Dispute Resolution Provisions in PFI Contracts

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SUMMARY

A draft standard PFI contract available for use on school infrastructure projects in the UK contains dispute resolution provisions that are modelled on the statutory adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996. The intention of this statutory adjudication is to give a temporarily binding decision until such time as a permanent decision can be sought through arbitration or litigation. The contract will keep flowing and business relations will continue. The use of a dispute resolution procedure that is intended for use on contracts lasting one or two years will be examined in the context of long-term PFI contracts, of which 25 to 30 years is typical. The appropriateness of a two-tier system, one aspect covering the construction period the other being applicable to the longer-term service period is investigated.

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1. INTRODUCTION

The UK construction industry is renowned for being adversarial in its contractual relationships between the various parties. This, amongst other factors, has given rise to various reports in an attempt to improve both its image and economic performance, Latham (1994) and Egan (1998, 2002) being the latest in a catalogue spanning half a century.

One of the recommendations made by Latham (1994) was for adjudication provisions to be available to the parties under a construction contract as the preferred means of dispute resolution. This led to the introduction of adjudication provisions within the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Under Section 108 of the Act a party to a construction contract has a statutory right to refer a dispute arising under the contract for adjudication. This is not a mandatory requirement and, subject to mutual agreement, leaves open to the parties to a construction contract other methods of settling disputes.

Adjudication procedures contained within a construction contract must comply with the requirements of the Act (s. 108(1) to (4)) for the contractually agreed scheme to apply. Should this not be the case, or if there are no adjudications provision in the contract, then the adjudication provisions in the Scheme for Construction Contracts (1998) will apply.

The adjudication provisions did not however come into force until 1998 due to difficulties in refining the procedural aspects.

The Act further provides that the decision of the adjudicator to be binding "…until the dispute is finally determined by legal proceedings, by arbitration or by agreement." This provision has been extensively tested in the English courts and the spirit of the Act has been upheld by the various judicial decisions.

The use of the Private Finance Initiative (PFI) for infrastructure projects is established in the UK. A draft standard PFI contract is available for use on school projects. Such contracts are for 25 to 30 years and as such there is a distinct possibility of the dispute resolution provisions being called into operation. The question of their efficacy over such a time scale is open to question. The maintenance of any public service is of paramount importance, and that for schools is no exception. The dispute resolution methods available to the parties must therefor reflect this.

This is not an absolute requirement to use the adjudication process, but it is a contractual right available to either party. The contract further provides that subject to the agreement of both parties either party may refer the dispute to arbitration (Clause 62.12.3).

2. DETAILS OF DISPUTE RESOLUTION PROVISIONS

2.1 Consultation

2.1.1 The first stage process

Under Clause 62.3 of the draft PFI contract there is an absolute requirement for the parties to "…first consult in good faith in an attempt to come to an agreement in relation to the disputed matter." The suggested period for this process is 7 days, but the parties may insert such other time period they deem appropriate. If this consultation fails to resolve the dispute then either party may refer the matter to an Adjudicator.

This requirement is in keeping with the current trend in English law where the parties are encouraged to attempt to settle their differences by "other means" other than resorting to more formal (and expensive in time and cost) methods such as litigation. The courts have generally taken a dim view of any party or parties who have been seen to reject such a course of action for whatever reason (Cowl 2001, Dunnett 2002), but there are exceptions (Wyatt 2002).

There is an enforcement problem with any consultation, mediation or conciliation clause. The parties must want a settlement and as such may agree before such process commences that any settlements or agreements are binding. Alternatively the contract can make such provision.

There is no provision within the contract for binding settlement through consultation. This is at odds with the absolute requirement nature of the clause. The courts would however tend to enforce such a settlement.

The need to maintain good relations between the parties on such long-term contracts is paramount. The absolute requirement of this consultation clause is recognition of this and an active encouragement to the parties to settle their differences before they escalate.

2.1.2 A cautionary tale

The parties may be tempted to appoint a mediator to assist them in the consultation process. An obvious choice could well be one of the adjudicators named in the appropriate panel. This could have the advantage of the adjudicator, should this first process fail, being conversant with the nature of the dispute and being able to proceed to adjudication with no loss of time. This process would be on similar lines to that referred to as med-arb as promoted by the American Arbitration Association.

A possible risk in adopting this approach is that the decision coming out of the adjudication process may be subject to challenge on the grounds of lack of impartiality or concerns about natural justice. The case of Glencot (2001) was concerned with the first point. In this case the adjudication process had commenced. Initial submissions had been made and a meeting convened. Prior to this meeting the parties held private discussions and reached an agreement

on valuation. The adjudicator was requested by the parties to act as mediator to assist with the resolution of outstanding matters. Negotiations broke down however and it was agreed that the adjudication would continue on another day. The position was confirmed to the parties by the adjudicator who requested that either party inform him immediately if they considered that the negotiations had compromised his capacity to make an impartial decision. This would have given him the opportunity to withdraw as the adjudicator. Subsequently separate meetings took place between the adjudicator and the parties. During the second such meeting Barrett requested that the adjudicator withdrew from the adjudication. The adjudicator decided to proceed having taken advice and having considered the question of impartiality. The adjudicator's decision required Barrett to pay Glencot. Payment was not made and Glencot applied for summary judgement of the amounts due. The application was resisted on the grounds that the adjudicator was no longer impartial. The court considered that there were inherent risks in the nature of the mediation process, namely the possibility that material or impressions conveyed in private meetings could have influenced subsequent adjudication decisions.

Although the practical outcome of this case was close to the outcome of the adjudication, what the case does highlight is the need for caution in adopting procedures that are in the spirit of current reforms taking place

2.2 Adjudication

2.2.1 Time Periods

Should the consultation process fail to resolve the dispute the matter may be referred to an adjudicator, the appointment of whom is from one of two panels, each comprising three experts (or such other number as the parties may require). One panel is to deal with construction matters (Construction Panel) and the other with operational and maintenance matters (Operational Panel). Selection of the adjudicator is to be on a strictly rotational basis. The panels of adjudicators are appointed jointly by the Contractor and the Authority. The Construction Panel appointments shall be made within a suggested period of 28 days of the appointment of the Contractor. The Operational Panel on the other hand shall be appointed on or before the Commencement Date.

The naming of experts provides a degree of continuity. However, the problem with naming individuals on any long-term contract is that over the duration period of 25 to 30 years the probable need for their replacement will arise.

The parties have to submit their respective arguments to the Adjudicator within seven days of their appointment. A written decision has to be provided by the Adjudicator within 28 days of appointment (or such other period agreed by the parties after the reference or 42 days from the date of the reference if the referring party agrees).

These time requirements are generally in accordance with those of Section 108 of the HGCRA. The Act requires "…a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice (*of intention to*

refer the dispute to adjudication)". Since panels of adjudicators have been appointed before commencement of construction or operational matters, the contract would appear to satisfy this requirement.

Where either party is dissatisfied with or wishes to challenge the adjudicator's decision the contract provides for a suggested period of "…[28] days *or* receipts of the Adjudicator's decision, where appropriate…" within which the other party has to be notified of the intention to refer the dispute to arbitration.
The contract specifically uses the word "*or"* which could be a typographical error and should read "*of*", thereby giving a time period from receipt of the adjudicator's decision in which to decide whether to challenge that decision. In this context the use of the term "where appropriate" relates to the fact that the use of arbitration is applicable to disputes in respect of matters referred to in specifically stated clauses or where both parties agree that the dispute is so referred.
An alternative interpretation would be that the time period relates to the notification of any dispute other than the referral of an Adjudicator's decision. Receipt of the Adjudicator's decision would open the possibility of referral to arbitration with no specific time period being stated during which such referral or notification of such has to occur. This is in keeping with the HGCRA, which allows for final determination by legal proceedings, arbitration or agreement with no time periods stated.

There has been widespread concern regarding the time-periods set out in the HGCRA as being too short, particularly for complex disputes. The reasoning behind the short time scales imposed is to obtain a quick settlement of the dispute in order to keep the contract moving and help maintain good relationships between the parties.

The possibility of 'ambush' has also been raised. This is where a claimant in a complex dispute will spend a long period of time preparing their case. They will then serve notice of dispute which will then only give the respondent the stipulated time periods in which to prepare their response. This scenario could arise on a PFI contract, given the time scales involved, with a consequential probable negative impact on party relationships.

2.2.2 The quality of adjudication decisions

The adjudication provisions of the contract mirror those of the HGCRA and the process as provided for in the Act has been described as a system of rough justice. Essentially there is no appeal against the decision of the adjudicator. That decision "…is binding until the dispute is finally determined by legal proceedings, by arbitration … or by agreement." (HGCRA s. 108(3)). The draft PFI contract makes similar provisions (clauses 26.6 and 62.12.2).

The consequence of these provisions is highlighted in the case of Bouygues (2000) where the Court of Appeal upheld the decision of the judge in the original case. In this case it was argued that the adjudicator had made a serious computational error in calculating amounts payable between the parties and that if Dahl-Jenson were allowed to enforce the decision then Bouyues would suffer an injustice. If the alleged error had been corrected, Dahl-Jensen

would have had to pay Bouygues. The adjudicator did not consider that a mistake had been made. The judge in the Court of Appeal stated that:

"The purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact."

He went on to explain this reasoning:

"It is inherent in the scheme that injustice will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation and possibly even by subsequent adjudication. Sometimes they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake."

There is no mechanism within the statutory adjudication provisions for removing any clerical mistake or error arising from an accidental slip or omission. However, if the adjudicator acknowledges that a slip has occurred and corrects it, the courts would appear to be prepared to uphold the correction (Bloor, 2000).

The Bouygues case underlines the short-term rough justice nature of the statutory adjudication provision of the HGCRA. The draft PFI contract has not made any provision to alleviate this.

The consequences of such rough justice on party relationships on the longer-term service and maintenance side of these contracts could be disastrous. However, the statement by Judge Toulmin in Bloor (2000) that

"In the absence of a specific agreement by the parties to the contrary, there is to be implied into the agreement for adjudication the power of the adjudicator to correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party."

would appear to obviate the need for specific provisions in the contract to correct accidental errors and the like. The application of an implied slip rule would be under the same circumstances as those applicable to judicial proceedings (as set out in the Civil Procedure Rules, rule 40.12 in the same terms as the Arbitration Act 1996). This is based upon the distinction between correcting an award or judgement to give effect to the intentions of the arbitrator or court, and amending an award or judgement to allow the arbitrator or court to have second thoughts.

This is fine where the adjudicator acknowledges the error. This was not the case in Bouygues (2000) and unless the aggrieved party can demonstrate that the adjudicator had exceeded his

terms of reference, then the adjudicator's decision will be upheld. The saving grace within the PFI contract is that the notice of arbitration can be served on receipt of the adjudicator's decision. This would prevent the protracted approach of attempting an appeal against the adjudicator's decision followed by recourse to arbitration or litigation to review the dispute in its entirety.

2.3 Arbitration

2.3.1 The scope of the arbitration provisions

The arbitration provisions contained within the contract are specifically applicable to disputes in respect of:

- matters referred to in stated clauses,
- dissatisfaction with or otherwise wishing to challenge the Adjudicator's decision, and
- any dispute where both parties have agreed that the matter is to be so referred.

An examination of these three aspects may cast some light on the intention of the drafters of the contract.

The particular 'matters referred to' cover such areas as Change in Service, Change in Law, Price Variation (optional), Compensation of Authority Default, Compensation on Termination for Contractor Default (optional), Compensation on Termination for Force Majeure, Compensation on Termination for Corrupt Gifts and Fraud (optional) or Compensation on Voluntary Termination.

The nature of these matters is such that adjudication, with its expert determination emphasis, restricted timetable and issues relating to the quality of decision discussed above, would be an inappropriate method of dispute resolution. It is perhaps considered imperative that a finally binding decision is what should be achieved at the outset. It is worthy of note that clause 62.12 goes on to state that the arbitrator

"…shall be a solicitor, barrister or arbitrator recognised by the Chartered Institute of Arbitrators…. If the parties are unable within 14 days to agree the identity of the Arbitrator either party may request the President of the Law Society to make the appointment."

Although the wording would appear to place a significant legal bias as to the chosen area of arbitrator's expertise an examination of the clauses would indicate that financial expertise would be the requirement in dealing with disputes for a significant number of these clauses. By placing such an emphasis on the need for a legal expert there is perhaps acknowledgement of the underlying legal nature of the 'matters referred to'.

Experts from other disciplines however are not precluded. The requirement for expertise in other areas may be needed should either a challenge be made on the Adjudicator's decision or if the parties agree that a dispute of a technical nature such as quantum or quality should be referred to arbitration.

2.3.2 Timetable

The contract sets down specific time periods in which the arbitrator's decision has to be delivered:

"…within 28 days of concluding any hearings … and in any event within 3 months (or such other period as the parties may agree) of his appointment."

This allows for a period of 63 days (or such other period as the parties may agree) for any hearings and associated procedures to take place. This is in contrast to the requirement for the Adjudicator's decision to be provided within 28 days of appointment (or such other period as the parties may agree after the reference or 42 days from the date of the reference if the referring party agrees).

A much lauded reason for the introduction of a statutory requirement for adjudication provisions to be introduced in construction contracts was the need for a speedy decision. This was perhaps necessary where arbitration clauses in contracts stipulated that proceedings could only commence on completion of the contract. Delay was inevitable, and if disputes occurred in the early stages of the contract – groundworks, structural frame – then the commencement of proceedings could well be at some distant future date by which time the relevant personnel with knowledge of the facts had invariably dispersed and were unavailable.

The draft PFI contract allows for arbitration at any stage. Arbitration can be a long process, dependent on complexity and the willingness or otherwise of the parties to achieve a quick solution. Conversely it can be as short a process as adjudication. In such an instance the advantage over adjudication is overwhelming – an immediate and binding decision.

A dispute referred to adjudication can be complex. In such circumstances the time scales set down are too short and the quality of the decision is likely to suffer as a consequence. On PFI contracts with total duration periods of 25 to 30 years, is access to two means of dispute resolution necessary with a time advantage of 63 days between one and the other?

The answer to this question is one of mutual party agreement in respect of dispute resolution procedure. Both aspects of a PFI contract will encompass construction operations as defined by the HGCRA and this will feature when consideration of the dispute resolution method options available is being undertaken by the parties. As discussed earlier in this paper the use of adjudication is not a mandatory requirement but its availability to a party to a construction contract is a statutory right.

Uff (2001) comments that there is no reason in principle why arbitration cannot match the timescales set out in the HGCRA for adjudication. The necessity of the parties to seriously consider whether adjudication will be the speedier option is discussed by Bingham (2002). He emphasises that adjudication is only an option. However if one party calls for it, the other party has to respond. A little forward thinking by the complaining party may reveal that a

better course of action would be to go direct to the court, or arbitration if the contract contains an arbitration clause.

3. CONCLUSIONS

The dispute resolution provisions in this contract may, on first impressions, appear a little incongruous for such long-term contracts. However, on reflection, these provisions could well be addressing the choice of appropriate procedures advocated by Bingham (2001). Uff (2001) calls for a holistic approach to be taken to future dispute resolution provisions, adopting the overall theme proposed by Joyce (2001). Although the preference of arbitration to litigation as the most cost-effective alternative was the main theme of the seminar from which their papers arose, there is some merit in their proposals. A series of apparently compartmentalised procedures can lead to confusion. The contract, although containing a requirement for consultation prior to any other process, fails to provide finality to any agreement reached. There are dangers in appointing a mediator who can continue as adjudicator or arbitrator should the initial phase fail, however it is a continuum that should be considered.

The key factor is the long-term nature of the projects for which the contract has to operate. Maintaining good party relationships has to be paramount. The introduction of what are essentially adversarial procedures as the two main dispute resolution provisions may work against this. It is likely that the drafters of the contract will be enjoying their retirement in the later years of the duration of the contract and therefor be blissfully unaware of problems that have arisen. More emphasis should have been placed on what are termed alternative dispute resolution (ADR) methods, namely consultation, mediation and conciliation with some over-arching variation of the holistic approach proposed by Uff (2001).

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