PARTNERING AND ALLIANCING: BACK TO THE FUTURE?

James Lacey*

Partnering and alliancing was born out of necessity in the North Sea oil and gas industry as a result of the weak oil prices and low profit margins being experienced in the early 1990s. Since this time partnering and alliancing has been used with great success in a variety of settings across a number of industries.

This article discusses the various settings in which partnering and alliancing agreements have been successfully used. It will also examine the law regarding the interpretation of a selection of issues that may affect an alliance agreement. In particular, as alliance agreements rely so heavily on the exercise of amorphous obligations of good faith, the attitudes of the courts towards enforcing these obligations will be examined.

1. INTRODUCTION

Partnering and alliancing are concepts which embrace the notion of contracts being underpinned by a strong relationship and the exercise of good faith. While traditional contracting methods for the delivery of major capital projects have focused on a legalistic, rights based approach, alliancing on the other hand focuses on a commercial, relationship based approach. This style of relationship contracting is an example of an alternative to using a contract as a blunt instrument with which to attack the other party. There has been a movement towards the use of relationship contracting with the increasing recognition by courts of the enforceability of good faith in agreements.[1]

A useful definition of strategic alliancing from the National Economic Development Council (NEDC) is: [2]

> "a contractual relationship arrangement between a client and his chosen contractor which is either open ended or has a term of a given number of years other than for a specific project. During the life of the arrangement, the contractor may be responsible for a number of projects, large or small, and continuing maintenance work or shutdowns. The arrangement has either formal or informal mechanisms to promote co-operation between the parties."

The terms partnering and alliancing are often used interchangeably as they describe very similar arrangements, the main difference being that partnering is mostly used to describe general business relationships whereas alliancing tends to be applied to project or outcome specific situations. In the resources sector most work tends to be project specific, thus the term alliancing will be used throughout this paper to describe the contractual relationship.

---

* Associate, Law Strategies Pty Ltd. I am grateful to Peter Dighton and Damien Cronin for their useful comments on an earlier draft of the article. All errors remain my own.

1 For example, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

2 National Economic Development Council (NEDC), 1991, Partnering: Contracting Without Conflict. London: National Economic Development Office (NEDO).

2. HOW CAN ALLIANCING STILL BE OF USE IN TODAY'S ENVIRONMENT?

The first major alliancing project in Australia was the Wandoo oil project in 1994. Due to the success of the Wandoo project, alliancing was replicated in other oil and gas projects and also in the area of construction.[3] Since the early 1990's there has been a major strengthening of oil and gas prices. Consequently there has been little incentive for the major oil and gas companies to enter into alliancing arrangements. More recently, spiralling capital and project operating costs have put pressure on project margins which is conducive to all levels of explorers and producers engaging in alliancing agreements.

Other segments of the resources sector have not experienced such a dramatic increase in commodity prices but continue to engage in various styles of alliances. An example is the coal industry where high quality coking coal continues to yield high prices whilst lesser qualities of coal have not had the same rise in price. These comparatively modest increases in prices combined with the huge increase in project costs have seen many companies opt for alliancing style arrangements similar to contract mining.

Alliancing has proven to be of great worth and utilised in situations of tight profit margins, however the incorporation of an alliance approach will also depend on a number of other factors. These factors include:

- the maturity of the industry sector;
- the parties understanding of the risks involved with the particular project delivery method; and
- the current status and the future outlook of the economic cycle.

In regard to economic conditions, alliancing arrangements tend to become more popular with different parties at different times in an economic cycle, for example, with contractors and project financiers when construction and lending margins are tight, and with project owners when commodity prices are down.

The attractiveness of alliance arrangements when considering major infrastructure projects can also be attributed to advantages in overcoming new and unforeseen circumstances in a way that fixed scope contracts cannot. In respect of technical issues, alliancing can foster collaboration and innovation between participants in a manner at odds with traditional contracting methods. Alliancing tends to be less common in the delivery process of projects containing high mechanical and electrical engineering content or new technology, for example clean coal technology in base load coal fire generation plants.

By entering into alliancing arrangements factors relating to risk, funding and escalating costs may be hedged. Thus an alliance could be the difference between the financial viability of a project or delaying the project until economic conditions stabilise.

---

[3] More recently project alliancing has been successfully used in the construction sector as seen by the success of the National Museum of Australia which was completed in March 2001. The National Museum opened on time, under budget and achieved high quality scores due to a highly innovated, collaborative project team: see M Sakal, "Project Alliancing: A relational contracting Mechanism for Dynamic Projects" (2005) 2 LCJ 67.

3. ALLIANCING AGREEMENTS – LEGAL ISSUES

Alliancing is based on trust, teamwork, aligned goals and sharing of risk and reward. A traditional contract aims to set out and protect the interests of the parties by prescribing all rights and obligations. This type of contract not only determines the legal effect of the business relationship between the parties but also guides the transaction through a predetermined, detailed and specific route to completion.[4] Alternatively, in alliancing arrangements there will be numerous issues that will not have been decided and may change based on conditions and external forces. Therefore the agreement must be dynamic enough to be able to cope with all the possible variables while fostering the philosophies of alliancing.

Due to the "soft" and unique nature of alliancing agreements a number of legal issues need to be considered when drafting, a selection of which is discussed below.

3.1 Structure

There are a number of legal structures that may be suitable for an alliance. These include an unincorporated joint venture, an incorporated joint venture, a partnership or unit trust. Most alliances structure the relationship based on the principles of an unincorporated joint venture but without declaring a joint venture relationship. Within this legal relationship the parties will usually create a management structure to oversee the relationship. This structure will usually consist of an Alliance Board, Management Committee and a Project Team (or similar names).

The creation of these management structures will not alter the legal relationship of the parties. However, it is possible that the management structure may create additional fiduciary duties (discussed below) on top of those already imposed as a result of the parties' legal relationship. This situation may arise where the management structure imposes unanimous decision making, but the legal relationship does not. Furthermore, the management structure may require that additional factors other than the parties' own commercial interests be taken into consideration, which may also be at odds with the legal structure requirements. In any case, depending on the legal structure the parties pursue, the following issues will also need to be considered:

- taxation;
- limited liability;
- flexibility; and
- accounting.

The legal structure of the relationship will ultimately be determined by the parties with regard to their individual situations.

3.2 Fiduciary Duties between the Alliance Partners

In a detailed commercial agreement, sophisticated parties will usually have dealt with each other in an arm's length fashion with no special reliance or trust and with the benefit of sophisticated advice. In this instance there can be no justification for the imposition of a fiduciary duty.[5]

---

4 P Warne, "Latest Developments on Alliancing and Relevant Legal Issues" (1998) OGLTR 326.

5 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 70 per Gibbs CJ.

This can be contrasted to pure alliancing arrangements where the alliance partners will be guided by the principles of openness, trust, and alignment of goals.[6] In pure alliancing arrangements the parties will clearly stipulate that there is no relationship of partnership or joint venture. Thus the parties will generally operate as an unincorporated joint venture.[7] Among the legal issues associated with an unincorporated joint venture is whether parties owe a fiduciary duty to each other in their dealings. If a breach of duty within the scope of the fiduciary relationship can be established the advantages of fiduciary law are multifarious, both in method – for example, the reversal of the onus of proof, presumptions of wrongdoing and disregard of notions such as causation, forseeability and remoteness, and in remedy – the flexible remedies of rescission, equitable damages, accounts of profits and constructive trusts.[8]

When drafting the alliance agreement lawyers must be careful to construct them in a manner which falls short of categorising the parties as partners or preferably even as joint venturers. Guidance as to how a court may decide the issue can be gleaned from cases relating to fiduciary relationships in joint ventures and partnerships.

A partnership is the relation that subsists or exists between persons carrying on a business in common with a view to profit.[9] The existence of a fiduciary relationship between partners has been well established by the courts.[10] The essential principle that underpins this relationship is best summed up by Bacon VC in *Helmore v Smith*:[11]

> "If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business goes on."

The distinction between a partnership and a joint venture can often be blurred. In an attempt to distinguish the two types of arrangements Dawson J in *United Dominions Corporation Ltd v Brian Pty Ltd*[12] concluded:

> "Perhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit."

---

6 G Thomson, "Project Alliances" [1997] AMPLA Yearbook 127.

7 *Warne*, op cit n 4.

8 R Chesmond, "Joint Ventures: the inter-relationship between contract and fiduciary law" (2005) 12 APLJ 80.

9 *Partnership Act 1963* (ACT) s 6; *Partnership Act 1997* (NT) s 5; *Partnership Act 1892* (NSW) s 1; *Partnership Act 1891* (Qld) s 5; *Partnership Act 1891* (SA) s 1; *Partnership Act 1891* (Tas) s 6; *Partnership Act 1958* (Vic) s 5; *Partnership Act 1895* (WA) s 7.

10 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

11 (1887) 35 ChD 436 at 444 per Bacon VC.

12 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 15 per Dawson J.

In a mining and petroleum context parties will usually arrange themselves in the form of an unincorporated joint venture. However, the formation of an unincorporated joint venture does not automatically free the parties of the imposition of fiduciary duties. As explained by the High Court:[13]

> "The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers from being a fiduciary one. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship (see, generally, *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, at pp 407-409)."

Although a pure alliance agreement will be drafted to avoid obligations imposed on a partnership and joint venture, it will undoubtedly contain many of the indicia the courts look for in imposing fiduciary obligations between parties.[14] These indicia will aid the court in determining the existence of a fiduciary relationship between the parties.[15]

In *Pacific Coal Pty Ltd v Idemitsu (Qld) Pty Ltd*[16] the parties associated themselves in an unincorporated joint venture for the purposes of (a) investigating the feasibility of developing and exploiting the deposits of coal in the Ensham area of the Bowen Basin in Central Queensland and (b) undertaking such development and exploitation if the investigation proved it to be viable. It was alleged that by virtue of the terms of the Joint Venture Agreement and the relationships between the parties established thereby, the parties to the Joint Venture owed to one another fiduciary duties.

In examining the existence of a fiduciary duty, the court examined the critical features of the relationship as contained in the Investigation Agreement:[17]

> "The participants agreed to associate themselves for certain purposes set out in the Preamble Clause C. The venture assets were to be dedicated to the Joint Venture exclusively: Clause 3.2. All liabilities, costs and expenses of the Joint Venture were to be shared: Clause 3.4. Each participant covenanted to be just and faithful in all its activities and dealings with the other participants and to act bona fide in the interests of the objectives of the Joint Venture: Clause 3.10. Each participant was to be bound by decisions of the Management Committee: Clause 4.5; and this was authorised to determine general policy

---

13 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10 per Mason, Brennan and Deane JJ.

14 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410; 139 ALR 193.

15 Ibid.

16 Unreported, SC (Qld), Ryan J, 21 February 1992.

17 Ibid at 12 per Ryan J.

> and have overall supervision of the control of the Joint Venture: Clause 4.17 There was an obligation of confidentiality (cl 13); and assistance in marketing of the product of the Joint Venture was to be provided by joint participants cl 14."

The above features of the relationship between the parties led to the following conclusion:[18]

> "By the Investigation Agreement the parties put themselves in a position where they placed reliance upon the undertakings of the others so as to further the objectives of the Joint Venture. Though Mason J. dissented from the majority decision in the Hospital Products case, I consider that he said nothing contrary to the views of the majority when he stated (at pp. 96-97) that 'the critical feature of these [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position'. In the present case, I consider that the participants undertook to act so as to further their joint interest in the venture and not to act so as to prejudice that joint interest. They placed mutual confidence in one another, and each was vulnerable to abuses of power by the others.
>
> I conclude therefore that a fiduciary relationship among the participants was established by the Investigation Agreement."

This case illustrates the willingness of courts to look beyond the establishment of a formal partnership or joint venture and rather examine the characteristics of the relationship when investigating the existence or otherwise of a fiduciary relationship.

One simple solution which may add some certainty to the relationship is to insert a clause clearly defining the scope of the relationship and which expressly states that neither party will owe any fiduciary duties to the other.[19]

3.3 Good Faith

An obligation to act in good faith is normally an express obligation in alliance agreements. The obligation should extend to areas such as termination, selection of persons for roles on the management committee and project teams, scope changes and open book accounting.

Where an alliance agreement is silent on the matter, a court may imply an obligation of good faith arising out of the relationship Discussion on the duty of good faith in Australian contract law can often be sourced to the judgment of Priestly JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works.* In his justification for the application of the doctrine in Australia, Priestly JA referred to its evolution within the United States where he stated:[20]

---

18 *Pacific Coal* (unreported, SC (Qld), Ryan J, 21 February 1992), at 13 per Ryan J.

19 PG Willis, "Chinese Walls: Myth, Metaphor and Reality – Living with Fiduciary Duties in Resources Relationships" [2002] AMPLA Yearbook 558 at 571.

20 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 264 per Priestly JA.

> "The importance of these developments in the United States for Australian purposes is the cumulative effect of the following:
>
> (i) they grew out of the same common law background as that of Australian law;
>
> (ii) under the stimulus first of academic systematisation of the accumulation of good faith cases and second the interaction of that with the Uniform Commercial Code, general contract law came quickly to recognise (or reinstate) the pervasive principle of the good faith obligation;
>
> (iii) despite the difficulties in precise statement of the obligation its use seems to have been generally accepted in a highly commercial country – throughout the period of the modern revival of the obligation the business of America has largely been business – and
>
> (iv) there has been little if anything to indicate that recognition of the obligation has caused any significant difficulty in the operation of contract law in the United States.
>
> When the broad similarity of economic and social conditions in Australia and the United States is taken into account the foregoing matters all seem to me to argue strongly for recognition in Australia of the obligation similar to that in the United States."

This decision was later accepted in *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[21] where Mason P said that, despite his lack of enthusiasm for the principle, he was bound by what had been decided in *Renard*; this view was again reaffirmed in *Burger King v Hungry Jacks Pty Ltd*.[22] It is now clear, at least in New South Wales, that that the implied obligation of good faith is broadly accepted to avoid exploitative conduct in the performance of a contract.[23]

This doctrine has been recognised in Victoria in the recent case of *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL.* In this case Buchanan JA, who gave the leading judgment said:[24]

> "I am reluctant to conclude that commercial contracts are a class of contracts carrying an implied term of good faith as a legal incident, so that an obligation of good faith applies indiscriminately to all the rights and power conferred by a commercial contract. It may, however, be appropriate in a particular case to import such an obligation to protect a vulnerable party from exploitive conduct which subverts the original purpose for which the contract was made."

In the end Buchanan JA did not consider whether the term requiring the exercise of good faith was to be implied, for even if such an obligation was to be imposed in his opinion it was not breached.

---

21 (1993) 31 NSWLR 91.

22 [2001] NSWCA 187.

23 Justice Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law", New South Wales Supreme Court Speech, 21 February 2006.

24 [2005] VSCA 228 at [25] per Buchanan JA.

Warren CJ who agreed with Buchanan JA noted that although there has been a clear recognition of the doctrine of good faith, the courts have tended to decide these matters on other bases due to the conceptual difficulty that can attend the concept of a duty of good faith. Her Honour went further and stated that the judicial reticence lies probably as much with the vagueness and imprecision inherent in defining commercial morality.

While recognising the existence of a duty of good faith *Esso* demonstrates that this duty will not be broadly implied into all commercial contracts. The court further reasoned that the interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Thus the judgment suggests that the scope for the implication of the duty of good faith is very limited.[25]

The Federal Court has also been reluctant to recognise a broad implication of the duty of good faith – see *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*[26] and *Aiton Australia Pty Ltd v Transfield Pty Ltd.*[27]

In the High Court case of *Royal Botanic Gardens and Domain Trust v South Sydney Council*[28] the majority declined to address the issue of the existence of an implied obligation of good faith, however Kirby J cautiously stated:[29]

> "…in Australia, such an implied term appears to conflict with fundamental notions of caveat emptor that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include."

While a judge of the Federal Court Gummow J was also reluctant to express support for a general implication of the duty of good faith.[30] Although the High Court has not given a clear judicial statement on the obligation of good faith, various state courts have been willing to at least recognise the concept of an implied obligation of good faith in the performance of commercial contracts.

However an alliance agreement will usually contain an express obligation of good faith and that gives rise to the question - What does "good faith" entail? In *Esso* Buchanan JA listed some of the various definitions of the content of good faith; in this he referred to *Renard* in which Priestley JA equated good faith with reasonableness, and Finkelstein J's views in *Garry Rogers Motors (Aust) Pty Ltd v Subaru Australia Pty Ltd*[31] that all the obligation required was that a party not act capriciously.

---

25 For further discussion of this case see: S Freire, "Implied Obligation of Good Faith in Contracts: Only 'Vulnerable' Parties Need Apply" (2006) 25 AURELJ 99.

26 (1993) 45 FCR 84.

27 1999) 153 FLR 236.

28 [2002] HCA 5.

29 Ibid at [87] per Kirby J.

30 *Service Station Association* (1993) 45 FCR 84 at 97 per Gummow J.

31 (1999) ATPR 41-703 at 43,014 per Finkelstein J.

Some believe it is easier to define what "bad faith" is, rather than to focus on the content of good faith.[32] This excluding approach has found support in the judgment of Priestley JA in *Renard*[33] and also *Burger King*.[34] Another often referred to approach is that of Sir Anthony Mason in his Cambridge Lectures. Sir Anthony suggested that good faith should comprise of the following:[35]

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

A direct application of this definition is provided in *Overlook Management BV v Foxtel Management Pty Ltd*[36] where Barratt J said:

> "Viewed in this way, 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 party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary: Burger King at para 187. The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms."

As is evident from the various definitions of good faith referred to above, the debate on the meaning of good faith is far from over. This will likely remain the state of affairs until the High Court makes a clear judicial statement on the issue.[37]

Whilst the express and implied obligations of contractual good faith are gradually finding more acceptance, the law regarding this area is far from settled. Parties wanting to contract on the basis of good faith should expressly state this intention and because the concept of good faith is uncertain and ambulatory, if possible they should define what it is they mean by the term.[38] An example of the appropriate behaviour is "open book" accounting which is discussed below.

3.4 Good Faith and Termination

Alliancing agreements usually require "open book" accounting as an incident of the exercise of good faith. In *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd*[39] the parties entered into a partnering contract in which Thiess would carry out mining operations. Under the contract Placer would pay Thiess charges based on those costs, to which there would be added an agreed profit margin of 5 per cent. The proposal was that Thiess would open its books to Placer and disclose the way in which it derived its rates for using particular pieces of equipment and carrying

---

32 E Peden, "The Meaning of Contractual 'Good Faith'" (2002) 22 ABR 235.
33 *Renard* (1992) 26 NSWLR 234 at 266 per Priestly JA.
34 *Burger King* [2001] NSWCA 187.
35 Sir A Mason, "Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith", The Cambridge Lectures, 8 July 1993, which was the basis for his later article, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66.
36 (2002) ATPR (Digest) 46-219; Aust Contract R 90-143 at [67] per Barratt J.
37 Peden, op cit n 32.
38 McDougall, op cit n 23.
39 (2003) 196 ALR 257.

out particular work. In addition to this "open book" accounting procedure was the following clause:

> "The successful operation of this Contract requires that [Thiess Contractors] and [Placer] agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document."

The partnering contract also contained a termination for convenience clause which was subsequently relied on by Placer to terminate the relationship between the parties. In response Thiess commenced an action in the Supreme Court of Western Australia for wrongful termination on the basis that the termination was inconsistent with good faith provisions. Placer counterclaimed, alleging among other things that it had overpaid Thiess because Thiess had deliberately inflated its estimate of costs in carrying out the work.

At trial it was found that, in breach of its obligations under the contract, Thiess submitted rates to Placer which were not a genuine estimate of its costs. Thiess also failed in its attempt to prove that Placer had wrongfully terminated. It was held that the obligation of good faith would not override a specific contractual provision which allowed a party to terminate. Placer was subsequently awarded $4.853m in damages.

On appeal to the Full Court of the Supreme Court the decision of the trial judge was overturned on the basis that the method adopted by the trial judge for calculation of damages was flawed and that Placer had failed to prove its damages. The Full Court substituted the nominal sum of $100 in lieu of the award of $4.853m. However in respect of termination the trial judge's decision that the obligation of good faith would not override a specific contractual provision was upheld.

On appeal to the High Court the central question to be decided was whether Placer had failed to prove the damages it had sustained as a result of Thiess Contractors' breach of contract. The High Court reinstated the trial judges' decision, finding that the Full Court had erred in concluding that the method of calculating damages which the trial judge used was wrong. Cullinan J observed that in circumstances where a party had been continually deceived a court should not be too critical of imperfections in the proof of a claim. In such circumstances an estimation and not an exact calculation of the damages is acceptable. Further, Cullinan J suggested the contractual obligation to act in good faith "in all matters" should not be regarded as discharged on the commencement of proceedings or suspended during them.[40]

This case emphasises the importance of alliancing parties meeting obligations of good faith and keeping books open for review, even at the commencement of legal proceedings. Importantly though, a party will not be in breach of its obligations of good faith by terminating where expressly permitted.

3.5 "No Dispute"

The concept of no dispute is fundamental to the success of an alliance agreement as it reinforces the ideal of co-operation. A no dispute clause seeks to prevent alliance participants from litigation other than for acts or omissions deemed to be classed as a wilful default. The inability of a party to engage the court thus raises the issue of ousting the courts' jurisdiction.

---

[40] Ibid at 282.

Generally, a contract which purports to oust the jurisdiction of a court will not be illegal, but void, due to it being contrary to public policy.[41] At the core of this head of public policy is the notion that the citizen is entitled to have recourse to the court for an adjudication on his legal rights.[42]

Alliances will usually establish an alliance board (or similar Committee) to deal with disputes between the parties as they arise. The decisions of the board will typically be binding on the parties. This dispute procedure in effect prevents parties from commencing litigation, however it will not amount to an ousting of jurisdiction of the court.[43]

Parties to a contract will be free to include a contractual provision which refers disputes to an arbitrator, expert or committee for resolution without being in breach of public policy. As stated by Heenan J in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*:[44]

> "As a general rule, the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute. As the provisions of the Commercial Arbitration Act 1983 show, if they have agreed in writing to refer present or future disputes to arbitration their agreement will be recognised and enforced. Even if the procedure agreed upon is not arbitration, the agreement might well be enforceable as a matter of contract. Thus the Court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise (for example, see the judgment of the Court of Appeal in Jones v Sherwood Computer Services [1992] 2 All ER 170)."

Thus, decisions of experts or committees may lawfully be regarded final and conclusive in relation to matters of fact. Consequently, decisions deemed to be final and conclusive extending to legal matters will be void as it will be seen to be an ouster of jurisdiction of the court, but for reasons mentioned below this may not apply to an alliancing agreement.[45]

A no dispute clause may typically read:

> "….except to the extent that the actions of a party constitute Wilful Default, each party agrees that it will make no claim against the other for damages, losses or expenses suffered by reason of that other party's negligent, inefficient or (in any other way) defective performance of its obligations under this Agreement."

A literal interpretation of the above or similar clause may suggest a case of ousting jurisdiction of the court due to the fact that the failure to perform an obligation cannot be litigated. However in the case of a pure alliance, this suggestion fails to recognise the fundamental principles of alliancing. As stated previously, alliancing is based on trust, teamwork, aligned goals and sharing in the risk and reward. If both parties are on the "same team" with commonly aligned goals, it would seem contradictory to the spirit of the alliance to blame a team member for a perceived failure in performance of an obligation. Therefore other than egregious actions (eg wilful default),

---

41 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643.
42 *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540 at 548 per Drummond J.
43 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *South Australian Railway Commissioner v Egan* (1973) 130 CLR 506.
44 (1997) 14 BCL 277 at 280 per Heenan J.
45 *Jones v Sherwood Computer Services* [1992] 2 All ER 170.

a party should not be able to sue another in respect of which the first party is equally liable to deliver.

The pain/gain share instrument is a commercial driver used to give an incentive to performance of obligations without going to court. The pain/gain share mechanism is designed to give incentive to parties to reach intended outcomes. It is also this mechanism that is intended to deter parties from non-performance of obligations. Should a party dispute any of the pain/gain share schedules then there will usually be provision for the dispute to go to arbitration. By referring these disputes to arbitration the parties have made provision for all matters of dispute to be resolved by a lawful means and without ousting jurisdiction of the court.[46] Another commercial driver for participants' adherence to the no dispute regime is reputation risk. A contractor's reputation for honouring alliancing arrangements and behaving accordingly will be risked, if having signed onto a no dispute regime it commences a dispute resolution procedure outside of the alliance's internal dispute resolution structure regime. Finally, a default remedy may be to use the termination clause to terminate the alliance without recourse should the parties fail to resolve a dispute. This type of provision adheres to public policy and also imposes a significant disincentive to protracted, high profile (such as the River City Tunnel) or long-term alliances where individual projects are completed under the auspices of the alliance.

3.6 Indemnity

Stemming from wilful default are issues concerning indemnity and liability. In particular, the challenge is to draft a simple clause, consistent with the style of most alliancing agreements, which does not fail to give effect to the intent of the parties due to legal technicalities. Most alliance agreements will state that the parties take responsibility for loss of or damage to their property as well as injury or death of their personnel, regardless of fault. This avoids the potential for double insurances by allocating risk consistent with the insurances each party already has in place. The UK CRINE conditions of contract, designed to streamline contracting, are drawn on this basis. If the indemnity is to apply regardless of negligence on behalf of the other party the agreement should expressly state this. Failure to expressly state the intentions of the parties may lead to a situation as was seen in the English case of *E E Caledonia Ltd v Orbit Valve Co*.[47]

The *Orbit Valve* dispute was a result of the disastrous fire on the Piper Alpha platform in the North Sea in which 165 people lost their lives. The cause of the fire and explosion was attributed to breaches of statutory duty and negligence. This case specifically involved the interpretation of an indemnity clause in which the plaintiff contractors were seeking to rely on in relation to a claim for damages. The main clause in dispute read as follows:

> "Company's and Contractor's Employees and Property:
>
> Each party hereto shall indemnify, defend and hold harmless the other, provided that the other party has acted in good faith, from and against any claim, demand, cause of action, loss, expense or liability (including cost of litigation) arising by reason of any injury to or death of an employee, or damage, loss or destruction of any property, of the indemnifying party, resulting from or in any way connected with the performance of this Order."

---

46 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643.

47 [1994] 1 WLR 1515.

Although the above clause did not expressly include provision for negligence, Steyn LJ did acknowledge the provision was nevertheless wide enough to cover negligence of the parties, thus satisfying Lord Morton's second proposition in *Canada Steamship Lines Ltd v The King.*[48] The third and final proposition from *Canada SS* states, if there is some other ground of liability other than negligence, the clause will be read as applying only to that other ground of liability and will not operate to exclude the claim for negligence.[49] Steyn LJ agreed with the trial judge in finding that another ground of liability in the Piper Alpha case was breach of statutory duty. Thus the plaintiff contractor failed in its attempt to show that the relevant clause was wide enough to cover negligence. Interestingly, His Lordship further suggested it was implausible that the parties would wish to release one another from the consequences of the other's negligence and agree to indemnify the other in respect of such consequences.[50] This statement is surprising given that the general intention of knock-for-knock clauses within the industry is to allow parties to contract out of liability for negligence. It is a salutary warning that courts do not always interpret commercial agreements in the way the parties intended, particularly where general terms are used.

In *Darlington Futures Ltd v Delco Australia Pty Ltd*[51] the High Court explained its approach to the interpretation of exemption clauses:

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

While earlier English decisions contained statements giving effect to the ordinary and natural meaning of the words of the clauses read as a whole, the High Court could not understand other statements which sought to deny the legitimacy, indeed the necessity, of construing the language of such a clause in the context of the entire contract of which it forms part. The difference was explained as follows:[52]

> "The formulation by the House of Lords of a new approach to the construction of exclusion and limitation clauses in place of the earlier approach based on the doctrine of fundamental breach explains why the emphasis in these statements is upon the language of the particular clauses rather than upon the context in which they appear."

The High Court's *Darlington Futures* approach rather than the *Canada SS* approach has been subsequently preferred in the later cases of *McCann v Switzerland Insurance Australia Ltd*[53] and *Andar Transport Pty Ltd v Brambles Ltd,*[54] effectively deciding the issue. As a result the outcome

---

48 [1952] AC 192 at 208 per Morton LJ.

49 Ibid.

50 *Orbit Valve* [1994] 1 WLR 1515 at 1523 per Steyn LJ.

51 (1986) 161 CLR 500 at [16] per Mason, Wilson, Brennan, Deane and Dawson JJ.

52 Ibid at [13] per Mason, Wilson, Brennan, Deane and Dawson JJ.

53 (2000) 203 CLR 579 at 602 per Kirby J: "Courts now generally regard the contra proferentem rule (as it is called) as one of last resort because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae".

54 (2004) 217 CLR 424.

of *Orbit Valve* may have been different had the matter been decided by an Australian court. Nonetheless, the above serves as an important reminder to draft exclusion clauses exactly as the parties intend but at the same time not leaving anything to chance. Unfortunately this is somewhat at odds with the intent of including simple, plain English principles in alliance agreements.

4. CONCLUSION

Project alliancing, as it is known today, was created in an attempt to design a project delivery strategy which would see project capital costs and operating costs restrained to ensure projects remained economically feasible. In today's environment of spiralling construction costs, labour shortages and a cooling of some commodity prices, suitable conditions may exist for the use of alliancing agreements in the resources sector.

Alliance agreements are based on the notions of trust and good faith. As such it is likely that courts will not look favourably on a party's behaviour which is inconsistent with these principles. However, a party will still be free to act in a manner as expressly stated in the agreement without breaching its duty of good faith. Care must also be taken in the alliance agreement that the document expressly and accurately reflects the commercial intent of the parties in regards to obligations towards one another.

The flexible and dynamic nature of alliancing agreements can in certain circumstances be of great advantage as compared to traditional contracting methods. Conversely, it is this nature which can create problems for drafters. The challenge for any drafter of an alliance agreement is to protect their clients' interests whilst giving effect to the trust based nature of the relationship and not being overly prescriptive. In most alliancing agreements there will inevitably be some issues that are left open, but this is the nature of the agreement. However, sufficient clarity and contingency must be in place so as to give the alliancing parties comfort in going forward.