Alliance contracts: Utility and enforceability

Trevor Thomas*

This article considers the objectives of alliance contracts as well as some of the potential difficulties they pose. In particular, it addresses the enforceability of "no blame, no dispute" clauses by considering whether such clauses could evidence a lack of intent to create legal relations; whether they could render the consideration under an alliance agreement illusory; whether they can be effective as exclusion clauses; and whether they could constitute an attempt to oust the jurisdiction of the courts. The article also considers the potential implications of a duty of good faith between alliance participants and whether alliance agreements have the potential to give rise to fiduciary duties.

INTRODUCTION

Since its birth in the North Sea oil fields, "alliancing" has evolved with Darwinian grandeur and today receives considerable attention, having been readily adopted in numerous major construction projects. Whether this contemporary favour is out of a genuine commitment to collaboration and working on a best-for-project basis, or whether it is due to the negotiating strength of contractors in the current Australian construction market is debateable.

There is no doubt that the objectives of alliancing are to be commended. By seeking to move from an adversarial environment to one of teamwork and partnership, the parties attempt to belay expenditure that would otherwise be wasted on claims and litigation, and instead devote those resources to achieving innovative and pioneering outcomes for the benefit of all contributors.

This sentiment should not be dismissed readily but, in the context of a binding legal agreement, unwittingly merging the role of project management with that of contractual risk allocation has the potential to lead to uncertainty. Further, some of the drafting constructs that are employed to give effect to these utilitarian objectives themselves raise basic legal issues as to enforceability.

This article gives a brief outline of the objectives of alliances before discussing some significant legal issues that such a method of contracting raises. In particular, whether:

(a) removing the parties' rights to access arbitration and the courts through the adoption of a "no blame, no dispute" methodology is enforceable at law;

(b) assuming a co-operative contracting model necessitates the implication of a reciprocal duty of good faith; and

(c) adopting a mutually reliant, profit-sharing approach (akin to a joint venture), gives rise to the imposition of fiduciary duties.

WHAT ARE SOME OF THE KEY ELEMENTS OF ALLIANCE CONTRACTING?

Alliance contracting seeks to address the adversarial nature of traditional contracting by providing a framework for collaborating in an incentive-driven way. The alliance partners work co-operatively, share the risks and rewards, and seek to attain a best-for-project outcome.

While a distinction is sometimes made between "pure" or "project" alliances and "impure", "hybrid" or "strategic" alliances, this article is concerned only with pure alliances.

Some of the key elements of an alliance include:

* The author gratefully acknowledges the assistance of Mr Andrew Stephenson and Ms Naomi Kelly in reviewing and commenting on this article. This article is based on the author's research as part of an LLM in the Faculty of Law at the University of Melbourne.

(a) an alliance board, consisting of senior representatives from each of the alliance partners, which provides strategic management and is charged with resolving disputes by unanimous agreement;[1]
(b) an alliance management team, consisting of the project management team, which is charged with the day-to-day administration of the alliance;
(c) the surrender of the participants' right to commence arbitral or court proceedings and agreement to confine the resolution of disputes to the alliance board (except in the event of wilful default or possibly insolvency). Wilful default may be defined as "acts and omissions which are wanton or reckless and amount to a wilful and utter disregard for the harmful and avoidable consequences of the act or omission".[2] As the names suggests, wilful default does not usually include mistakes or errors of judgment (including negligence);
(d) a performance or incentive-based remuneration structure whereby the owner agrees to meet all of the direct costs (and some of the overheads) and to provide an additional reward component which is made available to the builder at risk.[3] This at-risk component is known as a "gain-share, pain-share" and becomes payable in accordance with a set of pre-agreed key performance indicators. These indicators will vary from project to project and, in addition to basic cost and time elements, may include factors such as environmental or occupational health and safety considerations. As Gallagher observes, "gain-share outcomes should be either win/win or lose/lose – there should be no opportunity for a win/lose outcome";[4]
(e) in connection with item (d), the parties agree to cost the project on an "open-book" basis, whereby the actual costs and margins are transparent and fully audited;
(f) a right for the owner to terminate for convenience; and
(g) possibly, an express obligation to act in good faith.

The first key legal issue to consider is the enforceability of no blame, no dispute clauses.

WHAT ARE THE LEGAL CONSEQUENCES OF ADOPTING A NO BLAME, NO DISPUTE APPROACH?

What are no blame, no dispute clauses?

One of the principal tenets of alliance contracting is a no blame, no dispute concept, whereby the participants agree not to use arbitration or litigation as a dispute resolution technique and instead agree that all disputes will be referred to the alliance board for unanimous resolution.

Each participant agrees that it has no "legal or equitable cause of action against any other participant except in the case of wilful default or possibly insolvency",[5] and it is suggested that the concept of no blame, no dispute can considered to be inherent to alliance contracting.[6]

An example of a no blame, no dispute clause is as follows:

> The Project Alliance Participants embrace the fact that one of the prime advantages of alliancing is to avoid disputation and litigation.

[1] One of the concerns of having no deadlock-breaking mechanism is the possibility of the requirement for unanimity being construed as an agreement to agree, and hence being unenforceable at law. That is, the alliance contract is dependent upon the alliance board reaching agreement on a matter in dispute in order for the contract to continue. This issue is yet to be authoritatively determined by a court.

[2] See Mallesons Stephen Jaques, *Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services – An Overview of Legal Issues* (April 2005).

[3] Cornwell notes that since "the contractor is entitled to be reimbursed for all direct costs even in the case of delay, negligence, cost overruns or defective design … there is no certainty of time or cost". He further notes that, while this can cause some consternation for project financiers, "with the right financing structure, the right alliance partner and the right project, the alliance contract can be a viable basis for a project financing": Cornwell P, *Alliance Contracting – Is It Bankable?* (Allens Arthur Robinson, December 2006).

[4] Gallagher J, "Development – Project Alliancing: How the National Museum and Acton Peninsula Alliance Broke New Ground" (2001) (Nov) *Australian Property Journal* 704.

[5] Jones D, "Keeping the Options Open: Alliance and Other Forms of Relationship Contracting with Government" (2001) 17 BCL 153 at 155.

[6] Abrahams A and Cullen A, "Project Alliances in the Construction Industry" (1998) 62 ACLN 31 at 35.

> The contractual structure is designed to reinforce the fact that there are to be no disputes or litigation, the only exception being in the event of Wilful Default by a Project Alliance Participant.
>
> To that end, a failure by any Project Alliance Participant to perform any obligation or to discharge any duty or in connection with this Project Alliance Agreement will not give rise to any enforceable obligation at law or in equity except to the extent that the failure also constitutes Wilful Default.[7]

Clearly, these types of clauses are designed to isolate the resolution of disputes to the confines of the alliance and to prevent one participant from commencing court or arbitral proceedings against another. They reflect an emphasis on co-operation and dispute avoidance and reinforce the parties' objective to collaborate and develop innovative solutions for the success of the project without the threat of being sued.

However, while this sentiment may be laudable, from a legal perspective, the enforceability of these types of clauses may be questioned in a number of respects. Some of the key issues include:

(a) If the parties are prepared to give up an entitlement to legally enforce their rights, do the parties actually intend to create legal relations?
(b) If a failure to perform an obligation or to discharge a duty does not give rise to an enforceable obligation at law, is the consideration for performance of the contract illusory?
(c) Are no blame, no dispute clauses effective as exclusion clauses or are they drawn so widely so as to be unenforceable?
(d) Have the parties attempted to oust the jurisdiction of the courts?
(e) Will a no blame, no dispute clause compromise a party's professional indemnity insurance?

Can no blame, no dispute clauses evidence an intent not to be bound by the contract?

Unlike family or domestic arrangements, in commercial agreements it is generally presumed that the parties intend to create legal relations. This presumption will rarely be rebutted[8] and usually such refutation only occurs where the parties have either expressly stated that they do not intend to create legal relations or, when objectively determined, this may be implied.

An example of an express exclusion of contractual intent in commercial agreements may be found in "honour clauses", which were discussed in *Rose and Frank Co v Crompton & Bros Ltd* [1923] 2 KB 261. In that case, the defendant was the manufacturer of carbonising tissue paper and the plaintiff was a New York firm dealing in such tissues. The parties entered into an agreement giving the plaintiff the right to distribute the defendant's products in the United States and Canada for three years (distribution agreement). Individual "purchase orders" were then called off the distribution agreement. The distribution agreement contained an "honourable pledge clause" as follows:

> This agreement is not entered into nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but is only a definite expression and record of the purpose and intention of the parties concerned, to which they honourably pledge themselves.

When the defendant cancelled the distribution agreement and refused to honour purchase orders that had been received and accepted, the plaintiff claimed that the defendant breached the distribution agreement and the purchase orders and sued for damages.

The Court of Appeal held that each purchase order was a separate contract that was intended to be legally binding. Consequently, the defendant was in breach of those purchase orders that it had accepted but refused to honour. However, the Court of Appeal did not draw the same conclusion with respect to the distribution agreement. The court held that the honourable pledge clause made it clear that the parties did not intend for the distribution agreement to be legally binding. Consequently, the plaintiff was unable to establish a breach of contract. Scrutton LJ held (at 288):

> It is quite possible for the parties to come to an agreement by accepting a proposal with the result that the agreement does not give rise to legal relations. The reason of this is that the parties do not intend

[7] Mallesons, n 2.

[8] See, eg *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep 239 at 269.

> that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties … I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention.

Similarly, in *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626, a football pools coupon contained an honour clause that stated:

> It is a basic condition of the sending in and acceptance of this coupon that it is intended and agreed that the conduct of the pools and everything done in connection therewith and all arrangements relating thereto … and this coupon and any agreement or transaction entered into or payment made under it shall not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever or be legally enforceable or the subject of litigation.

Atkinson J held that "this formidable clause was a bar to any action in a court of law".[9]

The wording in these clauses shares some similarities with the phraseology in the example no blame, no dispute clause set out above. Thus, it may be argued that, since the parties have agreed to give up their legal entitlement to enforce their rights and obligations under the alliance agreement, the no blame, no dispute clause is an honour clause and, consequently, an express exclusion of contractual intent. Counter arguments include:

(a) the express exclusion is not clear and unequivocal;

(b) the parties have agreed to be bound by an alternative dispute resolution procedure (being the alliance board) which suggests intent; and

(c) the exclusion of wilful default sufficiently differentiates the no blame, no dispute clause from the honour clauses discussed above.

Courts have generally been reluctant to find a lack of intent in commercial contracts. Accordingly, it has been held that, in order to be effective, the words of an express exclusion must be clear and unequivocal. For example, in *Edwards v Skyways Ltd* [1964] 1 All ER 494, Megaw J held that the use of the words "ex gratia" to describe a promise of payment was not a clear and unequivocal exclusion of contractual intention. As Carter notes, the "words were construed to signify only that the promisor did not admit a liability to make the payment".[10] However, given the similarity between the terms of honour clauses and no blame, no dispute clauses, it may be argued that, prima facie, the parties' express exclusion of any enforceable obligations at law or in equity may be sufficiently clear and unequivocal to exclude contractual intent.

Notwithstanding that the parties may intend to exclude legal liability, the prescription of an alternative dispute resolution procedure, by which the parties agree to be bound, does suggest that the parties expect to be held to their bargain. Unlike domestic or family contracts, this may suggest that the parties do intend to create legal relations.

Finally, the fact that the parties have chosen to treat wilful default in a manner different to other conduct under the alliance agreement suggests that each has agreed, at least in part, to be held to the bargain made. This supports the argument that the parties intend to create legal relations.

On balance, while no blame, no dispute clauses appear very similar to honour clauses, it is submitted that there is unlikely to be a clear and unequivocal exclusion of contractual intent. Accordingly, the contractual element of intent is likely to be present.

Can no blame, no dispute clauses make the consideration under the alliance agreement illusory?

As discussed above, the contract sum under an alliance agreement typically consists of two elements:

(a) a cost component; and

[9] Starke JG, Seddon NC and Ellinghaus MP, *Cheshire and Fifoot's Law of Contract* (6th Australian ed, Butterworths, 1992) p 310.

[10] Carter J, *Carter on Contract* (Butterworths, subscription service) at [08-060].

(b) an incentive component.

That is, the owner agrees to pay the builder its costs for undertaking the project and, in the event that certain key performance indicators are met, the owner will also pay the builder an incentive payment.

The adequacy of this consideration will not, of itself, come into question. It has been a longstanding rule that courts will not inquire as to the adequacy of consideration.[11] Courts "will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems unfair".[12] Therefore, even if the builder is only entitled to its costs, this will constitute adequate consideration.

Nevertheless, even where the consideration is deemed adequate, where a promise is, upon closer inspection, actually a discretionary promise or where a promise is made without attracting legal consequences, the consideration may be described as illusory. In this situation, the absence of a binding pledge will result in the contract being unenforceable.

For example, in *British Empire Films Pty Ltd v Oxford Theatres Pty Ltd* [1943] VLR 163, the parties entered into a contract for the supply of films. The contract excluded all legal liability of the distributor for a failure to supply. The court held that, since there were no legal ramifications for non-performance, the promise was discretionary, the consideration was illusory, and the contract was unenforceable, therefore the party that had not received supply could not sue on the contract.

On this basis, it may be argued that a no blame, no dispute clause in an alliance agreement effectively strips the parties of legal liability for a failure to perform (other than for wilful default). If this proposition is maintained, performance becomes discretionary and the alliance agreement will collapse due to the consideration being illusory.

However, courts generally have been reluctant to adopt such an interpretation. It has been observed that so "long as there is some vestige of an objectively ascertainable obligation which can be broken by the promisor, then the promise probably amounts to good consideration".[13] For example, in *Meehan v Jones* (1982) 149 CLR 571, a purchase agreement was made subject to such finance as the purchaser found "satisfactory". It was argued that this clause effectively rendered the purchaser's obligation voluntary and hence resulted in the consideration being illusory. The court held that since the purchaser had an obligation to act bona fide in securing finance, it did not have an "unfettered discretion" and, as a result, the consideration was valid.

A similar finding was established in *Mango Media v Bassal* [2004] NSWSC 1253. In that case, the plaintiff was a financier and the defendant sought to take out a loan. The defendant provided a letter of offer that permitted the plaintiff to take a charge over the defendant's property while the property was valued in order to determine whether the loan would proceed. It subsequently transpired that the value was insufficient and the loan was rejected. It was argued that, since the granting of the loan was at the financier's discretion, the consideration was illusory. The court held that the financier had a bona fide obligation to consider the application and that this was sufficient consideration for taking a charge over the property.

Therefore, in the case of alliance agreements, one needs to consider whether there are contractual provisions that make the parties' performance mandatory. If not, it is arguable that the consideration will be illusory. It may be contended that the presence of a carve-out for wilful default, an enforceable alternative dispute resolution procedure and an obligation to act in good faith (discussed below), are demonstrative of essential obligations. Alternatively, it may be argued that the wilful default provisions only apply in such narrow circumstances so as to make the overwhelming majority of the obligations discretionary.

While this proposition may be reasoned either way, it is submitted that, on balance, the better view is that the consideration in an alliance agreement with a wilful default exception will not be

[11] See, eg *Thomas v Thomas* [1842] 2 QB 851.

[12] Starke et al, n 9, p 217.

[13] Starke et al, n 9, p 241.

illusory. However, in the absence of such a provision, as the consequences of a failure to perform are negated, it may be argued that the consideration is merely illusory and the alliance agreement is unenforceable.

Are no blame, no dispute clauses effective as exclusion clauses?

Since no blame, no dispute clauses seek to restrict the alliance participants' liability for breach, they are a type of exclusion clause. Exclusion clauses operate to limit or exclude a party's rights within, and potentially outside,[14] the terms of a contract. Consequently, the courts have tended to address the potentially punitive nature of exclusion clauses by adopting particular rules of construction and interpretation. In the context of alliance agreements, this gives rise to the following questions:

(a) How should courts approach and construe no blame, no dispute exclusion clauses?
(b) How wide can no blame, no dispute exclusion clauses be drawn before there will be a total collapse of consideration?

How should courts approach and construe no blame, no dispute exclusion clauses?

The law has historically taken an unwelcome view of exclusion clauses. As Lewison notes:

> Lord Denning MR has demonstrated in [*Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284], the court's hostility to exclusion clauses manifested itself in the court's tendency to adopt a strained and artificial construction in order to strike down the clause.[15]

This historical hostility arises principally out of a concern to protect vulnerable consumers from punitive contractual terms.

Commercial transactions, however, arguably do not raise the same issues of vulnerability and naivety as consumer contracts. For example, the parties to an alliance agreement will generally:

(a) be sophisticated commercial entities of equivalent bargaining power;[16]
(b) have turned their minds to the allocation of risk when negotiating the terms of the alliance agreement; and
(c) have engaged professional legal advisors to assist them negotiate and settle the contractual terms.

On this basis, it may be argued that the traditional disinclination to enforce exclusion clauses (such as no blame, no dispute clauses) is not well founded in the case of alliance agreements. As Lord Wilberforce stated in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843:

> In commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said … for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

As Carter observes, "in the context of commercial contracts, the better view is that exclusion clauses are to be treated in the same way as other types of contractual provisions".[17] The High Court in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 has provided some general guidance on this point as follows:

> [T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

Therefore, since an alliance agreement is a sophisticated commercial arrangement between parties of more or less equal bargaining power, a court will be unlikely to read down the no blame, no dispute exclusion clause in the same way as it may have done if the agreement was a consumer transaction.

[14] For example, the parties can agree to exclude liability for negligence but such an exclusion must be clear and unequivocal.

[15] Lewison K, *The Interpretation of Contracts* (3rd ed, Sweet & Maxwell, 2005).

[16] "Equivalent" in this sense is used to describe a relationship between two commercial parties rather than a commercial and non-commercial party, as may be the case in consumer transactions. Naturally, there may still be a significant difference in market power between the two commercial parties.

[17] Carter, n 10 at [15-020].

Instead, a court is likely to construe the no blame, no dispute clause in light of the alliance agreement as a whole. On this basis, a court will likely uphold the validity of the no blame, no dispute clause and will give it its ordinary meaning, which is to exclude liability other than for wilful default.

How wide can no blame, no dispute exclusion clauses be drawn before there will be a total collapse of consideration?

Historically, courts have been reluctant to allow exclusion clauses to apply to particularly serious breaches. As Treitel observes, courts would tend to construe such a clause "narrowly, so that it would not apply where such a serious breach had occurred, unless the intention that it should apply in spite of the gravity of the breach was made very clear".[18] However, in *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 649, the High Court rejected the notion that liability could not be excluded for a fundamental breach. Therefore, prima facie, exclusion clauses in alliance agreements can be drawn sufficiently widely to cover very serious breaches.

However, if the scope of such exclusion clauses is wide enough, no contract might arise at all. In *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125, an airline ticket contained the conditions of carriage and purported to permit the airline to "abandon any flight or cancel any ticket at any time" and to "refuse to carry any passenger, baggage or goods without any reason". The High Court found (at 133) that these conditions were so broad as to "occupy the whole area of the obligation, leaving no room for a contract".

Similarly, in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 92, Lord Wilberforce held:

> One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent.[19]

Consequently, if a no blame, no dispute clause is drawn sufficiently widely (eg if it did not include an exception for wilful default), it may be argued that the exclusion is so broad as to reduce the contract to a mere declaration of intent.

Are no blame, no dispute clauses an attempt to oust the jurisdiction of the courts?

It is a longstanding rule of the common law that a contract which purports to extinguish the rights of one or both parties to submit questions of law to the courts is pro tanto void for being contrary to public policy.[20] As the High Court held in *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652:

> No contractual provision which attempts to disable a party from resorting to the Courts of law [is] recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them.

As Jordan CJ stated in *Murphy v Benson* (1942) 42 SR (NSW) 66 at 67: "[a] provision that an existing legal right shall not be determinable or enforceable by the appropriate Court is void for repugnancy to the right." However, there are two important distinctions that must be made when considering whether the parties have attempted to oust the jurisdiction of the courts. These are whether the potentially offending clause:

(a) relates to questions of fact or law; or
(b) is really a condition precedent to commencing legal proceedings.

Questions of fact and law

It is permissible for parties to agree to refer questions of fact to an extra-judicial tribunal for final resolution even though it is not possible to do so on questions of law. As Lord Denning stated in *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329 at 342:

[18] Treitel G, *The Law of Contract* (11th ed, Sweet & Maxwell, 2003) p 225.

[19] See also *Firestone Tyre Co Ltd v Vokins & Co Ltd* [1951] 1 Lloyd's Rep 32.

[20] *Thompson v Charnock* (1799) 101 ER 1310.

> [Parties can] make [a] tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If the parties should seek, by agreement, to take the law out of the hands of the courts and put it in the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void.[21]

Similarly, in *Dobbs*, a joint and several guarantee was provided by a guarantor to a bank on behalf of the borrower. Clause 8 of the instrument of guarantee provided that a certificate signed by the manager of the bank stating the balance due would be "conclusive evidence" of the indebtedness of the borrower. The High Court held that cl 8 was not an attempt to oust the jurisdiction of the court. Rather, it was an "evidentiary stipulation which might facilitate the exercise of the court's jurisdiction".[22]

These situations arise frequently in a construction context in relation to certificates issued by a superintendent or determinations of an expert. For example, in *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506, a dispute arose under a contract for the construction of certain bridges and culverts for a railway line. Clause 32 of the contract provided that certificates issued by the Chief Engineer for Railways were to be "final and conclusive". Stephen J relied upon the decision in *Dobbs* as authority for the validity and effectiveness of the decision of the Chief Engineer as being "in no way an attempted ouster of the Court's jurisdiction" (at 531).

In *Jones v Sherwood Computer Services Plc* [1992] 2 All ER 170, a "final and binding determination" from a firm of accountants that were appointed as "independent experts" in relation to financial matters concerning the sale of a computer company was also held to be valid and not an attempt to oust the jurisdiction of the courts.

Therefore, to the extent that a clause purports to make an extra-judicial determination final and binding, it will be valid on a question of fact but, if that clause is broad enough to cover questions of law, it may be void on the basis of being contrary to public policy.

Conditions precedent

The common law also makes a distinction between clauses that purport to make judicial proceedings contingent upon the occurrence of some process or event under the contract. A common example is a "*Scott v Avery* clause"[23] under which arbitration is made a condition precedent to litigation.

The effect of *Scott v Avery* clauses have, however, been modified by uniform legislation in each Australian jurisdiction.[24] They are now regarded merely as giving rise to an agreement to arbitrate. Nevertheless, where legal proceedings are commenced in the face of an agreement to arbitrate, the courts have the power under the Uniform Arbitration Acts (which they will usually exercise) to grant a stay of proceedings.

Notwithstanding that the Uniform Arbitration Acts have essentially reduced *Scott v Avery* clauses to agreements to arbitrate, the courts have also addressed conditions precedent to litigation in other circumstances.

In *Egan*, the High Court upheld the validity of a clause that made a certificate issued by the Chief Engineer a condition precedent to a claim to recover money under the contract. Gibbs J said:

> The parties to a contract may by their agreement validly provide that the giving of a certificate, or the making of an award, by a third party shall be a condition precedent to the right to bring or maintain an action. Such a provision is construed, not as ousting the jurisdiction of the courts in respect of a cause of action already accrued, but as having the effect that no cause of action arises until the certificate or award is given or made.[25]

---

[21] See also the decision of James LJ in *Re Kitchin* (1881) 17 Ch D 668 at 672.

[22] Starke et al, n 9, p 1205.

[23] *Scott v Avery* (1856) 5 HLC 811.

[24] See, eg the *Commercial Arbitration Act 1984* (Vic), ss 53, 55.

[25] *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506 at 519.

In *Hong Kong Bank of Australia Ltd v Larobi Pty Ltd* (1991) 23 NSWLR 593, the lender (Hong Kong Bank) lent $300 million to the borrower (Larobi). Eight guarantors, who were parties to a guarantee, secured the loan. When the borrower defaulted, the lender sought to enforce the guarantee against four of the guarantors (the applicants). The applicants then sought leave to cross-claim against the remaining four guarantors, claiming that each was liable to make a contribution. The lender resisted relying, inter alia, on the terms of the guarantee which provided that a guarantor was not permitted to enforce any rights against any other guarantor without the consent of a third party to the proceedings. The applicants contended that that this clause was an attempt to oust the jurisdiction of the court and should be declared void as being contrary to public policy.

The Supreme Court of New South Wales referred to the decision of House of Lords in *Spurrier v La Cloche* [1902] AC 446 where their Lordships found (at 450-451) that "if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of any Court". Rogers CJ upheld the validity of the clause in *Larobi* stating (at 599) that:

> I am satisfied that each guarantor agreed, as it was entitled to do, not to attempt to enforce any right to contribution which it may otherwise acquire against other guarantors until the occurrence of a specified event within its own control. The applicants have not satisfied that condition and until that happens no right arises.

Therefore, and with regard to the special treatment of *Scott v Avery* clauses in relation to arbitration, clauses that purport to make a certain circumstance or event a condition precedent to a right to commence legal proceedings may not, of themselves, be contrary to public policy and unenforceable.

These principles can now be applied in the case of alliance agreements. It will be recalled that no blame, no dispute clauses require that a failure by any of the alliance participants to perform any obligation or discharge any duty "will not give rise to any enforceable obligation at law or in equity except to the extent that the failure also constitutes wilful default".

These types of clauses are not seeking to put in place a valid means of determining questions of fact as opposed to questions of law (as occurred in *Dobbs*). Rather, they are specifically seeking to exclude a right to rely on any legal or equitable cause of action. Therefore, they will offend the rule discussed in *Showman's Guild of Great Britain*.

Nor are they seeking to make certain obligations a condition precedent to commencing legal proceedings. As the exclusion of the right to litigate is not contingent upon the happening of some event, these clauses will not fall within the scope of *Scott v Avery* and *Larobi*. Consequently, it is arguable that no blame, no dispute clauses are an attempt to oust the jurisdiction of the courts.

However, even if it can be established that no blame, no dispute clauses are, prima facie, an attempt to oust the jurisdiction of the courts, this will not be determinative as to their unenforceability on grounds of public policy. This is because considerations of public policy must be placed in context. This may require a court to have regard to broader notions of what "public policy" means, rather than looking at that concept in isolation. For example, Lord Wright in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 293, held that "public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds".

In the context of alliance agreements, it may be argued that adopting the narrow view that no blame, no dispute clauses are void for ousting the jurisdiction of the courts disregards the broader public policy objective of enforcing and holding parties to their commercial bargains.

In support of this argument is Lord Atkins's warning in *Fender v St John Mildmay* [1938] AC 1 at 12 that "the doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds". This goes to the oft-quoted caution of Burrough J in *Richardson v Mellish* (1824) 130 ER 294 at 303 that "public policy is a very unruly horse, and when once you get astride it you never know where it will carry you".

Support for courts taking a more cautious approach to questions of public policy may also be found in *Felton v Mulligan* (1971) 124 CLR 367. In this case, Windeyer J held (at 385) that "the

grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of the courts cannot be accepted in this second half of the twentieth century as pronouncements of a universal rule". Further, in *Larobi*, Rogers CJ held that "[f]or a number of reasons, today it is no longer a rarity for parties to agree to have disputes resolved otherwise than by resort to the courts".[26] These cases are demonstrative of some modern judicial reluctance to cut down the scope of contractual terms purporting to limit the scope of parties' rights to commence proceedings as being void on public policy grounds.

Therefore, in determining whether a no blame, no dispute clause should be declared unenforceable, a court will need to weigh up whether public policy would be best served by:

(a) striking the clause down for being an attempt to oust the jurisdiction of the courts; or

(b) holding the parties to their commercial bargain.

Given previous judicial warnings about intervening on grounds of public policy, it is submitted that a court would likely uphold the validity of such clauses.

Will a no blame, no dispute clause compromise a party's professional indemnity insurance?

Traditional professional indemnity insurance policies are a species of "liability insurance". This means that the insurance policy will only respond once the insured incurs a liability to another party in connection with its negligence. Consequently, such forms of professional indemnity insurance are unlikely to be effective for parties to an alliance agreement because:

(a) other than in the case of wilful default, the acts or omissions of the alliance partners do not give rise to any enforceable obligations at law or in equity. Consequently, no liability can arise and the insurance policy cannot be called upon; and

(b) in the case of wilful default, most professional indemnity policies expressly exclude the right to make a claim in the event of wilful default and are therefore of little use.

Hence, one of the effects of a no blame, no dispute clause is to render liability-based insurance policies ineffective. As Stephenson notes, "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".[27]

However, the insurance industry is starting to respond to this issue by developing specialised insurance products for alliances, such as "first party insurance", albeit at a significant premium. A review of these products is beyond the scope of this article.

IS THERE A DUTY TO ACT IN GOOD FAITH UNDER AN ALLIANCE AGREEMENT?

Good faith is an amorphous concept that has been the subject of much legal and academic consideration. It is significant in the context of alliance agreements because it has the potential to impose more onerous obligations on the parties than otherwise may have been the case. For example, where it is applied in relation to the open book accounting requirements under an alliance agreement, what is the extent of the parties' obligations of disclosure?

Even if the alliance agreement does not state expressly that the parties are under a duty to act in good faith, courts may imply such a term. Therefore, it is important to consider:

(a) What is good faith?

(b) Is there an express or implied duty to act in good faith under alliance agreements?

(c) Can a duty to act in good faith be excluded?

(d) What are the ramifications for the alliance partners of a duty to act in good faith?

[26] *Hong Kong Bank of Australia Ltd v Larobi Pty Ltd* (1991) 23 NSWLR 593 at 598.

[27] Stephenson A, *Alliance Contracting, Partnering, Cooperative Contracting* (Clayton Utz, June 2002).

What is good faith?

Good faith has been recognised by the common law since as early as 1766 when Lord Mansfield said in *Carter v Boehm* (1766) 3 Burr 1905 that it "was the governing principle … to all contracts and dealings". Notwithstanding its early genesis, a universally agreed definition of the concept continues to be elusive. As Professor Waddams notes, "good faith is a multifarious concept, capable of enlarging or restricting contractual obligations, as the occasion may require".[28]

Attempts to give meaning to the concept range from, at one end of the spectrum, defining it by reference to "bad faith" (known as the "excluder thesis"); and, at the other end of the spectrum, by attempting to ascribe to it a meaning in its own right (known as the "core meaning thesis").

An example of the excluder thesis may be found in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266, where Priestly JA noted that "the typical judge when examining good faith is primarily concerned with ruling out specific conduct, and only secondarily, or not at all, with formulating the positive content of a standard".

Conversely, an example of the core meaning thesis may be found in Sir Anthony Mason's 1993 Cambridge lecture, where the concept of good faith was said to embrace no less than three related notions, being:

> (1) an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties.[29]

Niemann has also observed that "it seems apparent that good faith can be understood as having both a subjective aspect (requiring honesty in fact) and an objective aspect (requiring compliance with standards of fair dealing)".[30]

It is generally accepted in Australia that acting in good faith does not require a party to abandon its own interests entirely. As Barrett J observed in *Overlook Management BV v Foxtel Management* [2002] NSWSC 17, "the party the subject to the obligation is not required to subordinate the party's own interests, so long as the pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms". Barrett J described the purpose of good faith as underwriting "the spirit of the contract and [supporting] the integrity of its character". His Honour continued (at [65]-[68]):

> A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self interest entirely, which is the lot of the fiduciary … The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and have regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.

Therefore, notwithstanding these divergent concepts, good faith can be perceived as imposing obligations more onerous than a mere duty to co-operate but less onerous than those imposed on fiduciaries.

Is there an express or implied duty to act in good faith in alliance agreements?

An alliance agreement may expressly provide (and often will provide) that the alliance partners are under a duty to act in good faith. However, in the absence of such an express provision, a duty to act in good faith may be implied by the courts.

---

[28] Waddams SM, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 JCL 55 at 57.

[29] As quoted by Sheller, Beazley and Stein JJA in *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [171].

[30] Niemann R, "Recent Aspects of Good Faith" (2002) 18 BCL 103.

Conventionally, a distinction is made between terms being implied in fact (or "ad hoc") and terms being implied by law.[31] Terms may be implied in fact to give effect to the presumed intention of the parties, whereas terms implied by law arise independently of the parties' intentions.[32]

While the High Court has been prepared to accept that obligations less onerous than good faith should be implied in commercial contracts, it has not definitively stated that good faith is a universal property of commercial agreements.

For example, in *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 602, 606-607, the High Court accepted that a general obligation to co-operate should be implied in every contract. In *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; 75 ALJR 1385, the High Court found that commercial contracts contain:

(a) an implied positive obligation on the parties to do all things necessary to enable the other party to have the benefit of the contract; and

(b) an implied negative obligation not to hinder or prevent the fulfilment of the purpose of the contract.

In *Petersville* and *Secured Income*, the High Court endorsed the position set out in *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71 (Griffith CJ) and the earlier authority of Lord Blackburn in *Mackay v Dick* (1881) 6 App Cas 251 at 263, where his Lordship stated:

> [A]s a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part of the carrying out of that thing, though there may be no express words to that effect.

As might be expected, the duty to co-operate has arisen in numerous circumstances. It is generally accepted, however, that the "underlying principle is that contracting parties must, in addition to performing the letter of their contract, act so as to protect the other party's interests where it is necessary and reasonable to do so".[33] It is these elements of necessity and reasonableness that curtail the extent of the obligation to co-operate on the parties. The objective is to preserve the benefit of the contract, not the benefit to the party. Thus, in *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212 at [39], it was held that in a contract between commercial parties genuinely at arm's length, where each was free to act in its own interests, the duty to co-operate was "relatively low".

However, the High Court has, for a long time, been reluctant to impose the more onerous duty to act in good faith on contracting parties other than fiduciaries.[34] Still, it is yet to make a definitive finding on this issue. For instance, in *Royal Botanic Gardens and Domain Trust v South Sydney CC* (2002) 186 ALR 289 at 301, five judges (including Gleeson J) of the High Court recently noted that there is "a debate in various Australian authorities concerning the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and powers".

As Wallwork notes, "there has been strong judicial support for the implication of a duty of good faith in New South Wales".[35] This stems from the position in *Renard* where the right to terminate a construction contract was subject to an implied obligation to act reasonably (which was implied both in fact and in law). In *Renard*, Priestly LJ said:

---

[31] Terms may also be implied by statute or by custom.

[32] See *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at 426-427, 441-442, 447-450; 185 CLR 410.

[33] See Seddon NC and Ellinghaus MP, *Cheshire and Fifoot's Law of Contract* (8th Australian ed, Butterworths, 2002) p 416.

[34] See *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1.

[35] Wallwork A, "A Requirement of Good Faith in Construction Contracts?" (2004) 20 BCL 257.

> People generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness which are consistent with the existence in all contracts of a duty of good faith and fair dealing in performance. In these days, anything less is contrary to prevailing community expectations.[36]

In *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703, Finkelstein J held that a termination clause was subject to an implied term of good faith and fair dealing, which was implied solely in law:

> Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the presumed intention of the parties) but as a legal incident of the relationship.

Similarly, in *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, Sheller JA was prepared to recognise a duty to act in good faith in the absence of any fiduciary relationship. So too in *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [159], where the New South Wales Court of Appeal noted:

> A review of cases since *Alcatel* indicates that courts in Australian jurisdictions have, for the most part, proceeded upon an assumption that there may be implied, as a legal incident of a commercial contract, terms of good faith and reasonableness.

In *Overlook Management*, Overlook (a Saudi-owned company based in the Netherlands) was the supplier of non-English language programs to Foxtel (in Australia) which on-sold such programs to its subscribers.[37] Overlook received a percentage of the revenue generated by Foxtel subscriptions. At the time of the agreement, subscribers were charged $19.95 per month for Overlook's programs. When Foxtel dropped this charge to $9.95 per month, Overlook sued Foxtel arguing, inter alia, that Foxtel had breached an implied term to act in good faith towards Overlook. Overlook argued that the effect of such a term was that any variation to the subscription fees would only be made with Overlook's consent. The court held that an implied term of good faith was not necessary to give business efficacy to the contract and, consequently, the term could not be implied in fact. However, Barrett J found that an obligation to act in good faith should be implied in law in all commercial contracts, holding that:

> An additional term implied by law into commercial contracts is a term requiring the exercise of good faith in the performance of the contract. This is now in this State a legal incident of every such contract.[38]

The New South Wales position has been given some support in Victoria. For example, in *Far Horizons Pty Ltd v McDonalds Australia Ltd* (2000) VSC 310, Byrne J held that there was an implied duty to act in good faith in a franchise agreement between McDonalds and one of its franchisees. His Honour held that this duty should be implied as a matter of law, stating:

> I do not see myself as at liberty to depart from the considerable body of authority in this country which has followed the decision of the New South Wales Court of Appeal in *Renard Constructions* … I proceed, therefore, on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing … Such a term is a legal incident of such a contract.

However, this should be compared with the decision of Hansen J in *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108, where his Honour was not prepared to find an implied requirement of good faith in a distribution agreement.

Therefore, while the position is not yet settled, there is significant judicial authority for the implication of a duty of good faith in commercial contracts. Further, as one commentator observes, a "duty of good faith is more likely to be implied into a relationship contract, such as a [joint venture agreement], partnering or alliance contract rather than a traditional construction contract given their

[36] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266.

[37] Overlook also sold the programs to Foxtel's competitor, Optus.

[38] *Overlook Management BV v Foxtel Management* [2002] NSWSC 17 at [62].

collaborative nature".[39] It would appear likely that, in the absence of an express duty to act in good faith, such a duty would be implied in an alliance agreement as a matter of law.

Can a duty to act in good faith be excluded?

Typically, terms in a contract can only be implied to the extent that they are not inconsistent with express terms of the agreement. However, it has been observed that "universally implied terms, in particular the obligations to cooperate and act in good faith, impose obligations which seem to lie at the core of every contract".[40] As such, it may be contended that to permit their exclusion would be to strike at the foundations of the contract itself.

It is arguable that a term in a contract that expressly permits a party to act in bad faith would be void for being contrary to public policy. Further, it has been suggested that a clause in an agreement generally excluding all implied terms would not be effective at excluding an obligation to act in good faith.[41]

However, the New South Wales Court of Appeal in *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [173] noted that:

> Principles of good faith … do not block use of terms that actually appear in the contract [and] will never impose an obligation which would be inconsistent with other terms of the contractual relationship.

Additionally, Bryson J in *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267 at 282-283 held that "[t]he implication of an obligation [of] good faith may not be available or the obligation may be qualified where the contract gives the party the opportunity … to take advantage".

Thus, an alliance partner is unlikely to be able to rely on a clause in the alliance agreement generally excluding implied terms to obfuscate its duty to act in good faith. However, that duty may be qualified by the extent of any express rights that party has under the alliance agreement.

What are the ramifications for alliance agreements of a duty to act in good faith?

The ramifications of good faith in a "partnering agreement" are exemplified by the case of *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768; 196 ALR 257. In this case, the parties entered into a mining contract on a risk-sharing basis (similar to that in an alliance agreement). Placer, the manager of a mine in Western Australia, engaged Thiess to carry out mining operations. Thiess was to be paid on an "open book basis" whereby it would be entitled to its costs plus a margin of 5%.

As the contract proceeded, Placer became suspicious that Thiess' original tender estimates contained an element of profit and Placer eventually terminated the contract. Thiess sued for loss of profits. Placer counter-sued for breach of an obligation to act in good faith by deliberately overstating its costs. While there were various appeals relating to the proof of damages, on the question of the obligation of good faith, the court found in favour of Placer.

As one commentator observes, "[t]his case emphasises the need for the parties in an alliance arrangement to strictly comply with their obligations of good faith and to genuinely keep their books open for review by the other party".[42] Further, while Jones observes that alliance agreements have

[39] McElhone D, "Is there a Duty to Act in Good Faith in Joint Venture Agreements?" (Minter Ellison, *Legal Insights*, July 2006).

[40] Seddon and Ellinghaus, n 33, p 430.

[41] *Hart v MacDonald* (1910) 10 CLR 417.

[42] Mallesons Stephen Jaques, n 2.

come a long way since *Placer*, he notes that the "case remains an indication that the courts may recognise false representations of cost estimates as acts of bad faith under painshare/gainshare arrangements".[43]

With respect to alliances, the key issue is that obligations of good faith, whether express or implied, will impose more onerous duties on the parties than may otherwise have been the case. However, it is submitted that such obligations are entirely consistent with the objectives of an alliance.

DO THE ALLIANCE PARTICIPANTS OWE FIDUCIARY DUTIES TO EACH OTHER?

What are fiduciary relations?

In some circumstances, the relationship between two parties may be such that equity steps in and imposes additional obligations in the form of fiduciary duties. These circumstances typically arise where it is appropriate to protect one party from an abuse of trust by another. In the Canadian case, *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14, Sopinka J noted that there are three common characteristics of fiduciary relationships:

1. the fiduciary has scope for the exercise of some discretionary power;
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary.

The imposition of fiduciary duties not only imposes additional obligations as between the parties but may also give rise to additional remedies in equity. As Gaudron and McHugh JJ noted in *Breen v Williams* (1996) 186 CLR 71 at 113:

> [F]iduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary prospective obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach.

Is an alliance a type of relationship that is presumed to give rise to fiduciary duties?

Fiduciary duties are presumed to arise in certain types of relationship such as between a director and company, a doctor and patient, a lawyer and client, or an agent and principal. Importantly, fiduciary duties are also presumed to arise between the parties to a partnership. Therefore, if the relationship between the alliance partners could be characterised as a partnership, fiduciary duties will be presumed to exist at law.

Legislation in each Australian jurisdiction defines a partnership as "the relation which subsists or exists between persons carrying on a business in common with a view to a profit".[44] However, not all persons who carry on a business with a view to a profit will be partners. As Cassidy observes, "as the existence of a partnership is dependent upon the contractual relationship between the partners, the parties' intention to create a partnership is the paramount consideration".[45]

The following factors may suggest that the parties to an alliance agreement are acting in partnership:

(a) the parties both are undertaking the project with a view to a profit;

(b) the parties are acting with a degree of trust and confidence in each other in carrying out the project;

(c) the alliance has one combined management structure;

[43] Jones, n 5 at 162.

[44] For example, the *Partnership Act 1958* (Vic), s 5.

[45] Cassidy J, *Concise Corporations Law* (4th ed, Federation Press, 2003) p 25.

(d) while the carrying on of a business usually requires a degree of repetition, depending on the scope of the project, it has been held that parties undertaking a single venture may still be "carrying on a business" together;[46] and
(e) the parties agree to enter into a form of profit sharing via the gain-share, pain-share mechanism.

Conversely, the following factors suggest the absence of a partnership:

(a) each party derives a separate benefit from the alliance (ie the owner gets the benefit of the outcome and the builder gets the benefit of payment);
(b) the business is not being carried on "in common" because the alliance parties are not acting as the agents of each other;[47]
(c) as the form of profit sharing in an alliance is more akin to that found in mining ventures, the relationship is more analogous to a joint venture rather than a partnership;[48] and
(d) the alliance agreement may expressly state that the parties are not acting in "partnership".[49]

On balance, it is likely that a court would characterise an alliance as a joint venture rather than as a partnership per se. Therefore, it is unlikely that fiduciary duties will be presumed to exist at law as a consequence of a partnership but the characteristics of a partnership may be present in a joint venture (as discussed below).

Is an alliance a type of relationship that may otherwise give rise to fiduciary duties?

Notwithstanding that the alliance may not be a relationship that is deemed to be fiduciary, fiduciary duties may still arise if warranted by the characteristics of the alliance relationship.

One of the factors militating against the imposition of fiduciary duties in an alliance is the fact that the parties have entered into a commercial arrangement at arm's length. In such circumstances, the courts will be reluctant to impose fiduciary duties. As Tipping J noted in *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 at 462:

> [E]quity must tread carefully when intervening in commercial relationships. There is no room for such intervention on a tender moralistic basis. The circumstances must be such as to call loudly for equitable relief.

However, this is not decisive. As Mason J held in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 99:

> The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

Another factor against the imposition of fiduciary duties in an alliance is the fact that the parties have deliberately chosen a contractual relationship other than a partnership. For example, in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 96, it was noted that "[m]any joint ventures are set up particularly because the venturers do not wish to be bound by obligations akin to those of partners".

Conversely, fiduciary duties have been found, on a number of occasions, in commercial joint venture agreements. These are common in the mining industry and share a number of characteristics with alliance agreements.

It is not easy to characterise a relationship as a "joint venture". The High Court has stated that the "borderline between what can properly be described as a 'joint venture' and what should more

[46] See, eg *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321.

[47] It was held in *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1 that the test of whether a business is being carried on in common is whether the person actually carrying on the business does so as the agent for all the persons alleged to be partners: see *Halsbury's Laws of Australia* (Butterworths, subscription service) at [305-10].

[48] See *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 15.

[49] See *Mount Isa Mines Ltd v Seltrust Mining Corp Pty Ltd* (unreported, SC, WA, Rowland J, No 1614/85, 5 July 1985).

properly be seen as no more than a simple contractual relationship may on occasion be blurred".[50] The concept has been described as "an association of persons for the purposes of a particular … commercial … undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill".[51] On this basis, it may be argued that an alliance should be characterised as a form of joint venture.

If the alliance is in fact a joint venture, it may be arguable that the form of the venture gives rise to fiduciary duties. For example, in *United Dominions Corp Ltd v Brian Pty Ltd*, the High Court held that "whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken".[52] In that case, a fiduciary relationship was established because the joint venturers entered into the enterprise with a view to profit, the profit was to be shared and the property of the joint venture was to be held on trust for each of the parties. The court held that the policy of the joint enterprise was "ultimately a matter for joint decision". There are some similarities between this case and an alliance in that there is a mechanism for sharing in the success of the project by the gain-share, pain-share procedure and decisions of the alliance are determined jointly by the alliance board.

Another key indicator of a fiduciary relationship in a joint venture is the presence of mutual trust and confidence. In *Marr v Arabco Traders Ltd* [1987] 1 NZBLC 102,737 at 102,745, Tompkins J said that "if the course of dealing indicates an intention to carry out a common purpose by a joint association in a way that involves mutual confidence in each other, fiduciary duties may well result". This is also a view that has been espoused by Dawson J in *United Dominions* where his Honour held that "the relationship between participants in a joint venture … may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another".[53] It is arguable that, since the parties to an alliance agreement have given up the right to take legal action against each other, this is indicative of a high level of mutual trust and confidence. Further, the alliance objectives set out in the alliance agreement may expressly state that the parties place mutual trust and confidence in each other.

The level of control that one party asserts over another is also a key factor. For example, in *Aqua Max Pty Ltd v MT Associates Pty Ltd*,[54] Gillard J referred to an article by McPherson J[55] that suggested that "a common characteristic [of fiduciary relationships] is that the fiduciary has conduct, and to that extent some control over the whole or a specific segment of somebody else's affairs". His Honour found that the joint venture agreement in *Aqua Max* "gave each [party] the required degree of control over one part of the venture, and which meant that each party relied upon the other party to perform its role in good faith and for the common good". Given the dispute resolution procedure provided for in an alliance agreement, it is arguable that such a degree of control is also present in alliances.

On balance, it will be a matter of fact and degree whether an alliance agreement gives rise to fiduciary duties. A court will have to weigh the fact that the parties are sophisticated commercial entities lacking in "vulnerability" against the joint nature of the relationship. It is submitted that a court should be wary to impose fiduciary duties too readily in what is, essentially, a mercantile arrangement that does not "call loudly for equitable relief".[56]

CONCLUSION

Alliancing may be an attractive form of relationship contracting when applied in the right circumstances and where the parties are genuinely committed to the principles underlying the

[50] *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10 (Mason, Brennan and Deane JJ).

[51] *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10.

[52] *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11.

[53] *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 16.

[54] *Aqua Max Pty Ltd v MT Associates Pty Ltd* (unreported, Supreme Court of Victoria, 19 June 1998).

[55] McPherson J, "Fiduciaries: Who Are They?" (1998) 72 ALJ 288.

[56] *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 at 462.

approach and understand the intended alliance dynamics. However, the objectives and structure give rise to some significant legal issues. In particular, this article has considered the enforceability of no blame, no dispute clauses, the possible implication of obligations of good faith, and the potential for fiduciary duties to be found between the alliance partners. It is imperative, therefore, that the parties to an alliance understand these issues and take the necessary steps to ensure they are adequately addressed, both in the alliance agreement and while the project is being carried out.