

# ADR IN CONSTRUCTION: IS IT EVER UNFAIR?

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'Homai ki te tangata i te kanohi.' MAORI PROVERB<sup>1</sup>

## **A Introduction**

### ***The general theme***

If a construction project uses a form of Alternative Dispute Resolution – or has ADR applied to it – when and how may one of the parties challenge these procedures as in themselves unfair or otherwise contrary to law? If a challenge is successful, what consequences follow? This essay explores these questions, primarily in the context of the law of England & Wales, focusing on adjudication (both statutory and contractual) and on court-encouraged ADR. Along the way it revisits some fundamental questions about the sources of English law (including different bodies of European law) and their inter-relationship.

The idea of 'challenge' implies that whatever legal text, decision or process is challenged is presumptively valid (hence enforceable), unless someone with the power to do so successfully takes some form of legal action against it.<sup>2</sup> So the burden of proof normally lies on a challenger, though in litigation the public interest may – exceptionally – require the court to raise a relevant issue on its own motion.<sup>3</sup> In our field, the challenger will

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- <sup>1</sup> 'Give it to the person face to face': in other words 'Direct your criticism to the person concerned; do not whisper it to others': *Maori Proverbs*, Auckland, Reed Books (1992).
- <sup>2</sup> As Lord Bridge said in *Factortame* (note 54 below) at page 142, '... the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid.'
- <sup>3</sup> The only example of such an exception relevant to this essay relates to unfair contract terms and consumer protection, where in the *Oceano Groupo* cases (note 171 below and its linked

normally be a party in a project whose own rights or liabilities depend on the outcome of the challenge; only exceptionally will an outsider be empowered to make a challenge.<sup>4</sup>

Challenges to ADR are often merely 'relative': that is, to the particular actions and decisions of an adjudicator (or arbitrator) in a given case.<sup>5</sup> The main question of policy they raise is the scale of the autonomy the courts should, or must, allow the adjudicator (or arbitrator) to make 'mistakes' – the other side of the same coin as the scope for challenging in court how the ADR decision-maker has behaved.<sup>6</sup> By contrast, this essay focuses on 'absolute' challenges: that is, to the whole notion, or to the rules governing a particular form, of ADR.

### *The impact of adjudication*

Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced adjudication into the United Kingdom; this statutory form of ADR applies to all disputes within 'construction contracts', as defined. Section 108(3) provides that adjudicators' decisions under the Act are to be binding unless and until overturned by separate litigation, arbitration or agreement between the parties. However, as in Singapore,<sup>7</sup> but in contrast to Australasia,<sup>8</sup> these decisions are not immediately enforceable as if court judgments.<sup>9</sup>

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main text) the European Court of Justice made clear that national courts have a duty to raise questions of the fairness of terms under the 1993 Directive (note 165 below) if the parties fail to do so themselves.

- <sup>4</sup> As in note 3 above, the only relevant example of the exceptional situation comes from the law of consumer protection, where the Office of Fair Trading and other bodies are empowered to challenge unfair terms in consumer contracts by a variety of measures, including court action. These powers derive from the 1993 Directive (note 165 below), as extended by Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L166/51 (11 June 1998), implemented for the UK by The Stop Now Orders (EC Directive) Regulations 2001 (SI 2001/1422). These and separate powers under the Fair Trading Act 1973 have now been overtaken by wider powers under Part 8 of the Enterprise Act 2002: see [www.oft.gov.uk](http://www.oft.gov.uk).
- <sup>5</sup> The essay uses 'adjudicator' or 'arbitrator' in the singular: no distinction is intended between the position of a sole adjudicator (almost universally the rule) or arbitrator and panels of either.
- <sup>6</sup> On challenges to adjudicators, see Julian Bailey, 'Public Law and Statutory Adjudication', SCL paper 145 (June 2008); for recent House of Lords' discussion of the position of arbitrators, see in particular the *Lesotho Highlands* case (note 13 below) and *Fiona Trust and Holding Corporation v Privalov* [2007] EWCA Civ 20, [2007] Bus LR 686; affirmed as *Premium Nafta Products Ltd (20th Defendant) v Fili Shipping Co Ltd* [2007] UKHL 40 and (under its original name) at [2008] 1 Lloyd's Rep 254; now applied in *El Nasharty v J Sainsbury plc* [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep 360.
- <sup>7</sup> Building and Construction Industry Security of Payment Act 2004 (revised 2006) (Cap 30B) (Singapore), sections 21 and 27(1): 'An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.'
- <sup>8</sup> Eg the Building and Construction Industry Security of Payment Act 1999 (NSW), section 25(1): 'An adjudication certificate may be filed as a judgment for a debt in any court of

