

ALLIANCE CONTRACTING, PARTNERING, CO-OPERATIVE CONTRACTING RISK AVOIDANCE OR RISK CREATION

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1 INTRODUCTION

The construction industry has an unenviable reputation for cost overruns, disputation and (occasionally) protracted and expensive litigation.

Given this reputation it is not surprising that participants in the industry have, probably since time began, been looking for alternative ways of structuring projects to avoid these outcomes.

In the early nineties the fashion was in favour of a concept imported from the United States called "partnering". More recently "alliance contracting" or "co-operative contracting" have become fashionable.

The most enthusiastic disciples of these concepts are often lawyers. These lawyers pronounce themselves as being different from their counterparts in the regular profession because they are, unlike the balance of the profession, non-adversarial and as a consequence better able to serve their clients' interests.

Many of the papers published in respect of these concepts (whether they be about partnering or alliance contracting or co-operative contracting) are marketing tools which are largely descriptive but short on analysis.

The purpose of this paper is to cut through the hype and to explore these concepts by:

- (a) comparing them with alternative and more traditional approaches to contracting;

- (b) determining how they work (or do not work) from a legal point of view; and
- (c) considering what advantages they have in a managerial, rather than legal sense.

Before embarking on a consideration of the brave new world of alliance contracting, partnering and co-operative contracting, it is necessary to consider the more traditional forms of contracting and to determine why they are perceived to have failed the industry.

2 OLD FORMS OF CONTRACT

2.1 Three basic models

The various names and acronyms given to the old forms of contract are extensive. However, there are 3 basic models which generally cover the field as follows:

- (a) traditional;
- (b) design and construct (sometimes called EPC - ie Engineer Procure and Contract); and
- (c) project management (similar to EPCM - Engineering Procurement and Construction Management).

2.2 Traditional

Pursuant to this style of contract the owner will:

- (a) engage an independent designer (either a professional engineer or architect) who is responsible for designing the scope of work. This is usually done prior to the contract for construction being awarded; and
- (b) contract with a contractor for the construction of the work in accordance with the design done by the owner's consultant.

Usually the designer and the contractor are paid on a lump sum basis. However, it should be noted that the final amount payable to such contractor is unlikely to equal the lump sum agreed. That is because the contract will provide for adjustments in the price (at least in theory both upward and downward, but in practice more likely only to be upward).

2.3 Design and Construct (EPC)

As the name suggests with this form of contract the contractor is responsible for both:

- (a) design; and
- (b) construction.

Often, the contractor in this environment is paid on a "lump sum" basis. Again, it is unlikely that the amount paid to the contractor will equal this lump sum. However, the advocates for this style of contracting argue that subject to good management, there is less potential for cost overruns.

2.4 Project Management (EPCM)

In this form of contract, the project manager/contractor is engaged as an agent of the owner. The project manager's obligations (generally) are to:

- (a) engage a design professional (engineer/architect) to prepare the design, and manage that professional as agent of the owner; and
- (b) engage trade contractors to perform work as and when the design is completed. These contractors will usually be engaged progressively and on a lump sum basis. Again, when engaging such trade contractors, the project manager is acting as agent for the owner.

3 RISK PROFILES

3.1 Typical risk profiles associated with any form of contract

The owner risks associated with the design and construction process are relatively few in number and can be generally stated to be:

- (a) poor design;
- (b) poor construction;
- (c) cost overruns; and
- (d) time overruns.

The risk profile is different in each of the old forms of contract, although the exact risk profile under each form of contract can be adjusted by appropriate drafting.

Considering the generic risk profiles, the respective risks associated with each of the old forms of contract can be summarised as follows:

3.2 Traditional

Referring to the principal areas of risk, the risk profile is as follows:

3.2.1 Design

The risk of poor design lies with the consultant. The capacity of the consultant to take such risk will be dependant upon the adequacy of its insurance policy. Most consulting firms (even the large local businesses) do not have significant balance sheets. The exception are the international engineering corporations, such as Bechtel, Fluor Corporation and Kaiser.

Excluding those designers which have a significant balance sheet for the moment, the risk is then primarily assumed by the designer and the risk supported by a professional indemnity insurer.

Curiously, those designers which have significant assets tend to be the most risk adverse and claim often not to carry any insurance. These organisations are predominantly involved in the very large projects (\$100 million plus). They often have corporate policies (which are occasionally broken) which prevent them from:

- accepting risk for consequential loss; and

- accepting full risk in relation to direct costs.

Because the smaller engineering companies are more prolific and are therefore in a far more competitive market, they often enter into contracts with unlimited liability. However, for the reasons outlined, above their capacity to take the risk is a function of their insurance arrangements.

While insurance is the subject of another paper here today, it is appropriate to note that professional indemnity insurers are notoriously reluctant to pay even in the most extreme circumstances. Accordingly, where the risk ultimately devolves to a professional indemnity insurer, there is a significant risk that the insurer will only pay when forced to do so as a consequence of expensive and (depending upon the jurisdiction or rules of procedure in arbitration) a protracted dispute resolution process.

3.2.2 Quality of Construction

This risk obviously lies with the contractor. Under most standard form contracts, the contractor is obliged to construct in accordance with the plans and specifications prepared by the owner's consultant. A failure to do so will constitute a breach of contract often entitling the owner to:

- (a) instigate a contractual regime requiring the contractor to rectify the works or to pay the costs of the owner so doing; or
- (b) pay damages associated with the breach.

3.2.3 Risk where defects arise which cannot be definitively identified as construction or design related

It is not uncommon in major construction projects to have defects exhibited in the final works which are potentially as a consequence of:

- (a) a failure of the designer to design in accordance with the contract; or
- (b) a failure to construct in accordance with the building contract.

In these circumstances, human nature being what it is, it is likely that the contractor will contend that the defects are a function of the design and the designer (or its insurer) will contend the opposite.

Often these disputes cannot be resolved easily. The owner is left in the unenviable position where neither of the participants will do anything to assist in the rectification of the defect. The owner's choices are stark and limited to 3 options:

- (a) rectify and sustain the loss;
- (b) rectify and sue both the designer and the contractor, then await the outcome of the dispute resolution process to find out who was responsible; or
- (c) not rectify, sue the designer and contractor and use the funds made available as a consequence of the litigation to effect the rectification.

3.2.4 Cost

In the vast majority of cases where a traditional contract is used, there will be a "lump sum price". The degree to which that lump sum price is subject to adjustment will depend upon a number of factors including:

- (a) the drafting of the contract;
- (b) the effectiveness of the owner's management of the process and the effectiveness of the design consultant's management. Failure of either to manage properly can give rise to breaches of contract entitling the contractor to damages;
- (c) the quality of the information provided to the contractor at the outset in relation to the construction risk. For example, if the contractor is given geotechnical information which contains factual information which is incorrect, this is likely to give rise to a right in the contractor to recover further remuneration outside the scope of the contract (for example as a consequence of a breach of Section 52 of the *Trade Practices Act*);
- (d) directions which constitute a change in the scope of work; and
- (e) the occurrence of a risk which is not the responsibility of the contractor or the owner, pursuant to which the contract entitles the contractor to further remuneration.

Notwithstanding that there are a number of reasons which might give rise to a change in contract price, it is important to understand that margins earned by contractors in this country are extremely low and the risk profile of those contractors is relatively high. The Australian Tax Office (for a fee) provides information about various industry sectors and the level of profitability typical in those sectors. On average, general contractors who competitively tender for construction work earn between 1% and 7% on turn over. Given the nature of the risks assumed pursuant to the standard form contracts, the reward is relatively low.

The common conception that contractors in the competitive tendering market have significant margins is untrue. The circumstances where contractors make super profits are rare. Significant losses are not uncommon. This is notwithstanding the fact that the Australian construction industry has been found to be cost-effective and productive when compared to other OECD countries.¹

This low profit and significant potential for loss is one of the main drivers for the adversarial and contentious nature of the relationship between contractors and owners under the old forms of contract.

If the figures were available it would be interesting to track over the last 40 years contractors' profitability and compare that with the amount of litigation conducted in the industry. The relevant figures are not available, but anecdotal evidence from those who have been in the industry for this length of time indicate that contractors have, as margins have reduced, allocated increasing resources to "contract management" to ensure that all avenues for cost recovery are pursued. This in turn has given rise to disputation with owners who have sought to avoid the unexpected increase in cost.

¹McKinsey report, 'Growth Platforms for a Competitive Australia' (1995), as reported by Wal King in the *Australian Financial Review*, 15 May 1997, page 27

3.2.5 Time

Under traditional forms of contract the risk in relation to time is split as follows:

- (a) owner caused delays - usually the contractor will be entitled to:
 - (i) an extension of time and therefore relief from liquidated damages/general damages; and
 - (ii) additional remuneration to compensate for the additional overheads associated with being on site longer and (in some cases) the lost opportunity costs of being on site longer;
- (b) neutral delays - traditionally the risk associated with these is split. The contractor will take the risk associated with things such as weather, industrial disputation within its capacity to manage but the owner will also take some of that risk, for example excessive inclement weather and industrial disputation unrelated to the site or a function of the owner's business or conduct. Where the owner has taken the risk, the contractor will be entitled to an extension of time and thereby be relieved of the obligation to pay liquidated damages. However the contractor will have to bear its own losses associated with the delay;
- (c) contractor caused delays - in this case the contractor must bear its own overheads costs and will not be entitled to an extension of time and therefore is liable to the owner by way of liquidated or general damages.

3.3 Design and construct

The risk profile in relation to construction, cost and time in a design and construct contract is usually the same as that taken by a contractor under a "construct only" contract.

The principal advantages of design and construct contracts are considered to be two fold:

- (a) the contractor is responsible for both design and construction. Therefore, if there is a defect in the work the contractor must be responsible, it having obligations in relation to both design and construction; and
- (b) given that the contractor is responsible for both design and construction it is easy to have a "fast track" program. What this means is that design and construction is done concurrently. The design is developed to a level where construction can commence. From then on design proceeds with construction following closely behind. In this way, completion can be achieved earlier than under the traditional approach where the design is completed before construction commences.

A further distinction in relation to design and construct contracts is that because the contractor is given the task of completing the design to a design brief, the owner loses much of the control over the final design which it would enjoy under a project management or traditional form of contract.

This form of contract is unsuitable for circumstances where the owner wants or needs a high degree of control over the design process. This situation may arise where:

- (a) the aesthetics of the finished product is important; or

- (b) it involves novel mechanical or process engineering.

From a legal point of view only, most of these problems can be limited by a project brief which narrowly defines the aesthetic or performance criteria.

3.4 Project management/PCM

3.4.1 Features of project management/PCM

There are various types of contract which fall within this class. The essential features of this class of contract are as follows:

- (a) the owner appoints a "project manager" to act as its agent;
- (b) the project manager is required to manage both:
 - (i) the design process; and
 - (ii) construction;
- (c) the project manager (generally) is paid a percentage of the actual cost of construction or a fixed fee. In more recent times a fixed fee has been more popular;
- (d) the project manager undertakes to exercise reasonable care in the performance of its management services. However, it does not warrant that:
 - (i) the project will be built to a particular standard;
 - (ii) the project will be completed by a particular time; or
 - (iii) the project will be built for a particular price.

The risk profile associated with this form of contract is summarised below:

3.4.2 Design

The risk in relation to the quality of the design is shared between the project manager and an independent design consultant employed by the project manager (in its capacity as agent for the owner).

Primary responsibility for the quality of the design rests with the design consultant. Liability for poor design will not generally arise in the project manager, except in unusual circumstances.

Again, the capacity for the risk to be borne by the designer is a function of its insurance. As indicated previously, insurers in the professional indemnity market are notorious for contesting liability, which gives rise to the risk associated with enforcement of the rights provided.

3.4.3 Construction

In the project management model, the project manager will engage a number of trade contractors. Each trade contractor will be responsible for its own work and will generally enter into a contract where it undertakes to complete works in accordance with the specified standard.

Notwithstanding the apparent shift of risk from the owner to the trade contractor, problems do arise where more than one trade contractor is responsible for the end result. In those circumstances it is not uncommon for the trade contractors concerned to blame one another for any defect that might appear in the final work.

Similarly, problems arise where the work of one trade contractor is damaged by the work of another.

These problems can be significantly reduced by defining the trade packages in such a way as to make discrete parts of the work the responsibility of one contractor.

3.4.4 Cost

The project manager is not responsible for costs, except increases of cost which are a consequence of the project manager's negligence. Generally, the costs will be the aggregate amount paid to each of the trade contractors plus a margin for the project manager, plus the design fees.

As is the case with traditional contracts, costs can increase for the same reasons, ie:

- (a) the drafting of the contract;
- (b) the effectiveness of the owner's management of the process and the effectiveness of the design consultant's management. Failure of either to manage properly can give rise to breaches of contract entitling the contractor to damages;
- (c) the quality of the information provided to the contractor at the outset in relation to the construction risk. For example, if the contractor is given geotechnical information which contains factual information which is incorrect, this is likely to give rise to a right in the contractor to recover further remuneration outside the scope of the contract (for example as a consequence of a breach of Section 52 of the *Trade Practices Act*);
- (d) directions which constitute a change in the scope of work; and
- (e) the occurrence of a risk which is not the responsibility of the contractor or the owner, pursuant to which the contract entitles the contractor to further remuneration.

3.4.5 Time

Again it is generally the case that the project manager does not take any risk in relation to time, apart from its general obligation to exercise reasonable care in the management function.

A peculiar risk associated with this form of contract is that delays and disruption can be caused because of co-ordination difficulties between the trade contractors. Logically the primary responsibility for co-ordinating the trade contractors rests with the project manager. However, even with the best project management, co-ordination difficulties can arise because of non-performance of one or more of the trade contractors which interferes with the operations of subsequent trade contractors. Under a traditional or design and construct form of contract, this risk rests with the head contractor. However, in a project management arrangement that risk will more than likely rest with the owner.

In summary, project management:

- (a) allows the owner significant involvement in the design;
- (b) allows some control over costs, as the design is completed, trade contractors are appointed and lump sums obtained;
- (c) however, these advantages come with a significant assumption of risk by the owner in the areas of design, construction, cost and time.

4 PARTNERING

Partnering is an American concept which was introduced to Australia during the recession in the early nineties. At that time, the down turn in the economic environment had resulted in many projects failing. The degree of disputation within the industry was at its highest. It is not surprising then that the concept of partnering was enthusiastically adopted by the Australian industry. Mr Charles Cowan, an engineer who had previously been in the employ of an American Road Authority and the United States Corp of Engineers is credited with inventing the concept.

However, the principles espoused by Charles Cowan were largely oversold in this country.

The basic partnering concept is relatively simple and is not intended to give rise to a change in the legal structures which regulate the risk of the participants to the project.

Partnering is best described as a management philosophy or tool. The major aspects of the concept as espoused by Charles Cowan were:

- (a) improved methods of communication;
- (b) the escalation of disputes quickly from the site to senior management; and
- (c) the encouragement of lateral thinking to overcome problems which arise during the construction phase, without necessarily reverting to the contract as a matter of first resort.

As to the first suggestion, the partnering concept requires that there be a partnering workshop prior to work commencing. The contractor and owner meet for a period of up to 2 days, usually with some form of facilitator. At such meetings various matters are discussed, including:

- (a) the goals of the owner and contractor;
- (b) the risks which may arise during the course of the contract; and
- (c) how dispute resolution can be achieved without destruction of personal relationships.

Obviously, such a meeting can be extremely useful in improving the communication between the two teams charged with responsibility for the project. The intention is, despite sometimes competing commercial interests, to produce a team capable of achieving a better outcome than if the parties failed to communicate effectively.

The dispute escalation concept is a valuable and simple idea. The concept anticipates that if a problem arises at, say, foreman level, then the foreman and his opposite number (perhaps a supervisor employed by the owner) must either resolve the dispute or pass it on within a defined period of time. At that level the appropriate time is measured in a couple of hours. The dispute is then handed to the next rung of management who must meet to see if they can resolve the dispute. If the dispute can be resolved within, say, 24 hours, then the dispute must be passed on to the next level of management until it reaches the chief executives of the respective organisations.

It is said that this escalation of the dispute quickly through the management system takes the angst away from the "work face" and moves it to a point where compromise and solution is likely quickly.

The third aspect of partnering is perhaps the most nebulous and is the concept which was largely oversold in the Australian market. That concept requires one or other of the parties to retreat from its strict contractual rights, in order to assist the other. Examples include:

- (a) if the contractor finds that the costs of performing the work are in excess of that for which it has budgeted, the owner may lower the standard of the work required so that the contractor can perform the work within budget or at a reduced cost;
- (b) if problems arise for the contractor which would otherwise entitle it to extra remuneration or time, it might forego some of its profit and not insist upon its strict legal rights.

It was an important element of partnering as advanced by Charles Cowan that the legal framework be defined by a contract. However, in the ideal circumstance the contract would not be consulted. The management of the project would therefore be regulated by contract as a matter of last resort.

As a management concept partnering has a number of attractions. However, it was not intended to constitute a legal framework, instead representing a particular philosophical approach to construction.

However, partnering comes with certain risks. Those risks include as follows:

- (a) a number of claims have been made by contractors around the country based on the partnering workshop. The causes of action are premised on propositions that:
 - (i) the terms of the contract have been modified by the partnering workshop where other agreements were reached;
 - (ii) strict enforcement of the legal rights is no longer available because the owner is estopped from relying on those rights or by its conduct at the partnering workshop waived those rights; and
 - (iii) representations were made at the partnering workshop which are untrue (whether as to a present fact or a representation as to a future matter) and are therefore actionable pursuant to the *Trade Practices Act*;

- (b) at a management level if the concept is oversold and underdone (which is usually the case) the failure of partnering becomes a reason for the breakdown in the relationship between contractor and owner with serious recriminations and subsequent litigation.

5 ALLIANCE OR CO-OPERATIVE CONTRACTING

5.1 What is it?

When reading the literature associated with this concept it becomes apparent that it defies easy definition.

One legal commentator has observed as follows:

"First and foremost it must be remembered that project alliancing is strictly a business relationship. The relationship is built on the following principles:

- a primary emphasis on the business outcomes from all parties (ie win - win)
- clear understanding of individual and collective responsibilities and accountabilities
- an equitable balance of risk and reward for the parties
- encouragement of openness and co-operation between the parties
- encouragement to develop and apply innovative approaches and achieve continuous improvement
- access to and contribution by the expertise and skills of the parties▪ a commercial basis which offers the opportunity to achieve reward commensurate with exceptional performance".²

Another legal commentator has defined the concept this way:

"Essentially alliancing is a collaborative, incentive driven method of contracting where all the participants work co-operatively to the same end, sharing the risk and rewards of bringing in the project within time and under cost, whilst respecting principles of good faith and trust".³

These are indeed fine sentiments. To criticise them or be cynical about them is a heresy with the major protagonists for this style of contracting. In fact, one Australian observer has, when commenting on the lawyer's role in such transactions, observed that:

"Alliancing actually requires a different attitude from lawyers. A good alliancing lawyer is very much in a facilitator role. The lawyer has to have an inherent understanding of alliance principles, understand the wishes of each participant, facilitate consensus and then promptly implement what are quite often innovative ideas. The initial reaction of many lawyers to alliancing is cynical and/or negative, which is unfortunate."⁴

However, in defence of the cynical lawyer, it must be remembered that the primary task of a lawyer when charged with the responsibility for drafting a contract is to provide certain and clear risk allocation. The better the wording in the contract (and the technical documents) the less likely there will be a dispute. Disputes generally arise and are sustained for significant periods,

²Graham Thomson, Mallesons Stephen Jaques, 'Project Alliances', Paper presented at the 21st AMPLA Conference, 24 July 1997, at page 8. (Thomson cites these principles from an article by B Scott, 'Partnering and Alliance Contracts: A Company Viewpoint', April 1994.)

³Presentation by Tony Abrahams, Director, Construction and Infrastructure, KPMG Legal, as reported by Juliet Pratley, 'Project Alliancing: Does it work?' (1999) 15(2) Building Australia 33.

⁴Thomson, above n.1, page 12.

when the documentation fails to accurately and precisely allocate the risk, using as few words as possible. The concept that a lawyer operates as a "facilitator" to achieve some higher goal of alliancing, places the lawyer outside the area of his/her core competency, as many of the alliancing projects have to date demonstrated. It is submitted that the idea that alliance contracting can or should be a legal concept confuses the role of a lawyer with that of management. It is management's role to ensure that cohesive and effective teams are built from different organisations. It is the lawyer's role to legislate for the risk in the event of certain circumstances. It may well be the case that certain contractual structures increase the capacity to manage for positive outcomes. However, the contractual framework will not be a major driver. There are numerous examples where quite severe risk allocations of a negative type have been placed on contractors and yet the project has been a phenomenal success for all parties concerned. There are also numerous examples where alliancing or co-operative contracting models have been followed which have been unmitigated disasters. In both cases the defining element is more likely to be the management skills brought to bear rather than the legal structure.

The legal structure and detailed drafting should allocate risk clearly. The better it does this the less room there will be for disputation, which is important where despite good management or because of a lack of it, the project has gone badly.

5.2 The legal structure

What then is the legal structure associated with alliancing? Obviously as a new concept there are a number of models which have been adopted in the past. However, it is said that a good alliance agreement will generally have these elements:

- (a) the project is controlled by an "Alliance Board". The relevant agreements should establish the following in respect of the Board:
 - composition (representatives from each participant);
 - voting (equal voting rights);
 - unanimity (it is recommended that anonymity be required and that no mechanism be included to deal with a deadlock; the Board should be left to resolve the matter);

- (b) the establishment of an integrated development team:
 - drawing upon the best available resources of each of the participants to fill each position. The integrated team is distinct from the organisations of each of the participants. It is housed in separate offices, operates with its own logo and identity etc. in order to create an appropriate environment for working together to achieve common goals;

- (c) establish the commercial arrangements between the parties:
 - no dispute;
 - splitting the margins (value of work?; ability to influence?);
 - personal injuries, property damage and third party liabilities;
 - joint and/or several liabilities;

- liability limitation;
- default of a party;
- dispute resolution.

The concept is relatively simple, the aim being to create an "entity" which will manage the project. Usually this entity is not a legal structure but constitutes a group of people charged with the responsibility of managing the project (the Alliance Board). The representatives on the Alliance Board would, in a typical example include representatives from:

- (a) the designer;
- (b) the contractor; and
- (c) the owner.

Each representative is given one vote and in the recommended model there is no casting vote. Accordingly, the owner (who has to live with the project for the rest of the facility's life) can be out voted by the Board charged with the management of the project. Presumably this is why the proponents of alliance contracting recommend that unanimity be required.

No doubt such a structure will encourage the participants to reach agreement. However, there are numerous commercial circumstances which can and do arise whereby the requirement for unanimity will provide a commercial weapon to one of the parties to achieve some ulterior commercial objective.

Obviously the establishment of an integrated development team is a management issue, rather than a legal one. However, those that advocate alliance contracting argue that to make the designer or contractor liable for damages in the event of non-performance, is destructive of the team. Accordingly, they suggest that:

"Blame' is contrary to the fundamental concept of alliancing, and hence the associated contracts restrict access to the courts to breaches of contract or duty which amount to "wilful default". Hence the parties do not sue each other over questions of negligence or even gross negligence".⁵

Having dispensed with the usual incentive to avoid liability, it is necessary for the proponents of such a system to devise some other incentive to ensure that the works are done in accordance with the contract.

Generally, this is said to be achieved by putting at risk the contractor's profit and some of its overheads (off site). As indicated previously, contractors' margins are usually relatively small when compared with the total value of the project (eg. profit between 1% and 5%, head office overheads 2% to 5%).

Further, whether such "profit and overhead" are really put at risk will depend upon the way in which the base cost is calculated. This is often done by reference to rates for plant, equipment and people. Often these rates are structured to recover both a profit and overhead. Accordingly, if the alliancing model is adopted, great care needs to be taken in the definition of the concept of "cost".

⁵Thomson, above n.1, page 10.

There are examples of alliancing which have occurred in this country where contractors have been able to declare very significant profits as a consequence of the project while the project suffers overruns in cost by hundreds of millions of dollars.

5.3 Risk Allocation

The risk allocation associated with alliance contracting will be considered under the same headings as the other contracts we have reviewed namely:

- (a) design;
- (b) construction;
- (c) cost; and
- (d) time.

5.3.1 Design

Generally the designer will not be liable for negligent design or a failure to deliver the design in a timely fashion. Obviously the cost consequences of defective or late design can be significant, and include:

- (a) a failure of the project to achieve design criteria. In the case of a processing plant (for example) this may mean that it may not be able to produce:
 - (i) the product at all; or
 - (ii) the product at a rate which makes the plant commercially viable.
- (b) in a fast track contract, where the design process is on the critical path of construction, significant extra cost can be incurred as a consequence of the late delivery of design. In major projects it is possible for daily overheads to exceed \$1M per day. Any delay associated with the finalisation of the design, or with rectification of the design during the construction process, will be very expensive in such projects.

Most insurance available to designers is "liability insurance". This means that the insurer will not pay unless the designer is liable. If the contract states that the designer is not liable except for wilful default, the policy is unlikely to respond at all because:

- (a) pursuant to the contractual arrangements the designer is not responsible for its own negligence; and
- (b) most policies exclude liability for wilful default.

Accordingly, if the owner is to have any comfort in this area, it would need some form of exotic insurance. However, insurers are generally reluctant to assume risk where the person primarily charged with responsibility for the task does not carry any personal responsibility.

Accordingly, for all intents and purposes the risk associated with design under the model of alliance contracting rests firmly with the owner.

5.3.2 Construction

If the contractor performs defective work it must be rectified. If the contractor is not liable for breach (except wilful breach), then the costs of rectification will be borne by the owner.

5.3.3 Cost

Each of the participants are paid on a cost basis. Whether they recover any profit or overhead usually depends upon the success of the project. However, if for example the designer performs defective design work which requires the contractor to perform the work more than once, the costs associated with that re-performance ultimately rest with the owner.

5.3.4 Time

Again, given that the participants in the project are not liable except for wilful default, the time risk rests with the owner.

6 CONCLUSION

The overwhelming majority of projects delivered by reference to the traditional system are successful and do not result in protracted claims or dispute resolution. Where the contract is competitively tendered the contractor's margin is modest.

Better communication and better dispute resolution processes are likely to reduce the number of unsuccessful projects which result in significant claims and/or litigation.

Partnering is a useful concept for improving communication and dispute resolution. It is a management concept not a legal concept. It should not be dressed up by lawyers as being legal in nature.

Clear and precise risk allocation in properly drawn contracts also significantly lowers the risk of disputation. This is because arguments are more difficult when the contract documents are as short and clear as possible.

Alliance contracting may well provide an environment in which the avoidance of disputation is possible, but it only achieves this through an enormous assumption of risk by the owner.

While it is a commercial rather than legal issue, it seems unlikely that the assumption of risk associated with alliancing contracts is worth taking on, to avoid the relative low risk of a more traditional contract going badly.