



Marsh Specialty

Joint Ventures

Insurance considerations for
contractors and service providers

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Introduction

Contractors and service providers frequently team up to form joint ventures to tender for, and undertake projects. In this paper we explore these relationships and identify the key insurance issues that need to be given consideration prior to the formation and during the operation of any joint venture. Joint ventures are used as an effective way for contractors (and also engineers or consultants) to pool resources and expertise on large and/or complex projects. Establishing clear procedures and protocols, using an appropriate joint venture agreement, is critical in effectively managing the inherent risks.



Types of joint venture

The nature and composition of joint ventures can vary extensively but will often be arranged so that the joint venture partners share profit and liabilities.

The interests are commonly established with 50/50 financial interest but, this will vary depending on the resources and expertise made available by the partners. In some circumstances there may even be more than two joint venture partners. All partners would normally share the profits and losses in the same proportion as their financial interest in the venture.

It is not unusual for the joint venture partners to be jointly and severally liable to their employer for the acts, errors, and omissions of the joint venture and its constituent partners.

Joint and several liability

Joint and several liability is where multiple parties can be held liable for the same event or act and be responsible for all restitution required. In cases of joint and several liability, a person who was harmed or wronged by several parties could be awarded damages and choose to collect from any one, several, or, all of the liable parties.

The liable parties would be required to pay the entire damage award, which could be split among multiple parties or could come from just one. Each party would be liable for part of the damages, or up to as much as all of the damages. Critical to creating the correct insurance strategy is understanding how the joint venture will execute the work, whether it will be integrated, and whether it will be legally incorporated.

Integrated or non-integrated work

How the joint venture will deliver its scope of work or service under the contract will affect the insurance approach. For example, will the joint venture partners be working together and sharing their resources so that there is no divisibility between delivery of the work (for instance, a fully integrated approach)? It could be that designers are working jointly on a design, or a team of workers installing materials or assembling equipment are working so closely that it would be impractical or impossible to determine how responsibility for an incident should be allocated other than jointly to the joint venture partners.

Such an integrated working approach would suggest that the joint venture needs to give serious consideration to a project or joint venture-specific policy.

Alternatively, the scope of work and method of delivery could be a very distinct one, with one joint venture partner providing, say, the bridge and another, a road (this would be considered a non-integrated approach). This approach makes the use of a joint venture partner "annual" insurance policy a possibility. However, the issues arising from the joint venture partners being jointly and severally liable will still need to be addressed in the joint venture agreement and by their insurers.

Combination joint ventures

These are a combination of integrated and non-integrated methods of working.

Each joint venture partner undertakes a specified scope of work and is responsible for the profits or losses associated with that work. In addition, the joint venture partners also agree to act collaboratively with respect to a portion of the project. These arrangements are becoming more popular as they reflect the likely spread of specialist as well as general work required on larger, more complex projects.

Incorporation of joint ventures

Joint ventures are most commonly established to undertake individual projects and the rationale for formation is quite specific to those particular circumstances. Joint ventures formed in these situations are most likely to remain unincorporated. However, incorporation of joint ventures does occur, albeit less frequently.

Incorporation may be a sensible option where the joint venture has longer-term strategic aims beyond that of delivery of one individual project. For example, it might be a collaboration to combine resources to develop a particular market sector or geographic territory. These joint ventures will naturally have a longer life span than those established for single projects and hence are worthy of more formal arrangements. Clearly, the joint venture partner interests will be allocated by shareholding as opposed to financial interests established within the agreement.

The question of incorporation does raise interesting questions in relation to insurance. In the case of an incorporated joint venture, it is clear that this entity has legal personality and is in a position to directly employ staff and enter into contracts with principals, subcontractors, suppliers, and consultants. The position is less clear in relation to unincorporated joint ventures.

While the majority of our clients take the view that an unincorporated joint venture does not possess a single legal identity and therefore does not have the capacity to enter into contracts, there are those that take the contrary view, supported by legal advice. However, this paper has been prepared on the former basis, which represents the majority view. The reader should be aware that there is an alternative approach that can be adopted in certain circumstances.

Alliances

An alliance is a form of collaborative working that includes the employer as well as the contractor. These are principal-led arrangements that are most commonly found in large infrastructure projects. Typically, the greatest hurdles in alliance arrangements are cultural in nature. Employers and contractors must cooperate with shared goals and complete alignment of interests. Unfortunately, this can be an unfamiliar (and uncomfortable) position for some individuals on both sides.

Alliance contracting is a complex area and will not be covered in further detail in this paper other than to say that the contractual and insurance arrangements should be need to be carefully considered in each individual case.

Insurance options

Below are three options for structuring joint venture insurances that could be applied irrespective of the individual insurance class.

Joint venture-specific policies

The most streamlined solution for insuring joint ventures is to arrange joint venture-specific policies. This solution provides all joint venture partners with the comfort of having cover in place specifically for the joint venture on known terms, and with separate ringfenced limits that cannot be exhausted by other activities.

Evidencing insurance to the employer is also facilitated by this option. With the insurance contract in the name of the joint venture and the joint venture partners, the relevant certificates and documentary evidence can be issued accordingly. This avoids the requirement to engage with the employer to explain complex arrangements where other insurance strategies are adopted, which can be an unwelcome complication, particularly for publicly procured projects.

The other significant advantage is that all losses are handled under one policy without the complication of involving multiple insurers, each providing different coverage and potentially having unaligned interests. This makes the joint venture-specific option sensible for classes of insurance with a high frequency/low severity loss profile, such as primary employers liability (EL), public liability (PL), construction all risks (CAR) and motor. There is also the benefit of a single excess applying to a loss rather than each partners' annual policy excess, as well as a single appointed loss adjuster and aligned claims procedures.

One joint venture partner to insure

This solution involves one of the joint venture partners agreeing to provide coverage for another partners' interest under its existing insurance programmes. There are benefits to this approach in that evidencing of cover should be simple as only one policy per risk need be disclosed. This solution may also

benefit from more cost-effective insurance pricing as we would expect annual insurance programme rating to be more competitive than that for joint venture-specific insurances, as detailed above.

There can also be coverage advantages. For example, an annual contractor's professional indemnity policy will normally provide broader coverage than a project specific placement.

Challenges

Unfortunately there are also drawbacks, including the following:

- The fundamental objection to this arrangement is that joint venture partners are reluctant to expose their annual insurance programmes to the acts, errors, and omissions of others. There may be sound commercial reasons for this decision; there may be substantial elements of self-insurance, perhaps involving a captive or self-insured retention, or the lines of business concerned may have aggregate limits of indemnity or claims-sensitive premiums, such as Professional Indemnity.
- There can be a lack of transparency in the cover provided by the "host" joint venture partner, as it is often considered unwise to disclose full copies of policy wordings for reasons of commercial confidentiality.
- Levels of cover will invariably differ between the joint venture partners, and aggregate limits can unknowingly be eroded by unrelated activities. Insurance market approval would be required, which would be dependent on a number of different factors.

Finding a workable solution

First, in order to achieve the simple solution with the advantageous pricing it may be possible for the risk to be covered under the "host" joint venture partner's annual policies, but with an indemnity provided by the other joint venture partners in relation to any policy

benefits. The latter can then be insured under the annual insurance arrangements in the normal way.

This approach would not be suitable for the high frequency/low severity loss profile classes of insurance, for the reasons stated above (in relation to two insurers dealing with claims). However, the solution could be effective where each partner had greatly disproportionate interest shares in the joint venture. In this case, the partner with the larger interest may be more relaxed about extension of cover under its annual insurances.

This position can be further developed in cases where partners are conducting very different activities within the joint venture. For example, where one joint venture partner is providing design or professional services only and the other is executing physical construction activities only, a suitable arrangement may be that one partner provides PI cover and the other insures the physical working risks, such as PL and CAR.

There may be sound reasons why a particular joint venture partner does not carry a specific class of insurance. Continental European contractors, for example, do not typically procure PI insurance. Where their expertise is required in joint ventures working in the UK, their partners may consider extending annual insurances to avoid incurring unnecessary additional costs.

Each joint venture partner to insure own financial interest

Under this solution, each partner insures its own financial interest arising from the joint venture as provided for in the joint venture agreement allocation. This should provide a cost-effective arrangement as annual policies would be utilised, and as each partner would be insured under its own insurance arrangements, it should therefore be familiar with the extent of cover provided.

However, this is not as simple a solution as joint venture-specific insurances for the reasons previously explained, and there may be issues in relation to evidencing of cover to the principal. We would recommend that our clients engage with their employers in relation to these issues.

There are other disadvantages to this approach. Once again, where there is more than one insurer handling a claim, there is the possibility for dispute so we would not recommend this approach for classes of business with high frequency loss profiles.

These would be more appropriately dealt with under some form of joint venture or project-specific insurance.

There can be an issue in relation to policy excesses, especially where those excesses are significant, for example on professional indemnity insurance. The excess applicable under each joint venture partners insurances will apply to that partner's financial interest in the claim only. In this regard the excesses under each programme "aggregate" as detailed in the following hypothetical example:



EXAMPLE



Companies A and B participate in a 50/50 integrated but unincorporated joint venture. Each is responsible for insuring its own financial interest in the PI risk, which is covered under each joint venture partners annual PI programme. Company A has an excess of £1,000,000, and Company B has an excess of £2,000,000.

The joint venture sustains a £3,000,000 loss arising from its professional activities and duties, and each joint venture partner presents a claim of £1,500,000 to its annual primary professional indemnity insurer. Clearly, Company A will make some recovery and Company B will not.

This example illustrates how this type of structure may reduce the extent of cover available to the joint venture as a whole, as opposed to the individual joint venture partners.

This arrangement can be very effective for non-integrated joint ventures. Each joint venture partner would insure its own work, and if there is joint and several liability, the arrangement could be supported by some form of cross indemnity agreement. There can be some confusion in relation to joint working or shared facilities on site, but this can be managed by clear differentiation by the joint venture partners.

We have in the past attempted to address how claims may be handled under such arrangements. If there is more than one insurer acting in a primary capacity, it would be sensible perhaps to agree in advance the appointment of a claims handler, or external service provider, to represent the interests of all parties. If it is simply a matter of allocating the relevant claim and costs by reference to the respective financial interests, you would expect that this would not be a problem as all interests should be aligned. However, there is still the possibility for dispute, and underwriters are very reluctant to cede claims authority or the ability to set defence strategy to other insurers.

The arrangements will also be complicated by the presence of different wordings and hence different policy liability considerations for each. Whereas this is unlikely to be a significant consideration for a straightforward injury or damage claim, more complex losses involving financial loss or PI issues are likely to lead to differential indemnification and potential misalignment of interests.

This position is particularly relevant to PI insurance where we have seen underwriters extremely resistant to agree to such arrangements in advance.

Summary

It is important to take reasoned decisions on a case by case basis, having given full consideration not only to what is best for the joint venture structure as a whole, but focusing in on what is the right choice for each individual class of insurance.

On this point, it is important to note that the optimum solution for a particular line of business may be a hybrid of the above options. For example, primary PL insurance may be arranged on a joint venture-specific basis, but excess PL coverage above a sensible attachment point may be provided by each of the joint venture partners' annual excess liability programmes.



Class considerations

As well as looking at an overall joint venture solution for all policies there are specific issues that need to be considered in relation to individual classes of insurance.

Employers liability

As discussed earlier, it is generally accepted that an unincorporated joint venture has no legal standing and cannot enter into contract. Instead, contracts are typically led by one or other of the joint venture partners. This is not a unanimous view but is the most common, and our further comments are provided on this basis.

As a result, most staff working within an unincorporated joint venture will be seconded from the joint venture partners. It is commonly agreed that the most simple and cost effective method of insuring such staff is for the joint venture agreement to provide that each partner indemnifies the other(s) for any liabilities for injuries to its own staff irrespective of fault, with no rights of recourse against the other partners. This arrangement should be supported by relevant provisions within the joint venture partner EL insurance arrangements.

This reciprocal arrangement has the effect of simplifying the claims process and avoiding unhelpful disputes within the joint venture as to which partner is responsible for employee injuries. These disputes, if not avoided, can corrode the harmonious working relationships between partners.

Further, some groups of individuals such as agency staff, labour-only subcontractors, and hired-in plant operators can be regarded as “employees” in relation to personal injury litigation. These may not have been procured through one or other of the joint venture partners; instead they may have been engaged as a contract let by the joint venture itself. Parties could be in breach of the compulsory EL insurance legislation if insurance is not in place for these “employees”. We recommend that sufficient commercial controls are introduced to ensure that contracts are led by either one of the joint venture partners and not the joint venture itself so as to avoid this eventuality arising.

Where the joint venture is incorporated and/or will be employing these groups of individuals, we recommend that consideration is given to joint venture-specific EL arrangements.

Public and products liability

Again, the joint venture’s legal structure and method of work delivery will determine the correct approach for PL insurance. Issues for consideration will include:

- Does the joint venture have the legal personality to attract liabilities in its own name?
- Will the joint venture partners be jointly and severally liable, or will each joint venture partner be responsible for their own work?
- With the potential for individual third party claims to be made against the joint venture or the individual joint venture parties, what mechanism is there in the joint venture agreement for dealing with this situation?

HAS BREXIT CHANGED HOW INSURANCES ARE ARRANGED FOR JOINT VENTURES?

The right of insurers and brokers to “passport” (to carry out business in other countries from a single country license) into the European Economic Area (EEA) has been restricted following the end of the transition period on 31/12/2020.

This change of rights has had a direct impact on how insurances can be procured.

From 31/12/2020 insurers and brokers are required by their regulators to separate their business into UK and EEA categories. There is a slight difference in how each party is required to qualify what is considered UK and EEA business. While the broker will look at the client, the insurer will look at the risk to determine whether the business is UK or EEA.

Joint ventures are particularly exposed to these regulatory changes as by definition they comprise of a number of parties. In addition, construction projects typically include a number of locations which may span various territories.

Marsh Specialty have adjusted their engagement model to be able to service UK and EEA clients or a combination of both in joint ventures. Early conversation with your advisor will be key in deciding,

1. How to arrange your insurance as set out in this paper
2. If the found solution is compatible with what is required by regulators and
3. Importantly, who in Marsh Specialty is licensed to arrange your insurances.

[Marsh Specialty has produced some helpful guidance, which includes a number of frequently asked questions on the implications of Brexit for insurance buyers and for the insurance market more broadly.](#)

As it is assumed that any third party claims will be the responsibility of the joint venture, it will be preferable to effect a separate joint venture-specific PL insurance for a primary layer limit of indemnity. This avoids the complexity of more than one policy responding to the claim and multiple policy excesses applying. Each joint venture partnership can then rely on its own annual programme for coverage in excess of the primary layer limit of indemnity.

The alternative to the above approach is to seek agreement of the respective annual PL insurers to jointly indemnify the joint venture company for their insured's share of any claim. An agreement where one insurer deals with all claims would be beneficial. Also each joint venture partner's excess will apply to its share of the loss. Another option is to agree that one of the joint venture parties insures all third party claims. The disadvantage of this arrangement is that incurred amounts will count against the relevant joint venture partners' annual PL insurance claims experience.

Contractors all risks

If each joint venture partner is responsible on a joint and several liability basis, it would be beneficial that a project specific contractors "all risks" (CAR) insurance is purchased in the name of the joint venture company (or the partners if the joint venture is unincorporated) so that only one policy of insurance provides cover for the joint venture's works.

The alternative to this approach is that each partner takes responsibility for its own work, and then depending on the contract value, location, and nature, each partner can rely on its annual CAR insurance to provide cover, however this can have its own difficulties.

Alternatively, if each partner is jointly and severally liable, they can seek the agreement of their annual CAR insurers (subject to the works falling within the parameters of the policy) to indemnify for the respective share of any claim. Again, there can be issues with the aggregation of excesses and differential cover applicable under each policy.

Contractor's plant and equipment

A contractor's annual CAR insurance will provide cover for a contractor's plant and equipment, temporary buildings, and contents owned or hired. If the joint venture will own or hire any contractor's plant and equipment, temporary buildings, and contents, then this is most effectively insured via a project-specific insurance effected on behalf of the joint venture, particularly where the plant and/or equipment will be shared between the partners and responsibility for loss may not be easy to determine.

Professional indemnity

Yet again, the legal structure and the allocation of professional work between the joint venture has a material bearing on the most appropriate approach to PI insurance, and where the joint venture is a mix of contractor and consultant further complications

are to be expected as the basis of cover available in the insurance market can differ.

Where the joint venture involves integrated professional work or an incorporated legal structure, a project-specific PI insurance could be considered, so that one policy will provide indemnity for the whole joint venture.

However, the market for project-specific PI insurance is more limited than annual PI insurance and this is not always a viable option.

PI insurance claims are often complex and take many years to resolve. Typically, claims involve underwriters engaging lawyers to defend the third party claim and provide an interpretation on policy response.

The use of individual annual PI policies for each joint venture partner can lead to protracted claims settlement, as:

- Each set of insureds and insurers may have different interests and attitudes to claims settlement.
- Each policy is likely to provide coverage on a differential basis.
- The different lawyers appointed by each underwriter may have different approaches to the handling of the claim. This is likely to lead to delays and increased legal costs.

In summary, the options include:

- Purchasing a project specific PI policy for the project term and post-completion period (typically, maximum period available on a non-cancellable basis is 10 years). It should be noted that such multi-year project policies can be less broad than annually renewable PI policies.
- Purchasing a project specific PI policy on an annually renewable basis, giving wider choice of market and potentially coverage, but less certainty with respect to overall cost and coverage and the ability to renew. In the event of a poor claims experience or a change in market sentiment, the ability to annually renew a single project policy could be seriously jeopardised.
- Use the respective annual PI policies of the joint venture partners. This is the most economical method, but the major issues associated with claims settlement need to be taken into consideration. However, a standard annual PI policy only covers liabilities arising out of the acts of the insured and the parties it employs (such as subcontractors). Therefore it is critical that the annual PI policy is extended to cover liabilities which arise as a consequence of the provision of professional services by joint venture partners. On the basis of how the PI insurances are procured, they will need to be in place for the duration of the contract plus any period that liability may attach (6 or 12 years) for all members of the joint venture.



Motor liability

The standard position is normally similar to that of EL insurance, where the employing joint venture partner insures. We usually recommend that for motor vehicles, the procuring (either purchasing, leasing or hiring) joint venture partner insures, again irrespective of driver or negligence.

The benefits are the same as those for EL risks as detailed above and this approach will also remove the administrative problems associated with maintenance of the motor insurance database.

Difficulties can arise where the joint venture itself, and not a joint venture partner, procures vehicles. In our experience, this normally occurs with short-term hire vehicles. The solution is to ensure that either the joint venture arranges its own motor insurance or adheres to specified procurement procedures involving one or other of the joint venture partners. This could include leasing the vehicles inclusive of adequate insurance.

Directors and officers

For an unincorporated joint venture, the standard position is normally similar to that of EL insurance where the employing partner insures. However, in the case of an incorporated joint venture, the partners will in particular need to check their individual policy definitions of associated company to ensure it includes their employees working for the joint venture. For example, there may be a requirement for a shareholding in the joint venture which may be an issue for those set up as limited liability partnerships (outside directorships).

Property

The joint venture may occupy premises owned by one partner or another. This property could be damaged by the negligent actions of an employee of the non-owning partner, and there could be a subrogated claim brought by the property insurer. This could be damaging to the joint venture relationship and can be avoided by the inclusion of a waiver of subrogation in favour of the partner.

Crime

For an unincorporated joint venture, the standard position is again similar to that of EL insurance where the employing partners insure. However, this is only suitable where there is a high degree of work separation of the joint venture partner's employees.

Where work overlaps, for example, one partner may supervise the work of the other, a loss may involve employees of more than one joint venture partner and therefore a single policy, as for an incorporated joint venture, is the more suitable solution.

Insurers' attitude towards joint ventures



Insurers generally adopt a more cautious view of joint ventures than they would normally on a single insured. This is because joint ventures are usually created for a specific project and there is no combined claims history to base an underwriting decision on. However, if the joint ventures are formed from joint venture partnership they already insure on an annual basis, then generally insurers will be more comfortable with the risk.

From an EL perspective, the supervision of employees and who is controlling them is crucial. It is helpful if one partner agrees to arrange the insurances on behalf of the joint venture as this will ensure continuity and a constant point of contact in the event of a claim. Insurers will need to be reassured that issues like health and safety are dealt with and all employees know what is expected of them. All companies have different operational procedures and safe working practices must be agreed and implemented to minimise risk and reassure insurers. If the project will take place over a long period, insurers may be reluctant to insure the EL risk for the duration. Instead they may only offer an annual policy due to the long tail nature of injury claims. They may also carry out regular surveys to assess how the work is being performed. Some insurers may be prepared to offer cover for the first three years with a review of premium in the event a loss ratio threshold is exceeded. They may also be prepared to offer a rebate in the event the claims are minimal after the project has finished.

For PL, products and CAR, the same applies but the potential difference in conditions cover between project and annual policies often causes confusion. An example of this is where the project policy excludes cover for financial loss, but one of the joint venture partners enjoys this cover under its annual policy.

This partner could be indemnified under its annual policy, albeit only to the extent of their share in the joint venture. There is also a potential difference in limits exposure as the project policy may be for a smaller limit and requires topping up under the annual policy. Equally, the difference in conditions and excesses may also need to be considered. On CAR policies the difference may be on the design exclusion or types of maintenance cover given, all of which the underwriters need to consider carefully.

Another consideration is the scope of the claims jurisdiction under the policy. If the joint venture was set up for a UK project, but one of the partners is an overseas company, then it is likely that the jurisdiction will need to address both the location of the project and the jurisdiction for the domicile of the overseas partner.

Underwriters may wish to limit this to worldwide excluding North America, but if cover for actions brought in North America is required, this would normally have an impact on the premium, terms and conditions.

Motor underwriters do not tend to look favourably on newly incorporated joint venture companies with no motor insurance history, although if they do participate on the members' annual programmes then this may help. Generally, the premiums are likely to be significantly more expensive than those of a long-established company.

Other activities

When addressing the concern of one joint venture partner being held joint and severally liable for the other joint venture member's work or service, if their scope of work is outside that normally undertaken then it is important that the full gamut of the joint venture contract is agreed by insurers.

Primary insurance clause

Similar to when project insurance may be arranged by an owner or other party, it is important that any joint venture specific policies include a "primary insurance" or non-contribution clause to the effect the joint venture-specific policy cannot seek contribution from any of the joint venture partners' annual insurances.

Common philosophy

It is unlikely that joint venture partners will share the same insurance philosophy and style of insurance programme. Different limits of indemnity, levels of self-insurance, and scope of cover will almost certainly exist, meaning that the partner will need to be prepared to compromise so as to reach a position of common ground. Project-specific or joint venture-specific insurance may not always be available or purchased to match the joint venture partners' own insurance programmes, so there will often remain some need for difference in conditions or excess coverage.

A further consideration will be how the risks and liabilities of a partner are to be protected after the expiry of any project-specific joint venture insurance, especially as parent company indemnities may have been made available to support the contract.

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Our service offering is enhanced with insight-driven advice supported by tailored data, analytic, and consultancy capabilities to support clients in making important decisions about their complex risks.

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