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.

Building Ltd v Buckland Securities Ltd,[69] yet another enforcement case before the TCC. Here Judge Bowsher considered the precise way the HRA incorporated the Convention into domestic law, taking the view that the adjudicator, appointed under the HGCRA-compliant JCT Minor Works form, was not a 'public authority', so was not required by the 1998 Act to protect the Strasbourg catalogue of fundamental rights. Even if the adjudicator was subject to the HRA, section 6(1) of the HRA protected him from having to take into account the responding party's Convention-based challenge to the timescale for an adjudication, since the timescale rules derive directly from section 108 of the HGCRA (primary legislation) and allow an adjudicator no room for manoeuvre.[70]

Austin Hall certainly illustrates limits on the human rights arguments which can be used before an adjudicator; but it arguably underplays the TCC's own duty under the HRA to protect Convention-derived rights.[71] The case does not, we suggest, either hold that such challenges can never be brought at all, or that they can never be successful; and it is of course only a single TCC judgment.

What aspects of adjudication come within article 6(1)?

If article 6(1) is in the frame, does it apply to section 108 of the HGCRA as well as to all the adjudication provisions of the Scheme? After all, the Scheme – unless challenged as *ultra vires* the HGCRA, which no-one appears yet to have suggested – has statutory authority as secondary legislation adopted under the Act, so it might be assumed that it shares the same mandatory character. But we must not forget that parties can avoid the operation of the Scheme – as the drafters of the Act accurately expected that most would do, given the chance – by giving effect to the 'shopping-list' of adjudication requirements within their own contractual arrangements.[72] To have the Scheme apply therefore involves a failure by the parties to exercise a right to opt out.

It is therefore arguable that the parts of the Scheme which are truly mandatory and therefore potentially subject to challenge under the Convention are only those 'core' provisions which are essential to give

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69 *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] EWHC 434 (TCC), [2001] BLR 274.

70 The judge also held that the right to a hearing, if applicable, had been waived by the respondent party failing to request one from the adjudicator.

71 Judge Bowsher would have considered making a declaration of incompatibility (see note 55 above and its linked main text), had he been more convinced that there was a clash between the Convention and the HGCRA.

72 The 'shopping-list': see the main text linked to note 38 above.

effect to the eight requirements in section 108 of the Act.[73] This statutory 'shopping-list' is unavoidable, whether the parties opt out or not, but the rest of the Scheme, if it applies, is self-inflicted and, on this view, not subject to testing against article 6(1) of the Convention. By application of the mandatory/contractual dichotomy proposed above, the non-core provisions of the Scheme could as a result potentially be subject to challenge as unfair contract terms. However, as we have seen, terms which by statute apply in default, the parties having failed to adopt others themselves – precisely how the Scheme operates – appear to be protected against challenge on this basis.[74]

Adjudication and the substance of article 6(1)

In testing a national legal measure against rights protected under the Convention, there are four possible outcomes – and of course parts of a single measure may lead to different outcomes:

1	The measure contains provisions providing the guarantees required by the Convention	Compliant – challenge fails
2	The measure contains provisions which have no impact on the guarantees required by the Convention	Irrelevant – challenge fails
3	The measure contains provisions which conflict with the guarantees required by the Convention	Non-compliant – challenge succeeds
4	The measure contains provisions which fail to provide the guarantees required by the Convention	

Does adjudication under the HGCRA provide a guarantee of 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'?

Several aspects of this formula look relatively unproblematic, notably impartiality,[75] independence[76] and establishment by law.[77] For these

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73 The 'shopping-list': see the main text linked to note 38 above.

74 Article 1(2) of the 1993 Directive: see the main text linked to note 57 above. Section 29(1)(a) of UCTA protects terms 'authorised or required' by legislation against challenge: apparently a wider test.

75 Impartiality is item 5 of the HGCRA 'shopping-list' (main text to note 38 above) and paragraphs 4 and 12(a) of the Scheme (note 31 above). There are suggestions in the European Convention literature that a party may not be able to waive this requirement, in a context where compliance with aspects of article 6(1) can otherwise be waived: but the Court of Appeal in *Stretford* (note 90 below) disagrees at paragraphs [56]-[65]. Impartiality is the route by which courts have required adjudicators to observe aspects of natural justice, including absence of apparent bias: see *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*

aspects of the guarantees required by article 6(1), statutory adjudication appears to comply, suggesting Outcome 1 above. However, in relation to other aspects of the Convention text, the process appears more likely to lead to Outcome 3 or 4 (non-compliance).

Hearings

Although adjudicators do in fact often organise oral hearings, neither the HGCRA itself nor the Scheme requires a hearing, let alone one in public.[78] This was one of the main complaints made, unsuccessfully, in *Austin Hall*.[79] All the Act says about the running of each adjudication is in item 6 of its 'shopping-list',[80] which requires the contract to enable the adjudicator to take the initiative in ascertaining the facts and the law; but this abandonment of the traditionally English accusatorial approach to dispute resolution in favour of a measure of inquisitorial procedure is unlikely to be problematic under the Convention (Outcome 2 in the table above).

The Strasbourg court has said that the obligation to hold a hearing, though the norm, is not absolute, even in relation to a criminal charge. But the reasons for creating an exception must be substantial, and the exception must create no additional risk of injustice:

> 'There may be proceedings in which an oral hearing is not required; for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may

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[2004] EWCA Civ 1418, [2005] BLR 1, also Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), [2008] BLR 250 at paragraph [57].

76 'Independent' is probably satisfied in fact, though not guaranteed by law, since the appointment of an adjudicator is usually provided for in the parties' own contract (so a 'waiver' argument might apply – see note 101 below and its linked main text), or via the safety-net provisions of the Scheme, which look to an Adjudicator Nominating Body if the agreed machinery fails to produce an adjudicator willing to act.

77 As for 'established by law', the statute is the origin of the procedure, as of the requirement for a reasoned judgment (on request) under paragraph 22 of the Scheme.

78 In criminal cases, the right to a hearing under the Convention connotes the accused's right to be present at the hearing where evidence is heard and to be able effectively to enter into adversarial argument, but the requirements in civil cases appear less demanding: Richard Clayton and Hugh Tomlinson, *Fair Trial Rights*, Oxford, OUP (2001) at paragraph 11.205ff. Paragraph 13(f) of the Scheme (see note 31 above) gives the adjudicator power to obtain 'such representations and submissions as he requires': this wide discretion suggests no general duty to have a hearing. In *Scârth v United Kingdom* (Application No 33745/96) (ECtHR, judgment of 22 July 1999), it was a violation of article 6(1) for the English County Court to have referred the applicant's case for an arbitration hearing and then refused a request to hold the hearing in public, and the Court of Appeal had failed to cure the defect since its powers on appeal did not constitute 'full jurisdiction' (see note 89 below and its linked main text): see also Mathew Purchase and Esther Schutzer-Weissman, chapter 6 of Jessica Simor (General Editor), *Human Rights Practice*, London, Thomson/Sweet & Maxwell (loose-leaf) at paragraph 6.137.

79 *Austin Hall*: note 69 above and its linked main text.

80 See the linked main text to note 38 above.

> fairly and reasonably decide the case on the basis of the parties' submissions and other written materials... the character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided...'[81]

Could these ideas offer a lifeline to statutory adjudication? The Strasbourg court might be sympathetic to arguments the UK Government could deploy:

(a) The cashflow aims behind the 1996 Act require minimum time and cost in order to reach a decision;

(b) Unless the parties themselves choose otherwise, they may reopen the adjudicator's decision by later litigation or arbitration, or by agreement;

(c) Most construction disputes are document-centred, not depending on witness testimony as to facts; and

(d) The UK rules do not prohibit a hearing; if the parties want one, they can opt out of the Scheme and choose instead rules which guarantee a hearing.

Publicity

Since the Act and Scheme make no provision for hearings, they inevitably also fall short on the requirement that a hearing must, as a rule, be in public. They similarly lay down no requirement for an adjudicator to give his or her decision in public, nor could adjudication be squeezed into one of the limited exceptions to publicity permitted by the text of the Convention.

Timescale

The 28-day statutory basic timescale brings further problems. In 2007 the ECtHR said in *Capital Bank AD v Bulgaria*:

> 'The rights of access to a court and of adversarial proceedings, enshrined by article 6, imply, amongst other things, the possibility for the parties to a civil or criminal trial to be able to effectively participate in the proceedings and adduce evidence

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81 *Jussila v Finland* (Application No 73053/01, 23 November 2006) (2007) 45 EHRR 892 (ECtHR, Grand Chamber) at paragraphs 41-42, referring to *Håkansson* (note 101 below) and *Miller v Sweden* (Application No 55853/00) (2006) 42 EHRR 1155, ECtHR (8 February 2005).

> and arguments with a view to influencing the court's decision.'[82]

Does the HGCRA guarantee this effective participation? As the responding party in *Austin Hall* argued:

> '[The statutory timescale] gives the referring party the whip hand and enables referring parties to ambush another party to a contract by preparing a detailed case over an extended period of time and then requiring a detailed answer from the other party in a very limited period.'[83]

Section 108(2) (copied in the Scheme) may therefore fail to offer the guarantees in the idea of a 'hearing' or to respect the 'reasonable time' rule.[84] This, even though the rules permit the parties' contract to empower the adjudicator to extend the 28-day period by up to 14 further days, with the referring party's agreement; and further still, if both parties agree after the referral.[85] In relation to the impact of adjudication on staying or postponing litigation, the short timescale might work positively as not significantly impeding access to court (though the extra costs of going through an adjudication are another matter). However, the Convention-fuelled anxieties judges have expressed about interrupting the normal rhythms of civil litigation by imposing ADR, as the Court of Appeal has done in *Halsey,*[86] are not reassuring on this score.

Second-stage challenges in court to adjudicators' decisions

Under the Strasbourg caselaw, first-stage structural or procedural defects in the determining of civil rights and obligations may in theory be remedied by appropriate possibilities of *judicial recourse (appeal or review)* at a second or later stage.[87] In this context the Convention allows signatory states a wide margin of appreciation on what form and scope of judicial challenge to make available,[88] but there are minimum standards: the proceedings before the first-stage body, if not compliant with the Convention, must be

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82 *Capital Bank AD v Bulgaria* (Application No 49429/99) (2007) 44 EHRR 952, ECtHR (24 November 2005) at paragraph 118.

83 *Austin Hall*: note 69 above at paragraph [12].

84 The Strasbourg caselaw seems not yet to have considered the 'reasonable time' test specifically from the point of view of what *minimum* delay is acceptable in a civil case: Clayton & Tomlinson (note 78 above) at paragraph 11.219ff. In criminal cases an accused has a specific right to have adequate time to prepare a defence (article 6(3)(b)) but no equivalent exists for civil cases.

85 Paragraph 19 of the Scheme (note 31 above) reproduces the statute's three-pronged rules on timescale.

86 *Halsey*: note 124 below and its linked main text.

87 See eg *Edwards v UK* (Application No 13071/87) (1993) 15 EHRR 417, ECtHR (16 December 1992).

88 See Longmore LJ in *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] EWCA Civ 1341 at paragraphs [10]-[16].

'subject to subsequent control by a judicial body which has full jurisdiction and does provide the guarantees of article 6(1)'.[89]

In 2007 the Court of Appeal considered the compatibility with the Convention of the Football Association's arbitration-based disciplinary procedure in *Stretford v Football Association Ltd.*[90] Giving the court's judgment, Sir Anthony Clarke MR considered what the human rights position would have been, had this arbitration scheme been mandatory and imposed by law, rather than (as it was) purely contractual in nature. He correctly concluded that the legal and procedural structures, seen as a whole, would have to satisfy article 6(1).[91]

In the FA disciplinary context, he identified significant shortcomings at the arbitration stage, which turned the spotlight on the possibilities for challenging arbitral awards in court.[92] But the mandatory provisions in the Arbitration Act 1996 providing for such challenges would, he noted, manifestly fail to satisfy the Convention:

> '[these statutory rights] ensure that the High Court has power to put right any want of impartiality or procedural fairness, so that the only provisions of article 6 which could arguably be said not formally to be met by the Act are the requirements that the [arbitration] hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and that the judgment be pronounced publicly.'[93]

If the legal context of arbitration falls so far short, what of statutory adjudication? For understandable and well-known policy reasons, the HGCRA itself gives no guarantees of court intervention comparable even with those in the relatively narrowly drawn Arbitration Act. These in turn stop short of the grounds for judicial review generally available against inferior courts and tribunals – themselves less generous than a full appeal, judicial review being concerned only with legality, not merits, and the court's primary role being to quash a decision successfully challenged, not to substitute a fresh decision.[94]

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89 *Albert and Le Compte v Belgium* (Application Nos 7299/75 and 7496/76) (1983) 5 EHRR 533, ECtHR (10 February 1983) at paragraph 29, applied in *Bryan v UK* (Application No 19178/91) (1996) 21 EHRR 342, ECtHR (22 November 1995) at paragraph 40.

90 *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep 31.

91 In *Malmström v Sweden* (App No 8588/79), 38 DR 18 (Decision of 12 December 1983), the Human Rights Commission said at paragraph 30: 'If... arbitration is compulsory in the sense of being required by law... the parties have no option but to refer their dispute to an arbitration Board, and the Board must offer the guarantees set forth in article 6(1)'.

92 See also note 13 above.

93 *Stretford* (note 90 above) at paragraph [38].

94 Despite Bailey's principled view (see note 15 above) that HGCRA adjudications are subject to challenge by judicial review, as well in the TCC, this is so far unproven; he also accepts that to preserve the integrity and practicality of the adjudication system, the scope of this review would have to be carefully circumscribed.

If traditional judicial review may fail to offer the 'full jurisdiction' required by the Strasbourg caselaw, the TCC can only be in a worse position. Loyally implementing the policies behind the HGCRA, the court will refuse to enforce an adjudicator's decision only if the statutory requirement of impartiality has not been respected, if relevant aspects of natural justice have not been observed, or if the adjudicator acted without jurisdiction (ie 'asked the wrong question', rather than 'answered the right question the wrong way').[95] Hence many categories of 'error', like an adjudicator miscalculating what was due, are unreviewable by the court and therefore cannot invalidate a decision.[96] All in all, it is hard to be confident that an adjudication-plus-TCC combination would survive a challenge in Strasbourg, if we are correct that statutory adjudication engages article 6(1) and that the 'core' rules governing adjudications fail in some respects to provide the guarantees required by the Convention.

Waiving Convention rights

The principle

In *Cubitt*[97] Akenhead J went on to hold, unsurprisingly, that in situations subject to the HGCRA parties may agree to go beyond the minimum requirements of the statute: if they wish, they can give adjudication clear priority over litigation (or even exclusivity, though perhaps only for a defined period).[98] Provided they do so clearly, the court will give effect to their agreement, postponing the possibility of litigation (or arbitration) via a stay.[99] There may of course be a dispute about whether the parties have

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95 *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103, Ch D at page 108 (Knox J).

96 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49, TCC, affirmed [2000] BLR 522, CA; for more details, see Bailey (note 6 above).

97 *Cubitt*: note 62 above.

98 See *Enterprise Managed Services Ltd v East Midland Contracting Ltd* [2007] EWHC 727 (TCC), where the parties to a construction subcontract agreed a clause giving adjudication exclusivity 'until such time as the Main Contract Works have been certified substantially or practically complete'. Although the parties differed on the meaning of that clause and its application to the work done, they agreed that it would bar all remedies other than adjudication – including enforcement proceedings for the adjudicator's decision – until the happening of the specified event. Similarly in *Ardentia Ltd v British Telecommunications Plc* [2008] EWHC B12 (Ch), where the parties' agreed escalating dispute resolution procedure provided that 'the parties shall not institute court procedures [*an application for an interim injunction excepted*] until the applicable procedures [*including mediation*]... have been exhausted', the court ordered a stay when one party had given notice of litigation before the agreed procedures had been completed. Section 108(3) of the HGCRA authorises parties to an adjudication under the Act to 'accept the decision of the adjudicator as finally determining the dispute'; it is highly unlikely that many exercise this right.

99 On certainty in ADR clauses, see also note 66 above. Note that, if one party started litigation in another EU state whose courts have jurisdiction under the Brussels Convention or 'Brussels I' Regulation (note 190 below), in violation of a contractual commitment to adjudicate first, the ECJ judgment in *Turner v Grovit* (case C159/02) [2004] ECR I-3565 may prevent an English court from restraining this via an anti-suit injunction; see Ben Steinbrück, 'The Impact

in fact 'opted out' in this way, as in *Cubitt* itself.[100] According to the judge's interpretation of the DOM/1 provisions on adjudication and arbitration used in the project, adjudication had not been made a pre-condition contractually to all other forms of dispute resolution, so remained within the default statutory framework.

In Convention terms, this approach relies on *Deweer v Belgium*,[101] where in 1980 the ECtHR held, with ADR expressly in mind, that a potential litigant may waive what would otherwise be a right of access to a state court or tribunal under article 6(1):

> 'In the Contracting States' domestic legal systems a waiver of this kind [of the right to have a case dealt with by a state court or tribunal] is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts... The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.'[102]

The same applies to specific aspects of the right of access to court. In *Alatulkkila v Finland* the ECtHR said:

> '... a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interests making a hearing necessary. A waiver can be made explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing.'[103]

There may be grounds for suggesting – as in *Deweer* itself[104] – that a party's apparent consent to a waiver is ineffective. This will be the case if it was made 'under constraint';[105] or if 'important public interests' are at stake

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of EU Law on Anti-suit Injunctions in aid of English Arbitration Law' (2007) 26 Civil Justice Quarterly 358.

100 *Cubitt*: note 62 above.

101 *Deweer v Belgium* (Series A, No 35) (1979-80) 2 EHRR 439, ECtHR (27 February 1980); on waivers, see also *Pfeifer and Plankl v Austria* (Series A, No 227) (1992) 14 EHRR 692, ECtHR (25 February 1992) and *Håkansson v Sweden* (Series A, No 171) (1993) 13 EHRR 1, ECtHR (21 February 1990).

102 *Deweer* (note 101 above), paragraph 49.

103 *Alatulkkila v Finland* (Application No 33538/96) (2006) 43 EHRR 737, ECtHR (28 July 2005) at paragraph 53.

104 Under threat of having his butcher's shop closed by administrative order for alleged profiteering, he paid a fine by way of 'settlement' and agreed not to claim his right to be tried in court.

105 If the waiver is alleged to take effect by contract, a 'constraint' argument might also impugn the validity of the party's consent to the underlying contract, the disputes clause or both, on the traditional common law or equitable grounds of 'undue influence', 'duress' or 'mistake', the waiver then potentially failing to be effective on that basis too (or instead). For an unsuccessful duress claim in relation to an arbitration clause, in the light of article 6(1) of the Convention, see *El Nasharty v J Sainsbury plc* (note 6 above), following *Premium Nafta Products Ltd (20th Defendant) v Fili Shipping Co Ltd* [2007] UKHL 40, reported as *Fiona Trust and*

which require a hearing. But this seems not to be the case for arbitration (or, by extension, adjudication) between private parties, at least where based on contract.[106] 'Constraint' in this Convention sense seems hard to argue where two arms-length commercial parties in construction make their own procedural arrangements for adjudication – even if this choice derives from insistence by the party with the greater economic muscle.

Application to statutory adjudication

In situations within the 1996 Act, it is the specific statutory context – imposed on the parties from outside – which is of course the real driver for such 'opting-out', combined with the freedom which the HGCRA gives parties to provide themselves for adjudication (as also to comply with the statute's other 'shopping-lists'). The rudimentary character of the statute's provisions on adjudication (including in the Scheme) makes contractual self-help attractive; and the availability of model procedural rules on adjudication, some integrated into suites of standard forms, respond to this need. Parties can – and frequently do – therefore agree between themselves not to require an adjudicator to hold an oral hearing or to give his decision in public, by adopting procedural rules to this effect as part of their contractual arrangements.[107] And where their own rules, like the Scheme, do not guarantee a hearing, a party may fail to request one.

All of this may look like one or both parties giving effect to a 'waiver' in Convention terms. But applying this idea to the HGCRA and Scheme in relation to adjudication is not straightforward, since the concept of waiver in the Strasbourg caselaw imagines a party voluntarily abandoning what would otherwise be a right to have a dispute or claim heard *before a traditional state court or tribunal.* But that is not usually our case, for where parties make their own contractual arrangements for adjudication and do

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Holding Corporation v Privalov at [2008] 1 Lloyd's Rep 254. For two recent cases about waiver and article 6(1), see *Stretford* (note 90 above), followed by *Sumukan* (note 16 above).

106 See *Stretford* (note 90 above) at paragraph [51].

107 The CIC Model Adjudication Procedure (note 43 above) provides at the start of paragraph 17: 'The Adjudicator shall have complete discretion as to how to conduct the adjudication ...'. Under paragraphs 24-28 the adjudicator is, by implication, not required to deliver the decision orally or in public (the verb 'issue' is used), but the decision must be reasoned unless both parties relieve him/her of this obligation. Similarly, the TecSA Adjudication Rules (note 44 above) provide in rule 20 that 'The Adjudicator shall establish the procedure and the timetable for the Adjudication', going on in rule 21(xiii) to say that he may 'Reach his decision(s) without holding an oral hearing...'. There can of course be uncertainty about whether such model rules have been adopted by the parties, or which set: see *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 1721 (TCC).

so effectively, what most are really doing – and all they are wishing to do – is to opt out of the Scheme, not out of litigation.[108]

In the absence of guidance from Strasbourg on a comparable statutory ADR regime, we can imagine two possible approaches, either of which the ECtHR might adopt:

- The court might take a broad view of its 'waiver' doctrine, saying that parties whose who seize the opportunity to regulate their own adjudications within the HGCRA are abandoning the right to challenge any aspect of these procedures on human rights grounds. After all, they are free, in relation to most of those aspects of the default statutory procedures which are legally doubtful, to replace them with ones more clearly compatible with the Convention (eg including a mandatory hearing).[109] Their situation would therefore have only the law of contract applied to it – meaning at most a potential challenge on unfairness grounds by a party able to mount one (as discussed in section D below). Failing to opt out of the Scheme could equally be seen as an exercise of party autonomy, even if accomplished through inertia or incompetence – in which case the provisions of neither the 1996 Act nor the Scheme could be challenged on human rights grounds, whatever the parties did. However, it seems at least counter-intuitive that the HGCRA's mandatory aspects (in the sense already discussed) should escape all possibility of challenge merely because they are clothed with a measure of party autonomy.
- On a narrower view of what the Strasbourg court would regard as a waiver, parties would retain the right to complain about those 'core' features of section 108 from which they cannot opt out and which may be objectionable under the Convention – principally the 28-day maximum period. But parties who by contract opt out in favour of a form of ADR which could – but does not – meet the other procedural standards of article 6(1) (hearings, publicity and so on) may in consequence lose the right to complain about these failings. Those who

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108 For situations where parties came close also to opting out of litigation, see notes 97-98 above and their linked main text.

109 Judge Bowsher QC in effect took this line in relation to the parties' choice of the JCT Minor Works form in *Austin Hall* (note 69 above and its linked main text).

allow themselves to be subject to the Scheme may be able to challenge at least those Scheme provisions which give effect to the HGCRA 'shopping-list', to the extent that parts of this are contrary to the Convention – but probably no others.

C Challenging semi-mandatory ADR: civil procedure[110]

A second context in which ADR can enjoy state backing is within civil litigation. In the post-Woolf universe of the Civil Procedure Rules (CPR),[111] parties are required through standard procedural steps to grasp every opportunity to settle, rather than pursue conventional legal action. ADR in all its forms is an integral part of that strategy.

The regulatory framework

Even before proceedings are issued, parties must observe the relevant Pre-Action Protocol, the one for construction and engineering disputes uniquely requiring not only prescribed information passing between the parties by correspondence but also a meeting.[112] Once litigation is underway, judges have wide powers to 'encourage' parties to explore ADR, as a possibly fruitful detour off the road otherwise leading towards trial in court.

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110 See also Joseph Jacob, *Civil Justice in the Age of Human Rights*, Aldershot, Ashgate (2007), pages 92-104.

111 In Ireland, Part 2 of the Civil Liability and Courts Act 2004 (no 31 of 2004) gives direct statutory force to procedural steps in a personal injuries action comparable with English Pre-Action Protocols and to the court's powers in relation to ADR, including the possible costs implications of failing to comply with a direction by the court to attend a mediation conference. As a result, the English CPR caselaw is also regarded as relevant: see Gavan Carty, 'Landmark mediation decision will impact on costs', Law Society Gazette (Ireland), March 2008, page 21 (corrected version downloadable from www.kentcarty.com).

112 A claimant's failure to follow the requirements of the relevant Protocol may, if challenged, cause the court to stay the proceedings until compliance has been achieved (*TCC Guide* (2nd ed, 2007), paragraph 2.6.1). In *Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC), [2007] BLR 520, 115 ConLR 125 Jackson J granted a stay of more than two months, even though the particulars of the claim were clearly set out once proceedings had been issued: failure to follow the Protocol had short-circuited a stage in the procedure which in his view could still lead to a settlement. By contrast, in *Orange Personal Communications Services Ltd v Hoare Lea (a firm)* [2008] EWHC 223 (TCC), 117 ConLR 76 Akenhead J refused a stay following non-observance of the Protocol (the costs consequences being left for decision on a later occasion); in *TJ Brent Ltd v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC) the same judge refused an application for costs from a defendant alleging that the Protocol had not been observed. In substance the claimants had complied with its principles; the defendants had not shown that a real chance of settling the dispute had been lost; and had delayed raising the Protocol issue. For another failed attempt to argue non-observance of a Protocol as a reason for depriving the winner of some or all of his normal costs, see *Carleton v Strutt & Parker* (note 137 below and its linked main text).

Under paragraph 4.7 of the current *Practice Direction on Pre-Action Protocols*:

> 'The parties should consider whether some form of [ADR] procedure would be more suitable than litigation, and, if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs...
>
> It is expressly recognised that no party can or should be forced to mediate or to enter into any form of ADR.'[113]

Rule 26.4 CPR gives the court the power, on application by one of the parties or on its own motion, to stay the proceedings for a month (extendable) 'while the parties try to settle the case by [ADR] or other means'.[114] The 'teeth' for both Pre-Action Protocols and ADR come from rule 44.5 CPR on costs: 'the efforts made, if any, before and during the proceedings in order to try to resolve the dispute' are among the factors to which the court *must* have regard.

Application in practice: costs sanctions

Brown & Marriott consider these powers in relation to ADR 'fraught with difficulty, both conceptual and procedural',[115] but the courts' rhetoric vigorously supports intervention in this way, as part of active case management, itself defined as including 'encouraging the parties to use an [ADR] procedure if the court considers that appropriate and facilitating the use of such procedure'.[116] Hence in *Dunnett v Railtrack plc*[117] the

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113 Practice Direction – Protocols, reprinted in Lord Justice Waller (Editor-in-Chief), *Civil Procedure (The White Book)*, London, Sweet & Maxwell (2008 edition). For a discussion of the gradations between 'voluntary' and 'mandatory' ADR, see Law Reform Commission (Ireland) Consultation Paper: *Alternative Dispute Resolution* (LRC CP 50 - 2008), chapter 3 – downloadable from www.lawreform.ie.

114 This is mirrored in Ireland by the Rules of the Superior Courts (Commercial Proceedings) 2004 (but these confer no specific power to impose a costs sanction for refusing to participate in ADR); the role of courts in relation to ADR, including English caselaw, is discussed in chapters 9 and 11 of the Law Reform Commission (Ireland) Consultation Paper: note 113 above.

115 Henry Brown and Arthur Marriott, *ADR Principles and Practice*, London, Sweet & Maxwell (2nd ed, 1999) at paragraph 3-035.

116 CPR, r 1.4(2)(e).

117 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434. For an overview, see Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) 25 Civil Justice Quarterly 181; for comparisons with New South Wales (where the courts, as in South Australia, have clear statutory powers to order mediation against the will of the parties), see Brenda Tronson, 'Mediation Orders: Do The Arguments Against Them Make Sense?' (2006) 25 Civil Justice Quarterly 412.

Court of Appeal reminded parties and their lawyers that they have a duty to explore ADR, to assist the court in achieving the overriding objective of the CPR:

> '... if they [lawyers] turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened in this case, they may have to face uncomfortable costs consequences.'[118]

Hammering the point home, the Court of Appeal awarded the respondents Railtrack no costs at all, though the appellant Mrs Dunnett failed to overturn the first-instance County Court judgment dismissing her claim. The costs decision came about principally because she had followed advice from Schiemann LJ at a hearing ahead of her appeal by suggesting ADR to Railtrack; its solicitors, on instructions, had 'turned this down flat'. Research suggests that this single decision had a real impact in making parties more willing to mediate in all civil cases.[119]

A year later came *Shirayama Shokusan Co Ltd v Danovo Ltd*,[120] litigation in the Chancery Division to resolve disputes between the Saatchi Gallery and others with interests in County Hall in London, principally its Japanese tenants. The defendants asked Blackburne J to make a mediation order, following a model in the *Admiralty and Commercial Courts Guide*.[121] Under this, the parties were to submit their disputes to mediation, ahead of the hearing of an application for summary judgment (not therefore stayed). They were to endeavour in good faith to agree the name of an independent mediator, if necessary telling the court why mediation did not succeed (excluding matters covered by privilege). The judge was confident that he had power to make the order, even though the claimants opposed it, saying he thought it had no human rights implications.

At a second hearing three months later, the same judge was asked to order a formal stay of the litigation, in order to make possible (but not to require) the participation in mediation of a representative of five of the claimants, who could not fly in from Japan by the original mediation deadline. He identified competing considerations:

> 'On the one hand there is that party's right of access to the court for the adjudication of his claim, a concept which as

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118 Brooke LJ, with whom Robert Walker and Sedley LJJ concurred, at paragraph [15].

119 Hazel Genn, *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07 (May 2007), downloadable from www.justice.gov.uk.

120 *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] EWHC 2006 (Ch), [2004] 1 WLR 2985 (first hearing) and 2992 (second hearing).

121 Appendix 7 of the *Guide* (6th ed, 2002); the current edition (7th ed, 2006) retains the ADR Order as Appendix 7 – downloadable from www.hmcourts-service.gov.uk.

> Brooke LJ observed in *Woodhouse v Consignia plc*[122] has a particular resonance under article 6 of the Human Rights Convention concerning the person's right to a fair trial. On the other hand there is the wider public interest in making the best use of the court's time and resources and in promoting the resolution of disputes by consensual means, rather than by the adversarial processes inherent in a court adjudication, where such out-of-court resolution has a realistic prospect of achievement.'[123]

To take the further step requested would risk, he thought, violating both parties' rights under article 6(1) of the Convention, because it would require the ongoing litigation to be stayed indefinitely; so he refused to make the order sought.

In parallel, *Halsey v Milton Keynes General NHS Trust*[124] reached the Court of Appeal, with the benefit of submissions from the Law Society, the ADR Group, the Civil Mediation Council and CEDR. The court's long judgment, delivered by Dyson LJ, moved a step back from the original order in *Shirayama*:

> '... to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to court... it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable restraint on the right of access to the court and, therefore, a violation of article 6.'[125] [*original emphasis*]

But the court confirmed that the successful party may be deprived of some or all of its costs, if it unreasonably refused to agree to ADR, 'without prejudice' negotiations being disregarded. The judgment goes on to suggest factors relevant in deciding when such a refusal will be unreasonable, summarised by Jack J in *Hickman v Blake Lapthorn* [*here slightly shortened*]:[126]

> (a) A party cannot be ordered to submit to mediation, as that would be contrary to article 6 of the European Convention...[127]
>
> (b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in

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122 [*Our footnote*] *Woodhouse v Consignia plc* [2002] EWCA Civ 275, [2002] 1 WLR 2558 at paragraph [42].

123 *Shirayama* (note 120 above), paragraph [39] of the report of the second hearing.

124 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002. For views strongly critical of *Halsey*, see Lightman J, 'Breaking Down the Barriers', *The Times* (31 July 2007).

125 *Halsey* (note 124 above) at paragraph [9].

126 *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB), [2006] 3 Costs LR 452 at paragraph [21].

127 *Halsey* (note 124 above), paragraph [9] – see the direct quotation (main text to note 125 above).

refusing to agree to mediation.[128] It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.

(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of costs sanctions may be used to extract unmerited settlements.[129]

(d) Where a case is evenly balanced... a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must [not] be unreasonable.[130]

(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal.[131]

(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative.[132]

(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful.[133]

(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable.[134] Public bodies are not in a special position.[135]

After Halsey

Caselaw has developed apace, illustrating how these tests apply to individual pieces of litigation.[136] A striking – but also troubling – example from 2008 is *Carleton v Strutt & Parker,*[137] in which the points from *Halsey* above were central. The case was part of the fallout from a professional negligence action, brought in the QBD by a large estate against a firm of

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128 *Halsey* (note 124 above), paragraph [13].

129 *Halsey* (note 124 above), paragraph [18]; Jack J's summary in the transcript says 'cost', but *Halsey* itself says 'costs'.

130 *Halsey* (note 124 above), paragraph [19].

131 *Halsey* (note 124 above), paragraph [21].

132 *Halsey* (note 124 above), paragraph [25].

133 *Halsey* (note 124 above), paragraph [28].

134 *Halsey* (note 124 above), paragraph [29].

135 *Halsey* (note 124 above), paragraph [34].

136 Courts have agreed (after the event) that refusing a form of ADR was not unreasonable in *Hurst v Leeming* [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379, *Valentine v Allen* [2003] EWCA Civ 915, *Société Internationale de Télécommunications Aeronautiques v Wyatt & Co (UK) Ltd* [2002] EWHC 2401, *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 887, [2004] 1 WLR 3026, *Wills v Mills & Co Solicitors* [2005] EWCA Civ 591, *Askey v Wood* [2005] EWCA Civ 574 and *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC); and unreasonable in *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2924 (TCC), [2007] BLR 1.

137 *Carleton v Strutt & Parker* [2008] EWHC 424 (QB), (2008) 158 NLJ 480.

surveyors[138] about the terms of commercial leases for car parking at Bournemouth International Airport. Most of the claims succeeded at the three-week trial, though Jack J's later damages award of close to £1m was only a fraction of the total claimed (at its height, £87.8m). In a separate hearing before him on costs (in total £5.38m, grossly disproportionate to the amount won), the defendants argued that the claimants should not be treated as winners. The claimants were said not to have complied with the substance of the Professional Negligence Pre-Action Protocol; and to have made the possibility of mediation, first discussed at a 'without prejudice' meeting between the parties' solicitors, a non-starter by exaggerating their claim.

Jack J thought the non-compliance with the Protocol not significant enough to have any impact on costs. On the failure even to try ADR, evidence of how this occurred was before him only because the parties had waived their privilege, but they did not agree on the detail of what had happened at the meeting exploring the possibility of mediation. He concluded that the claimants and remaining defendants had been equally inflexible, just as they had at trial. There was so far no one-sided unreasonableness to justify penalising the claimants in costs under the principles in *Halsey*.[139]

But that was not the end of the story: in the case itself, further fruitless discussions about mediation had followed the pre-trial review; and after the judgment on liability there had been a one-day mediation (unsuccessful) on the damages issues. This use of ADR raised a further question for which English law so far had no clear answer: should a party suffer costs consequences if it takes part in a mediation – perhaps encouraged by the court – but in effect sabotages this from within? Jack J thought it should:

> '... a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in *Halsey*.'[140]

This did not apply in the case itself, since the evidence showed that *both* parties had acted unreasonably in the mediation, so the judge's views are

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138 The claimants' own firm of solicitors was added as a defendant, but the claims against them were dismissed, so they took no part in the issues considered at the costs hearing.

139 *Halsey*: note 124 above and its linked main text.

140 *Carleton* (note 137 above) at paragraph [72]. The Westlaw report of the case has 'by his reason of unreasonable', which appears to be a transcription error.

technically *obiter*. John Sorabji welcomes the judge's statement, believing that it averts any risk that court-encouraged mediation in England & Wales could develop into a 'costly, meretricious aspect of the litigation process'.[141]

However, doubts remain about its practicality, as well as its impact on ADR. As *Carleton* shows,[142] parties may have a shared interest, at a later costs hearing, in waiving the privilege attaching to the details of their pre-trial negotiations. However, the court has no power to insist on this waiver; further, if the parties have been through a mediation, they will usually have agreed contractually that no details of this shall be given in evidence in court.[143] Having ordered mediation at the first stage in *Shirayama*, Blackburne J said:

> '... the court is well able to distinguish, if it has to concern itself why a mediation fails, with[144] those matters which are privileged and which, therefore, should not be the subject of investigation and those matters which are not privileged...'[145]

If this is so, how well informed can the judge be who conducts the costs hearing, if asked to decide whether one party's conduct was unreasonable? Again as in *Carleton*, if recollections of what happened at one meeting can differ, perhaps influenced by self-interest, how much more so memories of the fluid and complex procedures (often taking place in long sessions late into the night, in the hope that a shared target deadline will encourage flexibility and a breakthrough) which make up a mediation. Some standard mediation agreements even prohibit the parties from making any record of the process, other than the terms of a settlement (if reached).[146] Most importantly, no participant in a mediation (including the mediator) would act as freely as the process ideally requires if they knew that there was a risk of having each exchange picked over in 'satellite litigation' later on.[147]

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141 John Sorabji, 'Costs – Unreasonable Conduct within a Mediation' (2008) 27 Civil Justice Quarterly 288 at page 292.

142 *Carleton*: see the linked main text to note 137 above.

143 Note that article 7 of the Mediation Directive (note 154 below) attempts to protect the confidentiality of the mediation process by normally protecting the mediator and those involved in the administration of a mediation from being required to give evidence about the mediation in separate civil proceedings or an arbitration. This merely confirms, but in a different legal form, what would normally be the position in English law, if the terms on which a mediation happens give the process a 'without prejudice' status and prohibit disclosure in court of any information about what happened during it: see eg the CEDR Model Mediation Agreement (10th ed, 2008), clauses 5-8 – downloadable from www.cedr.com.

144 The judge is likely to have meant 'between' instead of 'with' here.

145 *Shirayama* (note 120 above), paragraph [36] of the report of the first hearing.

146 Eg the CEDR Model Agreement (note 143 above), clause 8.

147 To similar effect, see the Law Reform Commission (Ireland) Consultation Paper (note 113 above) at paragraph 3.133ff.

Consistency in imposing costs sanctions for unreasonable behaviour within civil litigation, whatever form it takes, may point towards evaluating parties' behaviour within ADR, as Jack J suggests; but there are powerful arguments in the opposite direction. The Court of Appeal in *Halsey* – currently the ruling authority at this level – clearly considered that what happens in ADR should always be off-limits to judges:

> '... parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court... [I]f the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.'[148]

CPR, ADR and the European Convention

For all the care with which the courts consider how best to reconcile the CPR's objectives with litigants' rights, the cases discussed above show clearly how judicial practice could blur the theoretical distinction between being (a) forced by a judge into ADR; and (b) strongly encouraged towards ADR (with a beefy costs fist inside the velvet judicial glove). Approach (a) is very likely to violate article 6(1), as *Halsey* confirms, but it is not clear that (b) is immune from challenge under the Convention: as Jack J said, summarising *Halsey*, 'the fear of costs sanctions may be used to extract unmerited settlements'.[149] A litigant who is landed with an unfavourable costs order for failing to agree to ADR – or, even worse, goes to mediation at the court's suggestion but is afterwards stigmatised as failing to participate in good faith – could plausibly claim that this outcome operates as a clog or fetter on the right of access to the court, contrary to article 6(1); and that their apparent consent to ADR was no waiver of their rights.[150]

In our context, a successful challenge along these lines could involve allowing appeals against over-interventionist individual judicial decisions on case management and costs, interpreting the rules in such a way to make them consistent with the law from Strasbourg.[151] At the limit, courts may be driven to invalidate the very CPR rules under which those individual decisions have been made.[152] A determined and well-funded

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148 *Halsey* (note 124 above) at paragraph [14].

149 See note 129 above and its linked main text.

150 An *ex parte Witham* argument in parallel, based on the common law, would be rare these days, since the HRA tends to be used – for mostly good reasons – for all claims based on assertions of fundamental rights.

151 On this 'reading down', see note 35 above and its linked main text.

152 Only if the rule or decision was inevitable in the light of primary legislation – very unlikely in our context – does the court's ability to offer an effective remedy under the HRA hit the

litigant, unhappy with his or her treatment by the English courts and having 'exhausted domestic remedies',[153] could launch proceedings against the UK in Strasbourg. The ECtHR would be asked to find a violation of article 6(1) and to order 'just satisfaction' from the UK under article 41 of the Convention; but an adverse judgment could also force a rule-change in English law for the future – the probable real goal.

The EC Mediation Directive

A new element in this aspect of ADR is the EC Mediation Directive, which arrived in May 2008.[154] This is a harmonising measure, deriving from powers in Title IV TEC: 'judicial cooperation in civil matters having cross-border implications... so far as necessary for the proper functioning of the internal market'.[155] The Directive lays down a minimum package of measures, under which member-states are to recognise and encourage mediation in cross-border civil cases; it correctly defines mediation as intending to lead to a solution *agreed by the parties*, so rights-based adjudication or arbitration are beyond its scope.[156] Echoing English judicial concerns, it expressly aims not only to encourage mediation but also to ensure 'a balanced relationship between mediation and judicial proceedings'.[157]

Article 5(1) reads like a simplified version of rule 26.4 CPR:

> 'A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute...'

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buffers, but it may then make a declaration of incompatibility instead: see the main text to note 55 above.

153 Article 26 of the Convention.

154 Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters, OJ L 136/3 (24 May 2008), adopted under article 61(c) TEC and deriving from the Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 (April 2002). 'Cross-border' is defined in article 2; Recital 8 unsurprisingly confirms that member-states may extend the application of the principles contained in the Directive to situations with no cross-border element.

155 Like other EC measures on civil justice (the Brussels Convention, the Brussels I, Rome I and Rome II Regulations, the new Directive does not apply to revenue, customs or administrative matters, nor to state liability for acts and omissions in the exercise of State authority (article 1(2)). Nor, under the 'Maastricht compromise', does the Directive apply to Denmark; the UK and Ireland have the power – exercised in this case – to 'opt in'. On these EC powers in relation to civil justice, now and under the Treaty of Lisbon (2007), see Philip Britton, 'The Right Law for Construction? Choice of Law: Rome I and Rome II', SCL paper 148 (August 2008), pages 14-16 and 43-47.

156 Article 3; Recital 11 says that the Directive 'should not apply to... processes of an adjudicatory nature such as... arbitration and expert determination...'.

157 Article 1(1).

Article 5(2) adds, in effect cross-referring to article 6(1) of the Convention:[158]

> 'This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, *provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.*' [*emphasis added*]

Positively, this suggests that the costs sanctions used in England to push (or drag) litigants towards ADR are in principle acceptable; negatively, it restates, rather than resolving, that tension between traditional court access and the resolution of disputes via ADR which English civil procedure already embodies. Member-states are to transpose the Directive into domestic law by 21 May 2011 (with one exception); in the UK, few statutory changes appear necessary, except in the law of limitation, where member-states must ensure that periods no longer expire during a mediation process to which the Directive applies.[159]

D Challenging contractual ADR[160]

Paradoxically, it may be easier to mount an absolute challenge to ADR if its source is contractual between the parties, rather than imposed from outside by the State.

Possible grounds: UCTA and UTCCR

English caselaw offers many ways in which individual contract terms can be avoided or their impact blunted,[161] but offers no general principle

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158 Recital 27 specifically mentions fundamental rights and the Charter of Fundamental Rights of the EU.

159 The 2008 Directive (note 154 above), article 8. In line with normal EC law principles, insofar as the Directive intends to confer rights on individuals additional to those already available under national law – not obviously the case, at least in relation to England and the themes of this essay – then these will come into effect via new national measures or, in the absence of correct and complete implementation by a member-state, after the deadline for this has expired: see eg *Pubblico Ministero v Ratti* (case 148/78) [1979] ECR 1629, ECJ. A member-state in default on the transposition of a Directive into national law may also face infringement proceedings launched by the European Commission under article 226 TEC.

160 For a fuller discussion of the law on unfair contract terms, as well as the construction cases to 2004, see Philip Britton, 'The Architect, the Banker, his Wife and the Adjudicator: Construction and the Changing Law of Unfair Contract Terms' (2006) 22 Const LJ 23, from which parts of this section of the essay are derived.

161 For example the rules on formation of contract (how terms become incorporated, especially where neither side signs a document and the terms are regarded as 'onerous' or 'unusual' (see *Sumukan*, note 16 above)), interpretation *contra proferentem*, illegality and public policy, exclusion of liability for fraud, duress, undue influence, non-fraudulent misrepresentation and the law on penalties (significantly, many of these are equitable in origin). But apart from the rules of interpretation, most of these depend on some 'procedural unfairness' in the way the

allowing terms apparently agreed by the parties to be challenged head-on as unfair, especially if the document containing or referring to them is signed.[162] It is therefore legislative intervention which has enabled such challenges – many statutes in specific areas,[163] but at a more general level the present text of the Unfair Contract Terms Act 1977 (UCTA)[164] and the current Unfair Terms in Consumer Contracts Regulations (UTCCR), which implement a 1993 EC Directive.[165] Since the Directive imposes only a 'minimum harmonisation', measures in a member-state's domestic law which offer greater protection, as UCTA does in some respects, are not affected. Both UCTA and UTCCR provide that a contract term fulfilling their criteria of unfairness (or failing to be shown to be reasonable) will be declared unenforceable, the rest of the contract normally remaining intact.[166]

Despite its broad title, UCTA is concerned almost wholly with contractual provisions and notices seeking to limit or exclude liability (in contract and/or tort), or to achieve an equivalent effect, so its relevance to contractually chosen ADR appears limited, to judge from the caselaw so far.[167] However, it potentially applies to both B2B and B2C contracts, though under different conditions.

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contract was made to take the situation outside the normal consequences of the idea of freedom of contract: Law Commissions' 2002 Consultation Paper (note 166 below), paragraph 2.1.

162 See eg *Mitsubishi Corporation v Eastwind Transport Ltd* [2004] EWHC 2924, [2005] 1 All ER (Comm) 328, in which the wide carrier's exemption clause in a bill of lading referring to 'loss or damage to... the Goods of any kind whatsoever... however caused' was at common law effective at least to cover alleged damage to cargo caused by a faulty refrigeration system on the ship, neither UCTA nor UTCCR applying.

163 Many protective statutes regulate attempts to contract out of their provisions, eg the Defective Premises Act 1972, the Late Payment of Commercial Debts (Interest) Act 1998 and the Consumer Protection Act 1987; these are listed in *Chitty on Contracts*, London, Sweet and Maxwell, (29th ed, 2004 and First Supplement, 2004) at paragraph 14-115ff, together with statutes giving effect to regimes agreed internationally for carriage of goods and passengers.

164 The original 1977 text of UCTA has been modified to implement a package of EC-imposed changes boosting the rights of consumers in contracts for the sale and supply of goods: Council Directive 99/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, OJ 1999 L171/12 (7 July 1999), implemented in the UK by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045).

165 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L 95/29 (21 April 1993), first implemented for the United Kingdom by UTCCR 1994 (SI 1994/3159), then replaced by UTCCR 1999 (SI 1999/2083, now further amended). On the background to the Directive and its scope in relation to land transactions carried out by public authorities, see Laws LJ in *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 at paragraph [53]ff.

166 The overlap and interaction between UCTA and UTCCR cause needless complications; the two Law Commissions propose to replace both with a single comprehensive statute in Law Com No 292/Scot Law Com No 199, *Unfair Terms in Contracts* (Cm 6464, 2005), following the single Law Commission CP166/Scottish Law Commission Discussion Paper 119, *Unfair Terms in Contracts* (2002); see also Britton (note 160 above) at pages 40-41 and Table 3. On implementation of the Law Commissions' proposals, see note 208 below.

167 Unlike UTCCR, UCTA does not single out non-judicial agreed dispute resolution systems as specially vulnerable to attack, though the Act's definition of an exemption clause in section

By contrast, the UTCCR are concerned with any form of unfairness in almost any contract term,[168] provided that this has not been individually negotiated and is within a B2C contract (where one party deals as seller/supplier and the other as an individual – not corporate – consumer).[169] The 1999 Regulations 'copy out' the 1993 Directive into English law, so the special judicial approaches to EC measures summarised in section A above come into play: the implementing English rules are to be interpreted 'autonomously', in line with the parent Directive and the Luxembourg caselaw.[170] As in UCTA, tests guide the courts, the 'Grey List' in Schedule 2 of the Regulations giving examples of potentially unfair terms; this comes verbatim from the Annex to the Directive. Paragraph 1(q) shows a concern with access to courts close to article 6(1) of the Convention, mentioning terms having the object or effect of:

> 'Excluding or hindering the consumer's right to take legal action, or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration ...'

The *Oceano Groupo* cases in the ECJ,[171] together with *Zealander* from the TCC,[172] show that an ADR clause – adjudication, as well as arbitration –

13(1) includes one making the enforcement of a liability 'subject to onerous or restrictive conditions'; 'restricting any right or remedy in respect of the liability'; or 'excluding or restricting any rules of evidence or procedure'. If a contractual term can be fitted within any of these extended definitions, it is putatively unfair and unenforceable, unless rescued by the party seeking to rely on it showing that it is reasonable, by reference to the guidelines contained in Schedule 2 to the Act. All recent construction-related cases, so far as known, concern UTCCR alone.

168 Under the Directive, terms defining the main subject-matter of the contract and the price/quality ratio of the goods or services supplied are outside its scope, though this is under review: see note 209 below and its linked main text.

169 A corporate body not acting (nor holding itself out as acting) in the course of its business can be protected under UCTA, which also confers a limited form of protection on B2B contracts, if one party deals 'on the other party's written standard terms of business' (section 3(1)). The Arbitration Act 1996, section 90 extends the scope of UTCCR to arbitration agreements where the consumer is a company or partnership obtaining goods or services other than for the purposes of its business, as exemplified by *Heifer* (see notes 189-190 below and their linked main text); under section 91, an arbitration agreement with a consumer (in this specially extended sense), if not individually negotiated, is statutorily unfair if it requires the consumer to submit a claim for a pecuniary remedy of under a prescribed sum to arbitration, currently £5,000 in England, Wales or Scotland. Beyond the £5000, such an agreement falls under the general UTCCR controls on fairness. These provisions and other parts of paragraph 1(q) are considered – with no clear conclusions – in *Zealander*: note 172 below. In *Mylcrist* (note 193 below), Ramsey J pointed out at paragraph [35] that there is no definition of 'pecuniary remedy' making clear whether the £5000 limit includes VAT as part of a claim, but concluded that it did.

170 See note 33 above and its linked main text, also *Garland v British Rail* [1983] 2 AC 751, HL and *Marleasing* in the ECJ (note 34 above). Michael Shillig identifies and analyses ten ECJ judgments on the Directive in 'Inequality of bargaining power versus market for lemons: Legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms' (2008) 33 Eur Law Review 336.

171 *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (Joint Cases C240/98 - 244/98), [2000] ECR I-4941, ECJ; see also note 3 above and its linked main text and the discussion by Simon Whittaker in 'Judicial Interventionism and Consumer Contracts' (2001) 117 LQR 215; see

can fit within this paragraph (as could a choice-of-law or jurisdiction clause), if unfair in all the circumstances of the contract, assessed by reference to the time it was entered into. To show unfairness, though, there are further tests, including 'significant imbalance' between the parties, to the consumer's detriment, and the un-English concept of 'contrary to the requirement of good faith'.[173] If a term is written, it may also fail the test of fairness unless it is in 'plain, intelligible' language – if not, it will be construed against the party relying on it.

Applying UTCCR to ADR in construction

The first quartet of cases (2002-2004)

In a construction context, an important limitation on the scope of UTCCR is Regulation 4(2)(a), which repeats the rule in the Directive protecting mandatory statutory or regulatory provisions, including those which apply if the parties fail to opt out, against challenge.[174] This undoubtedly covers the adjudication and other provisions of HGCRA and the Scheme. As a result, only terms *not* required by the HGCRA, *not* in the Scheme (if applicable), or in a contract to which the HGCRA does *not* apply, are subject to potential control on fairness grounds. The well-known first wave of cases exploring the fairness of construction adjudication – *Picardi, Legg and Carver, Beckingham* and *Bryen & Langley*[175] – were potentially all within UTCCR, since each contract:

(a) had an individual consumer as employer;

(b) contained (or allegedly contained) adjudication provisions deriving from a standard form, so 'not individually negotiated';[176] and

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also *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (Case C-237/02) [2004] 2 CMLR 13, ECJ.

172 In *Zealander & Zealander v Laing Homes Ltd* (2000) 2 TCLR 725, TCC (a case on UTCCR 1994), Judge Havery QC concluded that the arbitration clause with new-build buyers of domestic dwellings under the then wording of the NHBC 'Buildmark' warranty was unfair. The outcome and reasoning are criticised in the unsigned editorial note which follows the report of the judgment.

173 It is not clear whether these are two separate tests or aspects of a single test: see the Law Commissions' Consultation Paper (note 166 above) at paragraph 3.57ff, also the Lords' speeches in *Director General of Fair Trading v National Bank plc* [2001] UKHL 52, [2002] 1 AC 481.

174 Article 1(2) of the Directive: see the main text to note 57 above. Section 29(1)(a) of UCTA protects terms 'authorised or required' by legislation against challenge: apparently a wider test.

175 *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), [2003] BLR 487; *Lovell Products v Legg and Carver* [2003] BLR 452, TCC; *Westminster Building Co Ltd v Beckingham* [2004] EWHC 138 (TCC), [2004] BLR 163; and *Bryen & Langley Ltd v Boston* [2004] EWHC 2450 (TCC), [2005] BLR 28.

176 *Picardi*: CE/99 and the CIC Model Adjudication Procedure – for the current version, see note 43 above; *Legg and Carver*: JCT98 Minor Works; *Beckingham*: IFC84; and *Bryen & Langley*:

(c) was excluded from the HGCRA because it 'principally relate[d] to operations on a dwelling which one of the parties occupies, or intends to occupy, as his residence'.[177]

In each case the challenge was an 'absolute' one, arising within enforcement proceedings in the TCC after an adjudication initiated by the non-consumer party. In two, *Picardi* and *Bryen & Langley,*[178] the adjudicator's decision was void and unenforceable because the consumer convinced the court that the ADR provisions were not part of the contract. In the other two, *Legg and Carver* and *Beckingham,*[179] the decision was enforceable because the adjudication arrangements were not unfair, in part because the form containing them was used at the suggestion – or insistence – of the consumer-employer's own professional team, as it was in *Bryen & Langley* above and *Heifer* below.[180]

So in none of the four was an adjudication clause part of the contract but then unenforceable as unfair; however, in *Picardi*[181] Judge Toulmin CMG QC would have held the adjudication arrangements unfair, had they been in force, largely because of the unrecoverable costs the consumer would face as an unwilling respondent; the judge was also impressed by the fact that Parliament had, for what must have been good policy reasons, protected this class of B2C construction contract against mandatory adjudication. Taking almost the opposite view, in *Bryen & Langley* Judge Seymour QC doubted whether HGCRA-style adjudication could ever be unfair:

> 'It seems a bold thing to envisage that a procedure created and approved by Parliament for the resolution of disputes, albeit on an interim basis, by someone bound to act impartially and subject, at the enforcement stage, to a degree of supervision by the court, could properly be stigmatised as unfair or producing a significant imbalance in the rights of those potentially involved in the procedure.'[182]

JCT98 Private with Quantities. Contrast the 'not individually negotiated' test in UTCCR with the 'on the other party's written standard terms of business' test under UCTA: see Britton (note 160 above) at pages 36-39.

177 HGCRA, section 106(2).

178 *Picardi* and *Bryen & Langley:* see note 16 above.

179 *Legg and Carver* and *Beckingham*: see note 175 above. For a County Court case reaching a similar conclusion, see note 204 below.

180 *Heifer*: note 189 below.

181 *Picardi*: see note 16 above.

182 *Bryen & Langley* (note 16 above), paragraph [46]. Whether Judge Seymour would have felt so clear about the fairness of adjudication in the face of a clause under which the referring party always paid both parties' costs (see the main text to note 42 above) is not known. There is now *Munckenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), concerning two terms in the RIBA SFA/99 form. In case of formal proceedings (litigation or arbitration) arising out of

So this quartet of cases leads to no simple conclusions about the fairness of contractual adjudication. Procedurally, though, it shows that the consumer party seems to face no difficulty raising the unfairness issue in court, whether or not s/he has done so in the adjudication – a point confirmed in later caselaw below.

The latest caselaw trio (2007-2008)

Domsalla v Dyason[183] from 2007 extends the sequence described above: a construction professional, employed under the JCT98 Minor Works form to demolish and rebuild the individual consumer's fire-damaged Surrey house,[184] attempted to enforce an adjudicator's decision requiring payment by the employer. The employer argued that the adjudicator had no jurisdiction;[185] but that, if he did, the adjudication clause was unenforceable under UTCCR, along with the notice requirements for an employer's set-off or counterclaim. Unsurprisingly, both these JCT clauses were in fact HGCRA-compliant, though the contract on the facts fell within the residential occupier exception. The adjudicator had excluded the employer's cross-claims from consideration, rejecting both claims of unfairness.

In the TCC, Judge Anthony Thornton QC held that the adjudication was presumptively valid, so its potential unfairness was a live issue. Aware of the courts' well-established caution in permitting challenges to adjudicators' decisions,[186] he put the question: if an issue under UTCCR has been raised before – and determined by – the adjudicator, can the court reopen it? He concluded that it could, as a matter of public policy, to ensure that the consumer's statutory protections were not ignored at the

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a dispute, the employer (in the case a 'consumer') was to indemnify the architect for all his legal and other costs, if the architect successfully claimed against the employer or if the employer failed in a claim against the architect. Unpaid invoices from architect to employer attracted interest at 8% over base rate after 30 days. Judge Richard Havery QC found both terms unfair under UTCCR as an imbalance to the detriment of the consumer.

183 *Domsalla v Dyason* [2007] EWHC 1174 (TCC), [2007] BLR 348, 112 Con LR 95.

184 This complicated the legal situation, since the reinstatement was under an insurance policy with a subrogation clause, so the judge had to consider whether the employer was an agent for his insurer in making the contract with the building contractor, concluding that he was (the principal being disclosed), but was also liable himself on the construction contract as principal.

185 Unlike other cases discussed in the essay, the employer's argument was not about the status of the adjudication clause as a contract term. He claimed instead (unsuccessfully) that the wording of the clause gave the adjudicator jurisdiction only if acting under the HGCRA – not the case where the employer was a residential occupier. The judge also found that in any event the parties had entered into an ad hoc adjudication agreement after the dispute arose.

186 This tradition, born of a concern not to undercut by judicial intervention the 'quick and dirty' (more politely: 'pay first, argue later') procedures Parliament had introduced, began with *Macob*: note 9 above.

crucial enforcement stage.[187] He followed *Bryen & Langley*[188] in holding an HGCRA-style adjudication clause not unfair in the context; but thought the withholding notice provisions unfair under several heads of the 'Grey List', so enforcement of the adjudicator's decision could not go ahead.

From late 2007 comes the first of a pair of cases about the possible unfairness of arbitration. In *Heifer v Christiansen*[189] Judge Toulmin CMG QC had to decide what contracts (if any) had been made between the (corporate) employer and five different Danish consultants and suppliers of construction services for refurbishment of another Surrey house. Was the applicable law Danish, including the AB92 standard form which appointed the Danish Arbitration Board as arbitral tribunal, giving it power to decide any disputes 'finally and conclusively'? If it was, the employer argued that this arbitration clause was unfair under UTCCR, so no stay to arbitration should be ordered; if it was not, the defendants argued that Danish, not English, courts should hear the action.[190]

The judge concluded that there was a valid arbitration clause in writing – not individually negotiated – between the employer and four of the defendants, so attracting the statutory 'stay' rules[191] but also the UTCCR.[192] It was not, he thought, unfair to the employer-consumer to have to institute arbitral proceedings in Denmark, though these would be conducted in Danish: the employer had specifically wanted Danish consultants and construction specialists for the project and retained Danish lawyers, whose initiative led to AB92, with its arbitration clause, being

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187 This echoes the *Oceano Groupo* cases (note 171 above), where the ECJ said that national courts and tribunals had a duty to raise unfairness issues of their own motion, in order more effectively to protect consumers under the Directive.

188 *Bryen & Langley Ltd v Boston* (see note 175 above and its linked main text.

189 *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] Bus LR D49.

190 The court was applying the Brussels Convention of 1968, replaced from 1 March 2002 by the very similar Council Regulation (EC) 44/2001 of 22 December 2000 (Brussels I), OJ 2001 L 12/1 (16 January 2001) between all EC members except Denmark, under its 'opt-out' from Title IV TEC. Implementation for the UK took effect under the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929 (now further amended). Where Denmark and EEA members are concerned, the Brussels and Lugano Conventions (as amended) at present remain in force, though Denmark entered into a 'parallel agreement' with the EC to apply Brussels I, taking effect in 2007. On 30 November 2007 Lugano II, closely similar to Brussels I, was signed between the EC, Denmark and the three EFTA states of Iceland, Norway and Switzerland. Since all the defendants in *Heifer* were resident in Denmark, the court had to make sense of the distinction in the Brussels Convention between 'matters relating to contract' under article 5(1) and 'matters relating to tort, delict and quasi-delict' under article 5(3), the connecting factor for each being different. The judge relied in particular on *Fonderie Officine Meccaniche Tacconi SpA v HWS Maschinenfabrik GmbH* (case C-334/00) [2002] ECR I-7357, ECJ, where in a preliminary ruling the court held at paragraphs 19-23 that these concepts have an independent Community identity, actions where there was 'no obligation freely assumed by one party to another' falling under article 5(3). See generally Adrian Briggs' and Peter Rees' masterly and incisive *Civil Jurisdiction and Judgments*, London, LLP (4th ed, 2005).

191 Arbitration Act 1996, section 9.

192 For the extension of UTCCR to corporate consumers in relation to arbitration, see note 169 above.

adopted for the first agreement and 'cascaded' down to the rest of the project team.

Finally, from 2008 there is *Mylcrist Builders Ltd v Buck*.[193] Like all the cases in this section, it concerns a claim made by a construction professional against an individual employer within a domestic construction project – here, to add an extension to the Herne Bay bungalow of the employer, Mrs Buck. As in *Heifer*, the contract provided for arbitration, not adjudication; this was one of the building contractor Mylcrist's own standard terms, to which Mrs Buck agreed by signing and returning a copy of a letter containing them.[194] Part way through the project, a dispute arose about which figures were, or were not, included in the agreed price. The builders started arbitration proceedings, in which Mrs Buck (on advice) took no part; this led to an award finding her liable in contract, plus Mylcrist's costs and the arbitrator's own fees, totalling over £12,000, with interest on top.

Mylcrist then attempted to enforce the award in the TCC; Mrs Buck (appearing in person) resisted this on two grounds: (i) the arbitrator had not been validly appointed; and (ii) the arbitration clause was an unfair contract term under UTCCR 1999, so should not be enforceable against her. Ramsey J agreed with Mrs Buck on both grounds – significantly, there was no argument from her builders that she was prevented from raising the unfairness point in court by having failed to take part in the so-called arbitration.

In relation to (i) the judge held that since the rudimentary arbitration clause[195] said nothing about appointing the arbitrator, the default powers of the Arbitration Act 1996 applied, requiring either joint appointment by the parties or, failing that, by the court.[196] Neither had taken place. In relation to (ii), the judge recognised that under the UTCCR an arbitration clause does exclude or hinder a consumer's right to take legal action in the traditional court sense. It could, along lines discussed in earlier caselaw,[197] cause a significant imbalance between a professional and a lay person to that person's detriment – a disadvantage not obvious unless adequately

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193 *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC), reported by Westlaw as 2008 WL 3996507.

194 'Should any other disagreement arise in connection with or out of this contract the matters in dispute shall be referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force.'

195 Note 194 above.

196 Arbitration Act 1996, sections 16(3) and 18.

197 Notably the House of Lords in *DGFT v First National Bank plc*: note 173 above.

drawn to the consumer's attention before s/he agreed to the contract containing it:[198]

> '... whilst the box signed by Mrs Buck properly drew her attention to the existence of terms, the impact of the arbitration clause would not be apparent to a layperson and was not apparent to Mrs Buck who was not aware of its effect, as her subsequent conduct shows. The requirement of fair and open dealing means that for consumer transactions the arbitration clause and its effect need to be more fully, clearly and prominently set out than it was in this case. I do not consider that the reference in paragraph 11 of the Contract to matters in dispute being "referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment" can be said to be sufficient. Equally, whilst there is no suggestion that the Claimant deliberately took advantage of Mrs Buck's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract or weak bargaining position, I consider that the Claimant by including arbitration in the Claimant's standard terms did take such disadvantage, albeit unconsciously. ...'[199]

As the judge said, if Mrs Buck had understood the impact of the arbitration clause, she would probably have been surprised by it and have objected to its inclusion. Unlike several of the earlier cases, there was no evidence that any professional adviser of Mrs Buck's was involved in drafting or selecting the contract.[200] Ramsey J therefore concluded that the factors which led to the arbitration clause in *Heifer*[201] being enforceable were not present; instead, he explicitly followed Judge Havery's approach in *Zealander*[202] to protect a consumer faced with an arbitration clause.

As this suggests, a contractual dispute resolution clause is not protected from challenge as unfair merely because it provides machinery which both sides are equally free to activate; it is the substance of the contractual procedure and how well or badly it compares with traditional litigation from the consumer's point of view which really determines the issue, as well as the communication questions discussed in the quotation above. Had the dispute resolution clause provided instead for HGCRA-type

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198 This echoes the common law argument exemplified in the oft-cited dicta of Lord Denning MR in *Spurling v Bradshaw* [1956] 1 WLR 461, CA at page 466: '... the more unreasonable a clause is, the greater the notice which must be given of it' [for it to successfully form one of the terms of the contract]. This approach was later approved in *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1989] QB 433, CA. Perhaps regrettably, signature by the consumer of the document containing the term – as in *Mylcrist* itself – whether s/he has read it or not, seems still to foreclose all such arguments, at least in English law: *L'Estrange v Graucob* [1943] 2 KB 394, Div Ct KBD. See also note 161 above and its linked main text.

199 *Mylcrist* (note 193 above) at paragraph [56].

200 See the main text to note 180 above.

201 *Heifer*: note 189 above and its linked main text.

202 *Zealander*: note 172 above.

adjudication, Ramsey J's approach to the European-derived tests for unfairness on the facts of Mrs Buck's case could well have led to the same outcome in court, despite what Judge Seymour said in *Bryen & Langley*.[203]

Mylcrist is therefore the only one of this sequence of seven recent B2C construction cases where a form of ADR has been held to be an unfair contract term (and hence unenforceable) under the 1999 Regulations. However, three of the seven ended with the decision or award not being enforced; in the three where the whole ADR procedure turned out to be a nullity, the adjudicator or arbitrator could probably still claim his fees – so a party who had already paid could not therefore claim these back.[204]

E Conclusions

The law as it is

As the exceptional character of *Mylcrist* above shows,[205] this essay has charted only a few actual successes in challenging ADR, whether mandatory or in a purely contractual context; but it has shown that the possibilities are there. In particular, the current statutory apparatus of adjudication under the HGCRA has not yet sustained a frontal attack under the Convention, though its failure to guarantee hearings, publicity and a timescale adequate for a responding party to participate effectively in the adjudication make it vulnerable to such an attack; and the TCC's limited willingness to intervene is unlikely to save the whole structure, if the adjudication stage fails to respect article 6(1). However, the freedom the statute gives to parties to opt out of the default Scheme and adopt their own adjudication provisions, combined with the idea of waiver by the parties of Convention rights, limits the scope for challenge, though by precisely how much remains unclear. The basic statutory structure, combined with the Scheme, might survive a challenge to its compatibility with article 6(1); on any test, it seems safe under the law on unfair contract terms.

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203 See the main text linked to note 182 above.

204 See Coulson (note 43 above), paragraph 11.12ff, also *Cartwright v Fay* (judgment of District Judge Rutherford, Bath County Court, 1 February 2005): on failure of the responding party's arguments that the adjudication procedure under the JCT Home Owner/Occupier form was not part of the contract or, if it was, was an unfair contract term, the adjudicator could recover that party's share of his fees by relying on the Contracts (Rights of Third Parties) Act 1999. An invalid adjudication could perhaps also be seen as a restitution and mistake of law situation, as in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, HL, now considered in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561, [2007] 4 All ER 657: see Judge Anthony Thornton QC, 'Compound interest and financing claims: the *Sempra Metals* revolution', SCL paper 150 (October 2008).

205 *Mylcrist v Buck*: note 193 above and its linked main text.

The scope for challenge is greater where ADR is contractual – even adjudication patterned on the 1996 Act – rather than mandatory; in such situations, UCTA may have more to offer than has yet been explored. The frequent factual overlap between the 'residential occupier' exception in the HGCRA and the 'natural person' normally required by UTCCR creates possibilities for challenges on unfairness grounds within B2C construction contracts which are simply not there in the more usual B2B situation. The recent caselaw shows that in relation to adjudication beyond the mandatory reach of the HGCRA, as well as to arbitration and to other terms in standard forms, a consumer can score the odd success. This is likely also to be true for challenges to adjudication provisions beyond the minimum requirements of the HGCRA, provided that the person alleging unfairness is able to invoke the protection of UTCCR.

The most fertile ground for challenges to ADR in the future lies, we suggest, within traditional civil procedure: the delicate reconciling of litigants' fundamental rights with active case management under CPR, in which the main battleground seems to be that of costs allocation after the event. Here tensions are evident between those judges who are willing interventionists, eager to penalise parties who behave unreasonably, even within ADR, and those who accept that ADR will simply fail to deliver the goods if it is open to retrospective judicial scrutiny. The CPR will remain centre-stage in resolving such conflicts, but article 6(1) of the Convention is certainly present in the wings. The well-established and secure position now held by adjudication – to be reinforced by the Construction Contracts Bill[206] – will make caselaw on court-encouraged ADR (and its costs implications) slow to emerge in a construction setting. Issues arising in other economic sectors will therefore deserve careful attention.

The law as it may become

Observers should keep an eye out for the measures which the UK will adopt to transpose the 2008 Mediation Directive into domestic law, as these will take effect within civil procedure and will not necessarily be limited to cross-border situations. They should also watch for implementation of the Law Commissions' 2005 report on the whole of the law on unfair contract terms.[207] This proposes to integrate into one statute both UCTA and UTCCR, with a unified conceptual structure, along the way varying in detail the scope of protection. Like all such

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206 See note 46 above and its linked main text.
207 See note 166 above.

reports, it depends primarily on Government for a place in the legislative programme.[208]

At the EC level, the Commission launched a consultation in 2007 to assist its review of the many European measures protecting consumers.[209] On the table in Brussels are suggestions to extend the scope of the Unfair Contract Terms Directive, perhaps abandoning its 'minimum harmonisation' approach in order to guarantee greater uniformity across all member-states. For example, the terms 'professional' and 'consumer' could be adopted across the board, replacing the confusingly varied terminology now used to define the scope of protection. This would almost certainly mean that terms in a wider range of contractual contexts would become subject to challenge on unfairness grounds. More specifically, the Directive could be extended to individually negotiated contracts (not just applying to those which are not, as now) and to terms defining the main subject-matter of the contract and the price/quality ratio of the goods or services supplied (at present also outside its scope). Further, the status of the 'Grey List' of terms may be rethought, with an overarching 'good faith' duty as a long-stop.

Adopting new or revised measures along these lines forms one pillar of the EC's Consumer Strategy 2007-2013,[210] which increases the chances of new measures from Brussels, at least in the medium term (remembering the traditional delay allowed for national implementation of European measures, if in Directive form). When any or all of the changes above become positive law, the scope for unfair contract term arguments in construction – specifically, challenges to dispute resolution provisions beyond the scope of the HGCRA – will at a stroke become markedly greater.

November 2008

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208 In July 2006 the Government told the Law Commissions that it accepted their recommendations, subject to a Regulatory Impact Assessment. If the assessment proved favourable, the Department of Trade and Industry would seek an opportunity to introduce appropriate legislation as soon as practicable, which on devolved matters would also involve Scottish Ministers and the Scottish Parliament. No further progress appears to have been made, and in June 2007 the baton passed from the DTI to its main successor BERR.

209 Green Paper on the Review of the Consumer Acquis, (COM) 2006 744 final (February 2007), discussed by Shillig (note 170 above).

210 See Commission Press Release IP/07/320 (13 March 2007).