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In the Asia/Pacific Region, "Quo vadis" Dispute Boards?

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"The world requires at least ten years to understand a new idea, however important or simple it may be." -- Sir Ronald Ross

"A journey of a thousand miles begins with a single step." -- Lao-tau

Sir Ronald was a 19th century English physician. While a junior "Doctor" and not yet a "Sir" he worked for the Indian Medical Service in a field hospital in Secunderabad, India. At that time, it long had been thought that the worldwide killer disease, malaria, was transmitted by "noxious effluvium," otherwise known as "bad air". Dr. Ross was drawn instead to the hypothesis that mosquitoes propagated the disease.

In 1894, he began experimental investigation and in 1897, confirmed that malaria was transmitted by the *Anopheles* mosquito. However his findings were not generally accepted until after 1903. Then, largely for his work on malaria, he was awarded the Nobel Prize for Medicine in 1904, ten years after his investigation had begun. The mosquito was recognised as the culprit.

Even after that recognition, there were many doubters that such a tiny insect could be the carrier of the dreadful disease. Despite the deaths from malaria of many Panama Canal construction workers during the previous 1.5 years it was not until the Autumn of 1905 that the Canal project physicians overcame disbelievers and got funding to rid the Canal area of mosquitoes. The much-publicised success of thereby stemming malaria in the Canal Zone finally led to general acceptance, worldwide, that it was the mosquito, not "bad air", which transmitted the disease.

Ross was right: no matter how important or simple the idea may be, it seems to take about 10 years for the world to understand and accept it. As Ross had learned, the journey from understanding an idea to its implementation it is a lengthy one

Lau-tzu was a Chinese Taoist philosopher born in 604 BC, who lived for 73 years and today is remembered especially for his writings in "The Way of Lao-tzu". His aphorism quoted above would have been understood well by Sir Ronald after his long "journey".

The two quotations above are appropriate perspectives from which to assess the prospects for – or “*Quo vadis?*” -- Dispute Boards in the Asia/Pacific region. This paper’s assessment focuses on what generally is termed “Southeast Asia”.

At the outset, the point should be made that the author’s experience is based upon involvement with Dispute Boards required by multinational development banks and aid agencies, and the author has not been involved in Dispute Boards which have been formed spontaneously on other projects in the region. (However, the author has had experience in spontaneous creation of Dispute Boards in private projects outside the region, and believes that eventually they will appear in the region; indeed they may have already and the author simply has not heard about them.)

Let us look first at the largest country in the Asia/Pacific region, China.

Ertan

One of the most prominent of the Asian projects to use a Board was the Ertan Hydropower Project on China’s Yalong River. It included an 800 feet high double curvature arch dam and an underground power plant housing six 550 MW units. It was constructed over a period of 10 years, completing in 2000, at a cost of nearly US\$ 2 billion. It is believed to have been the first project in China to use a Dispute Board, and the use was a success: no disputes went to arbitration; all were settled amicably. This success enjoyed considerable publicity and was influential in the use of Boards on other projects in China, on two of which the author has served.

Xiaolangdi

One was the Xiaolangdi Multipurpose Dam on the Yellow River, which began in 1994, three years after the start of the Ertan project. As with the Ertan project, the Xiaolangdi project had a single board serving all of the prime contracts for the project. Thus the Xiaolangdi Board served three joint venture contracts involving in total 10 continental European constructors and 4 Chinese constructors. The three joint venture contracts were for the dam, the underground powerhouse, and the tunnels. The project objectives were to raise flood protection from 60 years to 1000 years return frequency, reduce sediment build-up downstream, prevent ice accumulation, and provide irrigation, water supply, and power generation.

The project was major by any measure, involving a rock fill dam with clay core, over 500 feet high and containing 87 million cubic yards of fill (the largest such dam in China) and having a cutoff wall over 265 feet deep underlying it – the deepest and thickest such wall in China. The 10 intake towers are the largest and most complicated in the world. The project has more than 100 tunnels of various sizes arranged in the left bank; they comprise some of the most concentrated caverns in the history of global water and hydropower project construction. The plunge pool is the largest and most concentrated plunge pool in the world. The underground power house is the largest in China and houses six 300 MW Francis turbines. You will not be surprised to know that although it is located some 40 kilometers north of Luoyang, it has become, since its opening in 2001, a major tourist attraction.

Project cost for the Xiaolangdi project was over US\$ 4 billion, including about US\$ 1.2 billion in foreign financing. Severe problems arose from dealing with the geology encountered in construction and claims of approximately US\$500 million arose, but again no arbitration occurred and all claims were settled amicably, and this was accomplished by the time all construction was complete.

Kunming

The second Board in China on which the author has served is still in operation, and it serves a contract for construction of a major tunnel forming part of the massive project of providing additional water supply from the mountainous headwaters of the Zhangjiuhe River to metropolitan Kunming, in Yunnan Province. The tunnel was begun using a TBM but geological problems led to abandonment of the use of the TBM and full employment NATM methodology. The change in excavation methodology led to constructing additional adits to open additional faces in order to achieve timely completion. Many claims and counterclaims arose, but – fingers crossed! – it appears that all will be resolved amicably and without arbitration.

One of the Kunming Dispute Board members also had served on the Dispute Board for the 2nd and 3rd phases of the Shanxi Wanjiashai Water Control Project, on the north stem of the Yellow River. That project formed the first cascade of the basic development plan of the middle reaches of the Yellow River, the second largest river in China. The main targets of that project were water supply, especially in the Shanxi and Nei Mongolia areas (which were suffering water shortage) and improvement of the energy supply to Northern China. Secondary aims were flood control and ice prevention. A major feature of the project was the earlier-constructed Wanjiashai Dam, a gravity dam with a power plant having installed capacity of 1080 MW. Another member of the Dispute Board for the 2nd and 3rd phases of this project had served with the Ertan project “Engineer” and dealt extensively with the Ertan Dispute Board; thus there was an historical “linkage” among 3 Boards on major Chinese projects.

It is clear that in China, Dispute Boards can and have succeeded.

However, the author is not aware of Chinese construction contracts which do not involve foreign participants having adopted the use of Dispute Boards. It is perhaps too soon to judge whether in the future the Dispute Board system will become popular in such contracts. Certainly several of the major Chinese construction companies are garnering experience of the use of Dispute Boards when working on projects outside China, and the author is aware of projects outside China on which the Chinese constructors have welcomed the use of Dispute Boards. Nevertheless, to the extent that a Chinese State-owned construction company is working on a Chinese State-owned project, it may be that Dispute Boards are seen as unnecessary.

Outside China

Today, we are still short of Sir Ronald’s 10 years since the first appearance of the FIDIC MDB Harmonised Edition of Conditions for Construction. They were published in May 2005, as one product of the effort of the Multilateral Development Banks (“MDB”) and the International Financial Institutions (“IFI”) to harmonise their

respective Standard Procurement Documents for use by their Borrowers/Donees in contracting for engineering and construction projects financed by those Banks and Institutions. Such harmonisation effort was undertaken pursuant to the United Nations' Millennium Goals of 2000.

Dispute Boards of course had been extant for many years before 2005, but the idea of a unified approach by all of the major development lenders and grantors to the use of Dispute Boards was a "new idea" stemming from the Millennium Goals. The result of the development of the FIDIC MDB Harmonised Edition of the FIDIC "Red Book" has been a large increase in the number of Dispute Boards in developing countries worldwide, including many countries in the Asia/Pacific region. The author's view is that the MDB/IFI initiative will make Dispute Boards a permanent and growing feature of the engineering and construction industry in developing countries everywhere, including such those in the Asia/Pacific region.

Thus, it seems that in general, Dispute Boards will grow in number in the region primarily (and perhaps for some time, exclusively) on projects financed at least in part by foreign lenders/donors from the international development organisations.

One IFI which is taking a "pioneering" role in the region is the Japan International Cooperation Agency ("JICA") and Professor Omoto's paper for this Session of this Conference provides full details about JICA's efforts to develop successful use of Dispute Boards in the Asian countries where Japan is most active as a lender and donor for development. JICA also has begun cooperative efforts with the Asian Development Bank (which traditionally has a Japanese President) for increased ADB efforts toward successful use of Dispute Boards on projects which ADB finances. This augurs well for future increases in training in the Asian region on the technique for successful use of Dispute Boards.

Other regional experience

As the author has been asked to address not only his experiences on Boards in the region but also his general perceptions of the future for Boards in the Asia/Pacific area, it is appropriate to mention his overall regional experience which has influenced his perceptions. This experience includes more than 20 projects in Indonesia (Sulawesi, Sumatra, Java), Malaysia (Peninsular, Sabah, Sarawak), Philippines, Singapore, and Vietnam, ranging from hydropower, pipeline, port, and industrial projects to golf resort developments. It also includes over two decades of teaching procurement of construction services (including dispute resolution under construction contracts) to engineers and lawyers working in all of the Southeast Asian countries.

One result of this experience is having many happy memories, and some surprising experiences regarding Dispute Boards. One of the most surprising and happy experiences was the "conversion" to use of Dispute Boards of the gentleman who then headed the Employer's organisation on the Xiaolandi project in China: at the outset a sceptic about the Dispute Board process, at the end of the project he agreed to serve as the DRB Foundation's first Country Representative for China!

Another happy experience was being with the full Kunming project Dispute Board and a group of Chinese participants (including executives of China's famous

Sinohydro Corporation) at the World Bank office in Beijing and participating in a 3 hour live link televised symposium regarding Dispute Boards, with simultaneous participation from Bangkok and Hanoi, led by the DRB Foundation Country Representatives and their guests in those two capitols, together with simultaneous participation from Washington, D.C. by representatives of the World Bank Institute and the International Development Law Organisation which were the co-sponsors of the symposium. The interest in the Dispute Board technique which was evidenced in those 4 capitols was intense and promising.

Do Dispute Boards fit with the culture of the region?

Some authors assert that the culture of the region values highly courtesy, harmony, privacy, and respectful, amicable negotiations regarding any differing interests; adversarial actions and evident commercial conflict are to be avoided. Some of these cultural characteristics often are attributed to the influence of Confucianism and of Buddhism. Sometimes the culture is said to have a stronger tradition of regard for communal interests than for individual interests. From these assertions, it is suggested that such dispute resolution techniques as Dispute Boards are unnecessary.

No doubt there is truth among these assertions and characterisations; but it would be unwise to assume that they will enable conflict-free and amicable settlement of all disagreements arising in engineering and construction contracts in the region. Nor should one assume that because of the such broad cultural characteristics, Dispute Boards are unnecessary in the region. One must recall that a major Regional Centre for arbitration is headquartered in Kuala Lumpur; Hong Kong is another active arbitration arena, as is Singapore. Also, the lawyers and Courts of countries of the region have busy calendars of disputes arising from engineering and construction contracts. The region's construction scene is not without need for improvement of both prevention of contract disputes and prompt resolution of those disputes which cannot be avoided.

This author's summary view is that the region's culture is many-faceted, but is not hostile to Dispute Boards, and indeed Dispute Boards fit well with the culture of the region.

How capable and how suitable are Dispute Board members who are nationals of the countries of the region?

This is a question often presented in a way which suggests that nationals from the countries of the region are somehow "less experienced" and/or "less likely to be independent and impartial" than Board members who are foreigners. In some cases, such suggestions are accompanied (either expressly or impliedly) by a suggestion that nationals of the region are more likely to be "corrupt". The author's view of such suggestions is that they say much more about the suggestor than about Asians.

Certainly, no country or region has a monopoly on corruption or bribery. As for lack of independence and impartiality simply because of nationality, it is well to remember that nationality is generally not accepted as a basis for challenging the independence and impartiality of arbitrators. "Less experienced"? In terms of professional skills, no; in terms of experience in service on Dispute Boards, predominantly yes, but that is to

be expected at this stage of use of Dispute Boards in the region. It is a reason that often Boards in developing countries will have nationals as members but the Chairperson will be a foreigner with extensive experience in serving on Dispute Boards.

To draw on personal experience, the author chaired a Board on a large hydropower project contract in Pakistan in which the Employer was a Pakistan Government entity and the Contractor was a foreigner (Chinese), and the other two Board members were Pakistan nationals, without previous experience on Dispute Boards. In the author's view, both gentlemen clearly grasped the construction issues involved in the disagreements which arose between the Contract parties, were independent and impartial of the parties, and were exemplary Dispute Board members. They subsequently organised seminars in Pakistan on use of Dispute Boards, and one gentleman became DRB Foundation Country Representative for Pakistan.

Are Dispute Boards well-received in the industry in the Asia/Pacific region?

If there were a "report card" on the reception and use of Dispute Boards in the region, the schoolteacher probably would write "Could do better." For example, the DRB Foundation's Country Representative in Vietnam found several instances of MDB funded contracts where Government Employers artificially broke up single projects into several sub-projects solely to keep the estimated Contract Price of each contract below the level at which they were obliged to use at least a one-person Dispute Board. Discussion indicated that this was not because of the cost of the Board but rather the desire not to have an "outsider" present in the performance of the Contract.

In fairness it should be mentioned that manipulation of FIDIC Conditions is not unique to the Asia/Pacific region. A recent large Middle East Government contract using the FIDIC Yellow Book Conditions evidences extensive "editing" to omit many provisions seen as "too beneficial" to the Contractor, such as Price Variation, relief for encountering unforeseeable adverse physical conditions, and the entire Clause 20 (replaced with a requirement that disputes will be resolved solely by litigation in local courts, in Arabic language).

If such manipulation is discussed at all, it often is justified on the basis that the Employer does not have available the necessary experienced manpower to administer such complex contract provisions, although this explanation seems questionable when one considers the extensive presence in most developing countries of experienced consulting engineering firms.

Another explanation offered for failure to embrace the Dispute Board process, especially resolving disagreements by negotiation is that it is "politically difficult", or even dangerous, because it may lead to allegations of corruption, bribery, or other accusations which even if untrue nevertheless are damaging to the careers of the persons managing the Employer's role under the Contract. If the Contract has a full Clause 20, the belief is that the "safest" approach for the Employer to take to very claim is to process it through the Dispute Board, then on to arbitration. Only after an arbitral award, it is seen as "safe" to pay (or collect) the amount awarded.

Yet another explanation for not welcoming Dispute Boards is that they cost money, and there is a frequent perception that money can be “saved” if the Board is never established, or alternatively is established only if and when the parties find themselves in a dispute which they cannot resolve by negotiation. The sad record of the so-called *ad hoc* Dispute Boards should be a warning to anyone tempted to delay Board establishment until a dispute arises. Such approach deprives the Board of its unique feature of assisting in the avoidance of formal disputes.

Another “money saver” which is problematic is to seek to limit the Board,S for example by restricting the frequency or duration of Site visits by the Board, or having a single-person Board on a large and complex contract.

What can be done to improve the reception of Dispute Boards in the region?

The fact that some of the attitudes and approaches to Dispute Boards described above are allowed (or ignored) by the MDB and IFI representatives reflects a traditional reluctance of aid agencies to become involved in the administration of the contracts which they finance. The reluctance is understandable as a general principle. However, it is regrettable when used as an excuse for not assuring that Dispute Boards are established and operated properly, as foreseen by the Contract Conditions dictated by the aid agency itself. To insist that the Boards be created and operated is not “interfering with the administration” of the Contract. It is simply requiring that the Borrower/Donee abide by the terms of the loan/grant. It does not involve the aid agency in “taking sides” as between the Borrower/Donee vs. the Contractor. Such insistence is fully justified because it is fundamental to assuring that the MDB/IFI funds are used economically.

Just as the schoolteacher’s report card comment “Could do better” is apt to lead to an increase in “homework” by the student, so the “Could do better” remarks regarding use of Dispute Boards in the region should signal that there is a need for further education regarding Dispute Boards and how to use them successfully. This education is needed not only for the users of the Boards but also for the staffs of the MDBs and IFIs which are administering the loans which make the contracts possible.

Where do we begin?

We must begin with you. People who are interested in construction contract dispute resolution are the only persons who are likely to take the initiative to help establish the education that will lead to full and effective use of Dispute Boards. Education is needed in universities, in continuing professional development programmes of the professions involved in the construction industry, and in the MDBs/IFIs and their Borrowers/Donees. Most of this work will be predominantly *pro bono publico*, but it yields grateful appreciation which carries its own reward.

If you are resident in Australia, you may feel that there is little you can do because of the predominance in Australia of other approaches to dispute prevention and resolution on construction projects. However, Australia and Australians are active in most countries in the Asia/Pacific region, and if you look beyond the Australian continent you will see many opportunities to help in the successful growth of regional use of Dispute Boards, including opportunities to serve on Dispute Boards.

What can be done? Join and work with the DRB Foundation, and encourage your colleagues in all parts of the construction industry to do so, too. Help the Foundation in its training programs. Encourage your professional association to include Dispute Board training in its continuing professional development courses. Lobby your government to focus its representatives in the MDBs/IFIs on undertaking training programmes such as those of the JICA.

The journey to fully successful use of Dispute Boards in the Asia/Pacific region will be a long one, and many must share that journey. It too will begin with single steps by those who wish to see the journey succeed. Now is the time for you to take your step.

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