

Conflict Prevention in the Implementation of Large and Complex Contracts

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Abstract: Globalization and the consequent opening of markets abroad imposed the modernization and development of infrastructure. Investments for the respective implementation require the execution of highly complex contracts and the need to sub contract partners in accordance with the required expertise. A simple delay in the fulfillment of one of these instruments is reflected in terms of the smooth progress of work. We intend to demonstrate that the Dispute Boards are a means of resolving disputes, avoiding either arbitrators or the courts. This figure rises concurrently with the contract, in order to assist the parties to overcome the resolution of any conflicts during the contractual iter. A literature review will be carried out, contextualizing the figure in the analysis of large projects environment. Use shall be a deductive reasoning, based on reality and existing regulatory mechanisms, stressing the importance of Disputes Boards for the maintenance and success of contractual relations. The Disputes Boards provide for the settlement of disputes during the execution of the contract, quickly and adapted to the specificities of the contract, avoiding either the use of contentious means (arbitration and state justice) or damages caused by delays in performing the work. The Disputes Boards thus provide a means of facilitating conflicts, enhancing the good relations between the parties, allowing the technicians of their confidence to handle all the contractual instruments. It will be demonstrated through real examples, infrastructure projects, namely the Eisenhower Tunnel and Eurotunnel.

Keywords: *Arbitration, Contractual, Dispute Boards, International, Mechanisms.*

I. INTRODUCTION

Since the construction of Eurotunnel, inaugurated in 1994, we have witnessed the creation of new contractual models for large works. The complexity of these construction contracts and their lengthy implementation are reflected in their own regulations. These are large investments in buildings and infrastructures, e.g. Road works, railways, airports, etc.

We are dealing with contractual schemes, also called webs of contracts, necessarily linked to each other. Their size and complexity foster difficult relationships between the parties, thus generating conflict.

These contractual mechanisms have attracted a great deal of attention, both from the States, from international organizations of the sector (International Federation of Consulting Engineers) and from other entities, namely the UNIDROIT Institute and some arbitration centers, such as the International Chamber of Commerce from Paris.

These complex contractual schemes are almost always dependent on arbitrage. However, recourse to this form of dispute settlement cannot prevent conflict, acting, as we know, post-litigation.

The need to create a mechanism capable of monitoring the development of the project and overcoming the problems that have arisen has long been felt. These relate in particular to the pecuniary amounts involved, the possible changes in the circumstances in which the parties have based their decision to contract, the guarantees provided and the detailed plans for the execution of the work.

It was in this context that the Disputes Boards (DB) institute was born.

II. THE SLOWNESS OF STATE JUSTICE

Parallel to this, we have seen that the social paradigm has changed as a result of globalization and the proliferation of contractual figures previously unknown and emerging from the practice of international trade operators. On the one hand, judicial systems have not been able to keep up with these loans and, on the other hand, the judicial structure has not grown, has not specialized and has not followed the social changes, thus contributing to the discrediting of the judicial machinery.

The incapacity of this system was further exacerbated by the scarcity of human and monetary resources, leading to its decreasing operability.

In this context, other means of composition of litigation have been outlined, appearing as facilitators and enablers of timely responses to the problems of justice.

The real extra-judicial alternative means of dispute resolution is undoubtedly arbitration, characterized by speed, informality, neutrality, specialization and confidentiality. However, other mechanisms have emerged, not as alternative means of justice, but as means of resolving conflicts. Disputes Boards are a means of preventing and quickly resolving disputes over the conduct of long-term contracts.

III. INTERNATIONAL TRADE RELATIONS

The globalization of international trade relations has definitely demanded harmonized regulatory systems.

The role of three entities, which have contributed a lot to the "standardization" of international contract regulations, are mentioned: the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) Federation of Consulting Engineers (FIDIC),

In short, the regulation of international contracting demands a special discipline, appealing increasingly to a strong articulation between state law, conventional law and *lex mercatoria*. Molineaux (1997) or Berger (2000) or Fabado (2003).

This last one appears in the context of international contracting, specializing in the various market sectors. In the

case of large constructions and without discussing whether *ius ingeniorum* is or is not the source of *lex mercatoria*, we will only say that it will include the general engineering principles admitted in the sector, the uses and practices of commerce, especially the general conditions and contracts model elaborated by engineering entities (*maxime* FIDIC) and the arbitration awards.

The incompleteness and high risk in the execution of large-scale of these contracts, associated with their natural complexity - this being "(...) equated in three dimensions: the contractually anticipated amount of relevant medium- and high-probability contingencies; The variability of the counterparties or possible results for the parties before the occurrence of contingencies; And the level of cognitive demand demanded by the contract "- provide disagreements between the parties involved, which can only be overcome through mechanisms capable of promoting "contractual peace" Carmo (2012), Araujo (2007), Souza et al (2013), Vaz et al (2014).

IV. THE DISPUTES BOARDS

Dispute Boards (DB) as preventive instrument (pre-arbitration or pre-judicial mechanism) are made up of permanent committees, contemporaneous with the conclusion of the contract and aiming to assist the parties during the contractual process.

It should be noted that, on the one hand, the judicial and arbitral powers intervene in order to put an end to a dispute and, on the other hand, the DBs seek to reconcile the interests of the parties by means of a board of experts whose existence is prior or contemporaneous with the dispute. The acts performed by this committee are, almost always, in real time, because their members know the specialties of the contract and follow the progress of construction

The DBs, although they appeared in the 1960s, Cyrill (2008), only later became rooted in the construction sector as a means of facilitating the good conduct of the works.

One of the first success experiences of the DBs occurred in the construction of the Eisenhower Tunnel, Omoto (2009), becoming, from there, a reference for future contracts. There are, however, other examples that must also be highlighted. Take a look at the Cajón Hydroelectric Project (Honduras), the third set of locks in the Panama Canal, Arias, (2011), and the Twin Tunnels project on the Shepard subway line (Canada), Mallot (1999).

We note that under these construction contracts can be seen economic and financial crisis, fluctuations in prices of raw materials markets, legislative changes and acts of God or force majeure.

Its *modus operandi* contributed to the overcoming of conflicts, presenting itself as a preventive instrument of litigation. This mechanism may be contemporaneous with the conclusion of the contract or be created during the execution of the contract. This will depend on the will of the parties.

IV. ARRANGEMENTS FOR DISPUTES BOARDS

DBs are expert committees that are able to monitor and resolve conflicts arising during the execution of large contracts.

Its members are normally appointed at the time of conclusion of the contract and can thus make recommendations (Dispute Review Boards - DRB), make decisions (DAB) or perform both functions (Combined Dispute Boards - CDB).

The first category (DRB) is widely used in the United States and in the contracts of the Federation of international Consulting Engineers (FIDIC). It should be noted that the contractual models developed by this entity provide for the existence of a DRB committee. Also the International Chamber of Commerce's (ICC) Dispute Board Rules (DB Rules) enshrine this possibility, Wald (2005).

The first two categories mentioned, (DRB and DAB), serve the same purpose, although they exhibit some differences.

The DRB (Dispute Review Boards) issue recommendations on the conflicts that are subject to it, being assumed as a consensual mechanism whenever the parties are in agreement with the recommendation issued and commit to abide by it; If they disagree, they must notify the other within the stipulated time (either by a regulation of a DB service provider or by agreement of the parties to the contract) and if there is an arbitration clause the dispute may be submitted to arbitration. Failure to contemplate it shall be subject to the conclusion of an arbitration agreement and, lastly, recourse to the judicial courts.

The DRB committee is made up of three members, two expert technicians and the third, the chairman, usually a lawyer, arbitration expert and the contractual area concerned. The designation of these members, independent and impartial, is made according to the rules of constitution of the arbitral tribunals.

The committee is normally appointed, as we mentioned, at the beginning of the work, regularly visiting the work and thus finding out about the progress of those works. This approach will certainly influence the behavior of the parties during the contract. It should be emphasized that the contract must also cover the *modus operandi* of the committee, as well as the rights and duties of all those involved. This will be waived whenever the parties have resorted to an institutionalized in Dispute Boards services, Wald et al (2008)

Dispute Adjudication Boards (DABs) issue disputes decisions, which are less consensual than the first, although the parties have committed themselves to abide by their decision. If this does not happen, it shall be submitted to arbitration or to the state court.

The DAB committee shall consist of one or three members. If the composition is singular the member of the DAB cannot have the same nationality of the parties. If it is collective, it is only required that the presiding member does not have the same nationality of the parties. The appointment of the remaining members shall always be incumbent upon each of the parties, with the exception of the individual DAB which will require their agreement.

If the parties do not agree on the appointment of DAB members and if it is an institutional DB, the service provider shall be responsible for the appointment.

Finally, it should be noted that DABs can be set up as standing or ad hoc committees. The permanent ones will be constituted at the moment of the signing of the contract, will

remain until their conclusion, implying costs for the parties. This modality is characterized by the speed in the solution of disputes, acting as an advisory body and, therefore, avoiding the emergence of disputes between the parties, Genton (2000).

This typology is very advantageous since it allows the committee to monitor the work continuously, contributing to a fruitful dialogue between the parties, reducing hostile behavior that may arise, Seppala (2000) or Gaede (2000).

The seconds, ad hoc DAB, are contemporaneous with the conflict. Once the conflict is resolved, the committee dissolves. This modality entails lower costs and is not of an advisory nature. The contemporaneousness of this DAB in respect of the dispute allows the parties to choose the members of the committee according to the nature of the problems. However, because this body has not monitored the work from the outset, difficulties may arise in relation to the issues to be settled.

We cannot ignore some considerations about the binding nature of the decision issued by the DB committee, especially in the typologies that provide for it.

We must then ask ourselves whether the decision is enforceable. It does not seem at all admissible to draw a parallel between the decisions issued by DB and those of the arbitral tribunals. Most national legislations do not contemplate the possibility. This would not even be acceptable.

The Committee shall only make recommendations on the possible composition of the disputes and shall not have its judicial acts.

Finally, the CDB (Combined Dispute Boards) issue recommendations. If there is no opposition from the parties, such recommendations will become provisional decisions until the disputes are settled by arbitration or judicial process. This is a 'hybrid' DB mode provided for in the CCI Regulation.

We now find that there is great similarity between the schemes provided for by both the ICC and FIDIC. It should be noted that the ICC rules have a broader scope. As we know, FIDIC is a sectoral association specialized in the construction sector and its derivatives, Etcharren, (2006), Koch (2005), Madero (2006).

In short, DBs are not arbitration tribunals and their recommendations cannot aim at the category of sentences. They will only be binding if the parties agree to it in contract.

VI. LEGAL NATURE OF DISPUTES BOARDS

The DB activity develops in contractual context.

However, disputes between the parties in the case of disputes between the parties may be submitted to arbitration or to state courts.

The recommendations or decisions issued by the DB are based on the regimentation provided for in the contract itself and on the "field analysis" carried out by the members of the committee.

The success of these instruments, pre-arbitration or pre-judicial, lies in its operation. The degree of specialization required of the members of the Committee has proved to be a relieving and trustworthy element between the parties, Bentley (1992).

Where the parties adopt a FIDIC contract, it shall only be a reference. They cannot be attributed to the decisions issued by the judicial committee. In accordance with the principle of legality, only the law can recognize it.

A contrary view would entail serious risks of interference by third parties in the judicial power. It is not even said that DB members have a mandate from the parties, otherwise the principle of impartiality is violated, Bucker (2010).

We disagree with those who argue that DBs are a form of voluntary arbitration. It goes as far as stating that the arbitration clause and the DB clause represent the same arbitration agreement.

Finally, they point out that DB acts as the first instance of arbitration, constituting the "classical" arbitration, the second. In other words, and if true, the parties could agree on a double degree of jurisdiction, Schiller (2015).

We cannot accept this ingenious construction in any way, even though we understand the need for enforceable decisions within the DB.

Notice the differences between the two figures:

In the jurisdictional arbitration to the judgment issued by the arbitrator the same force of the decisions issued by the judges is recognized, due to the prerogatives assigned to it by the national legislators.

It is said that the "decisions" given by the DB are mere opinions / recommendations and will only be binding if the parties so wish. Everything lies in the principle of the autonomy of their will.

In fact, the performance of the DB evidences similarities with contractual arbitration. This modality is enshrined in some voluntary arbitration laws, e.g. Portuguese Voluntary Arbitration Law, article 1, no. 4.

Arbitration is not only a process aimed at resolving specific conflicts of interest, but can also prove to be a technique for specifying, completing and adapting durable performance contracts to new circumstances.

Contractual arbitration consists of "friendly" regulation. The opinion of the third party (arbitrator) will only complete the contractual relationship. Its mission is reflected in an opinion / recommendation, which will only be binding on the parties if they have envisaged it. In this way, the opinion / recommendation issued loses its autonomy by incorporating it into the "contractual whole". The parties are indisputably in agreement to settle their dispute, Kassis (1988).

The originality of this figure is based mainly on its strictly contractual nature. Contrary to the arbitration court that, despite having its origin in a contractual agreement (the arbitration agreement), has arguably a jurisdictional grounds because of the identity established between the arbitration award and the judgment.

For the third party, in that first modality, it is absolutely indifferent to the parties whether or not they respect their opinion / recommendation, their advice, even if they have previously been bound. One thing is the "opinion" issued by the third party (arbitrator) another the agreement of the parties to adopt this "opinion" in their contractual relations. When they do, it is through a will that is external and independent of

the activity of the third.

The arbitrator, in this modality, is limited to issuing the opinion / recommendation that is requested by the interested parties, remaining outside the relations established between the parties, not giving him any other obligation.

The use of contractual arbitration is thus one of the means of settling disputes by a third party.

Whereas in the arbitration decision, properly so-called, the formulated judgments usually reveal a condemnation; in contractual arbitration, the prepositions issued only express how the problem can be solved.

If one of the parties does not comply with the opinion / recommendation issued, it will lead to the resolution of the problem for jurisdictional arbitration or for the state court.

In any arbitral or judicial decision there is a rational element, which is expressed in a set of propositions, which expresses how the dispute should be settled, e.g. what must one of the parties do to achieve the proposed solution; and an imperative element consisting of the propositions set forth in commands / orders issued by the judge or the arbitrator to the parties for them to execute them.

In contractual arbitration, these elements, rational and imperative, are dissociated and only exist in the rational element. The mandatory element is found in the agreement of the parties, where they undertook to follow the third party's opinion.

Therefore, the differences between judicial arbitration and contractual arbitration are evident. Although the material result may be substantially the same as the composition of a dispute through the intervention of a third party, the means of attaining it are, in fact, quite different.

In short, the activity of the DB may, perhaps, constitute contractual arbitration, because the "decisions" of the committee have binding force only if so agreed.

To recognize, however, the activity of the DB as jurisdictional arbitration is certainly to detract from those whose purpose is the prevention of litigation. The function of each of these institutes seems quite different. In fact, this is reflected in the national arbitration laws, as well as the UNCITRAL model law.

And let it not be said that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, can accommodate the DB. This is not true. When the legislator uses the term foreign sentence, it refers to an act that could end litigation as a jurisdictional act. These are the effects of *res judicata* and enforceable title. Such characteristics cannot at all be recognized by the "decisions" of the DB.

To draw a parallel between the arbitration itself and the DBs, on the grounds that the two figures provide for a convention, is not appropriate. True, both are born of the will of the parties. While the DBs produce contractual effects, arbitration itself produces jurisdictional effects recognized by law. Moreover, in accordance with the principle of separation of powers, courts, as organs of sovereignty, have jurisdictional power, and are mandatorily enshrined in the supreme laws of States. To this extent, these have allowed the creation of other categories of

courts, above all to overcome procedural delays, alleviating their judicial machines.

We also refute the position that the decisions of the DB can be turned into true arbitration awards, even though they are approved. Following this reasoning would subvert the principle of equality of parties. Where one of them did not accept the decision of the DB committee, it would be obliged to accept the future decision of the arbitral court. He would not have to re-examine the merits. This cannot be considered since there is no double jurisdiction in arbitration.

Taking into account the characteristics pointed out to the DB, we can see that the figure is close to the *modus operandi* of contractual arbitration, and the opinion / recommendation of the third party will only be binding on the parties, if they so wish. If one of them does not comply with the opinion / recommendation, it may, whenever there is an arbitration agreement, resort to judicial arbitration.

In short, we admit that the action of the DB will be an antechamber to a future judicial arbitration. Not to be confused with this, nor the recommendations / decisions be comparable to real arbitration decisions.

CONCLUSIONS

Despite the generalization of arbitration as a means of settling litigation in international contracting, it was found that this means has not always proved capable of solving them.

It was in this context that the pre-arbitration mechanisms were delineated, where, of course, the DBs, as a committee for monitoring and prevention / resolution of conflicts are of particular importance.

Any of the modalities of the latter institute are in perfect harmony with the principle of the autonomy of the parties' will, which undoubtedly has repercussions on the nature of the opinions / recommendations issued by the DB committees.

In jurisdictional arbitration, the arbitration award has two elements: a rational element, a set of propositions that express how the dispute should be settled and an imperative element, propositions enunciated in commands / orders.

In contractual arbitration, the rational element and the imperative element are decoupled. The rational element subsists in the opinion / recommendation of the third party and the imperative element is found in the agreement of the parties.

If the imperative element does not exist in the opinion / recommendation of the third party, it cannot obtain judicial recognition.

Since the acts issued by the DB are only binding inter parties, because they have so determined, they can only be equated with the opinion of the arbitrator in contractual arbitration.

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