

ADR IN CONSTRUCTION: IS IT EVER UNFAIR?

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'Homai ki te tangata i te kanohi.' MAORI PROVERB¹

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.² 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.³ In our field, the challenger will

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¹ '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).

² 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.'

³ 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.⁴

Challenges to ADR are often merely 'relative': that is, to the particular actions and decisions of an adjudicator (or arbitrator) in a given case.⁵ 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.⁶ 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,⁷ but in contrast to Australasia,⁸ these decisions are not immediately enforceable as if court judgments.⁹

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.

- ⁴ 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.
- ⁵ 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.
- ⁶ 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.
- ⁷ 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.'
- ⁸ 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

Enforcement therefore requires court involvement – typically an application for summary judgment before the Technology and Construction Court under Part 24 of the Civil Procedure Rules (CPR).¹⁰ This gives a party unhappy at any aspect of an adjudication a ‘day in court’ to mount a challenge – ‘absolute’, ‘relative’ or sometimes both – where in court the losing party in the adjudication (now a defendant) challenges, to the extent that it can, some aspect of the procedure or the decision itself. The TCC’s judgment on this issue can of course be appealed, including up to the House of Lords (in 2009 and onwards, to its successor the Supreme Court, when Part 3 of the Constitutional Reform Act 2005 comes into force).

In the adjudication context, the enforcement stage is the most frequently used opportunity to ‘police’ the process; but challenges may also be made much earlier on, within the adjudication itself¹¹ and also in separate court proceedings, just as they can in relation to arbitration. A court challenge may be *direct* – eg where a responding party in an adjudication asks the court to declare that the adjudication already started is not valid in law, or attempts by declaration or injunction to prevent an adjudication from starting or continuing.¹² Or the challenge may be *indirect* – eg where in advance of, or in parallel with, the launching of an adjudication or arbitration, one party starts court proceedings relating to the same dispute, the other party then arguing that litigation should be stayed in favour of the chosen form of ADR; or where the losing party in the adjudication or arbitration resists enforcement of the decision or award.

competent jurisdiction and is enforceable accordingly’. Almost identical wording can be found in section 31(1) of the Building and Construction Industry Payments Act 2004 (Qld), section 45 of the Construction Contracts (Security of Payments) Act 2004 (NT) (as amended) and section 43 of the Construction Contracts Act 2004 (WA); similar, but more complex, provisions exist within the current text of the Building and Construction Industry Security of Payment Act 2002 (Vic), culminating in section 28R. The Construction Contracts Act 2002 (NZ), section 59 makes adjudicators’ payment determinations enforceable as if judgment debts.

- ⁹ The default Scheme (note 31 below) extends to adjudicators’ decisions the existing court powers in relation to ‘peremptory orders’ of arbitral tribunals under the Arbitration Act 1996, section 42, slightly modified, via its paragraph 24. Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, TCC said at paragraph [38] that it was not at all clear why Scheme adjudicators had these extended powers under the Arbitration Act, when adjudicators in HGCRA adjudications under contractual procedures did not.
- ¹⁰ The Civil Procedure Rules (SI 1998/3132, as heavily amended); see Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure* ‘The White Book’, London, Sweet & Maxwell (2008 edition).
- ¹¹ For a view that some human rights challenges to statutory adjudication cannot usefully be brought before an adjudicator, see *Austin Hall* (see the linked main text to note 69 below).
- ¹² See eg Judge Anthony Thornton QC in *Palmers Ltd v ABB Power Construction Ltd* [1999] BLR 426, TCC at paragraphs [54]-[56].

Arbitration and adjudication

The arrival of statutory adjudication has relegated litigation and arbitration into second and third place as methods of dispute resolution for most UK construction contracts: few such disputes, once provisionally resolved via an adjudicator's decision, are in fact later reopened, save to the limited extent possible in enforcement proceedings. By contrast, for international projects arbitration retains its primacy as the most frequently chosen method of ultimate dispute resolution. Two differences between adjudication and arbitration are worth noting, since they affect the possibility of court challenge:

- 1 Unlike the position in arbitration,¹³ the HGCRA gives the courts no explicit direction on the degree of intervention they should, may or may not exercise over adjudication. No surprise, then, that the caselaw on this point is abundant, but also sometimes unclear or contradictory.
- 2 As a consequence of the autonomy which statute aims to give the process of arbitration, reflecting its contractual origins, an arbitral tribunal under English law has statutory power to determine its own jurisdiction.¹⁴ An adjudicator under the HGCRA, in public law terms an inferior tribunal with powers derived from statute, does not.¹⁵

An 'absolute' court challenge to an apparently agreed form of ADR may require the court to deal with a range of related arguments, as recent cases illustrate:

- that the ADR procedures – whatever they are – should not be (or should not have been) activated because they were never part of the contract,¹⁶

¹³ Although the Arbitration Act 1996 provides a closed list of the possibilities for challenges to arbitrators' actions and to awards, uncertainties still arise regularly about the proper scope of this judicial intervention, illustrated by *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221; see also *Sumukan* (note 16 below) and *Stretford* (note 90 below and its linked main text).

¹⁴ Arbitration Act 1996, section 30.

¹⁵ If, as Bailey suggests (note 6 above), adjudications under the HGCRA come within the scope of public law, an application for judicial review before the Administrative Court under CPR Part 54 may also be available for an absolute or relative challenge to the actions or decisions of an adjudicator. No reported cases where this possibility has been used have yet been identified.

¹⁶ In two recent cases, residential construction employers successfully argued that adjudication provisions were not part of the contract: with an architect in *Picardi v Cuniberti*; and with a building contractor in *Bryen & Langley Ltd v Boston* (both at note 175 below). In *Sumukan Ltd v Commonwealth Secretariat Ltd* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep 87 a claimant sought, in challenging an arbitral award, to suggest that the clause excluding rights of

- that the court has no jurisdiction or should stay litigation, because the agreed ADR procedures are exclusive, or must come first;¹⁷
- that even if the alleged arbitration agreement is ineffective or unenforceable, an English court has no jurisdiction over the substantive dispute and its parties under the relevant EC rules;¹⁸ or
- that the person who acted as arbitrator and made an award was not validly appointed.¹⁹

Litigation as a fundamental right

The underlying theme in relation to challenges to ADR is of protecting access to the ordinary courts; these remain the default purveyors of dispute resolution services, backed by those coercive forms of enforcement over which modern states normally enjoy a legal monopoly. The principle asserts that a potential litigant's ability to go to court – meaning getting through the court door, but also having the court decide the dispute – should not be unduly limited or excluded, by the law or by the courts themselves. It is illustrated by *R v Lord Chancellor, ex parte Witham*,²⁰ a judicial review case from 1997 – just before Part II of the HGCR came into force and the Human Rights Act 1998 (HRA) fully incorporated the European Human Rights Convention²¹ into domestic law.²²

Mr Witham, a would-be litigant in person, successfully attacked a statutory Order, originating with the Lord Chancellor, article 3 of which removed the existing exemptions from court fees for those on low income.²³ In the Divisional Court, Laws J (with whom Rose LJ concurred) concluded that

appeal against the award had not been incorporated into the arbitration agreement, arguing (unsuccessfully) that it was onerous and unusual and had not been specifically drawn to his attention; and that it did not constitute a waiver of his rights under article 6(1) of the European Convention.

¹⁷ *Enterprise Managed Services and Ardentia*: see note 98 below and its linked main text.

¹⁸ *Hejfer International*: see notes 189-190 below and their linked main text.

¹⁹ *Mylcris*: see notes 193-199 below and their linked main text.

²⁰ *R v Lord Chancellor, ex parte Witham* [1998] QB 575, Div Ct QBD.

²¹ In full, the European Convention for the Protection of Human Rights and Fundamental Freedoms (and its relevant Protocols); in this essay also just 'the Convention'.

²² Given the order in which the two statutes were passed, it is likely that the compatibility of statutory adjudication with the Convention was hardly considered when these provisions were drafted; had the HGCR been adopted once the HRA was already in force, section 19 of the HRA would have required a Minister to make a written statement to Parliament that the provisions of the Housing Grants Bill were compatible with the rights protected by the HRA, or that – despite his/her inability to make such a statement – the Government wished the Bill to go ahead.

²³ Supreme Court Fees (Amendment) Order 1996, SI 1996/3191.

the effect of article 3 was to prevent all those unable to afford the normal court fees from litigating, at least in those classes of case for which civil legal aid was unavailable.²⁴ This was enough to invalidate it, reinstating the exemptions:

‘... the common law has clearly given special weight to the citizen’s right of access to the courts. It has been described as a constitutional right,²⁵ though the cases do not explain what that means.’²⁶

Thanks to the HRA, a claimant like Mr Witham could these days rely directly on the Convention’s article 6(1), whose key provisions are absolute and unqualified:²⁷

‘In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly...’²⁸ [*a short list of exceptions to the requirements of a public hearing and judgment follows*]

Although *ex parte Witham* had nothing directly to do with ADR, a right speaking in these forthright terms – especially with the enhanced status which the HRA now gives it – is obviously relevant to questions about the legal acceptability of ADR, where it displaces or postpones traditional state court litigation.

²⁴ In the context of the HRA and arbitration, where public funding for a party is extremely rare, Tomlinson J in *El Nasharty v J Sainsbury plc* (note 6 above) held at paragraph [34] that the claimant’s argument that he had agreed to arbitration under duress was not assisted by his asserting that he could not afford the costs of an ICC arbitration: ‘The regime enshrined in the ICC costs rules is in my view not incompatible with article 6 [of the European Convention]’. On *El Nasharty*, see further note 105 below.

²⁵ [*Our footnote*] Eg by Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909, HL at page 977E – quoted by Laws J. In countries with a written constitution, this may give the same right explicit protection and a clearer legal status, eg in the Irish Constitution (article 40.3) and in those former British possessions whose constitutions on independence gave a special legal status to versions of some or all of the rights protected by the European Convention, such as Jamaica: see *Hinds v The Queen* [1977] AC 195, PC.

²⁶ *Ex parte Witham* (note 20 above) at page 585F.

²⁷ Counsel for Mr Witham did in fact also rely on article 6(1) and the relevant caselaw from Strasbourg, but since the court was ready to find in his favour on common law grounds alone, the discussion on the Convention is limited and *obiter*. Laws J patriotically points out (note 20 above at page 585D): ‘... the common law provides no lesser protection of the right of access to the Queen’s courts than might be vindicated in Strasbourg. That is, if I may say so, unsurprising.’ On court fees, see now *Jedamski and Jedamska v Poland* (Application No 73547/01) (2007) 45 EHRR 47, ECHR (26 July 2005); on the unfairness of costs rules in litigation, see *Stankiewicz v Poland* (Application No 46917/99) (2007) 44 EHRR 938, ECHR (6 April 2006).

²⁸ For a survey of the impact of article 6(1) on English law, see Satvinder Singh Juss, ‘Constitutionalising Rights Without a Constitution: The British Experience under Article 6 of the Human Rights Act 1998’ (2006) 27 Statute Law Review 29.

Challenging ADR: the starting point

It may seem paradoxical even to suggest that what we here call ‘contractual ADR’ – a non-judicial method of dispute resolution agreed between the parties, free from any statutory compulsion – could ever be challenged head-on in law, provided of course that it is truly agreed. All the more difficult, it may be thought, to attack ‘mandatory ADR’ – a non-judicial dispute resolution method imposed by (or under) statutory authority. But, as we shall see, the ingenuity of litigants and their lawyers has led to recent debates of both kinds in the courts. The questions are interesting and the answers subtle, but the main points can be introduced in table form:

TYPE OF ADR	LEGAL ISSUE	SOURCE/S
MANDATORY	Does this form of ADR unduly limit access to court? Has the right of access to court been waived?	Article 6(1) of the European Convention ²⁹ via the HRA, but the right of access to court was already recognised by the common law ³⁰
CONTRACTUAL	Are any of the ADR provisions unfair contract terms?	UCTA 1977 (primary legislation) and UTCCR 1999 (secondary legislation, implementing an EC Directive)

Mandatory or contractual?

As the table suggests, a dichotomy between ‘mandatory’ and ‘contractual’ is fundamental in determining what sort of absolute challenge to ADR may be made. It comes about for two complementary reasons, both discussed in more detail later in the essay. First, potential or actual litigants subject to mandatory ADR can waive the protections article 6(1) would otherwise guarantee them; one way they can do this is by agreement, so a contractual form of ADR can escape from needing to comply with the Convention. Second, contract terms directly or indirectly imposed by law are protected against a challenge based on their possible unfairness.

However, the mandatory/contractual distinction is not always easy to apply. In construction, the HGCRA – unlike later legislation in other jurisdictions – looks initially to the parties’ own contractual arrangements to introduce adjudication (amongst other provisions) into a project, with a Scheme in reserve.³¹ So what look like freely adopted contractual

²⁹ Quoted as the main text to note 28 above.

³⁰ *Ex parte Witham*: note 20 above and its linked main text.

³¹ For England & Wales, the adjudication provisions form Part I of the Schedule to the Scheme for Construction Contracts (England & Wales) Regulations 1998 (SI 1998/649); ‘the Scheme’ elsewhere in this essay refers to these rules.

arrangements on dispute resolution may be no more than the parties' reaction to the statutory threat of the Scheme; and the application of the Scheme no more than the result of the parties' failing to opt out, though this is arguably still the consequence of their choice.

In litigation generally, the judges claim respect for party autonomy when encouraging ADR, but can impose serious costs sanctions for unacceptable behaviour by a party or its legal representatives; as a result, in section C of this essay we hedge our bets by labelling ADR within general civil procedure 'semi-mandatory'.

European sources

The table above shows that each possible legal issue involves 'imported' sources, as well as 'home-grown' English ones. In relation to access to court, the European input comes from the European Human Rights institutions in Strasbourg; in relation to unfair contract terms, from the EC.³² Each body of European law is in form both legislative and jurisprudential, the primary texts being interpreted in plentiful caselaw from the European Court of Human Rights (ECtHR) and European Court of Justice (ECJ) respectively.

This European factor complicates answering the question in the essay's title in two ways:

- 1 Requiring the relationship between each body of European law and English law to be taken into account (discussed in section B below); and
- 2 Bringing in the presumption in English law that domestic legislation (both primary and secondary) is intended to be, and therefore where possible should be interpreted to be, consistent with the UK's international obligations.³³

³² The EC is still alive, until the European Union as a body 'replaces and succeeds' it, on implementation of the Treaty of Lisbon in 2009 (or after, in the light of the failure of the Irish referendum in June 2008). See Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon (document CIG 14/07), new text of article 1 TEU; see also Conference of the Representatives of the Governments of the Member States, Final Act (document CIG 15/07) (both dated 3 December 2007), downloadable from www.consilium.europa.eu/uedocs. The Treaty is also published in the UK by HMSO as Cm 7294 (December 2007).

³³ For the general principle, see Hannen P (inaugural President of the PDA Division, 1875-1891) in *Bloxam v Favre* (1883) 8 PD 101, quoting the then current edition of *Maxwell on the Interpretation of Statutes* at page 107: '... every statute is to be so interpreted and applied, so far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law'. For the limitations of this approach, in relation to the pre-HRA status in English law of the law of the European Convention, see *R v Lyons and others* [2002] UKHL 44, [2003] 1 AC 976.

This ‘consistency’ rule of interpretation has special resonance in relation to both relevant bodies of European law, since English judges are specifically encouraged to give effect to it by the European Communities Act 1972³⁴ and the HRA.³⁵ Doing so includes taking into account the caselaw from Luxembourg and Strasbourg respectively. The ECJ and ECtHR in turn regularly make clear that concepts which are part of ‘their’ European law have an ‘autonomous’ supranational character, to be interpreted broadly and purposively – as a result with meanings potentially different from that which a domestic court or tribunal might give them, if applying just its own law.

EC law has a unique extra feature, designed to reinforce this autonomy, as well as its supremacy over domestic law: a procedural link from member-states to the ECJ.³⁶ Under this, a domestic court or tribunal may (in some cases must) refer to the Luxembourg court questions of interpretation of EC measures arising in litigation before it, later loyally giving effect to the answer which comes back.³⁷

³⁴ European Communities Act 1972, sections 2(4) and 3(1), which repeat what EC law would itself require: see Francis Bennion, *Bennion on Statutory Interpretation: A Code*, London, Butterworths LexisNexis (5th ed, 2007), Section 413 (Effect of Community law on UK enactments); also *Marleasing SA v La Comercial Internacional de Alimentacion SA* (case C106-89) [1990] ECR I-4135, ECJ – a case on interpretation of the Unfair Contract Terms Directive (see note 170 below and its linked main text). In several cases English courts have taken a wide view of what was possible in order to make English law conform to EC law, especially where English law had been changed ostensibly to implement an EC Directive: see eg *Litster v Forth Dry Dock Engineering* [1990] 1 AC 546, HL (the judges added words to the UK Transfer of Undertakings Regulations 1981 in order to make it conform with the parent Directive), also *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] 1 WLR 1454, HL.

³⁵ Section 3 of the HRA provides that where primary or secondary legislation is in issue, it must ‘as far as it is possible to do so [not just ‘if reasonable’] ... be read and given effect in a way which is compatible with Convention rights’. On this ‘reading down’, see Lord Steyn in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at paragraph [44]. For a case where the HL said that the CA had gone beyond what was possible by way of interpretation, in order to make a statutory scheme HRA-compliant, see *In re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, where Lord Nicholls said of section 3 at paragraph [37]: ‘This is a powerful tool whose use is obligatory. It is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further, the section applies retrospectively.’

³⁶ Strictly speaking, no longer unique: in order to encourage economic integration and development, member-states of the Andean Community (Comunidad Andina) have transferred power to Community institutions to legislate with supranational effect, the Court of Justice of the Andean Community in Quito (Ecuador) guaranteeing observance of the founding treaties. Its jurisdiction and procedures closely resemble those of the ECJ, including giving preliminary rulings on questions of the law of the Community arising in national litigation, referred to the CJAC by national courts or tribunals: see www.comunidadandina.org/ingles.

³⁷ Under article 234 TEC (the ‘preliminary ruling’ procedure). All the ECJ cases referred to in this essay came to Luxembourg under this procedure, as an incident of domestic litigation from one of the member-states.