

DISPUTE BOARDS AND CONSTRUCTION CONTRACT

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ABSTRACT

Construction contracts are known for their complexity, specificities and long duration. Thus, given the need for immediate response to problems during the execution phase, Dispute Boards (DB) arose. DB are a committee responsible for assisting the parties in their disagreements, preventing disputes, providing them with a quick, economical and efficient solution, preventing the emergence of a dispute. More than an extrajudicial means of conflict resolution, as advocated by certain authors, or pre-arbitral chamber, as called by others, a DB is, above all, a dispute prevention mechanism. It avoids not only the breach of contractual relations, but also warns against possible losses resulting from the interruption or suspension of the contract. In the construction industry, the establishment of this committee allows the work to be monitored from the very beginning by specialists, minimizing potential disputes that would jeopardize the effective compliance of the contract. The results are extraordinarily positive, reflecting on the effectiveness of the contracts. Once fully fulfilled, they satisfy not only the interests of the contracting parties but of third parties which are acquiring autonomous parts of the constructed property. Judicial delays and their natural burdens are avoided.

With this study, we intend to contextualize the DBs, demonstrating their importance, highlighting their contribution to international trade and explaining the reason for their success. We will allude to some DB's paradigm examples. Reference will also be made to the rules created by the Paris International Chamber of Commerce (JRC), as well as the reception of DBs by the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) contracts.

Keywords: Dispute Board; Construction Industry; Arbitration; Contracts.

1. INTRODUCTION

Social relations increasingly demand agility and legal certainty. Market and business law developments have led to the adoption of the technique of managing deals and contracts, different ways of managing conflicts of interest. It is assumed that in contractual relations, the business crisis best suits the parties if resolved by internal solution than by decisions imposed by an authority, without having control of the time and cost of the process.

The advantage lies in the fact that the construction of a decision in consensual proceedings ultimately avoids the court's own wear and tear, in which the use of purely litigious techniques detracts from trade relations to the detriment of commercial exchange.

Dispute Boards ("DB"), unlike arbitration, mediation and conciliation, recognized alternative means of conflict resolution, consist in the appointment of a board of technicians trusted by the parties, which will remain in charge of monitoring the execution of the contract and issue, at the option of those involved, opinions and technical advice, which may also be binding or non-binding.

This is an essential difference because, in addition to the advantage of the Dispute Board monitoring the execution of the contract and being close to the parties and the execution

of the contract, it is constituted before the conflict arises, as opposed to arbitration, mediation and conciliation¹.

What is aimed with this article is the study, both summary and non-exhaustive, of the Dispute Board institute in the context in which it was created, that is, in the construction contracts.

2. DISPUTE BOARD CONCEPT

Complication and interruption situations during the execution of construction contracts are very common, especially in large and long term contracts². If the inconvenience resulting from these complications and the interruption of the contracts were not enough, there is still the time and expense spent in resolving the disputes, even through arbitration. Another relevant issue is the existence of foreseeable and unpredictable internal and external contractual acts that may compromise the execution and the initial project.

It was with the sum of these factors in mind that the Dispute Boards, or translated into Portuguese, comitê de resolução de controvérsias, has emerged. A committee of specialists responsible for monitoring the fulfillment of the contract avoiding loss, failure, interruption, but, above all, avoiding the formation of disputes that usually lead to the breaking of contracts and the paralysis of works, causing damage not only to contractors, but to several other people affected by construction contracts³.

In this context, the committee is composed of one or three specialists in the contract object, independent of the contracting parties, whose main commitment is to issue technical advice on the progress of the works, analysis of project execution, but above all, to assist the parties in order to avoid disputes when possible, or to resolve disputes with quick, inexpensive and efficient resolutions when necessary, avoiding the need to institute arbitration, or even the beginning of the judicial demand.

It is necessary to highlight the relevance of the committee members' expertise, whose technique and experience will facilitate the conduct of the work, as well as the results. It is also observed that the most effective Dispute Boards are those established at the beginning of the contract, since the more intimate the committee members are with all the contractual clauses, object and purpose of the parties, the more efficiently and easily they will be able to conduct the works and the contribution expected by the contractors⁴.

However, it is necessary to note that the establishment of the committee is possible after the beginning of the contract, when the controversy arises, a modality known as "ad hoc". The advantage of setting up the committee in this version is that it can choose experts on the problem to be solved. However, the disadvantage is that the committee will not have intimacy with the contract, which may require time and even the need for expertise to identify and diagnose precisely the most appropriate solution to the problem. Moreover, one cannot lose sight of the fact that, in this mode, the greatest advantage of the Dispute Board is lost, namely, the predictability of the fortuitous, avoiding the implementation of the problem.

The existence of the committee, and its constant visits to the construction sites, facilitate communication between the parties, who receive information on progress and potential problems. In addition, they encourage the resolution of contentious issues regarding construction, even before a real dispute is formalized. If so agreed by the parties, it is capable of

¹ MARCONDES, A. F. M. Os dispute boards e os contratos de construção. In: MARCONDES, F. (Org.). *Direito da construção: estudos sobre as várias áreas do direito aplicadas ao mercado da construção*. São Paulo: PINI, 2014. p.137. ISBN-13: 978-8572662932

² GARCÍA, R. H. Dispute boards (paneles de solución de controvérsias) em Latinoamérica: retos y perspectivas de un fascinante medio de solución de controvérsias. In: GARCÍA, R. H. (Coord.). *Dispute boards in Latinoamérica experiencias y retos*. Peru: Estudio Mario Castillo Freyre, 2014, p. 23-32.

³ CAIRNS, D. J. A.; MADALENA, I. El reglamento de la ICC relativo a los dispute boards. *Revista de Arbitragem e Mediação*, v. 3, n. 10, p. 178-198, 2006.

⁴ MARTINS, P. B. *Arbitragem estudos em homenagem ao Prof. Guido Fernando Silva Soares*, In *Memoriam*. São Paulo: Atlas, 2007. p. 113/120. ISBN 9788522466825

promoting advisory opinions. To make this possible, it is given to the committee all contractual documents, plans, specifications and reports developed throughout the contract.

The boundaries of the competence of the committee are agreed upon by the parties at the time of the institution and signature of the contractual clause, in which they will have a free choice not only of the composition, but also the procedure, the limits and the competence attributed to the committee, and the possible appeal, whether arbitration or judiciary.

In the case of arbitration, the parties remove the state jurisdiction to proceed only with the action of the arbitrators who, in the end, will render a decision with the nature of a court decision. Only in the case of dispute boards - and other alternative forms of dispute settlement - do the parties choose to rely on state jurisdiction after complying with that contractual mechanism and, if necessary, in accordance with the wishes expressed in the contract⁵.

Besides, it is at this opportunity that the type of bank to be constituted is determined. Today the existing modalities are derived from the American model - Dispute Resolution Boards / DRB, or the European model – Dispute Adjudication Boards/ DAB. There is also a third model that is nothing more than the unification of the previous two – Combined DB.

Determining a DRB is a recommendation to the parties of what the committee considers optimal for proper dispute resolution. Such a recommendation has no binding effect, but has considerable persuasion between the contracting parties, due to the structure of the fair and independent banking itself, through which that recommendation was reached.

As for the European model, DAB, what happens is the issuance of contractually binding decision between the parties, which has mandatory compliance, regardless of the appeal, when provided by either party, until the issue is formally decided in accordance with the requirements for fine dispute resolution. Normally, a time limit is set for notification of dissatisfaction or disagreement with the decision given, without, however, exempting the indignant party from compliance. Also note the possibility of instituting the final resolution, either by arbitration or court demand, after the termination of the contract, only to compensate for any loss incurred in excess by either party.

In any case, for the purpose of conceptual introduction of the theme, we will start from the experience of the International Chamber of Commerce, whose regulation has been in force since September 1, 2004, on the World Wide Web. It should be noted that in Brazil there is already, within the scope of the Engineering Institute⁶, a Dispute Board regulation, which was called Comitê de Solução de Controvérsias (Dispute Settlement Committee), under the auspices of its Mediation and Arbitration Chamber.

One should always keep in mind that it is a rule freely agreed by the parties, as a kind of open clause, and may differ according to the elected institution and the contractual provisions. Its main characteristics are consensuality, informality, freedom, non-binding of the parties to the solutions adopted and decision made by impartial technicians and of the trust of the parties.

3. IMPLEMENTATION IN CONSTRUCTION CONTRACTS

The doctrine records that until the 1950s, the informality of construction contracts prevailed, the burden of which was borne exclusively by the Builder. Hence, arbitration became the mechanism of contractual equilibrium, and the complexity of contracts and disputes gave rise to the Dispute Board institute for the prevention and settlement of these disputes⁷.

The adoption of the mechanism was due to the increased cost of the projects due to the inevitable legal disputes. This was because, most of the time, the waiting time was unreasonable, almost always lengthy and ruthless, leading to the stoppage of the works, either due to financial incapacity or court order. Most of all, the most worrying thing, was the uncertain outcome, since continuing the project based on preliminary or precautionary

⁵ CARMONA, C. A. Arbitragem e processo. 3. ed. São Paulo: Atlas, 2009. p. 64. ISBN 9788522455843

⁶ www.ie.org.br Acesso em 19.10.2019.

⁷ Breves Considerações sobre os Dispute Boards no Direito Brasileiro. Revista de Arbitragem e Mediação, coordenador Arnaldo Wald, São Paulo, ano 3, nº 10, julho-setembro de 2006, capítulo 2.2.1, p. 167.

decisions, whose precarious character is evident, generated enormous insecurity and instability in these contracts⁸.

It was then that the choice of contracts with more flexible and balanced clauses regarding conflicts and disputes became more recurrent by the owners, for the benefit of the enterprise itself. Thus, the implementation of Dispute Boards made sense and overcame resistance. This is because the multiplicity of goods and services involved in the execution of contracts of this nature, such as the supply of goods, outsourced services of technical and operational areas, led to the need of implementing fast and effective solutions.

If considered the construction contract, from the project's birth to the delivery of the work, internal and external variables such as economic crises, changes in legislation, value of inputs, natural events, among others, such situations are capable of generating disputes due to any conflict of interest, causing the work to be paralyzed to the full detriment of the parties, those who benefit from the construction itself, practically translating into the concept of diffuse law.

From this perspective, Dispute Boards gather all the elements of success, as their priority is the conclusion of the contract, which does not mean damage to only one of the parties, since, as we have seen, such disputes can be settled at the same time or after than the end of the works, thus maintaining the priority of compliance and faithful conclusion of the contract signed⁹.

With the increasing implementation of committees, Dispute Board has been used in various forms of construction contracts, mixed, hybrid and even maintenance contracts. The formal requirements for its implementation are the valid existence of Dispute Board clause in the construction contract providing for the possibility of constitution the committee, regardless of the modality, its procedural rules to delimit the types of action of Dispute Board and, finally, the adjustment between contractor, builder and committee members, agreeing and formalizing the procedural rules.

Usually, the contract model presented by the International Federation of Consulting Engineers (FIDIC) and the International Chamber of Commerce (ICC) is used in the construction market, and we say usually because, as already explained above, Dispute Boards are open to negotiation and format, as it is an open clause where contractors may have the rules to obtain their best interest.

Based on the FIDIC model of contracting, conditions for contractual clauses are the joint appointment of the committee, up to the stipulated date for award. Such appointment is made from a potential list of members in the contract. At this time, the remuneration of the members is also defined and if any question arises, it may be referred to the Dispute Board, with or without the agreement of the parties.

The International Chamber of Commerce (ICC) recommends in its contractual clause for the use of DB in construction contracts, that all disputes should be submitted to the committee in the first instance and that the decision given should be issued in accordance with the agreed rules. If either party fails to comply with the decision, the other party shall refer the dispute to arbitration, which is elected to settle the dispute. If there is dissatisfaction with a Dispute Adjudication Board decision (modality suggested by the ICC), the dispute should also be referred to the ICC arbitration. The same happens in case of committee omission or delayed decision¹⁰.

⁸ VAZ, G. J. Breves considerações sobre os dispute boards no direito brasileiro. Revista de Arbitragem e Mediação, São Paulo, p. 140-179, v. 3, n. 10, 2006.

⁹ WALD, A. A arbitragem contratual e os dispute boards. Revista de Arbitragem e Mediação, v. 2, n. 6, p. 18-19, 2005.

¹⁰ <http://www.drdb.org/publications-data/drdb-database/> Acesso em 21.10.2019

4. REASONS FOR DISPUTE BOARDS' SUCCESS

Industry statistics point out that the cost-benefit of implementing committees is extremely attractive to the market, since costs are proven to be negligible given the overall value of the contracts.

The Dispute Resolution Board Foundation (DRBF) official website provides an extensive database on projects around the world that have used the Dispute Board in the construction market, identifying Hiring Party and Builder, value of contracts and values relating to disputes, resolved or referred to other resolution procedures. The numbers are attractive and prove the efficiency of the mechanism, justifying why many countries around the world are adopting in their contracts, including the public ones, the obligation of Dispute Boards.

They are considered very successful because they provide, as shown above, impartial, informed and rational mechanisms for resolving issues quickly. Its main goal is the literal concept of efficiency. In addition, it should be taken into consideration the expertise factor of its members, which facilitates the identification of problems that, in construction contracts, may be involved not only with the project, but with relevant issues of design, structure, implementation and application of the contract's documents, general process for resolving incidental disputes, and the specific project history to be addressed¹¹.

If both parties are positively willing to accept the DRB's recommendations, or not discuss the DAB's rulings, given that the parties themselves have approved the bank members, having confidence and respect for them, disputes are always resolved quickly, thus avoiding delays in time and costs¹².

Furthermore, issues discussed can often arise, be heard, recommended and resolved within the time it would take to select an arbitration panel or refer a lawsuit to a state court.

Another obvious advantage is that the committees are heard immediately after a standoff, while the facts and circumstances are still fresh in the minds of those involved. Therefore, better informed solutions are possible, considering that witnesses are still available and the Dispute Board can effectively see the problem and calculate its impacts on the site, including real-time hearings, minimizing costs, as the committee usually monitors the project's execution, always being present and contemporary to the emergence of the dispute.

Finally, we must not lose sight of the need to encourage the implementation of mechanisms such as Dispute Board in contracts in general, since they tend to promote bilateral agreements, facilitate relations between contractors, enable open communications, strengthen trust and cooperation, minimize complaints and indispositions, encourage the identification, assessment and negotiation of issues promptly and professionally, solving simple issues that would eventually turn into major disputes if not resolved in a timely manner.

These characteristics are in line with the general discipline of contracts, not just of construction, and strengthen the basic principles of any contractual relationship, such as good faith and continuity of contracts.

¹¹ CARMONA, C. A.; MARTINS, P. B. Arbitragem estudos em homenagem ao Prof. Guido Fernando Silva Soares, In Memoriam. São Paulo: Atlas, 2007. p. 87. ISBN 9788522466825

¹² MIMOSO, Maria João; ANJOS, Maria Rosário. Prevenção de Conflitos na Implementação de Contratos Grandes e Complexos. Edição Especial Publicada no International Journal of Trend in Research and Development (IJTRD), ISSN: 2394-9333, www.ijtrd.com International Conference on Trends & Innovations in Management, Engineering, Sciences and Humanities, Dubai, 20-23 de Dezembro de 2018.

CONCLUSIONS

1. It can be noted that dispute boards, as contractual dispute settlement mechanisms, are comprised of experts in the contract area and are able to deal with disputes arising during their execution;
2. They are presented as a pre-arbitral or pre-judicial instrument, especially in the context of civil construction and infrastructure contracts.
3. In this type of contract, of great complexity and size, the time factor promotes differences between the parties involved;
4. These factors call for close attention to conflict resolution modes.
5. The progress of the works and services commenced require that the execution of the contract is not called into question and that any disagreement is quickly overcome.
6. An efficient solution can only be achieved if there is a thorough knowledge of the peculiarities of the project and the techniques involved;
7. Dispute boards have emerged as the most suitable option for civil construction and infrastructure contracts, with major advantages for the continuous execution of the project, with the particularity of accompanying the work from the beginning;
8. The use of dispute boards in projects carried out in this world has proven its success, providing the improvement of clauses and their legal regime.

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