# Dispute Resolution

*Contributing editors*
**Martin Davies and Kavan Bakhda**

2018

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**Latham & Watkins**

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# Introduction

**Martin Davies and Kavan Bakhda**

**Latham & Watkins**

Welcome to the 2018 edition of *Getting the Deal Through – Dispute Resolution*. It gives us great pleasure to act as contributing editors of this publication (and co-authors of the England & Wales chapter) together with experts from numerous other jurisdictions.

The legal industry's evolution remains inextricably linked to the external factors surrounding it. Developments over the last year, as with recent years before it, have taken place against a backdrop of continued technological advancement and a degree of political uncertainty across the world. From the turn of the century, digitalisation has had a tremendous impact in virtually all professional fields. Its impact seems to proliferate year on year, and 2017 was no different. The legal industry, often associated with rich history and time-honoured traditions, has had to find a way to keep pace with technological advances.

Parties are demonstrating greater concern regarding cybersecurity and data protection. Across the EU, the implementation of the General Data Protection Regulation (GDPR) will undoubtedly mark a significant development in data use and the law generally. While of course the number and nature of disputes arising out of the new regulation is uncertain, an increase in compensation claims for data protection breaches can confidently be expected.

As for the influence of technology on procedure, here in England and Wales the government took further steps in 2017 to implement its 'Transforming our Justice System' vision. A pilot online facility was launched for civil money claims of up to £10,000 in the County Court, and electronic filing became compulsory for claims within the Rolls Building, providing greater ease with which to manage filings and pay court fees. Teething problems may be expected in the overhaul of any long-established procedure, but such changes seek to take advantage of the technology now available, and promise the fruits of greater efficiency and control for parties, litigators and courts alike.

Political uncertainty in some regions of the world, and the outcome of Brexit, will also continue to influence the legal industry in many jurisdictions. However, this does not yet appear to have put litigants off from considering the courts of England and Wales as one of the eminent centres for dispute resolution. The 'Great Repeal Bill', which aims to maintain the status quo of European law in the UK in the immediate future, remains subject to ongoing scrutiny. Meanwhile, a long-term framework for the UK post-Brexit remains to be seen. Nonetheless, in the year ahead we eagerly anticipate greater clarity on the eventual shape of dispute resolution in the UK, the effects of which may resonate across Europe and jurisdictions across the world.

Finally, we would like to thank each of the authors for their insight and contributions to this year's edition.

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# England & Wales

**Martin Davies, Kavan Bakhda and Yasmina Borhani**

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## Litigation

### 1 Court system

**What is the structure of the civil court system?**

The civil court system is made up of a number of courts and tribunals, which range from specialist tribunals such as the Employment Tribunal, the County Courts, through to the High Court, the Court of Appeal and the Supreme Court. A claim will be issued or heard in one of these courts or tribunals depending on the nature, value and status of the claim.

There are approximately 130 County Courts (including combined courts), each of which hears cases in certain geographical catchment areas. Cases in the County Court will ordinarily be heard where the defendant resides. Money claims with a value up to and including £100,000 and claims for damages for personal injury with a value up to £50,000 must be started in the County Court. These thresholds are subject to exceptions, eg, claims falling within a specialist court, which raise questions of public importance, or which are sufficiently complex so as to merit being heard in the High Court. Equitable claims up to a value of £350,000 must also be started in the County Court. The above thresholds indicate that parties are encouraged to commence proceedings in lower courts where possible, albeit that complex, high-value litigation is unaffected.

The Civil Procedure Rules (CPR) clarify which County Court must hear specialist claims, such as probate, intellectual property and claims in certain insolvency proceedings.

The High Court has three divisions: the Queen's Bench Division, the Chancery Division and the Family Division.

As of April 2018, there were approximately 71 judges in the Queen's Bench Division and 15 judges in the Chancery Division. With regard to the Family Division, judges who sit in the High Court can hear all cases relating to children and have exclusive jurisdiction in wardship.

The Queen's Bench Division deals with most claims in contract and in tort.

The Chancery Division deals with claims involving land, mortgages, execution of trusts, administration of estates, partnerships and deeds, corporate and personal insolvency disputes, as well as with some contractual claims (there is some overlap with the Queen's Bench Division in respect of contractual claims).

There are specialist courts within the High Court, including the Commercial Court, the Admiralty Court and the Technology and Construction Court in the Queen's Bench Division, and the Bankruptcy Court, Companies Court and Patents Court in the Chancery Division.

In addition, in October 2015, a specialist Financial List was created to handle claims related specifically to the financial markets. The objective of the Financial List is to ensure that cases that would benefit from being heard by judges with particular expertise in the financial markets or that raise issues of general importance to the financial markets are dealt with by judges with suitable expertise and experience. A test case scheme was piloted in the Financial List until September 2017. Under this scheme, parties could seek declaratory relief without the need for a cause of action. Now, a claim may be brought on the basis that it raises issues of general importance to the financial markets. Interested parties may intervene in the proceedings. There is also a general rule that parties bear their own costs. Claims in the Financial List may be started in either the Commercial Court or the Chancery Division.

As of July 2017, the Business and Property Courts were launched as an umbrella for the specialist courts and lists of the High Court, and include the Chancery Division, the Technology and Construction Court, the Commercial Court, the Mercantile Court, the Admiralty Court, the Financial List, the Companies and Insolvency Court, the Patents Court, the Intellectual Property and Enterprise Court and the Competition List.

The Civil Division of the Court of Appeal hears appeals from the county courts and from the High Court.

An extensive review of the structure of the civil court system commissioned by the Lord Chief Justice has been undertaken by Lord Justice Briggs and was published in July 2016 (the Briggs Report). The report sets out a number of recommendations to modernise the current system (in particular, to encourage the development of digital systems to transmit and store information and to create easier access to justice for individuals and small businesses) and suggests urgent measures to ease the current workload of the Court of Appeal.

As a result, a number of changes to the appeals process came into force on 3 October 2016. These include changes to the route of appeal so that, subject to certain exceptions, appeals from both interim and final decisions in the County Court now lie with the High Court instead of the Court of Appeal.

Another of the key suggested changes of the Briggs Report is the creation of an online court which would deal with simple claims up to a value of £25,000. The intention is that this would be a largely automated system that would be used by litigants in person without needing to instruct a lawyer. Whether this will be a separate court, or a branch of the County Court remains under discussion.

As of April 2018, HM Courts & Tribunals Service has introduced Civil Money Claims, an online facility to start an action in the County Courts for amounts of up to £10,000. This could represent the first step towards Lord Briggs' online courts being launched.

Also under discussion is the increase of the threshold for issuing a claim in the High Court to £250,000, with a further increase to £500,000 at a later stage, as well as applying this threshold to all types of claims. However, at the time of writing no such changes have been announced.

The Supreme Court is the final court of appeal. It hears appeals from the Court of Appeal (and in some limited cases directly from the High Court) on points of law of general public importance.

The Judicial Committee of the Privy Council, which consists of the Justices of the Supreme Court and some senior Commonwealth judges, is a final court of appeal for a number of Commonwealth countries, as well as the United Kingdom's overseas territories, Crown dependencies and military sovereign bases.

### 2 Judges and juries

**What is the role of the judge and the jury in civil proceedings?**

Judges are appointed by the Judicial Appointments Commission (JAC), an executive, non-departmental public body sponsored by the Ministry of Justice. The application process involves qualifying tests and independent assessment and candidates must meet the eligibility and good character requirements.

A Judicial Diversity Committee was set up in 2013 with the aim of promoting diversity on the bench. The most recent judicial diversity



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statistics report that female judges make up 24 per cent of the Court of Appeal, with the percentage increasing to 45 per cent for tribunals. Of those judges who declared their ethnicity, the percentage who identify as Black, Asian and Minority Ethnic is 7 per cent in courts, and 10 per cent in tribunals.

Civil cases are generally heard at first instance by a single judge. Exceptions include claims for malicious prosecution, false imprisonment, and exceptionally, if a court so orders, defamation. In these cases, there is a right to trial by jury.

While the introduction of the CPR in 1999 has, to some extent, altered the role of the judge in civil proceedings by encouraging the court to take a more interventionist management role, the civil justice system remains adversarial. Accordingly, the judge's role during the trial is generally passive rather than inquisitorial. Lord Denning pointed out in *Jones v National Coal Board* [1957] 2 QB 553 that 'the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large'.

Nevertheless, the recent case of *Kazakhstan Kagazy Plc & Ors v Zhunus* (Rev 1) [2015] EWHC 996 (Comm) emphasises the courts' increased involvement in scrutinising the conduct of parties during proceedings. In that case, Walker J gave guidance on the approach expected from parties to commercial litigation, which included advice that solicitors and counsel should take appropriate steps to conduct the debate, whether in advocacy or in correspondence, in a way that would lower the temperature rather than raise it.

## 3 Limitation issues

**What are the time limits for bringing civil claims?**

Most limitation periods are laid down by the Limitation Act 1980. The general rule for claims in contract and in tort is that the claimant has six years from the accrual of the cause of action to commence proceedings. Exceptions include the torts of libel, slander and malicious falsehood for which there is a one-year limitation period. The limitation period for making a personal injury claim is three years.

In contract, the cause of action accrues on the date of the breach of contract, whereas in tort it accrues when the damage occurs (unless the tort is actionable without proof of damage).

The limitation period for a claim under a deed is 12 years from the breach of an obligation contained in the deed.

Where any fact relevant to the claim has been deliberately concealed by the defendant, or where an action is based on the alleged fraud of the defendant, time does not run until the concealment or fraud is discovered, or could have been discovered with reasonable diligence.

## 4 Pre-action behaviour

**Are there any pre-action considerations the parties should take into account?**

The parties must consider the potential impact of their behaviour at the pre-action stage of any dispute.

They should comply with the relevant pre-action protocol or, where a pre-action protocol is silent on the relevant issue or there is no specific pre-action protocol for the type of claim being pursued, a party should follow directions in the Practice Direction on Pre-action Conduct and Protocols (PDPACP).

Pre-action protocols outline the steps that parties should take to seek information about a prospective legal claim and to provide such information to each other. The purpose of pre-action protocols is to encourage an early and full exchange of information about prospective claims, and to enable parties to consider using a form of alternative dispute resolution (ADR), narrowing down or settling claims prior to commencement of legal proceedings. They also support the efficient management of proceedings where litigation cannot be avoided.

There are 14 protocols specific to certain types of proceedings; for example, construction and engineering disputes, professional negligence claims and defamation actions. On 1 October 2017, the most recent pre-action protocol specific to debt claims came into force.

In cases not covered by any approved protocol, the PDPACP provides general guidance as to exchange of information before starting the proceedings. Although the PDPACP is not mandatory and only states what the parties should do unless circumstances make it inappropriate, parties will be required to explain any non-compliance to the court, and the court can always take into account the parties' conduct in the pre-action period when giving case management directions and when making orders as to costs and interest on sums due.

Prior to the commencement of proceedings, a prospective party may apply to the court for disclosure of documents by a person who is likely to be a party to those proceedings.

In view of the disclosure regime introduced as part of the 2013 Jackson Reforms to civil litigation and costs (Jackson Reforms) (see question 8), parties need to consider their respective disclosure obligations far sooner than has previously been the case, even if not as part of a pre-action protocol, or claim for pre-action disclosure.

An extra weapon in the claimant's armoury is the *Norwich Pharmacal* order. Such order can be sought where the claimant has a cause of action but does not know the identity of the person who should be named as the defendant. In such circumstances, the court may order a third party who has been involved in the wrongdoing, even if innocently, to disclose the identity of potential defendants or to provide other information to assist the claimant in bringing the claim.

## 5 Starting proceedings

**How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?**

Proceedings are commenced by the issue of a claim form, which is lodged with the court by the claimant and served on the other party (see below).

The claim form provides details of the amount that the claimant expects to recover, full details of the parties and full details of the claim, which may be set out either in the claim form itself or in a separate document called the particulars of claim. The claim form and particulars of claim must be verified by a statement of truth, which is a statement that the party submitting the document believes the facts stated in it to be true.

Claimants must take care that the particulars of claim comply with the CPR and with court guidelines as they may be otherwise subject to an adverse costs order, or, if they are found to be sufficiently irrelevant, incomplete or in breach of the rules, struck out (*Ventra Investments Ltd (In Liquidation) v Bank of Scotland Plc* [2017] EWHC 199 (Comm)).

A fee is payable, on submission of the claim form, which varies based on the value of the claim. For claims above £10,000, the court fee is based on 5 per cent of the value of the claim in specified money cases (subject to a maximum of £10,000). Claims exceeding £200,000 or for an unspecified sum are subject to a fee of £10,000. In certain circumstances, court fees can be reduced for persons who fulfil the relevant financial criteria, such as those with a low income or low savings.

As of 25 April 2017, issuing claims and filing documents in the Chancery Division, Commercial Court, Technology and Construction Court, Mercantile Court and Admiralty Court (the Rolls Building Courts) is only possible through the online filing system, CE-File. Under this system, parties can file documents at court, including claim forms, online 24 hours a day, every day.

Service is effected via a number of methods, depending on the location of the defendants. Defendants domiciled in England and Wales will normally be served via post (but other methods of service, such as service upon a defendant in person, are available). A recent Supreme Court case (*Barton v Wright Hassall LLP* [2018] UKSC 12) serves as a reminder to prospective claimants to follow the rules on service set out in the CPR. In that case, the Court of Appeal refused to validate service by email on the basis that the fact that the claim had been effectively brought to the notice of the defendants was not sufficient reason to validate. The Supreme Court upheld the Court of Appeal's decision.

Defendants domiciled in the EU will normally be served by way of the EU Service Regulation (1393/2007), which provides a mechanism whereby the English courts sanction a form of registered postal service within the EU. Certain formal requirements (such as translation of the claim documents) must be complied with when using this method of service.

The European Commission launched a public consultation on the modernisation of the EU Service Regulation from December 2017 to March 2018. The purpose of this process was to collect views of stakeholders about how the Regulation operates at a practical level as well as their views as to solutions. However, at the time of writing,



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no recommendations for change have yet been published. Where a defendant is domiciled outside the EU, a claimant may be required to obtain permission from the court to serve the claim outside of the jurisdiction, after which a claimant must follow the rules of service laid down by applicable conflict of laws rules (eg, the Hague Convention).

Court permission to serve proceedings outside the jurisdiction is not required in certain circumstances, including where, although neither of the parties are domiciled in England and Wales, they have agreed to the jurisdiction of the English courts (whether exclusively or not). Permission is also not required where proceedings involving the same cause of action have already been commenced in another member state, but the parties have agreed to an exclusive English jurisdiction clause. These rules are set out in Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (Recast)) and the CPR.

On several occasions, it has been held that service of court documents via social media platforms, such as Twitter or Facebook, is acceptable, as long as certain requirements are fulfilled (such as the claimants showing that they have attempted service by more conventional means, or that there was good reason for them not doing so).

The courts, and in particular the Court of Appeal have been experiencing capacity issues that have had an impact their ability to list disputes in a timely manner. This issue has been addressed in the Briggs Report which recommends, among other things, the creation of an online court for low value claims and an increased focus on ADR (see question 1).

## 6 Timetable

**What is the typical procedure and timetable for a civil claim?**

If the defendant wishes to dispute the claim, he or she must serve a defence. In most cases (though the timetables differ between different courts), the defendant has at least 28 days from service of the particulars of claim to serve his or her defence, as long as an acknowledgement of service is filed within 14 days after service of the particulars of claim.

The timetable for service of a defence may be extended by agreement between the parties or, where the court agrees to such extension, following application by the defendant.

The court will allocate the case to either the small claims track, the fast track or the multitrack depending on various factors, including the financial value and complexity of the issues in the case. The court may allocate the case before or at the first case management conference (CMC).

The CMC enables the court to consider the issues in dispute and how the case should proceed through the courts. At the CMC, the court makes directions as to the steps to be taken up to trial, including the exchange of evidence (documentary disclosure, witness statements and expert reports). The court will fix the trial date or the period in which the trial is to take place as soon as is practicable.

Cases can come to trial as quickly as six months from issue of the claim form. Often, however, complicated cases, such as those with an international aspect or of high value, can take between one and two years, and sometimes longer.

Two pilot schemes have been introduced in the Rolls Building Courts as of October 2015 with the aim of facilitating shorter and earlier trials for business-related litigation. The schemes will be in operation until 30 September 2018.

Under the Shorter Trials Scheme, suitable cases are expected to reach trial within approximately eight months after the CMC, and have judgment handed down within six weeks after the trial. The maximum length of trial is four days including reading time. This scheme is suitable for cases that do not require extensive disclosure or witness or expert evidence.

Under the Flexible Trials Scheme, parties are able to adapt the procedures currently provided for under the CPR by agreement to suit their particular case.

## 7 Case management

**Can the parties control the procedure and the timetable?**

Under the CPR, responsibility for case management belongs largely to the court and the judge enjoys considerable powers, including control over the issues on which evidence is permitted and the way in which evidence is to be put before the court.

Nevertheless, there is some scope for the parties to vary by agreement the directions given by the court, provided that such variation does not affect any key dates in the process (such as the date of the pre-trial review or the trial itself). In certain business disputes, the parties also have the option of bringing proceedings under the Flexible Trials Scheme (see question 6) which allows the parties to adapt various procedures by agreement.

The CPR impose a duty on parties to assist the court in active case management of their dispute.

**Compliance with rules and sanctions for non-compliance**

Following the Jackson Reforms, it is extremely important to comply with all rules and orders the court prescribes as any errors and oversights will not be easily overlooked, and it may be difficult to obtain relief from sanctions imposed for non-compliance.

The Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 was the high point in the court's tough new approach to granting relief from sanctions, with parties being refused relief for minor procedural breaches.

However, the test was set out by the Court of Appeal the following year in the leading case of *Denton v TH White Ltd* [2014] EWCA Civ 906. Under this three-stage test, the court will consider the seriousness of the failure to comply, why the default occurred, and will evaluate all the circumstances of the case to enable the court to deal justly with the application for relief.

Although the courts continue to take a strict approach when deciding whether to grant relief from sanctions, parties will most likely not be allowed to take their opponents to court for minor procedural breaches. The court will not refuse relief from sanctions simply as a punitive measure (*Altomart Limited v Salford Estates (No. 2) Limited* [2014] EWCA Civ 1408).

Nevertheless, strict adherence to the timetable is required by all parties, lest the court impose costs sanctions. The High Court decision in *Kaneria v Kaneria* [2014] EWHC 1165 (Ch) (as applied recently in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 2886 (Ch)) has clarified that an extension will not be granted simply because it was requested.

It should be noted, however, that under the CPR, parties have the flexibility to agree short time extensions in certain circumstances without needing to seek court approval, provided they do not impact on any hearing date.

Significant or tactical delays will not be tolerated. Notable examples include the High Court judgment in *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) and the Court of Appeal judgment in *Denton v White*.

Parties should also be cautious when attempting to take advantage of the other party's breach. In *Viridor Waste Management v Veolia Environmental Services* [2015] EWHC 2321 (Comm), a defendant refused to consent to an extension of time for service of the particulars of claim (which had been brought to the attention of the defendant but had not been properly served) where a new claim would have been time-barred. The court penalised the defendant in indemnity costs for seeking to take advantage of the claimant's mistake.

Lastly, amendments to the CPR in force as of 6 April 2017 provide that a claim or counterclaim is liable to be struck out if the trial fee is not paid on time.

**Costs management**

The CPR also impose various costs management rules. Parties to all multitrack cases valued under £10 million, for example, are required to comply with additional rules, in particular the preparation of a costs budget. However, cost management rules do not apply to proceedings under the Shorter Trials Scheme unless agreed to between the parties and subject to permission by the court.

Any party that fails to file a budget in time will be treated as having filed a budget in respect of applicable court fees only, unless the court orders otherwise, restricting the party's ability to recover costs in the event of a successful outcome.

For cases valued at £10 million or more, the court may exercise discretion as to whether a costs budget is required. The parties can also apply for an order requiring costs budgets to be served (see *Sharp v Blank* [2015] EWHC 2685 (Ch)).



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From 6 April 2016, budgets for claims worth £50,000 or more should be filed no later than 21 days before the first CMC, rather than seven days as was previously the case. Where the claim is for less than £50,000, the budgets must be filed and served with the parties' directions questionnaire. There will also be a requirement to file 'budget discussion reports' which indicate what is agreed and disagreed in terms of proposed budgeted figures, no later than seven days before the first CMC.

Under costs management rules, parties must exchange budgets and come to an agreement on them. However, it should be noted that budgets may nevertheless be scrutinised by the court to ensure they are proportionate and reasonable.

In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others* [2015] EWHC 481, the judge reduced a claimant's budget by over 50 per cent on the basis that it was not reasonable, proportionate or reliable. In addition, the claimant was criticised for including too many assumptions and caveats in its budget as this was deemed to be calculated to provide maximum room to manoeuvre at a later stage. Advisers should therefore be aware of the importance of filing accurate and proportionate budgets in view of the court's wide costs management powers.

Recent cases have suggested that a costs budget of about half the amount of the claim is proportionate (see, for example, *Group Seven Ltd v Nasir and others* [2016] EWHC 520 (Ch), although the judge in that case made clear that there is no mathematical relationship between the amount of the claim and the costs incurred when it comes to deciding what is proportionate).

### 8 Evidence – documents

**Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?**

The CPR provide that as soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. 'Document' is widely defined by the CPR as 'anything in which information of any description is recorded', which includes electronic communications and metadata. Accordingly, it is very important that parties consider document retention and new document creation carefully from the outset.

Once an obligation to disclose documents has arisen, the party has an obligation to disclose all relevant documents (both paper and electronic). This is an ongoing obligation until the proceedings are concluded; therefore, if a document that should be disclosed comes to a party's notice during the proceedings, he or she must notify the other party.

If a document is destroyed during the course of proceedings, or even when litigation is in reasonable prospect, the court may draw adverse inferences from this fact.

Although the CPR include a 'menu' of disclosure options, in practice the usual order made by the court is for standard disclosure. This requires a party to carry out a reasonable search for documents and disclose all the documents on which the party relies, or which adversely affect its own case, adversely affect another party's case, or support another party's case.

A party's duty of disclosure is limited to documents that are or have been in its 'control', which includes documents that a party has a right to possess or to inspect.

A party to whom a document has been disclosed has a right to inspect that document except where the document is no longer in the control of the party who disclosed it, or where that party has a right or a duty to withhold inspection of it (eg, if the document is privileged), or where it would be disproportionate to permit inspection of the particular category of documents.

A 'disclosure report' must be filed and served by the parties not less than 14 days before the first CMC. The disclosure report must be verified by a statement of truth and must contain information regarding the nature of the documents to be disclosed, their whereabouts and estimates of the costs involved in giving standard disclosure (including electronic disclosure).

There is also a requirement that the parties convene, at a meeting or by telephone, at least seven days prior to the first CMC to seek to agree a disclosure proposal.

The CPR give the courts significant powers over the conduct of the disclosure process. For example, under CPR 31.5 the court has flexibility to reduce the scope of disclosure to ensure proportionality and generally further the overriding objective of dealing with cases justly and at a proportionate cost. Extensive disclosure will be limited both in the Shorter Trial and the Flexible Trial Schemes.

The court also has the power to impose alternatives to the standard disclosure process. For example, the court may order wider-ranging disclosure of documents (likely to be rare) or dispense with disclosure altogether (only likely to be appropriate in the most straightforward cases). Ultimately, the court can make any order for disclosure it considers appropriate.

In November 2017, the Business and Property Courts released a disclosure reform proposal. This followed suggestions made by the Rolls Building Disclosure Working Group (the DWG) in May 2016, which identified areas of improvement regarding the current disclosure regime for the Business and Property Courts. Key suggestions of the new disclosure scheme include:

- parties should not be required to conduct searches for disclosable documents (as currently required under 'standard disclosure'). Instead, 'Basic Disclosure' of key or limited documents that are necessary for other parties to the litigation to understand the case they have to meet should be provided with the statements of case, unless the parties agree to dispense with this step (and subject to other exceptions);
- provided there has been full engagement by the parties in advance, at the CMC the court should consider which of five 'Extended Disclosure' models is to apply to which issue (or to all issues). The models range from an order for no disclosure to the widest form of disclosure (requiring production of documents that may lead to a train of enquiry). The requirement to disclose known documents adverse to the disclosing party should remain a core duty; and
- the existing Electronic Documents Questionnaire should be replaced with a 'Disclosure Review Document' (DRD). Parties should complete a joint DRD to list the main issues for the purposes of disclosure, exchange proposals for 'Extended Disclosure', and share information about where and how documents are kept.

The DWG's reform proposal suggests that parties' disclosure duties should be set out in a new Practice Direction and should include the duty to:

- preserve any relevant documents in their control;
- disclose known adverse documents, irrespective of whether an order to do so is made;
- cooperate with each other and assist the court over disclosure; and
- act honestly and refrain from providing documents that have no relevance.

### 9 Evidence – privilege

**Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?**

The disclosing party may withhold documents protected by legal privilege from inspection by the other party.

Legal professional privilege covers two principal categories: legal advice privilege and litigation privilege.

Legal advice privilege attaches to confidential communications between a client and his or her lawyer for the purpose of giving and receiving legal advice.

This includes advice from foreign and in-house lawyers, provided that they are legally qualified (eg, not accountants providing tax law advice), and are acting as lawyers and not as employees or executives performing a business role.

Only communications with the 'client' are protected, and the meaning of 'client' has been construed narrowly in an important case in which communications between a lawyer and some employees of the client company were held to fall outside legal advice privilege. This decision has been criticised by practitioners as being unduly narrow, and has been rejected in the Hong Kong Court of Appeal. In England and Wales, the narrow approach remains binding and has been confirmed in *Re RBS (Rights Issue Litigation)* [2016] EWHC 3161 (Ch).

The privilege is not limited to advice regarding a party's rights and obligations, but extends to advice as to what should prudently and sensibly be done in the relevant legal context.



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In 2015, the High Court took a wide approach to legal advice privilege, by confirming that elements of documents that do not ordinarily attract privilege will nevertheless be privileged if it can be shown that they formed part of the 'necessary exchange of information' between lawyer and client, the object of which was giving legal advice as and when appropriate (*Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 3187 (Ch)).

Litigation privilege attaches to communications between client and lawyer or between either of them and a third party if they came into the existence for the dominant purpose of giving or receiving legal advice or collecting evidence for use in litigation. The litigation must be pending or in reasonable contemplation of the communicating parties.

However, legal professional privilege will be negated by an abuse of the normal solicitor-client relationship under the 'iniquity principle' ie, when communications are made for wrongful, eg, fraudulent, purposes. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm), the iniquity caused by the litigant's concealment and deceit in relation to his or her assets put the advice outside the normal scope of professional engagement and justified an order for disclosure of documents that would otherwise have attracted legal professional privilege.

In the case of *Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd* [2017] EWHC 1017 QB (*ENRC*), the Serious Fraud Office (SFO) successfully challenged the defendant company's claims to privilege in relation to documents that its lawyers and forensic accountants created during an internal investigation of the company. Andrews J held that litigation privilege did not attach, as a criminal investigation by the SFO did not mean that litigation was in reasonable contemplation, and none of the documents was created for the dominant purpose of litigation. Andrews J concluded that documents created to try to avoid litigation, and for the purpose of being shown to the other side, cannot attract litigation privilege as they are not for the sole or dominant purpose of conducting litigation. Further, legal advice privilege did not attach to the lawyers' notes of interviews with employees, former employees and other third parties as the interviewees did not constitute the client.

Andrews J's determination on litigation privilege has been controversial, and was not accepted in the subsequent case of *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland* [2017] EWHC 3535 (Ch). In his judgment, Sir Geoffrey Vos, Chancellor of the High Court, distinguished that case from *ENRC* on its facts. He appeared to reject the proposition that documents created in order to try and settle the litigation, and for the purpose of being shown to the other side, could never attract litigation privilege. The *ENRC* decision is currently subject to an outstanding appeal in the Court of Appeal, and it is hoped this will provide clarity on privilege in connection with internal investigations.

There are other grounds of privilege, including in respect of documents that:

- contain 'without prejudice' communications between the parties, intended to resolve the dispute;
- pass between a party to legal proceedings and a third party where both parties share a common interest in the proceedings (for instance, third-party litigation funders);
- pass between co-parties to legal proceedings;
- would tend to incriminate a party criminally; or
- would be adverse to the public interest.

### 10 Evidence – pretrial

**Do parties exchange written evidence from witnesses and experts prior to trial?**

Parties must exchange written statements of evidence prior to trial. Ordinarily, at the CMC, the court gives directions regarding the exchange of written witness statements and experts' reports.

If a witness statement is not served within the time specified by the court, the witness may not be called to give oral evidence at trial unless the court gives permission.

Similarly, a party who fails to apply to the court to rely on an expert's report will require the court's permission to call the expert to give evidence orally or use the report at trial. This is likely to have adverse cost consequences for the party that failed to seek the permission of the court at the CMC.

The courts have express powers to identify or limit the issues for witness evidence, identify which witnesses may give evidence and limit the length of witness statements. In addition, parties seeking permission for expert evidence to be adduced will have to identify the issues the evidence will address and provide a cost estimate. The court may also cause the recovery of experts' costs to be limited, in accordance with the emphasis on proportionate cost pursuant to the overriding objective.

### 11 Evidence – trial

**How is evidence presented at trial? Do witnesses and experts give oral evidence?**

Factual and expert witnesses are generally called to give oral evidence at trial.

Their written statements will normally stand as evidence-in-chief, so the witness does not need to provide oral evidence on the matters set out in their statement. However, a witness who provides any oral evidence has the opportunity, if granted the court's permission, to amplify his or her witness statement and give evidence relating to new matters which have arisen following service of the witness statement on the other parties. The opposing party can cross-examine the witness, following which the party calling the witness has the opportunity to re-examine that witness. The witness may also be asked questions by the judge.

At the trial, the judge may also allow both parties' experts' evidence to be heard together (ie, 'concurrent expert evidence', also known as 'hot-tubbing') by way of a judge-led process, although in practice this has not been readily embraced by the courts. Revised provisions governing the procedure for hot-tubbing came into force on 22 November 2017. Among other changes, these provisions permit the court to set an agenda for hearing expert evidence, which may be on an issue-by-issue basis.

A party may rely on a witness statement of fact at trial even where a witness is not subsequently called to give oral evidence. The relevant party must inform the opposing parties, who may apply to the court for permission to call the witness for cross-examination. Where a party fails to call a witness to give oral evidence, the court is likely to attach less weight to his or her statement and in certain circumstances may draw adverse inferences from the witness's failure to give oral evidence.

### 12 Interim remedies

**What interim remedies are available?**

The court has wide powers to grant the parties various interim remedies including interim injunctions, freezing injunctions, search orders, specific disclosure and payments into court.

Interim measures are often used to prevent the dissipation of assets or evidence, and usually English courts will only make orders relating to property within the jurisdiction. However, in exceptional circumstances, the English court will make a worldwide freezing injunction if the respondent is unlikely to have sufficient assets within the jurisdiction to cover the applicant's claim. The English court may also grant interim relief (typically in the form of freezing injunctions) in aid of legal proceedings anywhere in the world.

On 17 July 2014, the European Account Preservation Order (EAPO) Regulation entered into force, creating a new procedure under which a creditor is entitled to apply to a member state's national court to freeze monies in any EU bank account held by a debtor, up to the value of its debt. The provisions are applicable in participating member states as of 18 January 2017.

The UK decided to opt out of the EAPO Regulation, meaning that courts of England and Wales will not issue EAPOs, and bank accounts held in the jurisdiction will not be subject to EAPOs from other EU member states. Nonetheless, a UK entity's accounts held in any of the 26 participating member states will be subject to the EAPO Regulation, and therefore may be frozen.

### 13 Remedies

**What substantive remedies are available?**

Common remedies awarded by the courts are damages (the object of which is to compensate the claimant, rather than to punish the defendant), declarations, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction), and orders for the sale,



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mortgaging, exchange or partition of land. Punitive damages, aiming to punish the defendant, may be available in very limited circumstances, for instance in cases involving oppressive action or deliberate torts. Interest may be payable on pecuniary awards.

### 14 Enforcement

**What means of enforcement are available?**

The following are the principal means of enforcement:
- execution by writ of control in the High Court or a warrant of control in the County Court, whereby the enforcement officer or bailiff (respectively) has authority to seise and sell the debtor's property;
- third-party debt orders that operate to prevent funds reaching the debtor from a third party by redirecting them to the creditor instead;
- charging orders over land, securities or funds in court; and
- insolvency proceedings.

### 15 Public access

**Are court hearings held in public? Are court documents available to the public?**

The general rule is that hearings take place in public. However, the court can order that a hearing (or part of it) be held in private in some circumstances, such as where the court considers it necessary 'in the interests of justice' (for example, where notice to the other party would defeat the purpose of the application, such as applications for urgent freezing injunctions).

Non-parties can obtain any statement of case filed after 2 October 2006 without permission of the court or notification to the parties.

Statements of case include the claim form, the particulars of claim, the defence, the reply to the defence, and any further information given in relation to any of them, but not documents aimed at confining the issues. The meaning of 'statement of case' in this context was examined in *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 397 (Ch), in which the judge distinguished between a particulars of claim (which constitutes a statement of case), and a notice to admit and the response to such notice (neither of which constitutes a statement of case). Accordingly, it was held that a third party was not entitled to copies of the notice to admit nor the response under CPR 5.4C(1).

Permission of the court may be sought to obtain copies of other documents on the court file, but in *Nestec SA v Dualit Limited* [2013] EWHC 2737 (Pat) the High Court clarified that it has no inherent jurisdiction to order non-party access to exhibits to witness statements, and documents put to witnesses in cross-examination, where these are not on the court file.

A party can also apply for an order restricting a non-party from obtaining a copy of a statement of case.

Copies of judgments and orders made in public are available without permission of the court. Supreme Court hearings, and legal arguments and the delivery of the final judgment in Court of Appeal hearings, are allowed to be broadcast live. The Supreme Court has a live streaming service, and an on-demand archive of past hearings that can be viewed online.

In addition, as of 6 April 2016, skeleton arguments (anonymised in family proceedings) are provided to accredited reporters in cases being heard in the Court of Appeal.

### 16 Costs

**Does the court have power to order costs?**

Generally, the unsuccessful party will be required to pay the costs of the successful party. However, the court has wide discretion to order which party costs are payable by, the amount of those costs and when they are to be paid. Even where costs are reasonably or necessarily incurred, if they are deemed disproportionate then the court may nevertheless disallow them.

In determining the way in which it makes costs orders, the court will have regard to all circumstances, and specifically the conduct of the parties before and during the proceedings, as well as any efforts made before and during the proceedings to resolve the dispute.

In particular, the courts allow parties to make certain pre-trial settlement offers that are expressly taken into account in relation to costs at any subsequent trial, namely, where the settlement offers are rejected. These rules are set out in Part 36 CPR.

Where a defendant makes a 'Part 36 offer' that is rejected, if the claimant does no better at trial, the claimant will generally not recover its costs after the period within which it was possible to accept the Part 36 offer (known as the 'relevant period'), and will be liable to pay the costs incurred by the defendant after the relevant period, and interest on those costs.

If a claimant makes a Part 36 offer that is rejected, and the claimant succeeds either in obtaining an amount equivalent to or better than the Part 36 offer, the claimant is entitled to an enhanced-costs award (that is, a higher rate of recovery, plus interest on both costs and damages up to 10 per cent above the base rate). In addition, the court can impose an additional penalty on the defendant, requiring an additional payment of damages up to a maximum of £75,000.

Subject to the points above, when it comes to making a costs order the court will stipulate an assessment of the successful party's costs on either the 'standard' or 'indemnity' basis:
- on the standard basis, the court will examine whether the costs were reasonable and reasonably incurred, as well as proportionate to the matters at issue; whereas
- on the indemnity basis, the court resolves any doubt it has regarding disproportionate costs in favour of the successful party, which results in a higher award to the successful party.

However, the court will not allow costs that have been unreasonably incurred.

A claimant may be required to provide security for the defendants' costs for several reasons. The most common grounds for obtaining an order for security for costs are where:
- the claimant is ordinarily resident out of the jurisdiction; or
- the claimant is a limited company and there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so.

In each case, the court must be satisfied that it is just to make an order for security for costs. There are many factors which the court may consider, such as whether ordering security would unfairly stifle a genuine claim. When considering whether to refuse to order security on such ground, the court must also be satisfied that, in all the circumstances, it is probable that the claim would be stifled (*Pannone LLP v Aardvark Digital Ltd* [2013] EWHC 686 (Ch)).

It is important to note, generally, that a party's conduct in litigation will be considered carefully by the court when exercising its discretion to award costs in line with the Denton principles (see question 7).

Additionally, from 6 April 2017 the court may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings.

However, note that in the Financial List test case scheme (see question 1), a test case proceeds on the basis that each party bears its own costs.

### 17 Funding arrangements

**Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?**

English law permits conditional fee agreements (CFAs) in relation to civil litigation matters, whereby a solicitor's fees (or part of them) are payable only in specified circumstances. Usually, the solicitor receives a lower payment or no payment if the case is unsuccessful, but a normal or higher than normal payment if the client is successful.

However, for CFAs to be enforceable, certain formalities must be observed. The success fee must represent a percentage uplift of fees charged (rather than a percentage of damages secured), and such uplift cannot exceed 100 per cent of the normal rate. These agreements are becoming less unusual in commercial cases.

One reason conditional fee arrangements are still relatively rare in complex commercial cases is the difficulty in defining the concept of 'success' to incorporate an outcome other than simply winning the case.



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The success fee element of the party's costs is not recoverable from the losing party subject to limited exceptions (eg, in insolvency-related proceedings where the CFA was entered into before 6 April 2016, and in publication and privacy proceedings). As of 6 April 2016, success fees are no longer recoverable in insolvency-related cases.

A third party may fund litigation in return for a share of the proceeds of the claim, if successful. If the claim fails, the third party may be liable for the successful defendant's legal costs. Such agreements are upheld provided that they are not contrary to public policy. The case law in this area is developing, and there is still scope for uncertainty. *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 is a notable case in which the Court of Appeal upheld the lower court's decision ordering the third-party funders to pay costs on the indemnity basis.

In the recent case of *Montpelier Business Reorganisation v Armitage Jones* [2017] EWHC 2273 (QB), the court ordered a third-party costs order against the 50 per cent shareholder of an insolvent claimant. As the claimant was unable to meet its costs liability, the order was granted on the basis that the shareholder had funded the litigation with a non-arms-length loan, had clearly exercised control over the litigation and stood to gain had the claimant been successful. The court's willingness to make third-party funders liable for the conduct of funded parties could have consequences for the funding market; funders are likely to be more careful as to whom they choose to fund, and the cost of such funding is likely to increase.

In addition to investing in a claimant's case, third parties may also invest in litigation by way of a payment from a defendant in exchange for taking on a share of the financial risk (both in respect of the claim and legal costs). This type of arrangement, in our experience, is very rare, and developments will be monitored with interest. It is only likely to feature in high-value litigation in which a defendant prefers to make a payment to an investor to reduce its overall litigation risk. Such arrangements may offer significant investment opportunities to professional funders in an industry that continues to evolve.

Lawyers may enter arrangements involving a success fee that is directly attributable to the amount of damages recovered by the client (a contingency fee). These arrangements are known as damages-based agreements (DBAs) and are regulated.

The recovery of the contingency fee is dependent on both the success of the claim and the recovery of sums awarded from the defendant.

In commercial proceedings, the contingency fee is capped at 50 per cent of the sums ultimately recovered by the client. The caps for employment and personal injury claims are, respectively, 35 per cent of the sums ultimately recovered, and 25 per cent of the general damages and pecuniary loss (other than future pecuniary loss). These caps do not apply to appeal proceedings.

Successful parties should be able to claim from the losing party some or all of their costs on the conventional basis, but must not exceed the DBA fee itself. The successful client will use the recovered costs and damages to discharge the DBA (or part thereof). It is noteworthy that DBAs have come under significant criticism from both the Bar Council and the Law Society, and very few solicitors are entering into DBAs.

In November 2014, the government announced that it did not intend to make any adjustment to the DBA regulations to expressly permit hybrid DBAs (where additional forms of litigation funding can be coupled with a DBA to fund a case), to discourage litigation behaviour based on a low-risk, high returns approach.

The government is currently in the process of drafting a new set of DBA regulations. In the meantime, the Law Society has suspended work on a model DBA and it advises that, until the DBA regulations are amended, care should be taken when entering these agreements.

## 18 Insurance

**Is insurance available to cover all or part of a party's legal costs?**

Insurance is available for litigation costs. There are two types of legal expenses insurance policies:

- before the event policies – such policies are typically taken out with an annual premium and provide cover for some or all of the client's potential costs liabilities in any future disputes. They are not usually relevant to major commercial litigation; and
- after the event (ATE) policies – such policies typically cover a party's disbursements (such as counsel and expert fees) and the risk of paying an opponent's legal fees if the insured is unsuccessful in the litigation.

ATE policies may cover the insured's own legal expenses, although this is less common.

If an ATE insurance policy is entered into on or after 1 April 2013, the insurance premiums will no longer be recoverable from the losing party. There are limited exceptions to this rule for claims involving insolvency (provided the policy was taken out before 6 April 2016), publication and privacy proceedings, and personal injury related to mesothelioma.

Additionally, ATE insurance premiums are no longer recoverable from the other side in insolvency proceedings if the insurance policy was entered into on or after 6 April 2016.

For publication and privacy proceedings and mesothelioma claims the abolition of recovery has been delayed, but it has already been decided that eventually the same rule will apply. The delay will be in place for:

- proceedings relating to publication and privacy, until costs protection is introduced in line with the recommendations of the Leveson Report. The consultation on costs protection closed on 8 November 2013, but there has been no published response from the UK government; and
- claims for damages in respect of diffuse mesothelioma, pending a review to be carried out by the Lord Chancellor. This review is now expected to take place in 2018.

The legality of the recoverability of CFAs and ATE premiums pre-April 2013 has been tested in the Supreme Court case of *Coventry v Lawrence* [2015] UKSC 50. In that case, the Supreme Court was asked to decide whether the pre-April 2013 recoverability of ATE premiums and success fees was incompatible with human rights, specifically the right to a fair trial under article 6 of the European Convention on Human Rights. The Supreme Court decided it was not incompatible, thus preventing an estimated potential 10 million appeals out of time.

## 19 Class action

**May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?**

Class actions are most commonly brought in personal injury, negligence, product liability, competition and consumer disputes, but now increasingly so in commercial cases.

There are several mechanisms for pursuing collective redress:

- representative actions – where a claim is brought by or against one or more persons as representatives of any others who have the 'same interest' in the claim;
- group litigation orders (GLO) – the court can make a GLO under CPR 19 where a number of claims give rise to 'common or related issues of fact or law';
- representative damages actions for breach of competition law; and
- collective actions – claims that can 'conveniently' be addressed in the same proceedings by being brought jointly, being consolidated, or having one or a small number of claims run as a 'test case', which can then be used to resolve similar claims.

These collective action mechanisms are generally conducted on an opt-in basis, which means that individual claimants must elect to take part in the litigation. Currently, there is no direct equivalent in England and Wales to the US opt-out model of class action. However, litigation funding continues to attract a high profile.

In addition, the Consumer Rights Act, the main provisions of which came into force on 1 October 2015 (and which came fully into effect in October 2016), allows for collective proceedings to be brought before the Competition Appeal Tribunal (CAT) for redress of anticompetitive behaviour, including both opt-in and opt-out. The opt-out collective action regime allows competition claims to be brought on behalf of a defined set of claimants except those who have opted out, albeit that third-party funders are barred from bringing collective actions.

Since competition collective actions have been permitted, there has not yet been a claim certified as suitable to proceed. In *Dorothy Gibson*



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*v Pride Mobility Products* [2017] CAT 9, an application was withdrawn following an unfavourable judgment rendering any possible class too small, whereas an application in *Merricks v Mastercard Inc* [2017] CAT 16 was rejected due to the class being too large and unworkable. Both applications were on an opt-out basis, though it is anticipated that the first opt-in claim may be presented to the CAT in 2018, in an action against a trucks cartel.

The issue of collective redress is continuing to attract interest and controversy. Businesses in the UK continue to be concerned about the new opt-out collective actions for alleged breaches of consumer or competition law, especially as the class action market is likely to continue to increase over the coming years.

### 20 Appeal

**On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?**

An unsuccessful party may appeal from the County Court to the High Court, from the High Court to the Court of Appeal, and from the Court of Appeal to the Supreme Court (as applicable). Permission to appeal generally must be obtained either from the lower court at the hearing at which the decision to be appealed was made, or from the relevant appeal court provided time limits are adhered to.

For permission to be given, the appeal must have a real prospect of success, or there must be another compelling reason for the appeal to be heard. The Civil Procedure Rule Committee (CPRC) decided to increase the threshold for permission to appeal to the Court of Appeal, so as to require a 'substantial prospect of success'. However, that decision was rescinded at the March 2017 CPRC meeting and it was agreed that no further action be taken.

The appeal court will not allow an appeal unless it considers that the decision of the lower court was wrong in law, or was unjust because of a serious procedural or other irregularity in the proceedings.

One of the key areas of concern highlighted by the Briggs Report is the workload of the Court of Appeal, which has increased dramatically over the past six years. Following the recommendations of the Briggs Report for easing the burden on the Court of Appeal, the Access to Justice Act 1999 (Destination of Appeals) Order 2016 changed the routes of appeal so that, subject to some exceptions, appeals from both interim and final decisions in the County Court will lie to the High Court instead of the Court of Appeal.

### 21 Foreign judgments

**What procedures exist for recognition and enforcement of foreign judgments?**

The procedure necessary to recognise and enforce a foreign judgment in England and Wales depends on the arrangements made with the foreign country in question. Examples of these arrangements include the Brussels Regulation (Recast) and the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015). The enforcement of judgments that are not subject to relevant arrangements is governed by common law.

As of 10 January 2015, the CPR have been amended in line with the Brussels Regulation (Recast) (see also question 5) to remove requirements for a declaration of enforceability when enforcing a judgment from a court of another EU member state.

The procedure for making an 'adaptation order', whereby a legal remedy contained in a foreign judgment but unknown to the law of England and Wales may be adapted, for the purposes of enforcement, to a remedy known in English law, has also been included.

To address uncertainty over the future applicability of the Brussels Regulation (Recast) and other EU legislation following Brexit, on 21 June 2017 the government proposed the 'Great Repeal Bill', pursuant to which the status quo will be maintained in the immediate term. The Bill is subject to ongoing scrutiny, and has recently been amended to accept some recommendations provided by the House of Lords Select Committee, which described the Bill in its previous form as 'constitutionally unacceptable'. Further developments and updates are awaited with interest.

### 22 Foreign proceedings

**Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?**

Where a witness located in England and Wales refuses to provide evidence for use in civil proceedings in another jurisdiction, the parties may request that the English courts grant an order requiring production of the evidence. The procedure for obtaining such an order differs depending on the jurisdiction in which the proceedings are taking place:

- requests for evidence for use in EU member states (except Denmark) are processed according to EC Regulation No. 1206/2001 of 28 May 2001. The procedure under the Regulation is highly centralised and permits the transmission of requests for evidence directly between designated courts in each EU member state (except Denmark); and
- requests for evidence for use in all other jurisdictions are processed according to the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to the Hague Convention of 1970 on the taking of evidence. An application must be accompanied by evidence and a letter of request from a court in the jurisdiction of the proceedings. The letter of request is submitted either to an agent in this country (usually a solicitor) or the senior master of the Supreme Court, Queen's Bench Division. The solicitor or Treasury Solicitor (as applicable) will make the application to the High Court for an order giving effect to the letter of request.

English law applies to the granting (or refusal) and enforcement of the request.

## Arbitration

### 23 UNCITRAL Model Law

**Is the arbitration law based on the UNCITRAL Model Law?**

The Arbitration Act 1996 (the Arbitration Act) broadly reflects, but does not expressly incorporate, the provisions of the UNCITRAL Model Law, and applies to arbitrations that have their seat in England, Wales or Northern Ireland. The structure and language of the Arbitration Act is similar to that of the UNCITRAL Model Law.

However, the Arbitration Act did not adopt provisions that were considered undesirable or inconsistent with established rules of English arbitration law. Further, the Arbitration Act contains additional provisions, such as the power of the tribunal to award interest. The Arbitration Act also has a broader definition of an arbitration agreement in the sense that it is not confined to agreements in respect of a 'defined legal relationship'.

### 24 Arbitration agreements

**What are the formal requirements for an enforceable arbitration agreement?**

Under the Arbitration Act, consistent with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), there must be an agreement in writing to submit present or future disputes (whether contractual or not) to arbitration. The term 'agreement in writing' has a very wide meaning; for example, the agreement can be found in an exchange of written communications.

An arbitration agreement is generally separable from the contract in which it is found as it is regarded as an agreement independent from the main contract and will remain operable after the expiry of the contract or where it is alleged that the contract itself is voidable, for instance by reason of fraud (see *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20).

Courts in England and Wales will stay litigation proceedings in favour of arbitration if there is prima facie evidence of an arbitration agreement between the parties.

Moreover, the English court may grant an anti-suit injunction to prevent parties from pursuing litigation proceedings in the courts of another country that is not a member state of the EU or European Free Trade Area (EFTA) in breach of an arbitration agreement.

The English courts cannot, however, grant anti-suit injunctions to restrain litigation proceedings brought in the courts of another member state of the EU or EFTA in breach of an arbitration agreement where the substantive action relates to a 'civil and commercial' matter, following



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the European Court of Justice (ECJ) decision in *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* (Case C-185/07) [2009] 1 AC 1138.

The Brussels Regulation (Recast) does not explicitly address the courts' power to grant anti-suit injunctions. In *Gazprom OAO* (Case C-536/13), the Advocate General's Opinion argued that anti-suit injunctions in support of arbitration are permitted by the Brussels Regulation (Recast), specifically paragraph 4 of recital 12. However, this argument was not addressed by the ECJ in its judgment. The point remains unresolved.

Nor can the English courts make declarations on the validity of an arbitration clause once it has been ruled upon by the courts of another EU or EFTA member state: see *Endesa Generacion SA v National Navigation Company* [2009] EWCA Civ 1397.

Oral arbitration agreements are recognised by English law, but fall outside the scope of the Arbitration Act and the New York Convention.

The Brussels Regulation (Recast) states explicitly that the New York Convention will take precedence over the Brussels Regulation (Recast).

### 25 Choice of arbitrator

**If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?**

Under the Arbitration Act, if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. The parties may agree a procedure for the appointment of the sole arbitrator. If they do not, the default procedure is that one party may serve a written request on the other to make a joint appointment. The appointment must be made within 28 days of the service of a request in writing. If the parties fail to jointly appoint an arbitrator in that period, either party may apply for an order of the court to appoint an arbitrator or to give directions. The court will rarely make an appointment without seeking guidance from the parties. Typically, the parties will each submit a list of potential arbitrators or request that the court direct that the President of the Chartered Institute of Arbitrators appoint a suitable arbitrator.

A party may apply to the court to remove an arbitrator on limited grounds, including that:
- circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality;
- the arbitrator does not possess the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his or her capacity to do so; and
- the arbitrator has refused or failed properly to conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

Pending the outcome of a challenge, the tribunal can normally proceed with the arbitration and make an award.

### 26 Arbitrator options

**What are the options when choosing an arbitrator or arbitrators?**

The parties are free to agree on the identity of the arbitrator or arbitrators. They may also specify an appointment authority and particular characteristics or qualifications. There is a deep pool of experienced, expert arbitrators capable of meeting the demands of complex international arbitration. The pool consists of leading practitioners from international law firms, barristers (the most accomplished of which are Queen's Counsel (QC)) and academics. The Chartered Institute of Arbitrators in London and the London Court of International Arbitration, among other institutions, each maintain lists of arbitrators.

### 27 Arbitral procedure

**Does the domestic law contain substantive requirements for the procedure to be followed?**

Party autonomy is the overriding objective of the Arbitration Act. It is therefore up to the parties to select the rules of procedure that will govern the arbitration.

However, if no express provision is made in the arbitration agreement, it is for the arbitrator to decide procedural and evidential matters.

The tribunal is at all times bound by the mandatory provisions of due process and to act fairly and impartially between the parties.

### 28 Court intervention

**On what grounds can the court intervene during an arbitration?**

The court's role is strictly supportive, and there is minimal intervention by domestic courts in the arbitral process. However, the court may provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances.

The majority of the court's powers can be excluded by the parties by agreement. Schedule 1 of the Arbitration Act sets out a list of mandatory provisions that cannot be excluded.

Examples of the court's powers in an arbitration include ordering a party to comply with a peremptory order made by the tribunal and requiring attendance of witnesses.

### 29 Interim relief

**Do arbitrators have powers to grant interim relief?**

Unless the parties have agreed otherwise, the tribunal has powers to make preliminary orders relating to security for costs, and preservation of property and evidence.

If the parties have expressly agreed in writing, the tribunal also has the power to order provisional relief, such as payment of money or disposal of property. Provisional relief is subject to the final decision of the tribunal on the case.

However, the tribunal has no general power to grant interim injunctions. Such power must be conferred either by express agreement of the parties to the arbitration under the Arbitration Act. Even so, case law has not been conclusive as to whether the parties' agreement to confer on the tribunal the power to grant a freezing injunction will be effective (see *Kastner v Jason* [2004] EWCA Civ 1599).

Although there is some debate over whether an arbitral tribunal has the power to grant a freezing injunction, in any event it could only do so by agreement of the parties. The court route is therefore likely to provide more certainty.

The court can order freezing injunctions and other interim mandatory injunctions in support of an arbitration. This was confirmed by the Court of Appeal in *Cetelem SA v Roust Holding Ltd* [2005] EWCA Civ 618, and was followed in *Euroil Ltd v Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm).

### 30 Award

**When and in what form must the award be delivered?**

The parties are free to agree on the form of the award. If there is no agreement, the award must at a minimum be in writing and signed by all the arbitrators, contain the reasons for the award and state the seat of the arbitration and the date it is made.

Unless otherwise agreed by the parties, the tribunal may decide the date on which the award is to be made, and must notify the parties without delay after the award is made.

The court can order an extension of time for an award to be made (although this is done only after available arbitral processes have been exhausted and when the court is satisfied that a substantial injustice would otherwise be done).

### 31 Appeal

**On what grounds can an award be appealed to the court?**

There are limited grounds for an appeal of an award to the court.



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A party may challenge an award on the grounds of the tribunal's lack of jurisdiction or because of a serious irregularity in the proceedings that has caused substantial injustice to the aggrieved party. These provisions are mandatory, and cannot be excluded by agreement between the parties.

The test for serious irregularity is quite onerous, and an award will only be set aside in rare cases (eg, *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm), as recently applied in *S v A* [2016] EWHC 846 (Comm)). *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) has confirmed and summarised the position succinctly.

In limited circumstances, a party may also challenge an award on a point of law. Only appeals on English law are permitted.

An appeal on a point of law requires the agreement of all the other parties to the proceedings or the leave of the court. For leave to appeal, the appellant must satisfy four conditions:

- the determination of the appeal will substantially affect the rights of one or more parties;
- the question of law was put to the tribunal;
- the decision of the tribunal was obviously wrong or is a point of general public importance; and
- the court is satisfied it is just and proper to hear the appeal.

Parties may – and often do – exclude the right to appeal to the court on any question of law arising out of the award.

Sufficiently clear wording to that effect is required within the arbitration clause: see *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp)* [2009] EWHC 2097 (Comm).

An agreement that the arbitrator need not give reasons for his or her decision is treated as an agreement to exclude the right of appeal. Further, there is no right to appeal to the court on a question of fact: see *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm).

### 32 Enforcement

**What procedures exist for enforcement of foreign and domestic awards?**

Awards made in a contracting state to the New York Convention will be recognised and enforced in England and Wales following an application by the debtor for an order to give permission to enforce and subject to the limited exceptions set out in the New York Convention as implemented by section 103 of the Arbitration Act.

A defendant has the right to apply to set aside the enforcement order. However, case law (for example, *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344) has re-emphasised that refusals to enforce will only take place in clear cases where the grounds of section 103(2) of the Arbitration Act are met.

Awards made in other countries may also be recognised and enforced in England and Wales at common law.

Partial awards disposing of part but not all of the issues are enforceable in the same way as final awards.

The enforcement of arbitral awards in England and Wales as well as the enforcement of awards issued by tribunals seated in the UK will not be affected by Brexit as the UK will remain a party to the New York Convention.

### 33 Costs

**Can a successful party recover its costs?**

Unless the parties agree otherwise, the arbitrator can order one party to pay the costs of the arbitration. The general principle is that the loser pays the costs, which include the arbitrator's fees and expenses, the fees and expenses of the arbitral institution concerned and the legal costs or other costs of the parties. However, this is at the discretion of the arbitrator, who will take into account all the circumstances of the case, including the conduct of the parties during the arbitration.

Any agreement that one party should pay the costs of an arbitration is only valid if made after the dispute has arisen.

Following the High Court decision of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), third-party funding costs are under certain circumstances recoverable in arbitration on the basis that they fall under 'other costs' of the parties under section 59(1)(c) of the Arbitration Act. In that case, the successful claimant was allowed to recover all of its third-party funding costs, which included a 300 per cent uplift, although it was emphasised by the court that the costs incurred must be reasonable in order to qualify for recovery.

Additionally, the court clarified that the question of the recoverability of costs in arbitration should not be construed by reference to what a court would allow by way of costs in litigation under the CPR.

## Alternative dispute resolution

### 34 Types of ADR

**What types of ADR process are commonly used? Is a particular ADR process popular?**

**Mediation**

This is by far the most popular form of ADR. It is a consensual and confidential process in which a neutral third party, who has no authoritative decision-making power, is appointed to help the parties reach a negotiated settlement. It can also be used as an aid to narrow down the matters in dispute and can be initiated before and after court proceedings or an arbitration has been initiated.

The mediation process can also be used in conjunction with arbitration by the parties using a multitiered clause, which involves mediation and then arbitration if needed.

**Expert determination**

This is the next most popular ADR process and involves the appointment of a neutral third-party expert of a technical or specialist nature to decide the dispute. The third party usually holds a technical rather than legal qualification and acts as an expert rather than a judge or arbitrator. The expert's decision is usually contractually binding on the parties and there is usually no right of appeal.

**Early neutral evaluation**

This is where a neutral third party gives a non-binding opinion on the merits of the dispute based on a preliminary assessment of facts, evidence or legal merits specified to them by the parties. As part of its general powers of case management, the court also has the power to order an early neutral evaluation with the aim of helping the parties settle the case.

**Adjudication**

There is a statutory right to adjudication for disputes arising during the course of a construction project. The adjudicator's decision is binding unless or until the dispute is finally determined through the courts or arbitration proceedings, or by agreement of the parties.

**Conciliation**

This is similar to mediation, except that the neutral third party will actively assist the parties to settle the dispute. The parties to the dispute are responsible for deciding how to resolve the dispute, not the conciliator.

### 35 Requirements for ADR

**Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?**

English courts will not compel a party to engage in ADR if it is unwilling to do so. However, the pre-action protocols require parties to consider ADR and parties may be required to provide the court with evidence that ADR was considered. Under the applicable ethical rules, a solicitor should also discuss with his or her client whether ADR may be appropriate.

Once proceedings have commenced, the overriding objective of dealing with cases justly and at proportionate cost requires the court to manage cases, including encouraging litigants to use an ADR process if appropriate (see *Seals and another v Williams* [2015] EWHC 1829 (Ch), where the court encouraged early neutral evaluation).

The court may stay proceedings to allow for ADR or settlement for such period as the court thinks fit.



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There may be adverse costs consequences if a party has unreasonably failed to consider ADR, as the court must take into account the conduct of the parties when assessing costs, which will include attempts at ADR. The burden of proof to demonstrate that the use of ADR was unreasonably refused rests with the losing party.

Case law has repeatedly re-emphasised the importance of considering ADR and has examined the cost consequences of failing to do so.

In *PGF II SA v OMFS Company Ltd* [2013] EWCA Civ 1288 (as applied in *R (on the application of Crawford) v Newcastle Upon Tyne University* [2014] EWHC 1197 (Admin)), for instance, it has been made clear that simply ignoring an invitation to participate in ADR is generally unreasonable, and may lead to potentially severe costs sanctions.

## Miscellaneous

**36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?**

Historically, there has been a split legal profession in England and Wales. This has meant that solicitors have tended to focus on the provision of legal services directly to clients, while barristers have specialised in advocacy skills.

While this distinction still exists, there is an increasing overlap and, in particular, solicitors will continue to have an increasing role in advocacy before the courts with the development of the 'solicitor advocate' role.

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