Collaborative Working:
BIM and Alliancing Agreements
Beale and Company in association with GHN

Monday 8th April 2013
Arup, 8 Fitzroy Street, W1T 4BJ
Programme

17.30 Registration and refreshments

18.0 Welcome - Michael Archer, Partner, Beale and Company

18.05 Alliancing Agreements

An introduction to Alliancing Agreements – Dr Robert Care, Director and Chair of UKMEA, Arup

The legal issues of Alliancing Agreements - Will Buckby, Partner, Beale and Company

18.30 BIM Protocol

The CIC BIM Protocol, the legal implications of using BIM and what it means for you
John Henderson, Partner, Beale and Company

18.45 Insurance implications of collaborative working

Steve Bamforth, Group Chief Executive, Griffiths & Armour

19.0 Q&A

19.15 Drinks and networking
Speaker Profiles

Dr Robert Care – Director and Chair of UKMEA at Arup

Robert Care is a member of the Global Board of Arup Group and the Chair of Arup Group’s UK, Middle East and Africa region.

Arup, a professional services firm of designers, planners, and project managers, have pioneered some of the most ambitious, ground-breaking and unusual sustainable buildings and infrastructure projects around the world today.

Before taking on his current role Robert worked around the world in a career spanning almost 40 years – with posts in Hong Kong, Papua New Guinea, Australia and the UK. He helped to lead the reform of Australia's building regulations in the 1990s and he has worked on many major global railway and infrastructure projects. Of particular note was his work on the Wandoo B Full Field Development and the development of a Control Strategy for Rolling Contact Fatigue on the British Rail System following the Hatfield Crash in 2000.

His commitment to the community is reflected in his appointment as a Director of RedR Australia (Registered Experts for Disaster Relief) in 2006 and his subsequent appointment as Chair of RedR Australia in November 2008 until December 2010.

In 2012 Robert was awarded Member of the Order of Australia for services to Business, Engineering, Humanitarian Programs and Athletics. In 2013 The University of New South Wales awarded Robert Alumni of the Year International.

Will Buckby – Partner, Beale and Company Solicitors LLP

Will specialises in non-contentious development, construction and engineering matters, both within the UK and internationally, having experience of being both a private practice solicitor and an in-house counsel at an international consulting engineering company.

Will has particular expertise in the highways sector, and advises on a range of other areas including education, health, hotels, offices, retail, mixed user commercial/retail and residential developments, stadia, data centres, rail, airports, marine and water. His recent notable projects include Sheffield Highways PFI, the London Highways Alliance, Network Rail’s Stafford Improvement Alliance Programme, Dolphin Square in London, Detailed Masterplanning and Engineering services for the Saudi Industrial Property Authority’s 2013 Industrial City programme of works, and the development of a Hotel in St Kitts.

Will is a member of the Society of Construction Law, and has a monthly section in Lexis Nexis’ Construction Law which examines the latest court rulings relating to construction and engineering.

Will also appears in the Associates to Watch category of Chambers and Partners UK 2013, which states that he ”...impresses clients with his ‘patience, good humour and impressive tenacity in his handling of a tricky and drawn-out matter.”

Will is a member of the Law Society of England and Wales and Society of Construction Law.
John Henderson – Partner, Beale and Company Solicitors LLP

"a very careful lawyer with sound litigation instincts" Chambers UK 2010

John has over 20 years experience acting on behalf of consultants, contractors and insurers in construction, engineering and IT disputes in the UK and internationally.

He also advises on negotiation of contracts and appointments and recently drafted the Standard Form BIM Protocol for the CIC.

John has a PhD in Artificial intelligence and Law.

Steve Bamforth – Group Chief Executive at Griffiths & Armour

Stephen Bamforth joined Griffiths & Armour in 1986 after graduating from Churchill College Cambridge and was made a Partner in the firm in July 1994.

In June 2003 he became Group Chairman and Chief Executive. He specialises in advising the Group's construction clients on their insurance requirements and is engaged in research into innovative insurance solutions for evolving construction risks – including the link between collaborative working and Integrated Project Insurance.

Michael Archer – Partner, Beale and Company Solicitors LLP

Michael trained as a solicitor with the firm and over a career as partner in the firm spanning over 20 years has advised on most company/commercial matters concerning both SME’s, Start-Ups and UK and Nasdaq listed companies in their business affairs and corporate transactions.

Consistent in the firm's reputation in acting for professional practices, a particular focus of Michael's work has been advising on incorporations of partnerships, conversions to LLP, joint venture structures, acquisitions and sales of professional services businesses and the structuring of bid vehicles for tendering for framework agreements and projects.

Professional practice clients range from consulting engineers, surveyors and architects to solicitors, accountants, IFAs and brokers. Other significant Corporate clients have touched most sectors of industry from construction to drinks distribution and IT to fine art auctioneers.

Michael is head of the firm's Corporate Services team and his professional affiliations include the Association of Partnership Practitioners (APP) and the Employment Lawyers Association (ELA). Michael is recommended in the Legal 500 2009 for corporate and commercial work.
Presentation Slides
Collaborative Working – BIM and Alliancing Agreements

GHN Seminar
Monday 8 April 2013

Wandoo B
A case study in Alliancing

April 2013
Dr Robert F Care AM
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The Project

- Offshore oil platform
- 75km north west of Dampier, WA
- 55 metres of water
- Small yet complex oil field
- Marginal field
- Operator needed it to succeed
Why an Alliance?

- Client was sole owner/operator
- No in-house capacity - Needed input from Alliance partners
- Not convinced conventional delivery on time or budget
- Needed to get it right first time
- Convinced by other Alliance successes (BP – North Sea)
**Alliance - my Definition**

- An Alliance is a process of getting to WIN/WIN (or LOSE/LOSE)
- Put another way, if the possibility of WIN/LOSE exists I would say it is not an Alliance

**An Alliance is about:**

- Specific shared business objective(s)
- Maximising effectiveness of each participant
- Virtual organisation (the Alliance)
- Shared culture
- No (internal) boundaries
- Sharing of risk and reward (negotiation)
  
  e.g. Extraordinary profit if extraordinary results achieved
**Client’s Selection Criteria**

- Capacity and experience for whole project
- People & organisations they can do business with – can be trusted
- Willing to be open and honest
- Willing to risk profit and maybe more
- Understand and accept client’s objectives, expectations and values
- Willing to share their objectives and expectations
- **Not ££££££**

**Key Alliance Principles**

- Spirit of openness and cooperation - Open book
- Prime consideration - work for overall benefit of the project & as a result there will be benefit to each participant
- Lowest CAPEX & meet the design basis - fit for purpose
- Best person for job/task
- No blame – reduce wasted time and effort; not a licence for irresponsibility
- No demarcation between design, construction and installation
- Commercial drivers to give effect to behaviours
Wandoo Alliance - Commercial Arrangements

- Profit
- Gross margin
- Costs (e.g. salary costs, materials, etc.)

Total project price

ARUP
Enabling Functions

- Senior corporate commitment and leadership participation on the board
- Create a virtual organisation from all participants
- Education – how to be cooperative
  - Shift from adversarial / confrontational approach
- Breakthrough principles
- Understanding of and commitment to stretch targets
- Question business as usual (BAU)
- OK to say no, but must say why

Alliance Cost Breakthroughs
And then…

- One month from commencing concrete construction
- We did not understand how it failed
- We did not know how to fix it
- We did not have the equipment to fix it
- We had H&S issue
- How would the participants behave?
What actually happened…

- Blame?
- Cooperation?
- Innovation?
- Future?
- Cost - $1.8m
- Time - 4 weeks
- And belief in the process!
Success??

- CAPEX - saved $13 million on $375 million
- Completed in 26 months (industry norm 35 months) – cash flow $300 million per year
- No disputes (one dispute)
- Project awards, including an environmental award
- Considered the model for Alliance projects in Australia
- Client delighted!
Alliancing Agreements: 
The key legal issues

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A Move Towards Alliencing

HM Treasury’s Infrastructure Cost Review Report 2011-2012

• “Structured alliances”.
• “a new form of alliance contract to the NEC3 suite of contracts …”

• Alliancing is being used now by:
  – Network Rail;
  – Thames Water and others (AMP 6);
  – National Grid (Substations).
What is alliancing?

- Parties – Employer, Consultant(s) and Contractor(s)

- Collaboration of “different disciplines” to achieve a “one project, one organisation approach ... removing the barriers associated with traditional contracting” (Alliance Manager on recent Network Rail project).

- An arrangement whereby the parties can “Win together and lose together” and adopt a “Best for Project” approach.

<table>
<thead>
<tr>
<th>Five Key Features</th>
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<td>- Delivery – management team.</td>
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<td>- Payment mechanism.</td>
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<td>- Joint and several liability.</td>
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<td>- Distribution of liability and profits.</td>
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<td>- No blame/claim culture.</td>
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(There are more!)
Management Team

- Alliance Leadership/Management Team = deliver the project.

- Representatives from each alliance member, including the Employer.

- Unanimous agreement required.

- Members will have different interests and therefore deadlock likely; commonly no deadlock provisions.

- Encourages alliance members to work together towards best interests of Project.

Payment Mechanism

- The participants are entitled to:
  - all costs actually incurred in relation to Project ("Reimbursable Costs"); and
  - fixed fee for corporate overhead and profit.

- One Target Cost agreed at the start of the Project.

- Payments subject to the deduction/addition of a painshare/gainshare amount.

- Pain/gain is shared equally, thus “winning and losing together”
Liability

- Participants jointly and severally liable to the Employer.
- All liability, as between the participants, apportioned in pre-agreed amounts.
- Risk of suffering losses due to other participants’ breaches, and “winning and losing together”.
- Encourages collaboration (each participant has a vested interest in assisting the other).

No Blame/Claim Culture

- Underlying ethos: a “no blame culture”.
- Agreement by participants and Employer not to sue except in limited circumstances.
- Very attractive – encourages parties to resolve issues through negotiation and discussion.
- Exceptions (e.g. Wilful default).
- Insurance (i.e. PI insurance) must be considered.
“All for one and one for all”

• If parties are willing to embrace the “win together, lose together approach”, alliancing is an ideal way to:
  
  – promote collaboration;
  
  – reduce the number of disputes;
  
  – achieve efficient and effective delivery of project, encouraging “gainshare”; and
  
  – encourage parties to work in the best interests of the project, which is great for Employer.

CIC BIM Protocol

The legal implications of using BIM and what it means to you

John Henderson
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The ideas underlying the CIC BIM Protocol

**EMPLOYER**

- Contract + PROTOCOL
- Contractor

Appointment + PROTOCOL
- Architect

Appointment + PROTOCOL
- Engineer

Etc

- Minimum changes
- No new contractual relationships
- One size fits all
- Protocol takes priority over underlying agreement

The Contents of the Protocol

- **Obligations:**
  - Employer
  - Project Team Member (PTM)

- **Restrictions on use of models / IPR**

- **Data integrity and limit of liability**

- **Appendices:**
  - 1 The Model Production and Delivery Table
  - 2 Information Requirements
### Model Production and Delivery Table

<table>
<thead>
<tr>
<th>Project</th>
<th>Phase 1</th>
<th>Phase 2</th>
<th>Phase 3</th>
<th>Phase 4</th>
<th>Phase 5</th>
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<tbody>
<tr>
<td></td>
<td>Model</td>
<td>Production</td>
<td>Delivery</td>
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### Information Management

- Information is king
- Appointment of the Information Manager
- The Information Manager’s Role
- Information Management Schemes – PAS 1192
Insuring Collaborative Works

The Good, The Bad, The Future……

Steve Bamforth
Group Chief Executive

Collaborative Working – BIM and Alliancing Agreements

GHN Seminar
Monday 8 April 2013
Supporting Documents

1. **BIM Update – Know your protocols**  
   John Henderson and Andrew Croft – Beale and Company Solicitors LLP  
   A copy of the CIC BIM Protocol can be on the [BIM Task Group website](#).

2. **Alliancing – “It’s all for one and one for all”**  
   Will Buckby and Andrew Croft – Beale and Company Solicitors LLP

3. **Collaboration and Insurance**  
   Steve Bamforth – Griffiths & Armour
BIM Update – Know Your Protocols

On 28 February 2013 the CIC BIM Protocol (“the CIC Protocol”), which was drafted by Beale and Company, was published on the BIM Task Group Website, (www.bimtaskgroup.org/commercial) as part of a new suite of documents for use on Level 2 BIM Projects, including Griffiths and Armour’s PI Insurance Best Practice Guide and a scope of services for Information Management.

As shown by the NBS National BIM Report 2013, which revealed that the use of BIM (Building Information Modelling) amongst those surveyed has risen to 39% from just 13% in 2010, BIM is becoming increasingly popular both in the public and private sector and offers numerous potential gains such as increased collaboration and reduced costs. These documents are therefore of significant importance, particularly in light of the UK government’s aim for Level 2 BIM to be used on all centrally procured public sector projects by 2016.

What Are the Risks of Level 2 BIM?

Level 2 BIM, in itself should not create significant additional risks and, depending upon the precise contractual arrangements, is unlikely to infringe the terms of a consultant’s PI policy.

The main risks likely to arise on a Level 2 BIM project concern:

1. Ambiguity as to responsibility for producing a model and the level of detail required in each model;
2. The use of models for purposes other than that for which they were prepared;
3. The extraction of intellectual property from a model and the fact that a model may contain information, such as calculations, which would not be submitted on a traditional project; and
4. Data corruption, particularly when models are exported into a different format for clash detection.

How does the CIC Protocol address those Risks?

The CIC Protocol aims to mitigate some of the above risks and encourage the adoption of Level 2 BIM. The main functions of the CIC Protocol are to:

- introduce an obligation for parts (or all) of the design on a project to be delivered in the form of a model and for those models to be developed in accordance with project wide information requirements;
- clearly allocate responsibility between the members of the Project Team for the production of models;
- define the level of detail required of each model at each particular stage;
- require the Employer to incorporate the Protocol into any contracts between the Employer and all those involved in the production, delivery and use of models and to ensure an Information Manager is appointed;
- grant licences (via the Employer) which give those whose appointments include the protocol the right to use the models for the purpose for which they were produced (the “Permitted Purpose”), but which also protect the designer from infringement of its intellectual property rights;
- exclude liability for use other than the Permitted Purpose; and
- exclude liability for corruption in electronic data following transmission and thereby reduce the need for Electronic Data Exchange Agreements between the parties who enter into the Protocol.
As identified in Griffiths and Armour’s PI insurance guidance, the CIC Protocol is considered by the insurance industry to be “best practice” on a Level 2 BIM project and if the CIC Protocol is used the adoption of Level 2 BIM should not “materially alter the risk profile”.

**Bespoke Protocols**

Inevitably, parties will either seek to amend the CIC Protocol or to use their own bespoke Protocols/Execution Plans. The implications of such documents will depend upon how they are incorporated into the contract, but the key areas of risk include:

- **Strict Obligations** – BIM projects can involve the adoption of very prescriptive project wide procedures in order to try and ensure that the models are reliable. Members of the project team should beware agreeing to strict obligations to comply with such procedures (either in the appointment or the protocol/plan itself) as this may expose them to losses for matters which are outside their control.
- **Increased Standard of Care** – Alongside the requirement to comply with strict, to justify the use of BIM the client may require the project team to agree to achieving “technical excellence”, or to removing “all clashes”. These are evidently good aspirations, but if expressed as obligations they may raise the standard of care and therefore any execution plan/bespoke protocol should be carefully reviewed.
- **Software Compatibility** – Another risk associated with BIM is compatibility between different types of software: parties should avoid taking general responsibility for ensuring that its models are submitted are “compatible” as this may be outside their control/expertise.
- **Collaboration** – Some execution plans/strategy documents imply that there is/will be an "integrated project team". This goes beyond merely increasing the level of collaboration and could create an informal alliancing arrangement, which may conflict with the contractual arrangements and create a number of risks which would need to be addressed in the appointment, such as the potential for “cross liabilities” to arise.

**Information Manager**

On a BIM Project an Information Manager (who will probably also have another role) may be appointed by the Employer to initiate, agree, implement and manage the requirements for the production, delivery and use of models on a project. The BIM Task Group has published an outline scope of services for the Information Management Role, which should not involve significant risk. If an alternative scope of services is used care should be taken so that it is clear to what extent he is responsible for corruption of data and any other issues arising from the exchange of information.

**Level 3 - The Future of BIM**

There are understood to be significant obstacles to the use of Level 3 BIM at this stage, including the need to develop adequate software. Level 3 is likely to be used in conjunction with an alliancing/partnering arrangement and contracts may be revised to address risk allocation and ownership of intellectual property. Level 3 is thought to give rise to additional risks because it may be more difficult to identify responsibility and liability for any particular amendment to the model and/or additional responsibilities may be imposed in relation to others’ models. Any such provisions will need to be considered in light of the extent of professional indemnity insurance cover available and alternative insurance arrangements, such as project insurance may be appropriate.

By John Henderson and Andrew Croft, Beale and Company Solicitors LLP
ALLIANCING – IT’S “ALL FOR ONE AND ONE FOR ALL!”

by Will Buckby and Andrew Croft,
Beale and Company Solicitors LLP

Key Points

- There is a growing trend towards the use of alliancing to procure infrastructure projects.
- Alliancing is underpinned by the idea that the alliance members “win together and lose together”.
- The way in which this approach is reflected in alliance agreements (such as by sharing liability and profits between the alliance members and by establishing a “no blame culture”) promotes collaboration and encourages parties to put the interests of the project before their own.
- There are a number of risks associated with the alliancing model and there is an element of uncertainty as to the enforceability of some of the key provisions (particularly the “no blame culture”).
- If parties are willing and prepared to “win together and lose together”, alliancing is an ideal way of documenting that intention.

In December 2012 Thames Water announced that it will deliver a significant proportion of its AMP 6 programme using alliancing agreements. This appears to be part of a trend towards the use of alliancing agreements: Network Rail and a number of other public bodies are also procuring infrastructure projects using the alliancing model. This article considers the notion which underpins alliancing - “winning together and losing together” plus some of the benefits and risks associated with this model.

What is alliancing?

Alliancing was first adopted by British Petroleum in the 1990s in an attempt to reduce the project development costs involved with drilling for oil in the North Sea. It has been successfully used by the public sector in Queensland Australia for over ten years, and in the last five years National Grid has used alliancing for its capital expenditure projects relating to sub-station work.

In the context of construction and engineering projects, alliancing is essentially a way for two or more parties to work together to achieve a common goal. It is generally used on major projects or where there is to be an ongoing relationship over a number of different projects. The alliance may include consultants, contractors (“the participants”) and the client. It can be structured either by incorporating a special purpose vehicle in which all the relevant stakeholders have a shareholding, or by forming a quasi-alliance where the stakeholders simply adopt the behaviours of an alliance.

As explained below, a key feature of alliancing is that the project team “wins together and loses together” and there are a number of benefits and risks associated with this approach.

Shared Liability

It is typical to alliancing that the participants are jointly and severally liable to the client for any breach. This is an excellent example of the “win together/lose together” notion. Under a joint and several liability arrangement, any of the participants could be liable for the other participants’ breaches, even if the participant has not contributed to the liability. The participants are ‘in it together’ and potentially bear each others’ risks and liabilities.

One advantage of such an arrangement is that is encourages the parties to collaborate as they have a vested interest in assisting the other participants in performing their obligations. Evidently there is a risk that a participant could suffer significant losses despite having performed its obligations, but this is simply a consequence of the “win together, lose together” approach.
Where joint and several liability amongst the participants exists, it is important that participants agree the basis on which liability for any claim by the client will be apportioned between them and include a mechanism to achieve any agreed apportionment. One way of apportioning liability is to agree that any liability, whether to the client, a third party or another participant, will be shared equally, regardless of fault (i.e. on a third, a third, a third basis if there are three participants). This is a ‘true’ “win together/lose together” scenario, as notwithstanding how the losses arise, they are shared by the parties. This does result in important insurance considerations (i.e. whether a professional indemnity insurance policy is required to pay out where there is no notifiable ‘claim’ by the insured under that policy because the insured has not caused the loss) which are not addressed in this article.

Cross indemnities as between the participants serve as a useful tool to ensure that the division of risk is in accordance with the agreed shares. However, they need to carefully drafted given the potential liabilities which may arise under the agreement - the participants could be liable to the client, third parties or as between themselves. Further, indemnities are only of any value if the parties to the indemnity have sufficient assets and/or insurance to meet them.

**Gainshare/painshare Mechanism**

Under an alliancing contract the participants are generally paid in accordance with a “gainshare/painshare” mechanism, which links the profit or losses recoverable to the success (or otherwise) of the project, with any pain/gain apportioned between the participants. The payment mechanism under an alliance agreement is thus another example of the “win together lose together” notion.

The participants’ entitlement is usually broken-down into three elements:

1. direct costs actually incurred in relation to the project (“Reimbursable Costs”);
2. a fee for corporate overhead and profit; and
3. a gainshare/painshare amount, calculated in accordance with an agreed mechanism.

The gainshare/painshare mechanism usually operates by reference to a target cost, which is collectively agreed by the participants at the start of the project. If the alliance members’ total Reimbursable Costs are less than the target cost, they share any savings and the participants are entitled to a gainshare amount; whereas if their total Reimbursable Costs exceed the target cost the losses are shared between the alliance members and the participants must pay the client a painshare amount.

Whilst a clear advantage of this payment mechanism to the client is that it aligns the profit recoverable to the success of the project and encourages the participants to work in a way which benefits the project as a whole rather than the participants’ individual interests, there are real risks to the participants – the participants have limited control over whether they ultimately make a profit and they may become liable for painshare solely as a result of the actions of one alliance member.

Alliancing agreements often include a relatively short defects liability period of two years. Whilst participants typically recover the cost of remedying defects during this period as Reimbursable Costs, it should be noted that any such costs can be taken into account in determining the gainshare/painshare amount.

**Shared Decision Making**

Alliancing contracts often provide for the setting up of an alliance leadership or management team. This comprises representatives from each of the alliance members, including the client, and provides strategic direction for the alliance. Typically, unanimous agreement is required before the management team can make decisions, and there is usually no deadlock drafting. This is another example of how the “win together/lose together” approach is reflected in the contract. If the parties are unable to agree to decisions ‘together’, the risk is that the progress of the project will be stunted and the overall future of the project put in jeopardy. In such situations the parties will lose together. On the other hand, if they can agree all management decisions ‘together’, the project will progress and hopefully be successful (i.e. a win).
It is important to note that if the management team is required to make unanimous decisions this will need to be carefully managed by both the client and participants. The client and participants will need to wear a collaborative hat and always have the success of the project in the back of their minds. Achieving unanimous decisions could be problematic particularly given the number of parties involved - the participants will of course have different interests to that of the client and the contractors may have alternative interests to the consultant.

Deadlock provisions would be ideal in order to resolve any situation where agreement cannot be achieved. However, they are considered to contradict the “win together/lose together” notion as they could result in some members of the alliance achieving a different solution to that sought by another.

**Good Faith and Alliance Charter**

Under alliancing agreements, the participants will often agree to act in good faith in performing their obligations. This is clearly to encourage cooperation and help establish the “win together/lose together” approach.

However, whilst “good faith” obligations are relatively common in construction contracts (the NEC3 requires the parties to act in the “spirit of mutual trust and co-operation”) and have received some judicial consideration (see *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 where it was held that an obligation to cooperate in good faith required discretion to be exercised in a manner which was not arbitrary, capricious or irrational) there is still some uncertainty as to the true effect of such obligations. The client and participants will need to look past such phrases and focus on successful delivery together, which may be easier said than done.

Further, alliancing agreements often also include an obligation to act in accordance with an Alliance Charter, which sets out a number of shared project goals. This reflects the “win together/lose together” approach as it encourages parties to work and behave in a way which best benefits the project.

However, charters often contain vague requirements, which are aspirations rather than obligations, and reflecting this in the drafting can be problematic. It is common that such terms are subject to disagreement and misunderstanding as to their interpretation, which has the potential to cause a dispute. The case of *Birse Construction Ltd v St David Ltd* [1999] EWHC Technology 253 demonstrates the uncertainty surrounding such arrangements. The court considered a non-binding partnering agreement as an aid to the construction of the formal contract on the basis that its terms were “clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured”. Following an extensive and costly litigation, the court held that there was no formal contract but only a “practical commercial resolve”.

**No Blame Culture**

A distinguishing feature of alliance agreements, and another embodiment of the “win together/lose together” approach, is a commitment to a “no blame culture”, including an agreement that the alliance members (including the client) will not commence proceedings for any breach of the alliance agreement except in limited circumstances, such as on termination for material breach, wilful default and non-payment.

This is clearly attractive to clients as it encourages parties to focus on resolving issues by negotiation and discussion as and when they arise, which should reduce delays and additional costs as a result of any dispute. It is also appealing to the participants as there will be limited situations when claims can be brought. Collectively, the client and participants may also be more willing to be open and collaborate without the fear of proceedings.

However, as identified above, there are often a number of exclusions from the no blame culture and therefore the participants could potentially incur significant liability in connection with the alliance. This is not a ‘true’ no-blame culture and the parties should not rely on it as being one.
One real uncertainty as to the “no blame culture” and the agreement not to sue is the extent to which these can be enforced if tested before the courts. Much is likely to depend on the precise wording of the alliance agreement, but some practitioners consider that such clauses are simply “agreements to agree” and are therefore unenforceable for lack of certainty.

Conclusion

Alliancing agreements and the “win together/lose together” ethos which they embody can be extremely beneficial to all parties involved. They enable the client to play an active role in the project and encourage parties to work in an open and collaborative manner and in a way that benefits the project rather than their individual interests. The “no blame culture” is also very attractive to all parties as it aims to remove the risk of disruption to the project and of additional costs being incurred as a result of a dispute between the parties.

However, alliancing can require a significant level of commitment and investment from the parties, not just in time and money but also in mindset. It is therefore not appropriate for all projects. Furthermore, if the alliance is unsuccessful there are a number of potential risks for both the participants and the client, and it is unclear how certain provisions would be construed in the event of a dispute.

Despite these risks, if the parties are prepared and willing to win together and lose together, alliancing is an ideal way of documenting that intention.

March 2013

If you have any questions regarding the issues raised in this article please contact:

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or

Andrew Croft at a.croft@beale-law.com or +44 (0)20 7420 8750
We have heard this evening about the positive impacts that working through collaborative integrated teams can bring to the construction procurement process. The potential benefits include better quality, leaner and safer construction and savings in terms of construction cost and timescale. There are many examples of projects including complex ones that have been successfully delivered through collaboration.

And yet we cannot assume that simply because a construction contract is let on a collaborative basis that it will be a success; that cannot be true. As an insurance broker specialising in construction we only tend to become involved in projects in detail when they go wrong – and that includes collaborative projects. Disputes on such projects are invariably complex particularly where pre-agreed apportionments of liability are involved. Consultants may be faced with uninsured fitness for purpose liabilities. Even where claims are clearly of a professional nature several insurers may be involved – each with potentially differing views on how the matter should be handled – and with multiple excesses at stake, settlement becomes difficult. It gets messy. Its gets expensive. Its gets time consuming. It is perhaps ironic that whilst collaborative projects that go well tend to go very well the opposite is true for those that don’t.

A number of potential sticking plasters are available – such as single project Professional Indemnity covers – but they are no more than that, sticking plasters. They do not address the fundamental mismatch between new ways of working in construction and traditional adversarial insurance products which are only triggered by blame.

Let’s take a step back and look at the problems that new ways of working in construction are looking to solve before looking at a potential solution that actually works even when projects or their finances go wrong.

The UK and Ireland, in particular, have a culture based on blame and a silo mentality. Clients appoint consultants to create designs which are then put out to low cost tender. The risks inherent in any construction project are turned into contractual liabilities which the members of the design and construction teams are asked to insure – to the extent that they can. The whole approach becomes adversarial – and not just on jobs that go wrong. An approach to risk, liability and insurance of this nature is flawed in that:-

(a) it is uncertain; clients in construction have only effectively transferred risk when they receive a cheque that does not bounce. In practice there are several reasons why that might happen including ineffective contract clauses, contractor insolvency, insurances that do not respond etc. In all and any of these cases the risk bounces back to the client at exactly the time when he has the fewest options available to manage or mitigate that risk.

(b) it is inefficient; it is estimated that in relation to Professional Indemnity insurance alone six pounds are spent, in the round, on legal and forensic costs for every one pound paid by insurers by way of damages.

(c) it acts as a break on team work; the threat of legal action must adversely affect behaviours, and not just on contracts that go wrong.

(d) it limits constructive feedback; the position of insurers is to look after the position of their insureds and not to act as a free information service for the benefit of society as a whole.

As a consequence construction in the UK is, as a process, less efficient than in many other European countries and the cost of insurance, particularly Professional Indemnity insurance, considerably more.

Other EU member states, such as the Benelux countries, operate on a much more collaborative basis using integrated design and construction teams which encourages innovation and drives out waste. In Holland, for example, standard form contracts are widely used throughout construction which, inter alia, limits the liability of consultants to the value of their fee. Consequently, construction disputes are relatively rare as clients arrange widely worded Contractor’s All Risks policies which include the consequences of defective design. The Dutch construction sector is seen as being lean and competitive; Dutch consultants can arrange Professional Indemnity insurance at much reduced rates compared to their colleagues in the UK.
Can the UK construction (and insurance) industries learn from better practice in Europe? There are signs that it can and will. Forward thinking construction practitioners in the UK are championing truly integrated collaborative working underpinned by a single, multi-party contract, open book accounting, project bank accounts and, crucially, a blame-free environment in which to work. Absent fraud or wilful neglect the client agrees to waive his rights to sue under such arrangements but, instead, insures his exposure to loss through integrated project insurance. The excess under these insurance arrangements is linked to the pain/gain sharing provisions contained within the multi-party contract. The concept is at an early stage of development. However, the UK Government is committed to trialling integrated project insurance as part of its Construction Strategy. Demonstration projects will be brought forward for trial during 2013. Feedback will be provided to both the construction and insurance sectors once the results of the trials are known.

It has to be a better way of working.

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The network for in-house legal advisers in construction professional firms