

Partnering: The Way Forward for Hong Kong?

Article for the Journal of the Hong Kong Institute of Architects

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Malaise in the Construction Industry

Looking at the Hong Kong skyline, it's hard to imagine that long ago, single humans constructed their own shelters. Today, raising those glorious monuments of steel and metal and glass takes a team of interdependent players. Like a work of art, each project starts out as an idea. To transform that idea into reality, designers, engineers, contractors and suppliers each bring special talents and experience. At every step of the way, these partners rely on the skills, competence and cooperation of the others. Surely, cooperation and harmony should be the most obvious and fundamental aspects of the process.

The reality is far from that. Behind that fabulous façade, the Hong Kong construction scene is rife with competition, mistrust and - let's admit it - selfish interest. Ask anyone involved with the construction industry here and you will hear a litany of complaints: misunderstanding, duplicated effort, unrealistic budgets, uncoordinated specifications and work, multiple change orders, overruns, delay, irritation, mistrust, confrontation, "claimsmanship", litigation, expense, acrimony - in short, an enormous waste of resources. Who wants to be involved in a business like that?

One of the worst features of the construction industry is the practice of postponing dispute resolution until the end of the contract. This does have the advantage of allowing the works to proceed more or less on time. However, procrastination removes the dispute resolution process to a time when relevant parties are engaged on new projects, perhaps in far-off countries. Memories of just what occurred are dim, hostility and frustration have built up, and there is no time incentive to resolve the dispute.

In November an eminent group of specialists from three continents gathered in Hong Kong to discuss this abysmal state of affairs¹. Inspired by the recently-released report to the Hong Kong Government of Jesse B. Grove, the experts aimed to identify the roots of the problems in the industry, and to suggest programmes for reform.

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¹ Conference, "Whose Risk?" held 20-21 November 2000. Proceedings will be published in 2001

In their unanimous call for better practices, the experts' continuing refrain was the need for fundamental change. We need a new approach to building, a positive approach where every partner in the project can be proud and satisfied with the role they play. We need a system to minimize conflict and maximize gain - for all the players.

Partnering aims to do just that.

What Is Partnering?

Partnering is not a contract; it is an attitude.² Partnering is an approach, a mind-set. It is a management concept in which parties cooperate for maximum efficiency and mutual benefit. The focus of partnering is creativity and teamwork. Partnering shifts the strategy from confrontation to cooperation. Instead of looking to maximize their own gain at the expense of "the other side", all partners work on the same side, in an atmosphere of respect, trust, and integrity towards their common goal of building the project. It is an example of the "win-win" method made famous in the 1970's by Dr. Roger Fisher of Harvard University.

Partnering is in fact an umbrella term for a variety of formal and less formal arrangements. It may be a one-off project in which a group comes together for a single building or complex. It may be a framework agreement in which an employer and a contractor, and even sub-contractors and suppliers agree to work on a series of projects. Or it can be a longer term strategic relationship involving many different undertakings.

This sounds very much like a joint venture. In a joint venture, independent parties, either contractually or by means of a corporate vehicle, engage in a common activity. Many joint ventures are very successful. However, anyone who has participated in a joint venture that has foundered will know the risks. The joint venturers, maintaining their traditional adversarial stance, may put together an agreement which is so "watertight" and so rigid, that it is impractical on a day-to-day basis and is therefore largely ignored. On the other end of the spectrum, the parties may work together on a friendly, ad hoc basis, so that there is no mechanism for dealing with issues that may arise during the life of the joint venture.

In a partnering situation, the ethos changes. Partners discard the adversarial approach. Confrontation gives way to co-operation. Partners focus on a common goal of achieving the best overall value. For the employer it's a quality product, at a good price and in the shortest reasonable time. For the contractor it means a pleasant working atmosphere with minimum change orders and wastage, and maximum freedom to get the job done on time - at a higher profit margin.

This all sounds like Nirvana. But is it real?

² RA Shadbolt in a presentation at "*Whose Risk?*" conference, *ibid.*

Partnering was "invented" in the United States in the 1980's under Colonel Charles Cowan, of the US Army Corps. He was trying to avoid the disputes associated with low bid public contracts. His successes with the Corps and later as Director of Transport in Arizona persuaded him that partnering had a definite future.

In 1986, the US Army Corps had 1,100 claims for a total of US\$1 billion and 700 cases in litigation worth US\$600 million. Five years later, using partnering, the Corps had only 300 claims worth \$360 million and 300 cases in litigation involving US\$250 million. Only one partnering agreement out of 400 had gone to litigation.³

NASA has latched on to partnering and attempts to involve not only the prime contractor, but also as many sub-contractors as possible. The NASA contract contains a clause stipulating that key personnel, subcontractors, A&E design contractor and NASA's contract management staff will all attend a partnership development and team building workshop in the early days of the contract.

In another American success story, the Transient Personnel Quarters was the first project in Alaska to use partnering, between Osbourne Construction Company and the US Corps of Engineers. From pre-design to contract award took seven months. The total project was completed in less than 18 months - five months under schedule - despite the addition of 48 rooms to the original specifications, the discovery of hazardous materials on site, and a record, 152 inch snowfall that year!

The English have embraced partnering as well. Sir Michael Latham's Report of 1994 and the Egan Report of 1998 both deplored the state of the English construction industry. Latham challenged the construction industry to reduce wastage by 30% by the year 2000. The Egan report cited success stories from other countries and recommended the use of partnering.

Partnering is not confined to the construction industry. The UK firm, Short Brothers, the oldest aerospace company in the world, and builder of the Wright brothers' "flyer" aircraft, was acquired in 1989 by Canadian Bombardier. At the time, it was not very profitable. Realizing that more than 60 percent of recurring costs were from materials, products and externally-supplied services, Bombardier devised a new relationship with its suppliers. After an intensive evaluation programme, Short's 7500 suppliers were whittled down to 1200, then to 93, and finally to 50 who enjoy "preferred" status and long-term contracts. Operating within a partnership framework with these selected few, Short was able to gain a thorough understanding of *their* business needs, and work together with them for continuous performance improvement. Results? Innovative products, produced on schedule, continued technical improvement, reduced costs - and improved profits.⁴

³ NEDC Report, *Partnering: Contracting without Conflict*, 1991

⁴ For details, see C. Browne in BPRC Forum: "*Partnering in Construction: Is this the Answer to Cultural Change?*" Focus Group, 27 Sept 1996, on internet: bprc.warwick.ac.uk/forum8.html.

An English hotel chain, Whitbread Hotel Company, embarked on long-term partnering arrangements with five contractors. It shared its five-year business plan with the contractors so that they could have input from the outset and plan their own work schedules to fit with Whitbread's agenda. Whitbread agrees fixed amounts for contractors profits and overheads and shares savings from performance improvement with them. The common goal of both Whitbread and its contractors is continually improved performance.

A New Model for Best Practices in Partnering

The Association of Consultant Architects in September brought out its own model partnering contract, incorporating the desiderata of the Latham Report. This standard form agreement covers the entire procurement process and the project team into a single multi-party contract. Team members can no longer escape the vicissitudes of the project by an "it's your problem" attitude. The contractor contributes from the start at the design and buildability phase. The client and contractor can select specialists together using an open-book selection process and preferably including the specialists in the partnering arrangement. A Partnering Timetable governs the works and a Core Group of key individuals from the partner organisations meets regularly to review progress and benchmarks, and to provide an early warning system for site problems. Key performance indicators (KPI) measure progress. Payments may be linked to KPI. All the team members warrant that they will use reasonable skill and care appropriate to their own roles and expertise. The ACA agreement allows partners to agree on profit margins, central office overheads, site overheads. A "gainshare/painshare" philosophy is at the heart of the contract.

In Hong Kong, Brian Clifford of John Carlisle Partnership draws on 20 years of partnering experience in the UK. Carlisle is a behavioural psychologist turned partnering facilitator. He claims that when the stakeholders come together they can expand their relationship and produce phenomenal results. The MTRC currently has 17 projects in which the contractors were chosen by competitive tenders and then invited to partner. Clifford relates that the projects are all going well, works are ahead of schedule, and under budget. As the partners become more confident with each other, they are able to reduce supervision and double record keeping. They share mobile communications, cut out unnecessary duplicate testing and save money.

Niels Kraunsoe of the Hong Kong Airport Authority points to the raised level of individual responsibility on the job site. As relationships improve, individuals are more likely to assume more risk. Partnering workshops are very useful in promoting this kind of trust. Kraunsoe warns however, that the reduced record-keeping and testing must be balanced with the need for accountability.

In general, partnering tends to reduce conflicts and improve team spirit, foster better quality and innovative solutions, produce faster completion times and reduce the learning curve on long term relationships.

How does Partnering work?

Successful partnering combines proactive teamwork with effective management techniques. The cornerstone of partnering is advance preparation and the creation of a joint management system. A government or other employer may spend months finding the right partner through the tender process and then more time to interview prospective candidates to find one willing to work in this kind of relationship.

Once the parties are identified, the key players will gather with a facilitator for a two or three-day session. Representatives of the employer, designer, architect, engineers, contractor and sub-contractors form a team and agree the mission and its objectives. Together, the partners will define their goals and expectations, create procedures for communication and payment flow, and for early attention to potential disputes. Each makes a commitment to these core principles of the project. The facilitator then guides the group in setting up the project Charter, usually a one or two-page document signed by everyone present.

A partnering coordinator will take over from the facilitator to keep the partnering ethos on track throughout the life of the project. He or she may conduct follow-up workshops every six to nine months, plus one at the end to evaluate the end result. The coordinator also ensures that the team adheres to its system of benchmarking performance, suggests improvements, and is the first person to hear about - and mediate - misunderstandings and disagreements as they arise. The coordinator also acts as a coach, motivating the partners throughout the life of the project.

One of the fundamentals of partnering is that risks should be borne by the party most prepared to manage it. Risk is to be identified, reduced, managed and shared equitably among the partners.

Dispute resolution is an ongoing process, beginning at site level. Only if the coordinator is unable to broker an accord there will the issues go to successively higher levels of management within the partnering team. Arbitration is still the "failsafe" mechanism for most agreements.

Who Pays?

Since partnering generally requires the involvement of a neutral facilitator from outside the organisations of any of the partners themselves, clearly there is an immediate extra direct cost. This may be borne in equal shares by the partners, or the cost may be factored directly into the cost of the project at the time of tender. Successful partners are quick to point out that the up-front direct cost is recuperated through the life of the contract by the major cost savings it achieves.

Legal Aspects

Does signing the Partnering Charter make you "partners" in the common law sense of the word, with all the attached baggage of joint and several liability, agency, and fiduciary duties? Or does it create some less stringent legal relationship? In fact, the answer depends very much on the wording and the circumstances of the individual case.

The fundamental idea is that the partners are motivated not by their contractual obligations, but by a desire to do what is best for the project. When the partnering relationship succeeds, the legal status of the parties is largely irrelevant.⁵ Disputes will inevitably arise though, and a recent jurisprudence highlights the uncertainty that surrounds this new concept.

In legal partnerships as recognised by the common law, the fiduciary relationship requires partners not to exploit their individual self-interest at the expense of the partnership. Partnering seems to demand the same commitment, but without establishing a legal basis for it. Unlike other common law jurisdictions, English law has in the last century not been amenable to the doctrine of good faith.⁶ On the other hand, Australian and U.S. writers have suggested that the "doctrine of good faith is ... the most direct way of importing into contract law the idea of cooperation. Indeed good faith is often equated with an implied term of cooperation."⁷ If partnering heightens the expectations of the parties beyond the obligations normally expected in a construction contract, the courts are likely to uphold those expectations by imposing an implied term of good faith.⁸

The interrelationship of the contract and the partnering charter is crucial in determining whether there will be an obligation of good faith. Traditionally, the partnering document, being a document extraneous to the contract, should not be used in construing the contract. However, this basic tenet of contract law is eroding in the face of implied terms arising out of the partnering relationship. The parties may be surprised to find that the charter is interpreted by a judge as a collateral contract.

Generally, according to Professor Colledge, "the (English) courts have in recent decisions moved significantly toward explicit recognition of an implied obligation of good faith in the performance of contracts". They rely heavily on the parties' intentions but also relate closely to the nature of the contractual relationship and its background, prevailing community expectations or reasonable commercial standards. These include honesty or fair dealing.⁹

⁵ Colledge, in *Obligations of Good Faith in Partnering of UK Construction Contracts*, *The International Construction Law Review*, [2000 Pt 1] 175

⁶ But see *Carter v. Boehm* (1766) 3 Burr 1905 where Lord Mansfield held that "good faith was the governing principle,... applicable to all contracts and dealings."

⁷ Adams & Brownsword, *Key Issues in Contract*, 1995, Butterworths, London at p. 309

⁸ Priestly, JA in *Interfoto Picture Library v Stiletto Visual Programmes* [1989] 1 QB 433

⁹ op cit Colledge at 183

In *Birse Construction Ltd v. St. David Limited*¹⁰, Birse had carried out construction work at the request of the defendant after signature of a letter of intent, a team-building seminar and the creation of a partnering charter. The parties never signed a contract. Judge Humphrey Lloyd said, "The terms (of the partnering charter) though clearly not legally binding are important, for they were clearly intended to provide the standard by which the parties were to conduct themselves and against which their conduct and attitude were to be measured.

Hong Kong, which until 1997 followed English law, has shared its twentieth century aversion to good faith. It now remains to be seen how Hong Kong law, no longer tied to English law, but open to influence from other jurisdictions, will treat the good faith issue in future.

The "Perils of Partnering"¹¹

Aside from the legal uncertainties, there are other pitfalls, especially if the partners misunderstand or misuse the relationship.

One real danger is complacency. Partners may count on the cooperative spirit of their relationship and fail to provide proper notices or otherwise their legal rights. In fact they may rely too heavily on the cooperative spirit, and pay too little attention to establishing clearly the terms of their contract. Partnering is not an excuse for sloppy drafting. "To muddle the roles of charter and contract...is a recipe for uncertainty an, if goodwill runs out, for even messier and more expensive litigation than usual."¹² It is important to realize that the partnership charter is still in most cases not an enforceable contract, but only a statement of desired goals and attitudes. It is usually not incorporated into the main contract. So, if you have an ambiguous term, or if you have neglected proper claims procedures and lost the right to enforce them, waving the partnering agreement later in Court or arbitration may not be legally persuasive.

Another related trap is the casual attitude sometimes engendered by partnering. Stephen Hilger puts it graphically: "A general contractor may not want to pull out its bull whip on a non-performing subcontractor if a partnering agreement exists."¹³ If however, the steel contractor isn't motivated to complete well and on time, the work of the finish trades may well be compromised.

Partners may be dissatisfied when the stronger bargaining power of the partners drives cost reductions and profit margins down.¹⁴ In Australia, some litigants are basing claims for

¹⁰ 1999 BLR 194

¹¹ See "The Perils of Partnering in Construction", Hilger and Rourke, Network of Leading Law Firms Newsletter on internet: www.nllf.com/articles/articles.htm

¹² D Helps, *Why partnering is not a duty* (1997) Building, 28 Nov 37

¹³ op cit Hilger

¹⁴ op cit Colledge, 175

disappointing results on misrepresentation, or failure of the project to live up to their previous partnering experience.¹⁵

More than one commentator has observed that the chief obstacle to successful partnering is the people involved in it. "However well-intentioned or structured, contracts cannot thrive in the void and require a mature workforce freed of some of the overriding prejudices of the past. Even if clients can evolve and become collaborative, the quantity surveyor who arrives on site spoiling for a fight...must become a character in the industry's superceded folklore."¹⁶

Conclusion - The Asian Way: Is it compatible with the new vision?

Critics claim that just because partnering has been successful in Anglo-Saxon jurisdictions does not mean it will work in Hong Kong. They point to the long tradition of tough adversarial attitudes here, as well as the fact that the government is the prime actor and an extremely forceful presence on the construction scene. They are doubtful about the ability of anyone to change the rules of the game. They point to Hong Kong's closely-held family companies, where blood loyalty takes precedence over any kind of business relationship with those outside the clan. They say that in Chinese society it is not customary to lay one's cards on the table in a business deal. They are derisive of an approach labeled "warm and fuzzy", saying it has no place in the tough business of construction.

Admittedly, to embrace partnering will require an about-face in the attitudes of the Hong Kong construction industry. No one is offering partnering as a panacea. However, given the abysmal state of the industry at present, it is clear that some drastic alternative is necessary. It's time the construction industry stopped thinking of itself in terms of a football game, with competing teams scoring points to defeat the opponents. Instead, construction projects should be like a symphony, with each player concentrating on its own part, to work in harmony with the others.¹⁷

Partnering is already being used successfully in Hong Kong, on major projects where the stakes are high. The MTRC, Cathay Pacific, the Airport Authority and other highly visible Hong Kong companies can point to their successes in creating innovative solutions, reducing claims, completing work on time, under budget and on safe work sites. Fewer disputes mean more resources and manpower freed up for the actual business of building. All of these factors translate into reduced waste and increased profit.

Perhaps it is time for the rest of the Hong Kong construction community to take notice.

¹⁵ *ibid*, 176

¹⁶ P Newman, "*Collaboration: a dream?*" in *Construction Law*, March 2000, p 29

¹⁷ RA Shadbolt, presentation to "*Whose Risk?*" conference, *ibid*.