DISPUTE BOARD

IN INFRASTRUCTURE CONTRACTS

JULY | 2024

ANALYSIS OF COURT DECISIONS

COORDINATION

LUIS FELIPE SALOMÃO

ELTON LEME

SUPPORT:

Jusbrasil

FGV JUSTIÇA

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SUMMARY

P

PRESENTATION

PRESENTATION

Referring disputes to more appropriate resolution approaches, such as arbitration, mediation, conciliation and dispute board, has the approval of the Brazilian Judiciary. In this sense, the National Council of Justice, through Resolution nº. 125, of 2010, gave appropriate means of resolving conflicts the status of national judicial public policy. This topic is part of the "conflict resolution" research line at the Judiciary Center, a line established since its creation and which already contributes to different studies and research in the sector.

The dispute board — or conflict prevention and resolution committee — is a contractual management instrument and has gained prominence in the civil construction and infrastructure sectors, aiming to resolve controversies that arise during construction work more quickly and impartially to avoid downtime. Specialized literature[1] refers to the method, also, through variations of terms such as "committee", "board", "council", among others.

According to the Dispute Resolution Board Foundation (DRBF)[2], an institution created in 1996 with the purpose of disseminating the prevention and resolution of disputes throughout the world through the aforementioned method, such committee is formed at the beginning of the project with impartial professionals to monitor the progress of construction, avoid disputes and assist in resolving disputes during contract performance. There are several training models for dispute boards, which can be differentiated by their main function within a project (prevention or resolution of disputes, or both), by the number of members that make up the committee (one or three, and exceptionally, five or up to seven members), by the duration (permanent or to this) and by the nature of the rules that the dispute board opera.

The expected use of dispute boards in infrastructure contracts are supported by institutions such as International Federation of Consulting Engineers (FIDIC) and World Bank.

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1 JOBIM, Jorge Pinheiro; RICARDINO, Ricardo; CAMARGO, Rui Arruda. "A experiência brasileira em CRD. O caso do metrô de São Paulo". In: CRD - Comitê de Resolução de Disputas nos contratos de construção e infraestrutura. São Paulo: PINI, 2016, pp. 169-191.

2 DISPUTE RESOLUTION BOARD FOUNDATION. DRFB Practices and Procedures Manual. Charlotte: Dispute Board Resolution Foundation, 2007.Resolution Foundation, 2007.

In 2005, a group of development banks formed by the European Bank for Reconstruction and Development, the Asian Development Bank, the African Development Bank, the Black Sea Trade and Development Bank, the Caribbean Development Bank, the Caribbean Development Bank Europe and the Inter American Development Bank published the document "Procurement of works and user's guide" which, in addition to recommending and adopting the dispute board as a form of dispute resolution, also gave these committees the power to issue mandatory decisions[3].

This research analyzes the dispute board based on decisions that referred to the method, with the perspective of evaluating, among other issues, the maintenance or reform of the committees' decisions by the judiciary bodies. The study also aims to contribute with elements that assist discussions on Bill nº. 2.421, of 2021, which regulates the installation of Dispute Prevention and Resolution Committees in public contracts and is currently being processed in the Chamber of Deputies.

Have a good read!

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3 CHERN, C. Chern on dispute boards: practice and procedure. 3rd. Edition. Abingdon: Informa Law, 2015.

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The mission of the FGV Justice is to contribute to improving the justice system, by promoting the development of research, studies, discussion forums, events and academic activities. The lines of research are:

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(iv) Human rights;
(v) Conflict resolution;
(vi) Health;
(vii) Infrastructure;
(viii) Public finances and Taxation.

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CONTEXTUALIZATION

01

CONTEXTUALIZATION

The anticipated use of dispute boards — or dispute prevention and resolution committees — in infrastructure contracts has been increasingly common. The complexity of the subject, associated with recent changes in laws in certain sectors, such as sanitation, requires that specialized professionals monitor the developments of these contracts which involve large resources and, in general, are long-term.

The use of this conflict resolution mechanism gains prominence, due to its relevance to the business environment, as it helps to avoid the stoppage of public works. Foreseeing the use of this mechanism is commonly a requirement by the financing body, due to the potential benefits for the continuity and execution of the work. In Brazil, this issue is specially sensitive, as revealed by the consolidated data in the audit report carried out by the Federal Court of Auditors[1]. According to this document, the country records that more than 14 thousand public works financed with federal resources are paralyzed, which represents approximately 1/3 of the works that should be in progress. Furthermore, around 37% of the works had no progress in the last three months and resulted in an investment of 114 billion reais.

The judicialization of infrastructure contracts is a problem with repercussions that go beyond the issue of halting works. The time taken to make a decision, even in an arbitration court, is long compared to the standard time for procedures of other types. One of the reasons for the delay in Judicial and arbitration processes comes from the time and complexity of technical examinations and decisions in the procedural course, an element that is greatly impacted when technical boards act during the execution of the work, as assessments take place gradually long contractual trajectory. The objective is primarily that, in the event of any issue, disagreement or conflict there is a technical positioning that guides the behavior of all actors involved until that the final word be given by arbitration or the judiciary, based on the idea of "pay, resolve and comply now and discuss later".

1 UNION COURT OF ACCOUNTS. Operational audit of suspended works. Available at: https://portal.tcu.gov. br/imprensa/noticias/obras-paralisadas-no-pais-causas-e-solucoes.htm. Accessed on: 31 July. 2023.

In Brazil, the disputes boards were foreseen in the construction and expansion contracts for line 4 of the SP subway, in the Belém BRT, in the reconstruction works in the city of Mariana, due to the dam disaster, among others.

The theme of dispute board reaches the courts for consideration, including the discussion of the validity of the use of this method of resolving disputes, as well as the maintenance or reform of the committee's decision. The tendency is this mean of adequate conflict resolution to be increasingly applied in complex contracts, with special attention to the basic sanitation sector, which is the focus of billion-dollar investments in the country and has moved the concessions market, due to the publication of the Law nº. 14.026, of 2020, which updated the legal framework for sanitation. In this sense, this research seeks to analyze the decisions that refer to the dispute board in infrastructure contracts.

OBJECTIVES AND METHODOLOGY

02

OBJECTIVES AND METHODOLOGY

General objective: to identify and analyze judicial decisions within the scope of the STJ, state Courts of Justice and Federal Regional Courts, as well as decisions of the state Audit Courts and the Federal Audit Court that deal with dispute boards in infrastructure contracts.

Specific objectives:

a) Find out which courts have already had to deal with issues related to dispute boards;

b) Understand the demands related to dispute boards that are judicialized in Brazil, and verify the most common characteristics and patterns of these demands;

c) Identify and specifically analyze decisions that refer to the application of dispute boards in infrastructure contracts;

d) Investigate how courts approach board decisions, particularly whether or not they attribute legal binding to these pronouncements;

e) Estimate the proportion of committee decisions or recommendations that are upheld by the courts.

Methodology

This research is based on a combined methodological approach, incorporating elements of quantitative and qualitative research to provide a complete and rigorous analysis of decisions related to dispute boards.

Initially, quantitative research was carried out based on collecting data on decisions relating to dispute boards in the courts of justice, the Federal Court of Accounts (TCU),

State Court of Accounts (TCE) and the Superior Court of Justice (STJ). This data was extracted from the Jusbrasil database, a partner in this study. This stage allowed the creation of a general overview of the volume and nature of legal demands processes that involve dispute boards.

Jusbrasil mapped 54 decisions based on the keywords "board", "dispute", "committe" and "infrastructure", which were given by the TCU, STJ, Court of Justice of the State of São Paulo (TJSP), Superior Electoral Court (TSE), Court of Justice of the State of Rio de Janeiro (TJRJ), Court of Justice of the State of Pernambuco (TJPE), State Court of Accounts of Minas Gerais (TCE-MG), Court of Justice of the State of Santa Catarina (TJSC), Federal Regional Court of the 1st Region (TRF-1), Federal Regional Court of the 3rd Region (TRF-3), Federal Regional Court of the 4th Region (TRF-4), Regional Labor Court of the 1st Region (TRT -1) and Regional Labor Court of the 4th Region (TRT-4). Next, the research identified that the dispute board in infrastructure contract was the central object of eight decisions, which were restricted to the scope of the TCU, TJSP and STJ.

The rest (46 decisions) were discarded from the analysis because they only cited the dispute board and/or its related terms (e.g. Dispute Resolution Committee), without this resolution method having had any repercussions on the case. For example, the TSE, within the scope of the administrative process nº. 0600169-60.2022.6.00.0000, provided for Resolution nº. 23.702, which dealt with governance policy of contracts in the electoral Court. The art. 31 of the aforementioned Resolution provides for the possibility of the TSE installing dispute resolution committees with the aim of resolving controversies related to available property rights, such as issues regarding the rees-tablishment of the economic-financial balance of the contract, non-compliance with contractual obligations due to any of the parties and the calculation of compensation. In the STJ, Special Appeal (Resp) nº. 0026453-13.2012.8.19.0000 RJ 2015/0177694-9, dealt with an advisory committee, installed in the case of a corporate operation to, in an opinion capacity, resolve specific divergent issues. For the specific disagree-ment regarding the values of the shares to be acquired, the parties agreed that the corresponding decision of the third party would be final, definitive and accepted by the parties. The vote of the rapporteur, Minister Marco Aurélio Bellizze, favors the con-tractual provision that establishes the third party's opinion as the final decision on the issue of determining the value of the shareholding. Therefore, the case was dismissed without prejudice.

The decisions of the TRT-1 (Labor Action - 0101725-49.2016.5.01.0024; Labor Action - 0101763-95.2016.5.01.0045; Labor Action - 0101740- 15.2016.5.01.0025; Labor Action - 0101754-47. 2016.5.01.0009 ; Labor Action - 0101748-22.2016.5.01.0015) relate to a fixed-term contract between the Organizing Committee of the Rio 2016 Olympic Games and Tecnogera Locação e Transformação de Energia S.A, to contract the supply of a temporary energy system, in the "clusters" called Copacabana, Deo-

doro and Maracanã, covering low voltage (BT) and medium voltage (MT) for the Rio 2016 Olympic and Paralympic Games, in the turn key modality, as regulated in the clauses set out below and defined in the Technical Scope and other annexes to this instrument, listed in Clause Fourteen. The contract provides as one of the contractor's obligations the maintenance of Daily Work Records ("RDOs"), resource histograms and meeting minutes updated and permanently available for consultation by RIO 2016 and the Dispute Resolution Committee ("CRD "), also presenting a weekly photographic report to monitor the work. Due to the fact that it mentions the Dispute Resolution Committee, the decision appears was found in the case base mapped by Jusbrasil.

In TRT-4, the labor action (0020933-21.2020.5.04.0401) has an attached Lattes CV that mentions the complainant's pparticipation in an event about the dispute board. Therefore, all decisions within the scope of labor justice were not subject to analysis by the institute.

The decision of the TCE-MG (Representation: RP 1077065) addresses an administrative contract between the Municipal Government of Santa Cruz de Salinas and the Intermunicipal Consortium of the Mining Area of Sudene, initiated to provide school transport in the municipality. Upon noticing a failure to provide the service, the City Hall extrajudicially notified the contracted company, informing them of the inadequacy of the vehicles presented, as well as establishing a period of 30 (thirty) days for replacement and adjustment, under penalty of application of a contractual fine, suspension payment and termination. The contractor, in turn, acknowledged the inadequacy of the vehicles presented, arguing, however, that the service was being properly provided with safety and efficiency. Both signed a consensual solution through an Administrative Agreement. The decision understood that the consensual initiative adopted by the Public Administration of Santa Cruz de Salinas is compatible with the Law nº. 14.133, of 2021, which art, 151, mentions the possibility of installing a dispute resolution committee in administrative contracts. This is the only mention of dispute boards in the decision.

The TJRJ's decision (Interlocutory appeal n°. 0037958-15.2023.8.19.0000) highlights that one of the parties to the dispute is "an author and speaker in the area of alternative conflict resolution methods — mediation, arbitration, dispute boards, litigation financing and production of technical evidence in arbitrations, as well as issues related to compliance (FCPA), risk mapping and management and implementation of corporate governance."

The TJPE's decision (Case n°. 0006572-50.2017.8.17.3130), in the context of judicial recovery, only points to the possibility of creating a Dispute Resolution Committee as an alternative method of conflict resolution.

The decisions of the TRFs and the TJSC could not be accessed through the link provided

by Jusbrasil and, therefore, at first, they were not analyzed within the scope of this report.

Next, qualitative research was carried out, which consisted of analyzing the entire content of the processes, allowing a more in-depth understanding of the characteristics of these demands and the courts' responses.

After collecting and analyzing the data, the research focused on compiling and synthesizing the findings, resulting in the writing and delivery of this final report.

RESEARCH

03

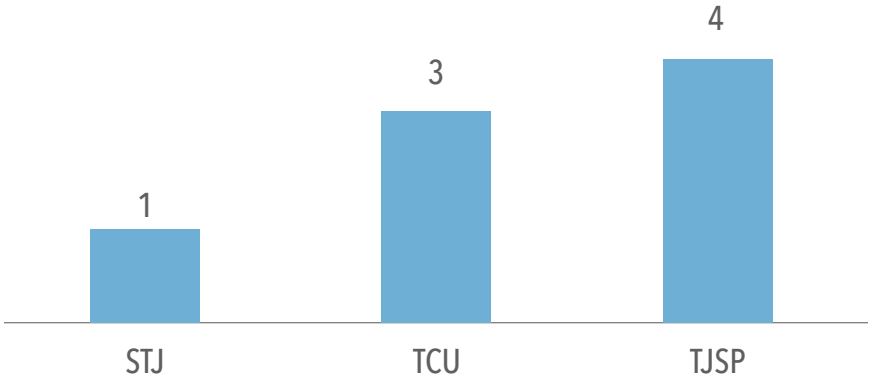
RESEARCH RESULTS

The research results are presented in two stages: the first brings together general information about the decisions, such as the court that issued them, the type of process, rapporteur, theme of the board, parts of the process, nature and position of the Judiciary in relation to the decision issued by the Committee. The second stage analyses, individually, each of the eight decisions that have the dispute board as its central objective, in order to deepen about the case, the doctrine cited in the decision and whether the judicial provision effectively addressed with the decision issued by the Committee.

3.1 Data consolidation and analysis

In the universe of 54 decisions analyzed, the dispute board in infrastructure contracts was the central object of eight decisions in the following courts: TCU, TJSP and STJ, as shown in graph 1 below.

Graph 1. Courts that analyzed the dispute board in infrastructure contracts as a central theme of a decision



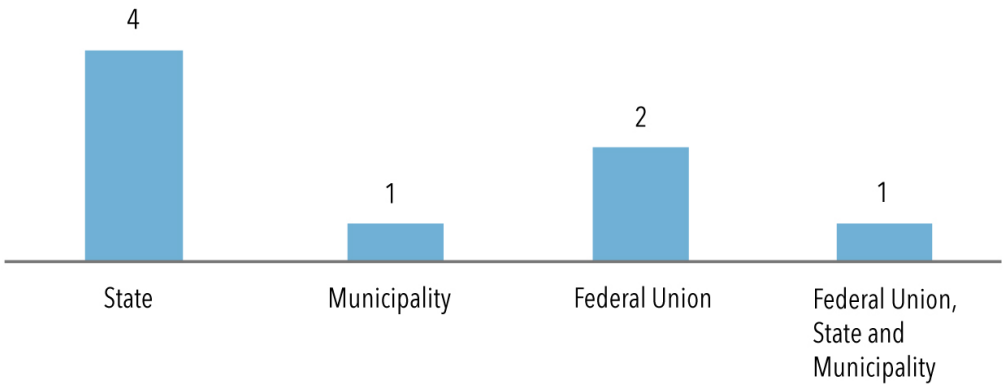
The types of process included privatization monitoring records, appeal, special appeal, instrument appeal, the direct action for the declaration of unconstitutionality and motion for clarification, as compiled in the table below.

Table 1. Type of process by Court

	COURT	JUDGE-REPORTEUR	BOARD SCOPE
1	TCU	Vital do Rêgo	Highways
2	TCU	Benjamin Zymler	Highways
3	STJ	Francisco Falcão	Subway
4	TCU	Torres de Carvalho	Subway / Trains
5	10th TJSP Public Law Chamber	Vital do Rêgo	Subway / Trains
6	TJSP special body	Costabile e Solimene	Direct action of unconstitutionality sponsored by the Municipal Mayor of Sorocaba.It challenges the content of article 4 of Law no. 12,235, of 10/13/2020, which regulates the installation of dispute prevention and resolution committees in ongoing administrative contracts celebrated by the direct and indirect administration of the municipality and provides other measures.
7	10th TJSP Public Law Chamber	Torres de Carvalho	Subway / Trains
8	10th TJSP Public Law Chamber	Torres de Carvalho	Subway / Trains

The research also found that the public administration was part in all the processes analyzed, as illustrated in graph 2 below.

Graph 2. Frequency of public administration as part of the processes

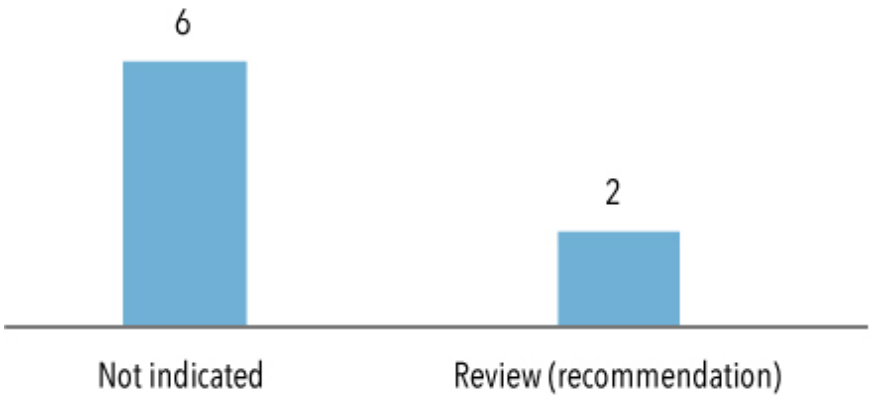


In the 8 decisions that dealt with the issue of dispute board in infrastructure contracts, it was possible to verify that the clause providing for referral of the conflict to the dispute resolution committee was present in seven of the eight cases analyzed.

It is worth highlighting that the only case in which the clause could not be perceived in the contract was a direct action of unconstitutionality, filed by the Mayor of the municipality of Sorocaba in the TJSP, with a view to challenging the content of the art. 4 of Law n°. 12.235, of 2020, which regulates the installation of dispute prevention and resolution committees in ongoing administrative contracts concluded by the direct and indirect administration of the municipality and provides other measures. The text was vetoed by the previous Mayor, however, it was overturned by the city council.

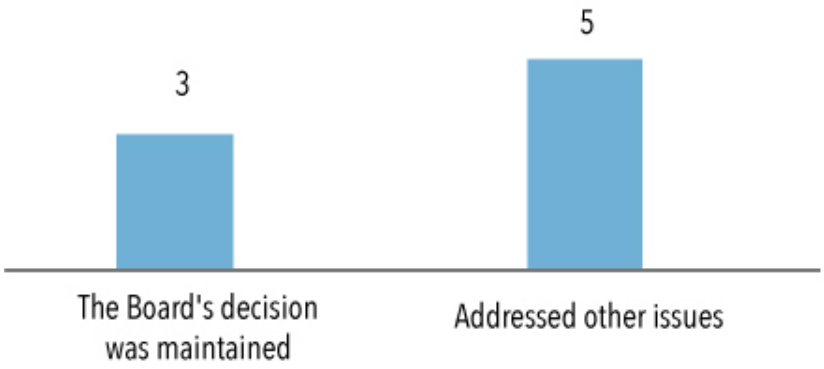
In some decisions, it was possible to ascertain the nature of the dispute board foreseen or established. The most common was the review committee, or mere recommendation, in the TCU privatization monitoring records. In five of the eight cases there is no indication whatsoever about the nature of the board, as can be seen from the graph below:

Graph 3. Nature of the Committee



The decision maintained the Committee's decision or, simply, dealt with other situations that do not concern the board. In none of the cases did the Judiciary reform the decision of the board, as shown in the following graph:

Graph 4. Courts in the face of the decision of the board



From the analysis of the content of the decisions, it was not possible to accurately extract whether the committee was ad hoc or permanent; nor whether arbitration was initiated after the decision of the board.

3.2 Case analysis

FEDERAL COURT OF ACCOUNTS (TCU)

1) TC 016.936/2020-5

The TCU has three decisions that analyze the issue of dispute boards in infrastructure contracts; all of them within the scope of privatization monitoring records.

Subject:

Privatization monitoring documents and monitoring documents for the first stage of privatization, referring to the granting of concessions for sections of the federal highways BR-153/TO/GO and BR-080/414/GO.

Rapporteur: Minister Vital do Rêgo

Year of decision: 2020

Theme of board: Highways

Bodies/Entities:

National Land Transportation Agency; Planning and Logistics Company S.A., Ministry of Infrastructure.

Decision link:

https://www.jusbrasil.com.br/jurisprudencia/tcu/1720390181

Understand the case:

The concession process is conducted by the National Land Transport Agency (ANTT) and the report of the aforementioned process at the TCU used as a basis the instruction prepared within the scope of the Secretariat for Inspection of Road Infrastructure and Civil Aviation. The instruction pointed out that:

> ANTT makes a regulatory option to have a leaner contract and detail the rules for the agency and concessionaires to operate within the scope of regulations. Note that there are more than 50 mentions of "ANTT regulations" in the contract under analysis (part 73).
> 30. In this sense, in order to understand ANTT's regulatory framework and its impact on the contract under study, ANTT was asked what specific regulations the contract refers to. This fact gains importance when there is an important number of regulatory innovations that aim to correct/improve the scenario of non-executions faced in the concessions.
> are federal highways.
> 31. This regulatory option brings three risks: i – lack of clarity regarding the extent of the rules agreed upon when signing the contract, since in addition to the contract the private partner has to know the entire ANTT regulatory framework that complements it (in the case of existing regulations);
> ii – conflicts between contractual clauses and regulatory clauses, which make it difficult to implement a response in the specific case, and iii – regulatory gaps, that is, contractual clauses that cannot be exercised due to the lack of detail in the contract and the absence of regulation by the ANTT.
> [...]
> 33. Regulatory innovations are varied and range from changing the type of auction and changes in risk allocation to requirements regarding the projects to be delivered to complete the works listed in the contract, as well as those that may prove necessary in the future, contractual amendments.
> 34. We can highlight the following innovations: hybrid auction (lowest tariff criterion – limited to 16.25%, followed by higher upfront grant), demand protection mechanism (for the 1st and 2nd investment cycles), protection mechanism exchange rate, greater detail of the rules for early termination, possibility of reaching a tripartite agreement (concessionaire, granting authority and financier), linked resources (resources intended for exchange rate protection, frequent user discount and demand protection), user discount frequent, tariff reclassification (different tariff for simple and duplicate sections), presence of an independent rapporteur to define whether initial work was delivered and measurement of the increase and rebalancing discount and the possibility of using the dispute board for conflict resolution (emphasis added).

It is important to highlight that the concession contract provided, in clause 41, three dispute resolution mechanisms, which included the self-composition of conflicts, arbitration and the conflict resolution committee (dispute board). However, the instruction highlighted that:

> 529. AAnother point that deserves to be highlighted is that the dispute board It is not dealt with by any

> specific Law nor is it regulated by ANTT. It should be noted that both arbitration and self-composition have specific legislation (Law n°. 9.307, of 1996 (amended by Law n°. 13.129, of 2015, which included §1° of article 1 and Law n°. 13.140, of 2015, respectively) and are covered in the Resolution n°. 5.849, of 2019.
>
> 530. In this sense, the absence of regulation by ANTT of a mechanism provided for in the contract incurs the risk of a regulatory gap, which may generate a pretext for the concessionaire's failure to fulfill obligations as well as judicial or arbitration challenges.

The ANTT attorney's office itself emphasized the importance of regulating such a mechanism in order to foresee the rite and conditions of applicability and that the installation of the Committee should be reserved for exceptional and complex concrete situations, so as not to exceed the agency's competence. Given these circumstances, the instruction recommended the exclusion of the dispute board as a mechanism for resolving contract disputes, which was reaffirmed by the TCU.

Specialized doctrine cited about the dispute board
There is not.

Conclusion:
The TCU understood that the predictions regarding dispute resolution through the dispute board were inadequacy, considering the absence of specific regulation by ANTT.
It is worth emphasizing that some legislation expressly recognizes the possibility of predicting the dispute board in administrative contracts, such as Law n°. 8.987, of 1995, Law n°. 11.079, of 2004 and Law n°.14.133, of 2021

Comments

The case report indicates that the draft contract contains the following characteristics of the dispute resolution committee:

- optional nature of its adoption for the parties;
- ad hoc establishment;
- recommendatory nature of the position issued;
- composition of 3 (three) members to be designated by ANTT and the concessionaire, in the established manner, provided that pre-established requirements are met;
- anticipation of related costs and expenses by the concessionaire and compensation through Factor C, in an amount corresponding to 50% (fifty percent) of the expenditure, in the ordinary review subsequent to the conclusion of the committee's work and proof of disbursement.

On August 8, 2023, ANTT held public hearing session n°. 6, of 2023, with the aim of collec- ting suggestions and contributions to the proposal for regulation of the dispute prevention and resolution committee (dispute board), to be applied to highway and railway conces- sion contracts signed between the Agency and its regulated entities.

The dispute proposal board, which is included in the ANTT 2023/2024 Regulatory Agenda, was developed by the Infrastructure concession Superintendency (Sucon), Road Infrastructure Superintendence (Surod) and Railway Transport Superintendence (Sufer).
Three types of committee were defined: permanent (from the beginning to the end of the contract), temporary (with a limited term) and ad hoc constituted in the absence of the temporary committee in complex works or services not foreseen in the contract. The formation of the committees will be composed of three members: one member appointed by ANTT, one appointed by the concessionaire and another member chosen in agreement between ANTT and the concessionaire, who will be the president of the committee.

Additional Information:

Public hearing link:

https://www.youtube.com/watch?v=xoMIlgQQ-9Q

2) TC 018.901/2020-4

Subject:

Monitoring documents relating to the intended concession of sections of the BR-163/MT/PA and BR-230/PA highways. The concession process is conducted by the National Land Transport Agency (ANTT).

Rapporteur: Minister Benjamin Zymler

Year of decision: 2020

Theme of board: Highways

Bodies/ Entities:

National Land Transportation Agency; Planning and Logistics Company S.A.; Ministry of Infrastructure

Decision link :

https://www.jusbrasil.com.br/jurisprudencia/tcu/1720389909

Understand the case:

These follow-up documents are in charge of the intended concession of sections of the BR-163/MT/PA and BR-230/PA highways. The concession process is conducted by the National Land Transport Agency (ANTT).

The decision adopted as a report the instruction prepared by auditors from the Secretariat for Inspection of Road Infrastructure and Civil Aviation. Regarding dispute resolution, the report points out that:

516. In the contractual draft under examination, clause 38 innovates by highlighting four dispute resolution mechanisms, namely: self-composition of conflicts, mediation, arbitration and conflict resolution committee, or dispute board. Its sub-clauses are divided into: general provisions (38.1), self-composition of conflicts (38.2), arbitration (38.3) and conflict resolution committee, or dispute board (38.4) (piece 66, p. 65 to 69). 517.

519. Therefore, in fact, the draft concession contract proposes three forms (and not four) of conflict resolution, namely: self-composition (which in the ANTT resolution is mistakenly called "mediation"), arbitration and resolution committee of conflicts (dispute board), so that sub-clauses 38.1.1 and 38.1.2 must be adjusted to eliminate the term mediation, used inappropriately, according to art. 1 of Law 13,140 of 2015.

Specifically regarding the Dispute Resolution Committee, the report highlights that:

520. Under the terms of the contractual draft (part 66, p. 68): 38.4.1 To resolve any differences of a technical and/or economic-financial nature manifested during the execution of the contract, it may be constituted, in accordance with art. . 23-A of Law n°. 8.987, of 1995, on the initiative of ANTT or the concessionaire, conflict resolution committee (dispute board). (...) 38.4.6 The procedures for establishing and functioning the dispute board must be established by mutual agreement between the Parties, observing this Agreement and, if applicable, ANTT regulations.

521. A dispute board is not dealt with by any specific law, nor is it regulated by the Agency, while arbitration and self-composition are subject to specific laws (Law n°. 9.307, of 1996, amended by Law n°. 13.129, of 2015, which included §1° of art. 1: "direct and indirect public administration may use arbitration to resolve conflicts relating to patriotic rights monials available"; and Law n°. 13.140, of 2015, respectively) and also ANTT Resolution n°. 5.845, of 2019.

522. The regulatory gap resulting from this lack of regulation by ANTT of a mechanism provided for in the contract may lead to con- tractual non-performance or judicial or arbitration challenges by the concessionaire, which may taint the entire contractual execution.

529. Thus, the dispute board can only be used after regulation, as it lacks detail, as noted by the ANTT attorney's office in an examination in which it provided the following contextualization and presentation of the legal basis of the mechanism (part 70, p. 9): 80. In addition to the self-composition of conflicts, mediation and arbitration, the draft contract provides for the possibility of establishing a conflict resolution committee (dispute board), on the initiative of ANTT or the concessionaire, with a view to resolving any differences of a technical and/or economic-financial nature manifested during the execution of the contract. 81. The draft contract also contains the following characteristics of this form of dispute resolution: optional nature of its adoption for the parties; ad hoc establishment; recommendatory nature of the position issued; composed of 3 (three) members to be designated by ANTT and the concessionaire, in the form established, as long as pre-established requirements are met; anticipation of related costs and expenses by the concessionaire and compensation through Factor C, in an amount corresponding to 50% (fifty percent) of the expenditure, in the ordinary review subsequent to the conclusion of the Committee's work and proof of disbursement. 82. Clause 40.4 of the draft contract provides for its basis in art. 23-A of Law n°. 8.987, of 1995, (...)

530. The specialized prosecutor's office also emphasizes that the dispute board, due to its optional and recommendatory nature, could harmonize with the technical regulatory competence of the Agency, however, it states that it should be reserved for exceptional and complex concrete situations, not exceeding the competence of the authority, and also highlights the importance of regulating such a mechanism in order to predict the rite and conditions of applicability (piece, 70, p. 10 – emphasis added):

84. It is true that, as provided for in the draft contract, especially due to its optional and recommendatory nature, it seems to us that the duties of this committee could be harmonized with the exercise of this technical regulatory competence by the Agency.

85. However, it is worth highlighting here that this compatibility or harmonization will be better assessed within the scope of its applicability, as it is a new mechanism, and it is recommended from now on that it be in fact reserved for specific exceptional and complex situations, not exceeding the competence of this Agency to establish general and abstract standards and to interpret them in an isonomic sense for all those regulated.

86. In this sense, aiming to provide a broader analysis of this prediction, it is recommended to foresee that its exercise may be subject to regulation by the Agency, which will allow for greater details of its rite and its conditions in general. (...)

531. It is unfeasible to immediately use the mechanism provided for in the draft contract, as essential definitions are absent, referring, for example, to the experience required of committee members, the procedure at ANTT (which area of the Agency and in which such a mechanism will be required at this time) and to exceptional and complex concrete situations. (piece, 66, p. 68 and 69 – our highlights): 38.4.3 The establishment of the dispute board can only occur for the issuance of a position on a specific issue of an eminently technical nature in the face of exceptional and complex concrete situations, on a recommendatory basis, with the aim of providing support for ANTT's decision-making and must, therefore, be given in advance the administrative decision on the matter (...) 38.4.5 The members appointed to the Conflict Resolution Committee (dispute board) appointed by the parties must also comply with the following minimum requirements: (i) be in full civil capacity; (ii) not have, with the Parties or with the dispute submitted to them, relationships that characterize cases of impediment or suspicion of judges, as as provided for in the Code of Civil Procedure; and (iii) have well-known and proven technical knowledge in the subject matter of the dispute to be submitted by the parties. 38.4.6 The procedures for establishing and functioning the dispute board must be established by mutual agreement between the parties, observing this agreement and, if applicable, ANTT regulations.

532. Furthermore, the instrument may not present the required agility, since, in addition to all the time necessary to understand the specific complexities of the concession, with its interrelated main and accessory obligations, the committee will be established on an ad hoc basis, or In other words, only when there is a problem (exceptional and complex concrete situation) will they be recruited members of the aforementioned committee, to then dedicate themselves to these nuances, and, when finally familiarized, seek a solution.

533. Therefore, given the possibility that issuing regulations at a later date after the contract may prove to be inefficient or, even, of causing damage to the contract and the public interest if the standard is not regulated, as well as considering the other points discussed, it proposes the exclusion of the dispute mechanism is determined board, in accordance with the provisions of art. 23, item XV, of Law n°. 8.987, of 1995 and in art. 37 of the Federal Constitution.

Based on these statements, the following route was proposed regarding the intended concession of BR-163/MT/PA and BR-230/PA, between Sinop/MT and Miritituba/PA:

a.24) exclude from the contractual draft the provision for the use of the dispute board, so as not to bid for the concession with such provision if the regulations regarding the specific applicable procedures, provided for in the draft, do not exist, in accordance with the provisions of art. 23, item XV, of Law n°. 8.987, of 1995 and in art. 37 of the Federal Constitution.

In the vote, Minister Benjamin Zymler, when examining the institute, determines that:

> 269. To close the topic, I turn to the conflict resolution committee, widely used in complex medium or long-term contracts. According to the draft contract, this is an optional mechanism designed to assist ANTT's decision-making on matters of eminently technical nature, in the face of exceptional and complex concrete situations. Its scope of action is restricted, compared to the scope of arbitration and self-composition, and its pronouncements are recommendatory, that is, they do not bind the agency. At this point, it is very close to what is known internationally as a dispute review board.
>
> 270. Unless otherwise agreed, it is composed of three members, one appointed by the local authority, another by the concessionaire and a third appointed by the two members designated by the parties.
>
> 271. A dispute board aims, in many cases, both to resolve and prevent disputes, being staffed by qualified and independent professionals. The body is generally created at the beginning of the contract to allow effective monitoring of the execution of the adjustment, so much so that one of its advantages, at least recognized in the literature, is the speed of its statements. Despite this, the contractual draft opted for its ad hoc implementation, probably so as not to significantly impact the project's cash flow.
>
> 272. When examining the topic, Seinfra Rodovia Aviação highlights that the conflict resolution committee is not dealt with by any specific law, nor is it regulated by ANTT, unlike arbitration (Law n°. 9.307, of 1996 and Decree n°. 10.025, of 2019) and self-composition (Law n°. 13.140, of 2015), which, in addition to the aforementioned standards, are supported by ANTT Resolution 5.849, of 2019. For this reason, proposes the exclusion of this mechanism from the contractual draft.
>
> 273. ANTT contested the technical unit's request. It states that there is no legal provision infringed, on the contrary, that it would find support in art. 23-A of Law n°. 8.987, of 1995 ("the concession contract may provide for the use of private mechanisms to resolve disputes arising from or related to the contract, including arbitration, to be carried out in Brazil and in Portuguese, under the terms of the Law n°. 9.307, of 1996") and in the CPC (Code of Civil Procedure, art. 190). It clarifies that this instrument is used in other projects, such as the early extension of the Vitória-Minas Railway (EFVM) concession, recently approved by the Court.
>
> 274. Regarding this issue, regulatory innovations are always welcome, even more so in the case at hand, in which an internationally used mechanism to assist in resolving disputes is being introduced into the contract. However, I express my concern regarding the lack of regulation of issues essential to its functioning, such as the experience to be required from committee members, the Agency's internal procedure and the definition of exceptional and complex concrete situations.
>
> 275. Even though there is provision in the draft that the procedures for establishing and operating the conflict resolution committee must be established by mutual agreement between the parties, I believe that the matter deserves uniform treatment for all cases, under penalty of promoting see undesirable differentiations and endless administrative and judicial questions. In this sense, when dealing with self-composition and arbitration, ANTT itself regulated the boundary conditions of these institutes, that is, it considered the vague art to be insufficient. 23-A of Law n°.8.987, of 1995.
>
> 277. Therefore, I propose to determine the inclusion, in the contractual draft, of a provision providing that the use of dispute board will only occur after its regulation by the agency and any omission thereof will not confer any subjective rights on the concessionaire.

In view of this report, the Ministers of the TCU, meeting in an extraordinary session of the Plenary, in view of the reasons explained by the Rapporteur, agreed, in relation to the dispute board, what:

> 9.1.19 include, in the contractual draft, in order to give effect to art. 23, item XV, of Law n°.8.987, of 1995, provision providing that the use of dispute board will only occur after its regulation by the agency and any omission by the authority will not confer any subjective rights on the concessionaire.

Specialized doctrine cited about the dispute board:

There is not.

Conclusion:

The TCU understood that there would be an obstacle to the use of dispute board due to the regulatory gap may generate questions from concessionaires and tarnish contractual execution. The body also highlighted that other appropriate dispute resolution mechanisms, such as arbitration and mediation, are regulated by specific laws — Law n°. 9.307, of 1996, Law n°. 13.140, of 2015, and ANTT Resolution n°. 5.845, of 2019).

In this way, the TCU established that the use of dispute board in highway concession contracts will only be possible after adequate regulation.

It is worth emphasizing that some legislation expressly recognizes the possibility of predicting the dispute board in administrative contracts, such as Law n°. 8.987, of 1995, Law n°. 11.079, of 2004 and Law n°.14.133, of 2021.

Comments:

On August 8, 2023, ANTT held public hearing session n°. 6, of 2023, with the aim of collecting suggestions and contributions to the proposal for regulation of the dispute board, to be applied to highway and railway concession contracts signed between the Agency and its regulated entities. The dispute proposal board, which is included in the ANTT 2023/2024 regulatory agenda and was developed by the Infrastructure concession Superintendence (Sucon), Road Infrastructure Superintendence (Surod) and Rail Transport Superintendence (Sufer). Three types of committee were defined: permanent (from the beginning to the end of the contract), temporary (with a limited term) and ad hoc constituted in the absence of the temporary committee in complex works or services not foreseen in the contract. The formation of the committees will be composed of three members: a member from ANTT, one from the concessionaire and another member chosen in an agreement between ANTT and the concessionaire, who will be the president of the committee.

Additional Information:

Public hearing link: https://www.youtube.com/watch?v=xoMIlgQQ-9Q

3) TC 018.901/2020-4

Subject:

Documents monitoring the privatization of the company Veículo de Privatização MG Investimentos S.A. (VDMG), as part of the privatization process of the Companhia Brasileira de Trens Urbanos (CBTU).

Rapporteur: Minister Vital do Rêgo

Year of decision: 2022

Theme of board: Subway/Trains

Bodies/Entities:

National Bank for Economic and Social Development; Brazilian Urban Train Company; Ministry of Economy; Special Secretariat for the Investment Partnership Program; Regional Superintendency of the CBTU of Belo Horizonte.

Decision link:

https://www.jusbrasil.com.br/jurisprudencia/tcu/1673482813

Understand the case:

During the entire process of constructing the proposal for the privatization of the Belo Horizonte subway, over the last two years, meetings and technical presentations were held by SEPPI, BNDES and Consortiums responsible for the studies to monitor the work by this inspection team and from other bodies (MDR, ME, CGU, TCE/MG, Seinfra/MG).

BNDES and SEPPI recommended that the difficulty of reaching an agreement between the parties (cargo and passenger concessionaires), a situation that was addressed in the CBTU-MG concession contract and in the 4th addendum for the extension of the southeast railway network concession contract , was resolved through the establishment of a committee for the prevention and resolution of disagreements (dispute board), which will have among its responsibilities to define the operational and engineering solution that makes cargo and passenger operations compatible in the Barreiro region, combining the application of the best technique, the lowest costs and meeting the interests of users of the metro rail transport service.

After the deadline set out in clause 7.4.1 has expired without an agreement being reached between the concessionaire and CBTU/MG regarding the engineering and operational solution under the terms specified in that clause, the concessionaire must request the installation of the dispute board whose the future concessionaire of the Metrorail Transport Service must

also participate to define the aforementioned Metrorail Transport Service passenger station.

> 41. BNDES (part 150, p. 3-5) and SEPPI (part 122, p. 3-5) presented identical responses, summarized as follows:
> 2) About Pátio Barreiro (MRS) and Barreiro station:
> Having demonstrated the presence of the basic design elements, it is necessary to delve into the merits of the solution adopted for coexistence between freight and passenger transport at Barreiro station. After interactions with the granting powers, the State of Minas Gerais and ANTT, there was a consensus that the proposed solution is the most appropriate as it allows interested parties – cargo and passenger concessionaires and respective granting powers – who have expertise in their sectors, can assess whether the existing station project is the most appropriate and, if necessary, negotiate possible adjustments.
>
> Analyzing the two hypotheses above, we have:
> - maintenance of the existing Barreiro station project, which implies maintaining the premises and costs originally foreseen in the studies; and
> - the need to change the Barreiro station project, which may result in:
> 1) the difficulty of reaching an agreement between the parties (cargo and passenger concessionaires), a situation that was addressed in the CBTU-MG concession contract and in the 4th addendum for the extension of the concession contract for the southeast Railway Network6, through the establish- ment of dispute board, which will have among its responsibilities to define the operational and engineering solution that makes cargo and passenger operations compatible in the Barreiro region, combining the application of the best technique, the lo- west costs and meeting the interests of users of the metro rail transport service ;
> 2) Once the parties have reached an agreement, with or without the need to appeal to the disagree- ment prevention and resolution committee, it is possible that there will be some change in the invest- ment value originally foreseen for such intervention, increasing or reducing the value of the investment. Thus, the allocation of the risks of change in the projects is contained in the contracts mentioned abo- ve, and in the case of the Barreiro metro station, the risk is assumed by the granting authority, which in both cases – a solution established consensually or by the dispute board – is part of the process, and you must agree to the solution or give your opinion on the dispute board, as provided for in the concession agreement.
> In line with the risk allocation described above, in the 4th addendum for the extension of the con- cession contract for the southeast Railway Network, signed by MRS and ANTT on 07/28/2022 (at- tachment), the granting power was also responsible for the risk of incremental costs arising from the implementation of the Barreiro station (see item xii of sub-clause 32.2).
> Finally, it is worth noting that the solution was considered viable, especially given the deadlines set for the start of works and operation of the Barreiro station, respectively years 4 and 6 of the concession, with, therefore, sufficient time for the planned negotiations.

Next, the rapporteur highlighted that:

> 49. In order to better clarify what was resolved, I bring an excerpt of the terms that make up item 7.4 of Annex 1 (Book of Obligations) of the 4th addendum of the MRS Logística S.A.3 concession agreement:
> 7.4. The concessionaire must adopt the necessary measures to make the future CBTU-MG line 2 (Nova Switzerland – Barreiro) compatible with the infrastructure and operation of the Railway, including with regard to the implementation of the passenger station of the Metroferroviário Transport Service with its location planned for the yard do Barreiro and its surroundings.
> 7.4.1. The concessionaire must act together with CBTU/MG, with ANTT and SEIN FRA participating in

the meetings, so that the respective concessionaires can develop, within 180 (one hundred and eighty days), counting from the signing of this contract or the concession contract of the Metrorail Transport Service, whichever occurs last, with its extension for an equal period being permitted, with good reason, engineering and operational solution that enables the implementation of the aforementioned passenger station of the Metrorail Transport Service, with the aim of optimizing the project of
joint operations between the concessionaire and CBTU/MG and mitigate impacts on the investments budgeted for the aforementioned passenger station, considering current legislation on passenger transport, in particular art. 34, of Federal Decree n°. 1.832, of 1996, and art. 23, item VI, of Federal Law n°. 12.587, of 2012.

7.4.2. After the deadline set out in clause 7.4.1 has expired without an agreement being reached between the concessionaire and CBTU/MG regarding the engineering and operational solution under the terms specified in that clause, the concessionaire must request the installation of the dispute board in which the future concessionaire of the Metrorail Transport Service must also participate to define the engineering and operational solution to be implemented to enable the implementation of the aforementioned Metrorail Transport Service passenger station.

i. After the expiry of the period contained in clause 7.4.1 and, prior to the establishment of the dispute board provided for in this clause, the concessionaire must inform CBTU/MG that it will proceed with the aforementioned establishment.

(...)

7.4.12. If the implementation of a future metro railway station of the Metro Railway Transport Service based on the engineering and operational solution referred to in clauses 7.4.1 and 7.4.2 causes economic and financial impacts to the concession, either due to the need to adapt the railway infras- tructure, whether due to operational impacts and incremental costs resulting from the implementation of the metro railway station in the Barreiro yard area and surrounding areas, the concessionaire will be entitled to economic and financial balance within the scope of this concession, in accordance with the contract.

Specialized doctrine cited about the dispute board:

There is not.

Conclusion:

The rapporteur recognized the clause that provides for the installation of the dispute board to define the engineering and operational solution to be implemented to enable the implementation of the aforementioned Metrorail Transport Service passenger station. Thus, it determined that:

50. The draft concession contract for the provision of management, operation and maintenance services for the metro rail network in the Metropolitan Region of Belo Horizonte (part 53), annex 9 of the bidding notice, requires adjustments in order to best reproduce possible normative form, the terms that make up item 7.4 of Annex 1 (Book of Obligations) of the 4th addendum of the concession agreement of MRS Logística S.A.

51. Therefore, accepting SeinfraUrbana's suggestion, with text adjustments, it is necessary to determine BNDES to review the legal documents of privatization, in order to reproduce, in the best possible normative form, in the draft of the concession contract for the provision of management, operation and maintenance services of the metro rail network in the Metropolitan Region of Belo Horizonte, annex 9 of the bidding notice, the terms that make up item 7.4 of Annex 1 (Book of Obligations) of the 4th Addendum of the MRS Logística S.A. concession Agreement.

COURT OF JUSTICE OF THE STATE OF SÃO PAULO (TJSP)

1) INTERLOCUTORY APPEAL Nº. 2096127-39.2018

Subject
TC Line 4 Yellow Consortium vs. Subway – São Paulo Metropolitan Company

Rapporteur: Torres de Carvalho
Year of decision: 2018
Theme of board: Subway
Decision link: https://www.jusbrasil.com.br/jurisprudencia/tj-sp/608545431

Understand the case:
The appeal was filed against the decision that granted urgent relief to suspend the effects of the decision of the board (CRD), established under administrative contract n°. 4107521301, which obligated the appellant to pay for the removal and disposal of contaminated soil from VCA Vila Sônia that would have been provided by the appellant in the quantities and costs indicated by it. The appellant claimed that three issues should be considered to reform the decision: the incompatibility of preliminary decisions with the CRD institute (DAB – Dispute Adjudication Board), the inaccuracy of the facts presented by Metrô and the presence of reverse periculum in mora.

The rapporteur's vote noted that:

> The decision on the disposal of the contaminated soil at VCA Vila Sônia was preceded by a dense instructional procedure, extensive debate between the parties and their technicians, clarification of positions, presentation of memorials and granting a new opportunity for the parties to demonstrate; the appealed decision is based on fallacies constructed by Metrô, which presents the facts in a confusing, repetitive and sometimes untrue manner. There was no mixing of clean and contaminated material; the appellant participated in the choice of the sampling method carried out, chose to reduce costs with soil analysis and agreed to continue excavations and forwarding the excavated material for temporary storage with the company Rodolixo. There was no non-compliance with environmental technical guidelines; The thermal desorption initially suggested is no longer an option for treating contaminated soil due to the lack of supply of the service; co-processing is foreseen as a method of treating contaminated soil, as recognized by the CRD.
>
> On 4/27/2017, Metrô was informed of the impossibility of using thermal desorption to treat contaminated soil, which is why the material would be destined for co-processing; the response only came on 5/16/2017, when approximately twenty days had already passed; the appellant's omission was deliberate, contrary to the principle of objective good faith; the appellant waited for the work to be completed and only then presented his disagreement regarding the use of the method known to be more costly; the CRD observed that the Metro only positioned itself after almost all the excavated material was sent for co-processing; the appellant intends not to pay for the services that he himself recognizes as having been provided, implying unjust enrichment.
>
> [...]
>
> The likelihood of the right remains undermined by the CRD's own decision, which accepted the argu-

ments put forward by the Consortium based on the grounds set out there; and the danger of damage or risk to the useful result of the process is mitigated by the existence of guarantee insurance in force until 3-7-2020, which ensures the payment of compensation of up to R$-85,873,454.67 due to losses arising from any failure to fulfill the obligations assumed by the appellant (here pages 834/849). In the absence of the requirements authorizing the granting of emergency relief, its revocation is a strict measure.

Specialized doctrine cited about the dispute board

There is not.

Conclusion

The interlocutory appeal was upheld to revoke the interlocutory relief granted.

Comments

The committee's decision was upheld. This case is the same one that generated the special appeal in the STJ, as will be analyzed later.

2) THE DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY Nº. 2130958-11.2021.8.26.0000 SP

Subject:

The **direct action** for the declaration of **unconstitutionality** challenging art. 4 of Law n°. 12.235, of 2020, which regulates the installation of dispute prevention and resolution committees in ongoing administrative contracts concluded by the direct and indirect administration of the municipality and provides other measures.

Rapporteur: Costabile e Solimene

Author: Mayor of Sorocaba

Interested: Sorocaba City Council

Year of decision: 2022

Decision link: https://www.jusbrasil.com.br/jurisprudencia/tj-sp/1407943086

Understand the case:

This is a **direct action** for the declaration of **unconstitutionality** filed by the Mayor of Sorocaba, in light of art. 4 of Law n°. 12.235, of 2020, which regulates the installation of dispute prevention and resolution committees in ongoing administrative contracts concluded by the direct and indirect administration of the municipality and provides other measures.

The device was vetoed by the previous Mayor, but the veto was overturned by the municipal Legislature. The art. 4th presents the following wording:

> Article 4 – The amounts to be disbursed by the contracting body to pay the fees of the Committee members must form part of the contracting budget, being certain that the private contractor will be responsible for paying the entire costs relating to the installation and maintenance of the Committee, while it will compete the contracting body reimburses half of such costs, after approval of the measurements provided for in the contract (emphasis added).

The municipality presented three arguments for unconstitutionality:

1) lack of initiative, as the topic under discussion would be the exclusive responsibility of the head of the municipal Executive Branch;
2) infringement of art. 25 of the State Constitution of São Paulo, as it creates expenses without budgetary forecast;
3) offense against the Fiscal Responsibility Law, because the contested provision came into force without a prior estimate of the budgetary impact, which contradicts art. 16 of Federal Complementary Law n°.101, of 2000.

The vote highlights that the members of the committee do not hold positions, whether permanent or commissioned, nor are they public employees. The remuneration of committee

members would come in line with the value of the administrative contract and would be the responsibility of the contracting body.
(Administration) reimburse half of such costs, as seen, after approval of the measurements provided for in the contract (art. 4).

The rapporteur understood that, as it was a rule linked to the public budget, as well as the reallocation of funds (repeat of half of the mediators' fees), a law was required to be initiated by the Chief Executive. Furthermore, according to his understanding, the device in question was not preceded by a statement estimating its budgetary and financial impact.

Specialized doctrine cited about the dispute board :

There is not.

Conclusion:

The ADI was judged valid and the special body of the TJSP understood that the aforementioned art. 4th is unconstitutional, highlighting, in the reasoning, the failure to observe the discipline of the legislative process linked to the public budget.

Comments:

The wording of the art. 4 of Law n°.12.235, of 2020 from the municipality of Sorocaba is not exactly innovative. To cite an example, Law n°. 16.873, of 2018, of the municipality of São Paulo, recognizes and regulates the installation of dispute board in ongoing administrative contracts signed by the city of São Paulo, and provides in its art. 4th:

> Art. 4 The amounts to be disbursed by the contracting body to pay the fees of the committee members must form part of the contracting budget, given that the private contractor will be responsible for paying the entire costs relating to the installation and maintenance of the committee, while competing the contracting body reimburses half of such costs, after approval of the measurements provided for in the contract. .

With due respect, the vote seems to create some confusion regarding the remuneration of these impartial third parties who deal with conflict resolution, such as the committee members themselves, mediators, arbitrators and others, since the reasoning used could culminate in the emptying of all dispute resolution methods.

In fact, the value of the contract must provide for the possible payment of fees to third parties for resolving conflicts, as has already been consolidated in the contracting practice of the brazilian public administration.

3) INTERLOCUTORY APPEAL Nº. 2221691-86.2022.8.26.0000 – 10TH PUBLIC LAW CHAMBER OF THE SÃO PAULO COURT OF JUSTICE

Subject:
TC LINE CONSORTIUM – 4 YELLOW vs SÃO PAULO METROPOLITAN COMPANY – METRÔ

Rapporteur: Torres de Carvalho

Year of decision: 2023

Board theme: Metro/Trains

Decision link: https://www.jusbrasil.com.br/jurisprudencia/tj-sp/1754388919

Understand the case:

This is an appeal filed against the decision that determined that the appellant deposit or present, within 15 days, a contractual guarantee of R$10,853,428.92, under penalty of a daily fine of R$100,000.00 based on the second clause of the additive nº. 6.

> The appellant Consórcio TC Linha 4 Amarela signed a contract with the appellant for the completion of Phase 2 of Line 4 Yellow of the Metro (Contract 4107521301, pages 47/265, here pages 209/427). During the course of the works, the Dispute Resolution Committee (CRD), provided for in the contract, recognized Metro's obligation to remunerate the service of disposing of contaminated soil extracted from Vila Sonia Station in the amount of R$10,853,428.92; Metrô, not resigned to the decision, went to court arguing its nullity. The judge temporarily suspended the decision of the CRD Dispute Resolution Committee; CONSÓRCIO TC LINHA 4 AMARELA filed, against this decision, AI nº 2096127-39.2018, where the injunction was revoked and Metrô was ordered to comply with the decision made by the CRD, in accordance with the clauses of the contract signed by the parties. The action continues and is in the examination phase.
>
> The judgment given in interlocutory appeal n°. 2096127-39.2018.8.26.0000 adopts two fundamentals, as is typical of the procedural moment; did not see the probability of the right given the dominance attributed by the contract to the CRD's decision [sufficient to revoke the injunction] and did not see the danger of damage given the current guarantee that ensured the payment of compensation of up to R$85,873,454.67. The court understood that the amount paid for Addendum n°. 6 was guaranteed by the policy that guaranteed the value of the contract, without taking care of its own guarantee. This value, as seen above, was included in the total value and considered in the following additions.

Specialized doctrine cited about the dispute board:
There is not.

Conclusion:
The vote is to grant the appeal so that, once the appealed decision has been reversed, the consortium is exempt from presenting its own contractual guarantee of the value indicated in Addendum n°. 6.

Comments:
This case is the same one that generated the Special Appeal within the scope of the STJ, as will be analyzed later.

4) MOTION FOR DECLARATION Nº 2096127-39.2018.8.26.0000/50000 10TH PUBLIC LAW CHAMBER OF THE SÃO PAULO COURT OF JUSTICE

Rapporteur:
Torres de Carvalho

Year of decision: 2018

Theme of board: Subway / Trains

Decision link: https://www.jusbrasil.com.br/jurisprudencia/tj-sp/903404744

Understand the case:

The Chamber, unanimously, upheld the appeal to revoke the urgent protection that suspended the effects of the decision of the CRD established under administrative contract n°. 4107521301. Metrô filed a motion for declaration and claimed that the decision was silent on the points raised about the CRD decision.

> It was therefore argued that the contractual infractions committed by the appellant were found, as per the email sent on 3/23/2017; warned about mixing clean soil with soil with signs of contamination and demanded that the treatment of contaminated soil follow the order determined by ABNT NBR 100004:2004; even after being notified, the embargoed party acted unilaterally and in violation of the contractual provisions; the amount of earth released is incompatible with the amount extracted from the VCA Vila Sônia modules; there were contractual and technical breaches that led to the extraction and treatment of a significant amount of land from an area where the existence of contaminated soil was not even expected to exist; the supposed scarcity of companies to carry out thermal desorption was discussed in the context of the contestation and counter-minute; the embargo always aimed to seek co-processing, not thermal desorption; negotiations with Essencis only arose to create a justification that supported not using the less expensive technique; the CRD decision did not thoroughly analyze the documentation presented; There are several points not addressed by the ruling and the analysis of these facts is essential for the decision on urgent relief. The validity of the contractual guarantee is not linked to the duration of the process, but rather to the duration of the contract; once the term of the guarantee insurance has expired, it will not have any other element to protect itself; the resolution of the action requires complex technical engineering evidence, given the specificities of carrying out the contaminated soil treatment service; we are facing a process with the possibility of being processed for a period longer than the contractual term; If this occurs, you will have to take legal action in order to be compensated for the exorbitant additional amount that you may be forced to pay at this time.

Specialized doctrine cited about the dispute board:
There is not.

Conclusion:
The motions for clarification were rejected.

5) INTERLOCUTORY APPEAL IN SPECIAL APPEAL Nº 1512201 - SP (2019/0150527-0)

SUPERIOR COURT OF JUSTICE

Comments:
This case is the same one that generated the special appeal, as will be analyzed later.

Subject: São Paulo Metropolitan Company vs. Consortium TC Line - 4 Yellow
Suspension of the effects of the decision of the dispute board, established within the scope of the administrative contract signed between the parties.

Rapporteur: Minister Francisco Falcão

Year of decision: 2020

Theme of board: Subway/Trains

Decision link: https://www.jusbrasil.com.br/jurisprudencia/stj/1384698791

Understand the case:

Metrô filed a special appeal, based on art. 105, III, "a", of the Federal Constitution, alleging violation of art. 1,022, II, of Code of Civil Procedure stating, in summary, that the Court of origin was silent in not expressing its opinion on all the aspects raised throughout the procedural process that would justify the existence of the probability of the right and urgency, necessary to grant the injunctive relief requested. He noted an omission, notably regarding (i) the amount of soil extracted in the excavation and the hiring of a company to decontaminate the land, which would have occurred in contrary to the agreed contractual clauses, and (ii) the fact that the contractual guarantee is not an impediment to the granting of urgent relief.

The rapporteur understood that the Court a quo was not negligent in analyzing these issues, as it decided them as follows:

> Decisions made by the Metrô CRD may be submitted to the Judiciary for consideration either based on art. 5th, XXXV of the CF, as well as based on the Notice and Term of Agreement that guide the administrative contract n°. 4107521301. The granting of urgent protection, in turn, is admitted as long as the requirements required by law are present, that is, the probability of the law and the danger of damage or the risk to the result useful to the process (Code of Civil Procedure, art. 300, 'caput'), assessed by the judge according to his free conviction.
> If these requirements are present, nothing prevents the granting of anticipatory relief, without this representing discredit to the relevant institute of the 'dispute board'; but judicial interference must be carried out in moderation and in cases that deviate from normality, so that the amicable resolution does not become a meaningless or effective phase or that coming to court does not represent more than non-compliance with a well-founded decision and, at the same time, your way, correct. The notice and contract must be respected, except for a specific reason not demonstrated here.

4. Urgent protection. Probability of law. Danger of damage. The judge saw objective evidence that the appellant's technical team, as well as the company hired by him, had not followed the procedure set out in the administrative contract regarding the identification of soil contamination and decontamination methodology (coprocessing, more expensive, instead of thermal desorption), generating doubt regarding the amount of contaminated soil and the cost of the services provided. The CRD's decision, however, thoroughly addresses the issues that concerned the judge, notably (i) failure and delay in Metrô's communication about soil contamination, without any repercussions on solving the problem; (ii) alleged mixing of contaminated soil with clean soil, alleged by Metrô just months after the completion of the waste disposal work; and (iii) option for the co-pro- cessing system instead of thermal desorption, due to the scarcity of companies in the market capable of performing the service and without Metrô insurgency until 16-5-2017, when he finally expressed opposition. The likelihood of the right remains undermined by the CRD's own decision, which accepted the arguments put forward by the Consortium based on the grounds set out there; and the danger of damage or risk to the useful result of the process is mitigated by the exis- tence of guarantee insurance in force until 7/3/2020, which ensures the payment of compensation of up to R$ 85,873,454.67 due to losses arising from possible default of the obligations assumed by the appellant. In the absence of the requirements authorizing the granting of emergency relief, its revocation is a strict measure.

[...]

Furthermore, for now the guarantee insurance, valid until 7/3/2020, which ensures the payment of compensation of up to R$ 85,873,454.67 due to losses arising from possible non-compliance with the obligations assumed by the appellant, mitigates the danger of damage or risk to the useful result of the process; the situation may be reviewed in due course by the judge, if the development of the case so recommends.

For these reasons, the decision accepted the appeal to dismiss the special appeal.

Doctrine cited about the dispute board:

There is not.

Conclusion:

The decision of the appeal states that the appellant's refusal is evidently limited to the fact that he is faced with a decision that is contrary to his interests and that, as a violation of art. 1.022 of the Code of Civil Procedure, it is not possible to return the case to its origin to discuss the presence of the requirements for anticipatory protection, as the appealed judgment presents a duly reasoned decision for that purpose.

Comments:

This appeal is a consequence of the case Line 4 of the SP Metro originating from TJSP.

PRELIMINARY CONSIDERATIONS

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PRELIMINARY CONSIDERATIONS

In general terms, the research observed that there is a small number of court decisions that mention or, even less, that focus on the method of dispute board and its implications, since only 54 decisions were mapped by Jusbrasil, of which eight analyzed, in more detail, the topic of the board in infrastructure contracts.

It was also possible to verify a certain confusion between the dispute board method and other mechanisms of alternative dispute resolution; which may be due to a still incipient doctrine on the subject. In fact, even in the eight decisions that delved deeper into the matter, there is little doctrine cited in the judgments.

The cases analyzed by the TCU in the context of privatization monitoring records (TC 018.901/2020-4 and TC 016.936/2020-5) reveal the court's concern with the perception of a regulatory gap regarding the institute, in view of the court's interpretation reflected in the stance of only authorizing the use of the dispute board in contract contracts transfer of highways through appropriate regulation. ANTT has led the debate on its proposal to regulate the aforementioned method in the context of a public hearing.

TJSP faced four dispute board cases. In the first, the interlocutory appeal nº. 2096127-39.2018.8.26.0000 was filed against the decision that granted urgent relief to suspend the effects of the decision of the board, established under administrative contract nº. 4107521301, referring to the São Paulo metro work. The emergency relief was revoked and the court honored the committee's decision.

A direct action for the declaration of unconstitutionality nº. 2130958-11.2021.8.26.0000 SP, filed by the Mayor of Sorocaba, in light of art. 4 of Law nº. 12.235, of 2020, which regulates the installation of dispute prevention and resolution committees in ongoing administrative contracts concluded by the direct and indirect administration of the municipality. The ADI was judged valid due to art. 4th not having observed the discipline of the legislative process linked to the public budget and having created expenditure without prior allocation and without an estimate of the financial-budgetary impact. However, this position deserves further reflection, with due respect. The reasoning seems to go against the very logic of multi-door justice and contractual practice already consolidated in Brazilian Public Administration.

The interlocutory appeal nº. 2221691-86.2022.8.26.0000 discussed the decision that resulted in the appellant depositing, within 15 days, a contractual guarantee of R$10.853.428.92, under penalty of a daily fine of R$100.000.00 based on the second clause of contractual amendment no. 6. The appeal amended the decision to exempt the consortium from presenting a contractual guarantee.

The motion for declaration nº. 2096127-39.2018.8.26.0000/50000 were opposed by Metrô with the allegation that the decision that revoked the emergency protection was silent on the points raised about the committee's decision, such as the fact that it did not thoroughly analyze the documentation presented. The motion were rejected because the committee's decision, made by experts, had addressed all the issues highlighted by the appellant. At the STJ, the discussion about dispute boards involved a case of corporate operation and another about the construction of line 4 of the São Paulo subway.

At the interlocutory appeal in special appeal nº. 1512201 - SP (2019/0150527-0), a case originating from the discussion of Line 4 of the São Paulo Metro within the scope of the TJSP, the STJ understood that the court a quo expressed its opinion and gave good reasons on all the points of disagreement of the parties.

SUPPORT: