

Public works and dispute boards: a pending debate in South America

Construction Law International homepage
(/Publications/publications_construction_law_international.aspx) » December 2020
(/Publications/CLINT-december-2020.aspx)



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Introduction

As is well known, dispute boards were created by the construction industry and have been defined by the International Chamber of Commerce (ICC) as 'a standing body typically set up upon the signature or commencement of performance of a mid- or long-term contract, to help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract'.¹ The main purpose of dispute boards is to operate during the execution of construction projects and allow the parties to resolve their differences contemporaneously and in a timely manner. However, it is important to note that in many cases, the use of these bodies is limited only to dispute resolution, losing their original purpose.

Even though the use of dispute boards is recommended and has important benefits during the execution of a project, South American countries have been reluctant to introduce them into the legal framework, especially in public works contracts. One of several reasons for this is that South American countries have civil law systems, in contrast to the common law system that originated in Anglo-Saxon countries. Under a civil law system, the principle of freedom of contract is limited by the governing law, which relies on public institutions to resolve the conflicts between the parties and to defend the weakest party. Conversely, under a common law system, in light of the lack of codification and the simplicity of statutory law, the need for legal certainty in contracts has resulted in the creation and development of standard forms, which usually provide for the use of dispute boards, mostly mandatorily.

Some South American countries, however, have been implementing dispute boards for at least two reasons: (1) the progressive introduction of common law features to civil law countries; and (2) the use of FIDIC standard form contracts, which provide for the use of dispute boards, is mandatory in projects financed by the Inter-American Development Bank (IDB).

In this article we will briefly analyse briefly: (1) the legal regulation of dispute boards in public works contracts, including the main causes that have prevented their general application in South American countries; and (2) the advantages and importance of having dispute boards for public works in this region.

The use of dispute boards in public works in South America

Legal regulation of dispute boards in public works contracts

After studying the legal framework of the six South American countries with higher gross domestic product (GDP),² it is possible to conclude that the regulation of dispute boards in public works contracts is minimal if not almost inexistent. Indeed, only Peru has a normative framework on this matter. Some countries have regulations for specific regions only or are working on the incorporation of dispute boards into their legal framework. Yet in most cases there are no legal regulations. The following table describes the regulations in Argentina, Brazil, Chile, Colombia, Ecuador and Peru:

	Dispute board in public works contracts	Standing or ad hoc	Number of members	Professional skills	Subject matters
Argentina ³	No	-	-	-	-

Brazil ⁴	Yes	Standing	1–3	Not restricted but preferably one lawyer and two engineers	Patrimonial rights
Colombia ⁵	No	-	-	-	-
Chile ⁶	No	-	-	-	-
Ecuador ⁷	No	-	-	-	-
Peru ⁸	Yes	Standing	1–3	Restricted by profession	Restricted (eg, excludes extra works)

Challenges for the implementation of dispute boards in public works contracts in South America

It is possible to identify at least challenges to the implementation of dispute boards in public works contracts: (1), the necessity of having a legal regulation in South American countries; and (2) the need for substantive change in the professional culture.

In relation to the first, as aforementioned, South American countries follow the civil law system, where the principle of freedom of contract is limited by the governing law, relying on public institutions to resolve the conflicts between the parties. This is especially true for public works contracts, which are ruled by public law regulations that require an express legal provision allowing disputes boards for their use. This brings, as an additional effect, a clear reluctance from the authorities to accept any decision of dispute boards as mandatory, as they are considered to be as an institution with reduced effectiveness.

Even when a legal regulation providing for dispute boards is included in the normative framework, cultural change is also essential, affecting not only the introduction of dispute boards, but also the dissemination of any kind of alternative dispute resolution (ADR). As an expression of this cultural behaviour, it is possible to identify at least the following situations that affect the implementation of dispute boards in South America:

- First, South American countries have a very close relationship with litigation, not other institutions orientated towards conflict avoidance. Almost all countries in the region believe that practically the only way to resolve a conflict that arises during the execution of a contract is through the judicial system, either through the courts or arbitration. Therefore, even when the parties could agree to go before a dispute board during the project execution, this method is not widely used or is used only partially, and the parties wait, sometimes as agreed, until the end of the project to resolve their differences judicially (usually through the courts), under the public system.
- Second, in South America, public entities prefer to have full control during the execution of works, rejecting the possible intervention of third parties such as a dispute board. Public entities also face the difficulty of having to explain and justify any public-money expenditure that could involve payment to a dispute board.

- Third, and closely related to the previous point, in most South American countries there is a public controllership, which is usually an obstacle to enforcing dispute board decisions, due to the possibility of administrative sanctions by the public controller.
- Finally, there is a trend in South Africa that non-lawyers are seen as incapable of analysing contractual controversies. Apparently, this arises from confusion between the technical expert used by the judge or arbitrator and the dispute board member. That is not a problem in the common law environment, where the focus when appointing a member of a dispute board is the candidate's skill for the particular case rather than their specific studies, and where the institution of the adjudicators, managed mainly by non-lawyers, has been operating successfully for several years precisely with the objective to avoid submitting disputes to the courts.

Advantages and importance of having dispute boards in public works

In recent decades, the construction sector has become highly complex, requiring more expertise and contractual frameworks that respond to the differences that may arise between the parties during the execution of the project, differences that involve legal and technical issues. Dispute boards were created by the industry to respond to these very challenges, and have been used with proven success in many countries. For that reason, it is difficult to comprehend their lack of use in public construction, at least in conceptual terms.

The public administration is the main party responsible for providing public services to all people in a country. To fulfil this obligation properly, countries need to have an adequate infrastructure that allows the governments to provide these public services. This infrastructure is developed normally via the execution of public works, which requires efficiency by public entities in the administration of the public budget and timely execution of projects. Dispute boards can help to achieve this objective, because they avoid, in most cases, time-consuming and ineffective litigation, keeping the project under way.

Indeed, dispute boards play an important role in the efficiency of construction because: (1) their existence pushes the parties to resolve any differences in a timely manner while the work continues; and (2) they reduce the probability of incurring court or arbitration costs. These reasons alone should be enough to introduce these bodies into the normative framework of South American countries.

During the pandemic, when it is important that parties can reshape the contractual terms of works in execution, dispute boards can support them to create an environment of mutual reliance, facilitating agreement without stopping projects. It is important to bear in mind that a country's public sector is responsible for taking effective measures to aid economic recovery, and one pillar of any recovery is keeping infrastructure projects in operation.

For the introduction of dispute boards to be effective, it is evident that South American countries need a cultural change, particularly moving from unbalanced contracts and adversarial management to models with more collaboration, focusing on the early avoidance of conflicts instead of resolution through litigation processes, relying on the professional skills of the non-lawyers and using dispute boards to support the parties during the whole project, and not only for dispute resolution.

Finally, given the times in which we are living, when collaboration is the only way to face the global crisis, perhaps the South American public sector will be finally pushed to consider implementing these panels and starting legislative processes to introduce them into their respective legal frameworks.

Notes

1 Dispute Board Rules (2015), International Chamber of Commerce, p 2.

2 World Bank 'GDP (current US\$) – Latin America & Caribbean' <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZJ> accessed 22 September 2020. Note that due to the lack of statistical information in the past five years Venezuela was not included in the analysis.

3 Argentina does not have regulations related to dispute boards or alternative dispute resolution (ADR) in public works.

4 The only existing legal framework in force is the Law No 16.783 (2018), enacted by the Municipality of São Paulo, which regulates in detail the creation, applicability and procedures of dispute boards, known as committees for the prevention and resolution of disputes (*Comitês de Prevenção e Solução de Disputas*) intended for long-term contracts where the City of São Paulo is a party.

5 Colombia does not have any regulations related to dispute boards in public works.

6 Since 2018 a committee consisting of the authorities of the Ministry of Public Works and representatives of the Chilean Chamber of Construction and Dispute Resolution Board Foundation, including legal and technical experts, has been working on a pilot plan of six contracts with different types of disputes boards and, in parallel, drafting a regulatory framework. The expectation is that results of the pilot will be gathered this year, and dispute boards implemented in contracts in specific sectors next year.

7 Ecuador does not have a regulation related to dispute boards in public works.

8 Peru has a particular regulation for dispute boards (*Junta de Resolución de Disputas* or JRD) in public works. This regulation is contained in three normative frameworks: the Law of Public Procurement No 30.225 (Ley de Contrataciones del Estado), enacted in 2015, which was last updated through Supreme Decree No 082-2019; the Regulation of the Law 30.225, contained in Supreme Decree No 350-2015-EF (Reglamento de la Ley de Contrataciones del Estado), and the recent Directive of Dispute Boards No 012-2019 (Directiva No 012-2019-OSCE/CD – Junta de Resolución the Disputas).

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