

OPTIMIZING 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. The fact that the parties that are involved in such projects regard each other as opponents is one of the main causes thereof. In a business where there is a great deal of money at stake, where contractors set low target prices for projects, and in which clients and contractors try to shift liability for any financial setback to the other party, a certain amount of antagonism is no wonder. This means there is a perfect breeding ground for conflicts. Instead of dealing swiftly with problems, participants in infrastructure projects have many and long discussions. Main question is who should bear the additional costs? This has a negative effect on the efficiency and often also on the quality of the project. The construction sector is looking for ways to deal with this problem.

A solution to the problem may be found in encouraging the parties to adopt a more cooperative attitude in order to improve efficiency in terms of costs, time, and quality. Alliancing is one of the most well-known forms of cooperation pursuing those objectives. In theory, it is a promising form. In practice, however, in only a few projects in which it was applied it led to substantial cost and time saving. In our opinion, the major reason is the loss of the concept's strong points when it is translated into a legal document. There seems to be

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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. As a consequence, alliance contracts rather constitute a threat to an alliance than support.

In our view, in alliances a legal framework is needed that effectively supports the alliance form and prevents parties from reverting to their former uncooperative and adverse behavior when conflicts arise. In this article, we will discuss the problems of “competitive contracting” and make some preliminary propositions for more “cooperative contracting” in alliances. We will try to incorporate negotiation- and conflict-theory insights into alliance contracts and the contracting process.

II. Alliances

A. The alliance between the client and the contractor

Alliancing and partnering are two terms that are often used in articles on the subject of cooperation. There is little consensus on what these terms 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 cooperation that is established by means of binding contract and the term partnering to a legally non-binding form of cooperation.² There is a third conception, 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 cooperate on an equal basis.

paper.

¹ See 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 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.

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. This form of alliance provides a model in which parties are on an equal footing, as partners cooperating in order to gain benefits from a project.⁴ They are stakeholders in employed activities by both, sharing profits and losses.⁵ The parties’ interests are in this alliance form not opposite, as is usually the case, but the same: 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 tried out in Western Europe.⁶

B. Some basic ingredients

In the literature alliancing is described as a “potpourri” of ways of working together.⁷ In general, the ingredients are a 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;⁸ a fully cooperative team attitude; access to “the books” for everyone; and a high level of flexibility.⁹ The most important organizational body is the alliance committee. The client and the constructor – and sometimes also the designer and the

⁴ See J.J. Myers, “Alliance Contracting: A Potpourri of Proven Techniques for Successful Contracting”(2001) *ICLR* 56-82, at pp. 58 ff.

⁵ See, for example, J.J. Myers, *supra* note 4 at p. 56.

⁶ 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.

⁷ Term from J.J. Myers, *supra* note 4.

⁸ An exception to that rule is often made in cases of “willful default.”

⁹ See, for example, J.J. Myers, *supra* note 4 at pp. 58-60.

main sub-constructors – constitute the committee that manages the project. They discuss and decide on the criteria for a reasonable target price and completion time.¹⁰

C. A successful alliance

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 in many other countries in the world, the form has worked out fine 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 materialize 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.” Are parties capable of working together in a cooperative manner all through the project?¹³ Do parties have confidence in each other? Are they committed and willing to share

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 G.A. Kneeland, *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 of 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* 2 188-195.

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); and case studies described by D. Jones, *supra* note 2.

¹³ Training programs have been developed to stimulate such an attitude and cooperative behavior 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 Form Construction Law Services in a ‘partnered’ Construction Industry” (1998) *ICLR* 78-84.

information amongst project participants? Do the personalities of project managers agree?¹⁴ If the parties communicate well and solve issues amongst themselves, cooperation may be enhanced. In such a situation, an alliance team will be able to complete the project, often saving an enormous amount of money and time.¹⁵

However, when one of these factors is lacking – or both –, the situation will be different. Parties may run out of luck: things may go very wrong, a mistake with great financial consequences may be made, risks materialize, or defects occur and the project’s budget is overrun by several millions. Discussions will arise about the division of these costs. Then the success of the alliance and the alliance itself are threatened.¹⁶ When great amounts of money are at stake, the parties will be tempted to shift from a collective alliance attitude to an individualistic attitude. Cooperation can quickly be replaced by competition.¹⁷ 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.” In such a situation, parties, their organizations, their investors, and/or lawyers usually prefer to take a legal 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, and sometimes it falls apart.¹⁸

¹⁴See, e.g., Y.L. 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.

¹⁵ 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% and profit increase up to 9%.

¹⁶ About the disappearing “team feeling” as soon as serious problems surface, see also, E. Larson *supra* note 11 at pp. 417 ff.

¹⁷ The worsening atmosphere – often the result of legal proceedings – may lead to even more conflicts.

¹⁸ For example, see D. Jones, *supra* note 2 at pp. 417 ff.

D. *The alliance contract*

In alliancing, usually two types of documents are used: the alliance agreement or charter and the legal contract. The main ideas behind an alliance may be 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 So, when everything goes well and the project managers succeed in maintaining a good atmosphere, the contract will hardly play a role. However, when luck runs out and things go seriously wrong, the contract becomes important. Unfortunately, in practice it will not provide much support for the alliance, as we have outlined above.

Is it really necessary to have a contract in alliances? An alliance is an organization form, mainly depending on and established by people, the parties. Management and the employees of companies are the ones who need to be taught about the alliance principles, and it is up to management to ensure a cooperative atmosphere and to keep “the team” together. So, it is mainly management that is responsible for the success of the alliance. It may be said that a strong belief in the alliance form is one of the main factors that will prevent it from falling apart. If everybody believes in the alliance, in each other, and does everything in the best interest of the alliance, the alliance will probably work.²⁰ It is our opinion that, even if it works for some time, belief only is not a very stable basis for durable cooperation.²¹ An alliance without a contract that effectively supports its principles lacks an important incentive for parties to always behave in the best interest of the alliance. In our opinion, the alliance

¹⁹ On these charters, see e.g. J. Critchlow *supra* note 13 at p. 30. For examples, see R.J. Stephenson, *supra* note 12 at p. 386; see, recently, C. Skeggs *supra* note 6; 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.

²⁰ For a description of this approach, see also C. Skeggs *supra* note 6 at p. 468.

²¹ See also D. Mosey, “The First Standard Form of Contract for Project Partnering,” paper available at the website of the Society of Construction Law (2001).

should always be backed by a contract to help it stay on a cooperative course when things go wrong and conflicts arise.

What should an alliance contract provide? Infrastructure projects in particular are surrounded by risks and outside influences that are difficult to control. However, the way in which parties should react to them can be prescribed in a contract. Therefore, alliance contracts should be drafted in such a way that they stimulate the parties to take a cooperative approach at all times. This requires a change in the way contracts are drafted as generally they rather facilitate competition and escalation of conflicts.

III. Contracts and alliances

A. Obstacles to overcome

Before discussing possible ways to improve the facilitation of cooperation by means of contract, let us briefly consider the obstacles to overcome. In the previous subsection, we concluded that the alliance contract rather threatens than facilitates the success of alliances. If conflicts arise, the contract will lead to competition rather than to cooperation. Research into the differences between alliance ideas and the legal environment helps identifying some important obstacles. Where does the divergence come from? What is the reason for it? What are we up against when we try to shift the focus of contracts from competition to cooperation?

- The focus on competition

The leading principles in alliancing are: cooperation, going for the highest possible gains for both parties, and win-win solutions. Alliance management is focused on how to make things run as efficiently as possible and day-to-day work run as smoothly as possible. The basic ideas are mainly derived from management theory and literature.²² An important aspect is securing and fostering the relationship between parties and leaving no room for disputes to escalate, so that the highest possible profit can be made.

The legal approach is a different one. One of the main ideas behind the writing-up of contracts is that a contract will provide people with the incentive to actually keep their promise.²³ The threat of litigation is supposed to be the incentive for parties to cooperate, in other words, to live up to their promise.²⁴ What is striking here is that the approach to relationships in contracts is based on competition, a zero-sum approach, a gain for one party entails a corresponding loss for the other side. Lawyers will try to draft the contract in such a way that it is in the best interest of their client, entailing the maximum level of protection for that party. Responsibility is laid as much as possible on the other party, and the other party's obligations are stated as clearly as possible whereas the party's own obligations are preferably drafted in a vague manner. The result is a legal document that states the rights, obligations, and responsibilities of the individual parties. It is mainly intended to stand up in court and will most likely be interpreted in one's own favor. If a conflict arises, the lawyers employed by the parties usually will translate the problems into legal issues and argue on the basis of the contract.

As a result, parties receive the "wrong" incentives from legal contracts. By nature people seem to be more zero-sum-minded than cooperation-minded, and by instinct people are

²² All the main writers approach the concept from a management perspective and outline procedures and team-building sessions. The role of lawyers and contracts is usually described briefly.

²³ This assumption can be found in Law and Economics literature on contracting. See, e.g., S. Shavell, "Economic Analysis of Law," available at www.ssrn.com (2003), p. 9.

²⁴ See, e.g., S. Shavell, *supra* note 23.

focused on maximizing their own benefit.²⁵ They can learn to think win-win, but when conflicts arise and money, honor, and reputation are at stake, the win-win approach is easily replaced by the zero-sum approach. When there is no incentive to keep parties on the cooperative track, the alliance is directly threatened. 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.

- Translation problem: Concepts that are difficult to translate into traditional legal terms

The next obstacle to overcome is that lawyers are not used to incorporating concepts such as “trust,” “commitment,” and “striving for common goals” in a contract. The most important reason is that such abstract concepts are very difficult to substantiate in court. Hard legal facts, responsibilities, rights, and obligations can be argued about in court and evaluated by a judge on the basis of prior experience and prior cases. Another reason for not incorporating the above-mentioned concepts is the notion that such factors need to grow and cannot be stated as an obligation or a right. They are regarded as the responsibility of management. In this way, the concepts that are essential to the success of project alliances are not incorporated in contracts.

- Lawyers resistance to alliancing

Finally, alliancing is a rather new phenomenon and different from traditional forms of cooperation, and is thus unattractive to lawyers and often considered risky by them.²⁶ It leaves

²⁵ This is an important assumption in microeconomics and most other social sciences. Cooter and Ulen provide a good description of the theoretical framework of this assumption, the so-called Rational Choice Theory; see, e.g. Cooter and Ulen 2004, at pp. 13 ff.

²⁶ See also D. Mosey *supra* note 21 at p. 9; a general risk is the need to learn and sustain new ways of working.

a great deal open to discussion: risks and costs are not always clearly divided and not limited and there is relatively little experience with alliance contracts. Lawyers tend to prefer more strict and well-known forms as they fit better into the legal environment. From a legal point of view, one would be inclined to avoid this uncertain and time-consuming form or restructure it by means of a traditional contract. Alliancing simply does not correspond with the fact that lawyers are trained to be suspicious and therefore try to regulate a relationship as much as possible providing the optimal protection for the party they represent. They are the ones who usually draft the contract and exercise damage control when things go wrong. Thus they have to be convinced of the advantages of alliancing in order to opt for it. As a result, when plans are made for an infrastructure project and the project seems “perfect for alliancing” from a commercial and management perspective, there is a strong chance that lawyers will be against it. They will probably advise the board to opt for a traditional contract and a cooperation form that lacks the possibilities and benefits of an alliance. Even when the alliance form is chosen, the alliance contract often resembles a traditional one and the legal representation of the alliance is that of a traditional client - contractor relationship.

B. Alliance contracts: From competition to cooperation

What can be concluded so far is that a shift is needed in alliance contracts from competition to cooperation. This is quite a challenge. However, some steps in the right direction have already been made as economics influences more and more the way in which contracts are drafted. The alliance contract as it is used today already contains some economic incentives to move from a competitive to a more cooperative stance. 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.²⁷ 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 cooperation often prove to be not strong enough to counterbalance all the other forces that work in the opposite, competitive direction when things get ugly.²⁸ We think that, apart from economic incentives, other incentives are necessary to keep contract parties on the right, cooperative track when conflicts arise. The success of an alliance, as we assumed, is primarily determined by what we call factors that determine “fluent human interaction.”²⁹ As current contracts do not specifically embrace them, the extent to which they play a role in an alliance today depends completely 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. This may make an alliance a stronger and a trust worthier – and thus more attractive – form of cooperation. It will stimulate parties to honor the contract and it will be of great use to a judge, who is thus enabled to get an impression of the cooperation and goals of the alliance when a conflict is brought before him. In our search for ways to stimulate parties to be cooperative other than by means of economic or legal incentives, we found that negotiation and conflict theory provides 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.

²⁷ Some agencies have published handbooks for drafting partnering or alliancing contracts; see, e.g., standard form contract drafted by the Association of Consultant Architects *PPC 2000* (amended 2003); See also Mosey *supra* note 21 and Mutek *supra* note 14 on new contract forms for alliances. However, a genuine solution for alleviating the basic tension between the legal environment and cooperation forms such as partnering, alliancing, and DRB outlined above is not given.

²⁸ See for examples the case studies described by D. Jones *supra* note 2.

C. Cooperation in negotiation- and conflict-theory

In the negotiation and conflict literature, specific attention is paid to cooperation and the variables that influence the level of cooperation between the parties. Deutsch is regarded as one of the main authors in this field.³⁰ He made a distinction between cooperation and competition in negotiation and conflict resolution. He – and others after him³¹ – distinguished factors that to a great extent determine whether the atmosphere is competitive or cooperative. Below, we mention the factors that in our opinion are relevant in contracting.

- 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” (maximizing 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.³²
- 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

²⁹ Factors such as equality, flexibility, striving for mutual goals, and openness (essential to the success of an alliance) are not incorporated in the contract.

³⁰ 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 Behavior” (1995) 21 *Personality and Social Psychology Bulletin* 1178-1188.

³¹ See, e.g., D. Tjosvold *supra* note 30; C.K.W. de Dreu and P. van Lange *supra* note 30.

³² M. Deutsch (1994) *supra* note 30; D.G. Pruitt, “Social Conflict,” in D. Gilbert, S.T. Fiske and G. Lindzey (eds.), *Handbook of Social Psychology* 4th ed., vol. 2 (New York: McGraw-Hill 1998, p. 470-503). C.K.W. de Dreu and P. van Lange *supra* note 30.

opinion in an open-minded fashion, and to integrate interests and aspirations into settlements that yield high satisfaction for both.³³

- People's *behavior towards conflict*. Different views on conflicts can be subdivided into "cooperative 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.³⁴
- 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 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.³⁵

³³ 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.

³⁴ 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.

³⁵ 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 32 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).

- *The level of transparency and clarity with reference to intentions.* Transparency in goals and intentions facilitates trust, which again facilitates cooperation.³⁶ The clearer the general attitude is, the more information is exchanged openly, and the more procedures are clear and specific, the better the cooperation environment will be.³⁷

This leads to the following principles which may be incorporated into the contracting process and the contract: select people who are cooperation oriented; make goals positively interrelated; stimulate cooperative behavior; 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. Some of the examples we give are already used in practice.

IV. Contracting for cooperation in alliances

In this section we will present an outline of the way in which the above-mentioned principles may be incorporated into the contracting process for complex infrastructure works.³⁸ To do this in an orderly manner, this section is subdivided into the following subsections: Negotiating the contract (A), Contracting (B), Conflicts (C), and conflict resolution (D).

³⁶ Conditions that encourage cooperation are the other party's dependence on itself and the other's personality being portrayed as cooperative. Research also indicates that people who wish to cooperate may act if there is a strong expectation that the other will reciprocate, see, e.g. D.G. Pruitt *supra* note 32 at p. 475.

³⁷ 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 Behavior* (New York: Academic Press 1981).

A. Negotiating the contract

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.³⁹ 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 “cooperation” signals. Contractors who do not like 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. A highly transparent approach will also present him as a trustworthy partner, which again facilitates cooperation.

2. Elements of an invitation to tender

The client may be brief on technical and product details in an invitation to tender (to encourage creativity), but should be specific about the way in which he intends to cooperate (interaction, atmosphere) and the type of constructor in terms of human factors (negotiation

³⁸ We limit our description to the interaction between the key players, the client and the contractors. Sub-contractors can be involved on the same basis.

style, motivation) he is looking for.⁴⁰ 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 organization, 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 cooperation, problem solving and sharing information relevant tot the solution of problems when they arise) For the sake of transparency, the client should be open to questions and clarifications, for example by organizing a public meeting, which is done in practice as regards technical issues.

3. *The selection*

After the client has received tenders from contractors, he has to make a 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 the client determine whether a contractor is suitable for an alliance or not. “Soft dollar” criteria such as the contractor’s ideas and the culture of the contractor’s organization are examples. The client may want to obtain information about the negotiation styles of the contractors and the way in which they will react in conflict situations. This information will give an indication of what cooperation with a particular party will be like. The client may not want to cooperate with a contractor who is inflexible in the case a conflict arise, 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.” The selection of a contractor with a cooperative attitude is a good start for the alliance whereas the

³⁹ It seems to be 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. E. Larson *supra* note 12 at p.190.

⁴⁰ See section III.C.

selection of a contender could be a bad start. It would be advisable for a client to do some research into the negotiation and conflict-management styles of contractors, but also their motives and perceptions of the future cooperation, as was discussed in section 3.3. A characteristic that has proven to enhance cooperation is the ability to view goals to be positively rather than negatively linked.⁴¹ People with a cooperative 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.

4. *A tool in the selection phase*

Presenting contractors with a case study is 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 center.⁴² The criteria should be objective. An outside specialist organization may be involved to test both the candidates and the client. The candidates can be rated on an “ideal candidate” scale. Valuable information on the match between personalities and on the ideal project managers can be collected.⁴³ The scores of the candidates in the assessment may be decisive along with other selection criteria such as price. The characteristics that make a contractor both a good cooperator and a good match with the client can be taken into account.

⁴¹ See M. Deutsch (1973) *supra* note 30.

⁴² For literature on contractor selection, selection criteria, and evaluation factors to rank bidders, see, e.g., also 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 mentioned often only concern technical, financial, and management aspects.

⁴³ It would be recommendable that not only the right person is selected as the project-manager, but also that this person is stimulated to stay on the project until it is completed. If replacement is necessary, the new candidate should meet the same criteria as his processor. This could be specified in a contract.

Possible test questions are: How would you deal with a situation where a serious risk materialized? (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 preventing discussions and conflicts about the selection process and the criteria applied.

B. Contracting

1. The contracting process

After the client selected the contractor, the definitive alliance form 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 cooperation 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 cooperative behavior; 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.⁴⁴ Such contracting may take place following, for example, the Harvard negotiation principles: focus on the interests of both

⁴⁴ Integrative agreements are believed to last longer and contribute more to the relationship than compromises; D.G. Pruitt *supra* note 32.

parties, brainstorm about possible solutions, and set objective standards to divide by in the case parties cannot agree.⁴⁵

Cooperation can be stimulated both in the process of drafting the contract and in deciding on the content of the contract. As regards the process, this would mean writing a contract based on what the parties discussed during the negotiations. It seems advisable that parties agree on a conflict-management style at an early stage, as well as on the adoption of a simple procedure containing the outlines of the method of problem solving to be used.

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, as is applied in partnering and alliancing contracts nowadays, fits this approach. Terms stating penalties and bonuses when parties are ahead or behind of schedule or when extra expenses are incurred may also be incorporated. Apart from that, parties' intentions concerning both the end result and the processes and techniques of cooperation to realize that result may be included in the contract.

Transparency is important in the process of contracting. The process and especially the information exchange should be open. What are the risks to be expected? What damage may occur? Parties may anticipate problems when they try to identify the potential problems beforehand. In the contracting process technical experts should be involved along with the lawyers drafting the contract. 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. The most important reason for involvement of these people is that 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

⁴⁵ 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).

a contract probably also has a positive effect on the intensity of their commitment to the contract.

The contract and its terms should be clear and transparent. A consequence of complicated legal contracts is that they are only used when parties are unable to solve conflicts amongst themselves. Most contracts are simply incomprehensible to non-lawyers.

The contract does not need to cover every detail. It is possible to identify potential risks beforehand and agree on a procedure to deal with them if and when they arise. Contracts usually establish which party is liable.⁴⁶ 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 always new risks materialize neither of the parties had thought of. Therefore, concerning 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.⁴⁷ This would also help maintaining a flexible organization 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.⁴⁸

2. Contracts and quality of the end product

In order to prevent differences of opinion about the level of the quality that should be reached, it is of the utmost importance that the parties agree on it before the project starts. However, it is also important to leave the alliance the freedom to find creative ways to realize the project.

⁴⁶ Such a provision does, however, not solve all the problems. Discussions on terms concerning issues in which the parties have opposing interests often result in contract terms that are quite vague. Such terms are open to more interpretations than one and therefore do not provide direction.

⁴⁷ See also section 5.1 on possible obstacles for the use of alliances.

⁴⁸ They need to be familiar with the ideas and goals of the alliance and, thus, of the contract, in order to prevent that, after parties have agreed on the basic terms of a contract, lawyers will rewrite it in such a way as to provide their clients maximum legal protection, which makes the contract competitive again.

This can be done, by stating the future function of the end product and some criteria. The end product is, for example, 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 performance criteria targets are, for example, the maximum noise level for the surrounding area, the minimum capacity of a tunnel, the maintenance-free period, the security level.⁴⁹ 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 organized regularly, the contractor will be in the position to explain the next steps and thus provide transparency.

Another dilemma in relation to quality concerns the question 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.⁵⁰

3. *A possible contract*

A contract that fits into the alliance concept may resemble a manual. In construction projects, people from different trades work together. A document may be drafted that the different trade groups can contribute to and can understand. Such a contract may resemble a partnering charter: some pages in which the general ideas are outlined along with some kind of mission statement and the general objectives along with explanations.

The process of contracting could be organized in a number of steps. First, groups consisting of representatives from both the client's organization and that of the contractor's

⁴⁹ 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 endresult by and may be used to assess gains and losses. On the criteria for judging a project, see also B. Scott, *Partnering in Europe: Incentive Based Alliancing for Projects* (London: Thomas Telford 2001), pp. 75 ff.

⁵⁰ On this problem, see also Van den Berg where he compares 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.

try to identify the interests involved in the project (client, contractor, other parties) and the problems the project may be faced with. Secondly, in order to be able to anticipate potential problems in relation to these interests brainstorming about these issues may be a good method. What risks may materialize? 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. Possible solutions used in practice and referred to above are risk sharing (the question to be answered here is to what extent) and creating financial incentives such as bonuses and penalties (the questions to be answered here are when, for what reason, and what amount).⁵¹

The issues parties usually agree rather quickly on are the main ones such as price, quality, and quantity. 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 parties cannot agree upon are left to third parties to decide (technical issues on which parties have differences of opinion), whereas other issues concerning differing interests are to be discussed within the parties' organizations at a higher level.⁵² In this way, risks that may never occur need not be discussed and discussions that may never need to take place are prevented. 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. Mutual goals of the contract parties and outside parties should be

⁵¹ See B. Scott *supra* note 49 at pp. 3 and 74. The risk with bonuses is, however, that the contractor may count on getting them and allows for them in his tender.

⁵² 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.

identified and be paramount. The contract may, for example, state what the parties wish to achieve within a specific time frame.⁵³

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 organized? 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.

C. Conflicts

1. When conflicts arise

Conflicts are a fact of life, so organizations have to try and deal with them; this goes especially for the construction industry. Conflicts may arise during selection, during contracting, during construction, and afterwards. A certain level of conflict may have positive effects. A low level of conflict may stimulate information processing, and suppressing conflicts may have negative effects on the quality of decision-making.⁵⁴ However, as a conflict intensifies, the cognitive system shuts down, information processing is impeded, and team performance is likely to suffer.⁵⁵

⁵³ Interests can be as, for example “keeping costs low” or “having a clear picture of the risks that may materialize,” or “dealing with conflicts in the best, most efficient way for the alliance.” For examples of legally sound contracts terms that mainly state interests and not duties and rights, see also A. Chew *supra* note 19 at p. 328.

⁵⁴ 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 can: promote mutual understanding, enhance employee performance, reduce free-riding, enhance creativity and a higher quality of decisions; J.L. Hocker and W.W. Wilmot, *Interpersonal Conflict* (Dubuque: Brown Publishers 1991).

⁵⁵ 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.

A conflict may have positive effects when team members perceive cooperative rather than competitive goal interdependence.⁵⁶ Parties with a cooperative attitude are likely to engage in constructive conflict-resolution processes. The more open information exchange is, the more constructive negotiations will take place and the more often the parties will arrive at mutually profitable agreement.⁵⁷ According to negotiation theorists, cooperative behavior towards conflict should be stimulated. Pro-social motives along with cooperative conflict-management styles may turn conflicts into constructive events. If a conflict escalates, it is no longer constructive, so contending, as a conflict-management style, should not be stimulated. 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 cooperation 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.⁵⁸

In conflicts too, 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.

2. *Defects as conflict issues*

Cooperation in an alliance implies a collective responsibility for the work 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

⁵⁶ Parties with cooperative goal interdependence may have different opinions, conflict, about how to reach a specific goal but they strive for the same goals. People's views on how they depend upon each other influences 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 further 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.

⁵⁷ 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.

will in general have to be borne by the alliance. Differences of opinion about the actual cause of the defect can thus be prevented; why answer that question if, in the end, parties bear the extra costs on a fifty-fifty basis? 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.⁵⁹ 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 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.

The risk here is that the parties will end up in a complicated analysis of the decision-making process. It will be hard to keep the good atmosphere, as the parties soon will search for the person to blame. Such discussions can be prevented by adding a “no claims” or “no blame/ no dispute clause” to the contract.⁶⁰ This fits into the idea of a partnership: one joins

⁵⁸ See also section IV.C.3 on risks.

⁵⁹ 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 bouwer. 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 50, at p. 840.

⁶⁰ See D. Jones *supra* note 2, at pp. 414 ff.; see J.J. Myers *supra* note 4, at pp. 57 ff.; see M.A.M.C. van den Berg *supra* note 50, at p. 854; see also, more recently, A. Chew *supra* note 19 at pp. 340-341.

together for better and for worse. Accepting that both parties may make mistakes is part thereof. However, in our opinion here should be a limit to this shared responsibility. Parties should not be allowed to fall back at all times on the collective responsibility as this may make parties careless. Even no claims clauses usually draw a line at willful default.

3. Risks as conflict issues

As we saw above, risks constitute one of the main sources of conflict. Who should pay for risks that materialize? Several measures may be taken to prevent disputes 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 and how long will it take to get them? What is 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?

In the target price, usually a certain amount of money is reserved for risks that may materialize during the realization 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 a risk materializes or the extent of the damage resulting from it.

The prevention of conflicts, potential risks, and defects may be discussed openly and included in the contract.⁶¹ Thus, the parties may agree beforehand on a certain threshold. If the threshold is crossed by one of the parties, it is that party that bears that risk and if it is not

crossed, the risk is 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 materialize; 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*.⁶²

D. Conflict resolution

1. Dealing with conflicts

In order to prevent deadlock and delay, a swift and harmonious conflict-resolution process is an essential ingredient of the alliance contract. However, early and swift conflict resolution proves to be hard in practice. The escalation of conflicts and long and expensive arbitration or litigation proceedings take time and money and are harmful to the parties' trust in each other.

Conflict resolution in the construction industry usually means either legal proceedings or arbitration. These are competitive problem-solving approaches, not cooperative ones. This is not always a bad thing, as some conflicts can be solved in an efficient way by means of legal proceedings. In purely technical discussions or when minor issues are at hand, a legally binding advice may be helpful. However, when issues arise in which the parties' interest differ seriously, cooperative conflict approaches seem to be more productive. Therefore, issues may be subdivided into those that parties may try to solve by means of integrative negotiation and those in which a legally binding advice is required. This approach seems to be supported by research into most efficient ways of dealing with different kinds of conflicts. In certain kinds of issues, people search for "the truth" and in other kinds it is most efficient to

⁶¹ See also section IV.B.2.

search for win-win solutions or compromises.⁶³ In general, it may be said that conflict-resolution procedures that stimulate integrative conflict resolution fit best into the alliancing concept. The challenge is to “fit the right resolution process to the conflict.”

Another non-legal mechanism that could be used in dealing with conflicts is the rules of the line of industry. (How are conflicts between people on the construction site dealt with? What are the rules in that particular line of business?) They may be incorporated in the contract. Finally, reputation effects could be used as a tool of conflict-management. Transparency about motives, conflict-management styles, trustworthiness, and the level of flexibility may influence contractors’ chances of selection for future projects.⁶⁴ Here again, keeping both the process and the content transparent is of great importance. A procedure should be clear about the steps that need to be taken. In this way, interpretation differences and disputes about the way in which a particular conflict should be dealt with may be prevented.

The conflict-resolution part of an alliance contract should be specific. The conflict-resolution procedures and also the behavior during and the approach to conflicts that is expected of the parties should be clearly outlined (What does the procedure entail? What is expected from whom? What is the duration of the procedure? What to do if parties do not agree?) The answers to these questions may, for example, be provided by a kind of “conflict-resolution manual.” A certain amount of freedom for parties to choose between different conflict-resolution procedures seems preferable. The use of 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.

⁶² 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 49 at p. 75.

⁶³ See, for example, C.K.W. de Dreu and L.R. Weingart *supra* note 56.

⁶⁴ See on reputation effects as conflict-management mechanism, e.g., L. Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions,” (2001) 99 *Michigan Law Review* 1724-1790.

2. *A possible conflict-resolution procedure*

One approach may be to establish an informal and flexible procedure along with some instructions. The procedure may, for example, consist in two or three steps, starting with the identification of potentially conflicting issues. 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 organization. If also at this higher level the conflict cannot be solved, each party may, after having informed the other, consult a third party, for example, a Dispute Resolution Board (DRB) for advice.

The DRB may either give advice on the method of conflict resolution or facilitate resolution of the conflict at hand. The parties may leave it to the conflict specialist within the DRB (a negotiation specialist, a mediator) to define the problem and 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 to resolve a conflict by. 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.⁶⁵

⁶⁵ For a recent overview of the possibilities of Med-arb, see A.M. Neto, T.E. Huei Ping and A. Christudason, "Med-arb in the Catbird Seat of ADR" (2003) *ICLR* 517-526.

V. ***Obstacles, opportunism, and the role of lawyers***

A. *Obstacles*

There are some obstacles to overcome to make incorporation of the in section 3.3 outlined principles in contracts and contracting successful. A major obstacle is that 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. However, in the end time can be saved, as the contract itself does not need to be a bulky document. It is also very difficult to establish exactly the costs that can be saved. In fact, one can only review projects that have been realized and estimate what could have been improved if an alliance contract form had been used.

Another obstacle that should be taken into account when trying to incorporate the abovementioned principles into a contract and the contracting process is that, at present especially European tendering rules are quite strict and do not leave much room for open negotiations with individual contractors on a bilateral basis at an early stage.⁶⁶ If the client is a government organization, there is not much room for improvisation. The rules are such that in fact all contractors have to be present at all times during tendering negotiations. The effects hereof may be, for example, that contractors will hesitate to suggest innovative, timesaving ideas as other contractors may appropriate these ideas while the former invested money in developing them. The good news, however, is that European rules concerning the negotiation aspect are changing. In innovative projects, Europe may follow the example of US public procurement tendering procedures.⁶⁷ Anyhow, in order to deal with this effectively, it seems

⁶⁶ Skeggs mentions European tendering rules as potential obstacles to the success of alliancing in Europe; see C. Skeggs *supra* note 6, at pp. 465ff.

⁶⁷ 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)

good to attempt to reach for the highest level of transparency in the tendering phase. The selection criteria and their importance should be explained and handed over to the contractors at the earliest possible stage. Vague criteria may easily lead to claims from contractors who do not agree with the outcome of tendering procedures, especially if they spent a great deal of time and money on a detailed offer. The investments the contractors are to make should be kept as low as possible.

Finally, clients are tempted to choose a contractor on the basis of the lowest price - the lowest bidder. Contractors try to make money anyway and are keen on every opportunity to claim extra money, so conflicts easily arise. Incorporating the soft-dollar criterion of suitability for alliances may help prevent the client from selecting such candidates and also decrease the effect that prices are set too low. The latter should 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”.

B. Opportunism

To deal with opportunism is a challenge in itself.⁶⁸ Will parties resist the temptation of behaving in an opportunistic manner throughout the project? To try and prevent opportunism or to deal with it at low costs, the following measures may be taken. In the first place, what is needed is that both parties take time to consider what alliancing and an alliance contract mean, and also whether benefits can be gained by using this type of contract in a particular project. (Will it lead to optimal cost reduction? Will it lead to optimal quality?) An alliance contract is particularly useful when high risks and many responsibilities are involved.

provides more freedom for the client and the contractors to negotiate at an early stage of the tendering procedure when complex infrastructure projects are concerned.

⁶⁸ See also A. Chew *supra* note 19 at pp. 348 ff.

Secondly, “risk managers” such as lawyers should be involved in the first phase. The benefits but also potential disadvantages of an alliance should be studied. A choice for alliancing that is made in consultation with lawyers enhances support and probably smoothens the contracting process.

The party that initiates the alliance – usually the client – should receive the full support of its superiors. The client needs to have the mandate to decide and full cooperation from the organization. The project manager should embrace the concept and its implications. The right motives, negotiation style, personality, and belief in the concept are essential.⁶⁹

Potential opportunism in the other parties should be identified early in the selection phase. As outlined above, the risk of opportunism can be managed by means of an assessment and a contract that is specific about the way in which parties will cooperate (approach to conflicts, the conflict-management style).

What also may help in maintaining a high level of cooperation is a regular evaluation of the parties’ general “cooperation attitude.” How are problems dealt with? What is the general atmosphere like? This may be done, for example, by interviewing people from both parties at the construction site. Preferably a third party, such as a DRB, carries out this task. If necessary, the DRB must advise to replace the project manager or correct the alliance board in its approach to certain matters.

Incorporating clear dispute-resolution mechanisms may also prevent opportunism. Early identification thereof and procedures in which it is made transparent to arbitrators what the contribution of each of the parties was to the escalation and/or the resolution of a conflict.

Other measures that may help to prevent opportunism on the part of the contractor are: “the shadow” of possible future cooperation: long-term prospects have a positive influence on cooperation behavior; adopting tit-for-tat strategies (cooperative behavior is rewarded while

opportunistic behavior is punished);⁷⁰ and the use of reputation effects: if the parties are transparent about their cooperation also as regards third parties, this will trigger a reputation mechanism that motivates supporting parties to behave cooperatively instead of opportunistically.

C. The role of lawyers

In the negotiation and contracting process outlined in section 4, lawyers have a different role than they usually have. Their role is often to achieve the best contractual protection possible for their client. However, an optimal contract from a legal perspective will not always lead to the best result at the end of the day. In our opinion, a contract should provide direction and be used, and not lie hidden in a drawer only to be used when the parties are not longer on speaking terms. A contract should be easily accessible and outline practical, clear, low-cost solutions or procedures. Lawyers have an important role in drafting them; in the construction industry they will often do this in close cooperation with technicians/project management.

In our view, the ideal lawyer is able to take legal, commercial, and technical interests and knowledge into account. He is innovative, and at the same time a reliable legal contract writer. Contracts containing conflict-resolution clauses that enable the parties to deal effectively with conflicts may prevent legal proceedings as well as delay.

In drafting a contract, the ideal lawyer will take into account social norms – the rules of the line of industry – the parties themselves use as a “frame of reference” in solving conflicts. Contracts in an ideal situation support, strengthen, and complete this frame of reference; they do not replace it by a set of rules the parties are unfamiliar with. By incorporating these rules,

⁶⁹ Preferably, this is backed by a document that states full internal support to the alliance concept and understanding of what this means especially when things get difficult (always a problem-solving approach, no competitive attitude); this document should be signed by all the people involved.

the lawyer's involvement in conflicts no longer means that completely new rules and procedures apply to the resolution of conflicts. The parties may no longer leave the conflict to the lawyers to fight over according to the rules of lawyers; they may be able to solve issues together with lawyers according to the rules they are familiar with.⁷¹

If a lawyer considers the alliance to be his client, he will draft a contract that is in the best interest of the alliance. For lawyers this entails a somewhat different and broader role than the limited role in contract negotiation and legal proceedings, as is common today. Having greater influence on the actual formation of the alliance, the lawyer may add to its success.

Finally, apart from being an advisor, a lawyer may be involved as a third party, as a negotiation and conflict-resolution specialist, advising parties whenever conflicts arise, and they may also play an important role in updating the contract when needed after evaluation.

VI. 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 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 cooperative nature of the concept. We also discussed obstacles to alliancing and ways of overcoming them. Of course, there are many items that we did not discuss or only briefly touched upon. Important questions that need thorough analysis are: How to deal with issues such as intellectual property rights? How to deal with outside factors such as pressure groups, politics, and interaction with the surrounding area? Further discussion and research is

⁷⁰ This strategy consists in responding to cooperation with cooperation and to defection with defection; see, e.g., D.G. Pruitt *supra* note 32, at p. 476.

necessary for parties to get an overview of all the relevant aspects and to be able to actually draft a cooperative contract.

In order to draft such contract the main challenge is to incorporate - what we called - “human criteria”. When conflicts arise, the parties should be stimulated to cooperate and engage in a cooperative negotiation style. Conflict-resolution strategies need to be in place, which will 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.

A culture change is necessary as well as more cooperation between the people involved in the project and the ones drafting the contracts. This may ask for a change in the perception of contract negotiating, contract drafting, and conflict resolution and in lawyer’s views of the role of contracts in general. Finally, what is needed is granting lawyers a role in the establishment of an alliance and in the process of negotiation and contract drafting. Lawyers as part of the team is essential in order to shift from competition to cooperation.

⁷¹ This seems to be an important reason why lawyers are involved at the stage when conflicts already have escalated. Stephenson suggests that having to involve lawyers is regarded as “a management failure”; R.J. Stephenson *supra* note 12, at pp. 130 ff.