

OPTIMISING CONTRACTING FOR ALLIANCES IN INFRASTRUCTURE PROJECTS

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I. INTRODUCTION

One of the main problems the construction industry is faced with worldwide is that the costs of complex projects such as infrastructure works always end up being much higher than planned. A second problem is that such projects are often more time-consuming than projected. Conflicts are an important reason for budget overruns and delays.

A solution to the problem is sought in encouraging the parties to adopt a more co-operative attitude in order to improve efficiency in terms of costs, time and quality. Alliancing is one of the most well-known forms of co-operation pursuing those objectives. In theory, it is a promising form. In practice, however, there is no guarantee it will lead to substantial cost and time savings. In our opinion there is an essential mismatch between the idea and the structure of the alliance form and the way in which legal (construction) contracts and legal thinking in general are structured. The concept loses its strong points when it is translated into a legal document. As a consequence, alliance contracts constitute a threat to an alliance rather than support.

A legal framework is needed that effectively supports the alliance form and prevents parties from reverting to their former unco-operative and adverse behaviour when conflicts arise. In this article, we suggest incorporating negotiation- and conflict-theory insights into alliance contracts and the contracting process. We also make some preliminary propositions for more “co-operative contracting” in alliances.

II. ALLIANCES

1. The alliance between the client and the contractor

Alliancing and partnering are two terms that are often used in articles on the subject of co-operation. There is little consensus on what these terms

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mean exactly. Sometimes they are used as synonyms,¹ sometimes as two different terms. In the latter perspective, the term alliancing refers to a form of co-operation that is established by means of binding contract and the term partnering to a legally non-binding form of co-operation.² There is a third concept, namely, that alliancing is a type of partnering; this seems to be the generally accepted meaning.³ There, the key element is the intention of parties to co-operate on an equal basis. What distinguishes alliances from partnering is the fact that the parties choose to divide certain or all gains and losses of a project between them. We take this meaning of the terms “alliance” and “alliancing” as the starting point in this article.

We will focus on project alliances; more specifically, on alliances that replace the traditionally vertical relationship between the client and the contractor by a horizontal one.⁴ This form of alliance provides a model in which parties are on an equal footing, as partners co-operating in order to gain benefits from a project.⁵ They are stakeholders in employed activities by both, sharing profits and losses.⁶ Keeping the costs low is in the interest of both parties. This form has been applied relatively successful in the US and Australian construction industries and is currently being tried out in Western Europe.⁷

2. Some basic ingredients

In literature alliancing is described as a “pot-pourri” of ways of working together.⁸ In general, the ingredients are: strong focus on collective objectives; the sharing of gains and losses; risk and reward systems; a focus on innovation and continuous improvement; the aim of completing the project according to an acceptable standard; the agreement of parties not to claim against each other; a fully co-operative team attitude; access to “the books” for everyone; and a high level of flexibility.⁹ The most important

¹ See, e.g., B Scott, *Partnering in Europe: Incentive-based Alliancing for Projects* (London: Thomas Telford, 2001); B Colledge, “Obligation of Good Faith in Partnering of UK Construction Contracts” [2000] ICLR 175–201.

² See D Jones, “Project Alliances” [2001] ICLR 411–436.

³ See A Crane and R Saxon, “The Future”, in D Jones, D Savage and R Westgate, *Partnering and Collaborative Working* (London: LLP, 2003), pp. 55–56; M A B Chao-Duivis and A Z R Koning (Eds), *Veranderende rollen. Een inleiding in nieuwe contractvormen in het bouwrecht* (Deventer: Kluwer, 2001), pp. 361–401.

⁴ See for an introduction to project partnering, R B Hellard, *Project Partnering: Principle and Practice* (London: Thomas Telford, 1995) and J Bennett and S Jayes, *Trusting the Team: The Best Practice Guide to Partnering in Construction* (London: Centre for Strategic Studies in Construction, 1995).

⁵ See J J Myers, “Alliance Contracting: A Potpourri of Proven Techniques for Successful Contracting” [2001] ICLR 56–82, at pp. 58 *et seq.*

⁶ See, for example, J J Myers, *supra* note 5, at p. 56.

⁷ See, for a list of the countries where the concept is applied, e.g., C Skeggs, “Project Partnering in the International Construction Industry” [2003] ICLR 457–482, at pp. 456–458.

⁸ Term from J J Myers, *supra* note 5.

⁹ See *ibid.* at pp. 58–60.

organisational body is the alliance committee. The client and the contractor—and sometimes also the designer and the main sub-constructors—constitute the committee that manages the project. They discuss and decide on the criteria for a reasonable target price and time of completion.¹⁰

3. A successful alliance and the contract

The above-mentioned ingredients need to be present in an alliance, but they do not guarantee that an alliance will be successful.¹¹ In the US and other countries in the world, the form has worked out well many times. However, in other instances, despite the presence of the above-mentioned ingredients, things went wrong.¹² It seems that the success of an alliance today depends greatly on two factors. Luck is the first. As long as serious risks do not materialise and no setbacks occur with substantial financial consequences, there is no real threat of serious delay and no extra costs to be borne by the parties, so there is no real reason for discussion or conflict. The second factor is what might be called a “fluent human interaction”.¹³ Are parties capable of working together in a co-operative manner all through the project?¹⁴ Do parties have confidence in each other? Are they committed and willing to share information among project participants? Do the personalities of project managers agree?¹⁵ If the parties communicate well and solve issues among themselves, co-operation may be

¹⁰ See, for a more extensive listing of alliances and the alliance process, e.g., D Jones, *supra* note 2. To create a strong “team feeling”, it helps to include as many parties as possible in the alliance structure. However, this does not mean that they all have to be parties to the contract; see also K A Godfrey, *Partnering in Design and Construction* (New York: McGraw-Hill, 1996), p. 13.

¹¹ Of course the word “successful” is open to several interpretations. Criteria often used are, e.g., meeting the time-schedule, cost control, good technical performance, meeting customer needs, avoidance of litigation and overall positive results. See also E Larson, “Partnering in Construction Projects: A Study of the Relationship Between Partnering Activities and Project Success” (1997) 44 *IEEE Transactions on Engineering Management* 188–195.

¹² See, for examples from the Australian and US construction industry, R J Stephenson, *Project Partnering for the Design and Construction Industry* (New York: John Wiley and Sons, 1996); J Barlow, M Cohen, *et al.*, *Towards Positive Partnering: Revealing the Realities in the Construction Industry* (Bristol: Policy Press, 1997); and case studies described by D Jones, *supra* note 2.

¹³ See also J Bennett and S Jayes, *The Seven Pillars of Partnering* (London: Thomas Telford, 1998); K A Godfrey, *supra* note 10, for a list of factors that determine this “fluent human interaction” and H J Schultz and V P Unruh, *Successful Partnering: Fundamentals for Project Owners and Contractors* (New York: Wiley, 1996).

¹⁴ Training programmes have been developed to stimulate such an attitude and co-operative behaviour in general; see, e.g., J Critchlow, *Making Partnering Work in the Construction Industry* (Oxford: Chandos Publishing, 1998), pp. 63–69; and also C L Noble, “Friend of the Project: New Paradigm for Construction Law Services in a ‘Partnered’ Construction Industry” [1998] *ICLR* 78–84.

¹⁵ See, e.g., YL Doz and G Hamel, *Alliance Advantage* (Boston: Harvard Business School Press, 1998), p. 256; M W Mutek, “Implementation of Public-Private Partnering” [2001] *Public Contract Law Journal* 557–583.

enhanced. In such a situation, an alliance team will be able to complete the project, often saving an enormous amount of money and time.¹⁶

However, when one or both of these factors is lacking, the situation will be different. Parties may run out of luck: things may go very wrong, mistakes with great financial consequences may be made, risks materialise or defects occur and the project's budget is overrun by several millions. Discussions will arise about the division of these costs.¹⁷

When conflicts arise and great amounts of money are at stake, the parties will be tempted to shift from a collective alliance attitude to an individualistic attitude. Co-operation can quickly be replaced by competition.¹⁸ Trust and understanding between the parties may disappear and minor irritations may grow into serious conflicts as soon as the parties start talking in terms of "responsibilities" and "blame". Then suddenly legal documents are relevant. The two types of documents used mostly in alliancing are the alliance agreement or charter and the legal contract. The main ideas behind an alliance are usually laid down in a separate document or "charter", which exists next to the document stating the parties' rights and obligations; the actual contract. A charter usually does not have legal status.¹⁹ In a conflict situation, parties, their organisations, their investors and/or lawyers often prefer to take a legal contract perspective. They try to limit the damage by covering themselves, digging in and hiding behind contract terms about the division of risks and responsibilities. Long discussions and legal proceedings are often the result. This all may seriously damage the alliance.

III. CONTRACTS AND ALLIANCES

1. What kind of contract is needed?

What should an alliance contract contain? In our opinion, the alliance should always be backed by a contract to help it stay on a co-operative course when things go wrong and conflicts arise. Infrastructure projects in particular are surrounded by risks and external influences that are difficult to control. However, the preferred way in which parties should react to

¹⁶ See for examples, E Larson, *supra* note 11, at p. 194; see also D Jones, *supra* note 2, at p. 190: e.g. the Bonneville Navigation Lock Project and other projects saving up to 11% with a profit increase up to 9%.

¹⁷ About the disappearing "team feeling" as soon as serious problems surface, see also E Larson, *supra* note 11, at pp. 417 *et seq.*

¹⁸ The worsening atmosphere—often the result of legal proceedings—may lead to even more conflicts.

¹⁹ See, for an overview of the advantages and disadvantages of (combinations of) contracts and charters, S Roe and J Jenkins, *Partnering and Alliancing in Construction Projects* (London: Sweet and Maxwell, 2003), at pp. 33–56; on charters, see, e.g., J Critchlow, *supra* note 14, at p. 30. For examples, see R J Stephenson, *supra* note 12, at p. 386; see, recently, C Skeggs, *supra* note 7, and A Chew, "Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services in Australia: An Overview of Legal Issues" [2004] ICLR 319–355 at pp. 526–527.

them can be prescribed in a contract. Therefore, alliance contracts should be drafted in such a way that parties are stimulated to take a co-operative approach at all times. This requires a change in the way contracts are drafted. Generally contracts rather facilitate competition and escalation of conflicts.

2. Incentives for co-operation

Some steps in the right direction have already been made. Standard contracts for alliance projects include risk- and benefit-sharing clauses, which enable the alliance committee to determine benchmarks for time, cost, safety, environment and community relations.²⁰ Penalties when budget or completion time is overrun and bonuses when the parties stay within the budget and/or time are other incentives that may be included in contracts.

However, these incentives for co-operation may not always be strong enough to counterbalance all the other forces that work in the opposite, competitive direction when things get ugly. We think that, apart from economic incentives, other incentives are necessary to keep contract parties on the right, co-operative track when conflicts arise. The success of an alliance, as we assumed, is primarily determined by factors that determine “fluent human interaction”.²¹ Current alliance contracts usually refer to those factors, but the extent to which they actually play a role in an alliance depends for an important part on the ability of management to build and maintain them during a project.

We suggest that management use the support of an alliance contract in which some of these human factors are included, which may thus act as incentives. In our search for ways to stimulate parties to be co-operative other than by means of economic or legal incentives, we found that negotiation and conflict theory provide directions and valuable insights. Below, we will discuss some views that we consider relevant and give suggestions as to their incorporation in alliance contracts and in the contracting process.

3. Co-operation in negotiation and conflict theory

In the negotiation and conflict literature, specific attention is paid to co-operation and the variables that influence the level of co-operation

²⁰ Some agencies have published handbooks on drafting partnering or alliancing contracts; see, e.g., the ACA’s PPC 2000 (amended 2003), the ECC’s Option X12, the JCT’s Non-binding Charter for Single Projects the Be Collaborative Contract. See for an analysis of these standard contracts, J Hosie, T Corcoran, and D Harvey, “Time, Cost and Quality”, in D Jones, D Savage and R Westgate (Eds), *Partnering and Collaborative Working* (London: LLP, 2003), pp. 153–190; also D Mosey, “The First Standard Form of Contract for Project Partnering”, paper available at the website of the Society of Construction Law (2001); and M W Mutek, *supra* note 15, on new contract forms for alliances.

²¹ Factors such as equality, flexibility, striving for mutual goals and openness (essential to the success of an alliance) are not incorporated in the contract.

between the parties. Deutsch is regarded as one of the main authors in this field.²² He made a distinction between co-operation and competition in negotiation and conflict resolution. He—and others after him²³—distinguished factors that to a great extent determine whether the atmosphere is competitive or co-operative. The factors that in our opinion are relevant in contracting are as follows:

- People's *motives* are an important factor. Some people aim at making profit for themselves, others aim at profits for the collective. Deutsch predicts that people with a “pro-social” (maximising a joint outcome) rather than a competitive (achieving an advantage over the other) orientation are more likely to develop positive interpersonal attitudes and perceptions and seek to understand the views of others and to make concessions. They are more constructive in negotiations, are more willing to discuss problems and are more open to exchanging information.²⁴
- People's *views of how their goals are linked*. People who view their goals to be positively rather than negatively linked are more likely to trust each other, to discuss differences of opinion in an open-minded fashion and to integrate interests and aspirations into settlements that yield high satisfaction for both.²⁵
- People's *behaviour towards conflict*. Different views on conflicts can be subdivided into “co-operative conflict” as opposite to “competitive conflict”. The way in which a person views a conflict affects his expectations, his communication and problem-solving methods and his productivity. This again influences the resolution of conflicts.²⁶
- People's preferred *negotiation—or conflict management—strategy*. Five basic strategies can be identified: avoiding, adapting, problem-solving, compromising and contending. Problem-solving is helpful when positions are too important to compromise. It is a particularly

²² See, e.g., M Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (New Haven: Yale University Press, 1973); M Deutsch, “Constructive Conflict Resolution: Principles, Training and Research” (1994) 50 *Journal of Social Issues* 13–32; and also D Tjosvold, *Learning to Manage Conflict: Getting People to Work Together Productively* (New York: Lexington Books, 1993); C K W de Dreu and P van Lange, “Impact of Social Value Orientation on Negotiator Cognition and Behaviour” (1995) 21 *Personality and Social Psychology Bulletin* 1178–1188.

²³ See, e.g., D Tjosvold, *supra* note 22; C K W de Dreu and P van Lange, *supra* note 22.

²⁴ M Deutsch (1994), *supra* note 22; D G Pruitt, “Social Conflict”, in D Gilbert, S T Fiske and G Lindzey (Eds), *Handbook of Social Psychology* (New York: McGraw-Hill, 1998, 4th ed.), vol. 2, pp. 470–503; C K W de Dreu and P van Lange, *supra* note 22.

²⁵ See M Deutsch, “A Theory of Cooperation and Competition” (1949) 2 *Human Relations* 129–152. See also D Tjosvold, “Conflict within Interdependence: Its Value for Productivity and Individuality”, in C K W de Dreu and E van de Vliert (Eds), *Using Conflicts in Organizations* (London: Sage, 1997), pp. 23–37.

²⁶ In social psychology, this concept is called “constructive controversy”. See, e.g., D Tjosvold and R H G Field, “Managers Structuring Cooperative and Competitive Controversy in Group Decision Making” (1984) 1 *International Journal of Management* 26–32; D Tjosvold and C K W de Dreu, “Managing Conflict in Dutch Organizations: A Test of the Relevance of Deutsch's Cooperation Theory” (1997) 27 *Journal of Applied Social Psychology* 2213–2227.

useful approach in situations in which one wants to obtain information from the other party, to integrate ideas of people with different perspectives, to stimulate commitment via consensus or to discuss feelings that are in the way of good understanding. Problem-solving in those cases helps people to reach integrative, win-win solutions.²⁷

- *The level of transparency and clarity with reference to intentions.* Transparency in goals and intentions facilitates trust, which again facilitates co-operation.²⁸ The clearer the general attitude is, the more information is exchanged openly and, the more procedures are clear and specific, the better the co-operation environment will be.²⁹

This leads to the following principles which may be incorporated into the contracting process and the contract: select people who are co-operation orientated; make goals positively interrelated; stimulate co-operative behaviour; strive for problem-solving as the main negotiation and conflict-management style; and be clear and transparent. In the next section, we will not try to introduce a completely new type of contract; rather, we will try to outline how negotiation and conflict principles may be integrated into a contracting process and a contract.

IV. CONTRACTING FOR CO-OPERATION IN ALLIANCES

In this section we will present an overview of the way in which the above-mentioned principles may be incorporated into the contracting process for complex infrastructure works.³⁰ To do this in an orderly manner, this section is subdivided into the following subsections: (1) Negotiating the contract, (2) Contracting, (3) Conflicts and conflict resolution.

²⁷ Research indicates that problem-solving leads to more creative solutions, greater satisfaction and the chance of new conflicts being smaller than with the other strategies: D G Pruitt and P J Carnevale, *Negotiation and Social Conflict* (Pacific Grove: Brooks Cole, 1993). See, on negotiation strategies, for example, D G Pruitt, *supra* note 24, at p. 480. An essential element in problem-solving is the focus on one's own interests and, at the same time, concern for the interests of others while maintaining a flexible attitude: J Z Rubin, D G Pruitt, and S H Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (New York: McGraw-Hill, 1994).

²⁸ Conditions that encourage co-operation are the other party's dependence on itself and the other's personality being portrayed as co-operative. Research also indicates that people who wish to co-operate may act as if there is a strong expectation that the other will reciprocate; see, e.g., D G Pruitt, *supra* note 24, at p. 475.

²⁹ Research indicates that exchanging information about priorities and basic interests produces win-win solutions: K E Kemp and W P Smith, "Information Exchange, Toughness, and Integrative Bargaining: The Roles of Explicit Cues and Perspective Taking" (1994) 5 *International Journal of Conflict Management* 5-21; D G Pruitt, *Negotiation Behaviour* (New York: Academic Press, 1981).

³⁰ We limit our description to the interaction between the key players, the client and the contractors. Subcontractors can be involved on the same basis.

1. Negotiating the contract

1.1 *Set the tone*

In contracting in the construction industry, the client usually takes the initiative. He issues the invitation to tender or approaches contractors in another way to invite them to submit tenders. He gives more or less specific instructions concerning the quality of the work expected. He is in the position to “set the tone” of the interaction.³¹ Apart from technical descriptions of the end product and the contract form preferred—alliancing—he may do this by informing potential partners about the way in which he expects parties to interact, so to speak, on a daily basis. He may take the principles mentioned above as a starting point, present a specific explanation of why they are important and describe them in more detail.

In being open about his intentions and demands, the client in fact makes a first selection of potential contractors. By adhering to the principles himself, he sets the tone, gives the right “co-operation” signals. Contractors who do not support the alliancing approach in the first place or think they do not fit the “partner profile” will not react. The client should be transparent about what he wants and expects and about what his motives, goals and preferred style of negotiation are.³² A highly transparent approach will also present him as a trustworthy partner, which again facilitates co-operation.

1.2 *Example: invitation to tender*

Below we will illustrate how a client may approach the contracting process. We will use the example of a client who wants a tunnel for cargo trains and wishes to apply the alliance form.

The client may be brief on technical and product details for the tunnel in an invitation to tender (to encourage creativity), but should be specific about the way in which he intends to co-operate (interaction, atmosphere) and the type of constructor in terms of human factors (negotiation style, motivation) he is looking for. As the alliance form is still relatively unknown in large parts of the world, some explanation is probably needed. Questions that should be answered are: What is understood by alliancing? (a brief description of the main elements, the organisation and the way in which problems are dealt with); What can be expected from the client and what does the client expect from the contractors? (a strong preference for co-operation, problem-solving and sharing information relevant to the solution of problems when they arise). For the sake of transparency, the client should be open to questions and clarifications, for example, by

³¹ It is very important that there is visible support from all levels of management for the alliance. Project managers must set an example and display a collaborative response to problems; see, e.g., Godfrey, *supra* note 10, pp. 104–106; E Larson, *supra* note 11, at p. 190.

³² See also B Scott, *supra* note 1, at p. 49.

organising a public meeting, which is done in practice as regards technical issues.

1.3 The selection

The selection criteria often concern technical issues, capabilities and the experience gained by the contractors in similar projects. The target price is an important aspect to take into account, but there are other factors that help determine whether parties are suitable for an alliance or not. “Soft dollar” criteria such as the party’s ideas and the culture of their organisations may serve as examples. Both parties may want to obtain information about the others’ negotiation styles and the way in which they will react in conflict situations. This information will give an indication of what co-operation with a particular party will be like. One may not want to co-operate with a party who is inflexible in the case where a conflict arises, as such an attitude easily leads to an escalation of the conflict.

The client can stimulate a problem-solving attitude by selecting a “problem solver”.³³ The selection of a contractor with a co-operative attitude is a good start for the alliance whereas the selection of a contender could be a bad start. It would be advisable to do some research into the negotiation and conflict-management styles of parties, but also their motives and perceptions of the future co-operation. A characteristic that has proven to enhance co-operation is the ability to view goals to be positively rather than negatively linked.³⁴ People with a co-operative view with regard to conflicts are usually better able to trust each other, to discuss differences of opinion in an open-minded fashion and to integrate interests and aspirations into settlements that are satisfying for both parties.

1.4 Example: a tool in the selection phase

The client may present contractors with a case study as a way of finding out about their attitudes and conflict-management styles. Their preferred approach in situations of conflict, in negotiation processes and when drafting contracts can thus be tested. All candidates may be tested on their “alliance qualities” in a kind of assessment centre.³⁵ The criteria should be objective. An outside specialist organisation may be involved to test both the

³³ On the selection of the right person, see also W C Ronco and J S Ronco, *Partnering Manual for Design and Construction* (New York: McGraw-Hill, 1996) at pp. 155–175.

³⁴ See M Deutsch (1973), *supra* note 22.

³⁵ For literature on contractor selection, selection criteria and evaluation factors to rank bidders, see, e.g., G D Holt, “Applying Clustering Analysis to Contractor Classification” (1996) 31 *Building and Environment* 557–568 and A M Alsugair, “Framework for Evaluating Bids of Construction Contractors” (1999) *Journal of Management in Engineering* 72–78. However, the factors often mentioned only concern technical, financial and management aspects. The training material used in programmes for future alliance partners might provide useful “soft dollar” selection criteria for an assessment centre; see on these training programmes, e.g., J Critchlow and C L Noble, *supra* note 14. On selection, see also B Scott, *supra* note 1, at pp. 52–60.

candidates and the client. The contractors can be rated on an “ideal candidate” scale. Valuable information on the match between personalities and on the ideal project managers can be collected.³⁶ The scores of the candidates in the assessment may be decisive along with other selection criteria such as price and previous experience with the construction of tunnels. The characteristics that make a contractor both a good co-operator and a good match with the client can be taken into account.

Possible test questions the client may use are: How would you deal with a situation where a serious risk materialised? (What steps would you take? What would the timeframe be? What third parties would you involve?) Further, one could ask for examples of their ability to understand the requirements of a project alliance and operate according to its main elements (examples of conflict or crisis situations, general atmosphere of interaction, negotiation and conflict-management styles).

A clear explanation of the choice to the other, non-selected, contractors after the selection may help prevent discussions and conflicts about the selection process and the criteria applied.

2. Contracting

2.1 Drafting the contract

After a contractor has been selected, the definitive form of the alliance needs to be decided upon and a contract needs to be drafted. During the selection process the parties have been able to gain insight into each other’s values, attitudes, intentions, problem-solving approaches and their ideas about co-operation in general. In the contracting process, they are challenged to incorporate their ideas into a contract. What may help to form and maintain the alliance is, in the first place, the introduction of mechanisms that stimulate co-operative behaviour; for example, mechanisms that make goals into interrelated ones and stimulate problem-solving as a negotiation and conflict-management style. Alliancing requires an integrative (win-win) approach to contracting, not a competitive approach.³⁷

Co-operation can be stimulated both in the process of drafting the contract and in deciding on the content of the contract. The contract is preferably drafted in such a way that the parties’ goals are positively interrelated. (If one wins, the other wins.) The idea of risk and gain sharing,

³⁶ It would be good if not only the right person be selected as the project manager, but also that this person be stimulated to stay on the project until its completion. If replacement is necessary, the new candidate should meet the same criteria as his predecessor. This could be specified in a contract.

³⁷ Integrative agreements are believed to last longer and contribute more to the relationship than compromises; D G Pruitt, *supra* note 24. Such contracting may take place following, for example, the Harvard negotiation principles: focus on the interests of both parties, brainstorm about possible solutions and develop objective standards for deciding what is fair in the situation. Harvard negotiation is one of the most well-known forms of integrative negotiation; see, e.g., R Fisher, W Ury and B Patton, *Getting to Yes; Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991).

as it is applied in partnering and alliancing contracts nowadays, fits this approach. Transparency is important in the process of contracting. The process and especially the information exchange should be open and the contract and its terms should be clear and transparent. If the people that will be bound to the contract are involved in its drafting, misunderstandings about its interpretation may be prevented and the contract stands a good chance of being a sound one. They are the ones that make or break the alliance and have to live up to what has been agreed and laid down in the contract. Involving them in the drafting process of a contract probably also has a positive effect on the intensity of their commitment to the contract.

We think parties entering into a contract should not attempt to regulate every possible aspect. In a complicated business such as construction, experience shows, that new risks that neither of the parties had thought of always materialise. Therefore, with regard to issues they are not able to agree upon in a contract, it would be advisable that the parties agree on a procedure to be followed if and when such issues arise. This would prevent the contract parties from losing the efficiency advantages of alliancing by embarking upon long drafting processes. This would also help maintain a flexible organisation that allows for a flexible and more tailor-made approach to individual problems. In order to be able to draft such contracts, lawyers should be informed and involved from the very beginning of the tendering and negotiation process.³⁸

2.2 Example: the contract

A document may be drafted that the different trade groups can contribute to and can understand.³⁹ Such a contract may resemble a manual. The client that wants a tunnel to be constructed may organise the process of contracting in a number of steps. First, groups consisting of representatives from both the client's organisation and that of the contractor's try to identify the interests involved in the project (client, contractor, other parties) and the problems the project may be faced with. What risks may materialise during construction? What defects? When all possible interests and problems have been identified, the next step may be to make an inventory of the possible solutions that are considered to fit the alliance approach best. In order to be able to anticipate potential problems in relation to these interests brainstorming about these issues may be a good method. Possible solutions used in practice and referred to above are risk-sharing (the question to be answered by the parties is to what extent) and

³⁸ They need to be familiar with the ideas and goals of the alliance and, thus, of the contract in order to prevent, after the parties have agreed on the basic terms of a contract, lawyers rewriting it in such a way as to provide their clients with maximum legal protection, which makes the contract competitive again.

³⁹ On the importance of writing a document in one's own words and thus enhancing one's commitment to the project and providing a high level of clarity, see also the *BE Collaborative Contract: Guide to Use* (Be, 2003), pp. 3 and 5.

creating financial incentives such as bonuses and penalties (the questions to be answered by the parties are when, for what reason and what amount).⁴⁰

For the issues that might cause conflicts, the parties may agree on an objective procedure. The parties may, for example, agree beforehand that after one round of negotiations a part of the issues that parties cannot agree upon is left to third parties to decide (one may think of technical issues on which parties have differences of opinion), whereas other issues concerning differing interests are to be discussed within the parties' organisations at a higher level.⁴¹ In this way, risks that may never occur need not be discussed. Thus, time can be saved for thinking about and drafting a procedure to solve such issues if and when they arise.

The provisions of the contract may, as far as possible, be stated in terms of interests, not in terms of duties and rights. The mutual goals of the contract parties and third parties should be identified and be paramount. The contract may, for example, state what the parties wish to achieve within a specific time frame.⁴²

Finally, it seems advisable to evaluate and adjust the contract regularly. In this way, the document remains up to date. Relevant questions when updating a contract may be: Should conflict procedures be updated? What works and what does not? Should more or fewer meetings be organised? Should new terms be added? (Certain issues need stricter regulation because they may lead to serious conflicts.) Suggestions should be taken into account during the project and be incorporated into the contract during evaluation.

2.3 Example: provisions about quality

In order to prevent differences of opinion about the level of the quality of the tunnel that should be reached, it is important that the parties agree on it before the project starts. Contracts in which the level of quality for parts of a tunnel are drafted in detail do not leave any creativity for the contractor. In our opinion, the contract should leave some freedom for creative solutions. This can be done, by stating the future function of the end product and the criteria it has to meet in order to fulfil this function.

⁴⁰ See B Scott, *supra* note 1, at pp. 3 and 74. The risk with bonuses is, however, that the contractor may count on getting them and allow for them in his tender.

⁴¹ Empirical research indicates that people are in general willing to look for compromises or integrative solutions in cases of conflict about interests. When differences of opinion exist, they will look for the "truth", for who is right and in such situations they will be much less prepared to trade: C K W de Dreu and P van Lange, "Social Interaction: Cooperation and Competition", in M Hewstone and W Stroebe (Eds), *Introduction to Social Psychology* (Oxford: Blackwell Publishers, 2001), pp. 341–370.

⁴² Interests can be, for example "keeping costs low", "having a clear picture of the risks that may materialise" or "dealing with conflicts in the best, most efficient way for the alliance". For examples of legally sound contract terms that mainly state interests and not duties and rights, see also A Chew, *supra* note 19, at p. 328.

For example, the end product is a tunnel for cargo trains. The requirements the alliance has to meet in order to make the end product function satisfactorily in terms of efficiency, durability and the so-called target performance criteria are, for example, the maximum noise level for the surrounding area, the minimum capacity of the tunnel, the maintenance-free period and the security level.⁴³ This may also be done for a future function of parts of the tunnel such as security doors. What is the security level they have to meet? Along with specific arrangements concerning the timeframe and general procedures that cover issues such as safety, the methods and materials used in the building process are left to the contractor to decide upon. If meetings are organised regularly, the client can ask the contractor to explain his next steps and thus provide transparency.

Another dilemma in relation to quality concerns the question of what expenses parties can submit to the alliance for work carried out by them. To tackle this problem, rates could be agreed upon beforehand, such as hourly rates for employees and tables with rates for materials combined with rates for the processing of those materials.⁴⁴

3. Conflicts and conflict resolution

3.1 Conflicts and procedures

Conflicts may arise during selection, during contracting, during construction and afterwards. In order to prevent deadlock and delay, a swift and harmonious conflict-resolution process is an essential ingredient of the alliance contract. However, a certain level of conflict may have positive effects. It may stimulate information processing. Suppressing conflicts may have negative effects on the quality of decision-making.⁴⁵

According to negotiation theorists, co-operative behaviour towards conflict should be stimulated. Parties with a co-operative attitude are likely to

⁴³ See, e.g., the Dutch Bouwbesluit, which provides for functional descriptions along with certain demands. They refer to specific NNI/DIN standards that apply: *Het nieuwe Bouwbesluit. Anders, maar wel eenvoudiger* (Den Haag: Ministerie van VROM, 2001). The criteria may be used to judge the end result and may be used to assess gains and losses. On the criteria for judging a project, see also B Scott, *supra* note 1, at pp. 75 *et seq.*

⁴⁴ On this problem, see also Van den Berg's comparison of two contracts used in alliances in the Dutch construction industry: M A M C Van den Berg, "Alliancing" (2002) 39 *Bouwrecht* 835–857, at pp. 853–854.

⁴⁵ See C K W de Dreu, "Productive Conflict: The Importance of Conflict Management and Conflict Issue", in C K W de Dreu and E van de Vliert (Eds), *Using Conflicts in Organizations* (London: Sage, 1997), pp. 9–22. Suppression may lead to "groupthink", lack of creativity and innovation, and enhanced escalation in the long run. Stimulation may promote mutual understanding, enhance employee performance, reduce free-riding and enhance creativity and the quality of decisions: J L Hocker and W W Wilmot, *Interpersonal Conflict* (Dubuque: Brown Publishers, 1991).

engage in constructive conflict-resolution processes.⁴⁶ The more open information exchange is, the more constructive negotiation will take place and the more often the parties will arrive at mutually profitable agreement.⁴⁷

The escalation of conflicts and discussing them take time and money and are harmful to the parties' trust in each other. If a conflict escalates, it is no longer constructive, so contending, as a conflict-management style, should not be stimulated.⁴⁸ Adapting and avoiding may result in loss of innovation potential and criticism. Compromising is more constructive, but problem-solving—searching for integrative, win-win solutions—in issues that matter is the best way to keep co-operation going and reach win-win outcomes. The way in which a conflict is perceived affects expectations, communication, problem-solving methods, productivity, etc. Defining conflicts as common problems is constructive in this light. Agreeing on sharing risks can do this, as risks are an important source of conflict.

Conflict resolution procedures in the construction industry usually mean either legal proceedings or arbitration. These are competitive problem-solving approaches, not co-operative ones. In purely technical discussions or when minor issues are at hand, legally binding advice may be helpful. However, when issues arise in which the parties' interests differ greatly, co-operative conflict approaches are more productive and fit best into the alliancing concept. The challenge is to “fit the right resolution process to the conflict”.

Clarity and transparency are of the utmost importance. Transparency concerning potential conflicts may be obtained by stimulating information sharing. If conflicts are identified at an early stage, escalation may be prevented. The conflict-resolution part of an alliance contract should be specific. The conflict-resolution procedures and also the behaviour during and the approach to conflicts that is expected of the parties should be clearly outlined. A certain amount of freedom for parties to choose between different conflict-resolution procedures seems preferable. The use of

⁴⁶ Parties with co-operative goal interdependence may have different, conflicting, opinions about *how* to reach a specific goal but in the end strive for the same goals. People's views on how they depend upon each other influence the way in which they deal with conflicts. See, e.g., D Tjosvold, “Conflict within Interdependence: Its Value for Productivity and Individuality”, in C K W de Dreu and E van de Vliert (Eds), *Using Conflicts in Organizations* (London: Sage, 1997), pp. 38–52; see also C K W de Dreu and L Weingart, “Task versus Relationship Conflict, Team Performance, and Team Member Satisfaction: A Meta-Analysis” (2003) 88 *Journal of Applied Psychology* 741–749.

⁴⁷ W Steinel and C K W de Dreu, “Interpersonal Relations and Group Processes: Social Motives and Strategic Misrepresentation in Social Decision Making” (2004) 86 *Journal of Personality and Social Psychology* 419–433.

⁴⁸ Research by Carnevale and Probst indicates that when conflict intensifies, this interferes with cognitive flexibility and creative thinking. In other words, too much conflict blocks people's flexibility and creativity: see P J Carnevale and T M Probst, “Social Values and Social Conflict in Creative Problem Solving and Categorization” (1998) 74 *Journal of Personality and Social Psychology* 1300–1309.

objective criteria (from law, case law, norms of the industry) and transparency about the way in which they were obtained may facilitate acceptance of the procedures by the parties.

3.2 Example: dealing with defects

Co-operation in an alliance implies a collective responsibility for the construction of the tunnel that has to be done by the contractor and the client as a team. In the case of a defect in the work, reparation costs will in general have to be borne by the alliance. However, application of some principles from construction law may lead to a shift from collective responsibility to individual responsibility of the separate parties.

The first principle is that the party that opts for a certain technique or construction process that turns out to be the main source of the problems also has to bear the financial consequences of that choice. This principle can be corrected by the second principle, which is that the sheer fact that one party has been able to limit or prevent any negative implications of its choice should be taken into account when answering questions about the division of liability.⁴⁹ These principles may thus imply a shift from collective responsibility of the alliance to individual responsibility of the client or contractor when a decision, made by both parties, which resulted in a defect in the work, originates from an error made by one of the parties. If, for example, the alliance management team acted on advice, calculations or data about the site conditions provided by the client that turned out to contain errors, according to the first principle the client may be held responsible for the damage. He may try to shift his responsibility to the contractor if, on the basis of the second principle, the other party should have checked the advice, calculations or data before using them.

To limit the risk that the parties will end up in a complicated analysis of the decision-making process a “no claims” or “no blame/ no dispute clause” can be added to the contract.⁵⁰ However, parties should not be allowed to fall back at all times on the collective responsibility as this may make them careless. The no-claims clauses should draw a line at wilful default.

3.3 Example: dealing with risks

Risks constitute one of the main sources of conflict. Who should pay for risks that materialise? Several measures may be taken to prevent disputes

⁴⁹ See, on these principles, C E C Jansen, “Grondbeginselen van moderne bouwcontracten”, in M A M C van den Berg and C E C Jansen (Eds), *De ontwerpende bouw. Over turnkey en design & build contracten* (Deventer: Tjeenk Willink, 1996), pp. 47–49; N G Bunni, “Liability of Contractors for Design and Construction” [1993] ICLR 441–451 at p. 442, and M A M C van den Berg, *supra* note 44, at p. 840.

⁵⁰ See D Jones, *supra* note 2, at pp. 414 *et seq.*; see J J Myers, *supra* note 5, at pp. 57 *et seq.*; see M A M C van den Berg, *supra* note 44, at p. 854; see also, recently, A Chew, *supra* note 19, at pp. 340–341.

about these issues. The first is to make a clear inventory of potential risks, especially when there is a tight budget. Relevant questions are: What construction permits are necessary for the construction of the tunnel and how long will it take to get them? What are the exact nature of the work and the extent of the project? What are the conditions of the construction site? What is the nature of the surrounding area?⁵¹

In the target price, the contractor usually reserves a certain amount of money for risks that may materialise during the realisation phase and the consequences of which may lead to higher construction costs. In alliance contracts, some or all the risks that are usually assigned to one party in traditional construction contracts are borne by the alliance. The objective here is that both parties involved in the alliance will feel responsible. They both have to pay when the budget is overrun. This may give the parties the incentive to limit the extent to which the budget is overrun. Parties will thus be stimulated to find cost-friendly solutions. However, it does not seem efficient to shift risks towards the alliance if both parties do not at least have influence upon the chance of a risk materialising or the extent of the damage resulting from it.⁵²

The prevention of conflicts, potential risks and defects may be discussed openly and be included in the contract. Thus, the parties may agree beforehand on certain margins, for example, considering the information provided by the client about the condition of the underground. If the quality of the underground is below a certain threshold that the parties agreed to beforehand, it is the client that will bear the extra costs that a different drilling process may bring about. If the threshold is not crossed, the risk will be borne by the alliance. In this way, the work is not interrupted by debates about the party that is to bear the costs of risks that materialise; the parties will also experience an incentive to limit the risks. No blame clauses may prevent disputes and conflicts. The parties may limit the costs to be borne by the alliance by setting so-called “caps”.⁵³

3.4 Example: a possible procedure

One approach may be to establish an informal and flexible procedure along with some instructions. The conflict resolution procedure may, for example, consist of two or three steps, starting with the identification of potential conflicts. When a conflict arises, the employees involved should first try to solve it themselves. If they do not succeed, the conflict is taken to a higher level within the organisation. If also at this higher level the

⁵¹ See for a step-by-step approach from the identification of objectives to an action plan to deal with the risks, e.g., *BE Collaborative Contract: Guide to Risk Management* (Be, 2003).

⁵² See M A M C van den Berg, *supra* note 44, at p. 855.

⁵³ In some cases, the fact that all costs can be charged to the account of the alliance may be a negative incentive. Caps seem reasonable because otherwise the alliance might in fact become some kind of insurance company. On damage caps, see also B Scott, *supra* note 1, at p. 75.

conflict cannot be solved, each party may, after having informed the other, consult a third party for advice.⁵⁴

The third party may either give advice on the method of conflict resolution or facilitate resolution of the conflict at hand. The parties may leave it to a conflict specialist (a negotiation specialist, a mediator) to define the problem and to advise on the procedure to be followed in this particular case. The nature of the conflict, its urgency and complexity may be the aspects to take into account when advising on the conflict-resolution procedure to be followed.

The parties may also include a number of conflict-resolution procedures in the contract and request a conflict specialist to choose one of those procedures to deal with a particular conflict. Final Offer Arbitration may be included as a procedure by which to resolve a conflict. In this type of arbitration, the arbitrator chooses one of the two solutions the parties come up with. Mediation is another option when the conflict concerns the parties' interests. A Med-Arb (mediation-arbitration) procedure may combine the benefits of these two options, as the mediator can become an arbitrator during the procedure.

V. OBSTACLES TO OVERCOME AND CONCLUDING REMARKS

1. Early investment, public procurement rules, opportunism and the role of lawyers

There are some obstacles to overcome to make incorporation of the principles outlined for contracts and contracting successful. First, extra time and energy may be needed at the beginning of a project: a more extensive invitation to tender and selection procedure, identification of potential conflicts and the drafting of a detailed conflict resolution procedure.

Secondly, European tendering rules are at present especially quite strict and do not leave much room for open negotiations with individual contractors on a bilateral basis at an early stage.⁵⁵ This means, that if the client is a government organisation, there is not much room for improvisation. The good news, however, is that European rules concerning the

⁵⁴ Conflicts escalating to a higher level is a way of dealing with conflicts and is used successfully in several projects.

⁵⁵ Skeggs mentions European tendering rules as potential obstacles to the success of alliancing in Europe; see C Skeggs, *supra* note 7, at pp. 465 *et seq.* See also J Hosie, T Corcoran and D Harvey, *supra* note 20, at p. 188 and B Scott, *supra* note 1, at pp. 31–39.

negotiation aspect are changing.⁵⁶ Anyway, in order to deal with this effectively, it seems good to attempt to reach for the highest level of transparency in the tendering phase.

Thirdly, clients are used to selecting contractors on the basis of target price. Incorporating the soft-dollar criterion of suitability for alliances may help prevent the client from selecting claim-prone candidates and also minimise the risk that prices are set too low. The latter may be done in such a way that scoring high on the scale of the “ideal alliance partner” can make up for not being the “lowest bidder” or “economically most attractive contractor”.

Fourthly, opportunism constitutes an obstacle. Will parties resist the temptation of behaving in an opportunistic manner throughout the project? Some important measures both the client and the contractor should take are: take time to consider what alliancing and an alliance contract mean and also whether benefits can be gained by embarking on this type of contract in a particular project; involve “risk managers” such as lawyers in the first phase; gain the full support of senior management; identify potential opportunism in the other parties early in the selection phase; evaluate regularly the parties’ general “co-operation attitude”; incorporate clear dispute-resolution mechanisms.

Fifthly, lawyers’ unfamiliarity with their role in alliances may also be an obstacle. Their traditional role is to achieve the best contractual protection possible for their client. Writing an alliance contract as we outlined above requires a different way of drafting contracts. It involves a cultural change. The approach that lawyers generally take in contracts supports the competitive mind-set. In contrast to the common focus of alliances, contracts provide parties with the incentive to focus on self-interest. An extra obstacle here is that a new contract causes a level of uncertainty: how will a judge interpret new provisions and terms concerning co-operation?⁵⁷

2. Concluding remarks

In this article, we have tried to outline a framework for more optimal contracting in alliances. We started the discussion focusing on the mismatch

⁵⁶ See the paragraph on “competitive dialogue” in the Directive on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts of 31 March 2004 (2004/18/EC), which provides more freedom for the client and the contractors to negotiate at an early stage of the tendering procedure where complex infrastructure projects are concerned.

⁵⁷ The fact that there is no coherent case law about partnering provisions even increases this uncertainty. In some cases, non-binding partnering agreements are taken into account and in others they are not. The most famous example is *HHJ Humphrey Lloyd, QC*, who took into account a (non-binding) partnering agreement in *Birse Construction Ltd v. St Davids Ltd* [1999] BLR 194. See, e.g., M Milner, “Contracting for Good Faith”, in D Jones, D Savage and R Westwood (Eds), *Partnering and Collaborative Working* (London: LLP, 2003), pp. 133–152, at pp. 138–140; also D Jones and A Crane, “Role of Lawyers”, in D Jones, D Savage and R Westwood (Eds), *Partnering and Collaborative Working* (London: LLP, 2003), pp. 83–98 at pp. 84–85.

we observe between the concept of alliances and legal contracting. We have tried to give some directions on possible ways of translating alliance principles into a contracting process and a contract that actually supports the co-operative nature of the concept. Finally, we discussed some obstacles and ways of overcoming them.

We see that one of the main challenges is effectively to incorporate criteria in contracts that determine “fluent human interaction”. When conflicts arise, the parties should be stimulated to co-operate and engage in a co-operative negotiation style. Conflict-resolution strategies need to be in place to facilitate problem-solving. In our opinion, the drafters should not try to be complete in drafting the contract, but focus on the main issues and on a good conflict-resolution procedure. The contract in general should be easy to read and transparent; also issues that are not directly legally enforceable in court should be incorporated. This may ask for a change in the perception of contract negotiating, contract drafting and conflict resolution and in lawyers’ views of the role of contracts in general. Of course, there are many items that determine the success of an alliance that we did not discuss or only briefly touched upon. Further discussion and research is necessary to get an overview of all the relevant aspects which are necessary to be able to actually draft a co-operative contract.