THE EARTHMOVER & CIVIL CONTRACTOR
ALLIANCE CONTRACTING IN CONSTRUCTION

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MANAGING CONFLICT WITHIN THE ALLIANCE

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1. INTRODUCTION

(a) Partnering is mentioned as a predecessor to the cooperative model of alliancing. The Master Builders' Association of Australia and Colonel Cowan from the Arizona Department of Transport introduced partnering to Australia in around 1991 after successes in the United States Army Corp of Engineers and Colonel Cowan's Arizona Department of Transport.

(b) With partnering we have most often heard of the successes. There have however been just as many remarkable failures.

(c) Will we hear the same negativity and will there be such outrageous failures associated with the alliancing delivery methods?

(d) Alliancing uses hard construction issues to provide a financial incentive for cooperation.

(e) At the heart of the alliance model is the principle of 'no disputes'.

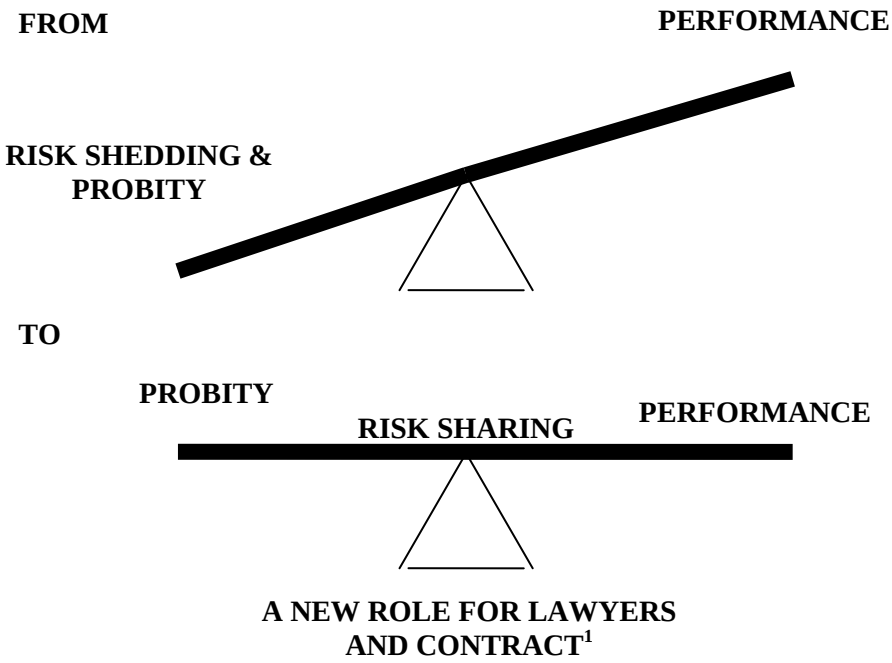
2. WHY IS THE MINING INDUSTRY, THE CONSTRUCTION AND ENGINEERING INDUSTRIES, INFRASTRUCTURE AND INDUSTRY IN GENERAL SO INTERESTED IN GOOD FAITH AND ALLIANCING?

(a) There was the 'no disputes' push in 1990 - supported by the Master Builders Association - with the Abrahamson principle (who controls the risk should carry the risk) advocated. The Giles Royal Commission revealed the frequency of questionable business practices and unethical conduct.

(b) Is there any chance for conflict to be managed differently or indeed avoided as some are suggesting by virtue of the alliance model?

(c) Financial incentive is suggested to be the only way to effectively drive parties away from adversarial claims.

(d) Lawyers have not assisted the process with owners demanding risk-shedding and probity and higher performance being demanded of contractors. Is there a new role for lawyers?



3. PREVIOUS METHODS TO AVOID DISPUTES - 'THE MAZE, THEN THE GUILLOTINE'

(a) Attempts in the past to reduce the scope for adoption of adversarial positions have included the claiming clause requiring particulars, notice in certain time or loss of rights. The attempt has failed. Despite the best efforts of draftsmen, the judiciary and philanthropists, clauses like this don't stop the claim from being made.

(b) Once the claim is tested and disputed and the parties go to their corners; the battle is lost, whatever the ultimate outcome of the claim.

(c) 'The drafting team must remove or reduce "adversarial" clauses, such as time bars and Draconian, forfeiture and "non-constructive" provisions.'[2]

(d) The following question has previously been posed in the context of partnering:

> *'Whether clients will possess sufficient confidence in partnering to take the brave step "[of removing these sort of claiming and notice provisions]" remains to be seen.*[3]

(e) Participants in alliancing model arrangements have committed themselves to do so. Such clauses have been altogether discarded, with the alliance agreement promoting collaboration and the common goal of the success of the project.

(f) Unlike partnering, most alliance models do not struggle with the need to bring the contract and the charter principles together. The alliance agreement often embraces these ideas under the one roof - the one agreement.

4. TYPICAL DISPUTE RESOLUTION MODELS

(a) There are various methods of dispute resolution processes which include:

(i) Negotiation.

(ii) Dispute review boards.

(iii) Dispute adjudication boards.

(iv) Dispute resolution advisors or dispute resolution experts.

(v) Mediation.

(vi) Conciliation.

(vii) Adjudication.

(viii) Mini trial.

(ix) Expert appraisal (non-binding).

(x) Expert appraisal (binding).

(xi) Hybrid arbitration:

- papers only;
- 'look/sniff'.

(xii) Arbitration:

- expedited;
- traditional.

(xiii) Litigation.[4]

(b) Starting from the grade (i) process, it involves an informal and consensual process where the disputants have control. As the list moves through towards (xiii), the processes for dispute resolution become more adversarial. In other words, control for outcome is given to a third party rather than to the parties themselves, ie, a party forces its view on the other parties as to the outcome.

Informal
Consensual
Control with Disputants

↓

Formal
Adversarial
Control with Third Party[5]

5. CONVENTIONAL DISPUTE RESOLUTION

(a) 'It is ironic that the one industry in the country [USA] that more than all others depends upon coordination, cooperation and teamwork among multiple participants should be the country's most adversarial industry.'[6]

(b) The UK Government has identified the cost of disputes as a key factor in the uncompetitiveness of the UK construction industry.[7]

(c) A significant aim must be to avoid dispute resolution at its earliest possible stage. Disputes tend to 'grow'. Efficient dispute resolution requires involvement and decisions being made at an early stage.

(d) It is a truism (and has been for some time) that industry participants who started with an aversion to litigation have not been convinced that arbitration offers them, as an alternative, significant improvements on the process.

(e) Through the many papers written by dispute resolution experts around the world, the following might be chosen to sum up the position:

> *'Users have been looking for mechanisms to discourage disputes altogether, or, if they do arise, to ensure that they can be contained in the interests of good management. Arbitration and litigation do* ***not*** *discourage disputes: they require people to keep records and store up claims, sometimes for years. A dispute clause in a contract is thus given a much broader purpose than merely the means by which disputes are resolved: it is enlisted to discourage disputes and to provide means of controlling them.'*[8]

(f) In a persuasive article which addresses changes in methods of dispute resolution[9] it is noted that the Chinese philosopher Sun Tzu wrote these words:

> *'To win without fighting is best'*
>
> *[Sun Tzu, The Art of War]*

more than 25 centuries ago.

(g) Despite the industry grappling with the concept of dispute resolution for almost as long, at least insofar as alliancing alternatives regarding dispute resolution is concerned, the industry has not previously grasped the nettle.

(h) Industry has for quite some time adopted what are called 'escalation clauses' whereby no formal steps can be taken in a dispute by either party until there is at least a meeting and a 'good faith' and/or reasonable negotiation process conducted by the parties. The procedure is adopted to some extent in certain standard industry forms.

(i) The development of alternative options for dispute resolution, to take place after such 'good faith negotiation' clauses - and before the alliance concept of 'no disputes' *whatsoever* - can be usefully reviewed by reference to international experience.

(j) Dispute Review Boards

- A dispute review board conducts a hearing - in an expedited fashion - and then sets about writing its decision. While often this is non-binding, the decision of the dispute review board at least defers open disputation.
- Experience suggests that this system discourage disputes. It is less certain whether such clauses contain and control a dispute (unless that process is binding, it is difficult to see how it can control it).
- A dichotomy of approach can include that for a party to agree to accept a binding determination by a dispute review board ('DRB'), that party might require the DRB to first conduct a full examination of the facts. This inevitably takes time and cost (dependent on the process, potentially as much as is the case in litigation or arbitration) and so expedition is lost.

(k) Disputes Adjudication Board

- From 1995 FIDIC required that disputes be referred to an independent Dispute Adjudication Board.
- Decisions of adjudicators can be expressed as binding until (failing agreement) the dispute is finally resolved by legal proceedings by way of arbitration or litigation.

(l) Dispute Resolution Adviser

- A party can be appointed to assist the parties in identifying the dispute mechanism to best resolve their difference. Decisions can be expressed as final and binding and to be conducted and concluded within 1 day.

- Another procedure adopted to avoid protracted argument has been called the 'final offer system' requiring both parties to write down and give to the adviser, the figure it would settle for, with the adviser picking which one he felt most appropriate. The system encourages the parties not to exaggerate their position. It provides the requisite incentive to the parties to resolve their disputes.

(m) The Courts

- Proactive approaches to dispute resolution vary from state to state.
- It is once again useful to look at the international scene. In October 2000, the United Kingdom's Technology & Construction Court introduced a pre-action protocol for construction and engineering disputes. The protocol aims to avoid commencement of proceedings prematurely, or at all, by requiring the parties to exchange full information early so as to narrow issues in dispute. The protocol requires the parties to make a concerted effort to understand the facts of the dispute and each others' position.
- The court imposes a frame work for the parties to exchange information and to meet before formal proceedings are started. If there is a failure to comply with the protocol, the court has the power to deprive the defaulting party of part of its costs or alternatively of interest.
- If litigation is not avoided altogether by this process, it is suggested that if the parties comply with the requirements, it will contribute to the efficient management and resolution of the litigation.
- The costs of litigation are 'front loaded'. This might act as a sufficient deterrent for parties to proceed.

6. THE 'PROPAGANDA'

(a) Many espouse the virtues of the dispute review board, the dispute adjudication boards and the dispute resolution adviser models as the best systems. It was however not that long ago that partnering was introduced to Australia as the be all and end all to avoid disputation. Industry commentators can wheel out (in much the same way as they did 10 years ago in respect to partnering results) figures and statistics, combinations and permutations, which suggest that dispute resolution processes such as these achieve fantastic results in respect to resolution of disputes.

(b) I have seen it unabashedly stated:

> *'On all contracts, independent of size, where a DRB (dispute resolution board) has been used, **all** disputes (that have reached the DRB stage) have been settled at the DRB stage.'*[10]

(c) Is this starting to sound like the catchcries used by those who advocated arbitration some decades ago and who then more recently advocated mediation as a precondition to litigation or arbitration? Is it starting to sound like the 'magic wand' that partnering was promised to deliver from the early 1990's?

(d) Should there be the same cynicism as regards the 'no disputes' procedure used as the basis of resisting or avoiding disputation in the alliance model?

(e) While it is easy to be cynical, it is more difficult to oppose the objectives being sought to be achieved by the no-disputes clause utilised in alliancing models. Rather, such an approach is to be applauded.

7. WHAT DOES THE ALLIANCE 'MODEL' PROVIDE FOR DISPUTE RESOLUTION?

(a) There is yet no 'standard form' alliance model in Australia.

(b) While called something different, the United Kingdom is getting closer to a 'standard form alliance' by virtue of PPC 2000,[11] described as the first standard form project partnering contract.

(c) PPC2000 is not the partnering model which was introduced to Australia in the 1990s. Rather, it adopts features synonymous to the alliancing model as we now call it in this country. For instance, it advocates:

> '· *firm duties of team work, with shared financial motivation to pursue those objectives;*
>
> · *encouragement of incentives for exceptional performance;*
>
> · *mechanisms for avoidance of conflict and speedy dispute resolution.'*

(d) Further, unlike the partnering charter which has been described as a kind of transparent overlay over the harsh commercial realities of the commercial arrangement which the parties agreed to, PPC2000 requires the parties to sign a single agreement which reduces the temptation of the parties to hide behind some unconnected document - the partnering charter - to assert their rights.

(e) Insofar as dispute resolution is concerned, PPC2000 advocates and requires a non-adversarial problem resolution. It provides for a problem solving hierarchy of increasingly senior individuals within each team member's organisation working to strict time limits with further reference of an unresolved problem then to the Core Group. PPC2000 also includes a facility for conciliation or other forms of alternative dispute resolution.

(f) The process for dispute resolution by PPC2000 is reproduced in appendix A.

(g) As noted, while in Australia there is yet no 'standard form', certain Australian State Government or other public or private sector clients are developing their own 'style'.

8. RUN - WIN/LOSE - RESUME: THE ALLIANCE APPROACH

(a) To preserve relationships, claims must be dealt with quickly.

(b) Courts have grappled with it by more judges and heavily managed Court lists.

(c) Arbitrators - some good, some bad - promise expedition, but an often heard criticism is that arbitration rarely delivers.

(d) 'The rolling stone gathers no moss' - expedition in the process is most important.

(e) The events giving rise to the claim must be strictly dealt with, agreement reached or a third party decision, binding on the parties, made quickly and before a Richter scale 3 dispute, measures 9 once the combination of claims consultants, Queen's Counsels and lawyers' respective and not inconsiderable weights are added to the scale.

(f) This is what the Review Board idea embraced by Alliancing promotes.

(g) An alliance or not, it is inevitable that disputes will arise. Also, Rome wasn't built in a day and the industry won't change overnight.

(h) There is no good improving communication if then, along with the first problem, back comes the suspicion, back comes the mistrust, back comes the bad faith - here comes the dispute.

9. THE DISPUTE RESOLUTION CLAUSE IN ALLIANCING

(a) Often the 'escalation' procedure is adopted, alternatively the dispute review board approach.

(b) Under the alliance guise, the dispute review board procedure is called by a different name, eg, Project Alliance Board ('PAB').

(c) Following is an example of a dispute resolution clause involving the PAB concept:

> *'2.* ***RESOLUTION OF DISAGREEMENTS***
>
> *2.1* ***Procedure for handling disagreements***
>
> *2.1.1 The Alliance Participants will try to settle any Alliance Disagreement in good faith in a manner consistent with the Alliance Principles.*
>
> *2.1.2 If despite their efforts, an Alliance Disagreement remains unresolved, an Alliance Participant, if it wishes to pursue the matter, may give a written notice to each of the other Alliance Participants requesting that the Alliance Disagreement be considered by the PAB.*
>
> *2.1.3 The PAB will consider any Alliance Disagreement referred to it and will give due consideration to submissions by all Alliance Participants, to any recommendation by the Alliance Project Manager in respect of the Alliance Disagreement and to any other relevant information.'*

(d) It is often a requirement that PAB decisions be unanimous.

10. THE NO-DISPUTE CLAUSE

(a) The no-dispute clause has been described as a central feature in the operation of a successful alliance.

(b) Alliancing has attempted to remove the notion of blame from the relationship between the participants. The contracts which form the basis of the alliance accordingly often restrict access to the courts for breach of contract or other obligations unless the conduct amounts to a 'wilful default' on the part of the transgressor.

(c) Disputes are to be dealt with by processes embracing the escalation model, culminating with final decisions being made by a core group, often styled as the Project Review Board or Project Alliance Board ('PAB').

(d) A sample 'no-disputes' clause is as follows:

> *'2.2* ***No arbitration or litigation***
>
> *2.2.1 Except as provided in clause 2.2.2 below it is the intention of the Alliance Participants:*
>
> *(a) that the PAB will deal with any Alliance Disagreement and the Alliance Participants will do their utmost to ensure that the PAB is able to fulfil this crucial function effectively and efficiently; and*
>
> *(b) that there will be no arbitration or litigation between the Alliance Participants on any Alliance Disagreement.*
>
> *2.2.2 A failure by any Alliance Participant to perform any obligation or to discharge any duty under or arising out of this agreement will not give rise*

to any enforceable obligation at law or in equity whatsoever save and except to the extent that the failure also constitutes an Event of Default.'

(e) 'Event of Default' is often narrowly defined - including the usual 'insolvency' styled provisions, other fundamental provisions, eg, insurance, and a term loosely referred to as 'Wilful Misconduct'.

(f) Wilful Misconduct is often defined as an intentional act carried out without regard for the harmful consequences but to not include errors, mistakes (including negligent acts or omissions) made in good faith.

(g) There are hybrids of these:

- In some cases the 'Event of Default' is extended to include failure to honour an indemnity, refusal to rectify a defect or refusal to allow an audit.
- In some cases the 'Wilful Misconduct' at least also includes a failure to make a due payment.

(h) Following is a further sample:

*'14. **SETTLEMENT OF DISAGREEMENTS***

*14.1 **General/releases***

14.1.1 The Alliance Participants' intention is that the PAB will deal with any Disagreement which may arise during the performance of the Work and the Alliance Participants will do their utmost to ensure that the PAB is able to fulfil this crucial function effectively and efficiently.

14.1.2 Except as provided in clause 14.1.3 below, it is the intention of the parties that there will be no litigation between the parties on any matter arising out of this PAA.

14.1.3 A failure by any Alliance Participant to perform any obligation or to discharge any duty under or arising out of or in connection with this PAA will not give rise to any enforceable obligation at law or in equity whatsoever save and except to the extent that the failure:

(a) also constitutes an Event of Default by an Other Alliance Participant or an Event of Default by 'QYZ'; or

(b) is a breach of one of the Other Alliance Participant's obligations in respect of Intellectual Property Rights in clause 12; or

(c) is a breach of the confidentiality undertakings in clause 13.

*14.2 **Procedure for handling disagreements***

14.2.1 The Alliance Participants will try to settle any Disagreement in good faith in a manner consistent with the key alliance principles and commitments set out in clause 2 and Schedule 5.

14.2.2 If despite their efforts pursuant to clause 26.2.1, the Disagreement remains unresolved, an Alliance Participant, if it wishes to pursue the matter, may give a written notice ('Notice of Referral') to the Alliance Project Manager, with a copy to the Other Alliance Participants, requesting that the Disagreement be considered by the PAB.

14.2.3 *Upon receipt of such notice the Alliance Project Manager will make arrangements for the Disagreement to be considered by the PAB as a matter of priority.*

14.2.4 *The PAB will consider any Disagreement brought to its attention and will give due consideration to submissions by all Alliance Participants, to any recommendation by the Alliance Project Manager in respect of the Disagreement and to any other relevant information.*

14.2.5 *The PAB will resolve the Disagreement and may for this purpose obtained skilled help (eg, mediator, facilitator, independent expert, etc). Any costs of such skilled help will be borne equally by the Alliance Participants.*

14.3 ***Decisions of PAB***

14.3.1 *A decision of the PAB taken in accordance with this PAA will be final and binding on the Alliance Participants.*

14.3.2 *Under no circumstances will a decision of the PAB, properly taken under this PAA, be classified as a Disagreement or be subject to any review under this clause 14.*

14.3.3. *Each Alliance Participant agrees not to take any legal action against another Alliance Participant for the purpose of reviewing, amending, rescinding or in any way interfering with any decision of the PAB made in accordance with this PAA.'*

- ***'Event of Default by the Manager'*** *- an event of default is deemed to occur if the Manager:*

(i) *commits an act or omission amounting to Wilful Misconduct in relation to any significant duty, obligation, term, condition or stipulation arising out of or connected with the (agreement);*

(ii) *informs the Client in writing or creditors generally that it is insolvent;*

(iii) *commits an act of bankruptcy;*

(iv) *has a bankrupt petition presented against it;*

(v) *is made bankrupt;*

(vi) *has a meeting of its creditors called with a view to:*

(A) *entering a scheme of arrangement or composition with creditors; or*

(B) *placing the Manager under official management;*

(vii) *enters a scheme of arrangement or composition with creditors;*

(viii) *is subject to a resolution passed at a meeting of its creditors to place it under official management;*

(ix) *is placed under official management;*

(x) *has a receiver of its property or part of its property appointed;*

(xi) *is the subject of an application to a court for its winding up, which application is not stayed within 10 Working Days;*

(xii) *has a winding up order made in respect of it; and/or has execution levied against it by creditors, debenture holders or trustees or under a floating charge.*

- ***'Event of Default by Client'*** *is deemed to occur if the Client commits an act or omission amounting to Wilful Misconduct in relation to any significant duty, obligation, term, condition or stipulation arising out of or connected with this (agreement).*
- ***'Wilful Misconduct'*** *means:*

  (i) an intentional and conscious act or omission by a Party carried out with utter disregard, or calculated disregard, for the harmful and avoidable consequences thereof on the other Party, but does not include any error of judgment, mistake, act or omission, whether negligent or not, made in good faith by a Party or its employees, directors, Suppliers, Subcontractors or agents; or

  (ii) failure by a Party to make a payment to the other Party which has become due under this (agreement).

(i) The result of a clause such as this is that:

(i) the PAB's decision is expressed to be final and binding;

(ii) the option of litigation is not available in circumstances of breach, act, error or omission amounting to negligence or even gross negligence; and

(iii) the participants must focus on repairing the damage or loss that has resulted from one party's breach.

(j) The deliberate selection process of the participants, the requirements of unanimity of the alliance board and the culture of alliancing all suggest that disputes should be dealt with by the parties in a direct fashion. The example in (h) is a slight hybrid of this, allowing the PAB to obtain skilled help by appointing a mediator, facilitator or independent expert.

(k) While these are persuasive arguments for adopting alliance structures and suggest that disputes will not happen very often, the fact remains that disputes will occur.

(l) Many dispute clauses in the alliance model provide that third parties are not involved in the dispute resolution process.

(m) The strength of alliancing is also its weakness, as parties who cannot resolve disputes among themselves have little recourse to the legal system to resolve those disputes for them.

11. IS A 'NO-DISPUTES' CLAUSE VOID?

(a) The 'no dispute' provision has, by some commentators, been suggested as open to challenge. The most common basis for this is to say that it is an attempt to oust the jurisdiction of the court and as such, to be void and unenforceable.

(b) Assistance can be found by recourse to cases which have been decided in respect to the independent expert appraisal processes. In this regard, industry commentators disagree as to the efficacy of such a process as a dispute resolutions procedure.[12]

(c) Arguments have been made that decisions of experts expressed to be 'final and binding' are 'bare-faced attempts to oust the jurisdiction of the court'[13]; contrary to public policy and so void. (A casenote is provided as appendix 'B').

(d) *Dobbs v National Bank of Australasia Limited*[14] suggests to the contrary:

> '*It has never been the policy of the law to discourage ... positive provisions giving efficacy to the ... definition or ascertainment of private rights upon which otherwise the Court might have been required to adjudicate*.'

(A casenote is provided in appendix 'C').

(e) By way of general principle, an agreement which contemplates that someone else, other than the court, would determine disputes, does not necessarily attempt to oust the jurisdiction of the court. It might merely limit the matters for consideration by the court to questions of whether the agreed expert had acted within the agreement of the parties.

(f) That said, difficulties can arise because nothing is provided to deal with the circumstance if the allegation of partiality is made. Unlike litigation or arbitration (where the respective processes are governed by legislation) will the courts intervene to fill a void or to negotiate an impasse?

(g) A leading case in the area of expert determination is *Triano Pty Ltd v Trident Contractors*[15] (a casenote is provided in appendix 'D') where Cole J said that the court had no jurisdiction to determine the procedures to be followed in the expert determination and said that with respect to the procedures to be followed, the appropriate procedures were left in the hands of the parties and not the experts. The court appeared quite content to let the parties have the agreement that they had struck in respect to resolution of the dispute - but in that case only the disputes that were provided for as regards expert determination (which out of interest was not all of them in that instance).

Cole J said that unlike an arbitration where pursuant to the relevant *Commercial Arbitration Act* the court had certain powers, in the instance of the expert determination agreement in that case, it was not intended to be an arbitration but a completely different set of proceedings. Accordingly, His Honour would not intervene. He left the parties to the procedures which they had determined to be followed. He would not impose his own procedures.

(h) A different approach was taken by the Western Australian Supreme Court in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*[16] (a casenote is provided in appendix 'E') where the expert determination clause was held void on the basis that it purported to oust the jurisdiction of the court.

A dispute arose which was attempted to be referred to an independent referee as the relevant contractual clause provided. The matter found its way to court and the respondent sought to restrain the claimant from proceeding with the determination. The court found that the clause operated to oust the jurisdiction and was void for 2 reasons:

- clause 20 provided for the resolution by the referee of 'any' dispute arising out of the contract, whether or not the dispute for determination was within his or her particular field of expertise; and
- the clause purported to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the court.

The court said that the main limitation imposed upon the power of the parties to prescribe their own rules of procedure for determination of disputes was that they could not, by contractual provision, oust the jurisdiction of the court.

(i) The *Triano* and *Baulderstone* cases appear squarely at odds. It has been suggested[17] that there was another, practical, reason for the decision in *Baulderstone* in that out of the same project, separate court proceedings were underway. Considerations by Heenan J as to the unattractiveness of 2 sets of proceedings arising from the same facts, yet with the chance of different outcomes, could have influenced the decision. A similar but not identical situation did not however appear to deter Cole J in *Triano*.

(j) A series of further expert determination styled cases are at least instructive.[18] (Refer casenotes provided in appendices 'F' to 'J')

(k) Commentators who advocate the view that a 'no disputes' clause is void, look little further than the Federal Court's decision in *Novamaze Pty Ltd v Cut Price Deli Pty Ltd*.[19] (A casenote is provided in appendix 'K')

(l) In *Novamaze* Drummond J referred to the following passage from *Dobbs:*

> '*No contractual provision which attempts to disable a party from resorting to the Courts of Law, was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny the other party in whom they vest the right to invoke the jurisdiction of the court to enforce them,*'

and said:

> *'At the core of this head of public policy is the notion that the citizen is entitled to have recourse to the Court for an adjudication on his legal rights. A contractual agreement to deny a person that 'inalienable right' contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation.*
>
> ...
>
> *There is no necessity to assume that only an express ouster of jurisdiction will infringe this head of public policy. Given this and given the importance of the right of the citizen to resort to the Court for an adjudication upon his legal rights, it is, I think, at the very least, arguable that a contractual provision that places a substantial fetter on this right of recourse to the Court is equally as bad as an express prohibition against going to Court.'*

(m) So what then is the position? It will depend upon the clause. If no disputes can ever go to the courts, the clause is more likely to be seen as an ouster and void as against public policy. Such 'full denial' clauses are not so often seen.

(n) Some commentators have suggested this risk not to be relevant:

> *'The finer legal point here is not relevant because if the intent is clear and the alliance is properly established and maintained it will never become an issue. The intention is that the integrity of the participants and the high-quality relationship, in conjunction with the commercial drivers will force the participants to reach agreement in all events. As evidence of this practice, the author is not aware of any alliance where the participants have failed to reach unanimous agreement'.*[20]

One suspects that this unanimity was also initially expected in almost every project which has found its way to the court. That is cold comfort here.

(o) One can therefore tend to challenge the suggestion that a no disputes clause will always work. An alliance contract is not a cure-all for conflict. It should never be assumed that the parties will always be able to reach agreement.

(p) If agreement can't be reached it can be predicted with some certainty that one of the parties will argue that the other caused the failure of the project or of the review board or flawed the PAB decision process and so the determination.

(q) Is it then worth the risk of a no-disputes clause or should the option to enforce rights be left a little more open? For example:

'22. ***SETTLEMENT OF DISAGREEMENTS***

22.1 ***General***

22.1.1 The Parties' intention is that the PCG will deal with any Disagreement which may arise during the performance of the Work and the Parties will do their utmost to ensure that the PCG is able to fulfil this crucial function effectively and efficiently.

22.1.2 Except as provided in clause 22.2.3 below, it is the intention of the Parties that there will be no litigation between the Parties on any matter arising out of the CPA.

22.2 ***Procedure for Handling Disagreements***

22.2.1 The Parties will try to settle any Disagreement in good faith.

22.2.2 If despite their efforts pursuant to clause 22.2.1, the Disagreement remains unresolved, the Party if it wishes to pursue the matter, may give a written notice ('Notice of Referral') to the Project Manager, with a copy to other Party requesting that the Disagreement be considered by the PCG.

22.2.3 Upon receipt of such notice the Project Manager will make arrangements for the Disagreement to be considered by the PCG as a matter of priority.

22.2.4 The PCG will consider any Disagreement brought to its attention and will give due consideration to submissions by all Parties, to any recommendation by the Project Manager in respect of the Disagreement and to any other relevant information.

22.2.5 The PCG will resolve the Disagreement and may for this purpose obtain skilled help (eg mediator, facilitator, independent expert etc). Any costs of such skilled help will be borne equally by the Parties.

22.3 ***Decisions of the PCG***

22.3.1 A decision of the PCG taken in accordance with the CPA will be final and binding on the Parties.

22.3.2 Under no circumstances will a decision of the PCG, properly taken under the CPA, be classified as a Disagreement or be subject to any review under this clause 22.

22.3.3 Each Party agrees not to take any legal action against another Party for the purpose of reviewing, amending, rescinding or in any way interfering with any decision of the PCG made in accordance with the CPA.

22.3.4 If the PCG fails to reach a decision resolving the Disagreement, either party may have the Disagreement resolved by litigation.'

(r) Another option is to revisit the binding third party determination process in the event the participants (or the PAB) can't agree.

(s) Alternatively, the PPC 2000 model which reserves rights to alternative processes.

(t) Some contracts express decisions only as final and binding until the conclusion of the project.

(u) Other contracts cap liability limits that are capable of being litigated to dissuade the claimant.

(v) It can be expected that a 'no disputes' clause will soon be tested by the courts.

(w) Some agreements provide for determination of the agreement as the only remedial option failing unanimous agreement.

12. THE 'GOOD FAITH' PROMISE

(a) The overlay of promises of good faith in respect to the project is also therefore made in respect to the method of dispute resolution and the 'no disputes' approach adopted in alliance agreements.

(b) The promise of good faith will likely be instrumental to the prospect of a no-disputes clause being tested, as well as to the attitude of the Court as to arguments of ouster.

(c) While good faith can 'mean different things, to different people, some definition is being acquired.[21]

(d) The good faith promise appears to at least import cooperation, honesty and reasonableness.

(e) While it appears customary for the good faith promise to be incorporated into the alliance agreement, draftsmen appear reluctant to give it an exhaustive meaning. A sample of the promise to act in good faith is as follows:

> *'3.2* ***Commitment to act in good faith***
>
> *3.2.1 Each Alliance Participant undertakes to conduct its activities arising out of this agreement in good faith. Acting in good faith in this case includes:*
>
> *(a) being fair, reasonable and honest;*
>
> *(b) doing all things reasonably expected of it by another Alliance Participant and by this PAA;*
>
> *(c) not impeding or restricting another Alliance Participant's performance; and*
>
> *(d) giving as much weight to the interests of the Project as to one's own self interest.'*

(f) Subparagraph 3.2.1(d) above is open to interpretation. The practice of including it in interim arrangements while negotiations continue towards a possible alliance, looms as a dangerous practice and a dangerous promise for tendering contractors to make.

13. THE TRADE PRACTICES ACT CLAIM?

(a) Any representation can give rise to potential for a claim for remedy and relief via the *Trade Practices Act 1974* (C'th) ('TPA').

(b) States have similar legislation by virtue of *Fair Trading Acts*.

(c) With the partnering model being a separate arrangement concerning the charter, the scope was high. It has been observed[22] that there was a practice of holding partnering meetings leading to the charter after the commercial contract had been struck. The objective was to remove the reliance ingredient integral to a TPA claim.

(d) The Courts are reluctant to turn a blind eye to the efforts of draftsmen to exclude the operation of the TPA.

14. FIDUCIARY OBLIGATIONS

(a) Circumstances giving rise to potential fiduciary duties between the parties in the partnering model have been considered[23] and for similar reasons fiduciary duties could arise in an alliance.

(b) While Canadian courts appear more expansive, [24] Australian courts also recognise the scope. [25]

(c) The scope for the alliance agreement to give rise to fiduciary obligations among the participants is probably higher than was the case in partnering. Indeed one commentator has suggested so much that participants fully understand and intend those obligations to exist.

(d) Breach of fiduciary duty looms as an issue inevitable to arise in the event of breakdown of an alliance model.

15. THE DEADLY COCKTAIL OF THE TRADE PRACTICES ACT AND 'GOOD FAITH'

Alliancing is about building long term relationships between participants in a project. The benefits of a successful alliance can be significant for both principals and contractors, although the downside of alliance contracts is the degree of uncertainty that comes with the way in which the parties' obligations are set out in the contractual documentation. This is further exacerbated by the notion that the contract is "relationship driven" and that parties to alliance and partnering contracts may be held to owe legal duties to each other which are undefined and can significantly impact upon the outcome of any dispute under the contract. As few disputes arising under partnered or alliance contracts end up before the Courts there have been few decisions which have interpreted the rights and obligations of parties to these contracts. Any such decisions should be noted by parties to alliance contracts as they shed some light on what may happen if an alliance contract becomes the subject of a dispute.

A recent decision of the Full Court of the Supreme Court of Western Australia (on appeal) has served to highlight issues arising out of:

(a) the operation of a 'termination for convenience' styled clause;

(b) the concept of 'good faith; and

(c) the use of the partnering model of project delivery.

The case is instructive as to how such termination claims and promises of good faith operate and the way in which such relationships will be interpreted by the Courts.

Promises of good faith and clauses entitling termination for convenience are regular features in alliancing models. As a result, this case (although under the auspices of partnering) must be considered in the context of any review of the alliance dispute resolution model.

In *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*[26] the Court dealt with two issues which are certain to arise in an alliance contract gone wrong:

(a) Whether a party to a partnering contract is entitled to rely upon a termination clause in that contract in circumstances where, during pre-contractual negotiations, it represented that it 'could not foresee any circumstance in which it would use the termination clause'; and

(b) Whether a party to a partnered contract had a duty of good faith when assessing rates for a schedule of rates contract and what that obligation entails.[27]

The Court ruled that the termination clause was valid and could be exercised by a party to the contract and that there was a duty of good faith which included a duty to provide genuine estimates

of costs when deriving rates. In this particular case, however, a failure by the plaintiff to properly quantify its damages resulted in the Court awarding $100 nominal damages only.

The facts

Thiess Contractors Pty Ltd ('Thiess') entered into a schedule of rates mining contract with Placer (Granny Smith) Pty Ltd ('Placer'). Unforeseen problems arose during the course of work and Thiess was required to carry out work outside the scope of the contract. A new contract was then negotiated between the parties. This new contract was structured as a partnering contract. In pre-contractual discussions and written communications Placer proposed that the new contract be based on risk sharing principles and that the parties 'work in good faith on all matters relating to the contract', and that the contract provide for a fixed profit to be earned by Thiess.

Placer terminated the contract in reliance on a termination clause contained in the contract which entitled it, at its option, and at any time for any reason it might deem advisable, to cancel and terminate the contract. Thiess alleged that Placer's termination was unlawful. Placer counter-claimed that in breach of the obligation of good faith, expressly provided for by the contract, Thiess had falsely represented that certain plant costs were its genuine estimates of the costs it would incur in carrying out work under the contract.

Thiess alleged that prior to entering into the new contract, Placer represented that it would only rely on the termination clause to terminate the contract if the mine were closed or if the mine was uneconomic to work. Thiess contended that it altered its position in reliance on those representations and that Placer should be estopped from relying upon the termination clause. Thiess alleged 2 representations were made:

(a) A representation to the effect that the contract was for the life of the mine, (or to similar effect); and

(b) a representation to the effect that Placer could not see any situation in which it would need to invoke the termination clause.

Findings

First representation: Placer's exercise of its' rights under the termination clause was not inconsistent with it's representation that the contract was to be for the life of the mine. There were several provisions in the contract itself which indicated that the parties intended that mining be carried on by Thiess for the life of the mine. That intention was always subject to the termination clause. Furthermore, at the time the representation was made, Thiess requested Placer remove the clause and Placer refused. Placer would not have agreed to the contract without the termination clause. Plainly it was prepared to enter into the contract, which was to be for the life of the mine, but subject to its right to terminate under the clause should it wish to do so. Thiess had agreed to these terms.

Second representation: The mere fact that (during negotiations) Placer could not conceive of a situation in which it would exercise its rights under the termination clause does not mean that it represented that such a situation would never arise or that it waived its' rights under that clause in any way. Thiess was well aware of the risks of agreeing to the contract with the termination clause in it. Placer did not represent that despite insisting on the termination clause being included in the contract, it would not rely upon it.

Duty of good faith

Placer argued that:

(a) by an express term of the contract Thiess owed Placer an obligation to act in good faith in the process of deriving the rates according to which remuneration under the contract was to be paid;

(b) Thiess represented to Placer that certain plant costs incurred in carrying out mining operations were its genuine estimates of those costs;

(c) those representations were deliberately false in that the plant costs, to Thiess' knowledge, contained elements of profit;

(d) Thiess thereby committed breaches of its contractual duty of good faith; and

(e) as a result, Placer suffered damage.

The duty to provide genuine estimates of costs

The contract covered a multitude of items in respect of which costs were to be incurred and rates charged. It also specified the profit to be made and how that profit was to be calculated. There were careful and detailed provisions made for the review of the rates.

Clause B1.1.5 provided:

> *'The successful operation of this contract requires that Thiess and Placer agree to act in good faith in all matters relating to both carrying out of the works, derivation of rates and interpretation of this document.'*

The contract provided for the agreement of rates, from time to time, in advance of work done. To that extent, it contemplated that agreed rates would be based on estimates of the costs of the work to be done. Implicitly, the parties were required to co-operate in the establishment of rates based as far as reasonably possible on actual costs. This was consistent with the scheme of the contract as a whole. The scheme of the contract as a whole and the obligation of good faith contained in clause B1.1.5 required Thiess at each review to disclose all facts relevant to the establishment of rates based on actual costs. The contract required Thiess to provide Placer with a genuine estimate of its costs for the purpose of agreeing the rates in accordance with the contractual terms. In the course of agreeing upon variations as to rates, Thiess knowingly misrepresented to Placer that certain costs were its genuine estimate of costs (whereas those costs included elements of profit). Misrepresentations like this (made after the contract had been entered into) constituted a breach of clause B1.1.5.

Misrepresentations

The representations in question were contained in a document referred to as the 'April submission'. Thiess represented to Placer that the rates in the April submission were it's genuine estimate of costs. The court found:

(a) Thiess accepted the principles embodied in a letter from Placer to Thiess which provided that:

- Placer recognises the right of Thiess to make a profit;
- The nature of the contract will remove the ability of Thiess to make 'windfall' profits; and
- Placer and Thiess agree to work in good faith on all matters relating to the contract.

(b) Placer's subsequent letter was an invitation to Thiess to produce the April submission using genuine estimates of its mining costs. In that letter Placer referred to Thiess using the 'new contract concepts'. The 'new contract concepts' were the concepts set out in Placer's original letter to Thiess.

(c) When Thiess produced its April submission the parties were negotiating on the basis that Thiess would provide genuine cost estimates. In seeking to agree to rates pursuant to the various provisions of the contract the parties were obliged to act in good faith in estimating the future costs. As the whole aim of the contract was to establish rates that would be an estimate of the anticipated actual costs of the mining operations, and would not give rise to 'windfall' profits, the inference to be drawn is that the open book analysis was to enable that to be done. The parties would be expected to 'work in good faith' to agree on the costs on the basis of what would be genuine estimates of those costs.

(d) Thiess represented to Placer that the plant rates contained in the April submission were genuine estimates of costs.

Breaches of Contract

There were 2 breaches of contract concerning representations made by Thiess when it provided rates to Placer (based in substance on the April submissions). Both breaches arose out of Thiess failing to act in good faith as required by the contract by knowingly misrepresenting that its rates were genuine estimates of its costs.

Causation

The parties were required to exercise good faith in attempting to come to an agreement within the constraints implicitly provided for by the contract. Those constraints were imposed by the parties intent, reflected by the contract, to provide a mechanism for the agreeing of rates and amounts (based on the equivalent of the actual costs incurred by Thiess), prior to each relevant rates review. By the contract, the parties were obliged to attempt in good faith to agree to the rates (by reference to the genuine estimates of costs that each produced), with the intent that the agreed rates be estimated actual costs to be incurred by Thiess.

In consequence of Thiess' breaches of contract, Placer paid Thiess remuneration based on rates higher than those that would otherwise have been agreed. Placer was therefore entitled to damages for breach of contract represented by the difference between the remuneration paid by it to Thiess and the remuneration it would have paid had Thiess not breached the contract.

Damages

The court held that damages could only be proved in the following manner:

(a) identify each item of plant in respect of which an inflated rate was used;

(b) in respect of each sub item of plant identify the Plant Department rate applicable thereto;

(c) carry out an FPC simulation in accordance with the contract, using the appropriate Plant Department rates for load and haul so as to establish the notional contractual rates applicable thereto;

(d) calculate the notional contractual rates for the other items of plant referred to in paragraph (a), applying the appropriate Plant Department rates in accordance with the criteria laid down by the contract itself;

(e) using the notional contractual rates so established to determine the revenue that would have been earned from the items of plant to which those rates applied;

(f) determine the revenue in fact earned from the plant to which the inflated rates were applicable; and

(g) deduct the revenue determined in accordance with paragraph (e) from the revenue determined in accordance with paragraph (f).

This formula which calculated the revenue that Thiess would have earnt from the Plant (in respect of which inflated rates would not be used), when deducted from the revenue that Thiess in fact

earned from the plant to which the inflated rate applied, would be Placer's damages. But Placer made no attempt to prove its damages in this way.

There were no grounds giving rise to the ordering of a retrial of the damages issue. The consequence was that Placer was entitled to nominal damages of $100.

Observations

This case demonstrates the importance of careful planning and contract administration when using new models of project delivery such as Partnering/Alliancing. Importantly, it shows that the nature of the obligation of good faith (regularly agreed by parties) is a shifting one. Good faith obligations require the parties to be candid in their dealings with one another and requires a less adversarial approach to be taken when considering the parties rights and obligations under the contract.

16. CONCLUSION

(a) The 'escalation' and dispute review board (PAB) model appears proven and effective.

(b) The no dispute clause is still the subject of concern as to enforceability in the event of it being drawn so broadly as to arguably constitute an ouster.

(c) Alliancing does not cure all conflicts.

(d) The PAB model is open to be tested in the event unanimous agreement can't be reached.

(e) Even if termination of the agreement and caps on liability levels are added to bolster the no disputes clause, it is uncertain this will be enough to deter an aggrieved party.

(f) History suggests that disgruntled participants can be innovative litigators.

(g) The *Trade Practices Act*, good faith promises and potential fiduciary duties are a deadly cocktail.

(h) Time will tell if disputes under alliance projects find their way into disputation in the same way, it seems, as have a number of partnered projects.

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[1] © David Dombkins.
[2] Dorter and Sharkey, Building and Construction Contracts in Australia, Second Edition, Law Book Co 1990 at [7.70], p3523.
[3] J Tyrill, 'The Dark Side of Partnering' 56 ACLN 30.
[4] Adapted from numerous versions, including, Leeper & Peters to IAMA, Queensland Chapter 3/8/00.
[5] Ibidem.
[6] Groton 1997.
[7] Report prepared by Sir Michael Latham; Constructing the Team.
[8] J Kendall, Allen & Overy, International Business Lawyer, 1997.
[9] P Gerber, 'The Changing Face of Construction Dispute Resolution in the International Arena: Where to From Here?', 73 ACLN.
[10] R M Matyas et al (1995) Construction Dispute Review Board Manual.
[11] Guide to Project Team Partnering: Construction Industry Council Partnering Task Force; N Raynsford, MP, Minister for State of Construction, June 2000.
[12] See P Davenport: 'Experts and Arbitrators' 21 ACLN 4 and see the reply by D Jones 'Experts and Arbitrators - Letter to the Editor' 23 ACLN 56.
[13] *Fletcher Construction Australia Ltd v MPM Group Pty Ltd* (NSWSC, Rolfe J, 14/7/97): See appendix 'B'.
[14] (1935) 53 CLR 643: See appendix 'C'.
[15] Unreported, Supreme Court of New South Wales, Cole J, 22/7/92: See appendix 'D'.
[16] (1998) 14 BCL 277: See appendix 'E'.
[17] M Tonkin: 'Expert Determination': 67 ACLN 22.
[18] Also see *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (appendix 'F'); *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583) (appendix 'G'); *Fermentation Industries (Aust) Pty Ltd & Anor v Burns Philp & Co Ltd* (NSWSC, 12/2/98) (appendix 'H'); *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 389 (appendix 'I'); *Badgin Nominees Pty Ltd v Oneida Ltd & Anor* Vic.S.C. Gillard J 18/12/98 (appendix 'J').
[19] (1995) 128 ALR 540 (appendix 'K').
[20] J Ross, 'Alliancing', August 2000.
[21] *Alcatel Australia v Scarcella* 44 NSWLR 369.
[22] J Tyrill, 'The Dark Side of Partnering' 56 ACLN 30.
[23] Jones: 'Building and Construction Claims and Disputes' 1996.
[24] *LAC Minerals v International Corona Resources Ltd* (1988) 61 DLR (4th) 81.
[25] *Breen v Williams* (1996) 138 ALR 259.
[26] SCWA 14/4/00.
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