

More dispute boards in LatAm construction contracts, urge panellists

Fredrik Karlsson 01 May 2019



Panellists at Latin Lawyer - GAR Live 3rd Annual Arbitration Summit – held yesterday in Miami – called for the increased use of dispute boards in Latin American construction projects to stop them being put on hold.



Ana María Legendre, Carlos Concepcion, Marco Tulio Venegas, Katherine Gonzalez Arrocha and Carlos Ortega

Panellists speaking at the conference, which was held at Holland & Knight LLP's Miami office, spoke strongly in favour of dispute boards, which are largely used in the construction industry. The boards are made up of individuals who are selected by the contracting parties. Their main advantage is that the members are appointed when the project starts and are involved throughout its development. These individuals' familiarity with the issues can speed up dispute resolution.

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“They are supposed to provide a quick solution to disputes, either advisory or binding, although in Latin America it’s normally binding,” explained Ana Maria Legendre from White & Case’s Madrid office and a former lawyer at Alemán, Cordero, Galindo & Lee in Panama. The benefit is that cash can quickly pour into projects again, she added. “This is often crucial for construction companies.”

Katherine González Arrocha, director of the ICC International Court of Arbitration in Panama City, said there is a growing trend for deadlocked parties to use dispute boards, especially in Colombia, Panama and Peru. “These are favourable in the construction disputes,” she clarified.

During the panel, which was moderated by Carlos Concepción of Shook, Hardy & Bacon’s Miami office, Legendre said clearer regulation of how dispute board nominees are appointed is needed to make them work well in Latin America. She also said dispute boards must be sold as beneficial to both construction companies and governments. “At the end of the day, if a concession is delayed, it is the government missing out on income,” she said.

Carlos Ortega, an engineer from FTI Consulting in Colombia, said dispute boards can make contract amendments easier. Public officials tend to refrain from signing contract amendments, because they don’t want to be investigated, he said. “But if a disputes board tell them to, officials are more willing to sign.”

Besides urging for more dispute boards in construction contracts, panellists said Latin America needs clearer regulatory frameworks for how companies obtain the necessary environmental and social licences. Marco Tulio Venegas, a partner at Mexican firm [Von Wobeser y Sierra SC](#), noted how companies are normally aware of the social licences, but often intervene in consultations to convince the communities. This often results in non-transparent consultations. “In those cases, can these companies really claim losses against the government when projects don’t go ahead?” he questioned.

Another problem is how regulations are followed. Social licences in Mexico should be obtained before projects start. “This rarely happens,” Venegas said. This causes projects to get suspended.



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Issues involving the regulatory framework also arise in Panama, said Legendre. When companies start consulting communities for environmental and social licences, it is up to them to identify the affected stakeholders. “There is no framework guaranteeing that certain communities are actually involved in the consultations, which allows companies to go through these consultations without major obstacles,” she said.

FTI’s Ortega also pointed to regulatory difficulties in Colombia. There is no defined way for how to obtain environmental and social licences and the latter is rarely clearly described in the contract, he said. This makes it difficult to know under which clause to file a complaint. Communities or individuals moving closer to a project area after it has started can also cause problems. This is because the implications of that move are not clearly covered by existing legislation.

The summit was co-chaired by [Miranda & Amado Abogados](#)’ José Daniel Amado and Jonathan Hamilton of White & Case LLP’s Washington, DC office. Latin Lawyer will continue its coverage of the event in upcoming briefings.

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