GOVERNMENT BY CONTRACT: ISSUES FOR THE PRIVATE SECTOR

One of the features of the post 2019 landscape has been the increasing use of the law of contract to resolve significant policy issues facing government. Thus, the main government response to the Grenfell fire has been the creation of a series of Self Remediation Terms ("the SRTs") to which developers are, as a matter of contract, to agree or face being excluded from the development market by operation of the Responsible Actors Scheme.[1] Similarly on the rail network, the pandemic lead to first the Emergency Measures Agreement and then the Emergency Recovery Measures Agreement followed by the National Rail Contract ("the NRCs").[2] Such provisions are, of course, in addition to the government's already strong economic and commercial presence in the creation, maintenance and operation of infrastructure and large scale projects.

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1 See https://hansard.parliament.uk/Lords/2023-03-14/debates/10FB1D50-3CAF-4D1F-BDA3-AF1C73FE9F56/BuildingSafetyUpdate

2 See https://www.gov.uk/guidance/public-register-of-rail-passenger-contracts

This article does not address the wider questions of transparency and accountability that result from the use of contracts in this way.[3] Nor does this article consider how these activities fall within the procurement regime. This article is concerned with what legal scope there may be for any private sector response to "government by contract".

The first point to note is that initiatives like the SRTs and the NRCs are not directly underpinned by either statute or statutory instrument.[4] This means that there is little prospect of challenging such initiatives on the basis that a given initiative is ultra vires the enabling statute or statutory instrument and that the government lacked capacity to enter into the contract as a result.[5] These initiatives are instead created under the far more nebulous and difficult to challenge exercise of prerogative. The second point to note is once the contract is entered into, actions under that contract are not susceptible to judicial review.[6] Thus, a decision in relation to the construction industry's self-certification scheme was not reviewable as it was contractual.[7] The "standard" routes by which government policy may be challenged are therefore not available here. The third point to note is that these types of initiatives have consequences on parties who are not privy to the contractual relationship between the government and say a developer or a train operator. To take two examples: the SRTs allow for the government to seek to govern a developer's contractual relationships with third parties; the NRCs may also impact on the train operator's third party relationships with, say, the providers of rolling stock and other infrastructure.

In these circumstances, there are three routes by which government actions under a contract may be challenged:[8] by deploying public law doctrines to challenge the exercise of powers under the contract; by deployment of good faith obligations; and, finally, by use of competition law.

Deploying Public Law Doctrines

As a *Hazell*-type challenge to the entry into the contracts at issue is not possible, the sole challenge must be to the exercise of powers under the contract.[9] Whether public law doctrines may be used against a public body's exercise of powers under an otherwise valid contract was considered in detail by Foxton J in *School Facility Management Ltd v Governing Body of Christ the King College*[10], where after a lengthy review of the authorities, he concluded:

> *"I have concluded that a decision by the College to enter into a contract which the College did not have power to conclude would give rise to a private law defence of lack of contracting capacity. If, however, the College did have power to enter into contracts of the relevant type, but is alleged to have acted unlawfully in reaching its decision to contract, the consequence of such public law unlawfulness in private law will depend both on the nature of the unlawfulness, and on whether the counterparty had notice of the relevant breach of public law duty."*[11]

One route by which the deployment of public doctrines is now well recognised is by way of implied terms as to lawfulness, reasonableness and fairness – the so-called *Braganza* argument.[12] Thus, it can be said that if one party has acted capriciously, an implied term preventing such action will come into play.[13] The difficulty with that argument is it relies on a) there being a discretion and b) a term being capable of being implied. As to the first, as was recognised in *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*,[14] where a party has an absolute contractual right to do X, there is a simple decision whether or not to exercise that right and nothing on which the implied term can bite. Where, however, there is a nuanced decision involving the exercise of judgement, then the term may be implied. As to the second, the term will have to pass the requisite test for an implied term – in essence necessity based on the terms of the contract as a whole[15] and a recognition that such an implied term is interfering with the parties' freedom to contract.[16]

A further difficulty is how far a *Braganza*-type application of public law doctrines would go. As set out above, the extent of any public law type investigation would be driven by the context and the alleged unlawfulness. Thus, whilst Braganza may offer some comfort to the private sector, particularly when faced with a particularly extreme or unfair exercise of a discretion, it is not a complete answer.

Good faith obligations

In *Yam Seng PTE v International Trade Corp*,[17] Leggatt J (as he then was) stated:

> *"I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties."*[18]

3 Though undoubtedly there could be a lively debate on those issues.

4 They may be indirectly underpinned by statute and statutory instrument – see eg section 128 of the Building Safety Act which purports to give the Secretary of State powers to create the Responsible Actors Scheme by Statutory Instrument. The Responsible Actors Scheme is intended to exclude developers that do not sign up to the SRT from future development projects in England.

5 See Hazell v. London Borough of Hammersmith and Fulham [1992] 2 A.C. 1 for the classic example of this type of vires challenge to a statute

6 This has been the case since R v Criminal Injuries Compensation Board ex p Lain [1967] 2 QB 864 and as pithily expressed in R v Disciplinary Committee of the Jockey Club ex p Aga Khan [1993] 1 WLR 909 at 924C.

7 See R (Underwritten Warranty Co Ltd) v FENSA Ltd [2017] EWHC 2308 (Admin) at [42]

8 In extreme circumstance, duress may also be open to a private sector party.

9 See the distinction drawn by Lord Justice Browne-Wilkinson (as he then was) in Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246 at p.302-304

10 [2020] EWHC 1118 (Comm)

11 At [162]. Foxton J went on to decide the case on the more traditional lack of vires and therefore of capacity to enter into the contract basis.

12 See Braganza v BP Shipping Ltd [2017] UKSC 17; Dymoke v Association for Dance Movement Psychotherapgy UK Ltd [2019] EWHC 94 (QB) at [60].

13 For a v recent articulation of this – see Palladian Partners LP & Ors v The Republic Of Argentina & Anor [2023] EWHC 711 (Comm) at [220]

14 [2013] EWCA Civ 200 at [83], [91] and [92]

15 See Equitas Insurance Limited v Municipal Mutual Insurance Limited [2019] EWCA Civ 718 at [113]

16 See TAQA Bratani Ltd v RockRose [2020] 2 Lloyd's Rep 64 at [53]

17 [2013] EWHC 111

18 At [131]

A category of contract where the presumed intention of the parties would be that there should be obligations of good faith was further said to be a "relational" contract.[19] These are contracts which:

> *"...may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements."*[20]

In *Bates v Post Office (No 3)*,[21] Mr Justice Fraser found there were nine requirements of such contracts:

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
9. Exclusivity of the relationship may also be present.

The possibility of an implied term as to good faith has been accepted by the Court of Appeal with qualifications and a degree of cynicism. Thus, in *Compass*,[22] whilst Lord Justice Jackson accepted the term could be implied, the term would not apply to a simple decision whether or not to exercise an absolute contractual power. In *Candey Ltd v Bosheh*,[23] Lord Justice Coulson stated:

> *"there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded."*[24]

Lord Justice Coulson then went on to adopt Lord Justice Beatson's views that a term could only be implied where it was consistent with the overall construction of the contract:

> *"... an implication of a duty of good faith will only be possible where the language of the contract viewed against its context permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."*[25]

Lord Justice Coulson then found that there was no implied term of good faith in the contract at issue (a retainer).

It follows that implying a term of good faith at least suffers the same issues as a *Braganza* implied term. In fact the Courts have qualified the implication of a term of good faith by holding that both the implication itself and the content of any implied term are very dependent on the context.[26] All of that has made the learned authors of *Chitty* somewhat sceptical as to the utility of the implied term of good faith.[27]

Added to the above difficulties with the implied term in theory, there is the difficulty with the implied term in practice. Given that it is the government contracting and therefore it is the government exercising public law powers, one can see (subject to there being no terms excluding implied terms) the scope for the implication of a *Braganza* type term. There is, however, more difficulty with a good faith term and for two reasons. First, assuming there were a *Braganza* type term, good faith would be subsumed into the public law doctrines being considered. Second, although contracts like the SRTs or the NRCs could be said to be long term, the imbalance of

19 At [142]
20 Yam Seng at [142]
21 [2019] EWHC 606 (QB) at [721 ff]
22 Op Cit
23 [2022] EWCA Civ 1103
24 At [31]
25 Candey Ltd at [32]
26 See cases summarised at Chitty on Contracts [2-088 – 90]
27 At [2-091]

contractual power and the wide ranging powers granted to the Secretary of State make it very difficult to categorise the contracts as *"relational"* or being permissible of a general contractual good faith obligation (other than in the context of a limited *Braganza* public law type of enquiry).

Competition law[28]

Obviously, what are at issue are contracts. Contracts tritely can attract a competition law scrutiny.[29] Further, an element of the initiatives is control of a party's ability to contract or to control the exercise of discretions under the contracts. Thus, in the SRT initiative, someone can be barred from participating in a market and if a developer does agree to the SRT, their contracts down the contractual chain can be controlled; under the NRCs, the DfT exercises the financial whip hand over the train operators and can then determine how they operate their contracts down the contractual chain. Manifestly that must affect trading conditions within the UK.[30]

It also can be relatively easily seen – even at a colloquial level – that there is a housing development market.[31] There are also markets in the provision of railway transport and then the provision of rolling stock and infrastructure. Further, developers, train operators and the providers of rolling stock are manifestly commercial undertakings operating in those markets. Given government's monopsonic status in terms of the developer market and in terms of control of the railways, the government would appear to be asserting market dominance over the private sector.

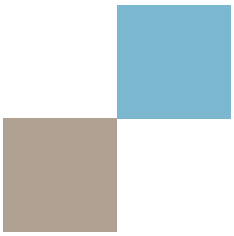
Thus, one can see the elements of an argument that there has been a breach of sections 2 and 18 of the Competition Act 1998.

The stumbling block to that argument was whether the government itself was acting as an undertaking engaging in economic activities so as to attract the provisions of the Competition Act. This question was answered by *Achilles Information Ltd v Network Rail Infrastructure Ltd* at least in relation to Network Rail.[32] The Competition Appeal Tribunal[33] and the Court of Appeal[34] held that when Network Rail entered into contracts with third parties, Network Rail was an undertaking carrying out economic activities even though part of that which Network Rail was doing was for the purposes of regulation and safety.[35] Thus, Network Rail was caught by the Competition Act and where Network Rail imposed terms and conditions there was a potential breach of section 18 of the Competition Act.[36]

There are analogies with both the SRTs and the NRCs. In both, terms are imposed on the counterparties and then down the line on parties that have or will contract with the counterparties. It would be reasonable to expect that the structure would be similar in further attempts to govern by contract. In that analysis, the fact that the arrangement did not owe its genesis to legislation would be a factor suggesting that all the parties to the arrangement were undertakings.[37] Thus, there could be similar issues over potential breaches of competition law in the way that government (via the contracting counterparties) was seeking to control contractual terms or the market.[38]

Conclusions

In governing by contract under the prerogative, it is possible to avoid the scrutiny of Parliament (the contracts do not have to be debated) and scrutiny by way of judicial review. Governing by contract brings, however, another set of perils – the rights and obligations that can flow from contractual activity and economic activity via contractual provisions. None of these arguments are straightforward but they are there if a private sector body were sufficiently aggrieved and minded to take them.



28 See Whish & Bailey Competition Law 10th Ed Ch 9 passim ("Whish")

29 Whish at pp 356 – 7

30 See s 2(2)(a). In the case of the SRTs, section 2(2)(e) may be relevant.

31 For the legal test – see Pfizer and Flynn v CMA [2018] CAT 11

32 [2019] CAT 20; [2020] EWCA Civ 323

33 At [99 ff]

34 At [54 ff]

35 The analogy with the regulation of rectification of developments for the purposes of safety is obvious.

36 See also UKRS Training v NSAR [2017] CAT 14

37 See Strident Publishing v Creative Scotland [2020] CAT 11

38 An obstacle to such arguments being made is an obvious unwillingness to challenge an economically dominant actor in a confined market. Thus, if government is the only end purchaser of a product or of a supply, there will be a manifest unwillingness to prejudice one's own economic interests by challenging government.