



Strategic Alliances and Strategic Contracting – Risks and Regulation

CBS MARCH 1ST 2017

KIM ØSTERGAARD, PROFESSOR, PH.D., LAW DEPARTMENT, SDU

Introduction

- ▶ Strategic alliances through strategic contracting
- ▶ The concept of conventional contracting and strategic contracting (Petersen & Østergaard 2017)
- ▶ Sharing risks and gains

Strategic contracting and servitization contracts – An example

- ▶ <http://www.danskemaritime.dk/da/information-og-presse/nyheder/1486-exilator-og-franske-monaco-marine-indgar-strategisk-aftale>

Conventional Contracting

Conventional contracting is characterized by the aim of own profit maximization (at the expense of the other contract party, if necessary) through the use of reactive provisions. The primary objectives of those provisions are to:

- (i) transfer risks, liability and undertakings to the other party;
- (ii) regulate how disputes are settled;
- (iii) stipulate conditions for the dissolution of the collaboration;
- (iv) stipulate how assets are to be divided between the parties if the collaboration is dissolved.

In economic terms, a conventional contract is basically an arm's-length agreement (Petersen & Østergaard 2017)

Strategic Contracting

In contrast, strategic contracting is characterized by the aim of generating **relational rent** through the use of both proactive and reactive provisions that, based on **resource complementarity** and **strategic fit** between the contract partners, protect knowledge exchange and relationship-specific investments against **opportunistic behavior**

Hence, a strategic contract is **a partnership arrangement** through which the contracting parties achieve sustainable competitive advantage (Petersen & Østergaard 2017) or one could argue a strategic alliance

Strategic contracting and the conditions to achieve relation rents

- ▶ Four cumulative conditions must be fulfilled:
 - ▶ Investments in relation-specific assets
 - ▶ Substantial knowledge exchange, including the exchange of knowledge that results in joint learning
 - ▶ The combining of complementary, but scarce resources or capabilities
 - ▶ Lower transaction costs than competitor alliances to more effective governance mechanisms

Strategic contracting – Risks and regulation

- ▶ Strategic contracting is based on the concept of sharing risks and gains
- ▶ The legal and economic concept of risk
- ▶ What is the economic rationale to include hardship and gain provisions?

Hardship

- ▶ Hardship is not part of Danish law – It is considered to be a part of lex mercatoria (PECL, UNIDROIT etc.)
- ▶ Thus, it is not a default rule a party can call upon in case of an incomplete contract- It must be included in the contract, if the contract is governed by Danish Law

Hardship - Unidroit

- ▶ Article 6.2.1 - Contract to be Observed
- ▶ Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.
- ▶ Article 6.2.2 - Definition of Hardship
- ▶ There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
- ▶ (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- ▶ (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- ▶ (c) the events are beyond the control of the disadvantaged party; and
- ▶ (d) the risk of the events was not assumed by the disadvantaged party.
- ▶ Article 6.2.3 - Effects of Hardship
- ▶ (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- ▶ (2) The request for renegotiation does not itself entitle the disadvantaged party to withhold performance.

Gain Provisions

- ▶ Gain provisions must be included in the contract
- ▶ This area of contract law is both legally and economically an undeveloped area
- ▶ See however in Dansih Kim Østergaard, Strategisk kontrahering – efterfølgende omstændigheder – Om anvendelsen af hardship- og gevinstklausuler som kontraktjusteringsmekanismer i festskrift til Sten Schaumburg Müller, Jurist- og Økonomforbundets Forlag 2016

Subsequent circumstances – A solution to bounded rationality

Open provision

- ▶ If the subsequent circumstance can not be solved in accordance with the wording of the contract the parties shall in good faith (re)negotiate a rider to the contract in order to maintain the contract

Half open provision

- ▶ Gain provision
- ▶ Hardship provision
- ▶ Residual provision

Thank you

- ▶ Comments or questions?
- ▶ Thank you for your attention