

Dispute Resolution Boards and the Hong Kong Airport: An Exciting Example of Commercial Dispute Resolution in Action

By Robert K. Wrede, JD, LLM

Historical Setting

Since the British returned Hong Kong to Chinese sovereignty in July 1997, Hong Kong has been a Special Administrative Region of the Peoples' Republic of China. Despite its return to Chinese sovereignty, Hong Kong remains, distinctly British in tone, but Asian in temperament, and its fiercely independent inhabitants continue to vigorously defend Hong Kong's autonomy under the characteristically ambiguous Chinese policy slogan: "One country, two systems."

This vibrant, mountainous, densely populated former British colony is but one third the area of Rhode Island. Despite its diminutive size, however, Hong Kong has long been one of Asia's greatest trading, shipping and banking centers. Under its century-and-a-half of British rule, Hong Kong functioned, and now continues to function, both as a major trade conduit between China and the rest of the world, and as a source of its own products and economic resources. Hong Kong's British-dominated recent history, cramped geographical confines, prime coastal location, mountainous terrain, vibrant economy, proximity to mainland China and large, energetic, multicultural population have combined to create both exceptional challenges and exceptional opportunities for Hong Kong's economic, political and social development, and its role in the new global economy and strong economic and political influence on the Peoples' Republic.

Among the many results of Hong Kong's growth and thriving economy has been a burgeoning construction industry, involving both numerous large-scale private projects, and many major publicly funded housing, transportation, cultural and other infrastructure projects.

Chek Lap Kok International Airport

Granddaddy of all such projects was, and remains, the construction of the Hong Kong international airport at Chek Lap Kok. Chek Lap Kok is within five hours flying time from half the world's population and has been designed

to accommodate some 80 million passengers a year -- more than London's Heathrow and New York's JFK combined.

It is currently the fifth busiest airport in the world, averaging more than 650 takeoffs and landings daily. In 2004, the facility managed over 37 million passengers, still far short of its design capacity but impressive nonetheless. It also boasts one of the world's largest air cargo terminals, handling over 31,000,000 tons of air freight in 2004 alone.

Chek Lap Kok's development required the creation of a state-of-the-art transportation corridor stretching over 20 miles from Hong Kong Island to the airport site and incorporating a high-speed automated rail system, two tunnels, two bridges and a six lane expressway. The suspension bridge carrying railway and highway lines from Hong Kong Island to Chek Lap Kok is the longest of its kind anywhere in the world. The airport was built on tiny, mountainous Chek Lap Kok Island, which was flattened and extended into the South China Sea to four times the island's original size to accommodate the huge development.

The airport terminal, designed for the rapid movement of millions of passengers, has 288 check-in counters, 200 immigration desks and 80 customs positions. It also boasts over a mile-and-a-half of moving walkways and approximately 120 shops within the terminal building itself, which is the largest covered space in the world. Related shopping and leisure facilities include the airport's adjacent Sky Mart, which houses 160 shopping outlets, 40 restaurants, Internet lounges, Wi-Fi access, and numerous other travelers' amenities.

In August of 2004, DHL opened a \$100 million Central Asia cargo hub capable of handling 400 tons per day of air express cargo. Asia Air Freight, in turn, is investing 1.75 billion Hong Kong dollars in the construction of its own air freight terminal, capable of handling some 910,000 tons of air freight per year. Hong Kong Disneyland, which opened in 2005, is also adjacent to the airport.

Future plans for Chek Lap Kok include development of an adjacent office, retail and business complex called Sky City -- which will include an Asian-World Expo exhibition center, a second hotel project and additional inter-modal transportation facilities, including a new marine terminal (with both cross-border and domestic ferries); an additional airport express line adjacent to the Asia-World Expo Center; and a new bus station.

Chek Lap Kok has been voted the world's best airport each year from 2002 through 2005, and has consistently been among the top five facilities in the world since its opening in 1998.

The Sheer Magnitude of the Chek Lap Kok Challenge

The core Chek Lap Kok construction project, generally acknowledged to be the largest such project in history, cost more than \$20 billion, involved four major public and private sponsors, 10 separate but interrelated projects, 225 construction contracts and subcontracts, and over 1000 critical interfaces. The design, engineering, construction, and coordination of the daunting project involved entities and consortia from around the world.

The facility was designed by British architect Sir Norman Foster, who also designed London's Stansted Airport. A British company engineered and designed the huge passenger terminal; a six party international consortium was awarded the \$1.2 billion terminal construction contract; subcontracts worth \$241 million for the installation of elevators, escalators, walkways, aircraft loading bridges and air conditioning facilities were awarded to a joint venture comprised of Hong Kong, Italian and British entities; a 16.3 million Hong Kong dollar contract for voice and data communications infrastructure was awarded to a Japanese company; and so forth.

Few would dispute the proposition that the construction industry -- as indispensable as it is to our comfort and welfare -- has traditionally proven to be highly confrontational and frequently litigious - many times resulting in huge cost over-runs, frustrating delays, and sometimes even resulting in project abandonment. Yet, incredibly, the vast, complex, multidisciplinary, transnational collaboration that collaborated to create Chek Lap Kok completed the massive project both on time and under budget.

The question is: How was Chek Lap Kok brought in on time and under budget in such a complex, potentially adversarial context?

The Chek Lap Kok Conflict Management Model

Simply stated, the Hong Kong government used a carefully crafted mix of alternative dispute resolution methods to avoid, manage, and resolve the wide range of problems that -- mismanaged -- could well have delayed, significantly increased the cost of, or even prevented completion of this vast undertaking.

More specifically, the government included a multi-tiered system of alternative dispute resolution mechanisms as a standard condition in all its Chek Lap Kok related contracts to avoid, or at least mitigate, the threat of delay, cost escalations and overruns, litigation costs, the risk of judicial interference, and the myriad other problems that frequently -- if not inevitably -- plague complex construction projects.

Arbitration was available as a remedy of last resort -- but only in the event all other ADR methods provided for in the contractual dispute resolution process failed. [See General Conditions of Contract for the Airport Core Programme Civil Engineering Works, Clause 92 "Settlement of Disputes."] A multi-tiered dispute resolution scheme was also used by the Airport Authority in the construction of the huge airport terminal itself. [See, Provisional Airport Authority, Dispute Review Procedure, July 1994 Edition.]

Both systems relied on the use of pre-selected panels of experts -- each with both procedural and substantive expertise spanning a broad range of disciplines -- to immediately address emerging disputes in order to nip potential or emerging disputes in the bud, by seeking their voluntary resolution as they emerged. This process was backed, however, by the potential of binding arbitration in the event disputing parties failed to resolve their differences voluntarily under the aegis of the pre-selected expert facilitator or facilitators.

Significantly, the Hong Kong government's Architectural Services Department has now introduced another form of multi-tier dispute resolution, generally referred to as the "Dispute Resolution Advisor System," in its contracts relating to other major public construction projects. This system provides for the use of a pre-selected neutral advisor charged with keeping abreast of all aspects of a project from the outset, to assist the parties in predicting and avoiding problems altogether or to resolve them as soon as they arise. Once again, arbitration occurs only if voluntary resolution efforts fail. [See P. Turner, "Dispute Resolution Advisors in Hong Kong," *Asian Dispute Review*.] But whether a single "Dispute Resolution Advisor" or a multiparty "Dispute Resolution Board" is used, the objective of both approaches is basically the same: to utilize pre-selected experts, with procedural and substantive expertise to help anticipate and avoid conflict altogether, or to nip it in the bud before it can blossom into truly adversarial and disruptive conflict.

Such approaches also have proven effective in avoiding, managing and resolving conflict in a wide range of other complex, costly and challenging multiparty projects like Chek Lap Kok -- where vast amounts of money are at

stake, the threat of conflict palpable, and litigation-related delays and escalating costs could be catastrophic.

The increasing use and popularity, worldwide, of both Dispute Resolution Advisors and Dispute Resolution Boards is evidenced by the relatively recent appearance of special rules relating to dispute resolution boards promulgated by such organizations as the International Chamber of Commerce, the International Institute for Conflict Prevention & Resolution, the AAA's International Centre for Dispute Resolution, and the Dispute Resolution Board Foundation.

Dispute Resolution Advisors and Boards: Prophylaxis for Conflict.

In summary, avoiding or minimizing conflict in complex commercial settings by contractual prearrangement is finding expression in a number of approaches, including the following:

Dispute Resolution Advisors (which could be an entity as well as an individual or individuals) are usually engaged in addition to professionals generally employed by the "owner" of a project to administer the project contract ("project administrators"). Such Advisors monitor project progress and confer at regular intervals with owners, project administrators, and the various contractors, in an attempt to avoid or resolve problems before or as soon as they arise. The principal function of the Advisor is thus not only to foresee and avoid potential problems, but also to promote and facilitate cooperation among the parties in seeking resolution of emerging disputes.

Such advisors are particularly useful where the "owner" is a government agency employing an in-house professional or staff to administer the project. As previously mentioned, Dispute Resolution Advisors are currently being used by the Hong Kong Architectural Services Department and, in addition, by the Hong Kong Housing Authority to provide oversight respecting the government's many public housing and related projects. The Architectural Services Department has developed a full set of rules for their common dispute Resolution Advisor system, which has been in use for some years and is generally viewed very positively by all parties involved in such contracts.

Dispute Resolution Boards function much as Dispute Resolution Advisors do, except that the boards generally involve a panel of individuals (frequently three), or in the case of very large, multi-discipline, multi-contract projects, a

larger pool of individuals with a range of procedural and substantive expertise from which specific panels may be selected as needs arise.

A key issue is whether determinations are to be simply advisory (nonbinding), binding unless overturned by arbitration or litigation, or fully and immediately binding as an exclusive, un-appealable remedy.

Conclusion

The favorable Hong Kong experience with carefully pre-designed programs of tiered alternative dispute resolution -- not only at Chek Lap Kok but with other major Hong Kong public works projects as well -- provides persuasive evidence for the proposition that thoughtfully designed and effectively implemented alternatives to traditional litigation, such as the use of Dispute Resolution Advisors and Boards, can be both highly efficient and cost effective in the avoidance, management and resolution of the conflicts that inevitably accompany most complex human endeavors.

Both logic and empirical evidence supporting the prophylactic use of these devices are compelling. One authority has estimated that, since dispute boards were first introduced almost 20 years ago, close to \$100 billion US dollars worldwide has been spent on construction projects that have used dispute boards. Of these, 98% were constructed without any court battles and of the remaining 2%, the dispute board decisions were upheld by either arbitration and/or the court: a truly impressive record.

Simply stated, “prophylactic collaboration, not confrontation” is proving to be a highly functional, cost effective tool for minimizing the cost and disruption of the conflict that inevitably plagues human enterprises, large and small.

These comments were originally prepared for and presented by Mr. Wrede on November 4, 2006, at the fall 2006 meeting of the Southern California Mediation Association held at the Straus Institute for Dispute Resolution at Pepperdine Law School, Malibu, California. The article also appeared on Mediate.com, January 2007 entitled Dispute Resolution Boards. A New and Exciting Role for Commercial Dispute Resolution: A Quintessential Example of ADR in Action.

Excerpts from the article have been edited for presentation here in *International Focus*.

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