

# DISPUTE BOARDS SET TO GAIN TRACTION IN BRAZIL

In this article, we look at recent changes in Brazil's approach to the adoption and use of Dispute Boards ("DBs"). This name can be misleading as unlike other dispute resolution mechanisms, the aim of most DBs is to avoid disputes arising. This is achieved by the DB being appointed at the commencement of a project. Through meeting the parties to the project and in particular those on site a few times a year, to discuss progress and any issues between them they should be able to prevent disputes from arising. If this fails, DBs will provide interim decisions or recommendations to keep projects on track as to allocation of risk and responsibility including costs and delays. In some DBs their sole role is to do this rather than being appointed for the whole of the project. Any decisions by a DB will be binding on the parties unless or until they go to arbitration.

Although widely used in many countries, particularly for major infrastructure projects, DBs had not taken off in Brazil. However, the Rio 2016 Organizing Committee for the Olympic and Paralympic Games did appoint DBs for many of its larger infrastructure contracts. Following Rio 2016's use of this mechanism, the following legislative support has now been given to the process.

## Legislative and judicial support

One of the core objectives of the new Brazilian Civil Procedure Code, enacted last year, is to encourage the take up and use of other methods of dispute resolution and avoid disputes through the promotion of conciliation, mediation and other consensual methods of conflict resolution.

Uptake was slow until the Brazilian Supreme Court decided in 2001 that arbitration was not in conflict with the guarantees of access to justice set out in the Brazilian Federal Constitution. Since then, arbitration has become a very popular method of dispute resolution for Brazilian and international companies operating in Brazil. This is in part due to the length of time that it can take to have cases finally resolved through the court system. Major Brazilian construction and commercial contracts now generally adopt arbitration as their main method of final dispute resolution.

The success of arbitration in Brazil should have heralded a new era for alternative dispute resolution ("ADR"), but so far, other popular ADR methods have yet to break through. One of the reasons is the lack of court support for enforcing agreements to mediate or any decisions of other third party dispute resolvers such as a DB. There is little point in parties agreeing such decisions are temporarily binding if the courts will not uphold this through enforcement.

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The Brazilian Federal Justice Council recently hosted its so-called 1st Campaign for the Prevention and Extrajudicial Resolution of Conflicts. The Council's "Campaigns" are intended to promote debate on Brazilian legislation and, after each Campaign, guidelines on best practice are published. Although these guidelines do not bind the courts, they are highly persuasive and are often used by judges to support the rationale behind their decisions.

Among almost 90 approved guidelines on the prevention and extrajudicial resolution of conflicts, three deal expressly with DBs. These include: (i) recognition of DBs as a valid consensual method of conflict resolution under the Civil Procedure Code (ii) that the decisions of DBs bind the parties unless and until a judicial or arbitral decision is otherwise issued and (iii) the recommendation that DBs be used in construction contracts and infrastructure projects to reduce cost and allow immediate resolution of conflicts.

As a result, it is expected that the Brazilian courts will uphold DB decisions, recognising them as valid, enforceable and aligned with the objective of promoting alternative dispute resolution.

## Scope for use of DBs

The use of DBs in construction contracts and infrastructure projects may help to address the problems with delays and cost overruns that have plagued many major Brazilian infrastructure projects.

The infrastructure sector is in a state of flux in the wake of the "Car Wash" corruption scandal, which has sullied the reputation and the balance sheets of many of Brazil's largest construction contractors. It is likely that these companies will, in many cases, be replaced by smaller or foreign players that do not have the same long term relationships with the public authorities and state-controlled companies. The use of DBs in these new relationships may help to build trust. In particular, public sector clients need to have confidence in decisions to grant variation orders, which were used to disguise kick-backs in some of the Car Wash cases.

Given Brazil's huge demand for new infrastructure investment, and upcoming PPP and concession programmes, there is a lot riding on new, dispute free, projects. It is to be hoped that this latest support from the Federal Justice Council will act as a catalyst for the wider use of DBs in Brazil, and that these can play some part in improving project management, avoiding disputes and delivering on Brazil's infrastructure demands.

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