

ALLIANCE CONTRACTING: ENFORCEABILITY OF THE CONSENSUSDOCS 300 MUTUAL WAIVER OF LIABILITY IN US COURTS

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Project alliances are on the leading edge of innovation in alternative project delivery methodologies and the mutual waiver of liability is a central canon thereof. Enforceability of this waiver, however, has yet to be tested in any court of law. If enforcement can be relied upon it has the effect of making claims and dispute resolution processes irrelevant as between the parties to the project alliance whereby the project alliance agreement fulfils one of its principal purposes, elimination of claims. This research examines the mutual waiver of liability that flows from safe-harbour decisions under the ConsensusDocs 300™ Standard Tri-Party Agreement for Integrated Project Delivery in order to determine its potential for enforceability in the courts of the US. It adopts a classic legal research methodology focused upon primary and secondary legal research sources and designed to provide balanced findings in the form of a memorandum of law. Case history findings reveal that courts have increasingly found implied duties of good faith and fair dealing in both design services contracts and construction contracts; that courts have also found fiduciary relationships in cost-plus construction contracts; but that courts have been unwilling to find fiduciary relationships in all design services contracts. Enforceability hinges upon the likelihood of courts finding common law fiduciary relationships and duties of good faith and fair dealing for both design and construction services within the express words of ConsensusDocs 300™. The research concludes with an appeal to the academic community to educate industry participants in the common law meaning of both good faith and fair dealing and the expectations of a fiduciary.

Keywords: contract law, liability, claims, fiduciary duties, good faith and fair dealing.

INTRODUCTION

The ConsensusDocs 300™ Standard Tri-Party Agreement for Integrated Project Delivery (“*ConsensusDocs 300*”) is a multi-party form contract for owner, designer, and constructor. Multi-party contracts can be constructed to form a project alliance or for integrated project delivery depending upon how the parties allocate liability between them. When the parties agree to a conventional allocation of liabilities, their multi-party agreement is said to be for integrated project delivery. But when the parties agree to a mutual waiver of liability, their multi-party agreement forms a project alliance. A mutual waiver of liability clause distinguishes the project alliance methodology from the integrated project delivery methodology. A mutual waiver of liability clause commits the parties to release each other from all liability arising out

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of the project, except for wilful misconduct (Sweet and Schneier 2013: §14.13) (AIA National and AIA California Council (AIACC) 2007: §6.1.1).

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This research examines the mutual waiver of liability that flows from safe harbour decisions under ConsensusDOCS 300 in order to determine its potential for enforceability in the courts of the United States. Its methodology is analytic, adopting a classic legal research methodology focused upon primary and secondary legal research sources and designed to provide balanced findings in the form of a memorandum of law.

BACKGROUND

ConsensusDOCS 300

ConsensusDocs 300 was first published in 2007 as one of a comprehensive set of standard form contracts endorsed by twenty-two leading U.S. contractor, specialty subcontractor, owner and academic organization under the brand name ConsensusDocs. On its introduction, two of the largest U.S. construction stakeholder organizations, the Associated General Contractors of America (the “AGC”) and the Construction Owners Association of America (the “COAA”) converted their standard construction contract sets to conform to ConsensusDocs. The ConsensusDocs coalition claims to protect the best interests of the project rather than a singular party, yielding better project results and fewer disputes (ConsensusDocs, n.d.).

ConsensusDocs 300 was itself the result of pioneering work by Mr. Will Lichtig, construction management attorney with the firm of McDonough, Holland and Allen, PC, of Sacramento, California. Mr. Lichtig, a member of the Lean Construction Institute, drafted a novel agreement that became known as the Integrated Form of Agreement (the “IFOA”). This IFOA was then successfully employed on several building construction programs, most notably those established by the Sutter Health Systems of California (AIA *et al* 2012).

A brief history of integrated project delivery

The first use of the term “*Integrated Project Delivery*” (“IPD”) has been attributed to Owen Matthews of Westbrook Air Conditioning and Plumbing. Matthews’s use of the term described a team-based, lean project delivery methodology that was first used in a chiller plant installation project in Orlando, Florida (Matthews and Howell 2005). This project involved a multi-party agreement between Westbrook and its key subcontractors. The contract with the owner was a typical design-build form of agreement as between two parties, the owner and Westbrook (Forbes and Ahmed 2011).

Although the term IPD was first used for the Westbrook project, Westbrook did not conform to what is today generally recognized as the contractual model for IPD. Today’s generally accepted contractual model for IPD has a multi-party agreement

between owner, constructor and design professional. The American Institute of Architects defines this type of IPD as

“...a method of project delivery distinguished by a contractual arrangement among a minimum of owner, constructor and design professional that aligns business interests of all parties” (AIA/AIA California Council (AIACC) 2010).

Westbrook deviated from this model in that its multi-party agreement did not involve the owner. Yet even the AIACC, despite its crystal clear definitional trilogy, acknowledges that very few IPD projects are “*pure*” IPD (AIA *et al.* 2012). Many IPD projects adapt the collaborative relationships, management and organizational strategies of IPD while foregoing the multi-party agreement.

Given an owner-included multi-party agreement as a discriminator, however, the AIA identifies nine “*pure*” IPD projects: Sutter Health’s Cathedral Hill Hospital of San Francisco and Fairfield Medical Office Building of Fairfield, California; the MERCY Master Plan Facility Remodel of Lorain, Ohio; the Lawrence and Schiller office remodel of Sioux Falls, South Dakota; the SpawGlass Regional Office of Austin, Texas; the Autodesk, Inc. interior renovation in Waltham, Massachusetts; Cardinal Glennon Children’s Hospital Expansion of St. Louis, Missouri; the St. Clare Health Center of Fenton, Missouri; and Encircle Health Ambulatory Care Center in Appleton, Wisconsin (AIA *et al.* 2012).

A brief history of project alliances

The first known project to use the term “*Alliancing*” was a small offshore oil platform built in 1990 in the Andres field, a relatively small reservoir in the North Sea about 230 km northeast of Aberdeen (Thomsen and Sanders 2011: 199). A highly successful endeavour the project came in six months ahead of schedule at a cost of £290 million against an initial estimate of £450 million (Thomsen and Sanders 2011: 200).

The oil and gas industry produced the second alliance contract, also an offshore project, the Wandoo Oil Field Project, in Western Australia. Thomsen and Sanders report that Wandoo “*...was delivered \$13 million under the target budget of \$377 million, and in 26.5 months against an industry norm of 34 months.* (2011: 200).”

The National Museum of Australia, completed in 2001, was the first major building project awarded on the basis of a joint alliance contract (Hauck *et al.* 2004). Museum construction was completed one day before its scheduled opening and the project was brought in under budget while winning many awards (Thomsen and Sanders 2011: 200).

In the U.S., the AIA has identified only three IPD projects that can be classified as project alliances: Sutter Health’s Cathedral Hill Hospital; the SpawGlass Regional Office of Austin, Texas; the Autodesk, Inc. interior renovation in Waltham, Massachusetts;

Defining features of these project alliances included the following:

- A rigorous, qualifications-based selection process;
- Substantial design development after joining the alliance;
- Joint budget and cost/time targets;
- Shared risk/reward formulas;
- Abatement of change orders; and
- Superior communication between parties (Hauck *et al.* 2004).

THE MUTUAL WAIVER OF LIABILITY

Safe harbour decisions within the project alliance

The defining features of project alliances, described above, are also defining features of IPD projects. Project alliances and IPD projects are the same if defined only by these features. A salient feature of a project alliance, however, something separates it from every other IPD project, is that the parties to a project alliance contractually agree to release each other from all liability arising out of the project, except for wilful misconduct (Sweet and Schneier 2013: §14.13) (AIA National and AIA California Council (AIACC) 2007: §6.1.1).

The mutual waiver of liability is a central canon of project alliances. If this waiver is enforceable in the courts, it makes claims irrelevant and it takes the vitality out of disputes. To accomplish that is to satisfy at least one purpose, if not the principal purpose, of a project alliance.

But is this waiver enforceable? When asked if the mutual waiver of liability clause is enforceable, Christopher Noble of Noble and Wickersham LLP in Cambridge, England, a nationally respected construction attorney and one of the negotiators of the project alliance agreement for the Nation Museum of Australia cited hereinabove, replied, “*Who the hell knows. But it sure encourages people to work out problems.*” (Thomsen and Sanders 2011: 163) It is good that owners, designers and constructors will, and have, worked out their problems. But what happens if they don’t? The mutual waiver of liability has not yet been tested in any court of law. This inquiry seeks to answer this question: Is the mutual waiver of liability enforceable in US courts?

The risk allocation choice clause of ConsensusDocs 300

ConsensusDocs 300 enables the contract drafter to choose between the mutual waiver of liability or traditional risk allocation. §3.8.2 is the risk choice clause. §3.8.2 (1) activates the so-called safe harbour clause. This safe harbour clause asserts, as follows:

“1. [] SAFE HARBOR DECISIONS For those Project risks arising from collaboratively reached and mutually agreed-upon Project decisions made by the Management Group (Safe Harbor Decisions), the Parties agree to release each other from any liability at law or in equity for any act, omission, mistake or error in judgment, whether negligent or not, acting in good faith, in performing its obligations under this Agreement except to the extent such act or omission amounts to a willful default of an obligation under this Agreement.”

IPD projects that are not project alliances will feature a more traditional allocation of risks between the parties. The AIACC expresses this in §6.1.3 as follows:

“...*The parties [to a multi-party IPD agreement that is not a project alliance] may agree to limit their liability to each other, but it is not completely waived. If errors are made, conventional insurance is expected to respond. Thus, there is a measure of traditional accountability...*”

§3.8.2 (2) activates traditional risk allocation, asserting, in pertinent part, as follows:

“2. [] TRADITIONAL RISK ALLOCATION Each Party shall be fully liable for its own negligence and breaches of contract and warranty arising from the performance of this Agreement, to the extent provided for under the law of the jurisdiction in which

the Project is located, except to the extent as otherwise limited as set forth below (Indicate Applicable Exception):“

Collaboratively reached project decisions

This inquiry starts by contemplating what is meant by collaboratively reached decisions because §3.8.2 (1) imputes these are the fountainhead of project risks. Article 3 defines collaborative principles, providing context for understanding §3.8.2. (1). In particular, §3.4 asserts, in pertinent part, as follows:

“3.4 COLLABORATIVE RELATIONSHIP The parties each accept the relationship of mutual trust, good faith and fair dealing established by the Agreement and covenants with each other to cooperate and exercise their skill and judgment in furthering the interest of the Project... The Owner, Constructor, Designer and all member of the [Collaborative Project Delivery] Team agree to adhere to principles of collaboration based on mutual trust, confidence, good faith and fair dealing...”

Project Alliance, has been described by others, as follows:

“...an agreement between entities which undertake to work cooperatively, on the basis of a sharing of project risk and reward, for the purpose of achieving agreed outcomes based on principles of good faith and trust...” (Abrahams and Cullen 1998).

The words “good faith and fair dealing” are terms of art in law. Good faith and fair dealing is increasingly being found to be an implied duty in contracts. In the project alliance it is evident that this duty is express.

GOOD FAITH AND FAIR DEALING

Lord Chief Justice Baron Bingham of Cornhill had, some years ago, explained, “In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts, the parties should act in good faith.” (Interfolio Picture Library v Stiletto Visual Programmes Ltd. 1989 (Interfolio v Stiletto)). Yet while tasteful to the civil law world, obligations of good faith and fair dealing were, until recently, repugnant to the common law world. This reflected the common law’s “belief that the written contract was [sacred, that] contracting parties should take care of themselves, and good faith is imprecise” (Sweet and Schneier 2013: §17.02D).

David Thomas QC, member of Keating Chambers in London informs us of a different view in the jurisprudence of Australia and New Zealand, asserting: “It may be said that the courts of Australia and New Zealand are perhaps more advanced in their understanding of the notion of good faith and the obligations it encompasses...” (Thomas 2012)

In England, as recently as 1992, the House of Lords still rejected the notion of any obligation of good faith and fair dealing (Walford v Miles 1992). Yet in the latest decade, English jurisprudence has changed its views. In the landmark case of CPC Group Ltd v Qatari Diar Real Estate Investment Company Mr. Justice Voss, in the High Court of Justice Chancery Division at London, citing contemporary English, Australian and US case law, announced the view of the modern common law, finding “a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with (the parties) actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of (the parties)” ((CPC Group v Qatari) 2010).

In his written opinion, Mr. Justice Voss quoted the United States Restatement (Second) of Contracts §205, defining good faith, as follows:

“The phrase ‘good faith’ is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving ‘bad faith’ because they violate community standard of decency, fairness or reasonableness.” (American Law Institute (ALI) 1987: §205)

In the twentieth century, perhaps in response to §205 but also heavily influenced by the Uniform Commercial Code, jurisprudence in the US began to hold contracting parties to the covenant of good faith and fair dealing (American Law Institute and National Conference of Commissioners on Uniform State Laws (UCC) 2009: §1-304) (Sweet and Schneier 2013: §17.02D). Good faith and fair dealing has manifested itself in various ways. An owner cannot interfere with or cause delay to the work of his contractor (Lewis-Nicholson v. U.S. 1977). Contractors are expected to cooperate with the owner, the architect, engineer, other consulting professionals, other contractors, subcontractors and suppliers (United States f/b/o Wallace v. Flintco, Inc. 1988) (Allied Fire and Safety Equipment Co. v. Dick Enterprises, Inc. 1995) (Crawford Painting and Drywall Co. v. J.W. Bateson Co. Inc. 1988). And a builder must bring design problems to the attention of the architect (American and Foreign Ins. Co. v. Bolt 1997) (Eichberger v. Folliard 1988). According to Professor Sweet, *“The outpouring of cases dealing with this doctrine demonstrates that the doctrine will be an important component of the construction contract obligation”* (2013: §17.02D).

The duty of good faith and fair dealing is expressed in the type of project alliance contemplated in ConsensusDocs 300. Good faith and fair dealing has been applied by US courts as the absence of bad faith (wilful interference with or delay to the work of others), a duty of cooperation, and a duty to inform with respect to design problems. Other, similar applications can be imagined. It behoves the parties to a project alliance to understand their common interests and to remain faithful in the furtherance of those common interests. In failing to do so, the safe harbour of good faith decision-making is breached and that breach will expose the breaching party to liability to the non-breaching parties.

FIDUCIARY DUTIES

The essence of good faith is a new commercial reality that reaches into the guts, or more correctly, into the soul of common law contracts to extol principles of rational common interest. But this stops short of eliminating self-interest. Citing the case of *Overlook v. Foxtell* heard in the Supreme Court of New South Wales, Mr. Justice Vos quotes Dr. Elisabeth Peden of the University of Sydney, who says: *“...the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no part is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary”* (Peden 2001).

A fiduciary relationship is similar, at least superficially, to a relationship founded on good faith and fair dealing. Unlike the relationship of good faith and fair dealing, however, fiduciary relationship imposes a duty upon the fiduciary to serve the best

interest of others, even if this results in economic or other harm to the fiduciary's interest.

Fiduciary law first appeared in common law jurisprudence in the English case *Keech v. Sandford* (1726). That case, exploring the contours of fiduciary duty to a minor child, established that a trustee owes a strict duty of loyalty. In more recent U.S. jurisprudence, legendary Chief Judge Cardozo established a strict standard of fiduciary conduct (*Meinhard v. Salmon* 1928). In his opinion, Chief Judge Cardozo asserted: "*Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place*" (1928). The reasoning in *Meinhard v. Salmon* was very similar to the reasoning found in *Keech v. Sandford*: the fiduciary is bound by the rule of undivided loyalty that exists to reinforce the integrity of trusting relationships. In the words of Chief Judge Cardozo, this rule remains "*relentless and supreme.*"

Fiduciary duties may be implied but more commonly they are proscribed in the words of contract. Trust and confidence is the usual standard in a fiduciary relationship (Sweet 2013: §17.02B, p.343). "*...the relationship is fiduciary when one party has superior knowledge and authority and that party is in a position of trust and confidence over the weaker party.*" (Sweet 2013: §11.04B, p.160). Words of trust, confidence, authority and intent are sufficient to proscribe a fiduciary relationship. The words of ConsensusDocs 300 §3.4 and the words of Abrahams and Cullen stated hereinabove, can both be construed to proscribe fiduciary duties upon the parties to the agreement. What is unclear is the scope and application of this fiduciary duty.

A cost-plus contract can impose a fiduciary duty on a contractor. In a case heard in the Maryland Appellate Court it was held that an express provision in the parties' contract for the construction of a home asserted that the contractor "*accepted a 'relationship of trust and confidence'*" with the owners, "*agreed to further their interests by performing 'the Work . . . in the most . . . economical manner consistent with' their interests,*" and promised "*to 'keep . . . full and detailed accounts'*" (*Jones v. J.H. Hiser Construction Co.* 1984). The court found that the contractor had a fiduciary duty to keep the purchasers informed of the rising expenses of the house, particularly when there was no explanation or the difference between the estimated cost and the final cost. The court found that the contractor had breached this duty when he admitted that he did not know until the end of construction what the cost would be.

ConsensusDocs 300 is in essence a cost-plus contract where cost decisions are required by §3.8.2 (1) to consist of collaboratively reached and mutually agreed-upon Project decisions made by the Management Group. "*Collaboratively reached*" attaches §3.4 words of "*mutual trust*" and "*furthering the interest of the Project.*" Thus, cost decisions must be construed as fiduciary duties. To that end the parties must subordinate their self-interest to the interest of the project, even if this results in economic or other harm to them.

Although cost-plus contracts impute a fiduciary relationship, in the design and construction context issues generally revolve around the relationship between the architect and the owner (Sweet and Schneier 2013: §10.02C). When an architect becomes the owner's agent a fiduciary relationship forms around that agency. Such special agency typically involves such things as professional advice during preconstruction and the bidding process and during construction on matters involving cost and performance. Merely providing a design does not make an architect the

owner's fiduciary (Incorporated Town of Bono v. Universal Tank and Iron Works, Inc. 1965). The architect becomes the owner's fiduciary by taking on so-called administrative services, usually as additional services to the basic services proscribed in the owner-architect agreement where the architect has superior knowledge and authority and is in a position of trust and confidence over a weaker owner (Carlson v. SALA Architects, Inc. 2007).

ConsensusDocs 300 §3.6, in defining the designer's responsibilities asserts, in pertinent part: "... *Cost and schedule are design criteria and the Designer, in collaboration with the CPD Team, shall ensure that design fully considers cost and schedule implications...*" As it is with cost-plus contracts, "*in collaboration with the CPD Team*" attaches §3.4 words of "*mutual trust*" and "*furthering the interest of the Project.*" Thus, these decisions must be construed as fiduciary duties. To that end the Designer must subordinate his/her self-interest to the interest of the project, even if this results in economic or other harm to the Designer.

The agency disclaimer clause

In ConsensusDocs 300, both §3.6 Designer's Responsibilities and §3.7 Constructor's Responsibilities conclude with the following disclaimer:

"The [Designer or Constructor] represents that it is an independent contractor and that in its performance of the Services it shall act as an independent contractor. The [Designer's or Constructor's] duties, responsibilities and limitations of authority shall not be restricted, modified or extended without written consent of the Management Group."

Thus, both Designer and Constructor are declared independent contractors and on its face this would preclude them from any fiduciary duties. The trouble is that the courts have a long history of not enforcing such disclaimers, relying instead on the meaning found in the contract as a whole and the actions of the parties thereto. Prudence dictates caution. If a court finds that either Designer or Constructor breached a fiduciary duty, despite the disclaimer, it would breach the safe harbor and expose them to liability.

CONCLUSIONS

The salient feature of a project alliance is a mutual waiver of liability arising from cooperative language. This waiver is enforceable in US courts for its reliance on doctrines of good faith and fair dealing, and fiduciary duties that are increasingly being recognized in all construction contracts. Project alliances - by definition incorporating such waivers - have been spectacularly successful. Yet despite the success of the Andres Field, the Wandoo Oil Field Project, the National Museum of Australia, the Sutter Health program, and others, project alliances have not become commonplace.

If this scarcity of projects emerged from apprehension about the application of good faith and fair dealing then such apprehension is misplaced. Because in both common law and civil law countries the courts have long ago started recognizing the existence of such cooperation in the form of implied duties of good faith and fair dealing. The consequence of the legal recognition is that a project alliance provides a valuable benefit, waiver of liability in exchange for nothing: a subscription to duties of good faith and fair dealing that would exist impliedly, even without the cooperative language of the project alliance agreement.

If, however, the scarcity of projects has emerged from apprehension about the application of fiduciary duties then such apprehension is not misplaced. The fiduciary must meet a strict standard of behaviour, enforced relentlessly and supremely by the courts, that requires complete subordination of the fiduciary's self-interest to the best interest of others, even if this results in economic or other harm to the fiduciary. ConsensusDocs 300 asserts a disclaimer, declaring that neither Designer nor Constructor is a fiduciary of the owner. But courts have overlooked such disclaimers, relying instead on the meaning found in the contract as a whole and the actions of the parties thereto. Case history militates toward a high likelihood that the Constructor will be construed as a fiduciary with respect to cost-plus contractual provisions. That the Designer would be construed as a fiduciary is less certain. Regardless, prudence dictates caution in decision-making in constraint of the reasonable self-interest of either Designer or Constructor.

This inquiry reveals that: 1) good faith and fair dealing is increasingly being recognized as an implied duty in construction contracts; and 2) both designer and constructor may acquire fiduciary duties in the words of contract and their actions thereto. Yet the meanings of both good faith and fair dealing and the fiduciary relationship - how and where they occur - are not widely understood within our industry. This presents a call to the academic community to inform the industry. For to gain an understanding of and appreciation for good faith and fair dealing and the fiduciary relationship would be to gain a better understanding of and appreciation for collaborative relationships. This in itself would succeed to move our industry further away from its adversarial past.

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