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The use of dispute boards for contractual rebalancing of large infrastructure works: an analysis based on the reports of stalled works by the Federal Court of Accounts (TCU) and the São Paulo State Court of Accounts (TCE-SP)*

O uso dos dispute boards voltado ao reequilíbrio contratual de grandes obras de infraestrutura: uma análise a partir dos relatórios de obras paralisadas do TCU e do TCE-SP

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ABSTRACT

This article addresses the importance of *dispute boards* as effective mechanisms for preventing and resolving conflicts in contracts for large infrastructure projects. Such projects, which have high economic value and technical complexity, often face contractual disputes that, if not promptly resolved, can lead to project delays, cost increases, and the prejudice of expected social and economic benefits, as shown by the reports of stalled works by the Federal Court of Accounts (TCU) and the São Paulo State Court of Accounts (TCE-SP). The article explores the fundamental concepts of *dispute boards*, their legal foundations, particularly in the Brazilian context with Law No. 14,133/2021, and their practical application in public contracts. The ability of *dispute boards* to act preventively, avoiding the escalation of conflicts and ensuring the continuity of projects is highlighted. International and national examples illustrate the effectiveness of this method in maintaining the economic-financial balance of contracts, promoting the successful completion of projects. Finally, the study emphasizes the need for greater acceptance and implementation of *dispute boards* in Brazil as a means of improving the management of public contracts and ensuring the effectiveness of infrastructure projects.

KEYWORDS

dispute boards — economic-financial balance — infrastructure projects — appropriate dispute resolution — public contracts

RESUMO

O presente artigo aborda a importância dos *dispute boards* como mecanismos eficazes para a prevenção e resolução de conflitos em contratos de grandes obras de infraestrutura. Tais obras, que possuem elevado valor econômico e alta complexidade técnica, frequentemente enfrentam disputas contratuais que, se não solucionadas de forma célere, podem levar à paralisação dos projetos, aumento de custos e comprometimento dos benefícios sociais e econômicos esperados, como demonstram os relatórios de obras paralisadas do Tribunal de Contas da União (TCU) e do Tribunal de Contas do Estado de São Paulo (TCE-SP). O artigo explora os conceitos fundamentais dos *dispute boards*, suas bases legais, especialmente no contexto brasileiro com a Lei nº 14.133/2021, e sua aplicação prática em contratos públicos. Destaca-

se a capacidade dos *dispute boards* de atuar preventivamente, evitando a escalada de conflitos e assegurando a continuidade das obras. Exemplos internacionais e nacionais ilustram a eficácia desse método na manutenção do equilíbrio econômico-financeiro dos contratos, promovendo a conclusão bem-sucedida dos projetos. Por fim, o estudo reforça a necessidade de maior aceitação e implementação dos *dispute boards* no Brasil, como meio de melhorar a gestão dos contratos públicos e garantir a efetividade das obras de infraestrutura.

PALAVRAS-CHAVE

dispute boards — equilíbrio econômico-financeiro — obras de infraestrutura — soluções adequadas de conflitos — contratos administrativos

1. Introduction

Major infrastructure works are fundamental to the economic and social development of the country. They involve projects of high economic value, long execution periods and technical complexity, which combine to make contractual disputes inevitable during the course of their execution. These disputes, if not resolved quickly and effectively, can have serious consequences, including delayed or stalled projects, increased costs and compromised social benefits.

In this context, the economic and financial balance of public works contracts is a central issue. The need to maintain the conditions agreed in the contract, even in the face of supervening and unpredictable events, is essential to guarantee continuity and the delivery of expected results.

Given the complexity of large infrastructure works contracts and high frequency of disputes, which lead to serious delays, as demonstrated by the number of stalled works reported by the TCU and the TCE-SP (see the next chapter), the search for effective conflict prevention and resolution mechanisms is vital. In this scenario, *dispute boards* (or *dispute resolution committees*) are proposed an appropriate solution. This method of conflict resolution, widely used for construction contracts abroad, has proven effective in maintaining contractual balance and ensuring the continuity of projects.

In this article, we analyze the use of dispute boards as a mechanism for contractual rebalancing for large infrastructure works. To this end, we address the fundamental concepts involved, their practical application in public works

contracts in Brazil and abroad, and effectiveness in resolving conflicts related to economic-financial imbalance.

Our research focuses on how dispute boards can contribute significantly to mitigating the negative impacts caused by contractual imbalances, facilitating the continuity of projects and achievement of economic and social development objectives.

Furthermore, we explore the legal bases that support the use of dispute boards in Brazil, with particular focus on Law No. 14,133/2021, which regulates public procurement and administrative contracts, and its provisions for alternative forms of dispute resolution, including dispute resolution committees. Discussion will extend to its practical application, highlighting successful examples and lessons learned from large-scale infrastructure projects.

Lastly, our aim is to contribute to the debate on the need to adopt more efficient mechanisms for resolving conflicts arising from administrative contracts. In a context marked by a high rate of construction work stoppages, evidenced by the 32.2 billion reais of federally funded construction work currently paralyzed,[1] with 19 billion reais of state construction work interrupted in the state of São Paulo alone,[2] there is a clear need for solutions which guarantee effective contractual execution and the delivery of the expected societal benefits.

2. Profile of major infrastructure projects: characteristics and dispute history

The choice of major infrastructure projects for this research is justified by the need to address a critical sector with a significant economic and social impact.

Infrastructure works have unique characteristics that distinguish them from other types of projects, including high economic value, protracted execution times, technical complexity and increased socio-environmental impact, so that contractual disputes are practically inevitable.

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1 UNION COURT OF AUDITORS. *Ruling No. 2134/2023*. Plenary. Rapporteur: Minister Vital do Rêgo. Brasilia, October 18th, 2023. Available at: https://pesquisa.apps.tcu.gov.br/documento/acordao-completo/*/NUMACORDAO%253A2134%2520ANOACORDAO%253A2023%2520COLEGIADO%253A%2522Plen%25C3%25A1rio%2522/DTRELEVANCIA%2520desc%252C%2520NUMACORDAOINT%2520desc/0. Accessed on: 11 Oct. 2024.

2 COURT OF AUDITORS OF THE STATE OF SÃO PAULO. *Stalled or delayed works Panel*. 2024. Available at: https://paineldeobras.tce.sp.gov.br/. Accessed on: 11 Oct. 2024.

It is important to highlight that agreements relating to large infrastructure projects are mostly construction or lump sum contracts, defined as follows by Hely Lopes Meirelles:

> A *Construction contract* is any formal agreement for the execution of a specific and determined works project, under the direction and responsibility of the builder, the legally authorized person or entity responsible for the work specified in the project, under the conditions agreed upon with the owner or principal. This concept generally encompasses the two types of private construction contracts known and practiced—general and administrative—which differ in terms of the economic conditions of the work but maintain the characteristics of the type highlighted.[3]

To be more specific, a public works construction contract covers any construction, renovation, manufacture, restoration or expansion of a public asset, carried out directly by the administration or indirectly, when the work is outsourced by means of an administrative contract.[4]

Hence, the concept of public works encompasses both small-scale jobs, such as a small renovation of the headquarters of an administrative body, and large-scale projects, such as the construction of a highway.

We may, therefore, define construction contracts for large works as formal agreements established between the administration and a contractor for the execution of large-scale projects, involving complex infrastructure, such as highways, railways, power plants, ports or airports. Such contracts are often associated with public development policies, aimed at improving the infrastructure of a given region.

For the purposes of this study, major works are considered those that, in terms of the aforementioned characteristics, fall within the legal concept of large-scale works, i.e., those with a value greater than BRL 239.624,058.14, under the terms of art. 6, XXII, of Law No. 14,133/2021, with the value updated by Law No. 11,871/2023:

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[3] MEIRELLES, Hely Lopes. *Direito de construir*. 12. ed. Revised by Giovani da Silva Corralo e Fábio Scopel Vanin. São Paulo: Juspodivm, 2023, p. 263.

[4] D'ANGELO, Aldo Cesar; GUIMARÃES, Irce Fernandes Gomes; VALE, Clécio Magalhães do. Causas de atrasos na conclusão de obras públicas: uma análise comparativa por pesquisa bibliométrica e estudo de caso. *Revista de Gestão e Projetos*, v. 14, n. 1, p. 190-218, jan./abr. 2023. p. 193.

> Art. 6. For the purposes of this Law, the following shall be considered.
> […]
> XXII—large-scale works, services and supplies, whose estimated value exceeds BRL 239.624,058.14 (two hundred and thirty-nine million, six hundred and twenty-four thousand, fifty-eight reais and fourteen cents);[5]

Major public works include infrastructure projects aimed at developing, expanding and improving the physical and technological structure of a region to stimulate economic and social development. Examples of large infrastructure works are the construction of roads, bridges, viaducts, airports and ports, among others.

Due to the size and complexity of this type of contract, as well as the variety of interests involved, disputes are common during their execution. These conflicts can result in unforeseen costs and significant delays, impacting essential sectors of the economy.

Even the best-planned projects are subject to changes and discrepancies, both in the design and construction phases. Efficient resolution of these conflicts is essential to ensure the completion of projects and reduce the risk involved, improving the institutional environment and attracting public and private investment.

Cyril Chern illustrates the disputes that typically arise with this type of project:

> Disputes may arise as a result of unsatisfactory or tardy execution by the company; unexpected increases in the cost of certain components or services that disproportionately harm a specific party; force majeure events that cause physical delays or prevent project development, construction, equipment delivery or operation; disputes between private operator shareholders (e.g. over financing obligations); failures of the government or its agencies to deliver; macroeconomic changes or changes in the political, regulatory or legal environment that mean the original terms of the concession or license become disadvantageous to one or more parties. In some cases, such as large dam projects, the local community may be negatively affected by the

[5] BRASIL. Congresso Nacional. Lei nº 14,133, de 1º de abril de 2021. Lei de Licitações e Contratos Administrativos. *Diário Oficial da União*, Brasília, DF, 1º de abril de 2021. Available at: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14133.htm. Accessed on: 20 July 2024.

> proposed project; for example, community members may need to be resettled or receive compensation, or they do not properly understand how their needs will be met.[6]

Disputes, then, may have several causes, such as poor planning on the part of the public administration, lack of technical expertise of the private entity, or unforeseen and unavoidable events.

Failure to resolve these conflicts effectively results in the familiar, unfortunate national scenario of unfinished public works.

According to data released by TCU in Ruling 2134/2023-Plenary,[7] in 2023, from a total of more than 21 thousand contracts analyzed, 8,603 projects financed with federal resources were found to be paralyzed. This represents 41% of all projects. The expected values of the suspended contracts amount to 32.2 billion reais.

The aforementioned ruling mentions that the TCU Audit, after consulting the state audit courts, concluded that, "in the view of local entities, financial issues related to contract execution, such as payment and transfer delays and imbalances, are responsible for most of the work stoppages". The data suggests that the economic-financial imbalance of the contract was the direct cause of stoppages in 16% of cases.

In the state of São Paulo alone, as stated in the TCE-SP Panel on stalled or delayed works,[8] 472 paralyzed works were identified in the first quarter of 2024, with contracts totaling more than 19 billion reais.

The 10 largest stalled projects in the state of São Paulo, according to data compiled by TCE-SP, are all large infrastructure works, with a value greater than that established in art. 6, XXII, of Law No. 14,133/2021, as seen in this table.

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6 "*Disputes may arise as a result of unsatisfactory or tardy execution by the private operator; unexpected increases in the cost of certain components or services that disproportionately harm a specific party; force majeure events that cause physical delays or prevent project development, construction, equipment delivery or operation; disputes between private operator shareholders (e.g. over financing obligations); failures of the government or its agencies to deliver; macroeconomic changes or changes in the political, regulatory or legal environment that mean the original terms of the concession or license become disadvantageous to one or more parties.11 In some cases, such as large dam projects, the local community may be negatively affected by the proposed project; for example, community members may need to be resettled or receive compensation, or they not properly understand how their needs will be met* CHERN, Cyril. *Chern on dispute boards*: practice and procedure. 13. ed. New York: Routledge, 2015. p. 570.

7 Tribunal de Contas da União, *Acórdão nº 2134/2023*, *op. cit.*

8 TRIBUNAL DE CONTAS DO ESTADO DE SÃO PAULO. *Painel de obras paralisadas ou atrasadas*. 2024. Available at: https://paineldeobras.tce.sp.gov.br/. Accessed on: 10 July 2024.

Table 1
Largest works paralyzed in the state of São Paulo

Description of the paralyzed work	Initial contract value
Renovation and expansion of the traction power supply system for CPTM Lines 11 — Coral and 12 — Safira	BRL 10,598,943,127.00
Construction work on the northern section of the Mário Covas ring road — Lot IV	BRL 788,021,820.59
Construction work on the northern section of the Mário Covas ring road — Lot I	BRL 647,611,591,06
Construction work on the northern section of the Mário Covas ring road — Lot V	BRL 646,340,371,22
Construction work on the northern section of the Mário Covas ring road — Lot VI	BRL 619,219,894.43
Construction work on the northern section of the Mário Covas ring road — Lot II	BRL 604,170,644.64
Construction work on the northern section of the Mário Covas ring road — Lot III	BRL 601,140,442.61
Works on the stretch between the Paulo Freire and Dutra stations — Vila Prudente-Dutra stretch of Line 2 of the São Paulo Metro Company	BRL 597,365,773.17
Works on the Paulo Freire Yard — Vila Prudente-Dutra Section of Line 2 of the São Paulo Metro Company	BRL 563,879,452.43
Supply and installation of signaling systems — CBTC and Telecommunications for line 8 — Diamante and Radiocommunication for all CPTM lines	BRL 288,764,798.72

Source: TRIBUNAL DE CONTAS DO ESTADO DE SÃO PAULO. *Painel de obras paralisadas ou atrasadas*. 2024. Available at: https://paineldeobras.tce.sp.gov.br/. Accessed on: 10 Jul. 2024.

These 10 related works alone total more than 15 billion reais in contract value, around 82% of the total value of the paralyzed projects in the state of São Paulo, demonstrating the significance of large infrastructure works in the overall context.

Also, according to data published in the TCE-SP Panel on the main causes involved: 11.44% of stoppages were attributable to events which occurred after procurement; 5.72% to deficiencies or inadequacies in project information; 4.87% to technical issues that only came to light after the procurement process; and 1.90% to unforeseeable circumstances or force majeure.

All of these causes, which account for approximately 24% of cases in the state of São Paulo, impact contractual stability and could, in theory, be resolved by restoring the financial equilibrium, thus demonstrating the importance of identifying effective solutions for contractual rebalancing and the successful completion of projects.

3. Impact of contractual imbalance on infrastructure works

The data presented in the last section demonstrate that economic and financial imbalance is one of the main causes of public works stoppages, supported by data released both by the TCU and the TCE-SP. Infrastructure project contracts, which have long execution periods and are highly complex, are more vulnerable to supervening circumstances that affect the economic-financial balance of the contract.

The definition of economic-financial equilibrium, which varies little among scholars, is summarized by Celso Antônio Bandeira de Mello as "the relationship of equality formed, on the one hand, by the obligations assumed by the contracting party at the time of the agreement and, on the other, by the economic return that will correspond to it".[9]

The right to contractual balance is established in the constitution, which, in item XXI of art. 37, refers to "maintaining the effective conditions of the proposal, in accordance with the law", thus establishing the need for a public contract procurement process which guarantees preservation of the contractual balance throughout its execution.

In infra-constitutional terms, *Lei de Licitações e Contratos Administrativos* (Law No. 14,133/2021) provides several instruments for maintaining the balance between the responsibilities of the contractor and the private party, such as readjustment and renegotiation, and provides, as a hypothesis for altering the administrative contract, for economic-financial rebalancing, stated in the following provision:

> Art. 124. Contracts governed by this Law may be amended, with due justification, in the following cases:
> […]
> II—agreement between the parties:
> […]
> d) to re-establish the initial economic and financial balance of the contract in the event of force majeure, unforeseeable circumstances or events of incalculable consequences, which make it impossible to fulfil the contract as agreed, respecting, in any case, the objective distribution of risk established.[10]

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[9] MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 37. ed. Belo Horizonte: Fórum, 2024. p. 553.

[10] Brazil, Law No. 14,133, of April 1, 2021, *op. cit.*

Under the terms of the law, contractual disturbances which justify rebalancing require the occurrence of unforeseeable circumstances or events with incalculable consequences that are beyond the control of the parties involved. In some contracts, identifying these may be relatively simple, but as the complexity of the contracted object increases, assessment of possible contractual imbalances becomes equally more complex.

This is most evident in construction contracts, which are complex by nature, due to the variety of technical disciplines and the number of variables involved, and encompass aspects of different legal branches, including administrative, tax, labor and civil liability law.

Although a well-defined contract should, in theory, foresee supervening events that may affect the contractual balance, and assign risks and responsibilities to the parties via the risk matrix, engineering contracts are especially challenging, making it virtually impossible to predict potential risks.

In this sense, regarding the prediction of risks in administrative contracts, Maria Sylvia di Pietro observes that

> […] it is more difficult to make, at the time of the contract, an adequate forecast of the balance, since administrative agreements generally involve risks arising from various circumstances, such as the long duration, the large amount of public expenditure, the nature of the activity, which often requires specialized labor, the complexity of execution, etc. The public interest that the Administration is responsible for defending is not stable, requiring possible changes to the contract to expand or reduce its object or incorporate new execution techniques.[11]

Lie Uema do Carmo provides a practical example of this unpredictability of supervening events and their consequences for large project contracts:

> Consider the turbulence that may arise from sources endogenous to the contractual program, such as macroeconomic, political or social factors. Examples include the vandalism at the Jirau power plant construction site in May 2011, when the site was trashed, leading to delays, destruction of materials and equipment and a dispute possibly involving billions between, on the one hand, the project developer, the consortium Energia

[11] DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 37. ed. Rio de Janeiro: Forense, 2024. p. 283.

> Sustentável do Brasil, along with the construction company Camargo Corrêa S.A. and, on the other, the project insurers. An event that is initially minor causes disproportionate, non-linear consequences.[12]

Thus, the impossibility of anticipating and providing contingency plans for all contractual risks leads to the occurrence of factors that generate contractual imbalance during the execution of the work and the consequent demand for economic-financial rebalancing.

However, the variety and technical specificity of the factors involved in rebalancing large-scale works contracts lead to enormous difficulty and delay in the analysis of requests by the administration, resulting in stalled projects.

A specific example of the difficulties administrations face is the suspension of work on the Transnordestina railroad, which resulted, among other factors, from the need to renegotiate the contract. In this case, the Federal Court of Accounts reported in the inspection process that "the Agency [ANTT] acknowledged that it lacks the institutionalized processes for calculating and renegotiating [...]".[13]

The administrative difficulty of analyzing rebalancing requests ends up paralyzing or impairing the progress of many works, impeding materialization of their anticipated benefits, and generating associated costs resulting from project failure, including immobilization of public resources.

The National Confederation of Industry (CNI) prepared a study in 2018, which empirically analyzed the economic impact of the shutdown of three major infrastructure projects: the east-west integration railway, the transfer of the São Francisco River and the Transnordestina railway.

In relation to the east-west integration railway project, the study estimated that "the losses due to unavailability of transport by Fiol in 2013-19, on the Caetité-Ilhéus stretch, will have generated BRL 12.2 billion in added value in the production of iron ore, which could no longer take place". He also pointed out that the delay in the work "prevented savings in grain transportation, totaling BRL 430 million."[14]

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[12] CARMO, Lie Uema do. *Contratos de construção de grandes obras*. Thesis (doctorate in law) — Faculty of Law, Universidade de São Paulo, São Paulo, 2012. p. 244.

[13] UNION COURT OF AUDITORS. *Ruling No. 1408/2017*. Plenary. Rapporteur: Minister Walton Alencar Rodrigues. Brasilia, July 5th. 2017. Available at: https://pesquisa.apps.tcu.gov.br/documento/acordao-completo/*/NUMACORDAO%253A1408%2520ANOACORDAO%253A2017%2520COLEGIADO%253A%2522Plen%25C3%25A1rio%2522/DTRELEVANCIA%2520desc%252C%2520NUMACORDAOINT%2520desc/0. Accessed on: 16 Aug. 2024.

[14] CONFEDERAÇÃO NACIONAL DA INDÚSTRIA. *Grandes obras paradas*: como enfrentar o problema? Brasília: CNI, 2018, p. 39.

Regarding the transfer of the São Francisco River, the study highlighted the enormous impact of the delay on the total cost of the work, noting that "the investment, calculated by the Selic rate, could have been BRL 9.739 billion, adjusted over time, if the budget and the original timetable had been followed. However, the present value of the investments actually comes to BRL 18,491 million, an increase of BRL 8.8 billion."[15]

Additionally, the CNI pointed out, in relation to the delay to the Transnordestina railway project, that "the combination of the extra cost in the execution of the work with the extended period of its completion caused a loss of BRL 7.6 billion, according to 2017 prices".[16]

Due to the size and complexity of the projects, delays in execution of infrastructure works have a major economic impact, considering the lost value in terms of unrealized economic activity and increase in the expected cost of the work, which drags on over time, affecting the economic viability of completing the project.

Besides the obvious economic impact, we must consider the lack of return on resources invested in benefitting the population, such as the period in which the municipalities affected by the transfer of the São Francisco River lacked a stable and adequate supply of water, which clearly impaired the quality of life of the populace as well as agricultural production.

Another factor that must be considered is the impact of the delay in infrastructure works on regional and national socioeconomic development. The Brazilian Construction Industry Council estimated the impact of stalled works on national GDP in the following terms:

> The best estimates indicate that, if all the stalled works in Brazil were completed in 2018, for example, this year's GDP could be increased by around 1.8% just by the direct and indirect effects of the corresponding investment on aggregate demand. In addition, the long-term effect of completing these works on infrastructure capital stock would enable expansion of the supply conditions in the following years in such a way as to increase potential GDP by approximately 0.65%.[17]

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[15] Confederação Nacional da Indústria, *Grandes obras paradas*, *op. cit.*, p. 58.
[16] *Ibid.*, P. 84.
[17] CÂMARA BRASILEIRA DA INDÚSTRIA DA CONSTRUÇÃO. *Impacto econômico e social da paralisação das obras públicas*. Brasília: CBIC, 2018. p. 39.

It should be noted that infrastructure works are often designed to reduce logistics costs, as is the case with railroads and highways, and the delay or stoppage of these works no longer encourages the expansion of economic activity in the region, driving away potential investors. In other words, "the potential output of the economy is expanded by infrastructure works—and restricted by their stoppages."[18]

The data show, therefore, that the economic and financial imbalance of contracts is a major cause of delayed or paralyzed infrastructure works, impacting the economy and society in a number of direct and indirect ways. Hence, it is necessary to find solutions that make the process of contractual rebalancing quicker and more efficient, so that the work can be completed and serve the public interest.

4. Dispute boards: fundamental concepts

To evaluate dispute boards as an effective contractual rebalancing system for major infrastructure projects, an in-depth understanding of the mechanism—its concept, characteristics and the legal basis that underpins it—is required.

Dispute boards are defined by Ronny Charles Lopes de Torres as follows:

> *Dispute boards* are a dispute resolution mechanism aimed at resolving conflicts in the corporate area, especially in relation to long-term contracts. A committee is formed, made up of one or more independent professionals, who periodically monitor the progress of the contract. In this way, dispute boards provide a form of management that prevents intensification of disagreements and conflicts arising from the natural deterioration of relations between the parties involved.[19]

Thus, a dispute board, or dispute resolution committee, as referred to in Law No. 14,133/2021, is a collegiate body (with three members, as a rule) of independent and impartial experts chosen by the contracting parties, whose purpose is to monitor the performance of the contract, to prevent the emergence

[18] *Ibid.*, P. 36.

[19] TORRES, Ronny Charles Lopes. *Leis de licitações públicas comentadas*. São Paulo: Juspodivm, 2021. p. 747.

of conflicts, assist in the resolution of disputes that arise and oversee the project until its completion.

Dispute boards differ significantly from other extra-judicial conflict resolution methods given their capacity not only to resolve but also prevent disputes, as their operation begins with the drawing up of the contract, before potential conflict arises.

A practical example of how this system can prevent conflicts is given by Cyril Chern:

> Dispute boards do work, and sometimes their mere presence and the ability of board members to give informal opinions before a conflict even arises can be of immense assistance. A good example of this in the UK is the Docklands Light Railway project, with an estimated value of USD 500 million, where no conflicts arose or were referred to the dispute board for arbitration; or the Saltend Private Thermal Power Station in the north of England, estimated at USD 200 million, which enjoyed a similar outcome. Indeed, such statistics were unprecedented in the construction industry before the introduction of dispute boards.[20]

The preventive function of dispute boards reduces the risk of contract termination or its interruption for conflict resolution, so that, as Karin Hlavnicka Skitnevsky observes, "maintenance and continuity of the contract must be considered the essence of the *dispute board*".[21]

Thus, we see the importance of this extrajudicial method of conflict prevention and resolution, which, having emerged in the construction industry, has expanded to encompass other types of contracts, especially large ones, given its proven efficiency in maintaining positive relationships between contract parties.

Dispute boards may can be set up at the beginning of the contract and be available throughout its term, or be set up to resolve a specific controversy,

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[20] "*Dispute boards do work, and sometimes their mere presence and the ability of board members to give informal opinions before a conflict even arises can be of immense assistance. A good example of this in the United Kingdom is the Docklands Light Railway, valued at US $500 million, where no disputes ever fully arose or were submitted to the dispute board; or the Saltend Private Gas Turbine Power Plant in the north of England, valued at US$200 million, where both the number of disputes referred to the dispute board and the number that went to arbitration were zero. Needless to say, such statistics were unheard of in the construction industry before dispute boards*." Black, *Chern on dispute boards*, *op. cit.*, p. 3. Our translation.

[21] SKITNEVSKY, Karin Hlavnicka. *Dispute Boards*: meio de prevenção de controvérsias. Belo Horizonte: Arraes Editores, 2016. p. 21.

ending after the decision rendered has been implemented, in which case it is called an *ad hoc dispute board*.[22] Ad hoc dispute boards are criticized by Antônio Luis Pereira de Sousa for lacking certain key attributes. Since, by definition, they do not monitor projects from the start and cannot have in-depth knowledge of particularities, "they are not preventive, they are not proactive, and much less do they allow the DB to manifest itself in 'real time'".[23]

Dispute boards are, technically, divided into two types: *dispute review boards* and *dispute adjudication boards*. The difference is that "while the former will issue mere recommendations, the latter will be competent to issue decisions, provisional and valid until they are modified by an arbitral or judicial decision, as provided for in the contract".[24] Another type, known as a *combined dispute board,* unites the two modalities, issuing both recommendations and decisions.

The role of the dispute board, therefore, will be defined by the contractors themselves, who will determine whether committee decisions are binding. If a *dispute adjudication board* is chosen, the decisions will be binding on both parties, with immediate enforceability; if the *dispute review board* is preferred, the committee will issue a non-binding recommendation, subject to acceptance by the parties.

In Brazil, dispute boards have already been used in relation to a number of public contract projects. The pioneering example was the contract for Line 4-Yellow of the São Paulo Metro, as required by the International Bank for Reconstruction and Development (IBRD). However, the first piece of legislation that expressly provided for the use of dispute boards in administrative contracts was Law No. 16,873, of February 22, 2018, in the São Paulo municipality.

At the federal level, the first legal provision was Law No. 14,133, of April 1, 2021, which included a specific chapter focused on alternative means of dispute resolution, and provided in article 151 that:

> Art. 151. In contracts governed by this Law, alternative means of preventing and resolving disputes may be used, notably conciliation, mediation, dispute resolution committee and arbitration.

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[22] MIMOSO, Maria João; BORTONE, Joana D'arc Amaral. A prevenção de litígios nos contratos de construção: a operatividade dos dispute boards. *Emerj Magazine*, Rio de Janeiro, v. 22, n. 2, p. 301-313, May/Aug. 2020. p. 92.

[23] SOUSA, Antonio Luis Pereira de. *Dispute boards*. 2014, p. 39. Available at: http://www.turnkeyconsulting.com.br/download/TKConsulting.ALPS.ADRs%20&%20DBs.pdf. Accessed on: 22 Oct. 2024.

[24] BUENO, Júlio César. Os dispute boards e sua evolução no direito brasileiro. In: NASCIMBENI, Asdrubal Franco. *Meios adequados de solução de conflitos*: arbitragem, dispute board, mediação, negociação e práticas colaborativas. São Paulo: Almedina, 2023. p. 172.

> Sole paragraph. The provisions of the head paragraph of this article will apply to disputes related to available property rights, such as issues related to the reestablishment of the economic-financial balance of the contract, the non-fulfillment of contractual obligations by either party and the calculation of compensation.[25]

According to the text of the new Procurement and Administrative Contracts Law, the dispute board is an alternative means of resolving conflicts that can be used in administrative contracts, provided the dispute is related to available property rights.

Thus, although its use was already established in practice, *dispute boards* now have express legal provision, removing any doubt as to their applicability to administrative contracts in Brazilian law.

5. Use of dispute boards in major infrastructure works

Dispute boards emerged in relation to major infrastructure projects, created as a management resource for large construction contracts.

As large infrastructure projects often require a long execution period, implemented in successive stages, and considering the complexity of the technical issues, dispute boards emerged as a way of resolving the inevitable controversies that arise in an agile, impartial and efficient manner, ensuring project continuity. On the topic, Aline de Toledo Rossi and Karen Cristina Moron Betti Mendes state that:

> After World War II, construction contracts became more complex, as they involved not only technical issues relating to the construction itself, which could be handled by engineers and architects, but also compliance with environmental standards and other government requirements—in short, a multitude of supplementary considerations. […] Thus, the DB emerged, so that a group of professionals with differentiated knowledge are able to provide assistance in this complex [26]

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[25] Brasil, Lei nº 14,133, de 1º de abril de 2021, *op. cit.*

[26] ROSSI, Aline de Toledo; MENDES, Karen Cristina Moron Betti. Comitê de resolução de disputas: referências de utilização no Brasil. *Revista de Direito Administrativo, Infraestrutura, Regulação e Compliance*, São Paulo, a. 7, n. 27, p. 253-265, out./dez. 2023. p. 255.

The first recorded use came out of the construction of the Boundary Dam, in Washington, in the 1960s, when contractors requested the creation of a "Joint Consulting Board" with the purpose of resolving possible conflicts and other related matters. Another important development occurred in 1975, when a dispute board was formed to monitor the construction of the Eisenhower Tunnel, in Colorado.[27]

From these first successful experiences, according to Igor Gimenes Alvarenga Domingues, dispute boards "began to be systematically adopted for several large project construction contracts around the world".[28]

In 1995, the use of this instrument became more widespread after the World Bank decision to require the provision of dispute boards for projects financed by it with a value exceeding 20 million dollars.[29]

Their use may be applied to any type of conflict that arises during the execution of a contract, including issues related to contractual dereliction, changes to projects, the economic-financial balance or other disagreements that emerge between the parties.

Successful examples of the use of dispute boards in infrastructure projects are the most varied. We will, then, analyze some examples from the literature to highlight the effectiveness of this system regarding this type of contract.

For the Ertan hydroelectric power plant construction project in China, which began in 1991, the Chinese government agreed to the use of a dispute board for the first time in the country's history. It was agreed between the parties that the board would make site visits three times a year and during the whole construction period there were a total of about 20 site visits. In this project, the board decisions were of a recommendatory nature only and were not binding. During the construction period, 40 disputes were submitted to the committee, none of which were passed on for arbitration or taken to court.[30]

The *Docklands Light Railway*, in London, was built between 1996 and 1999. In this case, there were two dispute boards, one technical and one financial, made up of three members each, working under a single president. The decisions of

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[27] Black, *Chern on dispute boards*, *op. cit.*, p. 11.

[28] DOMINGUES, Igor Gimenes Alvarenga. *Comitês de Resolução de Disputas* (dispute boards) *nos contratos da Administração Pública*. São Paulo: Almedina, 2022. p. 32.

[29] Bueno, Os dispute boards e sua evolução no direito brasileiro, *op. cit.*, p. 170.

[30] FERNANDES, Michelle Cristina Santiago. Dispute boards: Inovação no gerenciamento de conflitos em obras de construção. *In*: ANAIS do XVII Encontro Nacional de Tecnologia do Ambiente Construído. Porto Alegre: Antac, 2018. p. 1,986.

the committee were binding in nature, but no decision was necessary as the committee was effective in preventing disputes.[31]

One of the largest projects in the construction industry, costing approximately USD15 billion, Hong Kong International Airport, also drew on the assistance of a dispute board. During construction, six disputes were passed on to the committee and, of these, only one proceeded to arbitration, which upheld the decision of the dispute board.[32]

In Brazil, the first experience of using dispute boards was during construction of Line 4-Yellow of the São Paulo City Metro, at the request of the International Bank for Reconstruction and Development (IBRD), which financed the project.[33] The committee, whose opinions were not binding in nature, issued 11 recommendations in total.

The first dispute submitted to the committee, which became public due to the judicialization of the issue, concerned contractual rebalancing, the subject of our discussion.

The conflict concerned the difference in costs due to the change in the construction method used for a certain section of the work. The committee understood that this change was due to the delay in freeing up the site area, attributed to the contractor, and concluded that Companhia do Metropolitano de São Paulo (Metrô) should pay for the removal and disposal of contaminated soil, in the quantities and at the costs stipulated. Dissatisfied, Metrô took the dispute to arbitration, which upheld the decision of the dispute board. Finally, the matter was taken to court, which, after temporarily suspending the effects of the decision, reinstated it on appeal,[34] thus highlighting the technical nature of such decisions and the importance of the dispute resolution committee, also for potential legal disputes.

According to the database of the *Dispute Resolution Board Foundation*, which compiled a list of more than 2,800 projects, globally, that have used a dispute board,[35] between 1975 and April 2017, 3,249 disputes were recorded, of which

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31 Black, *Chern on dispute boards*, *op. cit.*, p. 93.

32 RIBEIRO, Suzane of France. *Dispute boards no Brasil*: dos contratos internacionais de construção para a legislação brasileira. Londrina: Thoth, 2024. p. 63.

33 BROWN, John; A utilização de dispute boards como método adequado para a resolução de conflitos no Brasil. *Revista de Processo*, São Paulo, v. 300, p. 343-362, fev. 2020. p. 347.

34 TRIBUNAL DE JUSTIÇA DO ESTADO DE SÃO PAULO. *Agravo de Instrumento nº 2096127-39.2018.8.26.0000*. 10ª Câmara de Direito Público. Relator: des. Torres de Carvalho, São Paulo, 30 jul. 2018.

35 DISPUTE RESOLUTION BOARD FOUNDATION. *Database of projects with dispute boards*. 2017. Available at: https://www.disputeboard.org/wp-content/uploads/2018/02/Copy-of-DB_

2,627 were resolved and only 478 submitted for arbitration or judgement; this is equivalent to a resolution rate of around 80% of all disputes, demonstrating the efficiency of the method for large infrastructure works.

Such efficiency led the Federal Justice Council (CJF), in Statement No. 80 of the 1st Conference on Prevention and Extrajudicial Resolution of Disputes, to recommend the insertion of a dispute board clause in construction or infrastructure works contracts, identifying it as a mechanism that allows for the immediate resolution of conflicts arising during the execution of contracts.[36]

6. Dispute boards as a contractual rebalancing mechanism

Contractual imbalance, commonly observed during the execution of large infrastructure works, is one of the main causes of delays and paralysis, as discussed, directly affecting the completion of vital public works projects. This highlights the need for a quick and effective method to ensure their continuity, through effective conflict resolution.

In terms of legislation, the New Procurement and Contracts Law provided, in sole paragraph, art. 151, that alternative means of preventing and resolving disputes, including dispute boards, may be used to resolve conflicts related to disposable property rights, giving as an example "*issues related to restoring the economic and financial balance of the contract*".[37] There is, then, no doubt about the legality of the solution proposed.

Traditionally, economic-financial rebalancing in administrative contracts is sought through negotiation. According to this dynamic, it is up to the individual party to demonstrate the occurrence of supervening and unforeseeable facts that render contract execution, as agreed, unfeasible. The public administration, in turn, must analyze the arguments and documents presented, and decide whether to grant the rebalancing. José Jair Marques Júnior systematizes the phases of the process of restoring contractual balance in the following way:

Project_Database_April_2017_for_web.xlsx. Accessed on: 24 Aug. 2024.

[36] CONSELHO DA JUSTIÇA FEDERAL (CJF). *I Jornada de Prevenção e Solução Extrajudicial de Litígios*. Brasilia, 2016. Available at: <cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/prevencao-e-solucao-extrajudicial-de-litigios. Accessed on: 3 Sep. 2024.

[37] Brasil, Lei nº 14,133, de 1º de abril de 2021, *op. cit.*

> The first stage is marked by (i) verification of the harmful event, (ii) and whether, due to the allocation of risks in the concession, responsibility for the incident, classified as an unbalancing event, should be borne by one of the parties; (iii) the submission of a claim by the party affected to initiate the recovery procedure, including evidence of the unbalancing event and its repercussions for the economic and financial equation. In a second stage, it is necessary to identify whether (iv) the treatment established in the contract for the allocated risk provides for the opportunity to restore equilibrium; if so, (v) the impact of the event is assessed, based on identification of all the conditions that guided the formulation of the proposal and the meeting point of the conditions to create the equilibrium; (vi) and, finally, define the expected objective of the restoration, how far it will go to restore equilibrium, and which of the methods provided for in the contract should be used […].[38]

However, negotiation between individuals and the public administration is often ineffective in maintaining the balance of contracts for major infrastructure works without interruption of the project.

Several factors contribute to this ineffectiveness, such as the lack of political interest in completing projects initiated by previous governments. In these cases, the political agenda may prevail over public interest, leading to paralysis and abandonment of the contract by the private company.

Another significant obstacle is the high risk that public administrators and technical professionals will be held accountable before control bodies. Even when there is agreement with the request, fear of personal liability often leads to rejection of rebalancing, perpetuating the cycle of administrative inefficiency. This phenomenon, described by Rodrigo Valgas dos Santos, highlights a tendency in which the official prefers to transfer the decision to the Judiciary, avoiding the burden of liability:

> […] the technique of rejection and consequent administrative paralysis acquires an important variant in Brazil, linked to the imbalance between the state functions that we are experiencing. The fact is that

[38] MARQUES JÚNIOR, José Jair. *Negociação aplicada aos contratos de concessão de infraestrutura*. Thesis (PhD in State Law)—Faculty of Law, Faculdade de Direito, Universidade de São Paulo, São Paulo, 2022. p. 83-84.

> the administrator, even acknowledging their competence to decide, prefers to reject the application, precisely so that the individual takes their claim to court. As we will see below, the official, fearing charges of dysfunctional liability, no matter what they decide, prefers to pass on the burden and the legitimate exercise of the administrative function to the Judiciary.[39]

Furthermore, proving the requirements for rebalancing is an additional challenge. The multifaceted nature of the contractual rebalancing of major works means production of evidence is complicated, and the administration often deny requests on the basis that legal preconditions have not been satisfactorily proven, forcing the parties to seek legal redress.

These factors make rebalancing negotiations for large contracts slow and ineffective, resulting in delays or even abandonment of vital national projects.

In this context, dispute boards are a vital mechanism for restoring contractual balance, providing a technical and efficient approach to overcome the challenges of direct negotiation between the administration and the private party.

The first obstacle identified in the negotiation process, vis-a-vis the lack of political interest in completing the project and, consequently, rebalancing the contract, can be overcome by the use of dispute boards. As these committees are made up of impartial technical professionals, appointed at the signing of the contract, they are not subject to changes in government, and thus protected from political interference.

The high level of accountability of public officials in relation to control bodies is also mitigated by the presence of dispute boards. In effect, they lower the levels of distrust on the part of the audit courts and allow professionals to act with greater independence, reducing the incidence of rebalancing rejections arising from fear of personal penalties.

Another crucial point is that, since dispute boards monitor the execution of the contract from the outset, they can potentially overcome the challenge of proving the legal preconditions for the economic and financial rebalancing of the contract. Committee members can intervene at the first signs of imbalance, assisting in the production of evidence and in procedural instruction, contributing

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[39] SANTOS, Rodrigo Valgas dos. *Direito administrativo do medo*: risco e fuga da responsabilização dos agentes públicos. São Paulo: Thomson Reuters Brasil, 2020. p. 360.

to the dialogue between the parties and minimizing disagreements and possible legal action.

Since dispute boards are intended to preserve contracts and the relationship between parties, preventing and resolving conflicts in an professional, agile manner, their use in restoring the economic and financial balance of large infrastructure contracts is especially appropriate, reducing the number of unfinished projects, providing essential public services and stimulating national development.

7. Conclusion

The analysis developed herein demonstrates the importance and effectiveness of dispute boards as mechanisms for contractual rebalancing for large infrastructure works. These committees, made up of independent experts, have proven a vital tool for the prevention and resolution of conflicts, ensuring project continuity and mitigating the negative impact of economic-financial imbalances.

The application of dispute boards to infrastructure works, in Brazil and elsewhere, demonstrates their effectiveness in preventing relatively minor disagreements from escalating into complex disputes that might compromise the completion of projects. International experience, and Brazilian cases, demonstrate that, when well-implemented, these committees not only resolve conflicts quickly, but help preserve the relationship between the contracting parties to ensure contractual objectives are fulfilled.

Aside from their efficiency, dispute boards have the advantage of technical, well-founded decisions, consolidating legal certainty and the trust of the parties involved. Legal provisions in the New Law on Public Procurement and Administrative Contracts (Law No. 14,133/2021) reinforce their relevance in the Brazilian context and their applicability to public contracts, especially large-scale works.

However, for dispute boards to realize their full potential, greater understanding and acceptance by the public administration is necessary. Professional training, clarity in defining the rules for committee operations and transparency are essential for their success.

Adoption of dispute boards undoubtedly represents a significant evolution in the management of infrastructure contracts in Brazil, especially in a context marked by high rates of stoppages and prolonged legal disputes. This method

of conflict resolution offers an efficient solution to contractual rebalancing, enabling projects to be completed in accordance with deadlines and budgets, which generates broad economic and social benefits.

This study, it is hoped, has furthered the debate on the need to modernize conflict resolution mechanisms for administrative contracts, in promoting the use of dispute boards as a common practice in relation to public works contracts. Continuation of this discussion and implementation of measures to encourage utilization of dispute boards is a key step to improving public management and the effectiveness of infrastructure projects in Brazil.

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