...in recent years the Peruvian State has been contracting steadily, with ever larger numbers of infrastructure works that have stimulated the economy and added value to the country. However, the economy is not the only thing to grow with increased construction activity; so too do the problems that arise during execution of contracts.

Growth Industry: Reasons for a More Efficient Method

Nowadays when everything moves at such high speed, Peru’s growth can be seen as less than impressive since the crisis of the late 1980s (over 20 years ago). In contrast to the claims made by some people that this growth has been admirable, it could be considered as natural and even logical that Peru has not only become stable, but today also has the reserves to withstand a global economic crisis (at least for a while). So, considering the speed with which transactions occur, it may be valid to ask why Peru has not grown even more.

However, it is also fair to say that those who consider Peruvian growth to be something to admire have a point, given the number of difficulties and disputes in which the Peruvian State has been involved in respect of public procurement for public works. Similarly, the extent to which public construction works contribute to the growth of a country and the corresponding increase in gross domestic product (GDP) is undeniable.

In 2013, Peru invested S/. 12,522.3 million in public works under the Public Procurement Law. In January this year (2014) alone, Peru has invested more than S/. 38 million in public works under this same law.

(continued on page 10)

1 “Reporte de Contrataciones Públicas 2013”. Source: SEACE. Research prepared by the Oficina de Estudios Económicos.
SENCICO, (the National Training Service for the Construction Industry) concluded in one of its reports in 2012 that the construction sector had accumulated 10 years of continuous expansion (9.9% annual average) and had been the growth engine of the Peruvian economy\(^3\); for its part, the Ministry of Housing and Construction recently reported that the construction sector had grown by 3.2%\(^4\).

In addition, it is expected that the construction sector will grow by up to 12% by the end of this year (2014). In other words, in recent years the Peruvian State has been contracting steadily, with ever larger numbers of infrastructure works that have stimulated the economy and added value to the country. However, the economy is not the only thing to grow with increased construction activity; so too do the problems that arise during the execution of contracts.

But while more construction contracts are signed for the execution of works (due to the growth just described), there are also more conflicts to be resolved. This is inevitable if we consider the nature of this activity where even with the benefit of current technology it is not always possible to foresee situations or events that come into play but that only come to light during the execution of the works.

This has created the need for more efficient methods to prevent and, if necessary, resolve disputes without drastically affecting the execution of works. Only in this way we can ensure more investment and better infrastructure works.

**Conflict in public works contracts in Peru and the arrival of Dispute Boards**

Along with the growth of the construction sector in our country, since 1998 the successive laws that have regulated the public procurement of goods, services and works in Peru have made it mandatory to settle disputes under public works contracts through conciliation and arbitration.

Accordingly, with the aim of promoting private investment, the Peruvian State provides private entities with a neutral mechanism such as arbitration to settle disputes in their contracts\(^5\).

This has led to an exponential growth in arbitration in Peru since all public entities that sign contracts under the Public Procurement Law resort overwhelmingly to arbitration rather than conciliation due to its *hetero-composite* nature.

A recent study prepared by the Centre for Conflict Resolution and Analysis of the Pontificia Universidad Católica del Perú (CARC - PUCP) revealed that 69.5% of

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5 Article 52 of the Public Procurement Law states the following:

“Article 52.- Disputes resolution

52.1 Disputes which arise among parties in relation to execution, interpretation, termination, inexistence, inefficacy, nullity or invalidity of contracts, shall be settle by conciliation or arbitration, accordingly to the agreement of parties. Conciliation must be conducted in a public conciliation center or recognized by the Ministry of Justice”.
public procurement arbitrations come from work contracts and only 19.5% from goods contracts and 11% from services contracts. This demonstrates the conflictive nature of the construction business, and which is especially evident in public procurement due to the public interests involved.

On the other hand, the Public Procurement Law (both repealed and current) have excluded from their application those contracts financed by foreign cooperating entities. This has resulted in the use of model construction and consultancy contracts (such as FIDIC contracts) for the resolution of disputes, as demanded by those foreign entities before agreeing to provide funding for a project.

Thus, disputes have been settled (and are today, only for these cases involving foreign investment) through the use of Dispute Boards (DB) as a pre-arbitration mechanism, establishing the possibility of subsequently submitting the disputes to arbitration under certain conditions.

However, as DB’s are not well known in our country, people thought of them as a sort of conciliation in which a decision is issued. Since conciliation is an auto-

composite mechanism for settling disputes and does not allow the conciliator to issue a decision to resolve them, it was logical to think that the DB is a mechanism with very specific features differing from those already known in Peru.

Since 2009, the CARC - PUCP has come to know more about this mechanism, determining that what was wrongly understood as “decision-making conciliation” was actually a Dispute Board. The CARC - PUCP undertook an arduous process of researching and promoting this mechanism, convinced of the advantages that proper contractual regulation could bring to the efficiency and speed in resolving disputes in public works contracts in our country.

The CARC – PUCP Working Team: Dispute Boards

The CARC-PUCP created a Working Team of renowned experts in construction law and managers from the largest construction companies in Peru to carry out research tasks in order to promote this mechanism within the national legal community and provide an institutional management service and organization of the DB in Peru through the development of Dispute Board Rules.

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6 Research study “Tendencias en los arbitrajes de la contratación pública: análisis de laudos”, prepared in 2013 by the Centre for Conflict Resolution and Analysis of the Pontificia Universidad Católica del Perú through its lawyer Dr. Rigoberto Zuñiga Maraví.

7 “3.3. This law is not applicable for: (…) contracts concluded in accordance with specific procedures of international organisms, States or cooperating entities, provided that they derived from external debt transactions and/or donations linked to those transactions.”

8 This team was created by the director of CARC – PUCP, Dr. César Guzmán-Barrón, and it was composed by lawyers Gustavo Paredes, founder partner of NPG Abogados; Humberto Arrese, Legal Manager of COSAPI; Martín Lazo, Legal Manager of GyM; Ives Becerra, Legal Manager of Abengoa Perú; Carlos López, engineer of Nippon Koei and arbitrator; Erik Franco, Legal Sub Manager of Compañía Minera Volcán; and Rigoberto Zuñiga, rapporteur lawyer of the Working Team.
In this regard, the following events were held:

- Specialist Seminar: “Arbitration and dispute resolution mechanisms in construction contracts and infrastructure projects” (October 10, 2012).

First-class speakers from Peru and abroad participated in each of the above-mentioned events. In addition, the Peruvian Society of Construction Law has contributed greatly to this work through its President, Dr. Jaime Gray.

**CARC – PUCP Dispute Board Rules**

The major contribution of the CARC – PUCP Working Team for the implementation of the DB in Peru has certainly been the development of the Dispute Board Rules, as a result of which the CARC - PUCP became the first Peruvian institution to offer DB management services as a mechanism for settling disputes. The Rules were introduced in May 2013.

The Dispute Board Rules are the result of an evaluation process combining CARC - PUCP experience and a review of provisions applied to DBs internationally. Contributions to the international community made by the International Chamber of Commerce (ICC) and the experience and statistics published by the Dispute Resolution Board Foundation were also taken into account.

The development of the Rules was based on national circumstances as well as the legal and social reality prevailing in Peru. In consequence, the possibility of referring controversies to a Dispute Resolution Board (DRB) that issues binding decisions or a Dispute Adjudication Board (DAB) that issues non-binding recommendations was established in the Rules. In either case, parties may jointly decide whether the DB should act on a permanent or ad – hoc basis.

Binding decisions issued by the DRB must be immediately complied with by parties once notified or within the time stipulated by the DRB. The non-compliance with a decision is considered as a serious breach of contract. Binding decisions issued by the DRB are not final, except those which acquire such status by not being submitted to arbitration within the specified time limit.

The recommendations made by the DAB are not binding and must be complied with only if parties so wish, if it is determined in arbitration or if recommendation becomes final.

When the Dispute Board Rules are applied in cases of public procurement, a DRB is the only option available to parties.

**Regulation of Dispute Boards in Public-Private Partnerships**

In December last year (2013), amendments were made to the Framework Law on Public-Private Partnerships. One of these includes the DB as a dispute reso-
olution mechanism, as a stage prior to arbitration.

We believe that this statutory provision is a clear sign of the positive reception and expectations that have been generated by the DBs in our country, demonstrating in addition the value of the research and promotion undertaken by the CARC - PUCP. DBs have now become a real and effective dispute resolution method for public-private partnerships.

High expectations of including Dispute Boards in public works contracts

We trust that future amendments to the Public Procurement Law will include the DB as a dispute resolution method in public works contracts. We are confident that this will help to resolve promptly the large number (69.5%) of disputes that nowadays go to arbitration as a result of the absence of a prior mechanism to prevent or resolve them during the execution of the contract.

DRBF Regional Conference & Workshop - Lima, Peru
16 & 17 July 2014 • Westin Lima

The time is right to engage with Dispute Board practitioners in Peru and the surrounding region. Participants will take a look at the historical perspective on dispute resolution in Latin America and receive guidance on successfully establishing and operating a DB. International and local industry DB users and practitioners will share their views and there will be opportunity to network. The workshop for users and practitioners will deal in some depth with the dispute avoidance role of DBs and also DB procedures in practice.

The event will be held at the Westin Lima Hotel & Convention Center located in the heart of San Isidro, Lima’s business district. Discounted hotel rates are available for those traveling from outside the immediate area. Discounted rates are available for DRBF members, and package pricing and Early Bird rates are available for all delegates.

Register today! www.drb.org
DRBF 18th Annual Meeting & Conference
Dispute Boards on Complex Projects: The Power of Dispute Avoidance and Real-Time Resolution
October 23 - 25, 2014 • Toronto, Canada

The DRBF 18th Annual Meeting and Conference will integrate practical experience shared by users of the DRB process with in-depth analysis of this evolving dispute resolution process. With an emphasis on the DRB’s unique role in dispute avoidance as well as resolution, conference delegates will explore ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process.

Event Details:

October 23: Training Workshops

- The DRBF offers two workshops integral for all Dispute Board practitioners: the introductory DRBF Administration & Practice Workshop and the Advanced/Chairing Workshop for advanced practitioners.

October 24 & 25: Conference

- Best practice and lessons learned from around the world, plus new challenges and opportunities in the application of Dispute Boards.
- Optional events include a tunnel site visit and the popular Al Mathews Awards Dinner at Toronto’s CN Tower.

Visit www.drb.org for complete event details and registration.