PROJECT PARTNERING IN THE INTERNATIONAL CONSTRUCTION INDUSTRY

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INTRODUCTION

Over the past decades, the international construction industry has observed an increasing frequency of litigation on major international projects. This has often been a consequence of the tendency of employers to minimise their risk profile through passing ever more contractual risk on to the contractor. According to recent experiences of many international contractors, this trend has been mitigated only partly by the general reworking of the accepted industry standard forms of contract issued in 1999 (FIDIC, 1999). This apparent increased risk for contractors has led one leading contractors' association, the European International Contractors (EIC), to publish their *EIC Contractor's Guides* to the three FIDIC "New Books for Major Works", which have all been published in this *Review* over the past three years (October 2000, January and July 2003).[1] The general perception in the *EIC Guides* is that the new editions have apparently allocated more contractual risk to the contractor in an already depressed market situation, where it is difficult to pass on the associated additional costs to the client.

Parallel to these developments in the international industry, project partnering has become increasingly established as a non-adversarial and performance enhancing approach to contracting in a number of national markets including the UK and US. Consequently when considering potential strategies for improving the performance of the international construction industry, beyond placing more risk on the contractor, the question arises, can project partnering be also successfully implemented in international contracts? This article investigates project partnering in the context of the international construction industry. Most of the findings are based on a survey response and direct consultations with the leading European construction companies facilitated by EIC.

[1] These and other references are found in the Bibliography at the end of this article, see p. 480. I am grateful to Dr Frank Kehlenbach of the EIC who facilitated access to most of my research data and reviewed this article.

1. AN INTRODUCTION TO PROJECT PARTNERING

1.1 Background and history

1.1.1 American Initiative

The first broad application of partnering in the construction industry was by the US Army Corps of Engineers in the late 1980s. Traditional methods of competitive tendering together with one-sided contracts and ineffective administration were leading to cost overruns and late completion. Furthermore litigation was becoming a significant problem. The Corps proposed a process whereby, post-tender, the successful contractor and the employer would discuss the nature of the project they were building and their mutual expectations. Goals would be defined and issues of concern and potential challenges openly discussed with a view to identifying and sharing risks. The result was a partnering agreement or charter jointly signed by all participants outlining mutually agreed-upon goals and principles (Jones Day, 2002).

1.1.2 The United Kingdom introduces partnering

Partnering was first applied in the UK in the North Sea oil and gas industries in the early 1990s. Major industry players such as BP were driven to this new model in an attempt to achieve profitability from what would have been otherwise uneconomic oilfields. The new approach (also known as alliancing) proved successful in achieving significant cost savings in platform construction for the employers and in creating increased profits for the participating partners (Bennett, 2000). The form of partnering differed typically from the US Corps of Engineers' approach with individual contracts between the employer and each alliance member and an additional umbrella agreement binding all parties to the alliance (the alliance members being the employer, the contractor, the designers and the key subcontractors).

Partnering in the UK civil engineering and building industry emerged from the background of the initial successes of this new approach in the oil and gas industry and the US building industry. In 1994 Sir Michael Latham, commissioned jointly by the government and the construction industry to conduct an independent review of what was generally accepted to be an under-performing construction industry, produced his *Constructing the Team* report. The central message of this report was that the employer should be at the core of the construction process. The use of teamwork and co-operation was advocated to improve employer satisfaction. One specific method recommended was the use of project partnering. When commenting on how to implement partnering, Latham noted that the New Engineering Contract (NEC) from the Institute of Civil Engineers (ICE) contained most of the

features required and would be, therefore, an appropriate form of contract for project partnering (Latham, 1994; ICE, 2001).

In the following year Bennett and Jayes, of the influential Centre for Strategic Studies in Construction at the University of Reading, published *Trusting the Team: The Best Practice Guide to Partnering in Construction* (1995) based on research into Japanese construction and case studies of partnering in US construction. This work discusses the principles and the practical implementation of partnering, including contractual and legal issues, and was highly influential as a standard reference in establishing partnering in UK construction.

1.1.3 Partnering in other countries

The development of partnering in other countries has been less prominent. In Australia, the US approach based on non-binding partnering agreements was introduced with mixed success in the early 1990s (Stephenson, 2000). The initiative was given momentum through the findings of the Gyles Royal Commission (1992) which carried out a pilot study on partnering. More recently, the Association of Australian Contractors has published a general guide on "Relationship Contracting" (1999). This term refers appropriately to all forms of partnering practised. The South African industry has followed the UK approach and the use of the ECC contract and partnering is finding increasing application (Baird and Bennett, 2001). In Hong Kong intensive reviews of the industry (Tang Report and Grove Report)[2] have advocated partnering and it has recently been introduced on a number of projects including one high profile metro project (Bayliss, 2002).

Significantly, partnering in mainland Europe is not common practice with, to the author's knowledge, only a very limited number of "pilot" projects being partnered to date in Holland and Scandinavia. It is pertinent to question why, given the generally positive experiences in the UK, partnering has not been tried particularly in France and Germany, where the domestic industries have been performing poorly. The reasons for this are not immediately evident. One reason is possibly the lack of a concerted government and industry effort to reform the construction industry, which for example in the UK, Australia and more recently Hong Kong provided the initial impetus for partnering. Another may be the perceived difficulties of implementing partnering under civil law judicial systems which are not as easily adaptable to new project delivery mechanisms as the Anglo-Saxon standard forms of contract and procurement codes. Possibly most plausible are two factors: first, in these countries the government still plays a strong role in supporting the industry consequently reducing pressure for reform, and, secondly, more progressive procurement models such as construction management in the US or management contracting in UK—both of which

[2] See The "Hong Kong Papers" collected in [2001] ICLR 302 (in particular Nunn), and in [2001] ICLR 617, 627 (Nunn and Cocking, Fenn).

embody some aspects of the partnering model—are not common in continental Europe. Last but not least, as concerns the public employers, the format and modalities of the European Public Procurement Directives are still not conducive to conducting more complex procurement and project delivery forms, such as public-private partnerships.

1.1.4 The growth of partnering

Significantly, in all countries where partnering has been established, this acceptance has only followed strong promotion of partnering from very influential industry and public sector bodies. The Construction Industry Institute, the US Army Corps of Engineers and the Association of General Contractors in the US; the Latham and Egan Reports, the Institute of Civil Engineers (through their New Engineering Contract) and the Construction Industry Board in the UK; the Gyles Royal Commission (1992), the Construction Industry Development Agency and the Australian Constructors Association in Australia; the Tang Report and the Grove Report in Hong Kong. These initiatives were all born out of the same frustration at the chronic lack of performance of the existing construction industries in each of these countries.

This poses a key question for the potential development of partnering on international projects. Can partnering develop internationally based on national experiences and commercial market pressures alone or is endorsement and encouragement from major international bodies (e.g. World Bank, EBRD, FIDIC, EIC, CICA, etc.) a precondition?

1.2 A definition of partnering

1.2.1 Leading principles

From the available literature (CII, 1991; CII, 1996; Bennett and Jayes,1995; Barlow *et al.*, 1997; Bennett and Jayes, 1998; Bresnen and Marshall, 2000) it is very clear that different perceptions towards partnering prevail. There is conformity over the general concept of partnering as a co-operative relationship between business partners formed in order to improve performance in the delivery of projects but there is considerable variation of definition. This inconsistency is undoubtedly due to the different world perspectives of the authors and variations in the development and implementation of partnering between national industries (e.g. the US and UK) and also within national industries. Confusion over definitions is further fuelled by the often imprecise use of the term *partnering* in industry literature. This general use of *partnering* without further detailed reference is in fact often counter-productive and tends to propagate the perception of partnering as a fuzzy concept which is talked about by many but understood by few.

Barlow *et al.* (1997) conclude that partnering is best considered as a set of

collaborative processes. Processes which emphasise the importance of common goals and raise such questions as how such goals are agreed upon, at what level are they specified and how are they articulated?

The following generic definition reflects the views held in most literature:

- partnering is a set of collaborative processes rather than simply a form of relationship;
- partnering is a co-operative arrangement between two or more organisations based on mutual objectives and increased efficiency through shared resources, open communications and continuous improvement;
- partnering is applied either in project situation known as project partnering or in a long-term relationship known as strategic partnering;
- project partnering is typically practised at a first generation level or at a more developed, more committed second generation level (mature partnering) (Baird and Bennett, 2001).

It is worth repeating that there is no one correct definition but that the above attributes are to be found in most rigorous works on partnering.

Having briefly introduced project partnering it is appropriate to add a word of caution. Green (2000) and Barlow *et al.* (1997) both reiterate concerns about the simplistic and imprecise language often used by advocates of partnering indicating that is often difficult to differentiate between partnering as a distinctive practice and partnering as management rhetoric or corporate marketing agenda. They underline the dangers of overselling the benefits of partnering without taking due consideration of the rigorous implementation measures advocated for example by Bennett and Jayes (1995), CII (1996) or John Carlisle Partnerships (2002).

For a more comprehensive and critical review of literature *Partnering and the UK Construction Industry, the First Ten Years—A Review of the Literature* (Fisher and Green, 2000) or *Partnering in Construction: A Critical Review of Issues, Problems and Dilemmas* (Bresnen and Marshall, 2000) are to be recommended.

1.3 Partnering outcomes: benefits and concerns

1.3.1 The investment

Partnering has to be practised and learnt over a series of projects and typically requires an early commitment in terms of management resources and direct costs. Partnering involves an initial investment from the organisations involved. There are the direct costs of workshops, of training staff and of the more intensive early involvement of management in establishing the partnering approach. Ongoing costs include review workshops, monitoring and evaluation, and training new members during the partnership (Bennett and Jayes, 1998). Barlow *et al.* also reported that contractors incurred increased overheads as, often, more time from senior staff was required for

attending meetings and maintaining the generally higher level of communication required. Certainly, effective partnering requires an efficient and "time now" contract administration which for some contractor and employer organisations will mean increased overheads.

1.3.2 The benefits

Perhaps the most common response of people new to the ideas of partnering is to question the tangible benefits which partnering can bring to their organisation. This is an understandable reaction particularly in today's economic climate where every element of business strategy is carefully scrutinised in terms of its potential for adding value. Some studies quantifying the benefits of partnering have been completed with generally very positive results. It is important however to appreciate some of the problems in measuring the performance of partnering. Barlow (1997) in particular mentions problems analysing the effects of partnering in specific cases for two reasons. First, because partnering consists of a number of interrelated business processes all occurring simultaneously within the framework of an overall project management process making it very difficult to disseminate any benefits (or problems) and assign them to a particular partnering process. Secondly, because different organisations within a partnered project will have different objectives, the success of a partnered project must measure the degree to which all mutual and individual objectives have been achieved—again a difficult task. A third influence often mentioned when discussing the success of partnered projects is what is known as the "Hawthorne effect" (Mayo, 1933). Put simply this is where performance of individuals on pilot or high profile projects is improved simply through the knowledge of the individual that his or her performance is being monitored (i.e. obtrusive observation). The author adds an additional point to this discussion suggesting that partnered contracts by their very nature attract individuals in each participating organisation who are interested in working co-operatively and who have a generally positive attitude to achieving individual and project goals in the realisation of a construction project (i.e. they are good managers). It is probable that these individuals would contribute equally to the success of a project realised under a traditional approach.

These points are not intended to question the validity of benefits quoted in particular research or case studies but only to suggest that they be considered in a broad context. It can also be argued that an exact analysis of the origins of benefits achieved on partnered projects misses the critical point. More significant is the realisation that the use of partnering is more likely to improve performance either directly as a result of particular partnering processes followed or due to collateral factors which have resulted from the improved project environment due to partnering.

There is a general consensus that partnering has the potential to bring

consistently better results than the more traditional approach. Typical benefits from partnering would be (CIIA, 1996):

- Reduced exposure to litigation.
- Improved project outcomes in terms of cost, time and quality.
- Lower administrative and legal costs.
- Increased opportunity for innovation and value engineering.
- Increased chances of financial success.

The works of Barlow, Bennett and others make a positive case for partnering in the UK market. A Construction Industry Round Table (CIRT) survey of leading architectural, engineering and construction companies in the US reported significant to extraordinary benefits in creating a less adversarial working environment among parties to a construction project and slightly less impressive reports of cost reduction (in 32% of cases) (CIRT, 1999). In describing feedback from alliancing projects Scott (2001) also quantifies significant cost and time savings in the construction sector of the offshore industry.

In summary, the weight of available information indicates a positive case for partnering in terms of improved project outcomes. There remain however doubts in some quarters and the positive case for partnering would certainly benefit from further research quantifying the benefits and the problems experienced on partnered projects.

1.3.3 Common areas of concern

(a) Competitive tendering and lump-sum contracts

There is the perception in some quarters that project partnering and competitively tendered lump-sum contracts are mutually exclusive. This is not the case and there is no explicit reason why project partnering can not be implemented where the competitive tendering of lump-sum contracts is required (Bennett and Jayes, 1995). In fact in the US much of the partnering carried out is initiated after the works are competitively tendered. Following the awarding of the contract, the successful contractor is invited to enter into a partnering agreement with the client and other participants for the duration of the contract. This appears to function in the established US domestic market but the author is very sceptical as to whether such an approach could be applied to lump-sum contracts in the fragmented international market.

A significant disadvantage of implementing the partnering approach on a lump-sum contract is that neither the client nor the contractor has, *prima facie,* a tangible incentive to comply fully with the partnering agreement. One solution to this problem would be to supplement the lump-sum contract with an incentive mechanism which encourages the contracting parties to work together to realise common targets. Such incentives could be for example the

sharing of cost savings from value engineering reviews or offering bonuses when project milestones (often referred to as "Key Performance Indicators") are achieved. Critical when formulating such incentive mechanisms is that they reflect an equitable sharing of contract risk and that they are true incentives for all the contract parties—not just bonuses which for example the client views simply as additional costs.

Lump-sum contracts are often associated with simple construction-only contracts. These types of projects do not offer the optimal project environment for maximising the benefits of partnering and the potential gains to be had should be checked against the costs of initiating and administrating a partnering arrangement before deciding to partner. In these cases the reason not to partner is due to the nature of the project and not the fact that it is competitively tendered lump-sum project.

(b) Legal aspects

In this section some of the contractual questions which often arise when discussing the potential pitfalls of partnering are briefly addressed. The legal and contractual implications of partnering are obviously dependent upon the legal system of the country whose law is applied for a particular project. Particularly differences in application between civil law and common law systems are often relevant. The following issues are referred to in partnering literature and should be appreciated before entering into a partnering arrangement:

(i) Good faith. It is not clear whether there is an implicit duty to perform a construction contract in good faith in common law jurisdictions. Partnering, however, imposes this question because partnering originates under a legal system which recognises the existence of good faith in contracting (the US) and because the basic principles of partnering are consistent with good faith. Hence, through implication, the commitment to a partnering charter (i.e. commitment to good faith) could have ramifications for the contractual arrangement (where no legal commitment to good faith is at hand). It is therefore recommended that the issue of good faith is clarified by express provision in any charter so as to avoid potential implications on the contract.

(ii) Estoppel and waiver. In a partnering arrangement parties may make representations to one another which do not conform to the contract but upon which they rely. This approach may minimise disputes and increase efficiency. However should the partnering agreement break down, there will be inevitably a conflict between the requirements of the contract and the representations made during the partnering process. Parties then in dispute may then be unable to prosecute their rights under the contract due to the doctrines of estoppel and waiver.

There is then a problem when proceeding according to the partnering

agreement brings a party into conflict with its contractual obligations. This can be addressed by incorporating into the partnering charter a procedure which is to be followed if a party is to be denied its right to insist upon enforcement in accordance with the contract conditions or, alternatively, each agreement which alters the position of the parties should be recorded as an amendment to the contract, with the effect of the amendment being strictly limited to the factual matter being addressed (Jamieson, 2001).

(iii) Confidentiality/statements "without prejudice". Successful partnering requires a degree of disclosure which could compromise a party's position on the project or outside of the project environment. The partnering charter should address these issues limiting the use of confidential information to purposes relevant to the partnering process.

(iv) Fiduciary relations. Fiduciary relations effectively impose a duty upon each party to act in the best interests of the other parties to whom the obligations are owed. These are not typical in a normal commercial relationship but they can be applied in a true partnership such as joint venture agreement. The participants in a partnering agreement must consider whether they owe fiduciary obligations to the other partnering parties which impinge upon their right to act in their own self-interest. A partnering charter can include a clause which excludes the possibility of these obligations arising. Conversely, should the parties agree that these obligations are consistent with partnering, then the charter should define the scope of such obligations for the purpose of the partnering process (Jamieson, 2001).

2. PROJECT DELIVERY, THE CONTRACT AND PARTNERING

2.1 Procurement models and partnering

2.1.1 Project delivery systems

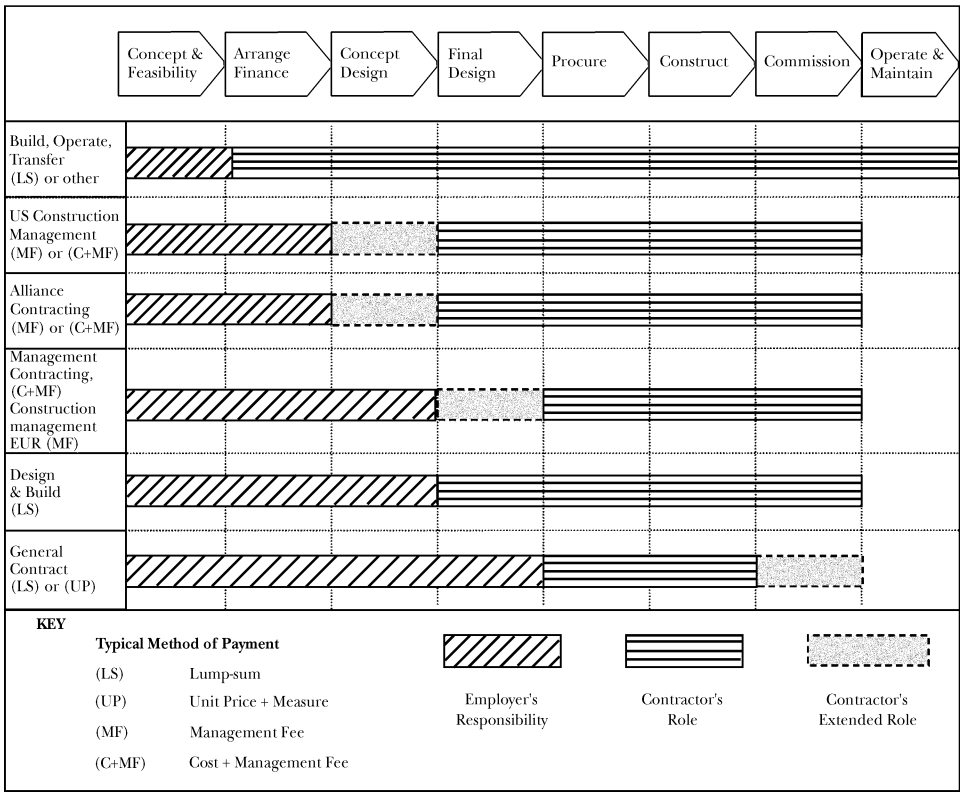
Traditionally, the project construction and, in design and build contracts, the final design came under the contractual responsibility of the contractor. Services upstream in the value chain such as feasibility studies and project financing or downstream services such as facility management and operational activities were not included in the contractor's range of products. In today's market, however, there are different procurement models to cover the needs of every employer.

The underlying reason for the trend to new forms of project delivery in the last two decades has been the change in the nature of the projects—not necessarily in a technical sense but also in regard to employer requirements and interests. Ballard and Miles (1997) focus on the US industry in

describing this change but the central issues apply to the industry world-wide. They note that formerly the majority of the projects were *slow, certain and simple*. Due to a number factors, primarily of economic origin but also influenced by technological and sociological factors, projects have become increasingly *quick, uncertain and complex*. This change in the nature of projects along with less flexibility in project financing has induced employers to look to new procurement models to reduce their risk profile. The development of these newer project delivery forms and also new strategic approaches such as partnering is the industry's response to the changing nature of the projects and the employer's requirements.

In Figure 2.1 typical procurement systems are compared illustrating in particular the area of responsibility of the employer and of the contractor under the different models. It is worth noting that there is often confusion over the definition and structure of the different contract models. Adding to this confusion is the use in some cases of the same term for different models in the US and the UK/Europe.

FIGURE 2.1. EXTENT OF THE EMPLOYER'S AND CONTRACTOR'S ROLES UNDER THE ALTERNATIVE PROJECT DELIVERY SYSTEMS



Source: Adapted from ACA (2000).

Figure 2.1 also reiterates how the contractor has diversified, increasing his range of services to meet increasingly complex employer demands on one hand and to seek competitive advantage in a very tight market on the other hand.

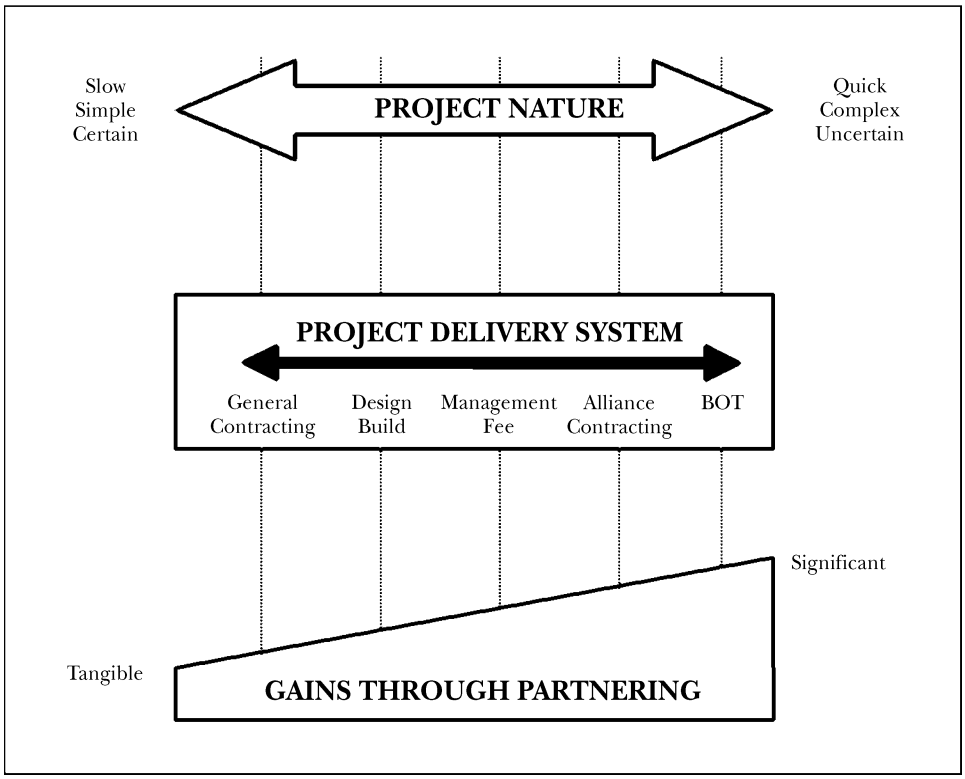
2.1.2 Partnering and the project delivery systems

Most proponents state that partnering can be practised in combination with all project delivery systems. This is true in so far as the partnering process can be applied independent of the project contract and therefore independent of the project delivery system. The question arises, however, is partnering an appropriate strategy for all project delivery systems? The type of contracts where partnering has the most potential to deliver benefits are on projects where there are a high volume of inter-organisational transactions (i.e. interactions between, for example, employer and contractor, between project manager and subcontractor through the contractor, etc.). This occurs typically on quick, complex and uncertain projects. Partnering brings benefits, first, because the partnering approach requires that inter-organisational transactions be conducted conforming to mutually agreed objectives and not in the own interest of one party or the other. Secondly, the open and horizontal organisational infrastructure under partnering reduces the cost and increases the effectiveness of each transaction by enabling more direct and uninhibited communication.

Hence it is likely that partnering will produce the most gains when used in conjunction with, for example BOT, alliancing and management fee type project delivery systems. This is not to imply that the benefits when applying partnering in a simple general contracting type contract will not be significant, only that they will most probably be proportionally less than those gained on more complex projects. Figure 2.2 summarises the relationships between the nature of the project, the project delivery system chosen and the potential benefits from project partnering.

Significant is the point at which partnering can be initiated in the procurement process. This is obviously dependent on the chosen project delivery system and in some cases public procurement regulations. Potential benefits of the combined inputs of a partnered project team, for example, in refining technical aspects of a project (value engineering), are obviously at their highest when partnering is initiated before the final design phase. It follows that partnering has the most potential for achieving benefits such as cost reduction through improved design and tailored construction methods on project delivery systems which allow the early initiation of a partnering. This again does not disqualify partnering for traditional tendered works contracts but reiterates the advantages of being able to involve the whole project team at the earliest practical stage.

FIGURE 2.2. PARTNERING *v.* PROJECT DELIVERY SYSTEM



Source: Author's research.

2.1.3 Partnering and PPP/PFI

PPP/PFI projects with their BOT and similar procurement models offer excellent opportunities for the application of project partnering in the procurement phase of the new project. Due to the complex and varied contract structure of such projects there is no one specific approach, however, the flexibility which a project company typically has on a BOT/PPP project would, for example, allow the initiation of a project partnering early in the planning and construction process, thus enabling the project an excellent opportunity to benefit significantly from partnering. A prominent example of this is the successful application of the NEC contract form and partnering for the construction contracts on the Channel Tunnel Rail Link in the UK (Baird and Bennett, 2001). Also Jones (2002) briefly describes how project partnering in the form of alliancing has been successfully applied within a broad PPP framework on public works projects in Australia.

On the other hand, a concession agreement with government or a local authority body may require a strict adherence from the project company to established procurement models for the construction works. This could then preclude the use of partnering on the construction contracts.

2.2 Partnering and the project contract

2.2.1 The role of the contract

In considering this issue it is important to appreciate the traditional and unique role of the contract in construction. Construction projects are temporary and composite organisations which form for the duration of a project. The members of this organisation may have worked together previously or they may have no previous common work experience. The criteria for the team selection are primarily the cost of the services delivered and little or no weight is given to the potential harmony of the team. Each team member (i.e. each individual organisation) has differing and even opposing objectives. In this simplified scenario, the contract(s) binding the team members, principally the construction contract between employer and contractor but also the professional services contracts and the construction subcontracts, then play a very significant role in the execution of the project. This significance is even greater on international projects where common experience is less common.

In previous eras of international contracting it would appear that the contract played a much less significant role than today. The ideal "the contract remained in the bottom drawer" scenario may not always have been as prevalent as experienced contractors like to remember but undoubtedly both the relationships among the contracting parties and the style of contract administration were typically much more constructive and less adversarial than has become the norm in the last two decades. The reasons for this are many-fold and include more stringent financing, increased competition amongst contractors, the increasing contractual and technical complexity of major projects and a less equitable risk distribution amongst the contracting parties.

The consequence is that today the main contract, particularly on international projects, has a more significant role to play in promoting good project management and in creating an appropriate project environment for achieving optimal project outcomes than ever before.

2.2.2 Project partnering and the contract

There are two diverse views in the industry regarding the role of the project contract (the contract between employer and contractor) in the partnering process. The first advocates that partnering is all about co-operation, dispute avoidance and self-improvement and that, as such, a successful project partnering agreement can be implemented independently of the contract,

even when the contract contains clauses that are not in alignment with the co-operative principles of partnering.

The second view, on the other hand, supports the use of the project contract to reinforce the elements of a partnering arrangement. This can be in the form of a traditional standard form contract amended to enforce a partnering agreement or in the form of partnering-type standard contract.

There is no conclusive view in the industry literature which approach is most advisable, but there is evidence that contract general conditions, which reinforce the principles of the partnering process, are more likely to contribute to optimal project outcomes.

(a) Traditional contract and partnering charter

The role of the contract in a partnering agreement varies widely. In the US partnering practised in the 1990s the contractor would be informed in the tendering phase of the intention of the employer to enact a partnership agreement. After award of the contract the contractor would be "invited" to participate. The resulting partnering agreement was a non-binding charter practically independent of the conventional construction contract. This approach is indicative of first generation partnering.

This is the most common approach to project partnering. In terms of the construction contract it remains on proven ground. Here the contract can act as an insurance policy in a worst case situation should the parties retreat from their roles and responsibilities under the partnering agreement. Typically, the partnering agreement is set in place post-tender although the wish to partner is indicated in the tender documents. The partnering charter itself is generally a short document and although most examples follow a similar format, there are few standard forms available.

(b) The two-party contract aligned to partnering

In the next level of approach (mature partnering), the construction contract chosen reflects the principles of the intended collaborative relationship between the parties. This remains a two-party approach and dependent on contract conditions covering the partnering aspects, it can be supplemented by a partnering charter. The crucial difference to the first approach is that the parties are contractually bound to working co-operatively and there is much less risk of one party exploiting the partnering approach for their own gains, particularly when a profit-sharing or other incentive mechanism is included.

In this case either a standard form contract is chosen (e.g. the ECC from the ICE or a new FIDIC form) or standard works contracts are amended aligning them to the partnering principles. For example, amending clauses covering giving notices, early warning/resolving disputes, controlling information and communications should be addressed. Additionally points

covering liquidated damages, warranties and defects liability, retention, time extensions, termination and incentives can be modified and introduced (Scott, 2001; Freshfields *et al.,* 2001; Bennett and Jayes, 1998).

The partnering charter can be considered optional but is found in most partnered contracts even when aspects of the partnering arrangement are included in the main contract. The charter can also serve to involve third parties (e.g. designers or subcontractors), who are not party to the main contract, in the partnering agreement.

(c) The multi-party partnering contract

The third approach is the multi-party contract. It represents the most radical departure from traditional contracting and, to date, is the least common approach. Here there are two variations. The true multi-party contract, of which the PPC 2000 (ACA, 2000) is the only standard form published, and the "umbrella" multi-party contract which binds the major project participants in an addendum to each party's individual works contract (two-party) with the employer, e.g. the X12 Option to the ECC standard form (ICE, 2001).

A major hurdle in the acceptance of this form is the perceived complex legal situation in regard to the responsibilities and liabilities in a multi-party situation. In an industry hardened by frequent litigation, there is very much a reluctance to adopt new contractual approaches before they are proven both in the field and in the courts.

2.2.3 A contract form for international project partnering

Surmising developments in project partnering to date and taking into account that both international clients and contractors prefer to operate with tried and tested forms of contract it is possible to determine which contractual approach would be most appropriate for the wider implementation of project partnering on international contracts.

A traditional contract with a non-binding partnering charter is very dependent on all contract participants having an appropriately developed organisational culture and, realistically, previous experience of partnering and would, therefore, seem inappropriate. The ECC contract from the ICE, on the other hand, commits the parties to implementing partnering fully through the provisions of the contract. The ECC is proven in the UK but has had little international exposure and is, despite its merits, unlikely to find a broad acceptance in international construction in the short term.

The most probable approach, if not the ideal approach, then is the use of an established and tested international standard form contract (e.g. the FIDIC "Red and Yellow Books"), however, significantly modified to include the main provisions of partnering. For instance, an adequately amended FIDIC form should include, apart from an equitable risk/reward balance, an

emphasis on co-operation between the parties, incentives for exceptional performance, mutually binding early warning duties as well as similar time periods and procedures for the consideration of claims. Such a revised form of contract would then be supplemented by a standardised partnering charter which would govern the procedural (soft) aspects of the partnering agreement.

3. PROJECT PARTNERING IN INTERNATIONAL CONSTRUCTION

3.1 The international construction industry

Prior to looking specifically into project partnering on international contracts it is appropriate to discuss current developments in the international industry. The term "international construction" as applied in this article refers to the activities of the civil engineering and general building sector in projects procured outside the contracting company's home country.

3.1.1 International contractors

In the last two decades, the profile of the international contractors has become more complex. Formerly, the major international contractors were large players in their domestic markets in Western Europe, Japan and the US which had expanded their operations to include large international projects in Asia, Africa, Latin America and the Middle East. The share of the European contractors was according to available statistics between 50 and 60% of the international market. Projects were primarily construction only (i.e. employer design) with some design-build and turnkey projects. Contractors often spread risk by operating in joint ventures with other international contractors. The competitively tendered or negotiated projects were one-off or sections of a large incremental project (e.g. a large road project). The degree of local involvement depended on the availability of local competence, stipulations from the lenders, and on national laws limiting foreign operations in a country. The larger international contractors were genuinely global operators normally running their international projects direct from their home base.

The picture today is a little different due to a number of factors. First, the requirements of employers have changed. The increased risk aversion of employers due to more restricted financing has led to an increase in design and build contracts and latterly to the growth of BOT or similar projects. Secondly, the competition from local and regional contractors has increased. To date, the major international contractors cannot compete alone on price of construction against competent and established local players. This is particularly the case in the emerging economies (e.g. South-East Asia) and

the transition countries (former Eastern bloc) although less applicable in the lesser developed countries (e.g. many sub-Saharan African nations) where local competence in major projects is limited.

The range of services offered by major international contractors has followed these developments in the market. First, the major contractors now offer diverse project delivery systems to meet any requirement of the employer and additionally offer financing and operating packets such as BOT or leasing models. Additionally, the major contractors now focus on competencies which differentiate them from local companies such as financial resources, technical experience (e.g. metro construction, tunnelling, harbours and airports) or management competencies (major project "know-how", quality standards) in acquiring their international contracts.

A further development has been the internationalisation of key account management by contractors. Global companies who have relatively uniform needs in different countries often prefer a trusted and experienced contracting partner when developing and constructing new foreign operations. This applies predominantly to manufacturing industries such as car production or computer chip production but does draw on general building and civil engineering services particularly in the field of property development.

The international structure and organisation of many contractors has also changed. The number of foreign subsidiaries owned by the major contractors has increased significantly, hence shifting emphasis from global to multinational operations. According to internal research of EIC, European international contractors recorded 2,050 foreign affiliates in the year 2000, of which some 60% were in Europe and 40% overseas. These additions are either direct subsidiaries or local companies partially or fully owned by the international contractors which give access to the local markets and provide a base for carrying out international projects.

3.1.2 Trends in the international construction market

There are indications that the basis of the international construction market as it has traditionally been perceived is changing. This can be appreciated when considering the following developments:

(a) Fewer development projects

The emphasis of multilateral development has shifted away from high profile one-off infrastructure projects such as dams, bridges, highways or large power projects. Today there is more emphasis on development of social systems rather than technical infrastructure. Technical development is then often orientated towards smaller integrated engineering projects with a much more significant local input. There remains the need for large projects,

only that such projects are fewer and, furthermore, they are often less attractive than in earlier times due to more stringent lending policies from international institutions.

(b) The growth of local competence

As mentioned the increasing competence of contractors in local markets leaves less opportunity for international contractors to procure traditional construction work in these markets. This is particularly evident in infrastructure projects which were once the almost sole domain of the international contractors. This development is supported by the EIC International Statistics of 2001 which indicate that, despite a high total of more than €80 billion in international orders, a significant portion is carried out in the mature markets of the United States, Europe and Australia, thus meaning a relative reduction of direct export contracts amongst European contractors. This trend which began in the 1990s is likely to continue leaving the influence of large multinational contracting companies in regional markets predominantly in the hands of their semi-independent local subsidiary operations.

(c) Globalisation of skills and services

Using the term globalisation broadly to refer to the breaking down of trade barriers, to the internationalisation of all services from financing to engineering consulting to specialist contracting, and to the development of electronic communication, it can be speculated that the need in the future for the large and expensive "one shop" international contractor to execute major projects will diminish. It is likely that major projects will become predominantly local operations with international expertise only being procured for specialist management and technical areas of a project.

3.1.3 Influences on the development of project partnering

How will these developments in the international industry influence the potential growth of project partnering on international projects?

The major international contractors are becoming less global and more multi-national in the sense that more and more of their international operations are being carried out by local subsidiaries. The organisational culture of these subsidiaries will most probably be more reflective of local conditions than of the central policies of their holding company. This implies that, for example, any effective initiation to embrace partnering will most probably originate in the local market and not by decree from a foreign head office.

The movement of the international financing institutions away from high-profile projects and their increased emphasis on transparency and

project returns should encourage the introduction of better management methods and in the long term positively influence the organisational cultures of employers in international construction. The appropriate organisational structure and culture is essential for successful partnering. This organisational environment certainly does not exist in many public or private employer organisations in emerging economy and developing countries—or in some western countries for that matter. This implies a low probability of partnering being able to be implemented on projects involving these employers. In fact there is likelihood that if employers which do not possess the appropriate culture attempt to implement project partnering the outcomes will be negative. This lack of organisational culture of many international employers is a significant barrier to the development of partnering.

3.2 Views of the international industry on project partnering

In current literature on partnering and on international construction there has been little or no work attempting to quantify the current status of partnering in international construction. In this section the results of research in this area are presented.

3.2.1 Experiences and expectations of the contractors

With the support of the EIC a survey investigating the development of project partnering in international construction was conducted. The respondents included major international companies from France, Germany, Holland, Spain, Sweden, Turkey, the United Kingdom and Japan. No responses were received from companies in the US. The summarised results together with issues arising from follow-up discussions are presented as follows:

(a) The contractors' international operations

All contractors were active in general contracting and most carried out design and build/turnkey projects. Approximately half the contractors carried out management fee and BOT type projects. The most common forms of contract were the modified FIDIC standard form and the employer own forms, with both getting widespread use. Other contract forms were rated less common. Interestingly the FIDIC standard forms (without amendments) were indicated as being a less common form of construction contract.

(b) International project partnering

There is no consensus understanding of what precisely partnering is and in particular how it can be implemented. The degree of experience of

partnering reported was varied. There was some experience of partnering in national markets reported but experience of partnering on international contracts amongst the contractors was negligible. Notably there was scepticism about the incentive to implement project partnering given the perceived lack of evidence on the quantifiable benefits of partnering (e.g. cost benefits, proof of reduced litigation etc.).

Opinion was divided on whether partnering was consistently an improvement on traditional approaches. Only one company reported partnering as always being beneficial with the majority saying partnering was usually beneficial. Importantly, more than a third of respondents maintained partnering was seldom beneficial.

Questioned regarding commonly perceived benefits of partnering, agreed mutual objectives, dispute avoidance, equitable risk allocation and improved cost certainty were uniformly considered to be significant to a successful project outcome. Perceived impediments to partnering were generally found to be less common. Lack of culture shift by the contractor and poorly drafted/inappropriate partnership agreement were seen as common impediments to successful project partnering by approximately one-third of respondents.

When queried on the future development of partnering, there was a clear indication that partnering would establish itself as a superior alternative to traditional approaches for particular projects and employers. Few respondents indicated that partnering is a short-term trend or that partnering will become a widespread form of project administration suitable for most projects.

There was a perception that the strict tendering and administrative procedures for the procurement of public works within the European Union, the Procurement Guidelines and Standard Bidding Documents of the World Bank and the regulations of other public works employers prohibited the implementation of partnering on projects under the direction of these bodies. However, as the example in the US and the UK proves, tight procurement regulations do not *per se* inhibit post-tender partnering, if an appropriate standard contract form is available.

Considering the prospects of the wider application of project partnering to international projects, it was commented that the markets where partnering or associated forms have established themselves (US, UK, Australia and, to a lesser degree, Hong Kong, New Zealand and South Africa), have conditions of operation which are not found in the international market. First, in these national markets there are today few "non-privatised" public employers whereas the international market consists of a significant proportion of public employers, which are often bound to traditional contracting approaches, not overtly conducive to partnering, and/or have an inappropriate organisational culture for successful partnering. Secondly, on national level projects the employers, consultants and contractors often have experience of working together on previous (and potentially on future)

projects which is not commonly the case on international projects. Thirdly, in national markets there is a stronger incentive of repeat contracts which is an effective motivation in maintaining good contractual relations. This incentive does not play such a significant role in the international market where, due to the strong competition and the low margins, short-term attitudes often have priority over the philosophy of "short-term pain for long-term gain". However, at the same time, international contractors are naturally interested in reducing the amount of litigation on major projects and would very much welcome any practical measures in this direction.

(c) Partnering contract documents

The most common contract/partnering constellation was very clearly the traditional main contract with a supplementary partnership agreement. Some experience of the partnering type main contract (e.g. NEC/ECC) and almost no experience of the multi-party contract were reported. When indicating which contractual arrangement is preferable on a partnered project the most common answers were the traditional works contract plus partnering agreement or the contract form is dependent on employer and project. The tendency of partnering agreements "going bad" when disputes arise, was not considered a significant problem. Strong support for the inclusion of an incentive mechanism (gain sharing/pain sharing) in a partnering agreement was indicated.

Regarding the role of FIDIC standard contracts, the majority indicated that the classical FIDIC contract with the appropriate modifications plus a partnership agreement would be an appropriate basis for a project partnership. Similarly, the endorsement by FIDIC of any standard form of contract which better supported partnering was seen as important by the majority of respondents. It was commented by some contractors that FIDIC and their standard form contracts are very influential in international construction. As it is perceived that partnering provides no significant role for the independent engineer, then it was questioned if and how the partnering concept could be supported by FIDIC.

3.2.2 Views of employers and lenders

The World Bank is still the most influential international body in the provision of funds for international construction projects. A significant precondition for funding projects is the application of strict tendering and contract administration guidelines as prescribed in the Standard Bidding Document (SBD) (World Bank, 1999). A feature of this document is the requirement that, for construction works, the Fourth Edition of the FIDIC works contract (the "Red Book") be applied. Regarding the partnering, the SBD contains no reference to partnering and hence there appears to be no

impediment to partnering being implemented using the traditional contract plus partnering charter approach.

Against this background, representatives of the Procurement Unit of the World Bank were queried directly regarding their views on partnering. They confirmed that the World Bank had yet no official policy on partnering in their procurement procedures but it was commented that they were carefully monitoring the development of partnering in the US domestic market.

This position of the World Bank appears consistent with other international financing institutions and literature does not indicate any specific policies regarding the use of partnering in procurement by other multilateral institutions. The attitude of these agencies is based on the perception of their role as a third party to the construction contract, with the legal responsibility for project implementations lying with the borrower. Despite the constant call from international contractors for establishing a fully-fledged supervision mechanism from pre-qualification to final project completion, the international financing institutions are not yet willing to take responsibility beyond the review of the procurement arrangements.

It is appropriate here to mention, however, that, traditionally, commercial lenders in general are very much in favour of lump-sum contracts which they perceive as bringing the best value for their clients' investments. This viewpoint can be countered for example by recent evidence (Latham, 1994; Scott, 2001) which points to more flexible procurement procedures actually delivering employers consistently better value for money than more traditional lowest bid lump-sum contracts, particularly when viewed over a series of projects. With respect to the development of partnering this strict commitment to lump-sum contracts does tend to preclude more developed partnering forms which would include an incentive payment system.

3.2.3 Views of the engineer and architect

For the development of partnering, which is almost exclusively an employer initiative, the support of consultant engineers and architects is very important. This support should necessarily be taken for granted as the short-sighted, but not uncommon, discussion which describes "partnering as a bi-party employer/contractor arrangement which effectively excludes the engineer (or architect) and serves to further limit his or her professional influence" would indicate.

The major body representing consultant engineers in international construction is FIDIC (Fédération Internationale des Ingénieurs-Conseils). Their influence on international contracting is twofold; first, in representing the interest of the consultant engineer and, secondly, as publisher of the only widely accepted international standard forms of contract in the construction industry. FIDIC proffer no official policy on the use of partnering, either in respect of the role of the consultant engineer or in respect of the use of partnering in conjunction with its standard contract forms. Sources indicate,

however, that approaches which reduce the risks of conflict between the parties in the preparation and implementation of projects, while meeting high standards of transparency, accountability, economy and efficiency would be supported by FIDIC. A further point was the broad perception of partnering as a vague term used to cover a range of different approaches rather than a strategic approach having specific aims and attributes—a view also expressed by the contractors.

Other institutions of particular influence are the Institute of Civil Engineers (ICE) in the UK and the American Institute of Architects (AIA). These institutions both publish standard forms of contract which are widely applied in their domestic markets and which also have some international use. The ICE through its New Engineering Contracts is obviously very much committed to project partnering or, at least to creating an appropriate contractual environment for partnering. It is generally accepted that their NEC standard forms represent the best example of a bi-party construction contract which embodies the fundamentals of partnering directly in its general conditions. As a supplement, the ICE has published in June 2001 a NEC Partnering Option (X12) that contains guidance on the practical realities of using the NEC coupled with the partnering philosophy and how it should be incorporated into NEC contracts. The AIA offers no official comment on partnering which could be seen as being consistent with partnering in the US which is practised generally independent of the main construction contract.

4. CONCLUSION

4.1 Project partnering

Project partnering is a positive development in the construction industry which has the potential to improve the performance of the international industry. There is sufficient theoretical and practical evidence to indicate that effectively implemented project partnering improves the performance of the participating organisations. In particular the benefits to be gained are more significant on complex large-scale projects. Whilst there is a broad general awareness of partnering, a more precise understanding of partnering and its potential is not widespread. Most influential international industry institutions have no specific policy on partnering.

4.2 Project partnering in international construction

To date there is no widespread application of partnering on international projects. The partnering experiences of the international contractors are generally limited to projects in national markets where partnering is

established. Partnering is viewed positively by most players in the international industry. Whether this support can be mobilised to encourage the wider application of partnering is uncertain. The structure of the international industry is changing significantly and these changes will create more opportunities to partner.

In terms of promoting positive developments it is to be mentioned that, as significant industry players, the international financing institutions could contribute to the process by assuming more responsibility for the project implementation itself and by promoting good commercial and engineering practices on the construction projects financed from their funds.

The general perception is that the international construction industry suffers from under-performance, one of the root causes of which is the non-alignment of the interests of the primary participants. This non-alignment typically leads to inefficiency of performance and often, more seriously, to conflict and litigation. Project partnering offers an established vehicle for addressing this fundamental problem.

4.3 A contractual approach for international project partnering

There is no widespread support for a new standard form of "partnering" works contract. There is, however, a case to be made for developing a standard contractual approach to partnering in the international market. First, this would standardise the starting-point for implementing partnering—employers, consultants and contractors would become familiar with this approach and use it as a base from which to design their own project specific approach. It would eliminate some of the widely perceived "fuzziness" regarding partnering thus broadening the understanding of the concept. It would remove the incongruity of having a contract which advocates one set of goals and procedures and a parallel partnering agreement which advocates near opposite goals and procedures. Finally, contractors indicated a very clear preference for an incentive mechanism ("gain sharing/pain sharing") in partnering agreements—this is best handled within the main contract.

There are two viable alternatives to standardising the contractual approach to international project partnering in the short term. The first is to advocate the use of the NEC/ECC standard contract form, including the Partnering Option, for wider international use. This may require modification for wider use internationally or use in civil law countries. The ECC is the most appropriate contract form for implementing project partnering but despite its merits it is unlikely to find international acceptance in the near future.

The second approach would be to issue a guide to modifying particular conditions of an accepted standard form of contract, such as the FIDIC Conditions of Contract for Construction and for Plant and Design-Build (the

"New Red and Yellow Books"), and developing a standard partnering agreement to be applied in conjunction with the modified works contract.

4.4 The development of project partnering on international projects

Without concerted efforts between lenders, employers, contractors and consultants the development of project partnering in international construction is likely to remain slow and piecemeal. The author suggests, however, that by introducing the following measures the potential benefits of project partnering on international projects could be more efficiently realised:

(1) The development of a standardised approach to project partnering, perhaps under a more precise name such as "relationship contracting". This should be based on a standard form of contract (FIDIC or NEC) amended for partnering supplemented with a standard partnering charter. Such a standardised framework for partnering could then be modified as necessary to suit the requirements of particular employers and projects.
(2) The active promotion of a standardised approach to international project partnering from the major industry bodies as well as from the international financing institutions. The latter have an important tool in their hands, namely, the development of more flexible procurement regulations aimed at encouraging the use of project partnering to achieve better value for money.
(3) The development of partnering should also be encouraged in national industries. The UK example of the establishment of joint industry bodies representing the government, employers, consultants and contractors to investigate performance-enhancing measures such as partnering offers a good starting point.

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