



**A major international conference was held recently in Hong Kong to consider the title of this month's column. Described as an agenda for change in response to the Grove Report — two days of cutting edge debate about the future of the Hong Kong Construction Industry and the Government's Conditions of Contract — it did not disappoint. This month Professor Arthur McInnis looks back at the conference and ahead at what should come next.**

*Arthur McInnis is an Associate Professor at the Faculty of Law at the University of Hong Kong and a consultant at the Hong Kong office of the law firm Denton Wilde Sapte. He can be contacted by e-mail: [jam@dentonwildesapte.com.hk](mailto:jam@dentonwildesapte.com.hk)*

# Whose Risk? Managing Risk in Construction — Who Pays?

## Who

The conference was sponsored by the ACE (HK), HKCA, HKEMCA, HKIA and HKIS and managed by *International Conference Consultants*. Regrettably absent from the list as a sponsor, the government was nevertheless well represented in the audience. The speakers and panelists cut a broad swath of experience. Chaired by Arthur Marriott QC, someone who will be familiar to those in industry in Hong Kong for any period of time, a high tone was set throughout. Marriott opened and closed the sessions over the full two days and resonated on a number of important themes.

## What

The conference was divided into eight separate sessions covering a variety of themes. For the most part some relationship to the overall theme could be drawn and each theme was intended to serve as a hot button in construction. Leaving aside introductory and closing sessions, remaining sessions dealt with the following themes under their respective chairmen:

- unforeseen ground conditions and legal and physical impossibility under Fred Ng,
- sub-contractors and risk under Henry Lam
- third party interferences under Joseph Chow,
- international aspects of best practice under HH Judge Humphrey Lloyd, QC,
- dispute resolution under Jesse B Grove III, and,
- topics outside the Grove Report under Kenneth Leung

## Where and When

The conference was held in Hong Kong on November 20 and 21 at the Hong Kong Exhibition and Conference Centre.

## Why

The conference was carefully situated in between the release of the Grove Report (looked at here in two previous editorials) and the forthcoming report by Henry Tang on the current Construction Industry Review. If you are reading this editorial outside Hong Kong and thus perhaps unfamiliar with this background, it may be noted that they both concern the

future wellbeing, priority and development of the Hong Kong construction industry as well as the role that the government will play in it. The Grove Report, and quite likely the Tang Report, should set the stage in these regards but will also prove to be interesting reading for anyone with a genuine interest in construction and the issues facing it today. As will be seen from the diversity of speakers, most of the issues are common indeed. For the professional associations sponsoring the conference the intention was to achieve a full airing of views before Tang reports and thus perhaps seek to influence the eventual recommendations. While two speakers specifically identified themselves as representing sponsors — Denis Levett for the HKIS and Philip Nunn for the HKEMCA, the others spoke as individuals albeit from their unique perspectives.

## Tang Report

It is worth noting the Terms of Reference of the Tang Committee to better bring out the context of the conference. Tang's Committee was charged with examining the current state of the construction industry in Hong Kong in respect of quality, quantity, environmental friendliness, manpower, safety and supervision and identifying specific actions and good practices to improve the efficiency and cost effectiveness of local construction in terms of quality, customer satisfaction, timeliness in delivery and value for money.

While the conference was divided into sessions, repeatedly the speakers stepped back to look at the bigger picture and touch upon aspects of these Terms of Reference.

## The MTR — Some Views

Arthur Marriott QC first sketched an answer to the question, which the title of the conference raised. He said that the government had answered the question as to whose risk, beginning some 20 years ago when it gradually began amending its conditions to pass some of the most contentious risks to contractors, for instance ground conditions which were commented on by Dean Lewis and compared to Sweden, or how utilities are dealt with abroad. The Grove Report in effect looked back

at many of these changes with 20/20 hindsight Marriott, along with others, looked to the best practice model of the MTR Corporation and invited government to learn from it. Ian Wilson, on behalf of MTR, made clear that MTR would not be resting on its laurels as it mapped out new plans and directions. Wilson stressed the proactivity of MTR and attributed their timely and effective record of project delivery, and almost complete absence of arbitrations (one in total), to such a philosophy. What will MTR be doing? Partnering more, for one thing, and moving toward target cost contracts. Wilson summed up their approach in this way:

“We need to change the focus of any battle from employer versus contractor to employer, designer and contractor versus the project. Instead of the contractor seeing the only way to recover additional costs being from the employer, together the employer and the contractor should seek to drive down the project cost and share the saving.”

Better ways of dealing with the structural problems, including ADR and adjudication that come from the battle, were explored by HH Judge Humphrey Lloyd, QC and John Bishop.

### New Contractual Models

Numerous speakers referred to new contractual models. Professor Phillip Capper contrasted the Government Conditions with the new FIDIC, GC/Works and NEC forms while Charles MacDonald looked at the widest range of new project delivery models: D&B, DBM, BOT, BOOT, BLT, DBFO and PPP. Rohan Shorland and Domingo Vegas considered the application of new models in actual projects. Richard Shadbolt elaborated upon PFI as well as Prime Contracting in the UK. The PFI model was formally introduced in the UK in 1992, though was known through a number of earlier and larger projects including the Channel Tunnel and Dartford Crossing. The central feature of PFI is the transfer of responsibility for the provision of a project to the private sector. In this sense, it has strong counterparts in Hong Kong with the harbour tunnels being the best-known examples. Prime Contracting has been encouraged in the UK particularly by the Ministry of Defence. In Prime Contracting, the contractor has single point responsibility for delivery with his suppliers and subcontractors arranged around him in clusters to facilitate integration. Following the terms of the Prime Contract, responsibility for the clusters is passed from the prime contractor to each of the cluster leaders. Early appointment of the cluster leaders

is a feature of the contractual model to enhance overall integration. Whatever these models have to offer Hong Kong, and PFI at least was held out as offering some potential in the provision of health and education facilities for instance by Shadbolt, there is no question they have been strongly endorsed in the UK. Thus, mention of the fact was made that the UK Treasury announced in May that as from June 1, PFI, D&B and Prime Contracting would serve as the exclusive bases upon which all new works would be procured.

### Relationship Contracting

One of the most interesting themes that came to be developed was that of Relationship Contracting. Doug Jones gave the fullest exposition of this notion in his paper on Project Alliances. I added very briefly in one session that Relationship Contracting is a subject which originally had attention drawn to it in law related research that went back as far as the 1960s in the US. Today, notwithstanding some variation in terminology, it can be appreciated in various guises such as partnering, alliancing, joint-venturing, long-term contracting and other collaborative working arrangements. Jones said that Relationship Contracting

“Embraces a wide and flexible range of approaches to managing the client-contractor relationship based on a recognition that there is a mutual benefit in a co-operative relationship between client and contractor. This is often expressed in the literature as the establishment of a ‘win-win’ scenario. Essentially relationship contracting seeks to emphasise points of convergence between the respective interests of client and contractor, and in so doing, parties may well find they have arrived at solutions to areas traditionally characterised by divergence of their interests.”

Other speakers offered some illustrations of the intended benefits that were to flow from working in these modes. Thus Dr Peter Fenn focused on better supply chain management and how it acted as a driver for innovation and improving performance across industry while Dr Steve Rowlinson sought to apply the benefits to safety risk assessment methodologies noting among other things how value engineering could improve safety dramatically. Though agreement was not unanimous among the speakers on whether the advantages held out for Relationship Contracting will materialise, the vast majority maintained open-minds.

### Looking Ahead

There have been few conferences to come at such a critical time. As underscored, this choice of timing, post-Grove and pre-Tang, was deliberate. Hong Kong is at a crossroads at this very moment and it must reflect honestly and openly upon not only its strengths but its weaknesses too. This was the overwhelming central message that came from speakers at the conference whose depth of experience simply cannot be questioned. Buttressing this central message as well were specific actions which were recommended. The recommendations unreservedly called upon the government to pursue reform. We will not have long to wait before we see how that message was received.



*Review of General Conditions of Contract for Construction Works for the Government of the HKSAR, September, 1998 by Jesse B Grove III, Thelen, Reid & Priest, attorneys*

*Association of Consulting Engineers (HK), Hong Kong Construction Association, Hong Kong Electrical & Mechanical Contractors Association, Hong Kong Institution of Engineers, Hong Kong Institute of Surveyors*

*Deveboise and Plimpton, foreign lawyers*

*“Risk Allocation and Drafting in the New Standard Form of Building Contract,” Levett & Bailey Chartered Quantity Surveyors Limited*

*“Should Contractors have Legislative Protection to Ensure Prompt Payment?” Simmonds & Simmonds, solicitors*

*“Extreme Conditions (or Physical Impossibility),” Masons, solicitors*

*Per Olof Sahlstrom “The Stockholm Southern Link — An Urban Underground Motorway - Risk Management,” Swedish National Road Administration*

*John Elsdon, Binnie Black & Veatch gave examples from abroad in “Utilities — the Unmanageable Risk” and Hiroshi Ichikawa, Nishimatsu Construction Co, examined Japan in “How and on Whose Risk are Utilities Dealt with during Construction in Major Cities in Japan.”*

*“MTRCL on Track for Mutual Benefit”*

*HH Judge Humphrey Lloyd, QC “Adjudication,” Technology and Construction Court, UK*

*“ADR — the Need for Flexibility”, Masons, solicitors*

*“Basic Choices in the Allocation and Management of Risk,” Lovells, solicitors*

*“Allocation of Risk in Major Infrastructure Projects — Why do we get it so wrong?” Paramatta Rail Link Company Pty Ltd*

*“The Importance of Transparency and Communication in the Creation of Infrastructure Projects.”*

*“Differing Systems of Contracting around the World — Advantages and Disadvantages from the Contractor’s Point of View,” NESCO Entrecanales Cubiertas, SA*

*“Hong Kong and the Rest of the World — Working Towards Best Contract Practice” Shadbolt & Co, solicitors*

*“Strategic Alliances — A More Effective Risk Allocation Mechanism for Public Sector Contracts,” Clayton Utz, solicitors*

*“Value for Money in Construction,” Professor, University of Manchester Institute of Science and Technology*

*“A Better Procurement System. Can Safety be Improved through Contract?” Senior Lecturer, University of Hong Kong*