CONSENSUAL ADJUDICATION

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There are a number of features of adjudication in Australia that differ from its older brother in the UK; one of them is in the use of consensual adjudication.

THE UK EXPERIENCE

In the UK, adjudication was to be found, albeit in a limited form, in certain standard forms (particularly the Green Form and the Blue Form of subcontract) for some years before it was clothed with any statutory status. Even when the *Housing Grants, Construction and Regeneration Act* was passed in 1996, it brought adjudication in, not as a rigid statutory system, but as a requirement that construction contracts contain a compliant adjudication provision, failing which a statutory scheme would be implied into the contract. And so the message was, 'Put your own adjudication agreement in place, or the legislation will do it for you'.

Certain contracts were excluded, including domestic contracts and oil and gas contracts. It is not hard to see why domestic contracts were excluded: the consumer legislation represents a minefield, and the draftsmen of the legislation felt it was just too difficult to draft something in the domestic field that would be free from challenge. There was nothing very noble about this, since of course it is domestic employers who would most benefit from a quick, cheap and accessible system for resolving their disputes with their builders (except, perhaps, only those poor small builders faced with the nightmarish task of getting paid relatively small amounts by difficult clients).

As it happens, however, it has become not uncommon for parties to domestic contracts to include adjudication clauses in their contracts. There is no reason why they should not do so; the mere fact that there is no statutory right to adjudication in domestic building contracts does not prevent the parties agreeing to adjudicate.

It is perhaps unsurprising that these consensual adjudications have been challenged, and in *Picardi v Cuniberti*[1] an adjudication clause in the RIBA terms of engagement was struck down pursuant to the Unfair Terms in Consumer Contracts Regulations 1999; Judge Toulmin characterised an adjudication clause in a consumer architect engagement as 'clearly an unusual provision which must be brought to the specific attention of the lay party if it is later to be validly invoked'.

But since then, there have been several English cases in which the *Picardi* line has not been followed, and in which the courts have regarded it is entirely fair for the parties to agree to adjudication, even in a domestic context, if they want to:

- In *Lovell v Legg and Carver*,[2] an adjudication clause in a residential building contract was found to be not unfair.
- In *Westminster Building v Beckingham*,[3] an adjudication clause in a domestic building contract was upheld.
- In *Cartwright v Fay*[4] *Picardi* was construed very narrowly and distinguished; an adjudication provision in a domestic building contract was again upheld.
- Similarly, in *Allen Wilson v Buckingham*[5] Judge Coulson followed the *Westminster v Beckingham* line, and again narrowed *Picardi*.
- In *Bryen & Langley v Boston*[6] the Court of Appeal found that the Regulations could not bite because the term in question had not been 'imposed' on the consumer.[7]

APPLICATION TO AUSTRALIA

Is there any reason why the same approach should not be taken in Australia? There seems to be little evidence so far that parties have made consensual adjudication agreements in cases where the Security of Payment legislation does not bite (e.g. in construction contracts in South Australia or Tasmania, where the legislation has not yet arrived, or in excluded areas such as domestic contracts in other states). But could that change?

On one analysis, the commercial climate in Australia is different from that in England, since there are no standard forms of adjudication agreement that the parties can adopt 'off the shelf'. But in principle there seems to be no jurisprudential reason why an adjudication agreement, freely entered into by contracting parties, should not be given just as much effect in Australia as in the UK or elsewhere in the common law world.

WHAT IS ADJUDICATION?

In Security of Payment cases to date, the courts in Australia have not been much troubled by this question. The statutes contain their own enforcement regimes which make little demand on jurisprudential theory.

But in the case of consensual adjudication, a number of analyses are possible, each leading to rather different enforcement consequences:

• Is the adjudication a species of arbitration, and thus within the scope of the *Commercial Arbitration Act 1986*, and the enforcement provisions at section 33?

• Is the adjudication a species of expert determination, and thus subject to much more restricted rights of challenge and appeal?

• Is consensual adjudication to be treated in the same way as statutory adjudication, on the basis that what the parties have done is to agree to bind themselves into a statutory regime?

Probably, the answer to this question will depend on the wording of the adjudication agreement. But it is worth noting that the approach of the courts in the UK has been to worry rather little about the classification of consensual adjudications, and instead to treat them in exactly the same way as they treat statutory adjudications.

WHY BOTHER WITH CONSENSUAL ADJUDICATION?

The reasons why parties in Australia might want to agree to a consensual adjudication in Australia include those which make it relatively popular in the UK (i.e. to take advantage of a rapid, economical system in a case where, for one reason or another, the statutory regime has not extended). But further, there may be real advantages in a system in which the parties can agree a much more flexible system. Particularly in large or complex cases, the parties might want to agree a longer time period, so that the adjudicator can much better understand and evaluate the issues, with proper opportunity for fact finding and proper oral submissions. In all cases, the parties may benefit from being able to choose their own adjudicator, instead of being straight jacketed by an ANA.

CONSENSUAL ADJUDICATION'S PLACE IN THE STATUTORY FRAMEWORK

What would be the position if the parties to a construction contract in a state with Security of Payment legislation in place were to agree a consensual adjudication regime, tailored to their own wishes and needs? As far as we are aware, there is no example of this yet being done in Australia, but the position may well be as follows:

• The consensual adjudication could not displace the right of the parties to a statutory adjudication, but there would be no compulsion for them to take the statutory route. Indeed, if the parties have agreed a consensual adjudication regime that they both regard as more satisfactory that the statutory route, it is unlikely that they would want to invoke the statutory right to adjudicate.

• The mere fact that there may be a right to statutory adjudication would seem not, as a matter of principle, to afford any reason why the consensual regime, and its outcome, would not be enforced.

• It is possible, in principle, albeit unlikely that two adjudications, a consensual one and a statutory one, might run either at the same time or in succession.

WILL CONSENSUAL ADJUDICATION TAKE OFF IN AUSTRALIA?

We will have to wait and see. But insofar as patterns tend to replicate themselves around the common law world, it is quite possible that, as parties get more and more used to the advantages of adjudication and, at the same time, more conscious of the difficulties caused by the intense restrictions on it under the Australian statures, a desire for consensual adjudication in one form or another may well emerge.

REFERENCES

1. [2002] EWHC 2923 (QB), CILL 1980, 19 Const LJ (2003) page 350

2. (2003) TCC.

3. [2004] EWHC 138 (TCC)

4. (2005) Bath County Court, www.adjudication.co.uk

5. [2005] EWHC 1165 (TCC)

6. [2005] EWCA Civ 973

7. Rimer LJ at para 40:

It follows, in my view, that in assessing whether a term that has not been individually negotiated is 'unfair' for the purposes of Regulation 5(1) it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the requirements of fair dealing.

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