

Exploring Effective Financial Dispute Resolution Design Models through a Learning Orientation: Experiences From East Asia

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Abstract: In recent times, global financial dislocation has provided an impetus for examining effective avenues for the resolution of financial disputes. Hong Kong, like many financial centers throughout the world, has been directly affected by the collapse of Lehman Brothers. Its response to the collapse can partly be described by a learning orientation which first sought to examine existing institutional dispute resolution design mechanisms from which it could explore possible solutions. Based on its findings, its response included a creative mix of regulatory strengthening and government sponsored mediation and arbitration. This process of policymaking provides a useful case study of the prospects of using a learning orientation process to address policy challenges.

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Introduction

“Dialectic” or the exchange of differing views to seek out the truth implies a learning orientation to policy challenges. In recent times, global financial dislocation has provided an impetus for examining effective avenues for the resolution of financial disputes.

The first part of this paper presents an overview of the concepts of dialectic learning theories and goal orientation. It then examines the evolution of goal orientation, highlighting learning orientation as opposed to performance orientation.

Drawing on insights from learning orientation, part two examines how Hong Kong policymakers, following the financial crisis, responded by reviewing both regional and global lessons learned and designed a creative program of regulatory strengthening and government sponsored mediation and arbitration including a proposal for a Financial Dispute Resolution Center.

Part 1: Learning Orientation

In education and psychology, learning is commonly defined as a process that brings together cognitive, emotional and environmental influences and experiences for acquiring, enhancing, or making changes in one’s knowledge, skills, values and views.¹ It entails a lasting change in behaviours or beliefs that results from experience. Learning focuses on what happens when the learning takes place; and explanations of what happens constitute learning theories. As learning is a basic psychological process, investigations into the principles and mechanisms of learning have been the subject of research and debate since the establishment of the first psychological laboratory by Wilhelm Wundt in Germany in 1879.²

Three recognized categories or philosophical frameworks under which learning theories fall include behaviourism, cognitivism, and constructivism. Behaviourism focuses on the objectively observable aspects of learning. Cognitive theories look beyond behaviour to explain brain-based learning; and constructivism views learning as a process in which the learner actively constructs or builds new ideas and concepts.³

On the other hand, some researchers consider that it is not so much that learners acquire structures or models to understand the world, but they participate in frameworks that have structure. In essence, learning involves participation in a community of practice. This forms the basis of the social/situational learning theory where learning takes place in a social setting or particular social situation.⁴ The focus is on the ways in which learning is an evolving, continuously renewed set of relations.⁵

¹ Ormrod, Jeanne E., *Human Learning* (Upper Saddle River, NJ: Prentice Hall, 1999), 3rd edn.

² See <http://www.answers.com/topic/learning-theory>, retrieved on 14 Feb 2011.

³ *Ibid.*

⁴ Smith, M.K., “The Social/Situational Orientation to Learning” (1999) *The Encyclopedia of Informal Education*, at <http://www.infed.org/biblio/learning-social.htm>, last update: 3 Sept 2009.

⁵ Lave, J. and Wenger, E., *Situated Learning: Legitimate Peripheral Participation* (Cambridge: University of Cambridge Press, 1991).

Irrespective of the models used, learning remains an inevitable consequence of living, and the ability to learn provides every living organism with the capability to adapt to a changing environment.⁶

To better understand how learning affects people, governments and organizations in reaching their goals and targets in work and life, psychologists have proposed the concept of goal orientation. This is a mental framework that describes the different motivational approaches that people embrace to reach desired objectives, and is a strong predictor of behaviour and performance.⁷ Two types of goal orientation were described by Carol Dweck and her colleagues: learning orientation and performance orientation. Individuals with a learning orientation primarily approach situations in an attempt to enhance knowledge, skills and competence, while individuals with a performance orientation generally attempt to demonstrate their abilities and expertise to gain approval from peers or others.⁸ Subsequent researchers⁹ have demonstrated, among others, that individuals or organizations with a learning orientation perceive challenging settings as opportunities to acquire knowledge and expertise, and maintain their effort throughout frustrating times. They are more inclined to feel that cooperation with peers is a vital determinant of success.¹⁰

Learning or mastery orientation has been studied in relation to organizational concepts and practices, market-based learning orientation, entrepreneurial, innovation and social or situational settings.

An Overview of Learning Theories and Goal Orientation

The evolution of learning theories may be considered as a progression from broad theories developed to explain ways that learning occurs to more specific types of learning they are designed to explain.¹¹ One of the early theories was put forward by John Watson who asserted that learning should be the study of observable behaviours rather than consciousness or the mind.¹² This theory identified two main types of processes where behaviour was acquired, classical conditioning and operant conditioning. Classical conditioning was associated with the study by Ivan Pavlov on reflexes on dogs¹³ where behaviour became a reflex response to stimulus. Operant conditioning, primarily developed by Skinner, refers to behaviour learned as a function of its consequences, with reinforcement of the behaviour by a reward or punishment.¹⁴

Although behaviourism was the dominant theory in learning throughout the first half of the twentieth century, there was a resurgence of interest in the other early theory, cognitivism. Cognitive theories are concerned with the influence of thinking about and remembering experiences or behaviour. They focus on the individual as an active processor of information that modifies new experiences, relates them to past experiences, and organizes the information for storage and retrieval. In essence, learning involved an

⁶ See n 2 above.

⁷ See http://en.wikipedia.org/wiki/goal_orientation, retrieved on 16 Feb 2011.

⁸ Moss, S., "Goal Orientation" (2008), at <http://www.psych-it.com.au/Psychlopedia/article>, retrieved on 9 Feb 2011.

⁹ Dweck, C.S., *Mindset: The New Psychology of Success* (New York: Random House, 2006).

¹⁰ Duda, J.L. and Nicholls, J.G., "Dimensions of Achievement Motivation in Schoolwork and Sport" (1992) *Journal of Educational Psychology* 84, 290-299.

¹¹ Benjamin, Ludy T., *A History of Psychology: Original Sources and Contemporary Research* (New York, N.Y.: McGraw-Hill, 1997), 2nd edn.

¹² Watson, John B. (1913), "Psychology as the Behaviorist Views It", in Benjamin, *History of Psychology* (n 12 above), p 396.

¹³ See n 2 above.

¹⁴ Skinner, B.F. (1938), "A system of Behavior", in Benjamin, *History of Psychology* (n 12 above), p 466.

understanding about events and their consequences, and this led to purposive, goal-directed behaviour as put forward by Tolman and his concept of cognitive maps.¹⁵

With increase in the amount of available information that needs to be deciphered and learned, as well as the rapidly changing environment that requires new types of responses to evolving issues, contemporary learning theories have emerged. Some integrate specific components of the traditional learning theories, while others incorporate new perspectives. The social learning theory as put forward by Bandura looked into the interaction of learning through observation and modeling, and the components of cognitive processing,¹⁶ whereas a constructivist approach views learning as a process in which the learner actively constructs or builds new ideas based on current and past knowledge or experience. It is essentially a personal endeavour whereby internalized concepts and principles may be applied in a practical setting. This is also known as social constructivism when individuals engage in activity about shared problems or tasks and knowledge is thereby constructed.¹⁷

There has been criticism that the attempt to comprehend the process of learning through theory construction has created more problems than it has solved.¹⁸ Notwithstanding, if one views these theories as a body of research that describes how people modify their behavioural patterns as a result of experience, and integrate them with the biological perspective, it will help us to understand better the impact of emotions, intentions, values and the society on our learning orientations; provide the opportunity of enhanced learning and improved thinking, and guide us to creating a more successful environment in both public and private settings.¹⁹

Researchers have since developed the concept of goal orientation, a psychological construct that examines the attitudes and behaviours associated with achievement situations. These orientations illustrate how people react differently to accomplishment and failure.²⁰ Organizational studies first considered goal orientation to be a stable individual characteristic, while other researchers suggested that it can vary as a function of a person's implicit theory of intelligence. It can therefore exist both as a trait and a state, and one's trait goal orientation has a direct effect on his state goal orientation.²¹

An early theory related to goal orientation was proposed by Nicholls who differentiated between task or ego involvement. Task involvement defined success based on subsequent individual performance, whereas ego involvement defined success based on peer performance.²² The former was referred to as a learning orientation while the latter a performance orientation, as put forward by Dweck in her research with school children. The original work conducted by Dweck believed that individuals tend to adopt either a learning or performance orientation, as they were considered opposite ends of the same continuum. They would either strive to develop or enhance their skills, knowledge and expertise; or attempt to demonstrate their competence, and outperform specific targets and standards.²³

¹⁵ Tolman, Edward C. (1948), "Cognitive Maps in Rats and Men", in Benjamin, *History of Psychology* (n 12 above), p 450.

¹⁶ Bandura, Albert, *Social Learning Theory* (Englewood Cliffs, NJ: Prentice-Hall,1977).

¹⁷ See n 4 above; and <http://www.eadulthoodeducation.org/adult-learning>, retrieved on 16 Feb 2011.

¹⁸ See n 2 above.

¹⁹ *Ibid*; and <http://www.trainingplace.com/source/research/overview.htm>, retrieved on 16 Feb 2011.

²⁰ See n 7 above.

²¹ Payne, S.C., Youngcourt, S.S. and Beaubien, J.M., "A Meta-analysis Examination of the Goal Orientation Nomological Net" (2007) *Journal of Applied Psychology* 92, 128-150.

²² Nicholls, J.G., "Causal Attributions and Other Achievement-related Cognitions: Effects of Task Outcome, Attainment Value and Sex" (1975) *Journal of Personality and Social Psychology* 31, 379-389.

²³ See n 8 above.

These types of goal orientation were found to be established in adults and organizations as well.²⁴ Later researchers showed that learning and performance orientation could be conceptualized as two distinct dimensions, and individuals could exhibit a strong motivation both to develop and demonstrate their competence.²⁵ It was also recognized that performance orientation could be subdivided into two facets: a proof dimension in which individuals strive to demonstrate competence, and an avoidance dimension in which individuals attempt to avoid or conceal unfavourable attributes and negative judgment from others.^{26, 27]}

Attributes and Dimensions of a Learning Orientation

Learning orientation represents attention toward self-referent levels of performance. Individuals with a learning orientation focus on improving skills and acquiring knowledge, and are less concerned with making mistakes.²⁸ Research shows that adoption of learning goals leads to greater intrinsic motivation as opposed to performance orientation which is associated with external motivation.²⁹ People with a learning orientation perceive tasks they undertake as an opportunity to learn as opposed to a test of their ability, a performance orientation. They are less concerned with the possibility of failure, and their stress diminishes which often improves performance.³⁰ There have been postulations that learning and performance orientation reflect implicit theories of whether competence, character and morality are malleable or fixed. People with a learning orientation presuppose these qualities as malleable and able to be cultivated over time.³¹ In contrast, individuals with a performance orientation assume that these are impervious to change regardless of the effort they put in. They therefore tend not to seek feedback actively³² or embrace opportunities for development.³³ In relation to crisis situations, individuals with a learning orientation strive to integrate conflicting opinions and views to form a better understanding of the issues.³⁴ They attempt to understand and decipher the needs, interests and intentions of the other party, and are

²⁴ Farr, J.L., Hofmann, D.A. and Ringenbach, K.L., "Goal Orientation and Action Control Theory: Implications for Industrial and Organizational Psychology" (1993) *International Review of Industrial and Organizational Psychology* 8, 193-232.

²⁵ Button, S., Mathieu, J. and Zajac, D., "Goal Orientation in Organizational Behaviour Research: A Conceptual and Empirical Foundation" (1996) *Organizational Behaviour and Human Decision Processes* 67, 26-48.

²⁶ VandeWalle, D., "Development and Validation of a Work Domain Goal Orientation Instrument" (1997) *Educational and Psychological Measurement* 57, 995-1015.

²⁷ Pintrich, P.R., "Multiple Goals, Multiple Pathways: The Role of Goal Orientation in Learning and Achievement" (2000) *Journal of Educational Psychology* 92, 544-555.

²⁸ DeShon, R.P. and Gillespie, J.Z., "A Motivated Action Theory of Goal Orientation" (2005) *Journal of Applied Psychology* 90, 1096-1127.

²⁹ Elliot, A. and Church, M., "A Hierarchical Model of Approach and Avoidance Achievement Motivation" (1997) *Journal of Personality and Social Psychology* 72, 218-232.

³⁰ Alter, A.L., Aronson, J., Darley, J.M., Rodriguez, C. and Ruble, D.N., "Rising to the Threat: Reducing Stereotype Threat by Reframing the Threat as a Challenge" (2010) *Journal of Experimental Social Psychology* 46, 166-171.

³¹ See n 25 above.

³² VandeWalle, D. and Cummings, L.L., "A Test of the Influence of Goal Orientation on the Feedback-seeking Process" (1997) *Journal of Applied Psychology* 82, 390-400.

³³ Brett, J.F. and VandeWalle, D., "Goal Orientation and Goal Content as Predictors of Performance in a Training Programme" (1999) *Journal of Applied Psychology* 84, 863-873.

³⁴ Darnon, C., Muller, D., Schragger, S.M., Pannuzzo, N. and Butera, F., "Mastery and Performance Goals Predict Epistemic and Relational Conflict Regulation" (2006) *Journal of Educational Psychology* 98, 766-776.

perceived more favourably and evaluated more positively in social contexts.³⁵ As they tend to direct all their attention to the activity they are undertaking, they are able to process the concerns more comprehensively.³⁶ Individuals with a learning orientation perceive situations of disagreement as opportunities to advance their knowledge, remain engaged in their task, and attempt to probe into the sources of conflict.³⁷ They are more willing to explore the environment,³⁸ and to work creatively to uncover original and novel solutions.³⁹ Here, a related concept of growth-strength-need is relevant.⁴⁰ Growth-strength-need overlaps closely with a learning orientation where both groups of individuals attempt challenging endeavours in pursuit of growth and development which often fosters creative processes.⁴¹

Learning Orientation in Organizational Settings

Learning orientation has been studied under organizational settings. People with a learning orientation are generally more resilient to increased workload.⁴² Similar observations are also found in the context of job seeking, where individuals who exhibit a learning orientation seek jobs more intensely, consistent with the proposition that they equate success with effort and persistence.⁴³ In contrast, those employees who exhibit a performance avoidance orientation try to avoid unfavourable evaluations and are less capable of adjusting effectively to changing work demands.⁴⁴ Findings with persons having a performance orientation also reveal that while they tend to perform well when undertaking tasks they are familiar with, once they feel that they might be evaluated by an audience, this orientation can amplify anxiety. This does not facilitate success in job seeking.⁴⁵

A study on employee errors in an organization showed that situational learning orientation may mitigate an employee's tendency to err. When the learning orientation was high among the employees in that the majority share the perception that there is an

³⁵ Sasiki, S.J. and Vorauer, J.D., "Contagious Resource Depletion and Anxiety? Spreading Effects of Evaluative Concern and Impression Formation in Dyadic Social Interaction" (2010) *Journal of Experimental Social Psychology* 46, 1011-16.

³⁶ Nolen, S.B., "Reasons for Studying: Motivational Orientations and Study Strategies" (1988) *Cognition and Instruction* 5, 269-287.

³⁷ Darnon, C., Butera, F. and Harackiewicz, J.M., "Achievement Goals in Social Interactions: Learning with Mastery vs Performance Goals" (2007) *Motivation and Emotion* 31, 61-70.

³⁸ Green, J.D. and Campbell, W.K., "Attachment and Exploration in Adults: Chronic and Contextual Accessibility" (2000) *Personality and Social Psychology Bulletin* 26, 452-461.

³⁹ Janssen, O. and Van Yperen, N.W., "Employees' Goal Orientations, the Quality of Leader-member Exchange and the Outcomes of Job Performance and Job Satisfaction" (2004) *Academy of Management Journal* 47, 368-384.

⁴⁰ *Ibid.*

⁴¹ Shalley, C.E., Gilson, L.L. and Blum, T.C., "Interactive Effects of Growth Need Strength, Work Context and Job Complexity on Self-reported Creative Performance" (2009) *Academy of Management Journal* 52, 489-503.

⁴² Van Yperen, N.W. and Janssen, O., "Fatigued and Dissatisfied or Fatigued but Satisfied? Goal Orientations and Responses to High Job Demands" (2002) *Academy of Management Journal* 45, 1161-71.

⁴³ Creed, P.A., King, V., Hood, M. and McKenzie, R., "Goal Orientation, Self-regulation and Job-seeking Intensity" (2009) *Journal of Applied Psychology* 94, 806-813.

⁴⁴ Wang, M. and Takeuchi, R., "The Role of Goal Orientation During Expatriation: A Cross-sectional and Longitudinal Investigation" (2007) *Journal of Applied Psychology* 92, 1437-1445.

⁴⁵ Davis, W., Carson, C., Ammeter, A. and Treedway, D., "The Interactive Effects of Goal Orientation and Feedback Specificity on Task Performance" (2005) *Human Performance* 18, 409-426.

emphasis on improvement and on actively searching for additional knowledge and feedback in their work department, the number of errors decreased.⁴⁶

Research on market orientation and organizational learning have also found that higher levels of employee innovation are associated with a greater capacity for adaptation and innovation in firms, as well as cultures that emphasize learning, development and participative decision making.⁴⁷ While these environments offer the variety and challenges that are needed to facilitate growth and enhance the motivation of individuals with a learning orientation, they obstruct the attempts of people with a performance orientation.⁴⁸ In relation to entrepreneurial orientation, the findings also indicate that a learning orientation must be in place to maximize the effect of entrepreneurial orientation on performance.⁴⁹

Conclusion

Effective negotiation, as Richard Shell put it, is "...10 percent technique and 90 percent attitude."⁵⁰ The psychological makeup of an individual and organization, including personality and style are crucial variables in achieving a successful outcome. As has been found by the above research, organizational outcomes are improved when an organization adopts a learning orientation to decision making. A case study illustrating the use of a learning orientation in Hong Kong's response to the collapse of Lehman Brothers will be examined in part two.

⁴⁶ Stern, Zvi, Katz-Navor, Tal and Naveh, Eitan, "The Influence of Situational Learning Orientation, Autonomy and Voice on Error Making: The Case of Resident Physicians" (2008) *Management Science* 54, 1553-64. Available at SSRN: <http://ssrn.com/abstract>.

⁴⁷ Hurley, Robert F. and Hult, G. Thomas M., "Innovation, Market Orientation and Organizational Learning: An Integration and Empirical Examination" (1998) *Journal Of Marketing* 62, 42-54. Available at SSRN: <http://ssrn.com/abstract>.

⁴⁸ Potosky, D. and Ramakrishua, H.V., "The Moderating Role of Updating Climate Perceptions in the Relationship between Goal Orientation, Self Efficacy and Job Performance" (2006) *Human Performance* 15, 275-297.

⁴⁹ Wang, Catherine L., "Entrepreneurial Orientation, Learning Orientation and Firm Performance" (2008) 4 *Entrepreneurship Theory and Practice* 32, 635-657. Available at SSRN: <http://ssrn.com/abstract>.

⁵⁰ See Shell, *Bargaining For Advantage* (n 59 above), p 242.

Part 2: Hong Kong's Use of a Learning Orientation in its Design of a Financial Dispute Resolution Center

Drawing on elements of a learning oriented approach to policy-making in addition to local considerations, Hong Kong's financial dispute resolution system design drew on global and local experience. Policy makers actively looked to international and local models and standards in designing Hong Kong's financial dispute resolution system.

Lessons learned from the Lehman Minibond Dispute Resolution Scheme as well as insights gleaned from financial dispute resolution models currently in existence in the United Kingdom, Australia, Singapore and the United States provide a base of comparison by which to explore viable models. This section will review the background of the development of financial dispute resolution institutions in Hong Kong in the context of the recent financial crisis. Building on this background, this section will then examine the proposed procedural model, costs, and approach to handling systemic issues of the proposed Financial Dispute Resolution Center in comparison with four other jurisdictions.

Background

At the end of 2008, the world experienced what is considered to be the worst financial crisis since the Great Depression of the 1930s.

The effects of the crisis manifested in Hong Kong in a number of ways, of which the most prominently featured in local media was the Minibonds crisis, in respect of which the Hong Kong Monetary Authority ("HKMA") and the Securities and Futures Commission ("SFC") received over 16,000 complaints and resulted in many protests and demonstrations. In response, the Hong Kong Government set out to establish a dispute resolution mechanism to handle complaints arising out of the crisis.

The recommendations of the regulators

In response to the Minibonds crisis, the Financial Secretary requested that both the HKMA and the SFC prepare reports in respect of issues arising from the crisis. The reports were delivered and published in December 2008.

The issue of dispute resolution is specifically dealt with in section 35 ('Dispute resolution') of the SFC's Report to the Financial Secretary on Issues raised by the Lehman's Minibonds crisis, and in paragraphs 5.2 and 5.3 on 'Remedies available to investors' and paragraphs 8.44 to 8.50 on 'Recommendations' in the Report of the Hong Kong Monetary Authority on Issues Concerning the Distribution of Structured Products Connected to Lehman Group Companies.

The SFC suggested in its report that a dispute resolution scheme should be "simple, consumer friendly, free of charge (or substantially so)" whilst the HKMA noted that dispute resolution mechanisms are available in other jurisdictions for low cost

The recommendations made by the SFC and HKMA in their respective reports gave rise to a proposal in February 2010 by the Financial Services and the Treasury Bureau in respect of the establishment of a Financial Dispute Resolution Centre ("FDRC"). The FSTB conducted a study of dispute resolution schemes for the financial industries of four jurisdictions: the United Kingdom, Australia, Singapore, and the United States, and the four dispute resolution schemes considered were the

Financial Ombudsman Service of the UK (“FOS (UK)”), the Financial Ombudsman Service of Australia (“FOS (Aus)”), the Financial Industry Dispute Resolution Centre (“FIDReC”) and the Financial Industry Regulatory Authority (“FINRA”) respectively.

Lessons Learned from the Existing Lehman Mediation Scheme

In addition to drawing on overseas experience, regulators also looked to the experience of the Lehman Brothers Mediation Scheme. This section aims to discuss some of the lessons learned from the implementation of the program.⁵¹

It is without question that the existing Lehman Mediation Scheme has provided a helpful illustration of the use of mediation and arbitration in resolving financial disputes in Hong Kong. Given the recent Civil Justice Reform of 2009 which emphasizes case management and the use of Alternative Dispute Resolution,⁵² this Scheme was supported not only by the HKIAC and HKMA but was fully backed by the HKSAR Government and the Judiciary. Although judges and practitioners have historically acknowledged the benefits of mediation in some landmark cases,⁵³ mediation has always been perceived as largely restricted to family matters. It was not until the successful operation of the Lehman Brothers Mediation Scheme that the applicability of mediation and arbitration in resolving commercial and financial matters received widespread attention.

The Lehman Mediation Scheme was successful because of its careful consideration of the unique characteristics and needs of aggrieved investors and the incorporation of such considerations into the mediation procedures. Pre-mediation meetings⁵⁴ were held to familiarize investors with mediation procedures.⁵⁵ In addition, the HKMA and SFC provided strong support in gathering background information and the HKIAC provided the dispute resolution platform, all of which were critical to the success of the Scheme.

In looking toward the potential future development of a financial dispute resolution body in Hong Kong⁵⁶, the following lessons learned from the Lehman Mediation Scheme should be taken into account when designing such a system.

Observation #1: Need for a Clear Dispute Resolution Roadmap⁵⁷

⁵¹ See generally: Ali, Shahla F. and Kwok, John Koon Wang, After Lehman: International Response to Financial Disputes – A Focus on Hong Kong (August 1, 2011). Richmond Journal of Global Law and Business, Vol. 10, No. 2, 2011

⁵² For a better understanding on the recent Civil Justice Reform 2009, visit <www.civiljustice.gov.hk/eng/publication.html>.

⁵³ For a reference of some recent Hong Kong decisions on mediation, read *Leung Catherine v Tary Limited* – HCPI 805/2007; *Billion Express Industrial Limited v Tsang Hung Kong* –HCA 2740/2008; *Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd*; *iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd*; *Supply Chain & Logistics Technology Ltd v NEC Hong Kong Ltd* - HCA 1939/2006; *何應虹 v 恆豐電綫廠有限公司* – District Court – H H District Judge Marlene Ng – DCCJ 3595/2005 (source: To, Ken. "Mediation." *CJR Watch - A Personal Notebook on the CJR Development*. Web. 22 Apr. 2010. <<http://cjrwatch.com/?cat=3>>.Development. Web. 22 Apr. 2010. <<http://cjrwatch.com/?cat=3>>.)

⁵⁴ *Supra note 42*

⁵⁵ *Supra note 76*

⁵⁶ Soo, Gary. "Hong Kong International Arbitration Centre Year-End Report for 2009 from the Secretariat." *Hong Kong International Arbitration Centre*. 23 Nov. 2009. Web. <http://www.hkiac.org/newspdf/HKIAC_Year_End_Report_for_2009_from_Secretariat.pdf>.

In the few weeks after the Lehman Brothers' Group filed for bankruptcy, the Lehman Brother's minibond holders filed complaints with the HKMA and SFC against their retail banks on allegations of mis-selling.⁵⁸ After the Mediation Scheme was established, investors began to have a clear idea of how to seek compensation. Drawing from this experience, the need for a clear picture of the avenues available for redress at the outset of any financial relationship⁵⁹ will provide investors with a clear roadmap for resolution.⁶⁰

Observation #2: The benefits of a Multi-tier Dispute Resolution System

The use of a multi-tiered system of alternative dispute resolution has often been accredited with the "on-time and under-budget" completion of the Chek Lap Kok airport. Given its sheer magnitude and the fact that the project involved more than twelve different construction parties, the Hong Kong government used a carefully crafted mix of alternative dispute resolution methods to avoid, manage, and resolve a wide range of problems that could well have delayed, significantly increased the cost of, or even prevented completion of this vast undertaking. Clause 92 of the airport construction agreement outlined in significant detail the Hong Kong government's approach to the resolution of airport construction related disputes.⁶¹

The **first** formal step or *tier* envisaged by Clause 92 is known as a 'decision' of the engineer.⁶² Clause 92(3)(a) provides that this decision be given within 28 days of service of the notice of dispute. This type of resolution is aimed at resolving disputes between employer and contractor. In this step, the engineer acts as a neutral party empowered to exercise discretion and solve *practical* construction-related problems. The engineer's decision is subject to the oversight by the HKSAR government. If the government has an objection to the decision, then the dispute is removed from the engineer's jurisdiction and proceeds to the next tier of resolution.⁶³

The **second** formal step or *tier* is mediation.⁶⁴ Under Clause 92 of the agreement, if either party is dissatisfied with the decision of the engineer, then that party may serve

⁵⁷ With regards to the requirement of an arbitration clause, the author is aware that Professor Norbert Horn of University of Cologne recently emphasized the "form requirements for arbitration clauses with customers" for banks to customers (B2C) transactions in his talk at the University of Hong Kong, 15 April, 2010. For details, see Horn, Norbert "Arbitration of Banking and Finance Disputes in Germany".

⁵⁸ Siu Beatrice, "Minibond investors fear move spells end for claims", *The Standard*, 24 March 2009.

⁵⁹ For example, a dispute resolution clause might include the following language:

"In the event a dispute shall arise between the parties to this sales and purchase agreement of Lehman Brother's minibonds, it is hereby agreed that the dispute shall be referred to the Hong Kong International Arbitration Centre for arbitration in accordance with the applicable HKIAC Administered Arbitration Rules. The arbitrator's decision shall be final and legally binding and judgment may be entered thereon.

Each party shall be responsible for its share of the arbitration fees in accordance with the applicable Rules of Arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including a reasonable attorney's fee for having to compel arbitration or defend or enforce the award."

⁶⁰ *Supra* note 88

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ *Ibid*. Clause 2(1)(b) of the airport agreement provides that:

"Before carrying out [any duty or exercising any authority conferred by the contract] the Engineer may be required under the terms of his appointment by the Employer to obtain confirmation that the Employer has no objection to the Engineer's proposed course of action and, in the event of an objection, to act in accordance with the Employer's direction..."

⁶⁴ *Ibid*

on the other a “request for mediation.” This must be done within 28 days of receiving the engineer’s decision. Under Rule 3.2 of the Mediation Rules,⁶⁵ a valid request for mediation must include (1) a brief explanation of the nature of the dispute, the amount (if any) in dispute, and the relief sought, and (2) nomination of a proposed mediator with an indication of his fee and other conditions of such appointment. If the other party agrees to mediation, then the nominated mediator will take charge of the procedure.⁶⁶ If the other party disagrees with mediation and persists with the engineer’s decision, then according to Clause 92, the parties can proceed to the next tier of resolution.⁶⁷

The **third** tier of this multi-tier dispute resolution model rests on the selection of either adjudication or arbitration.⁶⁸ In the Hong Kong International Airport model, adjudication is only available when the dispute involved simple monetary claims and the claimant desired a speedy outcome.⁶⁹ Arbitration, on the other hand, was available when the dispute involved a complex legal or design issue.⁷⁰

Under the rules,⁷¹ if the parties select arbitration, a notice of arbitration must be sent in time to satisfy the ninety-day time limit. The respondent must send a ‘Response’ to the claimant within 28 days of receipt of the notice ‘for the purposes of facilitating the choice of the arbitrator’.⁷² Article 3.3 of the Arbitration Rules also envisages the appointment of an arbitrator by agreement of the parties within 42 days after service of the notice of arbitration, failing which either party is given the option of approaching the HKIAC to make the appointment.⁷³

Conclusion: The proposed Financial Dispute Resolution Centre

Taking into consideration both the lessons learned from the multiple avenues of redress available to Lehman Brothers investors in Hong Kong, the experience of the Chek Lap Kok airport resolution system, and overseas experience gained in Singapore, Australia, the UK and the US, regulators designed a proposal for a Financial Dispute Resolution Center in Hong Kong with the following key features: 1) The creation of a financial dispute resolution centre to administer a financial dispute

⁶⁵ Airport Core Programme Mediation Rules (1992 Edition).

⁶⁶ *Supra* note 98, Rule 5.2, provides that:

“Subject to Rule 7 in the absence of service of a notice of objection in accordance with rule 5.1 [i.e. within seven days of service of the request for mediation] the person nominated in the request for mediation shall be deemed to be acceptable to the party receiving a request for mediation.”

⁶⁷ *Supra* note 93, Refusal or failure to respond to a request for mediation cannot be used by its recipient as a tactic to block the appointment of a mediator. In such a case the mediation procedure will run its course with no long-term detriment to the claimant.

⁶⁸ *Supra* note 93

⁶⁹ *Ibid*, Under Clause 92(7)(a), following an unsuccessful mediation (or an unsuccessful attempt to initiate mediation), the dispute may be referred to either adjudication or arbitration. Interestingly, the sub-clause states that either party may make the choice. A potential problem that arises out of clause 92(7) is that a party, by acting quickly could spuriously refer the dispute to arbitration in order to temporarily hijack the contractor’s hopes of earlier relief through adjudication. In response, some have suggested that the election between adjudication and arbitration be best reserved to the claimant – the party which initiated the unsuccessful mediation.

⁷⁰ *Ibid*

⁷¹ For a quick reference of the rules, visit Hong Kong International Arbitration Centre (<<http://www.hkiac.org/content.php>>).

⁷² *Ibid*

⁷³ Airport Core Programme Arbitration Rules (1992 edition).

resolution scheme; 2) A two-tiered financial dispute resolution scheme whereby disputes are first mediated, and failing mediation, arbitrated; 3) Mandatory participation in the scheme by financial institutions regulated or licensed by the SFC or the HKMA; 4) An HK\$500,000 cap on claims under the scheme; 5) A “pay-as-you-use” charge to both claimants and institutions, with higher fees payable by financial institutions; and 6) The FDRC would not be empowered with any investigatory or disciplinary powers.

Whilst the proposal bears some resemblance to the Lehman Scheme, key differences include mandatory participation, a ceiling on claims, charges to complainants as well as service providers, the exclusion of MPF and insurance disputes, and systemic concerns being passed back to the regulators to deal with.

Drawing on both local and global experience, Hong Kong has put into place a viable system for the future resolution of financial disputes.