Dispute Resolution 2021

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Alanna Andrew of Latham & Watkins LLP, for their continued assistance with this volume.

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Introduction

Martin Davies and Alanna Andrew

Latham and Watkins

In what has been an unprecedented year for the world, the legal profession has also had to adapt and 'go virtual'. Remote hearings have become commonplace, even at Court of Appeal and Supreme Court level. In many respects this was a natural extension of the electronic working protocol and the widespread calls for efficiency. However, the 'new normal' came apace, and many of us quickly recognised its challenges: witness handling, e-bundles, and not least, how does leading counsel communicate with the wider legal team and client (cue multiple chat screens, videos and mute buttons). The House of Lords Select Constitution Committee recently published the first of three reports into the impact of covid-19 on the courts, calling for more data on how remote hearings affect litigants. At least in the short term though, remote hearings look here to stay. Moreover, the new Master of the Rolls, Sir Geoffrey Vos, has called for a 'fundamental generational reform of the civil justice system', in which all claims will begin online before entering a digital court process, arguing that future generations 'will not accept a slow, paper-based and courthouse-centric justice system'. As such, we should expect a continued trend towards technology-led solutions, and more rules and governance to support and police its use.

Over the past year, 'force majeure', 'frustration' and 'waiver' have been ringing in everyone's ears, in response to the business casualties of the pandemic. The Privy Council addressed the complex issue of 'waiver by election' of contractual rights, finding that it did not apply where a party had a range of options that were not conflicting and the courts have dealt with business interruption insurance issues, with the Supreme Court finding for the policy holders in the leading test case. Many have also been grappling with distressed scenarios, including the new Restructuring Plan that has saved businesses but led certain creditor groups (e.g., landlords) to claim they have lost out due to the controversial 'cross-class cram-downs'.

However, the litigation agenda has not been upstaged entirely by the pandemic. Brexit will usher in a new era for effecting service and taking of evidence in EU countries, with increased reliance on the Hague conventions. At home, the drive for efficiency continues, with judicial review reform on the agenda for the Ministry of Justice, and the publication of new procedural rules on contempt of court. A key issue for practitioners will be how to interpret and apply the new rules on witness statements, and whether it will succeed where so many other reforms have failed in reducing the page count of evidence, and allowing the court to find the true issues, safe from 'over-lawyering'.

England & Wales

Martin Davies, Alanna Andrew and Aisling Billington

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LITIGATION

Court system

1 | 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 and 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 in the county court located closest to 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: for example, claims falling within a specialist court that raise questions of public importance or that are sufficiently complex 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, but provide that complex, high-value litigation remains 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 2021, there were approximately 71 judges in the Queen's Bench Division and 14 judges in the Chancery Division. The Family Division consists of 19 High Court judges in addition to the president of the Family Division, who all 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 and companies work, 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 cross-jurisdictional Financial List was created to handle claims related specifically to the financial markets and to address the particular business needs of parties litigating on financial matters. 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, lists of the High Court and some of the work of the Chancery Division, and include the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Financial List, the Business List, the Insolvency and Companies List, the Intellectual Property List, the Revenue List, the Property Trusts and Probate List 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 was undertaken by Lord Justice Briggs and published in July 2016 (the Briggs Report). The Briggs Report sets out 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 of the Briggs Report, 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. More recently, Her Majesty's Courts & Tribunals Service (HMCTS) is undergoing a court reform programme, scheduled for completion in 2023, which aims to introduce new technology to make the court system more efficient and accessible to the public. As part of these reforms, it is now possible to apply via HMCTS online services for a divorce, money claim or appeal to the tax tribunal. In November 2019, the Ministry of Justice set out its proposed evaluation of the HMCTS court reform programme, which will explore the effect of the reforms on outcomes and costs for users of the courts. An interim report is expected in 2021, with a final report planned for 2024.

Another key suggested change of the Briggs Report is the creation of an online court that 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.

In November 2015, electronic working was introduced at the Royal Courts of Justice at the Rolls Building, London, as the Electronic Working Pilot Scheme. The Scheme was amended in November 2017 and extended in April 2018 until 6 April 2021. 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.

In March 2019, the first video hearing of an application to set aside a default judgment was held under the Video Hearings Pilot Scheme pursuant to Practice Direction 51V. The pilot scheme under CPR PD 51V was commenced in November 2018 and extended until 31 March 2021. Further reforms consist of the Statement of Costs for Summary Assessment Pilot Scheme and the Capped Costs Pilot Scheme, both of which aim to reform the ways in which costs that are accrued during the process of litigation are recovered. There are also a number of temporary schemes to address the global covid-19 pandemic, including PD51Y (Video or Audio Hearings in Civil Proceedings during the Coronavirus Pandemic), PD51Z (Stay of Possession Proceedings, Coronavirus) and PD51ZA (Extension of Time Limits and Clarification of Practice Direction 51Y). PD 51ZA provides a temporary update to CPR 3.8 and came into force on 2 April 2020. Essentially, parties are now permitted to consent to extensions of time of up to 56 days (instead of the usual 28 days) without having to notify the court, provided that the extension does not jeopardise a hearing date. PD 51ZA does not alter PD51Z (which permits a 90 day stay in respect of possession proceedings).

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.

Judges and juries

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

Judges are appointed by the Judicial Appointments Commission, 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 2020 Judicial Diversity statistics report that 32 per cent of court judges and 47 per cent of tribunal judges are female. Of those judges who declared their ethnicity, the percentage who identify as Black, Asian and Minority Ethnic is 8 per cent in courts and 12 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.

Although 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 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 which will lower the temperature rather than raise it'.

Judges in England and Wales have a fundamental duty under the English common law doctrine of stare decisis to interpret the law with regard to precedent. In practice, this means that a court should follow previously decided cases that considered similar facts and legal issues to ensure (as far as possible) consistency in the administration of justice.

Limitation issues

3 | What are the time limits for bringing civil claims?

Most limitation periods are laid down by the Limitation Act 1980 (as amended). 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.

Usually, if the limitation period for a claim has expired, the defendant will have a complete defence to the claim. However, 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, the limitation period does not commence until the concealment or fraud is actually discovered or could have been discovered with reasonable diligence.

Under CPR 17.4 (2), if a party wishes to amend its claim to introduce a new cause of action after the limitation period has expired, the court will not allow the amendment unless the new cause of action arises out of (substantially) the same facts as are in issue at the time of the amendment. The Court of Appeal has clarified this in the case of *Libyan Investment Authority v King* [2020] EWCA Civ 1690 in which it held that parties seeking to introduce a new claim after the expiry of the relevant limitation period cannot rely on previously struck out pleadings to demonstrate that the new claim arose out of substantially the same facts.

Pre-action behaviour

4 | 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, and consider at an early stage that the rules governing pre-action conduct apply to the prospective legal claim under consideration.

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). There are potentially serious consequences for failing to comply with the PDPACP, including significant costs penalties.

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 currently 13 protocols in force specific to certain types of proceedings; for example, construction and engineering disputes, professional negligence claims and defamation actions. As a general rule, the parties should consider carefully which protocol is most applicable to their proceedings. The Pre-Action Protocols are routinely updated to reflect best practice and are supplemented, from time-to-time, by pilot schemes or other similar provisional proceedings.

During pre-action exchanges, parties are typically provided with information about each other, which may amount to 'personal data' for the purposes of the General Data Protection Regulation (EU) 2016/679 (GDPR), which has been retained in domestic law following the withdrawal of the United Kingdom from the European Union. The UK GDPR sits alongside an amended version of the Data Privacy Act 2018. Parties should be aware of their obligations under the UK GDPR in this regard and seek appropriate counsel where necessary. 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, the 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. The PDPACP typically applies to all types of claim save for a few limited exceptions.

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, but must satisfy a number of tests, which limits the applicability of this route to many cases.

An extra weapon in the claimant's armoury is the *Norwich Pharmacal* order. That 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 those 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.

Starting proceedings

5 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.

There are various prescribed versions of the claim form, depending on the types of claim being issued. 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. Court fees may also be slightly reduced for the online submission of a claim form, applicable for any money claims up to a value of £100,000.

As of 25 April 2017, issuing claims and filing documents in the Chancery Division, Commercial Court, Technology and Construction Court, Circuit Commercial Court and Admiralty Court (the Rolls Building Courts) is only possible through the online filing system, CE-File. Online filing has been mandatory since 20 April 2019 for all professional users issuing claims in the Business and Property Courts regardless of location, and since 1 July 2019 for those issuing claims in the Queen's Bench Division in London. Under the courts' CE-Filing system, parties can file documents at court, including claim forms, online 24 hours a day, every day. For a claim form to be served on the defendant a claimant must take steps as required by the rules of the court to bring the documents within the relevant person's attention. 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. CPR 6APD.4 provides that where a document is to be served by 'fax or other electronic means', the party to be served or its solicitor must previously have indicated in writing that it is willing to accept service by such means (and any limitations, e.g., file size) and given the number or address to which it must be sent.

A claim form must be served within four months of filing if it is to be served within the jurisdiction and six months if it is to be served outside the jurisdiction. It is possible to apply for permission to extend the period of time for service, but usually any application should be made before the relevant period expires.

Service out of the jurisdiction is a complicated area. In many cases permission to serve out of the jurisdiction is required.

Prior to the end of the transition period, proceedings could be served on a defendant outside the jurisdiction without permission if the English court had jurisdiction under any of the instruments comprising the European regime, in particular the Recast Brussels Regulation, which broadly determines jurisdiction where the defendant is domiciled in a member state (subject to some important exceptions). From 31 December 2020, defendants domiciled in the European Union may no longer be served by way of the EU Service Regulation (1393/2007). The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 came into force on 31 December 2020, meaning that where a defendant is domiciled outside the European Union, a claimant may be required to obtain permission from the court to serve the claim outside of the jurisdiction.

From 1 January 2021, it is necessary to obtain the court's permission to serve the claim form outside the jurisdiction where there is a jurisdiction clause in favour of the English courts, except where the Hague Convention applies (CPR 6.33(2B)), or where the claim form was issued, but not served, before the end of the transition period and CPR 6.33(2) applied. Once permission is received, a claimant must follow the rules of service laid down by applicable conflict of laws rules (e.g., the

Hague Convention). Certain formal requirements (such as translation of the claim documents) must be complied with when serving documents outside the jurisdiction according to the Hague Convention.

On 6 April 2021, the Civil Procedure (Amendment) Rules 2021 (SI 2021/117) came into force, amending CPR 6. This amendment introduces a new rule 6.33(2C) allowing the claim form to be served outside the jurisdiction without the court's permission where the contract contains a jurisdiction clause in favour of the English courts, where the Hague Convention does not apply.

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).

Timetable

6 | 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, which each publish their own specific guides), 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 (by a limited number of days) or, where the court agrees to such extension, following application by the defendant.

The court will allocate the case to 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 disputes of high value will be given a trial date or window that is typically up to two years after the CMC.

Following a successful pilot scheme in the Rolls Building Courts, the Shorter Trial Scheme became permanent in the Business and Property Courts nationwide from 1 October 2018. Under this scheme, suitable cases are expected to reach trial within approximately eight months following the CMC, and have judgment handed down within six weeks after conclusion of the trial. The maximum length of the trial is four days, including time set aside for the judge to read into the materials. The scheme is designed for cases that do not require extensive disclosure or witness or expert evidence. Under the Shorter Trial Scheme, the costs management provisions of the CPR do not apply and an abbreviated, issue-based, approach is taken towards disclosure, with no requirement for parties to volunteer adverse documents for inspection.

The Flexible Trial Scheme has also become a permanent fixture within the Business and Property Courts, with parties being able to adapt procedures by agreement to suit their particular case and proceedings.

The aim of both schemes is to achieve shorter and earlier trials for commercial litigation within England and Wales, at a reasonable and proportionate cost.

Case management

7 | 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, 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 that 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 and 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. The underlying rationale behind the restatement of this test was to reinforce the understanding among litigants that the courts will be less tolerant of unjustifiable delays and breaches of court orders.

Although the courts continue to take a strict approach when deciding whether to grant relief from sanctions, the 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 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. The Court of Appeal has further clarified that it will not readily interfere with a first instance order imposed in respect of non-compliance with court orders or time limits, time extensions and relief from sanctions, where the first instance judge has made that order having exercised their discretion in relation to a case management decision (*The Commissioner of the Police of the Metropolis v Abdulle and others* [2015] EWCA Civ 1260).

However, under the CPR, the 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*.

The 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 to promote effective case management at a proportionate cost. 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. The costs budget should be in the prescribed Precedent H form annexed within the CPR.

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. In the recent case of *BMCE Bank International plc v Phoenix Commodities PVT Ltd and another* [2018] EWCH 3380 (Comm), the court confirmed that failure to file a costs budget is a serious and significant breach for which there has to be very good reason. In this case, the claimant's solicitors filed the costs budget two weeks late and without explanation on the morning of the CMC, and when questioned by the judge it was determined that the partner with conduct of the claimant's claim had been abroad on business. The court found that this was not a good enough reason to consider granting relief. However, in *Manchester Shipping Ltd v Balfour Shipping Ltd and another* [2020] EWHC 164 (Comm), the Court granted relief to defendants who filed their costs budget 13 days late on the basis that the parties had not communicated as to when costs management should be considered and as a result the defendants' default was inadvertent and not egregious.

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)).

From 6 April 2016, budgets for claims worth £50,000 or more should be filed no later than 21 days before the first CMC pursuant to CPR 3.13(1)(b). Where the claim is for less than £50,000, the budgets must be filed and served with the parties' directions questionnaire (pursuant to CPR 3.13(1)(a)). 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).

The relevant provisions of the CPR have recently been updated to note that, as part of the costs management process, the court may not approve costs incurred up to and including the date of the costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.

The parties should also approach the preparation of a costs budget carefully, as current case law is not consistent as to whether retrospective permission to revise the budget will be granted. Revision of a budget due to an error is extremely difficult.

Evidence – Disclosure Pilot Scheme

From 1 January 2019, the Business and Property Courts introduced a mandatory Disclosure Pilot Scheme (DPS) (subject to limited exceptions) pursuant to Practice Direction 51U (PD 51U), which is intended to run until 31 December 2021. It is expected that the pilot scheme will be adopted into procedure following the end of the trial, although with some amendments. The pilot scheme operates in the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, London, Manchester and Newcastle and has a significant impact on the disclosure process within civil proceedings and the overall case management.

On 22 September 2020, Flaux LJ, Chair of the Disclosure Working Group, published an update on the DPS, including details of proposed changes being put to the CPRC for approval. The proposed changes were approved at the October CPRC meeting, and were included in the 127th Practice Direction Update, taking effect on 6 April 2021. These updates include, inter alia, clarification that the latest time for disclosure of known adverse documents is as specified in PD 51U 9.1 to 9.3, express provision that adverse documents need not be disclosed with Initial Disclosure and provision that it will be possible to seek guidance 'on any point concerning the operation of the pilot' via Disclosure Guidance Hearings.

Under the DPS, it appears that it is still necessary for parties to comply with requirements under the Practice Direction – Pre Action Conduct and Protocols or any relevant specific pre-action protocol that may apply. However, the DPS also introduces important steps that parties must take before proceedings have commenced, and establishes certain duties owed by the parties to the court, referred to as the Disclosure Duties. The Disclosure Duties are continuing duties that last until the conclusion of the proceedings, and include ensuring that parties take all relevant steps to preserve documents within their control that may be relevant to any issue in these proceedings and undertaking to search for documents in a responsible and conscientious manner to fulfil the purpose of such a search. Disclosure Duties also apply to the parties' solicitors, whose duties include, among other things, taking reasonable steps to preserve documents within their control that may be relevant to any issue in proceedings.

Under the DPS, the parties are required to take reasonable steps to preserve documents in their control that may be relevant to any issue in proceedings as well as providing specific detail on what is required in terms of document preservation. Those requirements include an obligation to send a written notification in any form to all relevant employees and former employees that identifies documents or classes of documents to be preserved and notifying the recipient that they should not delete or destroy documents. Following the 127th Practice Direction Update, the duty to notify employees and former employees only applies where there are reasonable grounds for believing that the employee or former employee may be in possession of disclosable documents not also in the party's possession. There is also a requirement for each party's legal representatives to notify their clients of the need to

preserve documents and obtain written confirmation from their clients that they have discharged their obligations under the DPS with regard to document preservation. The 127th Practice Direction Update provides that parties' legal representatives will be able to confirm, on their behalf, that document preservation duties have been complied with.

The DPS also introduces the concept of initial disclosure, which involves each party providing to all other parties an initial disclosure list of documents. The list is to be provided simultaneously with the statement of case, and will list the key documents on which a party has relied, and that are necessary to enable the other parties to understand the claim or defence that they have to meet. There are several circumstances where initial disclosure is not required, most notably when the parties request extended disclosure.

Extended disclosure may be used in situations where the court is persuaded that it is appropriate to fairly resolve one or more of the issues for disclosure as identified by the parties. Extended disclosure involves five models of disclosure. 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).

A further aspect of the DPS is the replacement of the electronic documents questionnaire in its current form by 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 parties are required to complete a DRD prior to the CMC, which lists all issues for disclosure to be decided in the proceedings and decides which of the five models for extended disclosure is appropriate to achieve a fair determination of those issues.

Evidence – documents

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

The DPS is now in operation and governs the disclosure process for any proceedings commenced in the Business and Property Courts on or after 1 January 2019. For disclosure in any proceedings in any other court (or proceedings commenced prior to 1 January 2019), the existing CPR provisions remain in force.

The DPS and 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 the parties consider document retention and new document creation carefully from the outset. The process of disclosure allows the parties to formally state which specific documents or more generally which types of documents exist or have existed.

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. For cases participating in the DPS, the parties are now under an express duty to preserve documentation.

Although the CPR includes 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. The Court of Appeal has upheld a decision that, where personal devices belonging to the defendants' employees and ex-employees potentially contained relevant documents within the defendants' "control" for the purposes of disclosure, the court had jurisdiction to order the defendants to request the employees and ex-employees to deliver up those devices for inspection by the defendants' IT consultants (Phones 4U Limited v EE Limited [2021] EWCA Civ 116). For cases that are proceeding under the DPS a party's duty of disclosure is defined under the Disclosure Duties and the model for disclosure ordered pursuant to the DRD.

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 (e.g., if the document is privileged), or where it would be disproportionate to permit inspection of the particular category of documents. Inspection is a separate procedural step to disclosure and is the process by which the party who has disclosed a document allows the other parties to view the originals or provide copies of any documents disclosed.

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). For cases that are proceeding under the DPS, the disclosure report is replaced by the DRD.

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. For cases that are proceeding under the DPS, the parties should attempt to reach agreement on the appropriate model of disclosure to decide each Issue prior to the filing of the DRD which should take place not less than five days before the CMC.

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 is limited in both 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.

Evidence – privilege

9 | 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 or the court.

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 (e.g., not accountants providing tax law advice), and are acting as lawyers and not as employees or executives performing a business role. In *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm), the High Court held that legal advice

privilege extends to communications with foreign lawyers, whether or not they are "in-house", provided they are acting in the capacity or function of a lawyer. There is no additional requirement that foreign lawyers should be 'appropriately qualified' or recognised or regulated as 'professional lawyers' within their jurisdiction.

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 Court of Appeal confirmed in *R (Jet2.Com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 that communications or documents must have been created or sent for the dominant purpose of seeking legal advice to fall within the definition of legal advice privilege; the same principle (the dominant purpose test) will apply in cases of litigation privilege. 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.

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 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.

In 2020, the Court of Appeal confirmed that documents attached to emails will not be covered by legal professional privilege solely on the basis that the email itself is privileged; a non-privileged attachment must be disclosed notwithstanding that it may have been attached to a privileged email (*Sports Direct International Plc v Financial Reporting Council* [2020] EWCA Civ 177).

Legal professional privilege will be negated by an abuse of the normal attorney–client relationship under the 'iniquity principle', that is, when communications are made for wrongful, for example, 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 their 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.

Legal professional privilege had been in a relative state of flux following a controversial High Court decision by Andrews J in the case of *Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd* [2017] EWHC 1017 QB (ENRC). The High Court decision in that case narrowed considerably the scope of legal professional privilege in the circumstances of internal investigations in finding that documents created during the course of an internal investigation prior to the commencement of criminal proceedings by the Serious Fraud Office (SFO) were not privileged and should be made available for inspection. On appeal, the Court of Appeal overturned the High Court's decision, concluding that litigation privilege did apply to the documents in question, as they had been created by ENRC for the dominant purpose of resisting or avoiding criminal proceedings. The court held that businesses need to be able to investigate possible wrongdoing without the fear of creating material that might potentially incriminate them in later proceedings (once the investigation has concluded).

Prior to the Court of Appeal decision, Andrews J's determination on litigation privilege in the High Court was regarded as 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 to try to settle the litigation, and for the purpose of being shown to the other side, could never attract litigation privilege.

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.

Evidence – pretrial

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

The 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, including the number of expert reports that each party is entitled to rely on as evidence, the subject matter that should properly be considered in expert evidence, and the date by which the parties should file any relevant witness and expert evidence.

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.

Where the parties wish to rely on expert evidence on a particular issue the courts have the power to allow separate experts for each party or to appoint a single joint expert. The single joint expert will be instructed to prepare a report for evidence on behalf of two or more of the parties instead of each party appointing their own expert witnesses.

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.

On 6 April 2021, new rules on witness evidence came into force in the Business and Property Courts (through a new Practice Direction 57AC and accompanying Appendix which contains a statement of best practice). The new rules affect the content of witness statements and the manner in which witness evidence may be taken, including:

- a trial witness statement must be in the witness's own words and, if practicable, be in the witness's own language;
- a witness statement must contain only evidence as to the matters of fact of which the witness has personal knowledge, and only insofar as those matters need to be proven at trial by witness evidence. It is not acceptable to provide lengthy commentary on disclosure documents, nor to use the statement for the purposes of comment or persuasion;

- a witness statement must contain a list of the documents that the witness has referred to or has been referred to for the purposes of providing the evidence set out in that witness statement;
- a statement should be prepared in such a way as to avoid any practice that might alter or influence the recollection of the witness, other than by refreshing the witness's memory with documents to the extent that would be permissible if the witness were giving evidence-in-chief;
- an expanded form of statement of truth has been introduced, confirming that the person making the statement understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth; and
- witness statements will need to be endorsed by a certificate of compliance with PD 57AC signed by the 'relevant legal representative' confirming that they have explained the purpose and proper content of a witness statement to the witness and believe that the witness statement complies with PD 57AC (including the Appendix) and paragraphs 18.1 and 18.2 of PD 32 (PD 57AC, paragraph 4.3).

Evidence – trial

11 | 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.

Interim remedies

12 | 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 remedies are governed by CPR Part 25.

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.

When seeking a freezing injunction (or indeed, any interim remedy) on a without notice basis, applicants must comply with the duty of full and frank disclosure. This duty requires that all material issues must be presented to the court in a full and fair matter, including those issues that are adverse or detrimental to the applicant's position or interests. In *Fundo Soberano de Angola & ors v Jose Filomena dos Santos & ors* [2018] EWHC 2199 (Comm), the English High Court confirmed that the duty of full and frank disclosure is a serious and onerous obligation that applies to applicants and their legal advisers alike who, together, must make the fullest inquiry into the central elements of their case. The parties should consider this duty very carefully before making any interim application on a without notice basis.

The court also has the power to grant injunctions against 'persons unknown', that is, defendants who cannot be identified. The recent case of *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 provided further guidance on the necessary requirements for the grant of such an injunction, as identified in *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515. The court decided that it may prohibit otherwise lawful behaviour where necessary to secure effective protection for claimants' rights. The importance of clarity and precision in the drafting of those injunctions was also stressed by the court.

Remedies

13 | 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, rectification, rescission, subrogation, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction), and orders for the sale, 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.

Enforcement

14 | What means of enforcement are available?

Once a judgment has been obtained from a court in civil proceedings in England and Wales, the judgment can be enforced in a variety of ways. If the judgment is for a payment of a sum of money and the debtor has assets that can be easily obtained and sold for value, the court can issue a writ or warrant of control to command an enforcement officer to take control of and sell the debtor's goods. These are wholly administrative processes that do not require a judicial decision.

A third-party debt order can be obtained and operates to prevent funds reaching the debtor from a third party by redirecting them to the credit instead.

The court can enforce a charging order which imposes a charge over the debtor's interest in any land, securities or funds. This usually acts to prevent the debtor from selling any land with a charge over it without first satisfying the creditor. This is most effective when the debtor is the sole owner of any applicable assets.

An attachment of earnings can be employed by the court, which would order that a proportion of the income of the debtor be deducted like a tax from the debtor's salary by the employer and paid to the creditor until any relevant debt is satisfied. Alternatively, a creditor can employ a variety of insolvency procedures, such as bankruptcy, appointment of a receiver or a winding-up order.

Public access

15 | 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, 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). The court can also order a hearing to be held in private if the hearing involves matters relating to national security. The court can also redact parts of judgments relating to confidential issues in appropriate cases.

Following the outbreak of the covid-19 pandemic and the enactment of the Coronavirus Act 2020, the Courts Act 2003 has been temporarily amended to ensure public participation in proceedings conducted by video or audio.

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 or court records on the court file. Documents attached to a statement of case, witness statements, expert reports, skeleton arguments, notices to admit and response and correspondence between the parties and the court can be obtained by non-parties if the court grants permission. In *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, the Supreme Court held that courts must engage in a fact-specific balancing exercise to determine whether allowing a non-party to obtain such documents or court records would advance the principle of open justice.

A party can also apply for an order restricting a non-party from obtaining a copy of a statement of case, but any such order is confined to statements of case. When filing electronically a party may request that a document is designated where appropriate.

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.

Costs

16 | 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. CPR Part 44 details the general costs rules that apply in civil proceedings in England and Wales.

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 the parties to make certain pretrial 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.

Following the recent decision of *King v City of London Corp* [2019] EWCA Civ 2266, disapproving the earlier decision in *Horne v Prescot (No.1) Ltd* [2019] EWHC1322 (QB), an offer that excludes interest is not a Part 36 offer and therefore a Part 36 offer must include all interest up to the end of the period in question.

Once the court has made an order as to costs, the general rule is that the amount to be paid will be determined by an assessment process unless an amount is agreed to by the parties. The assessment process can be on either a summary or detailed basis. Summary assessment requires the parties to focus on the cost of proceedings as they progress, with the aim of increasing settlement chances if the parties are aware of the ongoing costs of litigation. Detailed assessment usually takes place after an order for costs is made and thus involves an assessment of costs at the conclusion of proceedings. In relation to hearings that last no more than one day (and cases allocated to the fast track) the general rule (as set out in Practice Direction 44 9.2) is that a summary assessment should occur at the conclusion of the hearing unless there is good reason not to do so.

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; and
- 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 but is not resident in a state bound by the Hague Convention; 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 that 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.

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 that are to be taken into account in any subsequent assessment proceedings.

However, in the Financial List test case scheme, a test case proceeds on the basis that each party bears its own costs.

Funding arrangements

17 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 CFAs 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.

The success fee element of the party's costs is not recoverable from the losing party, subject to limited exceptions (e.g., in cases where the CFA was entered into before 1 April 2013, in insolvency-related proceedings where the CFA was entered into before 6 April 2016, and in publication and privacy proceedings where the CFA was entered into before 6 April 2019). As of 6 April 2016, success fees are no longer recoverable in insolvency-related cases and as of 6 April 2019 success fees are no longer recoverable in publication and privacy proceedings.

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. Those agreements are upheld provided that they are not contrary to public policy. The common law principles of champerty and maintenance must also be considered when third-party litigation funding is used, for fear of 'sullying the purity of justice'.

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 be jointly and severally liable to pay costs on the indemnity basis.

In *ChapelGate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246, the Court of Appeal found that the 'Arkin cap', which caps a litigation funder's liability for adverse costs to the amount of funding that was provided, is not a binding rule to be applied automatically in every case involving a litigation funder. Instead, the court will consider all of the facts of the case, particularly whether the funder had funded the claim in full or in part, in determining whether to cap the litigation funder's liability for adverse costs. In the 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 to reflect the funders' increased risk exposure but also to cover after-the-event insurance premiums.

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. Those 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. The solicitor's legal fees are only paid in the event of 'success' (as defined in the DBA), and not during the case.

A DBA must not provide for a payment inclusive of VAT that is more than 25 per cent of the relevant sums recovered in personal injury cases, 35 per cent in employment matters and 50 per cent of the sums ultimately covered in all other civil litigation cases. These caps are only applicable to proceedings at first instance and the figures are a percentage of the amount actually received by the successful party, not a percentage of any order or agreement to pay.

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. The Court of Appeal recently confirmed that DBAs may contain provision for payment in the event that a DBA is terminated early by a client, which may ease the concerns of some solicitors and thereby encourage greater use of DBAs (*Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16).

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. However, the government is currently in the process of drafting a new set of DBA regulations. In October 2019, proposed redrafted regulations were published to reform the Damages-Based Agreement Regulations 2013, following an independent review of the existing regulations by Professor Rachael Mulheron and Nicolas Bacon QC. The proposals mark a significant shift in some key areas. A supplementary report is currently being prepared. Key changes in the current draft include the following:

- a shift away from the success fee model – the legal team will be paid the DBA percentage payment together with their recoverable costs;
- a reduction in the caps mentioned above – from 50 per cent to 40 per cent in commercial cases and from 25 per cent to 20 per cent in personal injury cases;

- hybrid DBAs to be permitted, despite the concerns raised by the Ministry of Justice;
- greater flexibility to agree terms relating to termination of the agreement within the DBAs; and
- availability of DBAs in broader range of claims, including non-monetary claims.

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. The Law Society has also published information which indicates that barristers are not prepared to risk entering into a DBA even if the case is deserving, leading to questions regarding access to justice in civil proceedings in England and Wales.

Insurance

18 | 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 – these 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 – these 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.

In publication and privacy proceedings the recoverability of ATE insurance was expected to be abolished, but these plans have subsequently been delayed indefinitely. In December 2018, the government announced that it was abandoning plans set out in its 2013 costs consultation and instead the recoverability of ATE insurance premiums will remain.

In mesothelioma claims the recoverability of ATE insurance has also been delayed until a review of the likely effect of any abolition of recoverability of premiums has been carried out.

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.

Class action

19 | 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. In recent years there has been a marked increase in interest in class action litigation in England and Wales.

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 v Pride Mobility Products* [2017] CAT 9, an application was withdrawn following an unfavourable judgment rendering any possible class too small. However, in April 2019, the Court of Appeal revived a £14 billion proposed class action lawsuit against Mastercard (heard at first instance as *Merricks v Mastercard Inc.* [2017] CAT 16), which was brought following a 2007 decision by the European Commission that multilateral interchange fees charged between banks in relation to Mastercard transactions involved a breach of EU competition law. The case was then heard by the Supreme Court, which upheld the ruling of the Court of Appeal and remitted the case to the CAT for reconsideration of the certification decision in accordance with the Supreme Court's new guidance. This guidance smooths the path to certification in several areas, making it easier for a claim to achieve the necessary threshold of suitability and emphasising the policy rationale for collective actions – to facilitate the vindication of consumer rights. It is expected that this judgment will encourage a greater number of collective proceedings to be launched in the coming years.

In spring 2021, the Supreme Court will hear another significant case in this area, an appeal of *Lloyd v Google LLC* [2019] EWCA Civ 1599. Among the issues in the case is whether it is required under the CPR that members of a class can be identified to demonstrate the 'same interest' when undertaking a representative class action.

The issue of collective redress is continuing to attract interest and controversy. Businesses in the United Kingdom 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.

Appeal

20 | 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. In instances involving appeal to the Supreme Court, an appellant may apply directly to the Supreme Court for permission to appeal if permission is refused from the Court of Appeal.

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 (which typically means an error of law, but may also encompass an error of fact or a serious error in the exercise of the court's discretion), 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.

Foreign judgments

21 | 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. The end of the Brexit transition period on 31 December 2020 also brought change in this area, meaning that the position differs depending on whether a given foreign judgment was handed down before or after that date. Examples of the arrangements applicable to foreign judgments from 31 December 2020 or earlier include Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (Recast)), the 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015).

The Brussels Regulation Recast applied to the UK during the UK–EU transition period, but ceased to apply to the UK on a reciprocal basis at the end of the transition period, except as provided for in part three of the UK–EU Withdrawal Agreement in relation to ongoing proceedings.

At the end of the transition period, the Recast Brussels Regulation was converted into UK law as retained EU law, which was amended by UK legislation. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations (SI 2020/1493)) revoked the retained EU law version of the Recast Brussels Regulation, subject to transitional provisions which saved the Recast Brussels Regulation (and, by implication, the 2001 Brussels Regulation) in relation to proceedings commenced before the end of the transition period (as provided for by article 67 of the UK–EU withdrawal agreement).

The enforcement of judgments that are not subject to relevant arrangements is governed by common law, which will thus govern most EU or European Free Trade Area judgments handed down from 1 January 2021, unless and until the UK and EU reach a new agreement. The UK applied to join the 2007 Lugano Convention on 8 April 2020, but the EU (which has a veto over the UK's accession) has not yet approved the application.

As of 10 January 2015, the CPR were amended in line with the Brussels Regulation (Recast) to remove requirements for a declaration of enforceability when enforcing a judgment from a court of an EU member state, though these requirements have continued relevance for judgments in proceedings commenced before that date.

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.

The Hague Convention 2005 continues to apply in England & Wales following Brexit, and requires the courts of contracting states to uphold exclusive jurisdiction clauses, and to recognise and enforce judgments given by courts in other contracting states that are designated by such clauses.

Foreign proceedings

22 | 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) were previously processed according to EC Regulation No. 1206/2001 of 28 May 2001 (the 'Evidence Regulation'). Following the end of the Brexit transition period, the Evidence Regulation has ceased to apply, by virtue of the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493). As a result, the UK will no longer carry out or consent to requests from EU member states under the Evidence Regulation to take evidence from persons in the UK.

Most EU member states are contracting parties to the Hague Convention of 1970 on the taking of evidence. Requests for evidence for use in such EU member states and in jurisdictions of non-EU contracting parties are processed according to the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to this Convention. 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

UNCITRAL Model Law

23 | 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 are similar to those 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'.

Arbitration agreements

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

Under section 5 of 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 (see *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm)). This includes where the contract itself is alleged to have been obtained by fraud (see *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20).

Brexit did not impact the approach to determining governing law or drafting governing law clauses. The instruments that previously determined governing law, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), have been implemented in UK domestic law in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

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.

Prior to Brexit, the English court could grant an anti-suit injunction only to prevent parties from pursuing litigation proceedings in the courts of another country that was not a member state of the European Union or European Free Trade Area in breach of an arbitration agreement. However, following the end of the transition period, in cases brought under English common law rules and in arbitrations, English courts and tribunals can now grant anti-suit (and anti-enforcement) injunctions in support of their proceedings wherever the foreign proceedings are threatened or issued (including EU countries), making London an attractive seat for international arbitration.

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

Brexit had no effect on the membership of the New York Convention and therefore courts in the UK and the EU member states continue to enforce arbitral awards rendered in either jurisdiction in the same way.

Choice of arbitrator

25 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 section 15(3) of 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.

The 2021 International Chamber of Commerce Rules of Arbitration (2021 ICC Rules) entered into force on 1 January 2021. Article 12(9) of these new rules empowers the ICC Court to appoint members of the arbitral tribunal regardless 'of any agreement by the parties on the method of constitution of the arbitral tribunal', in exceptional circumstances.

Arbitrator options

26 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) and academics. The Chartered Institute of Arbitrators in London and the London Court of International Arbitration (LCIA), among other institutions, each maintain lists of arbitrators.

Arbitral procedure

27 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 duty to act fairly and impartially between the parties.

Court intervention

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

Under the Arbitration Act, the court's role is strictly supportive and it may only intervene in the arbitral process in very limited circumstances. The court may provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances to support the arbitration.

The court's powers to intervene extend to arbitrations seated in England and Wales and, in certain limited circumstances, to arbitrations seated elsewhere. For example, in *A and B v C, D and E* [2020] EWCA Civ 409, the Court of Appeal allowed an application under section 44(2)(a) of the Arbitration Act compelling a non-party to an arbitration agreement to provide evidence in a New York-seated arbitration.

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.

Several of the court's powers under the Arbitration Act may only be exercised once all arbitral remedies have been exhausted or may only be invoked within a limited time period after an arbitration award has been made.

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. Further, 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).

Interim relief

29 | 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 for the preservation of property and evidence.

If the parties have expressly agreed in writing, under section 39(2) of the Arbitration Act, the tribunal also has the power to order provisional relief, such as payment of money or disposal of property. Most arbitral rules contain an agreement to confer such powers upon the tribunal. Provisional relief is subject to the final decision of the tribunal on the case and may be varied by the tribunal.

Similarly, while the tribunal has no general power to grant interim freezing injunctions under the Arbitration Act, such power may be conferred by express agreement of the parties to the arbitration. 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).

Award

30 | When and in what form must the award be delivered?

The parties are free to agree on the form of the award, in accordance with section 52(1) of the Arbitration Act. 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, under section 54 of the Arbitration Act, 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 under section 50(4) of the Arbitration Act (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).

Where a material application is made to correct an arbitration award under section 57 of the Arbitration Act or an agreed process to the same effect (such as article 27 of the LCIA Rules), and the application leads to a correction of the award, then the 28-day period for challenging the award under section 68 of the Arbitration Act runs from the date of the award as corrected. Where an application to correct an award fails, the relevant date for commencement of the 28-day period is the date on which it is decided that the award should stand without further clarification (*Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324 (Comm)).

Appeal

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

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

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.

Section 68(2) of the Arbitration Act lists the forms of serious irregularity that the court will recognise. The test for what constitutes 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 applied in *S v A* [2016] EWHC 846 (Comm)). The court in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) confirmed and summarised the position succinctly. Once the applicant has demonstrated that there has been a serious irregularity falling within section 68(2), it must also show that the serious irregularity has caused substantial injustice.

Under section 69 of the Arbitration Act, 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 must concern an issue of English law, and 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 is at least open to serious doubt; and
- the court is satisfied it is just and proper in all the circumstances to hear the appeal.

Following the hearing of the appeal, the court may confirm, vary or set aside the award, or remit the award to the tribunal for reconsideration.

If the application for leave to appeal is dismissed, the general rule is that only the judge who made the decision can grant leave to appeal to the Court of Appeal.

The parties may – and often do – exclude the right to appeal to the court on any question of law arising out of the award. An agreement to exclude the right to appeal on a question of law is contained in most arbitral rules.

Where the agreement to this effect is included in the arbitration clause, sufficiently clear wording is required: 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). The leading case on what amounts to a question of law is *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 QB 503. In that case, the court distinguished between the ascertainment of the facts in dispute and the ascertainment of the law, which includes the identification of all material rules of statute and common law, of the relevant parts of the contract, and of the facts that must be taken into account when the decision is reached. It is only the second category that may

be appealed as a question of law. Such an appeal may arise from the arbitrator's statement of the law, or an incorrect application of the law to the facts (*Dyfrig Elvet Davies v AHP Land Ltd and another* [2014] EWHC 1000 (Ch)). An application for permission to appeal an award can be rejected on the basis that the application was made out of time: the time for appealing an award runs from the date of the award, not the date of corrections (*Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd and another* [2018] EWHC 538 (Comm)).

Enforcement

32 | 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 under section 66(1) of the Arbitration Act 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. Similarly, awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) will be recognised and enforced in England and Wales pursuant to the Arbitration (International Investment Disputes) Act 1966, which implements the Washington Convention.

In relation to arbitral awards against a state, the Court of Appeal has held that it is not mandatory for an order permitting the enforcement of an arbitration award to be served in accordance with the provisions of section 12 of the State Immunity Act 1978. While orders permitting the enforcement of an arbitration award are required to be served pursuant to CPR 62.18(8)(b) and 6.44, the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 or 6.28. (*General Dynamics United Kingdom v State of Libya* [2019] EWCA Civ 1110).

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.

Commercial arbitration awards made in countries that have not acceded to the New York Convention 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 England and Wales is not impacted by Brexit, as the United Kingdom remains a party to the New York Convention.

Costs

33 | Can a successful party recover its costs?

Unless the parties agree otherwise, the tribunal 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 tribunal, which 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.

The High Court decision of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) held that third-party funding costs may under certain circumstances be 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, though it was emphasised by the court that the costs incurred must be reasonable 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

Types of ADR

34 | 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.

Requirements for ADR

35 | 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 the parties to consider ADR and the 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.

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. Nevertheless, while a recent report by the Civil Justice Council in December 2018 advocated several methods to encourage parties to use ADR, it did not recommend making it compulsory.

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 was made clear that simply ignoring an invitation to participate in ADR is generally unreasonable, and may lead to potentially severe costs sanctions.

MISCELLANEOUS

Interesting features

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. Solicitors are granted rights of audience in all courts when they are admitted or registered. However, they cannot exercise those rights in the higher courts until they have complied with additional assessment requirements. The Solicitors Regulation Authority sets the competence standards solicitor advocates must meet and maintain, authorises assessment organisations to test people against those standards, and sets the regulations under which the scheme of higher rights of audience operates.

UPDATE AND TRENDS

Recent developments

37 Are there any proposals for dispute resolution reform? When will any reforms take effect?

Contempt of court

The Civil Procedure Rule Committee (CPRC) replaced CPR 81 concerning the practices and procedures on contempt of court in its entirety on 1 October 2020. In a redrafted Part 81, the new approach:

- omits nearly all the substantive law;
- deals with procedure and applicable requirements in rules not practice directions or guidance;
- creates a uniform procedural code for use in all contempt proceedings where the CPR apply; and
- reduces the number of prescribed forms.

In redrafting the new CPR 81, the aim was to streamline the rules relating to contempt to ensure they are easier to operate, with the intention of reducing the instances where procedural unfairness is found.

Coronavirus

38 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

From 6 April 2021, CPR 51.3 enables Practice Directions to be made that modify or disapply any provision of the rules for specified periods and in relation to proceedings in specified courts to address issues for the courts' work arising from the coronavirus outbreak or any other public emergency.

PD 51ZA (Extension of Time Limits and Clarification of Practice Direction 51Y) provides a temporary update to CPR 3.8 and came into force on 2 April 2020. Essentially, parties are now permitted to consent to extensions of time of up to 56 days (instead of the usual 28 days) without having to notify the court, provided that the extension does not jeopardise a hearing date. PD 51ZA does not alter PD51Z (Stay of Possession Proceedings, Coronavirus), which permits a 90-day stay in respect of possession proceedings.

Between 25 March 2020 and 24 April 2020, HMCTS published a daily operational summary that provided a summary of the courts' operational position during the covid-19 outbreak. Since 24 April 2020, the frequency of the operational summary has changed from daily to weekly.

To tackle the impact of coronavirus on the justice system, the Lord Chancellor introduced 10 temporary 'Nightingale Courts' in July 2020. Further Nightingale Courts were opened throughout the pandemic, boosting the total number of emergency courtrooms in England and Wales to 60.

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PD 51Y, which is effective from 25 March 2020, makes provision for private hearings to be conducted remotely, by video and audio, during the covid-19 outbreak and clarifies the way in which the court may exercise its discretion to do so.

On 21 January 2021, the Judiciary published a revised version of the Senior Courts Costs Office Guide. The accompanying press release states that the revised guide does not feature extensive changes, but 'reflects some fundamental changes in practice which occurred before COVID-19 and which have been increased as a result of it'.

In relation to arbitration, article 26(2) of the 2021 ICC Rules introduces the possibility of holding virtual hearings and clarifies that a hearing should not necessarily be held, unless any party so requests, or if the arbitral tribunal deems it necessary.

On 1 October 2020, the updated London Court of International Arbitration arbitration rules came into force, replacing the 2014 rules. While the new rules were not driven solely by the pandemic, these rules also focused on the shift towards electronic communications, by imposing the use of email on parties and tribunals under article 4.2, requiring parties to make requests for arbitration and responses in electronic form under article 4.1 and providing for arbitral awards to be transmitted to parties by electronic means alone under article 26.7. The rules also enabled hearings to take place 'virtually by conference call, video conference or some other technology' under article 19.2. The new rules also aimed to facilitate the early determination of disputes (both in relation to an award or an order). Article 22.1(viii) enables tribunals to make this early determination that any claim or defence is manifestly outside their jurisdiction, inadmissible or manifestly without merit. However, the new rules do not provide any guidance for tribunals in devising procedures to make these early determinations.

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