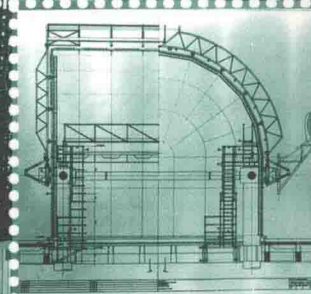
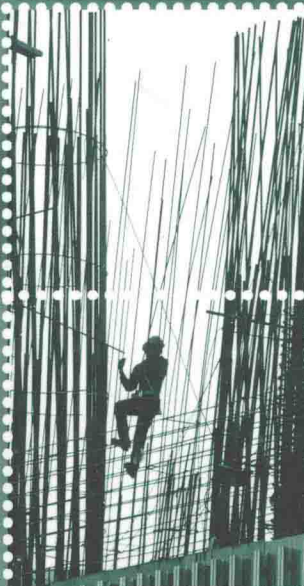
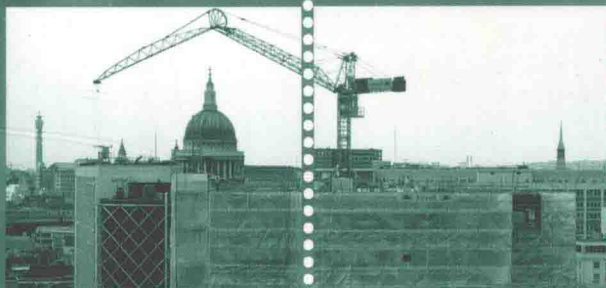


PRACTICAL CONSTRUCTION GUIDES

# PARTNERING AND COLLABORATIVE WORKING

General Editors:

David Jones, David Savage and Rona Westgate



# PARTNERING AND COLLABORATIVE WORKING LAW AND INDUSTRY PRACTICE

EDITED BY

DAVID JONES, DAVID SAVAGE  
AND  
RONA WESTGATE

**|LLP|**

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## FOREWORD

*His Honour Judge Humphrey LLOYD QC*

I was both pleased and honoured to be invited to contribute the Foreword to this innovative, timely, informative and stimulating work.

The basic elements of partnering have been in practice for a long time even if, as Don Ward says in the first contribution in this book, they may not have been recognised as such by those involved. They are present wherever client, contractor, sub-contractors, suppliers and professional advisers work together as a team, generally because they have all been on a previous project and have been brought in at very early stages. However, in the historic past opportunities for such collaborations tended to arise in the public sector where special features were present – perhaps wartime, perhaps because the project was of national importance or was technically novel or highly complex. Cost control was not normally of key importance; it probably could not really be implemented without prejudicing the success of the project (which also explained why such ventures were not popular in some quarters). Partnering was present before any contract was negotiated – indeed there might never be a contract. Partnering was not confined to the relationship created or recognised by contract; it was about the formation and development of the necessary relationships – which in law might or might not be recognised or be recognisable.

The same applied where it was imperative to build or modify new plant, a new factory or a new production line. Clients who are satisfied turn to those upon whom they can rely. The oil and petro-chemical industries are good examples. But such opportunities occurred infrequently in the normal work of the building and engineering sectors of the construction industry. Nevertheless at least one highly successful national contractor made its reputation by demonstrating that team work was not just a catchy selling point or logo. Even where they operated in conditions of competitive tendering those contractors recognised how important it was to avoid disputes and arbitration and litigation. Their management was adept at avoiding or controlling confrontation. At times they lost money rather than risk the adverse publicity that might affect their reputation.

\* A Judge of the Technology and Construction Court, High Court of Justice, London. Editor-in-Chief of *The International Construction Law Review*.

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However, traditional forms of procurement where little or no account was taken of the contribution that could be made by early collaboration, and the nature of competitive tendering itself, made it difficult for both clients to get the best out of providers (to use a neutral term). This was seen, for example, over 20 years ago in the United States when partnering was developed by the US Army Corps of Engineers. It has since been used extensively throughout the Corps and, like many other pioneering leads from the Corps, adopted by others. It is now a key feature of the way in which the Corps operates, aiming to reduce conflict and to resolve problems by discussion and ADR. Whilst originally the focus was improving relationships with contractors, it found that the principles of partnering could be applied to others and to every project.

Don Ward lists the many reports which for decades have pointed out faults in attitude and structure in the construction industry in Great Britain and which recommended measures such as partnering as agents for real change. They had their counterparts in other countries, notably the United States, where there is all too often a confrontational approach to the execution of some construction projects. The advent of the New Engineering Contract (now in its improved form, the Engineering and Construction Contract – with a partnership option) and the pioneering work of its proponents, notably Dr Martin Barnes, led to a real interest in how things could be done better if the relationships were right. In this country the value of partnering was thus formally recognised in 1994 in the Latham report. Sir Michael Latham noted however that it required “openness between the parties, ready acceptance of new ideas, trust and perceived mutual benefit...”. Only in that way might “partnering bring significant benefits by improving quality and timeliness of completion whilst reducing costs”.

At the beginning some in the US Army Corps of Engineers thought, somewhat naively, that if provision was made in the partnering arrangements for dispute resolution that dispute would surely arise. Yet acceptance of the principles of partnering should mean that differences of opinions do occur even in the best of situations and there will be additional trouble if the participants do not plan for them. That will probably mean not tacking on a standard dispute resolution provision, or even a sophisticated one (where part of the solution seems to be the challenge to find a way through the maze). I do not suppose that I am alone in wondering why in 1996 Parliament thought that parties who had endorsed partnering should not be exempted from the obligation to adopt “statutory” adjudication as the next (and virtually compulsory) stop after discussion. The ethos of partnering arrangements almost certainly points in another direction. But, as I and others have recognised (on more than one occasion), the list of exemptions shows how very carefully they were considered, even if we have yet to discern the principles that must presumably have underlain the decisions.

It is now accepted that participants can benefit if an intermediary or adviser is on hand, preferably as part of the team. That person's role is to guide the

parties' discussions and to assist them in the process of making decisions, but not to advise on or make specific decisions. Thus, whilst knowledge of construction and of its techniques and the law applicable within it may be of value, these attributes are secondary; what is essential is experience in negotiation, team building, and group dynamics.

Yet to many lawyers, perhaps especially to those not fully versed in partnering, a focus on "team building" must be accompanied by a real understanding – of the expectations of the other parties, of the performance required of other parties, of the performance that is really deliverable by other parties, of the areas where problems could occur, of the contractual and other legal documents that create and delimit the relationships between the parties, and, perhaps, sadly, but necessarily from the point of a lawyer, of the dispute avoidance and resolution procedures. The role of the lawyer has to be seen in that context. Ideally, just as there may only be one insurer, there should be only one lawyer to advise and guide the partners, rather than many lawyers each advising a separate party. That stage (which is considered in Chapter 5) has yet to be reached, at least as a matter of course. In the United States the concept of a single project lawyer – the project counsel – remains more of an idea than a reality. However, the treatment of that topic by David Jones (a partner and Global Head of Construction, Engineering & Projects, Hammonds) and Alan Crane provides a very good illustration of the range and quality of this book.

Partnering creates a variety of opportunities and concerns for the participants. This book thus has two main parts, although they are not separate, nor should they be considered separately. The book should be read as a whole. The first part is mainly directed to those in the construction industry itself. This comprises Chapters 1 to 4. The second part is about the law and for lawyers (Chapters 6 onwards).

I have referred to the authors of the first chapter, which is entitled: "The Story So Far". The authors are exceptionally well qualified to tell that story and to provide an insight into partnering from the viewpoint of those who have had to practise what others may only preach. The first section comes from Don Ward, the Chief Executive of Collaborating for the Built Environment and formerly Chief Executive of the Construction Industry Board, 1996–2001. He sets out the background to and history of the evolution of partnering in this country. He provides two helpful illustrations from projects for GlaxoWellcome and the Ministry of Defence. Alan Crane CBE is the Chairman of Rethinking Construction, the government task force which was established to oversee the implementation of the Egan reforms. As acting Chief Executive he also set up Construction Excellence. In 2001 we were both appointed by the Government to be members of the Architects Registration Board so I know the authority that he brings to a subject such as partnering. In the second section of Chapter 1, Alan Crane covers extensively and comprehensively "The management challenges of partnering". This is an excep-

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tionally important subject since the ordinary management approaches require reconsideration and modification if partnering is to work. He explains that, provided that the basic understandings required of the nature of partnering are present and can be realised, it is possible to do so, just as it is possible to work with standard forms of contract, suitably but not radically altered.

In line with the different opportunities and concerns that partnering faces, Chapter 2 is written by Paul Wilkinson who is Head of Corporate Communications, BIW Technologies. He examines the technological challenges that are present or should be anticipated by the adoption of partnering, concentrating on information and communication technology (ICT) – in particular, internet-based technology. In principle partnering should enjoy the best of ICT. However, as the author points out, the construction industry has been both reliant on slow, paper-based processes to transmit project information, and markedly reluctant to share accurate and timely information which is critical for all participants. Thus attitudes have to change as true partnering requires a more collaborative approach and ICT can serve it well. The author provides numerous instances where collaboration technology has succeeded and what can (and cannot) be achieved by application service providers. He also covers very fully the main legal implications so here, as elsewhere, readers of one part of the book must also read the other part.

Armed with what could be done, the book takes the readers to look into the future in Chapter 3 with two contrasting views from Alan Crane and Richard Saxon CBE, a Director of Building Design Partnership, and a Vice-President of the Royal Institute of British Architects. Alan Crane covers the possibility of the “virtual company”. Chapter 4 sets out a number of case studies that chart the experience of collaborative working from one of the earliest examples in 1996 to more recent ones.

Chapter 5 discusses the role of lawyers in partnering projects, which, as already noted, is by David Jones and Alan Crane. It provides a snapshot of the current position of lawyers who specialise in construction law. It is needed in order to mark the changes that would be required for a lawyer to serve the interests of partnering.

Procurement through partnering presents problems in the public sector, at least, given the legal framework that has to be observed. Chapter 6 – Procurement and Competition Issues – is written by three members of Hammonds: Richard Cooke, a partner, with Brona Heenan and Corin Ramsden, both solicitors. They discuss the main published industry construction contracts intended for use for partnering, including the first multi-party partnering contract PPC 2000 and the Non-binding Charter produced by the Joint Contracts Tribunal. A particularly innovative approach, which at the time of writing, is still in the consultation phase, is the approach adopted by the Movement for Innovation, which proposes the vehicle of a “virtual company”. In addition the authors cover the extent to which partnering can be implemented where the project is subject to the European Union rules relating to

public procurement and other measures intended to promote competitiveness which form part of our law.

In Chapter 7 Marina Milner, a solicitor with Hammonds, writes about “Contracting for Good Faith”. This is a subject which generates a good deal of speculation. In the construction industry the question can be academic. Some contracts specifically require “good faith” from each party in the performance of their respective obligations, e.g., GC/ Works/1. Any contract resulting from or directed to a partnering arrangement would nowadays surely contain a similar express provision. Other contracts contain equivalent obligations or are to be read to achieve the objectives thought to be attained by such an obligation. It is usually quite difficult to see what can be achieved by the addition of some implied obligation of good faith which would not be achieved by the use of the existing provisions, supplemented by inferences which bring out the parties’ presumed intentions. It is not necessary (or it should not be necessary) to have recourse to Lord Hoffmann’s restatement in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896. The intentions of the participants in partnering arrangements should be transparently plain if the openness and trust that are indispensable are present. There should be no room for misunderstanding, still less misrepresentations. The record (which will include the charter or the like) will be plain: “By their work you will know them.” Of course the language used in it or in some of the contractual documentation may not be that which would be appropriate in a traditional legal relationship. Judged by the standards of the law, there may be ambiguity or a lack of clarity. Hence dispute resolution should be entrusted to people who understand partnering. That will include lawyers with requisite the knowledge and background; it ought even to include those judges and arbitrators who are attuned by experience to the world of partnering.

Some years ago I had to consider a somewhat rudimentary partnering arrangement in *Birse Construction Ltd v. St Davids Ltd* [1999] 4 BLR 194. I am sorry if I disappoint anybody who thought that I might take advantage of this occasion to debate further some of the points that arose in that case or in subsequent commentaries on it. However, a judge cannot discuss (outside court) any decision that the judge has made or the decisions of other judges. Even allowing for the downturn in arbitration and litigation (in the latter case partly due to the introduction of adjudication) the paucity of cases bearing on partnering is perhaps surprising, at least at first sight. The very nature of partnering must be the main factor, as Alan Crane points out in the course of his excellent contribution (in the second section of Chapter 1). As described to me by Lester Edelman, an American lawyer with long experience of partnering: “The partnering process does not change the contract terms – what it changes is the mind-set or the attitude of the participants so that the objective becomes one of co-operation, openness and trust.” If those attributes are expressed as or can be found as contractual obligations then is there still a practical need for some super-added obligation of good faith?

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Chapter 8 looks at three specific areas covered by innovative contractual arrangements. The authors are Jonathan Hosie, Tara Corcoran and Diana Harvey, of Hammonds. They look at a number of the standard forms that have been developed for partnering: *PPC 2000*; the *NHS LIFT Strategic Partnering Agreement*; the *Defence Estates' Prime Contract (Regional and Stand Alone Capital Projects)*; the *Be Collaborative Contract*; the *M4i Virtual Company Model Form*; the *ECC Partnering Option X12*; and *JCT Partnering Charter for a Single Project*. With the possible exception of the ECC Form, none can strictly be called a standard form as they are not established (one at least is still experimental) and experience is limited. The authors rightly point out that in examining any standard form for use in partnering the question should be asked: was it devised to regulate the parties' behaviour (like a familiar standard form) or is it there to support the parties' own partnering arrangements. This approach then permeates the authors' consideration of the three main issues of time, cost and quality management. These themes follow on from the first part of the book. Their thoughtful and detailed analysis of each of the forms selected is applicable to other forms of contract so this chapter, in common with many others, has considerable general value. The themes follow up the first part of the book by focusing on time, cost and quality management.

Chapter 9 is by Mike Butler, solicitor with Hammonds. It is an extensive examination of the impact of the many intellectual property laws on the allocation of rights resulting from collaborative design working. It covers many points which are not confined to the question of partnering.

Chapter 10 is by another member of Hammonds, Katie Graham. Its title "Insurance in a Changing Industry" shows that, like the previous chapter, the subject is of general interest. It could well have been included in the first part. Katie Graham rightly draws attention to the seminal article by Robert J. Smith on "Risk Identification and Allocation: Saving Money by Improving Contracts and Contracting Parties" [1995] ICLR 40 in which he argues that contractual misallocation of risk is the leading cause of construction disputes in the United States. Certainly misallocation leads to people attempting to avoid the consequences of their contract. It also leads to insurers of the risk trying to re-allocate to the party whose insurers they consider to belong to those who should have borne the risk.

The final chapter, by Linda Grayson and Diana Harvey, both solicitors with Hammonds, is about "Resolution of Disputes". Second only to the allocation of risk, this is perhaps the most difficult area for someone to grasp who is not familiar with the methodology of partnering. The authors wisely approach it by looking at the customary methods of dispute resolution, which are based on an adversarial or confrontational approach that negates the essence of partnering and is an anathema to it. (Such approaches have to be provided for in contracts that presuppose their use.) By adroitly highlighting the deficiencies in such methods for use in partnering they fortify the case for really more suitable techniques which they have earlier identified in their thoughtful discussion of

*PPC 2000*, the *ECC Partnering Option X12*, the *Be Collaborative Contract*, the *M4i Virtual Company Model Form* and the *JCT Partnering Charter*. This chapter is a fitting culmination to an extraordinarily interesting book. Like every earlier contribution it is informed and thought provoking and, but for the common thread that weaves its way through and links each chapter, might have stood by itself as a paper worthy of publication.

I therefore found this book full and, in many places, fascinating, particularly in the first group of chapters. Readers should be very grateful to those at Hammonds and their principal collaborators in industry both for their remarkable work but also in securing so many knowledgeable people. The book combines the virtues of being a topical analysis of the practical issues that need to be resolved to make partnering work and a perceptive look into the future. It is of real value now and, I trust, will remain of value for the immediate future.

*Humphrey LLoyd*

## PREFACE

The idea for this book came about one wet day last October when we were debating internally the structure of a seminar to be delivered on partnering in the construction industry. As lawyers in Hammonds' Construction, Engineering & Projects Department we were aware of the wide experience our team had of documenting new forms of construction procurement, from partnering agreements, strategic alliances, and prime contracts to framework agreements amongst others. We also had good relationships with a number of leading innovators within the construction industry, in particular with Alan Crane, who is our industry special adviser.

The idea behind producing this book was to try to bridge the gap between a purely legal view of issues raised by collaborative arrangements in the industry, and the practical implications and history of adopting such arrangements from an industry perspective, as expressed by those closely involved in such projects to-date.

Rather than attempting to be simply a comprehensive but academic legal treatise, the book seeks to identify particular key industry and legal issues from a practical point of view, addresses how these issues are dealt with in the existing partnering standard form contracts, and provides an industry and historic perspective on experience to date. The book is not therefore addressed exclusively to either lawyers or construction professionals, but to anyone interested in understanding the history and practicalities of working with partnering and collaborative contracts in the field of construction procurement.

As editors, we are greatly indebted to the many people who have helped make our original idea come alive in a relatively short period. In particular we wish to thank the busy and senior figures from within the industry who agreed so willingly to contribute to the book, the stimulating nature of their contributions, and for working to short writing deadlines. We also wish to thank all the contributing lawyers from Hammonds' Construction, Engineering & Projects Department for their enthusiastic participation, and our clients for instructing us on a number of partnering and collaborative arrangements over the years – without those instructions this book might never have been written.

Finally, although the basic elements of partnering can be said to have been in practice for many years within certain parts of the industry, there is also

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much of the industry for which it remains untested and novel. We hope that this book can make a small contribution to informing future developments, and that readers will find it both practical and a useful reference tool.

*David Jones, David Savage & Rona Westgate*  
*19 August 2003*

## AUTHORS' BIOGRAPHIES

### DAVID M JONES

David Jones is the global head of Hammonds' Construction, Engineering & Projects Department. He is based in Hammonds' London office. With over 65 specialist construction, engineering and project lawyers, Hammonds has one of the largest and most experienced legal teams in the UK, with other offices throughout Europe and in Hong Kong.

David has extensive experience of all aspects of legal practice in the construction and engineering industries. He has undertaken substantial construction and engineering litigation/arbitration disputes both nationally and internationally. He has also drafted a number of specialist contracts including in particular the development of Prime Contracting for the Ministry of Defence with its integrated team approach and its collaborative working philosophy. He has also worked on a number of major projects around the world.

### DAVID J SAVAGE

David Savage is a London based partner in the Hammonds' Construction, Engineering & Projects Department.

Formerly in practice at the Construction Bar, David joined Hammonds in 1997. He has extensive experience of major litigation and arbitration proceedings, and has dealt with disputes and differences arising out of some of the world's largest construction and engineering projects. He has a particular specialisation in the transport sector generally, and railways in particular.

In non-contentious matters, David prepares documentation for projects, including amending standard forms, drafting bespoke contracts, and reviews all forms of construction documentation including bonds, warranties and guarantees.

He is also a specialist on the legal implications of the use of internet technologies and E-business in the construction sector, and a contributing author to a leading textbook on law and E-commerce.

### RONA WESTGATE

Rona Westgate is the senior Professional Support Lawyer for Hammonds' Construction, Engineering & Projects Department.

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She was formerly in private practice as a specialist construction lawyer, and writes extensively on construction law matters, both for training of Hammonds' lawyers and for client and marketing publications.

### JONATHAN HOSIE

Jonathan Hosie is a partner in Hammonds' Construction, Engineering & Projects Department and is Hammonds' main representative within Be. Since 1997 he has been actively involved in the development of partnering, and has chaired a number of working groups involved in mapping partnering processes and techniques onto a commercial framework. Jonathan also serves as an external tutor on the Masters' course in construction law and arbitration at King's College, London and is currently chairing a JCT working group on the drafting of a new form of professional appointment for use in the public sector. Jonathan led the team advising the integrated project team on the UK's first Prime Contract in 2000, the £23m logistics centre at Andover.

### KATIE GRAHAM

Katie Graham is a solicitor in Hammonds' Construction, Engineering & Projects Department. She is an experienced practitioner in all areas of construction law. She has acted on large litigation and arbitration matters (both domestic and international) and has drafted and advised on contracts and methods of procurement for a number of substantial projects in the UK and overseas. She has a particular interest in insurance related issues having a background in insurance litigation and co-authored the insurance module of the IBC written course in construction law. Katie also contributes regularly to a number of construction industry publications.

### MARINA MILNER

Marina Milner is a solicitor in Hammonds' Construction, Engineering & Projects Department. She has carried out work on projects sponsored under the PFI, as well as large and smaller scale developments. She is a non-contentious lawyer and has drafted construction contracts as well as consultants appointments and warranties. She also worked as a lecturer law at the University of East Anglia from 1994 to 2000, where she taught and published in a variety of subjects.

### RICHARD COOKE

Richard Cooke is a London based partner of Hammonds' Construction, Engineering & Projects Department.

He specialises in construction and engineering and oil/gas with an emphasis on infrastructure, major projects and disputes. His practice covers contentious work, including disputes management, adjudication, ADR, mediation, expert determination, arbitration and litigation, as well as non-contentious drafting and project advice. His experience covers civil, structural,