

INTER-FIRM NEGOTIATIONS AND CONFLICT: THE NEED TO NEGOTIATE “PROCESS” TO SUSTAIN CROSS-BORDER COMMERCIAL RELATIONSHIPS

*Y. Peter Kamminga**

Abstract	143
I. Introduction	145
II. The Example of Collaboration and Contracting in Infrastructure Projects	148
A. Infrastructure Development: A Sector with Conflicts and Failed Collaboration Processes	148
B. Collaboration and Project Success	149
C. Conflict in Infrastructure Projects	150
D. Sources of Conflict related to the Collaboration Process	150
Deficiencies in Project Organization and Communication	151

* Peter Kamminga is Associate Professor of Law at the Free University Amsterdam, and postdoctoral fellow at the Program on Negotiation at Harvard Law School. He has affiliations as continuing research scholar at UC Hastings College of the Law and the Gould Center at Stanford University. E-mail: <pkamminga@law.harvard.edu>. An earlier version of this paper was presented at the Negocia conference 4th International Biennale on Commercial Negotiation, Negocia Business School, Paris, France, November 2010.

Disturbances in Human Interaction	151
The Law: Legalizing and Tendering	152
E. The Role of Contracts and Collaboration	153
III. Contract Negotiations that Center around the Process	154
A. Critical Success Factors and Collaboration	154
B. Lessons for Negotiating (Cross-border) Contractual Relationships	155
C. What to Do when Discussing Process during Contracting?	156
Creating Commitment	157
Influencing Competence	157
Facilitating Interaction and Communication	157
Adequate Monitoring and Feedback	158
Managing Conflict	158
Improving Decision Making	158
Building Trust and Cooperative Selection	158
IV. Conclusions	159
References	161

Inter-firm Negotiations and Conflict: the Need to Negotiate “Process” to Sustain Cross-border Commercial Relationships

Y. Peter Kamminga

Abstract

During contract negotiations we negotiate content but often forget process. Content –the subject of the transaction– is what parties have their focus on naturally. On the other hand, how parties will collaboratively achieve their goals (the process) is an often-overlooked aspect in contracting and contracts. Yet, this element of the contractual relationship is as important as arrangements with regard to the content to achieve successful results. This is particularly so in cross-border contractual relations, where miscommunication about the “how” may easily lead to conflict and have significant consequences for achieving the goal of the agreement. Therefore, the question I address is what negotiators should address regarding the process of collaboration during the contracting process to minimize the chance of conflict and optimize the success of the parties’ efforts in a global market. I use the example of contracting for complex infrastructure projects to illustrate the interrelation between conflict, achieving the goals of the contractual agreement, and failure to discuss the collaboration process. Second, I draw upon literature on critical success factors to identify what elements related to the process of collaboration negotiators may want to include in the contract negotiations of long-term contractual relationships.

I. Introduction

Most business negotiations run by lawyers take place in the light of deal-making. The goal may be to draft an agreement, to (re-)negotiate the conditions of an existing agreement, or to resolve a conflict that arose during the contractual relationship.¹ When negotiating contracts the focus of (legal) negotiators is mainly on “the content”. Their attention goes to defining the objective (the particular effort or task at hand), the quality of the goods or service, the payment arrangements, and the party’s legal rights and duties related to risk distribution, responsibilities, and the applicable law.² Lawyers try to make sure their clients get what they want by negotiating an enforceable legally valid agreement that states duties and rights of both parties and allocates risks optimally.³

In practice, however, whether the contract partners will have a satisfactory contractual relationship depends on much more than what is specified about the content of the deal in the contract.⁴ Psychological elements that play a significant role here are for instance the parties’ initial beliefs about the nature and goal of the relationship, their ideas about the process used to deliver the performance, and how they experience the relationship with the other party along the way. These factors together are important to determining whether the goals are achieved and also whether a relationship between the business partners will continue in the future. Empirical studies of large scale projects also indicate

-
1. See for an excellent overview of the challenges of deal-making by lawyers, Mnookin, Peppet and Tulumello 2000.
 2. What the perception of effective contracts is varies by country and sector, see e.g. on differences between American and German contracts, Hill and King 2004, and for an Asian view on contracts, e.g. MacNeil 1986. See on differences in perceptions of contract also Salacuse 2003.
 3. See on the importance of an adequate contractual allocation and its incentive effects, e.g. Triantis 2000.
 4. Of course there are several external factors influencing whether projects are delivered in time and within budget which are out of the parties’ control, such as changing safety regulations, weather conditions or other so-called “acts of God”, however, we will not focus on these in this article.

that investing in successful collaboration is essential in achieving project success (Larson 1995; Black *et al.* 2000; Nystrom 2005; Iyer and Jha 2005). Therefore, we can assume that discussing and clarifying “the process” side of a business deal lies at the basis of not only a smooth collaboration process between parties but also of successful outcomes of the parties’ joint endeavors.

Particularly in cross-border deals, clarity about the collaboration process is essential to success. Because of differences in culture and perceptions of “how things are done”, it seems wise to talk about the process, instead of only agreeing on content. For instance, Asian views of contractual relationships can be radically different than ours, because a contract can be viewed as only the formal *start* of the relationship (MacNeil 1986; Salacuse 2003); contract terms may be subject to change and negotiation depending on fluctuations in the business or political situation; contracts may be much more “relational” by nature than Western negotiators are used to and may only bind the person actually signing the contract and not necessarily the company as a whole.⁵

However, how parties will collaboratively achieve their goals (the process) is an often overlooked aspect in contracting and contracts. We still seem to treat our complex relationships as one-time transactions that are so simple that there cannot be a misunderstanding about how parties will shape their dealings (Atiyah 1995). So, we have an interesting paradox: Our goal with contracts – at least in most Western countries – on the one hand is to get as much certainty as we can that the other party will actually do what he initially promised, but on the other hand we fail to be specific about how the coordination between parties will carry out the promise(s) and what both parties’ expectations are in that respect.⁶

Here (legal) negotiators may expand their roles and save parties from a disappointing deal. They may help them to negotiate a contract that also takes the process side of the contractual relationship into account and include arrangements that facilitate a smooth process of working together. Therefore, the main objective of this article is to identify

5. They may have to be renegotiated when the person with whom a personal relationship is established is replaced, see e.g. MacNeil 1986. See about cross-border problems in general Salacuse 2003.

6. There are of course other economic mechanisms at work in a sector that make parties live up to promises that are not specified in the contract, such as reputation mechanisms or a strong sense of obedience to social norms, but these not always apply or have the expected result, see e.g. Elickson 1991.

how lawyers and legal negotiators may contribute to business success by facilitating arrangements concerning the process of working together (collaboration).

We may draw from negotiation literature the basic characteristics of collaboration that are relevant to describe the interaction between parties in contractual relationships (Lewicki *et al.* 2007; Rubin and Brown 1975; Axelrod 1984). First of all, collaboration is a process that takes place between two or more people or organizations also referred to as “parties.” (Lewicki 2007: 6). Second, the parties embark upon a “joint” or “collaborative effort” instead of competing with each other, and “work together instead of trying to reach relative advantage over others.” (Lewicki 2007: 60). Third, they are working towards “goals”⁷ they would be incapable of accomplishing when working alone; they are interdependent (Lewicki 2007: 9). Generally, these goals are a mix of convergent and divergent objectives. Still, at least some of the goals should be shared (common goals). Fourth, the parties show “cooperative behavior” (willingness to cooperate) resulting from some form of “commitment” (as opposed to being coerced to cooperate) (Anderson and Narus 1990; Morgan and Hunt 1994). So, collaboration can be perceived as 1) a human interaction process (2) between parties (3) undertaking a joint effort (4) to realize goals they cannot realize alone, (5) through cooperative behavior. We may call this collaboration process “successful” when parties *meet or surpass their goals*. This definition of collaboration can be used in our exploration of the elements of process arrangements.

This article is organized into three parts. In the first part I use the example of infrastructure projects to point out some of the limitations of current contract negotiations and suggest how to introduce process arrangements as a subject of negotiation. In the second part of this article, I will use empirical findings on critical success factors to demonstrate what process elements negotiators may want to take into account to facilitate smoother collaboration processes. In the third part, I will discuss what theory tells us about how negotiators can contribute to project success by making process arrangements and thus facilitate relationship-building and maintenance.

7. Their purpose is also described as “reaching mutually beneficial outcomes, mutual benefit or mutual win”, “commonly agreed upon” or “collective goals.” See also Lewicki (2007: 77) who distinguishes between common, shared and joint goals.

II. The Example of Collaboration and Contracting in Infrastructure Projects

A. *Infrastructure Development: A Sector with Conflicts and Failed Collaboration Processes*

Infrastructure is a sub-sector of the construction industry of great importance. We understand “infrastructure works” to mean the construction or restructuring of transport facilities such as roads, highways, waterways, airports, tunnels, bridges, and train-connections (hereinafter referred to as infrastructure works).⁸

These projects are the construction works with the highest impact. Their presence may significantly boost the development of cities, regions, and even countries in terms of economic activity and employment.⁹ The flip side of these projects is their high cost. Financial costs include the costs of construction, which is generally at least tens of millions; the time span of the projects, which from planning to realization can take up to 20 years for large projects; and the costs in terms of nuisances unleashed such as construction noise, damage to the natural or economic environment, disruption of traffic circulation, and disturbance or damage to surrounding areas.

What makes infrastructure projects interesting as a case study for negotiators, is that this contractual relationship is surrounded by problems and conflict often arising soon after the contract is signed.^{10,11} Especially in public sector projects, increased costs, delay, and poor

-
8. *Facilities* such as the construction of the basic elements of a transportation system, and development of industrial or rural areas, and public *utilities* such as electricity, gas, water supply, drinking water connections, clean water installations and also telephone, radio and television, fire service, flood protection such as dikes, public health, police protection, waste management, and national services such as defense, and the postal system.
 9. For instance, it accounts for around 10% of all construction activity in the UK; see Overview Construction Industry (2006).
 10. Studies of the construction of public works around the world show that the calculated sum is exceeded in the majority of the projects. A recent worldwide study by Flyvbjerg of 258 projects revealed that in 9 out of 10 cases, the estimated costs were significantly overrun (See Flyvbjerg 2007).
 11. Empirical studies into the delay of infrastructure projects in the past already indicate similar failure to meet the deadlines. Bromilow e.g. studied construction in Australia and found that only one-eighth of the studied building contracts were completed within the scheduled completion dates and that the average time overrun exceeded 40% (Bromilow *et al.* 1980: 79-82). Other research projects pertaining to this problem have been reported by Kaming *et al.* 1997: 15:83-94).

quality have consequences for client and constructor as well as for society as a whole – all of which increase the pressure on the contract partners. The work, which is often financed by taxes, may turn out to be much more expensive than planned; the infrastructure may be ready for use later than planned; and there may be substantially more nuisances during the construction than estimated. That is why the contractual relationships are sensitive to conflict and demand much negotiation effort to keep them on track. In this explosive environment the challenge for the contract parties is to realize infrastructure works in close collaboration.

B. Collaboration and Project Success

Studies point out that the level of project success (the extent to which parties meet or surpass their project goals) depends on the parties' collaboration process. Clients and contractors need to coordinate their actions throughout the project.¹² For instance, in the first stage of infrastructure development the contractors need to obtain from the client all necessary information to do an adequate bid on a project, and the client needs to collaborate with the contractors to receive those bids. In the second stage, after a contractor is selected, client and contractor need to coordinate their actions over a long period of time to actually realize the project.

Empirical studies into the success or failure of these projects paint an interesting picture of the reasons why projects often fail to be realized in time. It turns out that external circumstances such as safety regulations, delay of licenses, and natural disasters are only an influence to some extent. In reality an important factor in the success of projects depends on the parties themselves: it is the result of how they manage their collaboration process (Black *et al.* 2000; Iyer and Jha, 2005).^{13,14}

Building upon the assumption that collaboration is instrumental to project success, we assert that the parties involved in infrastructure

12. See for an overview e.g. Larson 1995; Black *et al.* 2000; Nystrom 2005; Iyer and Jha 2005.

13. Chan *et al.* (2004) examined project success factors in design and build projects, and identified factors with essential importance for a successful project outcome: project team commitment; contractors' competencies; risk and liability assessment; clients' competencies; end-users needs; and constraints imposed by end-users.

14. Iyer and Jha studied factors for success or failure in terms of costs in the Indian construction industry. The important success attributes they found are effective monitoring and feedback by the project manager and project team members, coordinating ability and rapport of project manager (PM) with top management, positive attitude of PM and project participants, and project managers' technical capability (Iyer and Jha 2005).

construction that create and maintain a successful collaboration will increase their chance of achieving or even exceeding project goals regarding cost, time, and quality. However, it is essential that the collaboration process be negotiated.

C. Conflict in Infrastructure Projects

Unfortunately, in practice parties often fail to negotiate an effective way of working together, and as a result the collaboration is constantly threatened by the potential for conflict. In fact, conflict between client and contractors is considered to be the biggest variable that endangers project success (and thus, in our definition, successful collaboration).¹⁵

There are a number of reasons why the infrastructure sector is sensitive to conflict. First of all, the inherent divergence in interests between the contract parties makes a certain level of conflict among them almost inevitable (Fenn *et al.* 1997: 513-518; Baker and McLellan 1992).¹⁶ Conflict is rooted in the tendency of every player's wishes to maximize the benefits to their own organizations. The team members typically have different goals and needs, and thus, the potential for conflict exists when they try to work collectively on construction projects (Jones 1994: 28-38).

Furthermore, the costs, complexity, and risks of these projects make infrastructure construction a conflict-prone endeavor. The financial interests of both client and contractor are substantial. Moreover, in difficult economic times contractors often set target prices for projects too low, and clients may tend to shift liability for risks that materialize and result in financial setbacks to the other side. Third, the relationships between parties in the construction industry are often characterized as adversarial (Shove 1996; Cox and Townsend 1998). All in all, this creates a perfect environment for conflict to flourish.

D. Sources of Conflict related to the Collaboration Process

When looking at the sources of conflict in construction literature, we see a significant part is related to the process of cooperation. I focus on those that are related to the process of working together as they seem relevant not only for construction works, but also for multi-party projects in general. The kinds of circumstances that may be distinguished are: unclear project organization and communication; disturbance in human interactions; and selection and contract related problems.

15. See Larson 1995; Black *et al.* 2000; Nystrom 2005; Iyer and Jha 2005.

16. See also Hellard stating construction has a "built-in recipe for conflict" (Hellard 1992).

Deficiencies in Project Organization and Communication

Some disputes arise as a result of deficiencies in the project organization and the communication between representatives of client and contractors (Fryer 2004: 124 and Hellard 1988). These may be caused by gaps in the organizational context of projects, bureaucratic-entrepreneurial divergences, lack of skills and tasks definitions, a lack of confidence between the parties or a lack of understanding (Bennett and Jayes 1995: 141-165).

Common examples are poorly defined authority and responsibility structures, a lack of communication about problems, unrealistic time, cost, or quality targets, and unfair or unclear risk allocation.

In addition, inflexibility of an organization may potentially contribute to a conflict, such as the presence of pre-selected suppliers for key material and equipment, and unqualified, mismatched, and dysfunctional project management or staff assigned to the job by the client, user, designer, or contractor.¹⁷ Such organizational deficits may result in failure to deal with changes expediently, a lack of team spirit, adversarial attitudes and contract administrators who fail to remedy problems (Libbey 2000). Finally, tensions may arise between the partners in the project and the interests of their own organizations which affect the collaboration process between the project partners.

Disturbances in Human Interaction

Disturbances in human interaction also increase the chance of conflict. These may arise, for example, from humans' cognitive limitations or a clash of personalities between project managers.¹⁸ It may result in individuals lacking understanding of the needs of others involved or frustration over a lack of control over events affecting performance.

17. Stephenson mentions as causes of problems: contractors inexperience, owner interference, financing and payment, slow decision making, improper planning (Stephenson 1996: 62 ff).

18. During the process of receiving, selecting, and processing information, certain mechanisms may distort representations. Researchers have found that our brains compare information to what we already know. This allows us to interpret the situation and make quick, efficient judgments. While doing this, we use mental shortcuts, or "heuristics," Tversky and Kahneman 1974. They distinguish: availability heuristic, representativeness heuristic, overconfidence and self-serving biases; hindsight bias; anchoring and adjustment; gain and loss frames; endowment effect, status quo bias, habits. See also Bazerman *et al.* 2000; Korobkin and Ulen (2000: 37 ff); see for the effects of cognition in the construction industry setting, Kamminga, 2008).

Other human traits that increase the chance of conflict are the tendency for parties to exhibit unreasonable or strategic behavior in negotiations, excessive demands on resources normally relied upon to assist in the resolution of conflict, demands for higher quality than specified, and failure to meet commitments.¹⁹

Additional causes often cited are the tendency to demonstrate power (such as misplaced attempts to demonstrate who is in charge), greed and the desire to take advantage of those in weaker positions (Stephenson 1996: 27). Another factor that plays a role is time pressure resulting in insufficient time to make required decisions.

The Law: Legalizing and Tendering

A final and important category is “the law” as an important facilitator of conflict, particularly where it concerns tender and contracting. Taking a legal approach in handling or interpreting events may encourage escalation of conflict. Although the root cause is not legal, when a problem actually becomes a conflict, it may quickly be “legalized”. Parties who do not succeed in solving the matter tend to translate the conflict into legal terms, and at some point, the problem then becomes a legal dispute. In this stage the parties involve lawyers, and, if necessary, start legal proceedings.

In the tender stage the question may be raised if during the selection the purchaser carried out the process in accordance with applicable laws and regulations. Disagreements may also take place afterwards about the exchange of information during this phase. Was there enough and accurate information, and who was responsible if it proved incorrect and extra costs or poor quality resulted? Reputation and financial interests are at stake for the clients as well as the contractors. For that reason contractors who do not get the job are sometimes willing to spend lots of time and money litigating after the tender phase when they have the impression the client made a mistake during the tender process as a result of which the contract is awarded to another contractor.

The basis for most of these sources for conflict is related to a lack of clarity about the (collaboration) process or a lack of understanding about the *pre-conditions* affecting the process of collaboration. It may be due to organizational problems, information exchange, a lack of experience or competences of the project managers, a lack of confidence or under-

19. See for an overview of these and other traits and a discussion of how they may lead to conflict and literature references, Kamminga 2008, 263-299.

standing, a failed match of personalities, or lack of clarity on whether the applicable laws and regulations have been honored.

E. The Role of Contracts and Collaboration

What about the role contracts play in facilitating collaboration in infrastructure projects? Often it turns out that contract documents are unable to help parties get their collaboration process back on track. In fact, they are usually the starting point for disagreements about the consequences of unexpected events or changes (Stephenson 1996: 11, Kamminga 2008). They affect the collaboration process and the contractual relationship negatively in two ways.

First of all, contracts have become increasingly important over the years. This tendency seems to have contributed to adversarial relationships (O'Reilly 1999). Both relationships and the style of contract administration have become more adversarial with the new contract models (O'Reilly 1999; CII 2007). As a result of the increased focus on the contract, negative relationships have become the standard (CIRC 2001; Egan 1998). More stringent financing, regulations (Flyvbjerg 2007), increased competition, and a less equitable risk distribution among the contracting parties are also factors that contribute to the shift to more adversarial relations (Shove 1996; Cox and Townsend 1998; Skeggs 2003).

Furthermore, when problems arise about which the contract is not explicit during the realization stage, disagreements can be expected regarding who is responsible for covering the financial consequences. Moreover, as contracts are found to be difficult to comprehend, even by professionals, they are a cause of conflict. If there are differences in interpretation of their terms, these may lead to or increase conflict.

The good news is that in some situations the problems concerning collaboration and contracting have been acknowledged and there is a move towards more relational contracting. Traditional models are considered increasingly unable to fulfill new demands of clients (Naoum 2003). However, relational contracts forms are not applied on a very large scale, because a relational contract approach is often not considered suitable for a project. Furthermore, many of the used contract documents are missing process provisions and fail to keep parties on a cooperative course (Ng *et al.* 2000; Kamminga 2008).²⁰

20. See for an extensive analysis Kamminga 2008.

III. Contract Negotiations that Center around the Process

Perhaps not every contractual relationship is as sensitive to conflict as the one between client and contractor in infrastructure projects, but in many other situations similar deficiencies may exist: a failure to address the subject of collaboration and to fulfill the pre-conditions that allow for a smooth collaboration. So, what should be negotiated when we want to make arrangements about the process?

A. Critical Success Factors and Collaboration

Empirical studies have been done to identify factors that determine the success of projects, some of which focused on infrastructure development.²¹ As mentioned earlier, most of the factors that have been identified have a strong relationship with the collaboration process between parties. Therefore success factors should be addressed, as facilitating the discussion about these factors seems a good way for negotiators to contribute to a smooth collaboration process.

A number of key factors contribute to or threaten project success. These factors can be used as standards by which parties can measure during the project the extent to which they progress toward the project goals (Iyer and Jha 2005: 284; Toor and Ogunlana 2007).

The literature on project management, suggests four factors that are found to contribute positively to success in infrastructure projects and five factors that likely lead to project failure (Chan *et al.* 2004; Iyer and Jha 2005). The factors that contribute to achieving project goals are:

- *Strong commitment* of all participants, particularly, if those in the project team make their commitment to the project goals known, and top management supports the project (e.g., by showing support to the project-manager and the project team, giving enough mandate) (Iyer and Jha 2005: 289);
- *Competence* of contractors, client, and particularly the project-manager (e.g., leadership, technical knowledge, and coordination skills, supervision) (Chan *et al.* 2001; Iyer and Jha 2005: 283–295);²²

21. See e.g. Larson 1995; Black *et al.* 2000; Nystrom 2005; Iyer and Jha 2005.

22. Iyer and Jha cite e.g. Avots 1969 discussing the impact of choice of project managers and their competences on project success (Iyer and Jha 2005: 283-295).

- *Clear interaction and communication* between project participants (e.g., about clearly formulated goals and assessment of risk and liabilities) (Toor and Ogunlana 2007);
- *Effective monitoring and feedback* by the project-manager and project members through control and information mechanisms (Sayles and Chandler 1993).

Critical factors which may lead to failure to achieve project goals (Iyer and Jha 2005):²³

- *Conflict* among project participants (e.g., between participants on site or project-manager and top management);
- *Project management ignorance* of planning tools and lack of knowledge and experience in managing large projects (Rubin and Seeling 1967);
- *Bureaucracy* resulting in slow decision-making and indecisiveness (Baker *et al.* 1983);
- *Aggressive competition at the tender stage*;
- *Short bid preparation time* for contractors.²⁴

B. Lessons for Negotiating (Cross-border) Contractual Relationships

What can we learn from empirical findings on critical success factors and lessons on how to positively influence them? Infrastructure projects are unique and their problems are considered typical for the infrastructure sector. However by taking the perspective of collaboration, one may abstract from most of the sector- and situation-specific elements. When looking at international contractual relationships, it seems important in every situation where parties work together overtime in

23. The important reasons for failure Iyer and Jha list are poor human resource management and labour strike, negative attitude of the project manager and project participants, inadequate project formulation in the beginning, vested interest of client representative in not getting the project completed in time, and conflicts between PM and top management (Iyer and Jha 2005).

24. Iyer and Jha point out that the success factors obtained from the analyses in developing countries are consistent with the findings in the context of developed countries; thus, the study concludes that the critical success factor remains the same irrespective of geographical boundaries (Iyer and Jha 2005).

cross-border relationships to agree on aspects related to the collaboration process. This stands for not just complex ones such as international construction projects, but for any business relationship that parties would like to continue overtime. It seems that for a relationship to be successful, talking about the process of working together is essential.

In most of these business interactions, success will –like in infrastructure projects– be influenced by the levels of commitment to project goals, competence of managers, the extent to which parties interact and communicate effectively, and adequacy in monitoring and feedback by the parties. Conflict will always be a factor that undermines the collaboration process, as are time-consuming decision-making procedures and having a negative atmosphere during the pre-contractual stage of partner selection and offer in either vertical or more horizontal relationships. The exact measures may vary depending on the sector and the preferences of parties. In that sense they are examples which can be extended. What seems important is that the parties address the themes, exchange viewpoints and come to agreement about the “how” question in the context of their working relationship.

C. What to Do when Discussing Process during Contracting?

How can negotiators use these factors to set the scene for a smooth collaboration process? These variables of project success are subject to the parties’ influence, meaning they can make arrangements for them. In fact, the behavior of the parties is what determines to what extent the success factors are present. Also, by themselves these factors may be regarded as pre-conditions for a smooth collaboration process. For instance, without adequate commitment of the parties it is hard to create an interaction process through which parties coordinate their actions in such a way that they enable project success. The same goes for competence, and clearly for interaction and communication. And, without monitoring and feedback parties may not continue acting in a way that allows for a smooth collaboration process.

When looking at the negative factors, it has been seen that high levels of conflict frustrate collaboration. Further it can be assumed that failure to use project management tools, bureaucracy, aggressive selection, and time pressure to submit a proposal may all have a negative effect on smooth collaboration. These are all factors to be prevented. By determining what may be done to create the favorable pre-conditions for project success, we are able to actively work on establishing them and lay the foundation for a smooth collaboration process. Each factor will now be addressed along with what can be done to build or nurture them.

Creating Commitment

First, to influence the variable commitment to the project goals, one needs to *motivate* people to commit to project goals. There may be natural motivators for behavior, such as feelings of friendship and trust. These may be built by agreeing on interaction in a non-threatening environment such as team building sessions, by arranging for artificial motivators in the contract, charters, and provisions for bonuses or rewards mechanism (e.g., pain share/gain share formulas) even when not legally enforceable (Ryall and Sampson 2003). Investing in creating commitment to common goals is a process investment that may benefit smooth collaboration.

Influencing Competence

Second, the level of competence of project participants may be influenced by mechanisms such as assessments of the contract partner and having and communicating accurate selection criteria. The client may select a supplier that meets his standards. These mechanisms may also be used by both contract partners internally to select competent people for the project management team; for instance, selecting experienced project managers who have the technical knowledge and communication skills necessary to carry out and manage complex projects (Anvuur and Kumaraswamy 2007). Through executive workshops they may train the management in the skills and knowledge they deem necessary to achieve project success, such as leadership skills and an understanding of partnering principles (Bayliss *et al.* 2002: 255). Parties may clearly agree on the criteria and procedures used and communicate the qualifications expected of the people collaborating.

Facilitating Interaction and Communication

To influence the level and quality of interaction and communication, parties may agree on mechanisms that particularly focus on enhancing these factors. Examples are regular project meetings, facilitators leading discussions or meetings, regular social events to improve communication and trust (Bayliss *et al.* 2002: 255). Other measures parties can take are appointing special task forces to discuss particular subjects or issues of importance to the project, such as potential risks, conflict identification, and management (Katzenbach and Smith 1993; Pettigrew 1998), and using adequate communication channels and training in how to use them and in how to motivate others to do so.

Adequate Monitoring and Feedback

Adequate monitoring and feedback require mechanisms such as regular meetings, in which progress is discussed (partnering or KPI review meetings in which the collaboration process is assessed) and progress evaluation based on clear project targets (Bayliss 2004: 255). Also, selecting people with good communication skills and training contribute to the success of these processes.

Managing Conflict

The level of conflict may be influenced by issue escalation ladders, problem-solving procedures, and training in conflict identification or mediation skills. Selecting people with conflict resolution skills and providing for training will also help positively influence the level of conflict. Knowledge, use of planning mechanisms, and experience can be facilitated by selecting experienced people. Training to expand knowledge and teaching people to use the planning mechanisms will also have a positive influence. Monitoring and incentives may further facilitate the use of these mechanisms.

Improving Decision Making

The quality of decision-making can be influenced by implementing decision-making mechanisms. Examples are following specific decision making models. Different models have been developed, but, generally speaking, the steps for rational decision making are: 1) Define the problem 2) Find criteria 3) Give criteria a value 4) Brainstorm alternatives 5) Evaluate each alternative with respect to the criteria 6) Calculate the optimal decision 7) Reach a decision 8) Act on it. Selection, training, and monitoring may encourage the adequate use of these procedures.

Building Trust and Cooperative Selection

Finally, the aggressive competition and mistrust during selection of contract partners can be mitigated by providing for mechanisms such as a tender procedure that encourages a cooperative relationship between client and contractors, and, in so doing, sets a cooperative tone. For instance, the client may set the scene for a cooperative atmosphere by being trustworthy, predictable in his actions, and responsive to the questions of contractors (Bayliss 2004: 256). The bid timing may be influenced by creating more time for preparation of offers in the tender procedure. Although the process remains by nature a competition

between bidders, creating a cooperative atmosphere may soften the adversarial aspects of the process, which can otherwise negatively impact the relationship between bidders and client. By agreeing on a set of such preliminary arrangements, parties may commit to a set of cooperative principles governing their relationship even before a contractual bond is created.

IV. Conclusions

To optimize their contribution to project success, legal negotiators may want to address issues concerning the process of working together during contracting. These arrangements may be added as “process provisions” to the contract.

This paper uses the example of infrastructure projects. The sector of infrastructure development illustrates the problem of contracts today where there is much attention for the content of the deal, but not for the process in how to achieve it cooperatively. Other sectors may draw lessons from the experiences in this particular sector with regard to the dynamics of the collaboration process.

What negotiators can learn from infrastructure practice is that it is not to the benefit of project results when negotiators fail to pay attention to process meaning: addressing the question how-are-we-going-to-behave-toward-each-other-to-achieve-our-agreed-upon-objectives.

Even though it seems not important to day to day interactions, eventually the legal document is at the basis of the relationship, particularly when conflicts arise. It is what parties and eventually a judge falls back on when a disagreement gets a legal character. Often a contract reflects nothing about the way parties agreed to deal with each other on a day to day basis to keep their collaboration process and relationship in good shape.

Contracts in their current forms are not well-suited to smoothen the collaboration process. Moreover, contracts that fail to include clear process agreements such as on how to deal with disagreements may actually get in the way of collaboration and lead to or escalate conflict, and so are often no help to the parties in getting out of conflict. The contract's role during the contractual relationship then often becomes one of a document to support claims. Therefore they are experienced as something parties in general prefer to leave in the closet during their contractual relationship, instead of actively using it.

Findings from empirical literature on infrastructure development point out what negotiators may need to address and agree on. The critical success factors such as commitment, interaction and communication, and amount of conflict all are directly about the process of working together or are meant to influence that process.

Negotiators that see a role for themselves in not only reaching a deal but establishing a potentially enduring relationship between parties may use these project success factors and the underlying pre-conditions as a frame of reference when negotiating process agreements that facilitate optimal collaboration and project success. To make the contract a much more productive document, they may address elements of collaboration such as how to negotiate unforeseen events, identify, and deal with conflicts and how to build a relationship both parties are happy with. By specifically including provisions in contracts addressing them negotiators and contract drafters may be able to reflect in legal documents the relationships as parties actually experience and want to shape them.

References

- Anderson, J.C. and J.A. Narus, "A model of distributor firm and manufacturer firm working partnerships" (1990) 54 *Journal of Marketing* 42-58.
- Anvuur, A.M. and M.M. Kumaraswamy, "Conceptual model of partnering and alliancing" (2007) 133(3) *Journal of Construction Engineering and Management* 225-234.
- Atiyah, P.S., *An introduction to the law of contract*. 5th ed., Oxford and New York: Clarendon Press, 1995.
- Avots, I., "Why does project management fail?" (1969) 12(1) *California Manage Rev.* 77-82.
- Axelrod, R., *The evolution of cooperation*, New York: Basic Books, 1984.
- Bayliss, R.F., "Partnering on MTR Corporation. Ltd's Tseung" (2002) 9(1) *Hong Kong Institution of Engineers Transactions*, Hong Kong 1-6.
- Baker, B.N. *et al.*, *Factors affecting project success: Project management handbook*. New York: Van Nostrand Reinhold, 1983.
- Baker, D.C. and A.G. McLellan, "Substantive techniques for conflict resolution: aggregate extraction in Southern Ontario" in P. Fenn and R. Gameson, eds., *Construction conflict management and resolution*. Proc. 1st Conf. International Construction Management, 25-27 September 1992, the University of Manchester Institute of Science and Technology (UMIST). London (UK): E&FN SPON, 1992 at pp. 161-171.
- Bazerman, M.H, J.R. Curhan and D.A. Moore, "The death and rebirth of the social psychology of negotiation" in *Blackwell handbook of social psychology*, edited by M. Clark, G. Fletcher, Cambridge, MA: Blackwell, 2000.
- Bennett, J. and S. Jayes, *Trusting the team: the best practice guide to partnering in construction*, Reading: Centre for Strategic Studies in Construction/Reading Construction Forum, 1995.
- Black, C., A. Akintoye and E. Fitzgerald, "An analysis of success factors and benefits of partnering in construction" (2000) 18(6) *Int. J. Proj. Manage* 423-432.
- Bromilow, F. *et al.*, "AIQS survey of building contract time performance" (1980) 19(2) *The Building Economist* 79-82.

- Bryson, J.M. and B.C. Crosby, "Failing into cross-sector collaboration successfully" in *Big ideas in collaborative public management*, edited by Bingham, L. and R. O'Leary, London: Sharpe, 2005.
- CII, *Contracting to appropriately allocate risk*, CII Special Publication, Austin, Tx: Construction Industry Institute, Austin, 2007.
- Chan, A.P.C. *et al.*, "Design and build project success factors; multi-variate analysis" (2001) 127(2) *J. Constr. Eng Mang.* 93-100.
- Chan, A.P.C. *et al.*, "Exploring critical success factors for partnering in construction projects" (March/April 2004) 130(2) *ASCE Journal of Construction Engineering and Management* 188-198.
- Cox, A. and M. Townsend, *Strategic procurement in construction*, London: Thomas Telford, 1998.
- De Dreu, C.K.W. and P.A.M. Van Lange, "The impact of social value orientation on negotiator behavior and cognition" (1995) 21 *Personality and Social Psychology Bulletin* 1178-1188.
- Deutsch, M., *The Resolution of Conflict*. New Haven: Yale University Press, 1973.
- Elickson, R.C., "A hypothesis of wealth-maximizing norms: Evidence from the whaling industry", (1991) 5 *Journal of Law, Economics & Organizations* 83.
- Fenn, P. *et al.*, "Conflict and dispute in construction" (1997) 15(6) *Constr. Manage. Econ.* 513-518.
- Flyvbjerg, B., "Cost overruns and demand shortfalls in urban rail and other infrastructure" (2007) 30(1) *Transportation Planning and Technology* 9-30.
- Fryer, B. *et al.* 2004. *The practice of construction management*. London: Blackwell.
- Hellard, R.B., *Managing construction conflict*, Burnt Mill, Harlow Essex: Long Mill Scientific & Technical, 1988.
- Hill, C. and C. King, "How do german contracts do as much with fewer words?" (2004) 79 *Chi.-Kent L. Rev.* 889-926.
- Iyer, K.N. and K.C. Jha, "Commitment, coordination, competence and the iron triangle" (2007) 25 *International Journal of Project Management* 527-540.
- Jones, S.R., "How constructive is construction law?" (1994) 10(1) *Constr. Law J.* 28-38.

- Kaming, P., "Factors influencing, construction time and cost overruns on high-rise projects in Indonesia" (1997) 15 *Construct Manage Econom.* 83-94.
- Kamminga, Y.P., *Towards effective governance structures for contractual relations*, Tilburg: Tilburg University, 2008.
- Katzenbach, J.R. and D.K. Smith, "The discipline of teams" (March-April 1993) *Harvard. Bus. Rev.* 111-120.
- Korobkin, R., *Negotiation theory and strategy*. New York: Aspen, 2002.
- Korobkin R.B. and Ulen T.S., "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics" (2000) 88 *California Law Review* 1051.
- Lewicki *et al.*, *Essentials of negotiation*, Fourth Edition, New York: McGraw-Hill/Irwin, 2007.
- Libbey, C.A., "Working together while waltzing in a mine field: successful government contract dispute resolution with partnering and dispute review boards" (2000) 15 *Ohio State Journal on Dispute Resolution* 825-849.
- Lui, S. and Y. Hang, "An action pattern model of inter-firm cooperation" (2005) 42(6) *Journal of Management Studies* 1123-1153.
- MacNeil, R., "Contract in China: Law, Practice, and Dispute Resolution" (1986) 38(2) *Stanford Law Review* 303-397.
- Mnookin, R.H., S.R. Peppet and A.S. Tulumello, *Beyond winning: negotiating to create value in deals and disputes*, Cambridge, Mass.: Belknap Press of Harvard University Press, 2000.
- Morgan, R.M. and S.D. Hunt, "The commitment-trust theory of relationship marketing" (2000) 58 *J. Marketing* 20-38.
- Naoum, S., "An overview into the concept of partnering" (2003) 21(1) *International Journal of Project Management* 71-6.
- Ng, T. *et al.*, "Problematic issues associated with project partnering – the contractor perspective" (2002) 20(6) *International Journal of Project Management* 437-449.
- O'Reilly, M., *Civil engineering construction contracts*, 2nd ed., London: Thomas Telford, 1999.
- Parkhe, A., "Inter-firm diversity, organizational learning, and longevity in global strategic alliances" (1991) 20 *Journal of International Business Studies* 579-601.

- Pettigrew, F., "Intergroup Contact theory" (1998) 69 *Annu. Rev. Psychol.* 65-85.
- Rubin, J. and B. Brown, *The social psychology of bargaining and negotiation*, New York: Academic Press, 1975.
- Rubin, J. and W. Seeling, "Experience as a factor in the selection and performance of project managers", (1967) 14(3) *IEEE Trans Eng Man.* 131-134.
- Ryall, M.D. and R.C. Sampson, *Do prior alliances influence contract structure? Evidence from technology alliance contracts*, Strategy Research Forum, Washington University, St. Louis, MO, 2003.
- Salacuse, J.W., *The global negotiator: making managing and mending deals around the world*, New York: Palgrave, 2003.
- Shavell, S., *Foundations of economic analysis of law*, Cambridge: Belknap Press of Harvard University Press, 2004.
- Shove, E., "Chain Reactions: notes on partnering and supply chain management in construction" in ESRC/EPSRC Workshop, *Partnering in Construction*, Salford: University of Salford, 1996.
- Skeggs, C., "Project partnering in the international construction industry" (2003) *International Construction Law Review* 456-482.
- Sayles, L.R. and M.K. Chandler, *Managing large systems: Organizations for the future*, New York: Harper and Row, 1993.
- Stephenson, R., *Project partnering for the design and construction industry*, New York: John Wiley, 1996.
- Toor, S. and O. Ogunlana, "Critical COMs of success in large-scale construction projects: Evidence from Thailand construction industry" (2007) 2007-1 *International Journal of Project Management* 1-10.
- Triantis, G., "Unforeseen contingencies: Risk allocation in contracts" in Bouckaert, Boudewijn and De Geest, Gerrit, eds., *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, 1094 p. ISBN 1 85898 984 1.
- Tversky, A. and D. Kahneman, "Judgement under uncertainty: Heuristics and biases" (1974) 185 *Science* 1124-1130.