disputing parties, potentially aided by architects or engineers as mediators. Mediation,

¹⁵ Ali Mohammad Mirzaee, M. Reza Hosseini, Igor Martek, Payam Rahnamayiezekavat, and Mehrdad Arashpour, "Mitigation of Contractual Breaches in International Construction Joint Ventures under Conditions of Absent Legal Recourse: Case Studies from Iran," *Engineering, Construction & Architectural Management* 30 (2023): 1481–95, <https://doi.org/10.1108/ECAM-08-2021-0751>

¹⁶ Saad Alshihri, Khalid Al-Gahtani, and Abdulmohsen Almohsen, "Risk Factors That Lead to Time and Cost Overruns of Building Projects in Saudi Arabia," *Buildings* 12, no. 7 (2022), <https://doi.org/10.3390/buildings12070902>

facilitated by an impartial third party, seeks a settlement agreement, but its non-binding nature poses challenges if consensus is not reached. Yu states, arbitration, involving construction experts, offers a fast, cost-effective, and expert-driven resolution, with decisions being final and binding.¹⁷ Litigation, a court-based process, becomes a last resort if other methods prove ineffective, but its lengthy and expensive nature makes it less favorable. The choice of dispute resolution methods, such as judicial bodies, arbitration, or alternative dispute resolution, must be explicitly stated in construction contracts. Civil disputes, explicitly excluding criminal matters, are subject to resolution through agreed-upon methods. Arbitration, often preferred for its speed, cost-effectiveness, and simplicity, is highlighted in the Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, reflecting its preference among international business actors. Overall, efficient dispute resolution methods must align with principles of timeliness, cost-effectiveness, accessibility, protection of rights, fairness, trustworthiness of the resolution body, finality, ease of execution, and adherence to a sense of justice.

B. 3. Normative Review of Agreements Related to Construction Services, Disputes, and Forms of Dispute Resolution

Dispute resolution in construction agreements is intricately linked to various laws governing agreements and the procurement of goods and services. In the context of agreements, several distinct laws play crucial roles, each tailored to specific legal subjects and types of agreements. For instance, Law Number 5 of 1960 on the Basic Agrarian Principles governs agreements related to land and property, while Law Number 8 of 1999 on Consumer Protection regulates agreements between consumers and producers or service providers. Similarly, according to Forsyth, Hardy, and McCrystal, Law Number 18 of 2017 on Collective Labor Agreements oversees agreements between workers and employers, and Law Number 28 of 2014 on Copyright regulates agreements related to copyright issues.¹⁸ In the construction industry, the application of these laws is dependent on the specific nature of the agreement and the legal subject involved, with each type of agreement requiring different legal approaches and treatment in accordance with the applicable regulations.

¹⁷ Lilly Yu, “Third-Party Brokers: How Administrative Burdens on Nonprofit Attorneys Worsen Immigrant Legal Inequality,” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 9 (2023): 133–53, <https://doi.org/10.7758/RSF.2023.9.4.06>

¹⁸ Anthony Forsyth, Tess Hardy, and Shae McCrystal, “Collective Bargaining in Fissured Work Contexts: An Analysis of Core Challenges and Novel Experiments,” *Federal Law Review* 51 (2023): 509–32, <https://doi.org/10.1177/0067205X231205051>

Moreover, the procurement of goods and services in construction is subject to a distinct set of laws. Law Number 6 of 2023 on Job Creation simplifies regulations for procurement, emphasizing efficiency in the process. Laws such as Law Number 14 of 2008 on Openness of Public Information and Law Number 19 of 2014 on Amendments to Law Number 20 of 2008 concerning MSMEs introduce transparency and specific policies for procurement from MSMEs in government projects. Additionally, laws like Law Number 17 of 2003 on State Finances, Government Regulation Number 5 of 2021, Presidential Regulation Number 16 of 2018, and Minister of Finance Regulation Number 243/PMK.06/2016 regulate various aspects of procurement, providing procedures and guidelines. The effectiveness of dispute resolution in construction agreements is, therefore, contingent on a comprehensive understanding of these legal frameworks that govern agreements and procurement processes.¹⁹

C. Conclusion

Legal protection in construction agreements is shaped by various laws and regulations, such as the Civil Code, Law Number 2 of 2017 on Construction Services, and government regulations. Dispute resolution, primarily through arbitration, is crucial for addressing conflicts in construction services. Construction agreements, acting as binding legal documents, require meticulous attention to legal protections, and legal consultants specializing in construction law play a pivotal role in guiding stakeholders through legal complexities. The normative review underscores the importance of understanding and complying with diverse laws governing agreements and procurement processes, ensuring dispute resolution mechanisms align with legal principles for fair, timely, and cost-effective resolutions. The effectiveness of legal protection and dispute resolution in construction agreements lies in a nuanced understanding of legal frameworks to safeguard the interests of all parties involved.

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¹⁹ Bingsong Tang & Nan Li, *Contractual Governance for Dispute Resolution and Construction Sustainability: Case Studies from China*, 14 *Sustainability (Switz.)* (13) (2022), <https://doi.org/10.3390/su14137643>

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