The e-Borders arbitration settlement: the case for transparency

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***Ned Beale* of *Trowers & Hamlins* argues there is a case for transparency about recent litigation regarding a failed government procurement contract for secure borders services.**

The Home Secretary justified the government's August payment of GBP (http://www.cdr-news.com//firms/bp)150 million, to settle defence contractor **Raytheon**'s arbitration claim in relation to the cancelled e-Borders project, by stating the settlement was reached: "to protect the best interests of the taxpayer, including from further litigation costs (https://www.gov.uk/government/news/home-secretary-letter-on-e-borders-settlement)".

Those taxpayers, however, might legitimately ask what the government was doing arbitrating the dispute in the first place. The matter raises serious questions about government policy regarding arbitration which, in my view, ought now to be revisited.

First is the question of efficiency. A commonly cited advantage of arbitration is that it saves time and costs as compared to court litigation because it is confidential, streamlined and binding. This has been endorsed by the judiciary; for example, **Mr Justice Leveson** recommended in his inquiry into press standards that complaints against newspapers be resolved through "cheap and efficient" arbitration. The government itself also promotes arbitration as a matter of policy via its Dispute Resolution Commitment (http://webarchive.nationalarchives.gov.uk/20130128112038/http:/www.justice.gov.uk/courts/mediation/dispute-resolution-commitment) (DRC), which requires government agencies to consider using ADR, including arbitration.

However, the Raytheon arbitration is a striking example of arbitration's disadvantages. The process was extensive and protracted. It began in 2010, and the hearing before three leading arbitrators took place over six months, ending in April 2013. The tribunal did not deliver its award for another 16 months, in August

2014. That award ordered the government to pay approximately GBP (http://www.cdr-news.com//firms/bp) 225 million (including interest). The government then challenged the award pursuant to section 68(2)(d) of the Arbitration Act 1996, on the grounds that the arbitrators committed a "serious irregularity" in failing to deal with all the issues put to them.

Mr Justice Akenhead in the Technology and Construction Court in December 2014 and February 2015 delivered judgments (http://www.bailii.org/ew/cases/EWHC/TCC/2014/4375.html) upholding (http://www.bailii.org/ew/cases/EWHC/TCC/2015/311.html) the challenge. He held that the tribunal never considered the Home Office's "basic point", which was that the delay in the e-Borders project was down to Raytheon. He ruled that the tribunal got the result so seriously wrong that the award should be set aside and the dispute should be reconsidered by a new tribunal. He also gave permission to appeal. This meant that, after four years of arbitration and two High Court judgments, the parties faced appeal hearings in the higher courts, and then potentially a re-run of the arbitration process.

The message this sends to domestic and international parties is that UK arbitration is slow, expensive and prone to appeal. This is not a criticism unique to this case; concerns about the duration and costs of commercial arbitration are a frequent subject of debate within the field. In some instances, the ability to select a specialist tribunal militates in favour of arbitration.

However, the Technology and Construction Court is specifically designed to handle disputes just like the e-Borders claim. It is therefore difficult to see how the selection of arbitration could be justified on purely technical grounds.

Confidentiality factors may have come into play. The government may have wished to keep sensitive details of the e-Borders project confidential, and arbitration is usually held in private, whereas court is usually public. However, Mr Justice Akenhead's two judgments were made public, and it is not clear that the arbitration involved sensitive material.

Even if it did, there are court procedures available to limit public access. Many aspects of government business, for example procurement challenges, are litigated in court, and judges are very accustomed to dealing with confidentiality issues where they arise.

Second, there is an important transparency point. Both the contract and arbitration involved huge sums of public money. The matter was sufficiently significant to warrant reports to the Home Affairs Select Committee. Surely in a case such as this the public has a right to know how government funds are being spent, and if legal proceedings are necessary, to have those conducted in open court, rather than behind closed doors in arbitration?

On the face of it, the government has agreed to pay GBP (http://www.cdr-news.com//firms/bp) 150 million to a contractor when it had no legal obligation to do so, and aside from the details set out in Mr Justice Akenhead's two rulings and released by the parties, the public has received no explanation as to why this was in the public interest. The **BBC** reported that (http://www.bbc.co.uk/news/uk-politics-23104168) the government has "refused to answer detailed questions because the process is confidential". If replies could not be given because the answers involved sensitive material that is one thing, but justifying the refusal by reference to the confidentiality of arbitration is unsatisfactory because the government agreed to arbitrate in the first place.

As mentioned above, the Dispute Resolution Commitment (DRC) promotes arbitration as a matter of government policy. In the author's view, the lessons learned from Raytheon should encompass a review of its contents. First, the question of whether arbitration should be considered a form of ADR at all should be revisited. Paragraph 5.2 of the DRC acknowledges that there is debate over this.

However, arguably, the DRC should go further and reflect the widely held view within the profession that arbitration is not a form of ADR because it is an adversarial process, frequently as complex and expensive as court litigation. It is unsatisfactory for the government to be sending the message that private arbitral tribunals are more efficient arbiters of justice than its own state-funded courts.

Secondly, the DRC should take account of transparency. Under the European Convention on Human Rights and the Human Rights Act 1998, the fundamental right to a fair trial includes the right to a public trial. However, the DRC cites confidentiality as an advantage of arbitration without acknowledging the corollary to this; namely that a loss of transparency is a disadvantage.

At the very least, the DRC should require government agencies to consider transparency as a factor when selecting dispute resolution processes. Indeed, it should arguably go further and require government agencies specifically to justify the loss of transparency that a selection of arbitration would involve. Transparency is an acknowledged goal both of government and of the justice system; where the two intersect, the case for transparency is doubly strong.

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