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Collaboration – ideas from the construction industry?

During the current difficult period faced by the UKCS oil and gas industry, collaboration between the various parties in the offshore industry has been identified as one of the key factors in ensuring that the oil and gas output from the UKCS is maximised.

There has been recent discussion in Energy Voice about some of the ways in which this can be done – and some of the problems being encountered, including the publication of some very interesting survey results published by Deloitte.

Looking at these things in terms of their legal and contractual dimensions, there might be lessons to take from the way that the (onshore) construction and engineering sector has dealt with these issues in the last decade or so. In that area, particular forms of standard form contracts and the use of "good faith" obligations have been at the centre of trying to ensure collaborative working – with some success.

There are similarities between the work done in the upstream oil and gas industry and that carried out in the (onshore) construction sector: both often require highly technical, complex work which is also heavily industrial. Both often require the management of complex supply chains and the management and mitigation of very significant health and safety risks.

These similarities mean that the lessons from the construction industry might be worth taking into account.

Following its own long period of downturns and restructuring, in the early 1990S, Sir Michael Latham (at that point a recently retired MP but with a reputation in the construction industry) was commissioned by the UK government to report on the way the construction industry could improve its practices to ensure ongoing success. One of the key steps – for current purposes - was the identification of the need to encourage collaboration by the players in the industry.

The success of that collaborative effort has been, at best, mixed. However, the growing use of the collaborative standard form New Engineering Contract (NEC), especially for mega projects such as the London 2012 Olympics and Crossrail can be seen as supporting the idea that the idea of collaboration has traction.

Examination of the detail of the commercial operation of the NEC contract is something for another day. For present purposes, it stands as a useful benchmark in identifying some of the 'legal' issues involved with a collaborative arrangement – and how to grasp the idea of collaboration and collaborative working in the terms of the contractual document. There are two important ways in which the contract does this.

The first, and most overt way, in which the NEC (and other standard forms) attempt to do this is by providing for detailed notification provisions which set out detailed information flows over risk assessments and other important events throughout the contract's life. In some ways, the NEC contract operates as a manual for the project – rather than the more usual bundle of rights and obligations. Dealing with the approach this brings with it can be time consuming but the usual feeling seems to be that, as long as the parties to the contract 'buy in' to that approach; it works – and can minimise disputes.

Conversely, if parties to the contract don't engage fully with that approach, then the operation of the contract becomes more difficult: the mechanisms in the contract break down.

Without these levers, the other mechanism is to seemingly rely on a provision in the contract that parties ought to carry out their obligations in a spirit of "mutual trust and cooperation" (or something similar – that is the phrase used in the NEC).

For lawyers, that proves to be a problem: what does "mutual trust and cooperation" mean that people actually have to do? All too often, the intuitive reaction which someone might have would be to assume that everything that they have done has been in the right spirit and everything everyone else has done has been to further some less helpful ends.

In trying to answer this question, it can be said that there have been discussions of "good faith" provisions in other contracts and the courts have set out the need to ensure that these provisions are given some effect to. However, those cases have dealt with one specific task required under the contract: not with a situation where the obligation applied through – and was woven into the very fabric of the contract itself.

So, the approach which the courts might take to such a provision remains undefined. This might be a sign of success (there has been no dispute serious enough to lead to a court judgement). However, without clarity on the meaning of the term the approach which parties to a contract might take is similarly open to interpretation. In circumstances where the operation of a collaborative agreement needs both parties to understand what is required of them – and to make that approach integral to their way of working on a project; that is a problem.

Clarity is therefore needed.

It is understood that there are already attempts to work on collaboration on the industry wide level. These should be encouraged and some of the focus, at least, ought to be on ensuring that the people involved understand how all of this this impacts on the way in which they engage with their contractual documents and working out the meaning of them.

These approaches might then inform the construction industry – as it's not clear that these issues have been properly grappled with on that side of the fence yet – in particular, the lack of definition of "good faith" type obligations remains an issue.

In addition, for both sets of industries, in terms of that meaning of "good faith", one risk with that approach would be that expectations about conduct can vary from project to project and any agreements will take time to agree and "bed in".

One possible option for both onshore construction and work in the UKCS and in the absence of some more general guidance, might be to try and set out the expectations and understanding as to "collaboration" on a project by project basis. The 'legal' effect of this might be limited but in terms of setting out what the parties were looking for it could be influential and an important tool in setting the framework for collaboration. The risk of not trying to work things out is the uncertainty over the way that "good faith", or similar obligations, would be interpreted in the courts or other formal dispute resolution process.

Offshore contracts are already heavy tomes, abounding with additional documents and protocols. In addition, the risk is that, the more words that are written; the more there is to argue about. Rather than increasing collaboration; such an approach might just add to the difficulties.

However, one way in which this could be usefully progressed might be for the "collaboration protocol" to be developed by those who would be affected by it working together with their colleagues in different companies. Again – the enforceability of that document in a court of law might be limited but if matters get to that stage, the collaborative process is already in difficulty That approach, at the outset of the project, might help parties to identify and understand the approach which they plan to take to a project and ensure the commitment of all those involved to that process. Parties build up their relationship before they try and build up anything else.

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