

Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block

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Introduction

The use of Dispute Boards (DBs) as a variant of the conventional alternative dispute resolution mechanisms of mediation and arbitration is increasing in prevalence in Latin America. This is in response to the criticism that arbitration has adopted the selfsame qualities of judicial disputes that it was created to avoid, becoming very cost- and time-inefficient. The shortcomings of arbitration are especially apparent in construction projects, particularly large-scale infrastructure undertakings, wherein the many moving parts and parties, unforeseen circumstances and time constraints necessitate quick and efficient decision-making that anticipates problems, rather than just reacts to them.

Dispute Boards are increasingly being viewed as a solution. That perspective is grounded in data demonstrating that, in between 72 per cent and 85 per cent of the cases, the parties accept the decisions of DBs without resorting to arbitration.¹

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1 DB General Overview (Milan Chamber of Arbitration 2016), slide 14.

The structure of DBs contributes to their success, as they are designed to be responsive, convenient, and amicable. In Latin America, DBs are not born of legislation, but rather are contractual entities agreed upon by both parties. Dispute Boards are typically seen as the preliminary stage to arbitration, or as a mechanism used to avoid it altogether. Unlike arbitration, DBs – which are generally composed of one to three subject matter experts – are tasked with monitoring the progress of a project, and engaging in regular and unsolicited dialogue, identifying and resolving issues before they become true disputes between parties.

Examination of case studies of various countries in Latin America paints a picture of inconsistent adoption of DBs across the region, but also of a general trend towards their greater adoption. The leaders of this trend are countries like Peru, Chile, and Brazil which have, to greater or lesser degrees, enshrined DBs into their local and national law, and have experienced success in utilising them in important infrastructure projects. There is an expectation that DBs will continue to play an important role in the region, motivated by a need for large-scale public works projects, cost limitations, and previous success.

Nature and definition of Dispute Boards

The International Chamber of Commerce (ICC) defines a Dispute Board as: ‘a standing body composed of one or three DB Members. Typically set up upon the signature or commencement of performance of a mid- or long-term contract, they are used to help parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract. Although commonly used in construction projects, DBs are also effective in other areas. These areas include research and development; intellectual property; production sharing and shareholder agreements.’²

The Dispute Board Federation does not offer a clear-cut definition of Dispute Boards, but refers to them as a:

‘[q]uick and effective dispute resolution [method that] is not just an isolated theoretical problem – it goes to the heart of what we all want for developing countries – delivery of infrastructure, which has a critical impact on economic growth and therefore alleviation of poverty.’³

- 2 ‘Dispute Boards’, International Chamber of Commerce, available at <https://iccwbo.org/dispute-resolution-services/dispute-boards/>. See also Herfried Woss, ‘Los “Dispute Boards” de la Cámara de Comercio Internacional’, Newsletter, *Boletín de Asuntos Internacionales* (Mexico, No 1, January 2006), at p 1.
- 3 ‘The Use of Dispute Boards in Public-Private Partnership Transactions’, The Dispute Board Federation, available <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Dispute%20Board%20Federation-%20Dispute%20Boards%20in%20Practice%20by%20Cyril%20Chern.pdf>, at p 6.

Doctrinally, several definitions of DBs have been proposed, including the following:

‘... panels, committees or councils for the resolution of conflicts, whose members are appointed at the onset of the contract and who accompany the contract until the end of its execution, and that may – according to the case – make recommendations (in the case of Dispute Adjudication Boards – DAB), or may hold both functions (Combined Dispute Boards – CDB) according to the case, depending on the powers granted to them by the parties.’⁴

Also:

‘A Dispute Board (DB) is a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project.’⁵

Yet, another author defines DBs as:

‘... a panel of independent experts (normally 1 or 3 members), usually engineers or architects possessing legal-contractual experience even though sometimes lawyers participate as experts, with experience in the area (preferably in similar projects), appointed by agreement of the parties, and whose main role is to solve or provide their opinion in very short terms about any questions or claims submitted to their decision.’⁶

Additionally, a DB has also been defined as ‘an entity which assists the Contract Parties to avoid formal disputes.’⁷

Dispute Boards are translated into Spanish as ‘*Paneles Técnicos de Expertos*’, or simply as ‘*Paneles Técnicos*.’⁸

4 Gilberto José Vaz & Pedro Augusto Gravatá Nicoli, ‘Los Dispute Boards y los Contratos Administrativos: ¿Son los DB’s Una Buena Solución para Disputas Sujetas a Normas de Orden Público?’, in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Vol 23, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (June 2014), at p 101, citing Arnoldo Wald, A Arbitragem Contratual e os Dispute Boards, in *Revista de Arbitragem e Mediação*, 2(6) (July–September 2005), at 18.

5 Romano Allione, Richard Appuhn, & James Perry, DRBF Administration & Practice Training Workshop (Milan, 21 June 2016), at p 10.

6 Pablo Laorden Mengual, ‘Las Dispute Boards como Medio de Resolución de Controversias’, in *Tecniberia, Revista de la Ingeniería Española*, No 29, January/February 2011, at 40.

7 See ‘Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation’, Dispute Resolution Board Foundation’s Intensive Dispute Board Training Course (2017), unpublished, at 15.

8 Juan Eduardo Figueroa Valdés, ‘Dispute Boards: la Visión de las Partes y su Co-Existencia con los Contratos Administrativos. Experiencias en Chile’, in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre, (Vol 23, June 2014), at 124.

Purpose of Dispute Boards

Dispute Boards have been propelled by the alleged or real perception of the growing level of drawbacks involved in the arbitration of construction disputes,⁹ in particular due to the perceived 'judicialisation' of arbitration.¹⁰ Due to the non-binding nature of DB decisions in the US, these may be appealed and otherwise subject to subsequent arbitration procedures.¹¹ DB decisions are normally admitted as evidence in ensuing litigation or arbitration proceedings related to the same matter, which gives them significant weight.¹²

Dispute Board decisions are contractually binding from their issuance. In the case of a declaration of non-conformity, they may be subjected to arbitration *de novo* but remain binding until overturned by the arbitral tribunal. However, in case there is no declaration of non-conformity, arbitration is limited to the non-performance of the decision of the dispute board. Recommendations of a DB are non-binding (see ICC Dispute Board Rules) Yet, there are visible differences between DBs and arbitration.

In arbitration, parties submit complaints based on a dispute they have, which arbitrators are then chosen to resolve. On the other hand, Dispute Boards, chosen for their subject matter expertise, can, and often do conduct their own evaluations of issues without submissions from parties. Further, an arbitral award is judicially enforceable, whereas for a finding by a Dispute Board, enforceability hinges on local law if it is not re-qualified as an arbitration, and the issue remains undetermined in many jurisdictions.

9 Roberto Hernández García, 'Solución de Controversias en Construcción en México y Centroamérica: Avances y Retos', in *Tecniberia, Revista de la Ingeniería Española*, No 29, January/February 2011, at 46 (referring eg to lack of diligence of arbitrators, deficient knowledge of construction matters, and lack of ethical behaviour).

10 Roberto Hernández García, 'Dispute Boards (Paneles de Solución de Controversias) en Latinoamérica: Retos y Perspectivas de un Fascinante Medio de Solución de Controversias', in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (Vol 23, June 2014), at 26.

11 Jerry Brodsky, 'Mesas Paralelas de Resolución de Controversias en Mega Proyectos de Ingeniería y Construcción: Una Perspectiva Práctica', in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (Vol 23, June 2014), at 84.

12 *Ibid* at 84.

According to FIDIC (Fédération Internationale des Ingénieurs Conseil),¹³ the previous submission of a dispute to a DB is a precondition for a subsequent arbitration.¹⁴ Dispute Board decisions that are not subject to non-conformity declarations may then be enforced through arbitration or litigation, although usually not under a summary proceeding.

DBs are mostly used in international construction and infrastructure projects, and in 'major civil engineering projects such as highways, dams, hydroelectric schemes, water treatment facilities and major infrastructure works.'¹⁵ Also, DBs are widely used in other areas such as research and development, intellectual property, production sharing and shareholder agreements.¹⁶

Many of the controversies present in construction projects are of a financial nature.¹⁷ Developing countries have been increasingly resorting to DBs as a response to their need for infrastructure to be built timely and according to appropriate standards thus contributing to their economic growth and the alleviation of poverty. For this simple reason, DBs are used extensively in international construction projects, are required by international finance institutions, and in many international standardised construction contracts.

Available statistics show that 'in more than 80 per cent of the cases the parties accept that decision [the DB's decision] without resorting to a higher instance.'¹⁸ Also, it has been reported that 'of 1,261 disputes solved in 2003, only 19, or less than two per cent evolved into litigation or arbitral proceedings.'¹⁹

The on time (immediacy) and on site (at the place of the project) features of DBs, in addition to the know-how of panel members and the amicable nature of the proceedings form the most important advantages of DBs.²⁰

The following represent benefits for owners, contractors, investors, and industry:

13 Red Book of 1999, Clause 20.4, available at <http://site.iugaza.edu.ps/kshaath/files/2010/12/FIDIC-1999-RED-BOOK.pdf>.

14 Gustavo Paredes Carbajal, 'Dispute Boards y Arbitraje en Construcción: ¿Compiteo se Complementan?', in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (Vol.23, June 2014), at 151.

15 Romano Allione, above, note 6, at 18.

16 'Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation', above note 8, at 18.

17 Jerry Brodsky, above note 12, at 74.

18 Pablo Laorden Mengual, above note 7, at 40.

19 Herfried Woss, 'Los "Dispute Boards" de la Cámara de Comercio Internacional', Newsletter, *Boletín de Asuntos Internacionales* (Mexico, No 1, January 2006), at 2.

20 Gustavo Paredes Carbajal, above note 15, at 154.

- From inception, Dispute Boards are part and parcel of the project. Intermittent interaction with parties and inspections provide parties with ample opportunity to discuss potential or actual disputes, which promotes dispute avoidance.
- Periodic visits and regular review of reports ensures that Dispute Boards are kept abreast of all developments. Given their high level of involvement and subject-matter expertise, Dispute Boards understand all facets of the project and the parties involved. Disputes are speedily resolved.
- They are cost efficient, representing less than 0.2 per cent of a project's total cost.
- The vast majority of the time (99 per cent), conflicts are settled by the Dispute Boards without reaching arbitration, especially in jurisdictions where Dispute Board determinations are judicially enforceable. The uncertainty surrounding the involvement of a dispute resolution tribunal is avoided.²¹
- Dispute Boards' role can extend to protecting and including the interests of communities affected by projects.

Different types of Dispute Boards

FIDIC is the organisation responsible for preparing, publishing, and providing guidance on Conditions of Contract for use on various types of construction projects. FIDIC is comprised of 84 national Member Associations and 27 affiliate members, consisting of most of the world's practicing consulting engineers. FIDIC was founded in 1913 with the aim of promoting the common interests of the consulting engineering profession, and to distribute information of interest to that group.

Conditions of Contract are the responsibility of FIDIC's Executive Committee, but most of the work in developing and maintaining them comes from the Contracts Committee, which draws from other FIDIC members, as well as prominent individuals and groups outside of FIDIC. These participants are experts in the international construction, insurance and legal industries, in addition to international agencies that develop and finance engineering and construction projects. This myriad of backgrounds balances the interests of the contractor, engineer, and employer in a construction project, as well as ensuring the efficient and uncontentious completion of the contract of which the Conditions of Contract is a part.

²¹ DB General Overview (Milan Chamber of Arbitration 2016), slide 60.

In addition to the Contracts Committee, FIDIC is also responsible for Committees on Capacity Building, Risk and Liabilities, and Sustainable Development.

There are different types of DBs under FIDIC Contracts:²²

- *Dispute Review Boards (DRBs)*: first introduced by the 1996 FIDIC Supplement to the Fourth Edition Contract²³, DRBs issue recommendations, that is, non-binding opinions.²⁴
- *Combined Dispute Boards²⁵ and Dispute Resolution Experts*: pursuant to the parties' accord, these DBs may simply approve recommendations or alternatively issue binding decisions at the request of one party in the absence of the other party's objection.²⁶
- *Standing Dispute Adjudication Boards (DAB)*: under the FIDIC Construction Form (Red Book)²⁷ and the Design Build and Operate (DBO) Form, decisions issued by a DAB possess a mandatory character.
- *Ad Hoc Dispute Adjudication Boards²⁸*: these are appointed under the Plant and Design-Build (Yellow Book) or the EPC Turnkey Project (Silver Book) Conditions of Contract.
- *Dispute Boards*: these DBs issue binding decisions.

22 Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation, above note 8, at 15.

23 (01/28/2008). The Employer's Obligations. The FIDIC Forms of Contract. 208 - 221-221. (ISBN: 0-470-75941-0, 978-0-470-75941-7).

24 ICC Rules, Art 4.

25 ICC Rules, Art 6.

26 Romano Allione, above note 6, at 11.

27 'Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation' above note 8, at 34, stating that:

'Ad hoc DABs are used for:

- (i) Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and Building and Engineering Works Designed by the Contractor, First Edition 1999 (the Yellow Book);
- (ii) Conditions of Contract for EPC/Turnkey Projects, First Edition 1999 (the Silver Book);
- (iii) Short Form of Contract, First Edition 1999 (the Green Book); and
- (iv) Form of Contract for Dredging and Reclamation Works, First Edition 2006 (the Blue Book).'

28 'Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation' above note 8, at 34, stating that:

'Standing, full term DBs are used for:

- (i) Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, First Edition 1999 (the Red book);
- (ii) Conditions of Contract for Construction Multilateral Development Bank Harmonised Edition, for Building and Engineering Works designed by the Employer, 2010 Edition (the MDB Contract/Pink Book); and
- (iii) Conditions of Contract for Design, Build and Operate Projects, First Edition 2008 (the Gold Book).'

International financial institutions such as the World Bank, International Finance Corporation, Inter-American Development Bank, and German KfW Development Bank use various versions of DBs extensively, primarily for large infrastructure projects. For example, the World Bank's Standard Bidding Documents for Procurement of Works (SBDW) is mandatory in all work contracts worth at least US\$10 million. SBDW Clause 20 provides for a combination of DB, amicable settlement, and ICC arbitration.²⁹ Pursuant to Clause 20, all claims are referred to a DB, consisting of one or three experts knowledgeable about the type of project in contention and the interpretation of contractual documents, selected by mutual agreement. The DB then issues a decision that barring a Notice of Dissatisfaction with the decision issued by one or more parties becomes final and binding on both parties. However, if a Notice is given, the parties have 56 days to find an amicable solution to the problem before arbitration commences. The rules of the arbitration are determined by whether the contract involves foreign or domestic contractors. In the first case, ICC rules apply; in the latter, proceedings are conducted according to the laws of the employer's country.

Referral of a claim or conflict to a Dispute Board

Per the International Chamber of Commerce's Rules on Dispute Boards,³⁰ DBs are a contractual feature in which the parties agree upon the main aspects of the DB, for example, the selection and appointment of DB members, installation of the DB, scope of work, governing law, internal procedures, site visits, evidentiary rules (contract documents, photographs, videos, expert statements' records, correspondence, and minutes), expiry of the DB mandate, and the enforceability of DB decisions.

Sub-Clause 20.4 of the World Bank's Standard Bidding Contracts, Procurement of Works & User Guide, provides:

'If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its Decision, with copies to the other Party and the Engineer.'³¹

²⁹ See Clause 20 of the Standard Bidding Contracts, Procurement of Works & User Guide, World Bank (April 2015).

³⁰ Rules on Dispute Boards of the International Chamber of Commerce, available at https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/#article_2.

³¹ See Clause 20 of the Standard Bidding Contracts, Procurement of Works & User Guide, World Bank (April 2015).

The DRBF (Dispute Resolution Board Foundation)³² has approved ethics rules for DBs alongside existing rules applicable to arbitrators.³³ DRBF ethics rules contain disclosure requirements from DB members, conflicts of interest, confidentiality of information, duty of diligence in the procedures, and the duty of impartiality, among others.³⁴

Standard mechanics and procedures for the operation of Dispute Boards

DBs continuously monitor the development of the project during its construction, become acquainted with its administration, issue opinions to help the parties mitigate potential conflicts, and help the parties to amicably solve their disagreements.³⁵ The intervention of a DB generally avoids the escalation of conflict.³⁶

There are two already established procedures generally available for DBs: FIDIC³⁷ and ICC.³⁸

Under FIDIC – SC 20.4:³⁹

- any party may refer a disagreement;
- referral is to be in writing;
- copies of the request must be submitted to the other party and the Engineer;
- the parties must ensure the appointment of the Board within 28 days of the commencement date;⁴⁰
- the request must state that it is given under SC 20.4; and
- parties must promptly make available all additional information, and provide access to the site as the DB may require.

³² Dispute Resolution Board Foundation, available at www.drb.org.

³³ Dispute Resolution Board Foundation, Ethics Canons, available at www.drb.org

³⁴ *Ibid* Canons 1, 2 and 3.

³⁵ Juan Eduardo Figueroa Valdés, above note 9, at 127.

³⁶ *Ibid*.

³⁷ ‘Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation’, above note 8, at 8 (defining FIDIC as ‘an acronym of the French professional body “Fédération Internationale des Ingénieurs Conseil” (translated into English as “International Federation of Consulting Engineers”) by which it is commonly known. FIDIC was founded in 1913 by 3 national associations of independent consulting engineers within Europe.’).

³⁸ Romano Allione, above note 6, at 119–120.

³⁹ *Ibid*.

⁴⁰ ‘Dispute Avoidance and Resolution Through Dispute Boards: Introduction, DB Powers and Duties, DB Site Visits, Opinions, Formal Referral, Hearing and Decision/Recommendation’, above note 8, at 12.

Under ICC – Article 18:⁴¹

- any party may refer a dispute to a DB;
- referral must be in writing;
- no informal conversations or separate meetings with DB are allowed;
- a clear and concise description of the nature and circumstances of the dispute must be provided to the DB; and
- a list of issues for the DB’s determination must be furnished, also containing the referring party’s position on the conflict.

The following are the usual stages of a dispute submitted to a DAB:

- commencement date of the project;
- appointment of a DAB by the parties;
- parties’ submission to the DAB;
- DAB decision;
- party’s issuance of a Notice of Dissatisfaction; and
- arbitration.

Decisions of DBs and their enforcement

Prior to making a decision: ‘The DRB [DB] shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the disputes.’⁴² During the hearing portion of the process, DBs do not express opinions concerning the merits of any of the parties’ arguments in the dispute.

Thereafter, according to Procedural Rule 9 of the DBRF Canon, the DB makes a decision in accordance with Sub-Clause 20.4, or in a manner agreed upon by the Employer and Contractor in writing. If the DB is composed of three persons, it convenes after the hearing to discuss and prepare a decision, if possible, unanimously, and if not, the majority determines a decision, and provides a written report for the Employer and the Contractor.

Article 25 of the ICC DB Rules includes a similar provision, stating:

‘Issuing the Conclusion. When the DB is composed of three or more DB Members, the DB shall make every effort to achieve unanimity. If this cannot be achieved, a Conclusion is rendered by a majority of the DB Members. If there is no majority, the Conclusion shall be rendered by the president of the DB alone. Any DB Member who disagrees with the Conclusion shall give the reasons for such disagreement in a separate written document that shall not form part of the Conclusion but shall be communicated to the Parties. The failure of a DB Member to give such reasons shall not prevent the Conclusion from being issued or taking effect.’

41 ICC DB Rules, Art18.

42 Dispute Resolution Board Foundation, Canon 5.

Decisions are referred to as ‘Conclusions’, and are subject to a particular format, including that they must indicate the date on which they are issued and state the findings of the DB, as well as the rationale behind the findings.⁴³

They may also include, without limitation:

‘a summary of the Dispute, the respective positions of the Parties and the Conclusions requested, a summary of the relevant provisions of the Contract; a chronology of the relevant events, a summary of the procedure followed by the DB, and a list of the submissions and documents produced by the Parties in the course of the procedure.’⁴⁴

After a Conclusion is rendered, provisions are in place to guide parties on corrections and interpretation of Conclusions, as needed. Article 26(1) of the ICC DB Rules provides some guidance, stating that if there is an error, the DB may of its own volition correct it, provided that it is a clerical, computational, or typographical error, or any errors of a similar nature contained in a Conclusion, provided such correction is submitted to the parties within 30 days of the date of such Conclusion.

Conversely, any party can apply for the DB to make a correction of the above-described errors, or for the interpretation of a Conclusion, within 30 days of the application by a sole DB member, or the president of the DB. The other party is then granted an opportunity, a short time limit, to submit any comments in relation to the request. After the time limit expires, the correction or interpretation made by the DB is issued within 30 days. The parties may, however, agree to extend the time limit for issuing corrections or interpretations.

Provided that the DB releases a correction or interpretation, all time limits typically associated with the Conclusion start anew, upon receipt of the corrections or interpretations by the parties.

In general, DB decisions may be enforced pursuant to three options: by amicable settlement between the parties, under the FIDIC 1999 Suite, or under the ICC Dispute Board Rules. Under the FIDIC 1999 Suite, when a final and binding decision is made against a party who fails to comply with it, the other party may initiate arbitration procedures under Clause 20.7.⁴⁵ Similarly, under the ICC Dispute Board Rules, the affected party may refer the failure of the other party to comply to arbitration or to court proceedings (Article 4.4).⁴⁶

43 ICC DB Rules, Art 24.

44 *Ibid.*

45 Andy Hewitt. *The FIDIC Contracts: Obligations of the Parties* (John Wiley & Sons, 2014).

46 ICC DBR, Art 4.

Antecedents of the use of the Dispute Boards in Latin America

DBs are not creatures of legislation in Latin America, but are the product of contractual arrangements between the parties pursuant mainly to the interpretation of existing statutes regulating the resolution of disputes concerning public works.⁴⁷

In general, DBs have been conceived in Latin America as a preliminary stage before commencing arbitration.⁴⁸ The immediacy and efficiency provided by DBs allows for a timely and satisfactory completion of construction projects by preventing conflicts instead of attending to conflicts. This represents a pressing and growing need for the expansion of infrastructure projects in the Latin American region.

The growing interest and actuality of DBs in Latin America has been recently reviewed by the Dispute Resolution Board Foundation (DRBF) at its May 2016 annual international conference held in Santiago, Chile.⁴⁹

Given their high level of complexity⁵⁰ and potential for conflicts, construction contracts have been the main beneficiary of DBs in Latin America.⁵¹ In the 1980s, the 'El Cajón' hydroelectric project in Honduras was the first construction project subjected to DBs in Latin America.⁵² Also in Honduras, the construction of the Tegucigalpa-San Pedro highway was subject to a DB.⁵³ In this context, DBs have become a growing alternative for the solution of disputes involving construction contracts in the Latin American region,⁵⁴ and in particular the World Bank has made extensive use of DBs for its Latin America-based infrastructure projects.⁵⁵

A particular legal issue concerning the use of DBs in Latin America is its compatibility with the administrative contract doctrine present in those civil law jurisdictions. Namely, major infrastructure and construction projects usually involve the public administration in one way or another in most jurisdictions. Government agencies participate in large projects in several capacities: at a basic level, as regulators and enforcers of legislation and standards; and at a deeper level as

47 Gustavo Paredes Carbajal, above note 15, at 155.

48 Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (Vol 23, June 2014), at 10.

49 Yasemin Çetinel, 'Dispute Resolution Boards: Lessons from Latin America', Kluwer Arbitration Blog (22 June 2016), at <http://kluwarbitrationblog.com/2016/06/22/dispute-resolution-boards-lessons-from-latin-america/>.

50 Jerry Brodsky, above note 12, at 74 (stating that in any given construction project as many as 200 or more participants may concur:').

51 Roberto Hernández García, above note 48, at 10.

52 Roberto Hernández García, above note 11, at 28.

53 Juan Eduardo Figueroa Valdés, above note 9, at 125.

54 Roberto Hernández García, above note 11, at 17.

55 Gilberto José Vaz, above note 5, at 112.

co-owners of a project. The juridical expression of a governmental agency's involvement in any of these projects in any capacity takes place through administrative contracts. Theoretically, the ultimate role of the administrative contract is to guarantee that the public interest is protected in a given contractual relationship.⁵⁶ By virtue of the principle of legality and pursuant to administrative contracts the parties may only engage in activities that are expressly and previously authorised by existing legislation or regulation. Immersed in a typical Latin American administrative contract are the exorbitant powers of the administration. Pursuant to these powers, the respective government agency may unilaterally modify the contract and impose penalties on the contractor without needing judicial intervention.⁵⁷ In other words, contractual freedom is very limited in administrative contracts. This is the general rule in Latin American legal systems where exorbitant clauses (that is, provisions granting unilateral and overbearing powers to state agencies) are not uncommon.⁵⁸

As a result, several legal issues arise from the use of DBs in conflicts arising from administrative contracts (including construction contracts) in Latin America, including:

- whether a party (private contractor or government agency) may raise the invalidity of the contractual clause appointing a DB as an affirmative defence against the other party's request to submit a matter to a DB;
- whether a DB may decide on a matter that is reserved to the ordinary national courts;
- whether a DB may somehow deviate from the substantive solution or approach provided by specific legislation in a determined matter subject to its resolution under national law;
- whether the DB must consider the public interest as a crucial factor to decide the matter in its purview;
- whether a government agency may accept, comply with, and enforce a recommendation or decision adopted by a DB in a conflict in which that government agency participated;
- whether a DB recommendation or decision may be amended, clarified, or outright annulled by a national court in the country seat of the DB.

⁵⁶ *Ibid* at 103.

⁵⁷ Juan Eduardo Figueroa Valdés, above note 9, at 134.

⁵⁸ Gilberto José Vaz, above note 5, at 106.

Case studies

The use of DBs is already a reality in Latin America, although there exists a broad spectrum relating to level of application and enforceability. The prevalence of DBs has notably been propelled by foreign investment in the region, particularly by entities whose internal regulations provide for the regulation of DBs. However, notwithstanding the patchy landscape of DB use in Latin America, the trajectory of their implementation indicates greater incidence of adoption, as developers, engineers, and investors increasingly recognise the potential of DBs for the efficient resolution of the many types of conflicts which construction projects are particularly prone to produce.

Peru

On one pole of the spectrum are countries like Peru and Chile, which have histories of successful implementation of DBs in large-scale and important infrastructure projects, the decisions of which are enforceable under law. This is especially so in Peru, where the law on public-private partnerships (APP law) and the law on government procurement⁵⁹ include the concept of DBs. This latter law establishes that controversies that arise in public works concerning their performance, or the interpretation, resolution, inexistence, or invalidity of the contract must be solved through conciliation, Dispute Boards (*Junta de Resolución de Disputas*) or arbitration. In 2008, the construction contract for the water treatment Huachipa project included a DB clause.⁶⁰

Further, according to Law No 30225, law on government procurement, Articles 45.1 and 45.2:

- All construction-related controversies until the reception of the works may be submitted to a DB (*Junta de Resolución de Disputas*).
- Measures concerning the nullity, termination, extension of the term of an arbitral agreement, reception of the works, valuation of the works, or the liquidation of a contract for public works, may be challenged through conciliation, arbitration or a DB within a statutory term of 30 days.
- DB decisions may be submitted to arbitration within 30 days after the receipt of the works.
- Decisions issued by government agencies or the Comptroller's Office approving or rejecting additional payments in a construction project may not be subject to conciliation, arbitration, or DB, and must be necessarily subjected to judicial litigation.

⁵⁹ *Decreto Legislativo 1224, Ley Marco de Promoción de la Inversión Privada mediante Asociaciones Público Privadas (APPs)* of September 2015, modified by *Decreto Legislativo 1251* of November 10, 2016 and *Ley No 30594* of 22 June 2017 and *Ley de Contrataciones del Estado del Perú No 30,225* of July 2014, *El Peruano*, 11 July 2014, modified by the *Decreto Legislativo 1341*, of 3 April 2017.

⁶⁰ Juan Eduardo Figueroa Valdés, above note 9, at 125.

Implementing regulations were enacted in December 2015, and modified in 2017,⁶¹ establishing the conditions and characteristics for the operation of this alternative dispute resolution mechanism during the execution of the contract, and prior to the arbitration of contractual disputes. Also in 2015, Peru approved its Framework Law for the Promotion of Private Investment through Public-Private Partnerships aimed at fostering the development of infrastructure and public services, in addition to its implementing regulations, which formally introduce the use of DBs in infrastructure projects.

Additionally, the annual Budget Law No 30,114 of 2014, 11th supplementary provision, expands Article 9 of Legislative Decree No 1,012 to include DBs in Public-Private Associations.⁶²

Peru also takes into account the Dispute Board Rules approved by the Center for Analysis and Conflict Resolution of the Catholic University of Peru, which is currently working on the creation of its non-binding list of experts for DBs.⁶³

Much expectation exists in Peru regarding the benefits that the use of DBs will bring to different areas of the country and in particular considering the infrastructure to be put in place *vis-à-vis* the 2019 Pan-American Games, just as Brazil deeply invested in DBs for the Rio Olympics. There is optimism in Peru that DBs will play an increasingly vital role for the solution of a great proportion of the 69.5 per cent of controversies that are currently subject to arbitration as they presently lack preventative means to solve them during the execution of the contract.⁶⁴ Also, the natural disasters that occurred in Peru at the beginning of 2017 will most likely generate important infrastructure reconstruction projects in that country by the new Administration for the 2017–2021 periods. These new projects will most likely incorporate the alternative dispute resolution mechanism of DBs.

Chile

Similarly, Chile has developed a body of regulations relating to DBs, pursuant to their adoption by sectors of important state industries. However, in Chile, not all DB decisions are binding; the country provides for a three-tiered system created by Chile's Chamber of Industry and Construction, which has approved regulations concerning DBs in that country.⁶⁵

61 *Decreto Supremo* N° 350-2015-EF, Regulations of Law No 30,225 of July 2014 (July 2015), Articles 207–216, modified by *Decreto Supremo* 056-2017-EF (March 2017).

62 Roberto Hernández García, above note 48, at 15.

63 *Reglamento de la Junta de Resolución de Disputas* (Dispute Boards), *Centro de Análisis y Resolución de Conflictos de la Pontificia Universidad Católica del Perú*, available at <http://consensos.pucp.edu.pe/wp-content/uploads/2015/06/REGLAMENTO-1-1.pdf>.

64 Roberto Hernández García, above note 48, at 16.

65 Roberto Hernández García, above note 11, at 29.

The three classes of DB are: (i) Dispute Review Boards (DRBs), which issue binding decisions; (ii) Dispute Adjudication Boards (DABs), which also issue binding decisions; and (iii) Combined Dispute Boards (CDBs), which issue decisions or recommendations.⁶⁶

Chile's DBs conform to the general structure of DBs as contemplated by the ICC definition, in that they are composed of three members, two of them engineers, plus a lawyer and a professional specialised in economic and financial matters.⁶⁷ DB members are appointed by a high-level administrative body for a six-year period, are partially renewed every three years, and may not be reappointed.⁶⁸

Since 2007, Codelco (Chile's main state-owned copper company) has established the mandatory use of Dispute Review Boards (DRBs) in contracts for the construction of underground galleries for copper exploitation worth at least US\$50 million.⁶⁹ In these cases, DRBs only issue recommendations, which the parties may reject within a specific term. In case of silence during this period, the recommendation becomes mandatory for the parties.⁷⁰ Significantly, the construction of the Chacayes Hydroelectric Project in 2012 included DBs.⁷¹

Law No 24,410 of 2010 created 'Technical Panels' for the solution of disputes between the parties.⁷² Technical Panels' decisions may be subsequently submitted to an Arbitral Commission established in the concession contract or to the Santiago Court of Appeals.⁷³ These DBs have ample latitude to review matters related to the project, including the technical and economic evaluation of the investments made by the parties, their progress, costs and delays, the existence of additional costs, additional works, discount rates, risks, financial costs, and a series of other economic factors of determining value for the investment.⁷⁴

66 Yasemin Çetinel, Elina Mereminskaya & Roberta Regazzoni, 'Milan and Santiago Arbitral Institutions adopt Dispute Boards', Kluwer Arbitration Blog, at <http://kluwarbitrationblog.com/2017/01/03/milan-and-santiago-arbitral-institutions-adopt-dispute-boards/>, at 2.

67 Juan Eduardo Figueroa Valdés, above note 9, at 136.

68 *Ibid* at 136.

69 *Ibid* at 127.

70 *Ibid* at 128.

71 *Ibid* at 125.

72 Law No 24,410 published in the Diario Oficial [Official Gazette] on 20 January 2010, referenced by Juan Eduardo Figueroa Valdés, above note 9, at 135.

73 *Ibid*.

74 *Ibid* at 135–136.

Brazil

In recent years, Brazil has joined Peru and Chile in embracing the use of DBs. In its case, DBs were put in place in order to safeguard the timely completion of installations at the Rio Olympics in 2016, just as they were for the 2012 London Olympics. In Rio, a panel of pre-qualified potential Dispute Board members was organised, and special rules were created to fit with local law. Elements of the new system included abbreviated time frames, so that site visits and decisions could be made more expeditiously, decisions were to be binding unless overturned by arbitration, and DB members were chosen for their familiarity with local law, geographic proximity, and experience with DBs; all of these elements were intended to ensure the quick and efficient resolution of disputes.⁷⁵

In Brazil, recourse to DBs has been deemed doctrinally acceptable under several pieces of legislation, including Law No 8,666 of 1994, Article 42 §5^o, providing:

‘... the execution of works, services or the acquisition of goods with financial resources or donations originating by a foreign official cooperation agency or a multilateral financial organization of which Brazil is a part thereof, allows for the inclusion in the respective bidding process, of conditions arising from accords, protocols, international conventions or treaties approved by the National Congress, as well as the provisions and procedures of the aforementioned entities.’⁷⁶

Then, pursuant to Law No 8,666 of 1994, Brazilian legislation does not create DBs directly, but indirectly allows for the inclusion of DB clauses in contracts involving the granting of financing by foreign development agencies or multilateral financial institutions *when* the internal regulations of such organisations and institutions allow for the inclusion of DBs.

Also, the Law of Concessions No 8,987 of 1995, as amended by Law No 11,196 of 2005, Article 23-A states:

‘The contract concession may establish the use of private mechanisms for the resolution of disputes deriving or related to the contract, including arbitration, to be performed in Brazil and in Portuguese....’⁷⁷

In addition, the Law on Public-Private Alliances No 11,079 of 2004, Article 11 establishes that:

⁷⁵ See Augusto Figueiredo, DRBF 15th Annual International Conference, Dispute Board Programme for the Rio 2016 Olympic and Paralympic Games (22–23 May 2015), available at www.drbf.org.au/document/conferences?task=document.viewdoc&id=316.

⁷⁶ Law No 8,666 of 1994, Article 42, §5^o cited in Gilberto José Vaz, above note 5, at 108.

⁷⁷ Law of Concessions No 8,987 of 1995, Article 23-A, cited in Gilberto José Vaz, above note 5, at 110.

'The convoking instrument [to the bid] shall contain ... the use of private mechanisms for the resolution of disputes, including arbitration, to be performed in Brazil and in Portuguese ... to decide conflicts deriving or related to the contract.'⁷⁸

Mid-spectrum jurisdictions

In the centre of the spectrum are countries such as El Salvador, Mexico, and Bolivia, all of which have some experience with implementing DBs, but whose legal frameworks for them are not as mature as some of the other aforementioned Latin American countries.

El Salvador

For instance, there are several experiences with DBs in El Salvador. Exemplary, is the project for the design and construction of a highway within the Fondo del Milenio (Fomilenio), which was divided to adjudicate the construction of different parts to domestic and international companies with broad experience in the construction of highways and bridges.⁷⁹

Another project, worth US\$460m for the construction of the Longitudinal del Norte highway, was awarded in 13 separate contracts for an average of between US\$15–20m each. Of the total, there were disputes in 11 contracts, for which 12 DB proceedings were instigated.⁸⁰ Eight of the DB decisions were accepted and implemented by the parties without delay. Four of those decisions were followed by arbitrations that eventually ratified them.⁸¹

The new law on Public-Private Associations includes a provision on dispute resolution methods, in particular, referring to a Board of Specialists. That law provides:

'Direct Negotiations and Board of Specialists: Art. 93. The contractual parties shall aim at the beginning to solve their controversies through direct negotiations at the written request of any of them once the points of disagreement have been identified. The date of receipt of this request determines the beginning of the direct negotiations.'⁸²

78 Law on Public-Private Alliances No 11,079 of 2004, Article 11, cited in Gilberto José Vaz, above note 5, at 110.

79 Carlos A Peñate Guzmán, 'Las Mesas de Resolución de Disputas como Mecanismo que Viabiliza la Continuidad en los Proyectos de Construcción: la Experiencia en El Salvador', in Roberto Hernández García, Coordinator, *Dispute Boards en Latinoamérica: Experiencias y Retos*, Biblioteca de Arbitraje del Estudio Mario Castillo Freyre (Vol 23, June 2014), at 91.

80 *Ibid* at 96.

81 *Ibid* at 97.

82 Ley Especial de Asocios Publico Privados. Decreto No 379 of 2013, available at www.jmbauditores.com/biblioteca/detaile_ley.php?nombre=Ley%20Especial%20de%20Asocios%20Publico%20Privados.

Mexico

The laws relating to Dispute Boards in Mexico have become progressively more developed in the area of infrastructure projects. Until the 1990s, it was virtually impossible to use alternative dispute resolution mechanisms for infrastructure projects in Mexico and Central America.⁸³ The most important contract that included an ICC-modelled DB was signed in 2008 and concerned the construction of a US\$1bn drainage project, the Tunel Emisor Oriente. However, two years after initiating the project, the parties were unable to implement the DB in the case, due to lack of confidence in this 'new'⁸⁴ system of dispute resolution, exacerbated also by budget issues, and other conflicts of public administration which have not been settled. This situation stands in contrast with Honduras, which has demonstrated that it can implement DBs in large-scale public works. This is so, because DBs are derived and attached from and to loans and international programmes.⁸⁵

Mexico instituted its first DBs in 1999 to solve a series of conflicts related to oil platforms. Later in 2002, at the joint initiative of the Mexican Government and Mexican Arbitration Center, the first seminar on DBs was organised in Mexico. Another good example of the success of DBs is found in the case of the Hospital del Bajío-Public-Private Partnership in Mexico in 2005, which is a project broadly acclaimed as successful.⁸⁶

However, the stumbling block for the full acceptance of DBs in Mexico seems to reside in the juridical weakness of DB decisions. That is, DB decisions lack the legal force of judicial decisions or even arbitral awards. Said otherwise, DB decisions seem to be impossible to enforce based on current legislation in Mexico, unless they are approved by and incorporated into a judicial decision.⁸⁷

Bolivia

Although Bolivia has not expressly created any regulations relating to Dispute Boards, regulations are impliedly found in Article 14 §4 of the Constitution, which provides that '[t]hat which is not forbidden, is legally permitted'. By applying this article, Dispute Boards may be utilised, and, indeed, they are used in the country as an expedited dispute resolution mechanism. In particular, they are implemented in long-term contracts

83 Roberto Hernández García, above note 10, at 45.

84 *Ibid* at 46.

85 *Ibid*.

86 Herfried Wöss, presentation: 'Recent experience with Public-Private Partnerships for Public Specialty Hospitals in Mexico, Best practices in developing and protecting investments in privately financed infrastructure projects', International Bar Association, Rio de Janeiro, Brazil, 30-31 August 2007; Herfried Wöss, 'Long-term Performance Monitoring in Public Private Partnerships' (2010) 5(2) *Construction Law International* 28-9.

87 Roberto Hernández García, above note 10, at 47.

and large infrastructure projects, BOTs (Build-Operate-Transfer); EPCs (Engineering-Procurement-Construction) energy, oil and gas, other natural resources activities, and in utilities-related projects – principally in contracts involving foreign investments. Furthermore, another principle of civil law, Article 519 of the Civil Code covers Dispute Boards. This article recognises parties' freedom to contract so long as the contract is not at odds with the law.

Early-stage jurisdictions

Finally, several countries, such as Argentina and Ecuador have started to contemplate DBs as a viable mechanism of alternative dispute resolution, but are at a nascent stage.

Argentina

Argentina has a very modest experience with DBs. The Court of Arbitration for Engineering (TAI), created in 2005, includes all the Professional Councils of Engineering of National Jurisdiction, in addition to performing 'arbitration services.' Since 2012, the TAI has provided a 'Dispute Board' service, according to the Regulation prepared for such purposes, which is amended on a five-year basis. The TAI also has trained referees in order to serve on 'Dispute Board' panels. The aforementioned regulation was prepared by the TAI and then analysed and approved by the TAI Board of Directors.

Also, the TAI has been invited to be part of numerous technical bodies, among others, the MERCOSUR Economic and Social Forum, Justice 2020 Project of the Ministry of Justice and Human Rights of the Nation. As part of that project, in June 2016 the Arbitral Tribunal of Engineers of the Argentine Center of Engineers and the Professional Councils of all Engineers with National Jurisdiction presented a Proposal for the Application of Arbitration and Dispute Boards for the Resolution of Conflicts in Public Works (the 'Proposal') to the Ministry of Justice and Human Rights of the Nation.⁸⁸

The Proposal includes three main areas. First, it suggests overhauling all of the legislation and regulation applicable to public works throughout the country to establish that all conflicts and disputes arising therefrom be submitted to mandatory arbitration and/or dispute boards. Secondly, the Proposal seeks to create an entity with the power to control the accreditation of institutions administering arbitration and dispute boards. Finally, the

⁸⁸ In particular, the Justice 2020 Project of the Ministry of Justice and Human Rights of the Nation, 'the TAI has presented the initiative for the Modification of Article 55 of Law 13.064 (Public Works Act)', which has been very well received and is currently being studied.

Proposal aims at repealing all of the national, provincial and municipal legislation and regulation contrary to the above-mentioned provisions.⁸⁹

Ecuador

Ecuador has not yet embraced DBs as such, but it has instituted a similar concept. The Organic Law on Incentives for Public-Private Partnerships and Foreign Investment of 2015⁹⁰ established a dispute resolution model comparable to that of DBs. Chapter V on Conflict Resolution refers to delegated management contracts (DMC).⁹¹ Under this law, when a controversy arises as a result of a DMC, the allegedly aggrieved party may attempt to solve the dispute through a direct negotiation or mediation with the other party,⁹² in order to arrive promptly at a mutually agreeable direct solution by avoiding the escalation of the conflict. The law does not contain provisions regulating the procedure or method for these direct negotiations nor does it set the rules for mediation. Only after direct negotiation or mediation fail does recourse to domestic or international arbitration in the Latin American region become available.⁹³

Ecuadorian law mandates the prior exhaustion of domestic administrative remedies before the submission of a request for domestic or regional international arbitration, as provided in the respective DMC.⁹⁴ However, tax matters and ‘any other act directly derived from the legislative and regulatory power of the State’ are not arbitrable.⁹⁵ Contentious-administrative courts have exclusive jurisdiction to intervene in the resolution of disputes related to DMCs in two situations: (a) when the respective DMC has not included a domestic or regional international arbitration clause;⁹⁶ and (b) when the respective party has failed to initiate arbitration proceedings agreed upon in the respective DMC within the term established by the law after that party has been given notice of the resolution that concludes such administrative procedures.⁹⁷ The parties may agree in their DMC on arbitrations or technical reports to solve purely factual controversies originated during the implementation or liquidation of the respective DMC.⁹⁸ Markedly, the

⁸⁹ Proposal, at 2.

⁹⁰ Ley Orgánica de Incentivos para Asociaciones Público Privadas y la Inversión Extranjera (‘APP Law’).

⁹¹ APP Law, Arts 19–21.

⁹² APP Law, Art 20.1.

⁹³ APP Law, Art 20.2 ¶1.

⁹⁴ APP Law, Art 20.2 ¶1.

⁹⁵ APP Law, Art 20.2 ¶2.

⁹⁶ APP Law, Art 20.2(a).

⁹⁷ APP Law, Art 20.2(b).

⁹⁸ APP Law, Art 20.2 ¶6.

construction contract for the hydroelectric Plant of Coca Codo-Sinclair, construction of which started in 2010, with an investment of more than US\$1bn, contemplated DBs as a pre-arbitral dispute resolution mechanism.⁹⁹

Guatemala

Guatemala is representative of the group of Latin American countries with nascent Dispute Board expertise. Dispute Board mechanisms are not explicitly regulated in law. As in most Latin American countries their use is based on the doctrine of freedom of contract, subject to the limitations within the existing framework established by the traditional civil legal system. A mechanism similar to a Dispute Board is provided for within Chapter VII of the Regulation of the Law of Public-Private Partnerships, Acuerdo Gubernativo No 360-2011, although Dispute Boards as such are not mentioned within the Regulation. In response to the demonstrable success of Dispute Boards in Latin America, and the trend of their increased use, the Guatemalan Chamber of Commerce is advocating their use as a means for preventing disputes in the construction sector. The Chamber also considers Dispute Boards as an ideal framework for Public Private Alliances, concessions, government projects, and contracts between private parties.¹⁰⁰

Conclusion

The main purpose of DBs is to provide an efficient, cost-effective, and fair resolution to conflicts that arise in infrastructure and construction projects in parallel to project execution. In essence, DB clauses are included in infrastructure and construction contracts to provide the parties with an alternative to the traditional conflict-solving mechanisms of arbitration and litigation. Usually, independent experts are appointed at the onset of a contractual relationship, and they enjoy ample authority to solve technical conflicts between the parties. DBs are used under the FIDIC MDB Construction Contract, which provides for a standing dispute board that should be in place in all contracts financed by multilateral development banks. The Procurement Office of the World Bank has recently announced that under the new World Bank guidelines there will

99 Juan Eduardo Figueroa Valdés, above note 9, at 125.

100 Andrea Cáceres, 'Dispute Boards Como Medio Preventivo de Controversias en Proyectos de Construcción', Revista *Construcción* de la Cámara Guatemalteca de la Construcción (ed 205) available at https://issuu.com/construguate/docs/revista_construccion_205/44, at 28.

be a strict policy in favour of the use of DBs.¹⁰¹ DBs are part of all MCC FIDIC contracts.

Perhaps, one of the reasons for the rather modest use of DBs in the construction sector is that DBs are generally considered to be expensive. However, available data confirms the opposite.¹⁰² Therefore, convincing these state companies or agencies to resort to DBs in Latin America is still a work in progress. In fact, there is still road to tread in order to see DBs as a fully-accepted method for the resolution of claims and conflicts in the context of infrastructure projects in Latin America. We are convinced that if the most important energy companies or institutions in the region begin to adopt DBs others will follow.

Large oil and gas exploration and production projects are likely to lead to investment arbitration in case of administrative rescission, which is non-arbitrable according to most Latin American legal systems.¹⁰³

At the international level, in February 2011, the Global Corporate Governance Forum held its first training seminar for the Board Directors on Resolving Corporate Governance Disputes in Colombia. In 2004, the International Chamber of Commerce put into effect its Dispute Board Rules (the latest edition is from 2015 and the Rules are administered under the supervision of the ICC's International Centre for Alternative Dispute Resolution),¹⁰⁴ which shows the growing interest of the international community to provide for a common ground concerning this groundbreaking alternative dispute resolution mechanism.

On a related level, the Inter-American Development Bank has shown an increased interest in the incorporation of DBs in its contractual relationships throughout the region. The Inter-American Development Bank's initiative will certainly bring increased energy to the expansion of DBs in infrastructure projects in the region, energy which will certainly be reflected in new or modified domestic legislation on DBs in Latin America.

A last comment on the advantages produced by DBs is that they reduce political risk and help to avoid cases such as the recently settled *Commisa v Pemex* arbitration in which the latter was forced to pay US\$425m. The parties entered into arbitration in 2004, the decision of which was released in 2009.

101 Christopher Brown, Chief Procurement Officer of the World Bank, presentation at the Annual Conference of the Dispute Resolution Board Foundation, September 2016.

102 DB General Overview (Milan Chamber of Arbitration 2016), slide 79.

103 Peru's legal system is different. Arbitration is permitted for international investments, including within the oil and gas industries. In fact, Peru notified CIADI, and the state agency PeruPetro, which subscribes hydrocarbon contracts with foreign investors, as an entity with the judicial capacity to be part of a CIADI process. There has already been a CIADI case between PeruPetro and a Consortium for the exploitation of gas from Camisea in Cusco, in which PeruPetro won.

104 International Chamber of Commerce's International Centre for ADR, available at <https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/>.

After this already lengthy process, *Commisa* sought to affirm its judgment in the Southern District of New York, which confirmed the arbitration award in 2010, only to be subsequently appealed against by Pemex in both the Mexican courts and the Second Circuit. What followed was a remittance of the appeal to the Second Circuit back to the Southern District, and then another appeal to the Second Circuit based on the Southern District's decision, which was not resolved until 2016.¹⁰⁵ With an increased use of DBs in Latin America, it is hoped that cases such as *Commisa* will not come to distract the normal flow of foreign investment into the region.

105 *Annulled Commisa v Pemex Arbitration Award Enforced*, Lexis (Dec. 10, 2016), available at www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5KXH-R8V1-DYW7-W0WH-00000-00/Annulled_Commisa_v_Pemex_arbitration_award_enforced.