FGO – change management and control for the DSC

Issues on 'all party' governance

1   Introduction

1.1   This paper is intended to summarise for the 0565 workgroup the issues that Dentons see with the 'all party' approach to governance.

1.2   We understand that the all-party approach is intended to be inclusive and transparent and allow each party to feel they are properly represented.

1.3   Our earlier paper outlined what we understand the 'all-party' approach to be.

1.4   An initial point is that, from a legal perspective, the all-party arrangement will have to be structured to allow for the case where all representatives of all parties attend a change or contract management group meeting. From a legal point of view, that has to be seen as the base-case, if the decision-making body is all parties' representatives.

1.5   As noted in our earlier paper, to the extent that contract management (as distinct from change management) involves decision-making by a governing body, the issues in this paper apply equally to contract management.

1.6   We recognise that the 'committee' approach also is not perfect, and is not fully defined. As we understand it the principle concerns are (i) it may not operate as properly representative of parties' interests, and (ii) it lacks transparency. Our proposal seeks to address the second point by allowing any party to attend a committee meeting (and we can build in requirements for publication of proceedings). On the first issue, the UNC is built around governance within the panel and UNCC; but we have suggested that the shipper-representatives on the committee could be appointed based on sub-classes of shipper, if necessary.

2   Complexity and cost

2.1   Every decision will need to be associated with one or more 'constituencies', probably by being related to a particular service. Constituencies are built around shippers (possibly separated into different sub-classes), DNs, NTS, iGTs.

2.2   For any decision which relates to a service to more than one constituency, the arrangements will need to address the voting balance between each constituency. For example, there could be weighting of votes between the constituencies.

Note: the FGO workstream ToRs say (6f) 'changes that impact more than one constituency will require approval by consensus across all impacted constituencies'. The ToRs also refer to a possible appeal process (which we believe has not been defined) and then (7(b) the ToRs say that a failure to achieve consensus would be resolved by arbitration. Arbitration in any conventional sense would be entirely unworkable as a means of resolution.

2.3   Within each constituency, voting weights must be decided. There has been some discussion of more complex arrangements (such as 'two-part' voting, by voter and by weight) which would balance the interests of larger and smaller players.

2.4   So far as we know, the existing suggestion is that votes weighting would follow service charging. That introduces the complexity of the charging arrangements (currently around 47 different service categories are proposed, each with associated different charging allocation proportions between and possibly within constituencies).

2.5   For a change affecting a single service this would be complex enough. However we think most changes will be cross-service (or may not readily be identifiable with a single service or group of services). In those cases, if the basis of voting is by service, an additional layer of weighting would be needed, between the affected services. Where a decision cannot be related to particular services, potentially there is a need for a different set of 'all-party' voting arrangements, which by definition could not be built around the charging allocations for particular services.

2.6   In our view arrangements of this complexity are unlikely provide value – and administering these arrangements will be time-consuming and costly.

3   Viability as a solution

3.1   We anticipate major challenges in getting an adequate consensus around any given set of voting arrangements. We understand discussions in the FGO workstream have failed to achieve this to date. We assume that is why there is a reference to 'appeal' and 'arbitration' in the FGO paper.

3.2   As a process point, we don't think you can make a coherent decision to choose 'all-party' over 'committee' (or any other approach) unless you have at the same time defined what the all-party approach will look like (in terms of voting arrangements).

4   Practicality

4.1   Our earlier paper sets out that, wherever xoserve will act or alter its action in a particular way on the basis of a discussion in a change or management group, then the group has legally made a decision. In our view the all-party approach is simply not a practical way to deal with this.

4.2   We also think a layered approach, which relies heavily on a second-tier of decision-making (such as an appeal) is not practical, given the wide scope of decision-making. (We accept that, if in practice decision-making is consensual, this would be less of an issue; but the arrangements must be structured in anticipation there is not consensus.)

4.3   We believe the foundation of the FGO work was that the existing ASA arrangements work well and can be replicated for the DSC.   For reasons we have discussed previously (such as the far greater numbers of parties, the greater disparity of interests between parties and constituencies, the need for more explicit certainty for the CDSP), we do not believe this is an assumption that can safely be made. We think the best way to build on what works well in the ASA is via a committee.

5   Inclusivity

5.1   We think the all-party approach runs the risk of failing to deliver in practice its intended goals of inclusivity, fairness and transparency.

5.2   We believe the common view is that in practice the all-party meetings will (over time if not initially) come to be attended only by a small number of parties.

5.3   In our view a system whose foundation is the votes of all parties lacks credibility in practice if only a small number of parties actually participate.

5.4   It will be the larger parties who have the resource to attend. Smaller parties (those whose interests the CMA has been concerned with) may be unable to.

5.5   In a properly constituted committee by definition all parties are represented. The proposal for open meetings allows any party to attend which provides transparency.