A question of babies or bathwater

by DOUG JONES

ON MOST PROJECTS these days there is some consideration, at least at the outset, of whether to adopt a "partnered approach", form an "alliance" or try some other type of "relationship contracting".

The most common approach is to focus on a particular form of contracting, such as "alliance contracting", to see whether it is appropriate for the particular project.

In doing so, it is important to distinguish between:

❑ The "bathwater"(traditional adversarial contracting), and

❑ The "baby": a contract which, if things go wrong, provides the parties with an appropriate allocation of risk (if you like, an "insurance policy" of rights and obligations).

In your enthusiasm to throw out the "bathwater", you should not be seduced into throwing out the "baby" ... unless you intend to, of course.

But some of the key features of "true" alliancing can easily have this effect. And you might not even be aware the baby has gone.

It may often be better to start with a *general* "relationship contracting" approach, rather than specifically seeking to "do an alliance". This way, you will have a range of options, addressing both commercial and legal requirements, rather than one prescriptive solution which might produce some serious legal and commercial difficulties.

The starting point is to get the nomenclature right.

According to strong advocates of alliancing,

❑ "Partnering" and "alliancing" cannot be used interchangeably, as they are fundamentally different, and

❑ A project delivery system which adopts some, but not all, of the distinguishing features of an alliance is not a "true" alliance.

Boiled down to its basics, "alliancing" is a consensual relationship which has two fundamental features: a joining of *efforts* and a joining of *interests*. The first feature is shared with partnering and, indeed, traditional adversarial forms of contract, but the joining of "interests" is unique.

Unlike partnering, which is usually superimposed on traditional hard dollar forms of contract with an inherent tension between the parties' interests, alliancing deliberately *aligns* the interests of the parties - for example, through a "pain share/gain share" remuneration strategy for cost under-runs/over-runs, early completion/delays and other key performance indicators.

But even then the parties are not necessarily "doing an alliance".

To do so, say alliancing's proponents, it is necessary to have *additional* features, including:

❑ Careful selection of the alliance parties

❑ Early involvement of the contractor

❑ A statement of "mission", shared objectives and principles

❑ An "alliance board" contract management structure, enhancing team-building, communication, consultation, co-operation and collaboration

❑ Information sharing on an "open book" basis, while preserving confidentiality and intellectual property

❑ Flexible work scopes, and

❑ A "no blame" culture.

Most of these features are uncontroversial from a legal perspective. Indeed, several are shared with many other types of contracts under which the contractor assumes significant risks.

Two features, however, have significant legal implications and need to be carefully understood before you take the plunge: the way the alliance board operates, and the "no blame" culture.

The contract management structure of an alliance departs significantly from the way construction contracts have traditionally been administered. It usually involves an alliance board, the prime decision-making body, and a management team appointed by and reporting to the board.

The alliance board typically operates as a "virtual corporation", with total responsibility and wide powers. And it is usually required to resolve all issues unanimously, without recourse to a "circuit breaker" in the event of a deadlock.

This leads us to one of the stark differences between commerce and the law.

Commercially, you may be quite prepared to accept the uncertainty inherent in an insistence on unanimity. After all, commercial imperatives provide a strong motivation to seek agreed solutions and break through deadlocks so the project can progress, thereby avoiding the need for the parties' bargain to be struck by a third party such as an independent expert.

Lawyers, on the other hand, are trained at the University of Wet Blankets to avoid contractual uncertainty, and the attendant legal risk of an unenforceable contract, at all costs. So they seek to provide "objective" deadlock-breaking mechanisms, such as an independent expert, for any circumstances where the parties cannot agree.

Ultimately, of course, it is a *commercial* issue whether the parties require unanimity for all decisions at the alliance board level.

But if you are told, "If you choose to put this in your contract, you may not have a contract at all," it may *also* be a commercial approach to explore less radical alternatives - especially if the public sector or financiers have a significant role in the project.

With a little imagination, it should be a simple task for you and your advisers to devise a modified "relationship contracting" decision-making mechanism which offers the maximum opportunity for unanimous resolution of all issues but also provides the deadlock-resolution mechanism needed for contractual certainty.

Under a "no blame" alliance none of the parties is liable to another party for any default, other than perhaps a "wilful default". The "wilful default" exception, if any, is typically defined to mean a wanton, reckless act or omission involving a wilful and utter disregard for its harmful and avoidable consequences. It usually does not extend to include errors of judgment, mistakes or other acts or omissions made in good faith, even if they involve the grossest negligence.

Proponents of this "true alliancing" approach argue it allows the parties to feel free to consider alternative methods of design and construction, without the Damaclean sword of liability hanging over their heads if something goes wrong. And if something does go wrong, the parties can focus on solutions rather than "witch hunts".

But from a legal perspective the benefits may be illusory and the dangers very real. The exclusion of liability for any obligation under an alliance "contract" could, for instance, exclude a party's liability, both in contract and under the law of negligence, to use reasonable care in preparing the design of the project.

If the design were fundamentally flawed because the designer failed to use reasonable care, the other parties would have no recourse unless they could show a "wilful default", even though their losses could well be substantial, especially if major re-design and re-work were required.

In these circumstances, insurance would normally come to the fore. But because there is no liability for a breach of a professional duty, the parties suffering loss are unlikely to be able to resort to any professional indemnity insurance.

And to rub salt into their wounds, the alliance party responsible for correcting its defective design (or other defective work or materials) might receive not only payments for the direct cost of the rectification but also its margin on this cost!

All is not lost, however. Again it should be possible, with some thought, to satisfy commercial *and* legal imperatives. Drafted carefully, the provisions of a relationship contract dealing with liability for failure to perform could go a long way to achieving the perceived commercial advantages of "no blame" clauses.

At their simplest, these provisions should, without creating uncertainty of risk, motivate the parties to:

❑ Get it right the first time

❑ Seek the most cost-effective and efficient solution to any problems, and

❑ Solve the problem first and consider liability later.

In summary, then, unless you have a burning desire to be able to call your project an "alliance" in its "true" sense, there is a ready range of *other* relationship contracting structures which are quite capable of delivering similar commercial benefits without the legal risks. ■

Ed.: Doug Jones AM is a construction partner in the national law firm Clayton Utz.

■ After serving McConnell Dowell for 29 years and leading it for the last seven years, **Trevor Morgan** is to retire from his position as ceo, although he will continue to serve as a director. During his leadership, shareholdings in the company have increased from $13m to $100m.

Bruce McPherson ... geotechnical engineering

■ **Richard Leupen has succeeded Dennis O'Neil as ceo of Perth-based United Group. Leupen was md of Kaiser Engineers and president of the international and US operations of United. O'Neil, who is leaving United, has helped the group diversify through the acquisition of Kilpatrick Green Holdings and A. Goinan & Co and the formation of Total Asset Management Services.**

■ Sinclair Knight Merz has appointed **Geoff Linke** as its new regional manager in Queensland. He replaces **Alan Davie**, who will lead the global environmental operations of the engineering consultancy. Linke has been managing the firm's catchment management operations in Victoria.

■ **Geotechnical, groundwater and environmental consultancy Douglas Partners, based in Sydney, has appointed Bruce McPherson as senior associate in its geotechnical division. McPherson joins Douglas Partners from Ground Engineering, a subsidiary of Frankipile Australia, where he was manager. His most recent projects include pile testing programs for Sydney's Eastern Distributor.**

■ *Marner Steel and Mesh, supplier of steel reinforcing to the building industry in SA, has appointed* ***Ross Kennan*** *and* ***Claude Long*** *to its board as non-executive directors. Kennan has spend 27 years as an executive of Honeywell and is a retired vp of that company. Long is former gm of the Commonwealth Bank in SA/NT. Their appointments follow the death of* ***Bert Marner****, a founding partner of the company.*

■ National quantity surveying firm Donald Cant Watts Corke has appointed **Graeme Whitmore** as a director to head its new office in Brisbane. Whitmore has been development and commercial manager for WT Partnership. He has conducted viability studies for such projects as Reef Casino, Cairns Convention Centre, Suncorp Metway Stadium, Gabba Central development and Queensland Rail properties.

■ **Jaws Buckets & Attachments, Brisbane-based manufacturer of excavation and earthmoving equipment, is extending its presence in Indonesia with the appointment of Hardjanto Maryadi as its first permanent representative there. Hardjanto has been working for PT United Tractors for nearly 20 years.**