
THE
PROJECTS AND
CONSTRUCTION
REVIEW

FIFTH EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

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THE PROJECTS AND CONSTRUCTION REVIEW

Fifth Edition

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique modern (Daloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). Some important issues recently discussed during the annual meeting of the International Academy of Construction Lawyers (IACL) have also been included for a broader debate. All of these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from three new jurisdictions in this year's edition: East Timor, Nigeria and Saudi Arabia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 30 countries has shown us that to understand the world we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms who graciously agreed to participate.

Finally, I dedicate this fifth edition of *The Projects and Construction Review* to a non-lawyer, a non-engineer, but yet a most noble man: Ozias Bueno, my dearest father, whose tenderness, dedication and wisdom has given me nothing less than the desire to also be a model father to my own little son.

Júlio César Bueno

Pinheiro Neto Advogados

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Chapter 3

RELATIONSHIP CONTRACTING

*Doug Jones*¹

It is increasingly recognised that the zero-sum mentality that traditionally characterises the construction industry is counterproductive. The belief that any profit is made at the other party's expense is structurally enshrined in the conventional construction contract and generates a variety of inefficiencies. The routine of parties pouring time and money into the defence of their respective contractual positions creates an undesirable state of affairs for all concerned. Even where the parties are on relatively good terms, project management costs will include, for instance, full and detailed documentation in case of a later dispute. Where problems do arise, they will be dealt with by allocating blame, rather than through a collaborative search for solutions. As differences of opinion escalate from psychological disagreements to legal disputes, conflicts harden and become entrenched. A culture of defensiveness is then ingrained into the conduct of contractual negotiations, which become an exercise in the parties transferring as much risk as they can to the other.

Moreover, the conventional construction contract is not an instrument that facilitates successful outcomes. For example, the traditional fixed-price remuneration method sets the interests of owner and contractor in fundamental opposition. This perpetuates an adversarial environment that causes the overall quality of the project delivery to suffer. Design work is not a matter of exploring the best solution for the client's purposes, but rather conforming to inflexible cost constraints in pursuit of margins. Likewise, the constructor's interest also lies in favour of minimising costs, even at the expense of producing substandard results. The typical contractual mechanisms, such as liquidated damages and performance security, provide only negative incentives to perform and at most will ensure compliance with the minimum contractual requirements. As such, there is little in a traditional contract to incentivise outstanding performance. Many owners, consultants and commentators have come to the conclusion

¹ Doug Jones is an independent international arbitrator based in London, Sydney and Toronto.

therefore, that innovations in contract drafting that seek to address this state of affairs must do more than merely reallocate risk within the existing adversarial structure. What is required is a radical reassessment of the nature of the relationship between owner and contractor.

From this reasoning, the concept of 'relationship contracting' has developed. The expression embraces a wide and flexible range of approaches to managing the owner–contractor relationship, based on the recognition that there is a mutual benefit in a cooperative relationship between owner and contractor. This is often expressed as the establishment of a win-win scenario where the interests of owner and contractor are more closely aligned. The desired result is an improvement in the quality of work combined with a reduction in dispute costs. There are various emanations of relationship contracting, but this chapter will focus on four: partnering, alliancing, the managing contractor and the delivery partner model.

I PARTNERING

The term 'partnering' has been used in a variety of ways, but it best describes a situation whereby the parties to a traditional 'hard-dollar' contract attempt to soften its adversarial nature by establishing relationship guidelines through a non-binding partnering charter. This charter will emphasise the parties' commitment to adopting values such as trust, fair dealing, good faith and cooperation throughout the duration of their contractual relationship.

Partnering is not a project delivery strategy in the same sense as alliance contracting. The partnering charter is best seen not as a contract but as a covenant describing the attitudes and consultative processes to which the parties mutually aspire. The charter sits behind the contract and does not give rise to legally binding rights and obligations in and of itself. Accordingly, partnering is at the informal end of the relationship-contracting spectrum. It does not require the overhauling of conventional contractual mechanisms that govern, for instance, remuneration or dispute resolution. Partnering is a balanced approach that elicits a commitment to good-faith dealing and establishes a norm of positive relations while retaining the security and certainty of the allocation of risk and liability under the contract itself.

The utility of partnering should not, however, be overstated. Despite its apparent attractiveness as a balancing tool, having a foot in each camp has certain important disadvantages.

First, a partnering charter can give rise to a measure of uncertainty as to the rights and obligations of the parties. Although the charter is not *prima facie* a legally binding instrument, the behaviour of the parties in entering a partnering agreement may mean that the court views the parties as having assumed higher duties of fair dealing than is ordinarily the case in respect of commercial contracts. As such, the types of undertaking given by the parties may give rise to duties of good faith enforceable by courts in both civil law and common law jurisdictions.

Additionally, partnering may not go far enough to be a genuinely useful option within the relationship-contracting inventory. The charter ultimately glosses over what remains an inherently adversarial relationship and partnering will not necessarily involve

any real commercial incentive for the parties to cooperate. Moreover, the coexistence of the partnering charter with the main contract can be uneasy at times. For example, certain contractual provisions, such as liquidated damages clauses, will directly contradict the spirit of the partnering charter.

The success of partnering therefore really turns upon the willingness of parties to voluntarily adhere to the principles of their agreement. National culture can have an impact upon this. For example, long-standing values of trust and commitment underlie commercial culture in many Asian countries. Perhaps unsurprisingly, therefore, partnering has been a successful approach within, for example, the Japanese construction industry. However, where the parties are more inclined to operate in an adversarial manner, such as has traditionally been the case within the Australian construction industry, partnering may not provide a sufficiently strong response to overcome entrenched behaviour. A sturdier option may be necessary.

II ALLIANCING

At the other end of the relationship contracting spectrum lies project alliancing. This is the high-water mark of relationship contracting in respect of the design and construction of new infrastructure. An alliance is a collaborative structure where the parties work together to deliver project outcomes. The strategy rejects the adversarial nature of the traditional fixed-price construction contract by seeking to formally align the commercial interests of the respective participants. In contrast to a non-binding partnering charter that sits outside the contract, an alliance arrangement will require the parties to formally agree to share commercial risk and reward. These are not vague statements of good intention, but binding contractual terms that fundamentally reposition the relationships between the transacting parties. The sharing of risk and reward removes the incentive for parties to defend their own interests at the expense of the other and fosters a cooperative 'best for project' approach.

As with any contractual model, there are always variations. The best way of understanding the way that alliancing principles are used is to look first at the pure project alliance to identify its key features, and then to move from this starting point to identify and explore several variations of the model.

i Pure project alliance

The pure project alliance is the most common form of alliance and is the quintessential emanation of relationship contracting. There are several important features of the model that collectively contribute to aligning the interests of the parties.

Pure project alliances will typically involve the sharing of all project risks and rewards between the parties, embracing a 'we all win or we all lose' mentality. At its simplest, the alliance contract will establish a target cost and a risk/reward curve, allowing the benefits of any project savings or the burden of any overruns to be shared according to a prearranged formula. Thus, the incentive to perform has a commercial impetus and is contained in the contract itself. In addition to the basic objective of meeting the target cost and time of completion, the contract may introduce other benchmarks, usually known as key performance indicators (KPIs) against which performance may

be measured and bonuses awarded. KPIs might include, for instance, environmental or safety standards and satisfaction of community expectations. Participants will agree to these criteria at the outset of the project according to the usual costs of business. The risk/reward curve can be made considerably more complex, to give weight to critical objectives and to multiply rewards for outstanding achievement or impose penalties for poor performance.

This principle of risk/reward sharing is augmented in a pure alliance by a second important aspect of relationship contracting: consensus-based decision-making. Practically speaking, this involves the use of an alliance board, comprising management representatives from all parties to the alliance, to make all key decisions and settle any differences of opinion unanimously. The alliance board is an important feature as it allows collective ownership of decisions and for disagreements to be ventilated at an early stage, which is crucial for the preservation of relations. The requirement of unanimity fosters a culture of compromise and cordiality throughout the project as well as a creative and collaborative search for solutions. This is a welcome departure from the hard adversarial tactics that have often characterised relations between parties to a construction contract.

A third key feature is a contractual provision that states that participants will have no legal or equitable cause of action against any other participant except in the case of wilful default. Consistently with this, parties will also agree not to use arbitration or litigation as a dispute resolution technique. This represents the contractual adoption of the principles of 'no blame' and 'no disputes' considered by many to be a vital aspect of relationship contracting. These principles are crucial to the project alliance because they encourage participants to act on a 'best-for-project' basis since the incentive for participants to act to protect their own interests is removed by the lack of legal recourse to sue if things go wrong.

A pure project alliance is project based in that although it may take a variety of forms, it always incorporates or applies to a specific scope of works. This differs from the programme, or strategic alliance (see below).

The owner undertakes a rigorous selection process for each new project, calling for proposals from either individual organisations or pre-formed consortia, and arriving at the preferred bidders through a procedure involving interviews and workshops. Given that the target cost is established collaboratively after the selection process, contractors are selected according to a range of non-price criteria including:

- a* relevant experience;
- b* evidence of the bidder's ability to complete the full scope of the works;
- c* past performance in similar projects;
- d* management and technical skills;
- e* innovation and resource capabilities; and
- f* methodology for delivery.

Traditionally, therefore, price has not been an area of competition among tenderers for an alliance. This continues to be an area of heated debate between the government and industry (see below).

ii Hybrid alliance

The term 'hybrid alliance' is a broad expression that refers to alliances that adopt some, but not all, of the contractual concepts present in the pure alliance. They take various forms but are motivated by a common desire among some owners to pursue deviations from a pure alliance model to cater for some of its perceived shortcomings.

For example, some alliances may be structured to allow decisions to be made other than by way of unanimous agreement. This may be done to avoid potential unintended consequences of these provisions, such as a concern that the requirement for unanimous decisions will be construed as an agreement to agree and will be rendered unenforceable. Instead, a deadlock-breaking mechanism could be introduced to provide a course of action if unanimous agreement cannot be reached.

There are also alliances that do not fully embrace the no-blame concept, such as those requiring non-owner participants to accept a greater level of legal responsibility for defective work or negligence. These hybrid alliances range from those that merely expand the definition of wilful default to those that do not waive liability for non-owner participants at all. The latter model is essentially a traditional cost-plus contract that includes the alliance management structures and, perhaps, a KPI-based gain/pain-share regime. This is similar to partnering, discussed above, except that the alliance management structures and any gain/pain-share arrangement are embedded in the contract rather than superimposed over it.

Essentially, hybrid alliances reflect the reality that there is no 'one size fits all' when it comes to contracting strategies. They allow owners to pick and choose those features of the pure alliance that best suit the objectives and characteristics of an individual project.

iii Programme alliance

Programme alliances, also known as strategic alliances, share some fundamental characteristics with the pure project alliance. They both make provisions for the sharing of performance risks and incentives, and are founded upon the parties' stated intention to work cooperatively on a non-adversarial, open-book basis to achieve an agreed set of objectives. However, the programme alliance differs from the pure project alliance in a fundamental respect. It is conceived as a long-term relationship between the participants, enduring beyond any single project. This form of relationship contracting is appropriately employed where the owner requires the performance of routine and ongoing work, or a series of similar or related projects, and seeks to develop a close and long-term relationship with the contractor who assumes these responsibilities.

Because of its long-term collaborative character, a successful programme alliance requires the maintenance of a higher degree of trust from all parties than is necessary under a single project alliance. Therefore, programme alliances operate on a distinct rationale, and employ a rather different form of resource allocation to maximise the sustainability of good and intimate relations between the parties over a long period.

iv Competitive target out-turn cost alliance

Another species of alliance contract is the competitive target out-turn cost (TOC) alliance. This has been developed in response to the increasing sophistication of alliance arrangements and the need to improve value for money in construction projects. The

model deviates from the pure project alliance in that it incorporates price competition into the tendering process. As discussed earlier, the selection of partners in a traditional pure alliance is based only upon non-price selection criteria, focusing on the quality of delivery and not its cost. The omission of price from the selection criteria means that the value of the TOC and the proposed gain/pain-share arrangements are not subject to competitive forces.

In a competitive TOC alliance, however, the tenderers each develop an estimated TOC in the process of preparing their tenders, prior to final selection. The procedure is as follows. First, from among the initial pool of prospective tenderers, the owner will shortlist two non-owner participants (NOPs) to develop a TOC for the project. The costs of developing a cost schedule for the project will often be met by the owner, who is responsible for reimbursing the unsuccessful party. From these competing tenders, the owner will then make a final selection based upon a matrix of data that includes the respective TOC estimates of the tenderers, as well as a range of non-price criteria.

The rationale for this development is the need to improve cost-certainty at the business case stage. Alliancing generally provides a flexible contractual option to allow the parties to collaboratively develop the TOC after the contractor is selected. This model has been found to be suitable for projects with complex or unpredictable risk portfolios or where output specifications and project scope are likely to change during design and construction. However, a collaborative costing approach may sacrifice early cost certainty and may not result in the most competitive TOC that is attainable, thereby compromising value for money outcomes. Price competitive tendering is argued by some to be the solution to this problem.

Substantial debate surrounds these issues and many stakeholders are polarised on whether price-competitive tendering delivers greater value for money in major projects. In one corner, there is consistent unanimity among industry NOPs that price-competitive bidding would not support value for money in complex and risky major projects and that this is maximised only through a pure alliance model. In the other corner, the government and other owners argue that competitive alliancing is a necessary and important development in alliance contracting to maximise value for money.

First, the industry often argues that price competition damages the fundamental alliance culture of collaboration. The basis of this claim is that price competition in the selection process positions the parties on opposite sides of the table. It is said that this compromises the early development of trust and open communication between owner and contractor that is vital to produce quality outcomes and minimise disputes. Therefore, competition on any collaborative approach would weaken the establishment of the productive synergies critically needed by the most complex projects and increase project overhead costs for no obvious gain in selecting the best solution. Essentially, the argument is that collaboration is best fostered when owners and successful NOPs jointly estimate the TOC after the selection process.

This argument is often regarded as overstating the damage that price-competitive tendering will do to the collaborative culture of an alliance. Owners and the government contend that price-competitive tendering does not undermine the collaborative culture and actually delivers desirable outcomes in terms of innovation incentives. They argue that encouraging competition among NOPs is likely to promote innovative solutions earlier on in the procurement process so that the alliance tenderers drive the TOC as

competitively low as possible. NOPs are incentivised to show cost-saving innovation in their tender proposals to secure the project.

Another criticism directed toward the competitive alliance model is that it unnecessarily prolongs the project schedule by increasing the tender evaluation duration when compared to pure project alliances. Furthermore, it is argued that unnecessary costs are incurred in the tender selection process, as the cost estimation effort of the losing tenderer requires reimbursement from the owner. As a consequence, the two-TOC alliance requires a much higher initial owner outlay in developing TOCs than the single TOC alliance.

This criticism is often dismissed on the basis that it tends to ignore the role of the competitive alliance model within the broader context of achieving value for money. It is accepted that this process will require higher owner resource commitments but by investing more time and resources into the competitive procurement process, owners are able to achieve greater cost savings in the long run. Moreover, the presence of price competition reduces the need for independent auditors and robust owner cost estimates. Further, it does not follow that the parallel development of two TOCs in a competitive environment will necessarily take longer than the development of a single TOC in a non-competitive environment. Indeed, provided the owner is adequately resourced, the competitive forces are more likely to lead to the opposite result.

Essentially, the arguments advanced by industry amount to the proposition that dual TOC price competition delivers only illusory benefits that do not justify the alleged increased time and monetary cost and the damage to the relationship between owner and NOP. Again, in addition to the counterarguments already outlined, owners emphasise that the competitive TOC model allows the owner to see each tenderer operate in action so that a more robust assessment can be made of the capabilities of each NOP team before selection. Thus, the government has the opportunity to 'try before it buys', thereby increasing the chances that it will select the tenderer best able to deliver value for money.

The competitive TOC also satisfies the political imperative of setting the project cost in an arm's-length environment, thus absolving the government from the criticism that the TOC is not a fair estimate of the project cost. The competitive alliance model may also reduce the risk of a legal challenge from unsuccessful tenderers. With greater reliance upon quantitative selection criteria, the government will be better able to demonstrate fairness in the tender selection process when compared to the pure alliance selection process.

As can be seen there are strongly held views from both owners and contractors supporting both sides of the price competitive alliancing debate. Importantly, however, these questions may become academic depending upon the policy choices of the government. For jurisdictions in which the government pursues a policy of price-competitive tendering for alliance contracts, the matter becomes a foregone conclusion. In such instances, private-sector participants have no choice but to develop price-competitive tenders if they intend to maintain their foothold in public procurement.

III MANAGING CONTRACTOR

A further emanation of relationship contracting is the managing contractor. This is an innovative structure that shares some of its characteristics with 'design and construct' (D&C) contracts and others with the agency relationships seen in the construction and project management models discussed below.

The model originated in Australia and has been used extensively by the Australian Department of Defence as well as a variety of private-sector owners. The managing contractor is essentially a D&C contractor who is responsible for the delivery of the project from feasibility right through to the commissioning stage. The arrangement usually involves the owner entering into one contract for design and construction with the managing contractor, who then subcontracts out all of its design and construction obligations arising out of the primary contract.

This differs from the construction or project manager model where the owner contracts with a manager to provide management services only, and then contracts directly with each of the design and construction contractors. Under the managing contractor model, the owner has a single contractual link with the managing contractor. A managing contractor is thus a 'contractor' in the true sense of the word as its contractual responsibility is to actually deliver the project, not simply to manage its delivery.

Although many modern D&C contractors also tend to subcontract out many of their obligations, the managing contractor can be distinguished from the more common lump-sum D&C contractor in two key aspects: role and risk.

i Role

Although the contractual structure of this model imbues the managing contractor with the responsibility for delivering the project, its key role is project management. Accordingly, the managing contractor usually subcontracts out all of its D&C obligations. In this event, the only services carried out by the managing contractor itself, using its own in-house resources, are the management and advice services provided throughout the project, and also the provision of on-site preliminaries such as hoarding, plant and sheds.

Although the practical difference between a managing contractor and a D&C contractor may not be immediately evident since both tend to subcontract out most of their obligations, rather than use in-house resources, the divergence lies in the degree of control that an owner retains over the selection of subcontractors. While a D&C contractor has autonomy to appoint subcontractors of its choosing, a managing contractor must undertake subcontracting in close consultation with the owner, who will retain the ultimate authority to approve or reject tenderers. This right is consistent with the obligation falling upon the owner to reimburse the managing contractor for costs incurred in the design and construction.

Another important difference between a managing contractor and a D&C contractor is that the former will often provide more extensive project management and advice services to the owner throughout the course of the project. This collaborative approach between contractor and owner is consistent with the non-adversarial principles of relationship contracting. To identify the instances of collaboration throughout a project, it is necessary to explain the process by which a project is delivered where an owner decides to use a managing contractor.

The project would normally proceed as follows. First, the owner invites tenders from potential contractors for management services and defined common site facilities. Once a successful tenderer has been chosen as managing contractor, it will coordinate the feasibility stage of the project, including hiring any consultants required and providing advice to the owner where needed. If the project does not progress past the feasibility stage, the contract may be terminated.

The next stage is the design phase; this will be carried out by the managing contractor, from design brief through to detailed documentation. Throughout this process, the managing contractor will consult closely with the owner, who has the final say as to all decisions made. First, the managing contractor will prepare a design brief that must be approved by the owner. Once this has taken place, tenders for the design subcontract will be invited. Although the managing contractor can recommend a candidate, once again, the final decision is subject to the owner's approval. When the successful tenderer has completed the design, this must again be approved by the owner before construction can begin. This procedure differs from a turnkey arrangement, under which the owner minimises its involvement in the design phase to avoid diluting the contractor's design liability and affecting any warranty for fitness for purpose.

During the construction phase, the managing contractor has a variety of responsibilities. These will include:

- a* advising on the appropriate contract strategy for each package;
- b* managing the tender process and award of packages;
- c* engaging subcontractors to execute the construction work;
- d* programming and timetabling the construction work;
- e* supervising the construction to ensure it accords with design specifications;
- f* managing and administering the subcontract;
- g* instituting a system of cost control;
- h* managing community relations; and
- i* managing industrial relations on the project.

Consistent with the collaborative philosophy of relationship contracting, the process of selecting construction subcontractors is performed by the managing contractor in close consultation with the owner. Again, the owner exercises significant control over the decision through its right to finally approve a nominated candidate; this procedure is identical to that used in the selection of a design contractor.

The final stage of the project in which the managing contractor is involved is the commissioning phase. During this phase, the contractor coordinates the handover of the project and rectifies any defects that become apparent during the defects liability period.

ii Risk

The other feature distinguishing the managing contractor from a D&C contractor is the risk it bears. The managing contractor is exposed to lower risks in terms of both cost and time than a lump-sum D&C contractor.

In respect of cost, while a D&C contractor normally receives lump-sum remuneration, a managing contractor is remunerated on the basis of a combination of lump-sum and reimbursable components. Consequently, the D&C contract places the

risk of cost overruns on the contractor while the managing contractor is relieved of much of the cost risk. The lump-sum component is designed to pay for management services and site facilities, and allows the contractor to extract a profit. In contrast, monies paid by the managing contractor to D&C subcontractors and consultants are reimbursable by the owner. This 'cost-plus' form of remuneration therefore shifts all of the project cost risks, except those for management services and site facilities, onto the owner. Some degree of limitation does exist upon the contractor's right to reimbursement to ensure that the managing contractor is not reimbursed for any costs incurred unreasonably. Costs incurred from unauthorised variations, rectification of defects, breaches of contract or wrongful acts by the managing contractor that give rise to liability to third parties will be excluded from the reimbursement regime.

Time-delay risk is often also borne by the owner. The managing contractor will only have a 'soft' time for completion obligation in the sense that it will be required only to use its 'best endeavours' to achieve a target date. If this is not met there are no liquidated damages payable. This risk profile is beneficial in that it eases overt commercial tensions with the owner. However, because the contractor is paid a fixed lump sum for its management services, it is clearly in its own commercial interest to achieve completion as early as possible so as to preserve margins. Thus, timely completion is achieved not through an adversarial owner-contractor relationship enforced through the threat of damages claims but instead through the alignment of commercial interests of both parties.

The managing contractor model allows for early involvement of the contractor in the project, with close collaboration throughout. This means that the owner is able to achieve completion of the project in the manner it desires, using a spread of industry involvement and expertise but without the need for high-level management commitment. The owner can share some of the risks associated with a major construction project with a contractor and can achieve maximum flexibility in determining the elements to be included in a project and the design of those elements. At the same time, it provides the owner with the management expertise of a contractor organisation to assist and advise upon the design and construction of the project while planning for and remaining within a target time and cost for delivery of the project.

IV DELIVERY PARTNER MODEL

The delivery partner procurement model is a most recent emanation of relationship contracting that builds on the managing contractor model. The delivery partner model enables project owners who lack the resources necessary to oversee many aspects of a project to nonetheless proceed with the assistance of a single or multiple delivery partners. Delivery partners possess the expertise and resources to administer project delivery and provide a single point of accountability for the project's oversight and delivery. Another distinct feature of the model is the responsibility borne by delivery partners for designing and administering a safety system. The high involvement of delivery partners enables project owners to focus on maintaining stakeholder and media relations.

The model was employed successfully in the context of privately funded public infrastructure projects and was first used by the UK government in the construction of the necessary infrastructure for the London Olympic Games. Since then, the delivery

partner model has received attention in Australia as a potential delivery method for government infrastructure projects.

The role of delivery partners is to oversee and bear absolute responsibility for the management and delivery of the project. In this respect, the role of a delivery partner is similar to that of the managing contractor. The model allows for the engagement of multiple delivery partners; for example, a 'programme' partner responsible for programme management, stakeholder engagement and design negotiation, paired with a 'project delivery' partner responsible for project management, and construction or design contract administration. This flexibility makes the delivery partner model suitable for the delivery of major projects that require substantial expenditure, close project oversight and a high level of engagement with stakeholders, as is often the case in government infrastructure projects. Crucially, however, delivery partners are prohibited from self-performance of the construction or design works unless prior consent is obtained from the project owner.

The delivery partner model responds to a call for early contractor involvement by governments in publicly funded infrastructure projects. The involvement of contractors or delivery partners as early as the feasibility stage of a project can enhance efficiency and costs at these early stages.

The remuneration structure under the delivery partner model features an incentivised gain/pain-share mechanism and in this way aligns the interests of the project owner with those of its delivery partners, as relationship contracting has historically undertaken. Delivery partners commit to deliver the project to cost and time targets and are reimbursed according to their real salary costs and a fixed margin that is tied to KPIs and project outcomes. KPIs are flexible and, as with other relationship contracting models, can be tailored to address the project owner's desired outcomes.

As in the case of the managing contractor, the project owner retains supreme authority over the appointment of subcontractors, as these costs will be passed up the remuneration structure to the owner, who will bear them. However, the delivery partner model enables the principal to gain access to the capabilities of the private sector without having to rely on a sole provider, thus ensuring value for money and timely project delivery. This provides project flexibility and efficient time management as it enables detailed design to be progressively developed and allows different construction streams to commence before the design is complete. The model provides government with control of costs, scope and risks, and facilitates a performance-based approach that aligns delivery-partner interests with government objectives.

However, under this model, there is no provision for the comfort of cost or time outcome certainty at the start of project commitment. Public accountability for completion of the project infrastructure ultimately remains with the principal. Additionally, the requirement of a high degree of supervision and coordination to be undertaken by the delivery partner makes the selection of a partner with suitable capabilities and resources essential and can potentially lead to the incursion of substantial project costs in the form of high management fees.

The delivery partner model is yet in its early years and it remains to be seen how and to what effect the model will be implemented and adapted by players in both the

private and public construction sectors. A more extensive and defensible analysis of the model and its potential uses and shortfalls will only be possible after the model has been more widely used.

V CONCLUSION

The various emanations of relationship contracting provide an alternative to the traditional construction contract that is worthy of consideration. By seeking to align the interests of the parties and develop a culture of collaboration to replace one of conflict, partnering, alliancing and managing-contractor arrangements have the potential to deliver real commercial benefits for major project procurement. The efficiencies achieved through minimising dispute risk in construction contracts are not to be understated and each of the models discussed may deliver this objective when used in projects for which they are appropriate. Despite the categorical approach taken by this chapter, it should also be noted that the models are not inflexible and may be tailored by experienced legal practitioners to suit individual client needs and objectives in a variety of projects.

Appendix 1

ABOUT THE AUTHORS

DOUG JONES

Independent international arbitrator

Professor Doug Jones AO is a leading independent international arbitrator and an internationally recognised infrastructure and dispute resolution lawyer. Doug has extensive experience as an arbitrator in international and domestic arbitration proceedings under the ICC, LCIA, AAA, ACCL, CCCL, ICDR, KLRCA, SIAC, DIAC, ACICA, IAMA, AMINZ, and the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund, as well as the ICSID and UNCITRAL Rules.

Having acted for owners (both government and private sector), financiers, contractors, consultants and subcontractors, Doug has advised extensively on project structuring and financing, contract drafting and has advised during project implementation and dispute resolution for major infrastructure matters, including Australian Department of Defence facilities and equipment acquisitions, airports, ports, roads and rail projects throughout Australia, New Zealand, Europe, Asia, the Middle East and the United States. Doug has devised innovative ways of successfully bidding for and closing PPP and PFI project delivery in Australasia and internationally.

In June 2012, Doug was made an Officer of the Order of Australia for his distinguished service to the law as a leader in the areas of arbitration and alternative dispute resolution, to policy reform, and to national and international professional organisations. Previously, in January 1999, he was also made a Member of the Order of Australia in recognition of his services to construction law and dispute resolution.

His expertise in international arbitration and construction law has been regularly recognised. He has been Global Construction Lawyer of the Year in *Who's Who Legal*, and in *Chambers Asia-Pacific* (2014) he received a Star Individual ranking in the Construction category, a Band 1 ranking in the Arbitration (International): Most In Demand Arbitrators – Asia-Pacific Region category, and was also ranked in the Projects category.

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