ADR IN CONSTRUCTION: IS IT EVER UNFAIR?

A revised and extended version of the essay awarded the Society of Construction Arbitrators' Norman Royce Prize 2008

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'Homai ki te tangata i te kanohi.' MAORI PROVERB[1]

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]

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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.

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 itself[11] 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.

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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]

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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 HGCRA came into force and the Human Rights Act 1998 (HRA) fully incorporated the European Human Rights Convention[21] 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

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

19 *Mylcrist*: 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 HGCRA 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.

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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

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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]

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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 1972[34] 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]

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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 Commercial 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.

B Challenging mandatory ADR: adjudication

The UK version of adjudication is the clearest example in our field of a form of ADR imposed from the outside by statute. The 1996 Act lays down a 'shopping-list' of eight provisions on adjudication, to be included within every relevant construction contract:

1 Each party to be able to give notice at any time of his intention to refer a dispute to adjudication;

2 A timetable to appoint the adjudicator and refer the dispute to him within 7 days of such notice;

3 The adjudicator to reach a decision within 28 days of referral or such longer period as the parties agree after reference of the dispute;

4 Power in the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the referring party;

5 A duty on the adjudicator to act impartially;

6 The adjudicator to have power to take the initiative in ascertaining the facts and the law;

7 The adjudicator's decision to be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement; and

8 Immunity of the adjudicator (and any employee or agent of his) for anything done or omitted in the discharge or purported discharge of his functions as adjudicator, unless in bad faith.[38]

If the parties fail to incorporate all these points into their own contract, the HGCRA imposes instead the adjudication provisions of the Scheme.[39] The 26 paragraphs of the Scheme's Part I implement the fundamental points above but go into much more detail than the parent Act on the appointment of the adjudicator, procedure, the decision, fees and so on.

Is adjudication mandatory?

The mandatory character of adjudication may seem obvious, particularly where the parties' own contract is not HGCRA-compliant, the Scheme applying instead. However, section 114(4) provides that Scheme

38 HGCRA, section 108(2)-(4).
39 The Scheme: see note 31 above.

provisions take effect 'as implied terms' of the parties' own contract, permitting an argument that even here adjudication is contractual rather than statutory.

The better view, though, is that the real source of the fundamental requirement to go to adjudication is the Act itself, provided of course that the situation properly falls within the Act's scope.[40] If correct, this analysis applies not just to a Scheme adjudication, but equally to one where the parties' own contract needs to be, and in fact is, compliant with the eight minimum requirements above in relation to dispute resolution. Its mandatory character is shown by the fact that either party to a relevant contract can insist on referring a dispute to adjudication, even against the will of the other, whose rights and procedural possibilities are thus modified. Further, where the Scheme applies, this may be in order precisely to override what the parties have themselves agreed, if this conflicts with the HGCRA 'shopping-list' above; or to fill gaps in the same list which the parties have themselves failed to provide for.

By contrast, it must be wrong to label adjudication as mandatory where the 1996 Act does not 'bite' on the situation at all: in this case, ADR provisions – whatever they are – can derive only from the parties' contract. This is so, even where adjudication applies by being contained in a standard form successfully (re)designed to comply with the minimum requirements of the 1996 Act. Most of the cases discussed in section D below concern situations where such a form was used, but in a situation outside the Act's scope, ie a construction contract with an individual residential employer.[41]

Contractual 'add-ons' within statutory adjudication

There is a more difficult intermediate category, where the situation is within the HGCRA but the parties by contract add provisions beyond the statutory minimum – for example, regulating the adjudication process in more detail than the Act does, or in respects which the Act fails to address.

An obvious example of such an 'add-on', under the present law, concerns each party's potential liability for the other's costs.[42] Neither the Act nor

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40 See Bailey (note 6 above).

41 All the cases discussed in section D below, except *Heifer*, fall into this category; see also Akenhead J in *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] BLR 24 at paragraphs [29]-[33].

42 On which also see note 182 below and its linked main text. Some statutory adjudication systems offer clear and obligatory rules on costs, like the Singapore statute (note 7 above), whose section 30 provides:

the Scheme gives an adjudicator power to allocate the parties' costs between them, so the default result is that each bears all its own costs.[43] But in the context of the Act's silence and its drafting approach, parties are clearly free, if they do not like this outcome, to adopt a different system by agreement. They could mimic the approach of the civil courts, giving the adjudicator a discretion, starting with a presumption that the loser pays the winner's reasonable costs. But they could equally agree, as it turns out parties have done, that the referring party must pay all the respondent party's costs, whatever the outcome of the adjudication on the merits.[44] If such a rule were imposed by statute, the chances are that it would violate article 6(1) of the Convention[45] – but, as we shall see, the Convention is not in the frame if the provision comes only from contract.

As it happens, agreements between the parties on adjudication costs are one of the targets of the consultation draft of the Construction Contracts Bill (July 2008), the penultimate stage of the Government's extended review of the operation of Part II of the 1996 Act.[46] The mischief which arises where parties agree an unfair allocation of their own costs in an HGCRA adjudication could be attacked by restricting their freedom, imposing a simple rule that each party always bears its own costs. Instead,

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(1) The costs of any adjudication shall not exceed such amount as may be prescribed by the Minister.
(2) An adjudicator shall, in making his determination in relation to any adjudication application, decide which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party.
(3) Where an adjudicator is satisfied that a party to an adjudication incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the second-mentioned party shall pay some or all of those costs.
(4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

43 *Total M&E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 (TCC), 87 Con LR 154 at paragraphs [24]-[25]; see also HHJ Peter Coulson QC, *Construction Adjudication*, Oxford, OUP (2008), chapter 11. The CIC Model Adjudication Procedure (4th ed, 2007) provides expressly in its paragraph 29 that each side bears its own costs – obtainable via www.cic.org.uk.

44 As the parties had agreed in *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL 1662, TCC (Liverpool), of which Frances Paterson MBE has said: '... the parties could never have believed that the names of that case would be reported so often' (Society of Construction Law/King's College London Conference, 'Amending the Construction Act', 11 September 2008). Under the TecSA Adjudication Rules (v 2.0, 2002), the adjudicator does not automatically have power to make a costs award, but rule 29 specifically overrides any contractual provision making the referring party responsible as such for the respondent party's costs – downloadable from www.tecsa.org.uk.

45 *Stankiewicz v Poland*: note 27 above.

46 See *Improving payment practices in the construction industry: 2nd Consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996* (2007), pages 24-26; and *The Draft Construction Contracts Bill* (2008), both downloadable from www.berr.gov.uk.

the present draft adopts a more complex approach, as well as aiming at an additional target:

1 Under the suggested new section 108A, any agreement on the allocation of costs reached between the parties in advance of the appointment of an adjudicator[47] will be ineffective;

2 The new section 108B will give an adjudicator power to override an agreement on the allocation of their own costs made between the parties to an adjudication after the adjudicator has been appointed,[48] where these require one party to bear some or all of the other's costs, if s/he considers the agreed provisions unreasonable;[49] and

3 The new section 108C will introduce longstop principles in relation to the parties' liability for 'a reasonable amount' in respect of the adjudicator's own fees and expenses;[50] but the parties may validly agree their liability for these, with each other or directly with the adjudicator, though only after the adjudicator has been appointed.

However, the reforms presently proposed will touch no other contractual 'add-ons' affecting the process of adjudication, so their status – hence susceptibility to possible forms of challenge – still needs to be addressed.

It seems unlikely, as well as undesirable on public policy grounds, that any 'add-on' provisions are protected from attack as unfair contract terms, merely because the rest of the situation falls under the statutory umbrella of Part II of the HGCRA. As a result, it might not need the new Construction Contracts Bill to be passed for a party to be able to challenge as unfair a contract term allocating both sides' costs in an adjudication to the referring party – or any other term not already on the HGCRA 'shopping list' – under the conditions described in section D below.

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47 A widely shared view at the SCL/King's College London Conference (note 44 above) was that it was unhelpful for the proposed new section 108A to use the moment of appointment of the adjudicator as a key date, as this is not always easy to ascertain and no better than, say, the date of the notice referring a dispute to adjudication.

48 Which will now have to be made in writing to be even presumptively effective.

49 But the present draft text does not apply this power to Scheme adjudications, even though the Scheme contains no costs provisions, so it fails to extend the new review power to a category of case where there is – perhaps contrary to what the drafters imagined – no existing safety-net.

50 Compare the Arbitration Act 1996, section 28; on adjudicators' fees see also note 204 below and its linked main text.

Scope for attacking statutory provisions

At common law

Under the UK's present constitutional arrangements, the courts normally apply unquestioningly all of each statute in force: the scope for challenging primary legislation remains limited and exceptional. Where then does this leave rights labelled as 'constitutional', like the right of access to court? Laws J in *ex parte Witham* elegantly explained:

> 'In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose *vires* in main legislation specifically confers the power to abrogate. General words will not suffice, and any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.'[51]

This approach self-evidently puts no limitations on what Parliament can do, but requires Parliament to be specially clear, if it wishes to abrogate – or to authorise a public official or body to abrogate – any right having this special status. It therefore operates like a presumption within the process of statutory interpretation.[52]

Enter European law

Beyond this common law doctrine, limited in scope and effectiveness, could provisions like those within Part II of the HGCRA be attacked head-on in an English court? There is no special procedure for doing so, but these days there are possibilities deriving from European law not contemplated by Laws J in *ex parte Witham*. A litigant can use such an argument via two possible grounds:

> The particular English statutory provisions conflict with, hence in some respects should give way to, one or both of –

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51 *Ex parte Witham* (note 20 above) at page 581D.

52 As for the explicitness required in a statute to abrogate, or permit abrogating, such a right, Laws J suggested (note 20 above at page 586A) that only express authorisation by Parliament would have been sufficient: '... I find great difficulty in conceiving a form of words capable of making it plain beyond doubt... that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.'

GROUND 1	One or more directly applicable rights deriving from the law of the EC or EU
GROUND 2	One or more fundamental rights deriving from the European Convention, 'brought home'[53] to be part of domestic English law by the HRA

However, even within these possibilities, the result of a successful challenge to a statute is not to repeal (or nullify) the statute – or part of it – by court decision:

- If Ground 1 above can be established, the court will give priority to European law by refusing to apply an English statute conflicting with it, but will do no more: the statute remains in all other contexts and respects valid and enforceable.[54]
- In relation to Ground 2 above, national judges are 'public authorities' under section 6 of the HRA, so have a duty to protect the catalogue of Convention rights. This in part gives effect to the UK's commitment as a Contracting State, under article 1 of the Convention, to 'secure to everyone within [its] jurisdiction the rights and freedoms [*as later defined*]'. However, the most that a court (but only one of appropriate rank, including the TCC) may do is to make a declaration of incompatibility between the English statute and the Convention. This empowers (without compelling) a Minister to modify, repeal or replace the offending statutory provisions by statutory instrument for the future; but has no impact on the validity, continuing operation or enforceability of the legislation in question.[55]

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53 Government White Paper, *Rights Brought Home* (Cm 3782, 1997); Judge Anthony Thornton QC reported in his SCL paper, 'The Human Rights Act and Construction Disputes' (1999), that in a House of Lords debate on the Human Rights Bill Lord Wilberforce jauntily remarked: '['*Rights brought home*'] is a lovely phrase. It makes us think of 'the Ashes' or, perhaps, 'the bacon'.' More practically, the phrase enshrines the idea that the HRA adds no rights to English domestic law which could not also (and already) be protected in proceedings before the ECtHR in Strasbourg.

54 *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85, HL, especially Lord Bridge at page 140B-D; liability of the UK Government in damages then followed, for the loss suffered by the claimants during the period in which the relevant UK statute was enforced against them in violation of their directly enforceable EC rights.

55 HRA, sections 4 and 10; described by Geoffrey Marshall as 'not a legal remedy but a species of booby prize' [1999] Public Law 377 at page 382. The power to take remedial action by statutory instrument also arises if the ECtHR gives a judgment from which it appears that a statutory rule of English law may be contrary to one of the protected Convention rights. Incorporation of the Convention into Irish domestic law, following the Good Friday Agreement of April 1998, adopted a similar 'declaration of incompatibility' device in the

Application to statutory adjudication

Does either of the grounds above offer a route for arguing that statutory adjudication fails to respect potential litigants' rights?

There is no relevant EC law directly on ADR in general: the 2008 Mediation Directive,[56] discussed in section C below, would not touch adjudication, even if already in force. The 1993 Directive on Unfair Terms in Consumer Contracts, though concerned with dispute resolution, is inapplicable to 'contractual terms which reflect mandatory statutory or regulatory provisions'.[57] Its Recital 13 explains this limitation:

> '... provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms... ; ... the wording 'mandatory statutory or regulatory provisions' in article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.'

We take the view that the parties' own contractual arrangements on adjudication, to the extent referable to the need to comply with the HGCRA, fit precisely within this exclusion, as do the provisions of the Scheme as default contractual terms, so Ground 1 therefore seems unavailable.

However, in relation to Ground 2, the Convention, echoing the common law, has a clear interest in protecting the right of access to courts. So should the adjudication provisions in the HGCRA be tested, in theory and in practice, against article 6(1)?

Does the UK form of statutory adjudication engage article 6(1)?

At first blush, the process leading to an adjudicator's decision does look like a 'determination of... civil rights and obligations'. The idea that it might nevertheless escape the need to comply with the Convention comes in three forms.

The first relies on the *provisional* character of decisions reached by adjudicators – as did Judge Havery QC in *Elanay Contracts Ltd v The Vestry*.[58] However, this approach seems unconvincing, given their binding

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European Convention on Human Rights Act 2003: see Ursula Kilkelly (general editor), *ECHR and Irish Law*, Bristol, Jordans (2004; 2nd ed forthcoming, 2008).

56 See note 154 below and its linked main text.

57 The 1993 Directive (note 165 below), article 1(2).

58 *Elanay Contracts Ltd v The Vestry* [2001] BLR 33, TCC.

and (presumptively) enforceable character,[59] as well as the limited powers of intervention exercised by the courts (far short of a rehearing on the merits). In *Southwark LBC v St Brice*,[60] the Court of Appeal held, in the context of a possession action by a local authority against one of its secure tenant for rent arrears, that article 6(1) had to be observed in the public court hearing which decided whether the landlord should be granted a possession order bringing the tenancy to an end (granted, but in fact suspended, on condition the tenant made good an offer of defined regular payments against the arrears). But when the tenant failed to keep up the payments, the next stages leading to actual enforcement of the possession order did not, the court said, attract the protections of the Convention. If therefore 'enforcement' may escape the application of article 6(1), the previous 'rights and obligations' stage – in our field, the adjudication itself – must be subject to the Convention. Contrariwise, but a less plausible approach in our view, if an adjudicator's decision is not subject to the Convention, on one view not being 'legal proceedings' within the terminology of the HGCRA,[61] then the enforcement proceedings relating to the decision must so qualify, shifting the focus on to compliance by the TCC with the Convention.

The second ground for suggesting that the Convention may not apply to statutory adjudication focuses on the effect of the statute, as Akenhead J did in the TCC in the 2008 case, *Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd.*[62] Following Judge Peter Coulson QC in *DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd*,[63] he pointed out, as we have done above, that adjudication under the statute is no more than an *option*:

> '... [section 108] does not impose an obligation on the part of a party to a construction contract to refer disputes to adjudication: a right is not an obligation.'[64]

So in situations within the HGCRA, each party acquires – whether it wants it or not, whether it uses it or not – the *possibility* of an extra dispute

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59 See *Ringeisen v Austria (No 1)* (Series A, No 13) (1979-80) 1 EHRR 455 (16 July 1971), where the ECtHR expanded the meaning of 'determination' and *Le Compte, Van Leuwen and De Meyere v Belgium* (Series A, No 54) (1983) 5 EHRR 183 (18 October 1982), where the ECtHR held that to engage article 6(1), the proceedings must be directly decisive of civil rights and obligations.

60 *Southwark LBC v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537.

61 See Judge Bowsher QC at paragraph [15]ff of *Austin Hall* (note 69 below and its linked main text).

62 *Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd* [2008] EWHC 1020 (TCC) at paragraphs [62]-[74].

63 *DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd* [2007] EWHC 1584 (TCC), 116 Con LR 118, [2008] BLR 371.

64 *Cubitt* (note 62 above) at paragraph [66].

resolution procedure: the Act itself imposes no bar to (or pre-condition for) litigation on the same issues.

How then should the court react, if one of the parties seises it with the same dispute as is potentially or actually subject to adjudication, the statute giving no clear direction?[65] Not to subvert adjudication encourages (perhaps even requires) a court in that situation to order a stay until there is a decision from an adjudicator. Doing so would be analogous to the court ordering a stay in favour of a purely contractual form of ADR, which it will normally do unless the form of ADR is insufficiently certain.[66] In *DGT Steel,*[67] Judge Coulson suggested that the court would in relation to *any* construction dispute subject to adjudication stay litigation temporarily (if asked), to allow a party wishing to adjudicate first the basic statutory 28 days to do so. But in the HGCRA context this surely adds words to the statute, limiting the normal right of access to court, which are simply not there. In *Cubitt,*[68] Akenhead J was hesitant to follow Judge Coulson unless the parties had agreed contractually to give adjudication priority. In no reported purely HGCRA case does the TCC appear yet to have ordered such a stay; but if Judge Coulson is correct, this comes close in effect (though not in strict law) to giving statutory adjudication priority over traditional litigation. In turn this supports the view that article 6(1) is engaged.

A third category of reasons why the statutory adjudication regime might not need to comply with the European Convention surfaced in *Austin Hall*

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65 Section 34 of the Singapore statute (note 7 above) specifically provides for parallel proceedings:

(1) Nothing in this Act shall affect any right that a party to a contract may have –

(a) to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding;

(b) to apply for adjudication under this Act, notwithstanding that the dispute is the subject of proceedings in a court or tribunal or the subject of any other dispute resolution proceeding; or

(c) to take such measures as he is entitled under Part V to enforce payment of any adjudicated amount.

(2) If a party to a contract submits a dispute relating to or arising from the contract to a court or tribunal or to any other dispute resolution proceeding while the dispute is the subject of an adjudication under this Act, the submission to that other dispute resolution proceeding shall not bring to an end or otherwise affect the adjudication...

66 On certainty, see *Cable & Wireless plc v IBM United Kingdom plc* [2002] EWHC 2059 (Comm), [2003] BLR 89, where Colman J relied on the CPR and *Dunnett* (note 117 below and its linked main text) to validate the parties' unclear choice of ADR procedure; compare *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, 153 FLR 236, where the New South Wales Supreme Court laid down a demanding series of conditions for the granting of a stay in favour of contractual ADR.

67 *DGT Steel* (note 63 above) at paragraph [20] and paragraph 14.35 of his *Construction Adjudication* (note 43 above).

68 *Cubitt*: note 62 above.