



DRBF LATIN AMERICA CONFERENCE:

“Arbitration and Litigation: What is the Dispute Board's Impact?”

KEY TAKEAWAYS:

29 OCTOBER 2021

Moderator: Ignacio Palacios

Speakers: Macarena Letelier, Ricardo Barreiro and Victor Madeira

This session covered the impact of Dispute Boards in Arbitration and Litigation generally in Latin America and specifically in Chile, Argentina and Brazil.

Initially the session started with Macarena providing some background about the presence of Dispute Boards in Chile and the current incentives in the short term to promote its use.

Macarena kicked off the session by explaining the great efforts that are being made for promotion. The main initiative is the signing of an agreement between the Chilean Arbitration Center, the DRBF, and the Chilean Construction Chamber for the implementation of pilot programs. Some of the biggest developers and main contractors in Chile are participating in this initiative.

The current objective is to involve the ministry of public works.

Ricardo gave his perspective from past experiences in Argentina. These were not very successful due to the failure to select the right DB members for the projects. However, Ricardo conveyed that Argentina is still a fertile field full of opportunities and needs for the DB to flourish.

Victor also delivered his opinion on the same topic but focusing on how the statutes recently issued in Brazil are impacting the use of Dispute Boards and its acceptance as a dispute avoidance and resolution method.

Victor explained that before the new regulation only the multilateral banks used Dispute Boards. Also, the absence of statutes and experience made it very difficult to implement the method for state projects.

The inflection point occurred due to the Olympic Games where the use of the Dispute Boards was a success to deliver the projects on time. Added to that, in the construction of the Sao Paulo Stadium, three directors of a state company were accused as a result of complying with a Dispute Board decision.

The desire to implement this successful method properly and to give confidence to users boosted the need to regulate it under the legislative frame.

In 2018, the Sao Paulo Dispute Board Act was enacted to regulate the use of Dispute Boards in major projects involving the municipality.

After that, in 2021 a Public Procurement law document was published to establish Dispute Boards as an acceptable resolution method for public works.

Currently the use Dispute Board in Brazil is increasing significantly in practical terms.

Following the current status of the Dispute Boards in different locations of Latin America, the conversation deepened into more legalistic of contractual concepts.

Ricardo Barreiro talked as to what extent a DB decision is final and binding. Ricardo started by establishing the difference between final and binding. Final is considered as a decision that puts an end to a dispute raised by the parties and binding means a decision that was not challenged by the parties in the period setup in the contract and thus must be complied as such.

Dispute Board decisions are as final and as binding as the parties have established that in the contract. Normally, contractual Dispute Board clauses set up clearly the processes to be followed and the remedies, however the matter gets complicated when these decisions are challenged and taken up to the next level commonly arbitration. Unlike arbitration or litigation, a Dispute Board decision is a contractual measure. As such, its enforceability presents different questions such as: will an Arbitral Tribunal enforce the Dispute Board Decision temporarily and review the merits at a later stage? Or will it treat the matter as a breach of contract?

There is no uniformity as to the way to treat Dispute Board decisions in Latin America which has generated some degree of uncertainty and opens many questions yet as to what occurs when the decision arrives at arbitration or litigation.

Afterwards, Macarena gave an insight as to how construction disputes are dealt with in Chile.

In order to attract investors and give certainty to international contractors, in the 90s the state established bespoke arbitration and conciliation panels to deal with disputes in concession projects in an effective and quick manner.

However, this method was not implemented in other type of projects where the state acts as Employer. Currently construction disputes against the state end in very lengthy processes which creates a major imbalance between the state and small and medium contractors resulting in many companies disappearing from the market.

After analyzing this situation, the Chilean Free Competition Tribunal recommended to implement a system where disputes could be resolved as they came along.

However, in Chile, like Arbitration or litigation, mediation or Dispute Boards decisions do not count on a statute that supports their enforceability. In addition, civil workers are reluctant to follow DB decisions due to the absence of statutes that support their decision, even if the contractor is right.

That is why it is expected that the near future the state will create the ground to facilitate the compliance with Dispute Boards' decisions and with the agreements reached. Eventually, the state acts as a contractual party and should follow the decisions taken by a panel of impartial professionals in the sector, giving example and not searching for the modification of the Dispute Boards' decisions.



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As well as in other Latin American countries, the construction sector is waiting for the state to enact a statute to back up Dispute Boards' decisions, avoiding such a dependency on arbitration and litigation.

Victor carried on the conversation explaining how Brazil's regulation is impacting the enforceability and effectiveness of Dispute Board decisions.

Victor started by clarifying that Dispute Board decisions are binding but not final, and as such not complying with a decision involves a breach of contract.

The Dispute Boards cannot issue decisions equivalent to arbitration or litigation. The essence of the Dispute Board is to protect the project, it is key that the parties understand this principle for the success of the mechanism.

Parties need to follow the directions of the Dispute Board to solve the issues that are impacting the project as they arise and avoid ending into long processes such arbitration or litigation.

Victor also raised the point that, in his opinion, even if some contracts, such as FIDIC, make a Dispute Board's decision final and binding if not challenged in 28 days, this clause is not enforceable under the Brazilian law. As a result, the parties are not prevented from questioning the decision even after the 28 days period.

Finally, it is up to the parties to accept the Dispute Board's decisions.

To conclude the session, Ignacio Palacios asked the speakers' opinions about the successful factors needed for Dispute Boards to succeed in Latin America.

Ricardo Barreiro explained that it mainly depends on the statutory support that this mechanism is able to secure to provide certainty to the professionals of the sector and companies.

Added to that, parties' trust is the main factor for the success of this method.

Parties that believe in the professionalism, impartiality of the adjudicators and that their primary purpose is the project are able to construct the foundation of the success of the method.

The DRBF thanks our speakers, who can be contacted directly:

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