PANORAMIC

DISPUTE RESOLUTION

United Kingdom - England & Wales

LEXOLOGY

Dispute Resolution

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LITIGATION

Court system

What is the structure of the civil court system?

High-value (generally more than £100,000) and cases of legal importance are dealt with at first instance in the High Court. The High Court is split into three divisions: the King's Bench Division, the Chancery Division and the Family Division. The King's Bench division primarily handles contract and tort claims while 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 King's Bench Division in respect of contractual claims). The Business and Property Courts were created as part of the High Court to provide an umbrella structure to other specialist courts such as the Commercial Court and the Technology and Construction Court.

In addition to the specialist courts, there are also special Lists within the High Court to handle particular types of claims. The Media List is a specialist list of the High Court and belongs to the King's Bench Division. It handles claims such as defamation, breach of privacy, and claims under the Data Protection Act, whereas the Financial List is a dedicated cross-jurisdictional list within the Business and Property Courts of the High Court of Justice. It operates as a joint initiative between the Chancery Division and the Commercial Court. It is set up to deal with claims related to the financial markets and handles cases that typically involve more than £50 million, need expert judicial knowledge of financial markets or pose important issues for the financial sector.

Lower value (typically under £100,000) and less complex civil cases typically begin in the County Courts, with the option to appeal decisions to the High Court. The Civil Division of the Court of Appeal reviews cases from the High Court's divisions and specialist courts, and occasionally from the County Courts, with a panel of three judges presiding. The Supreme Court, as the ultimate appellate court, hears cases of the greatest public or constitutional importance affecting the whole population. Twelve judges sit on the Supreme Court, and they decide cases in panels of five (or very rarely, for cases of major importance, seven). 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 several Commonwealth countries, as well as the United Kingdom's overseas territories, Crown dependencies and military sovereign bases.

Additionally, there are specialist tribunals and courts such as The Competition and Appeal Tribunal (CAT), the Intellectual Property Enterprise Court and the Employment Appeal Tribunal, which handle legal issues related to specific types of competition, IP and employment claims, respectively.

Depending on the type and value of the claim, the Civil Procedure Rules (CPR) determine which court should handle it. The civil court system has begun to move some operations online. For example claims in the High Court are issued electronically through the C E File system and in cases where the amount in dispute is a money only claim for less than £100,000 claims can be started using the Money Claim Online (MCOL) portal.

Recommendations made by Lord Briggs in his 2016 report suggesting that an online court system should be created are starting to be realised, with two pilots in the County Court

for Online Civil Money Claims and the Damages Claims Portal. In addition, the Judicial Review and Courts Act 2022 created a framework for Online Procedure Rules and an Online Procedure Rules Committee (OPRC) that has already met.

Law stated - 17 June 2024

Judges and juries

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

In England and Wales, the legal system is based on the common law and is adversarial, with the onus on the parties to argue their case. The judge's role is primarily to assess the facts presented by the parties and apply the law set out either in statute or previous case law. Judges are required to interpret the law with reference to precedent, which means that a judge should follow previous cases decided on similar facts and points of law.

Civil cases usually do not involve juries, except in some cases of libel, slander, false imprisonment, malicious prosecution or fraud, where a jury trial may be allowed. Jurors, comprising 12 citizens, are randomly selected from the electoral register, and serving on a jury is a mandatory civic duty.

Judges are selected via The Judicial Appointments Commission (JAC), which is an independent commission that selects candidates for judicial office in courts and tribunals. Vacancies are advertised on the JAC website. Judicial diversity is an important goal and the JAC is involved in its promotion. Recent D&I statistics from 2023 show a positive trend, with equal representation of women in legal judicial selection and an increase in ethnic minority representation.

Law stated - 17 June 2024

Limitation issues

What are the time limits for bringing civil claims?

Limitation periods are governed by the Limitation Act 1980.

Common types of claim	When claim accrues	Limitation period	Notes
Contract	Accrual of cause of action (usually date of breach of contract)	6 years	
Tort	Accrual of cause of action (usually date of damage)	6 years	Some torts are actioned without proof of damage (for example, trespass or public nuisance)
Libel	Date of publication	1 year	
Personal injury	Date of injury or date of knowledge of the person injured	3 years	

Enforcement of a judgment	Date when judgment becomes enforceable	6 years	Relates to a 'fresh' action on a judgment not in relation to enforcement proceedings
Deed	Breach of obligation contained in a deed	12 years	

Where a claim has been concealed by a defendant, or where the action is based on the alleged fraud of the defendant, the limitation period does not start to run until the fraud or concealment is discovered or could have been discovered with reasonable diligence.

Limitation can only be extended in certain circumstances. For example, parties can agree to suspend the limitation period by entering into a standstill agreement through which parties can mutually extend or suspend the limitation period. This must be drafted carefully and legal advice should be sought regarding its efficacy.

It is possible for a party to bring a claim after the limitation period has expired; however, this will give the defendant a chance to raise limitation as a complete defence.

Law stated - 17 June 2024

Pre-action behaviour

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

Before starting a claim, a party must consider the rules governing pre-action conduct. These are contained in the Pre-Action Protocols (PAPs), which accompany the CPR. The Practice Direction on Pre-action Conduct and Protocols (Pre-action PD) applies to all types of claims, subject to a few limited exceptions There are additional PAPs that apply to pre-action conduct in specific types of claims. The required steps depend on which PAP applies. There are PAPs for claims relating to personal injury, real estate, professional negligence, claims relating to media and communications, and debt claims, among others. For a complete list see https://www.justice.gov.uk/courts/procedure-rules/civil/protocol.

The PAPs require parties to exchange information and documentation setting out their respective positions with a view to narrowing down disputed issues and settling claims and to consider some form of alternative dispute resolution (ADR) before proceedings are commenced. There can be serious consequences if one or both parties fail to comply with the Pre-action PD or specific PAP relevant to the claim. Where there has been non-compliance the court may order that the proceedings are stayed while steps are taken to comply with the PAP or sanctions can be applied, which may include that the party at fault pays the costs of the proceedings or part of the proceedings.

In August 2023, the Civil Justice Council (CJC) produced a report reviewing the efficacy of PAPs and whether they were suitable for the digital age. The report examined the potential benefits of digitalising pre-action processes, and the place and content of the Pre-action PD. For disputes currently subject to the Pre-action PD, the report recommended there should be a new General Pre action Protocol as a PD to CPR Part 1 and a new PAP for small claims worth £500 or less. The report sets out what the new General PAP should require of the

parties. A second reporting phase will focus on reforms to the existing PAPs and whether any new ones should be created such as for high value commercial claims.

There are several court applications that parties can make prior to the issue of a claim to help formulate their cause of action. These include pre-action disclosure under CPR 31.16 (and PD 57AD if the claim will be issued in the Business and Property Courts) and an application for a ***Norwich Pharmacal*** order. A claimant may apply for a ***Norwich Pharmacal***if they need to obtain information from a third party who is involved in or has facilitated wrongdoing that is the subject of the claim but is not necessarily liable for it. For example, a claimant may seek to identify the anonymous author of a defamatory online post by requesting the disclosure of the author's IP address from the website operator. Once disclosed, the claimant will then know the identity of the defendant.

Law stated - 17 June 2024

Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload? Do the courts charge a fee for starting proceedings or issuing a claim?

The rules for starting civil proceedings are laid out in Parts 7 and 8 of the CPR. Part 7 is used for starting most types of claims, especially those that involve a dispute of fact or require a trial to resolve. Part 8 claims are suitable for cases where the claimant seeks a declaration or an injunction, such as claims for the construction of a document, the determination of a point of law, or the enforcement of an arbitral award. Part 8 claims are also appropriate for claims that follow a special procedure, such as claims under the Companies Act 2006, claims for rectification of the register of title, or claims for probate or administration of estates.

Civil proceedings officially start with the issue of the claim form. In the High Court, this is done by filing the claim electronically through CE File.

Courts charge a fee for issuing a claim. The fee is dependent on the amount being claimed plus interest and currently ranges from £35 (where the value of the claim is no more than £300) to £10,000 (where the value of the claim is more than £200,000). If the claimed amount is left blank, the fee will be £10,000. Fees change periodically. The current civil court fees can be found here.

The claim form sets out the names of the parties, their legal representatives (if relevant), the nature of the claim and the amount or remedy the claimant is seeking. The details of the claim will be set out in the particulars of claim (POC), which can be included in the claim form or in a separate document served at the same time or within 14 days of the claim form. A response pack must be included with the POC and includes forms for acknowledging service of the claim form and POC, defending or admitting the claim and if appropriate, challenging the court's jurisdiction.

Claim forms served within the jurisdiction must be served within four months of issue, those served outside the jurisdiction must be served within six months of issue and permission of the court may be required. This is a complicated area and local advice should be sought. In

some cases, it may also be possible for the claimant to request an extension of time for the service of the claim form.

Service of the claim can include personal service, service by post, email or other electronic means (if agreed by the other parties). CPR 6 contains a list of the different methods of service permitted. Sometimes service of a claim form is impossible by the means provided for in the CPR, for example, in the case of a claim for crypto asset fraud where the claimant does not know physically who the defendant is or where they may be located. The English court has been creative in such situations and in cases such as *Osbourne v Persons Unknown Category A*, the court permitted the claimant to serve her claim form by NFT. On other occasions the courts have allowed service via social media platforms such as Facebook and Instagram.

If the claim is to be served on someone based outside the jurisdiction it must fall within one of the gateways set out in PD6B and the court's permission may be required. In October 2022, a new gateway 25 was added with the aim of strengthening the court's power to order foreign non-parties to provide information or documents and to help claimants who urgently need to find the right defendant or track stolen assets. The gateway was introduced for cryptocurrency fraud claims. The court's permission to serve outside the jurisdiction will not be required when there is an exclusive jurisdiction clause in favour of the English court.

The POC should include the statement of the facts on which the claimant relies, the legal basis for the claim, the relief or remedy sought by the claimant, and any supporting documents or evidence that the claimant wishes to rely on. The POC should be clear enough to enable the defendant to understand the claim and to respond to it. The POC should also comply with any relevant practice directions or PAPs that apply to the type of claim being made.

Law stated - 17 June 2024

Timetable

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

The CPR contains the procedure the parties should follow and sets out various time limits they must comply with.

The Particulars of Claim (POC) can be served at the same time or within 14days of the claim form.

The acknowledgement of service must be filed within 14 days from the date on which the defendant was served with the POC (whether served together with the claim form or separately). If the claim is to be defended, the defendant is provided with a further 14 days to serve a defence or to contest the court's jurisdiction (see CPR 10 and 11).

According to CPR 15.4, a defence must be served within 28 days of service of the POC. This time can be extended by written agreement between the parties for up to 28 days (CPR 15.5) or by court order on application by the defendant (CPR 15.6). If the defendant fails to serve a defence in time, the claimant may apply for judgment in default (CPR 12).

If the defendant serves a defence and counterclaim, the claimant may serve a reply and defence to counterclaim within 21 days after service of the defence (CPR 15.8). If there is

no counterclaim, serving a reply is optional unless the court orders otherwise (CPR 15.9). A reply should only be served if it is necessary to deal with any new issues raised in the defence or to advance a positive case that is not already set out in the particulars of claim (CPR PD 15 paragraph 2.1).

The case management phase begins after the statements of case have been served. The claim will be allocated to a 'track' by the court: the small claims track for claims up to £10,000, the fast track for claims between £10,000–25,000, the intermediate track for claims up to £100,000 and the multi-track for claims over £100,000.

Directions to take the case to trial will then either be given by the court or agreed by the parties, depending on which track the claim is allocated to. In multi-track cases, the Directions set out when documentary evidence and witness statements will be exchanged, whether expert evidence is required and how long the trial is likely to take. If the parties are unable to agree the directions this is considered by the court at a Case Management Conference (CMC) and the court will make orders ensuring that an appropriate timetable is put in place.

English court procedure is continually evolving, and recent updates include the addition of a Shorter Trial Scheme and a Flexible Trial Scheme within the Business and Property Courts. The Shorter Trial Scheme is designed for cases that do not require extensive disclosure or witness evidence with cases expected to reach trial within eight months of the CMC and judgment delivered within six weeks of conclusion of the trial, while the Flexible Trial Scheme allows parties to tailor procedures by agreement to ensure they are suitable for their case.

Law stated - 17 June 2024

Challenging the court's jurisdiction

Can the parties challenge the court's jurisdiction? If so, how can parties do this? Can parties apply for anti-suit orders and, if so, in what circumstances?

The court's jurisdiction can be challenged under CPR 11 on the basis that (1) the court does not have territorial jurisdiction or (2) where it does, the court should not exercise its jurisdiction in the matter.

The defendant must file the acknowledgement of service (AOS) confirming it wishes to contest the court's jurisdiction. The defendant then applies for an order seeking a declaration that the court has no jurisdiction or should not exercise any jurisdiction that it may have (CPR 11.1). This application must be within 14 days (28 days in the Commercial Court) of filing the AOS and be supported by evidence (in the form of a witness statement as to why jurisdiction is contested) and a draft order. Failure to file the application within this timeframe equates to submission to the court's jurisdiction. General guidance on how to make an application is contained in CPR 23. Generally, the application to contest jurisdiction will be considered at a hearing and the court will either agree to the proposed order or decline it.

If the court makes the requested order that it does not have jurisdiction, further provisions can be made, including setting aside the claim form. If the court declines to make the order sought, it will give further directions as to when the defence (and any subsequent statements of case) should be served.

The procedure under CPR 11 is also used if the parties have agreed that any dispute should be referred to arbitration, and one party issues proceedings in court in contravention of the arbitration clause.

If jurisdiction of the English courts has been specified in a jurisdiction agreement, then a party to that agreement may apply for an anti-suit injunction restraining the other party from commencing or continuing foreign proceedings in a different jurisdiction as the foreign proceedings amount to a breach of contract. Anti-suit injunctions are not granted lightly, as they may infringe the sovereignty of foreign courts and the principle of comity. In addition, they are penal in nature. An application for an anti-suit injunction is also made in accordance with CPR 23 and requires evidence in support in the form of a witness statement stating why the injunction should be granted, a draft order and a cross-undertaking in damages by the applicant that if the court later finds that the injunction had been wrongly granted and the respondent suffered loss as a result, the applicant will comply with any order the court may make in respect of that loss.

Law stated - 17 June 2024

Case management

Can the parties control the procedure and the timetable? Can they extend time limits?

The CPR sets out the procedure parties should follow. The procedure is dependent on which track the claim is allocated to. The track may also determine the timetable and extension of time limits.

Once the defence is filed and proceedings enter the 'directions' phase parties have greater flexibility over both procedure, timetable and the ability to extend time limits (track allocation permitting).

The court where the claim is issued will allocate the claim to a track. To do this the court will assess the financial value of the claim.

Track	Financial value	CPR	Procedure	Further details
The small claims track	Claims up to £10,000 (£1,000 for personal injury)	CPR 27 CPR 27.1 sets out which CPRs do not apply to this track	Rules and procedure is less formal as designed for low value claims. Hearing will be informal. Only limited legal costs are recoverable.	The rules on standard disclosure and witness evidence do not apply instead the court will give directions as to what it requires.

The fast track	Claims between £10,000 and £25,000	CPR 28	For straightforward claims with a trial of less than one day. Trial should be within 30 weeks from allocation and giving of directions and held in the County Court. Different costs rules apply to claims issued before and after 1 October 2023. For claims issued after 1 October 2023 the fixed recoverable costs regime applies.	CPR does apply but: Expert evidence is limited to one expert per party per field and each party is limited t expert evidence in tw fields. Disclosure is what is required in the case rather than standard disclosure. PD28.9.5 sets out a typical 30-week timetable for fast-trac directions.

The intermediate track	Claims between £25,000 and £100,000	CPR 28 PD 28	Less complex civil money claims. A quicker, simpler procedure than the multi-track for less complex cases that do not require more detailed preparation and a lengthy trial. Claims that include non-monetary relief are not suitable for this track. Claims will be allocated to a complexity band that provides an ascending scale of fixed recoverable costs.	The intermediate trac is suitable for claims where: • the trial will not last longer than three days. • oral expert evidence is likely to be limited to two experts per claim. • the claim can be managed under the procedure set out in CPR 28 section IV; and • there are no additional factors that make the claim inappropriate for the intermediate track. The claim is not one that involves more tha two parties on one sic (the other side must only have one party).

The multi-track	Usually over £100,000	Heard in County Court or High Court. CPR 29 PD 29	Higher value and more complex claims that do not fall within the other tracks. Costs are managed under CPR 3 and CPR 45. For claims under £10m parties must file a cost budget and have a costs management conference to assess the fairness of their budget.	Court will fix a date fo a case management conference and may also fix a date for a pretrial review. Directions are decide by the parties and the court will agree if thes are suitable. Directions will cover the extent of the parties' disclosure, witness and expert evidence and the preparations to trial. The directions will als set out the length of th trial. Certain time limits can be extended by agreement between the parties but where they impact on the tri date the court may intervene.

Parties are able to extend time limits without permission from the court in a number of scenarios:

- by a written agreement between the parties;
- a consent order agreed by the parties and approved by the court;
- a court order made on an application by one or more of the parties; and
- the court, exercising its case management powers.

In all these cases, the court will assess whether the extension of time will impact on the trial date, the reasons for the extension and whether it has been requested and granted previously. This will affect whether the extension of time will be granted.

If a party does not comply with a direction or order then a sanction can be imposed upon it for non-compliance. A party may then apply to the court seeking an order requesting relief from that sanction. The court will apply the three-stage test set out in ***Denton v TH White Ltd*** [2012] 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 so as to deal justly with the application for relief.

Multi-track cases are subject to costs management unless the amount of money claimed as stated on the claim form is £10 million or more. In addition, costs management will not apply if the claim is non-monetary or not fully quantified and the claim form states that it is valued at more than £10 million, or is made on behalf of a person under 18, or is subject to fixed costs or the court otherwise orders. If the claim is subject to costs management, a cost budget and budget discussion report must be filed in accordance with the timings set out in CPR 3.13. A party that fails to file a costs budget will be treated as filing a costs budget that only covers its court fees (CPR 3.14) and may not be able to recover its legal costs from the other party if it is successful in the case. Budgets should be completed on form Precedent H.

The court has the right to review costs budget even where they are agreed between the parties to ensure they are reasonable and proportionate.

Law stated - 17 June 2024

Evidence – documents

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

There is a duty to preserve documents and other evidence pending trial and parties must share documents with other parties including those that are unhelpful to their case. This is called disclosure.

The relevant rules are contained in PD57AD, for those claims progressing through the Business and Property Courts, and CPR 31 for all other claims in which disclosure applies. CPR 31 also applies to some aspects of the disclosure scheme under PD57AD.

The scope and nature of disclosure differs between PD 57AD and CPR 31. However, at an early stage a party's legal representatives have a duty under both CPR 31 and PD 57AD to inform their clients of the need to preserve disclosable documents. A document is broadly defined to include electronic communications and their metadata. Accordingly, it is very important that the parties consider carefully at the outset the retention of documents and the creation of new documents. If a document is destroyed during litigation, or even when litigation is reasonably foreseeable, the court may draw adverse inferences.

The disclosure process enables parties to formally declare which specific documents, or more broadly, which categories of documents exist or have existed. Once the obligation arises, a party must produce all relevant documents, both paper and electronic. This obligation continues until the case concludes. If a party becomes aware of a document that should be disclosed during the proceedings, they must do so.

A party's duty of disclosure is limited to documents that are or have been under its control, which includes documents that a party has a right to possess or inspect. The Court of Appeal has upheld a decision that this includes personal devices belonging to employees and former employees (***Phones 4U Limited v EE Limited*** [2021] EWCA Civ 116).

CPR 31.17 permits a party to apply to court for the disclosure of documents from a non-party to the proceedings, known as a third-party disclosure order. This application must

be supported by evidence and is only granted if the documents sought are likely to support the applicant's case or adversely affect another party's case, and if disclosure is necessary for the fair conduct of the proceedings or to save costs. Section II of PD57AD incorporates CPR 31.17 for claims progressing through the Business and Property Courts.

A party to whom the document is being disclosed has the right to inspect it unless the party who disclosed it no longer has control over it or if the party disclosing the document has the right to withhold inspection of it. The party who has revealed or disclosed a document lets the other parties see the originals or gives them copies of any documents disclosed. Under CPR 31, inspection is a different step from disclosure, whereas under PD57AD it is incorporated into the disclosure process as electronic copies are usually provided with the list of documents.

Under CPR 31, Standard disclosure is the usual order sought by the parties. It requires a party to only disclose documents on which they rely, documents that (1) affect their own case, (2) adversely affect the other party's case, and (3) support another party's case and any documents that are to be disclosed under a relevant practice direction. As discussed above, a party's obligation to disclose documents only extends to those documents that are or have been in their control. These documents are contained in a list that is served on the other parties in accordance with timetable set out in the Directions order.

One of the aims of PD57AD is to make the process of disclosure suitable for more complex cases where the amount of electronic disclosure is significant. It contains a distinct procedure to that contained in CPR 31 although, as outlined above, there is some overlap.

PD57AD requires each party to give an Initial Disclosure list of documents to all other parties. The list should be given at the same time as the relevant statement of case is served and will include the principal documents that a party is relying on and that help the other parties understand the claim or defence they face. There are some situations where initial disclosure is not needed, including where the parties agree to dispense with it.

Where it considers it appropriate to resolve the issues in the case, the Court may order Extended Disclosure. This consists of five models of disclosure. Parties can attribute a different model of disclosure to a different issue in the case. Each disclosure model varies in scope depending on the facts and complexity of the case. The models range from an order that no disclosure should be made to the broadest form of disclosure (requiring production of documents that may lead to a train of enquiry). This is recorded in the disclosure review document (DRD).

The DRD is intended to streamline the disclosure process, ensuring that it is handled efficiently and effectively, with a focus on the key issues pertinent to the case. The DRD is a document produced jointly by the parties. The document typically contains sections such as a list of issues that may require disclosure of documents, suggestions for models of Extended Disclosure, each with different requirements, and an explanation of the scope and detail regarding the collection and production of documents, including both hard copy and electronic files.

The claimant must serve a completed draft of section 1A of the DRD, which includes a draft list of the key issues for disclosure, within 21 days of the filing and service of the defence or any later statement of case if that is when a request for Extended Disclosure is first made. The defendant must respond to the claimant's draft List of Issues for

Disclosure no later than 28 days after the claimant has served t
he draft.

As mentioned above, under PD57AD inspection is not a separate step as electronic documents are usually given at the same time as the List of Documents is served.

Law stated - 17 June 2024

Evidence – privilege

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

There are two principal categories of legal professional privilege (LPP) under English law: legal advice privilege and litigation privilege. If documents fall into either of these two categories, the documents do not need to be shown (inspected) to the other party or the court.

Legal advice privilege

This protects confidential communications between a lawyer and their client and evidence of those communications, provided that communications are for the dominant purpose (ie, the ruling, prevailing or most influential purpose) of conveying legal advice (***R (Jet2.Com Ltd) v Civil Aviation Authority*** [2020] EWCA Civ 35). The protection does not extend to communications with a third party. A lawyer includes a qualified in house or foreign qualified lawyer as long as they are acting as a lawyer and not simply giving business advice.

Unlike in other jurisdictions, a document will fall under legal advice privilege irrespective of whether the advice was conveyed by in-house lawyers or an external lawyer. The document must, however, be for the dominant purpose of conveying legal advice (***R (Jet2.Com Ltd) v Civil Aviation Authority*** [2020] EWCA Civ 35). The advice must also be legal in nature and cannot simply be commercial advice.

Only communication with the client is protected as the meaning of client is narrowly construed (***Three Rivers District Council and Others v The Governor and Company of the Bank of England*** [2003] EWCA Civ 474 (***Three Rivers No. 5***)). Legal advice should be sought as to whether the privilege will extend to all persons who are receiving the advice. If they are outside the narrow confines of the definition of 'client' the advice will no longer be privileged and may need to be disclosed in the event of a dispute.

Litigation privilege

This privilege extends to communications both between a lawyer and their client as well as third parties (eg, an expert witness) provided that it is created for the sole or dominant purpose of pursuing or conducting the litigation. For the privilege to apply, litigation must be pending or in the reasonable contemplation of the parties (so a 'real likelihood' rather than a 'mere possibility').

Where a privileged email attaches non-privileged documents the Court of Appeal has held that LPP only applies to the email itself, not the documents attached to it. If an attachment is not privileged, it must be disclosed even if it was sent with a privileged email (***Sports Direct International Plc v Financial Reporting Council*** [2020] EWCA Civ 1JJ).

LPP plays a pivotal role in internal investigations and those by Regulators. Parties are often unsure what they can disclose and what can remain cloaked in privilege. In an important ruling the Court of Appeal in ***ENRC v Director of the SFO*** [2018] EWCA Civ 2006 held that litigation privilege could apply to documents created during the course of an internal investigation prior to the commencement of criminal proceedings by the SFO as they had been created by ENRC for the dominant purpose of resisting or avoiding criminal proceedings. The rationale was that businesses should be able to create documents during an investigation without fearing that they might be incriminating themselves.

There are other grounds of privilege of which it is important to be aware:

- without prejudice communications between the parties intended to resolve the dispute;
- communications 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);
- documents that pass between co-parties to legal proceedings;
- communications that would tend to incriminate a party criminally; or
- that would be adverse to the public interest.

Law stated - 17 June 2024

Evidence – pretrial

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

The court will give directions for the exchange of written evidence from witnesses and experts at the CMC.

A witness statement includes the evidence that the person would give orally if called to do so at trial. The court will also give additional directions as to the order in which witness statements are to be served and whether or not witness statements are to be filed. If a witness statement is served late then the witness may not be allowed to give evidence at trial unless the court gives permission.

A witness statement must be produced in accordance with the rules in CPR 32 and PD 32. It must be in the witness's own words and contain a statement of truth. If a witness statement is in a foreign language, a party wishing to rely on it must the file statement, together with a certified translation, with the court.

Practice Direction 57AC and its accompanying Appendix, which contains a statement of best practice, must be followed for all trial witness statements in the Business and Property Courts. These rules set out how the witness evidence should be prepared. The witness statement will need to be endorsed by a certificate of compliance 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 PD57AC (including the Appendix) and paragraphs 18.1 and 18.2 of PD 32 (PD57AC,

paragraph 4.3). If the statement does not comply with the PD57AC the court retains the power to strike out the statement and prevent its use at trial but in most cases the court will order the party to redact the non-compliant sections or replace the whole statement with a compliant one.

The Directions Order will set out the number of experts each party will call and the issues the expert evidence will consider. Depending on the nature of the claim, the court may appoint a single joint expert or allow the parties to choose their own expert. Expert evidence must be independent and not influenced by the pressures of litigation. The expert report should include a statement setting out the substance of all facts and instructions relevant to the report, the reasoning behind the expert's own opinions and other information as laid out in Practice Direction 35 of the CPR.

Law stated - 17 June 2024

Evidence – trial

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

Witnesses of fact and experts will generally be called to give oral evidence at trial. Their statements stand as evidence in chief, which means that they will be required to give evidence on the issues set out in their statement. Witnesses and experts are then cross-examined by the opposing party (usually by barristers) and then re-examined by the party who called them. The judge may also ask questions.

A witness statement of fact can still be used as evidence at trial by a party, even if the witness does not appear to testify in person. The party must notify the other parties, who can ask the court for permission to cross-examine the witness. If a party does not bring a witness to give oral evidence, the court may give less importance to his or her statement and in some cases may draw adverse inferences from the witness's absence.

If a witness or expert is based abroad, they may give evidence via video link if the court gives permission.

Although not widely used, the CPR does permit expert evidence to be heard together in a judge led process called 'hot tubbing'. This may mean the evidence is discussed on an issue-by issue basis rather than each expert giving evidence separately.

Law stated - 17 June 2024

Interim remedies

What interim remedies are available?

The court has broad powers to grant interim remedies. These can include orders for the preservation or sale of property, interim prohibitory or mandatory injunctions, a freezing injunction, a search order for specific disclosure, payment into court and security for costs. CPR 25 contains a full list of those available.

The courts can grant a freezing injunction to prevent dissipation of assets or evidence. Usually, English courts will only make orders related to property within the jurisdiction. However, in exceptional cases, the English court will grant a worldwide freezing injunction if the respondent does not have enough assets within the jurisdiction to cover the applicant's claim. The English court may also grant interim relief (usually in the form of freezing injunctions) in support of legal proceedings anywhere in the world.

Often, when applying for an injunction, the applicant will apply without telling the other side that they are seeking the injunction. This is an application made 'without notice'. This is because they may be concerned that the other party will seek to destroy or remove the asset or evidence that is the subject of the injunction. In this case, the party seeking the injunction must comply with the duty of full and frank disclosure by informing the court of any arguments that are adverse to its position. This includes any arguments that are prejudicial or unfavourable to the position of the applicant. An injunction that is granted on this basis can be set aside if a court decides that the duty has not be complied with.

An interim remedy can be applied for at any time during the proceedings and even after judgment has been given. This is common in the case of freezing injunctions where the applicant is concerned that the losing party may dissipate assets to frustrate the judgment handed down by the court. The court may also grant an injunction against defendants who cannot be identified. These are against persons unknown or 'newcomer injunctions' (*Wolverhampton City Council and others v London Gypsies and Travellers and other* [2023] UKSC 47).

Law stated - 17 June 2024

Remedies

What substantive remedies are available?

The courts can award different remedies to the claimant, such as damages (which are meant to compensate for its loss, not to penalise the defendant), declarations, rectification, rescission, subrogation, injunctions (which can be mandatory or prohibitory), specific performance (a type of injunction that requires performance of a duty or obligation), and orders for the sale, mortgage, exchange or partition of land. Punitive damages, which aim to punish the defendant, may only be possible in very rare cases, for example in cases involving abusive conduct or intentional torts.

Monetary awards may include interest payments (see section 35A of the Senior Courts Act 1981). Interest will accrue on judgment debts from the date the judgment is issued at rate of 8 per cent until the debt is satisfied (see section 17 of the Judgment ACT 1838, CPR 40.8 and 44.2(6)(g) for the High Court).

Law stated - 17 June 2024

Settlement

Are there any rules governing the settlement process? Can parties keep settlement discussions confidential from the court?

Parties are encouraged to consider settlement throughout the course of litigation. It is particularly important to consider and ADR at the pre-action stage of a claim and prior to the CMC.

Settlement offers can be made at any point before judgment. There are no rules governing the process unless the offer is made in accordance with CPR 36, which is considered as forming its own 'code'. Under Part 36 of the CPR, settlement offers have specific cost implications and must state a period after which the defendant may be liable for the claimant's costs. Part 36 offers are a very important strategic tool in litigation because they create an incentive for parties to settle and avoid the risk of adverse costs consequences. If an offer is not accepted by the other party and the outcome of the case is at least as favourable as the offer, then the offering party may be entitled to enhanced costs and interest from the date of expiry of the offer. Conversely, if a party rejects a Part 36 offer and the outcome of the case is less favourable than the offer, then the rejecting party may have to pay the offering party's costs and interest from the date of expiry of the offer.

Offers outside CPR 36 are typically made on a 'without prejudice' basis, which means that the offer is not disclosed to the court. A 'Calderbank offer' is expressed to be 'without prejudice save as to costs', which means the offer cannot be disclosed to the court except when it is considering the question of costs. It is separate to a Part 36 offer as it can be made outside the parameters of Part 36. Multiple offers can be made during the litigation and the costs consequences mean that there are real risks for the receiving party not accepting a sensible offer.

When the parties agree to settle, they sign a consent order and have it sealed by the court. A Tomlin order is a kind of consent order that has two parts: a 'public' part that shows that the parties have settled, and an annex that contains the confidential terms of the settlement. The Tomlin Order acts as a legally binding contract that can be enforced by the court without initiating new proceedings in the case of breach.

Law stated - 17 June 2024

Enforcement

What means of enforcement are available?

There are different ways to enforce a judgment from a civil court in England and Wales. A court will not automatically enforce a judgment or order that a defendant chooses not to comply with. Claimants will need to seek the most appropriate method of enforcement depending on the nature of the judgment and the identity and location of the judgment debtor.

If the judgment is for a money payment and the debtor has assets that can be easily seized and sold, the court can issue a writ or warrant of control to order an enforcement officer to take and sell the debtor's goods.

A third-party debt order can be obtained and prevents funds being paid to the debtor from a third party by diverting them to the creditor instead.

The court can enforce a charging order, which charges on the debtor's interest in any land, securities or funds. This usually stops the debtor from selling any land with a charge on it without paying off the creditor first.

The court can order an attachment of earnings, which would mean that some of the debtor's income would be deducted from the debtor's income by the employer and paid to the creditor until any debt is paid off.

Alternatively, a creditor can use various insolvency procedures, such as bankruptcy, appointment of a receiver or a winding-up order.

Law stated - 17 June 2024

Public access

Are court hearings held in public? Are court documents available to the public? Are there circumstances in which hearings can be held in private? Is there a mechanism to preserve documents disclosed as part of the court process?

The general rule for civil proceedings (all hearings and trials) is that they are held in public. Only in exceptional circumstances can hearings be held in private, irrespective of the parties' consent. These exceptional circumstances are laid down in CPR 39.2, where a court might allow for proceedings or a part of them to take place in private if it is found necessary for the administration of justice.

The public can request access to statements of case (but not documents filed with them) and judgments and orders (CPR 5.4C(1)). As such a non-party can access the claim number, parties and legal representatives. The reasoning behind this is that the English civil court system operates on the basis of open justice. If the matter goes to trial, witness statements relied on in court are also made public.

If a party wishes to keep a statement of case out of the public domain, then an application can be made under CPR 5.4C(4). Filing such an application can be done without notice. Based on this application, the court may either grant an order for the statement of a case not to be made available to a non-party, restrict access to the documents or make any other order that it thinks fit.

The Civil Procedure Rule Committee (CPRC) has proposed to amend CPR 5.4(C) and is currently consulting on its proposal. The new amendment would controversially allow non-parties to access skeleton arguments, expert reports and witness statements prior to hearings. The consultation has now closed and because of a number of very critical responses the CPRC has decided to postpone changing the rule for the moment.

In certain types of litigation, such as that involving trade secrets or patents, it is vital that documents are subject to strict rules regarding who can access them. A confidentiality club deals with this scenario as it provides a framework ensuring that only designated individuals, usually the lawyers, can view the relevant material. Members of the 'club' will be required to transmit material in ways to ensure confidentiality is maintained.

Law stated - 17 June 2024

Costs

Does the court have power to order costs? Are there any steps a party can take to protect their position on costs both before the start of proceedings and while proceedings are in progress?

CPR 44 contains the general rules on costs that apply to civil claims in the English courts. The starting point is that the unsuccessful party pays the costs of the successful party. However, the court has a wide discretion to depart from the usual rule depending on the way the litigation has been conducted, the amount of costs incurred and whether they are proportionate to the amount in dispute, and the effect of any Part 36 offers (see below).

At the end of a hearing, the court can either order the unsuccessful party to pay fixed costs or have their costs assessed either by summary assessment or in the case of a trial, by detailed assessment. Summary assessment typically applies at the end of a short hearing, which lasts for less than one day, or trial (usually in the fast track) when the judge assesses the costs payable by one party to another based on costs schedules submitted by the parties at least 24 hours prior to the hearing.

At the end of a longer interim hearing or following judgment, the court may make a costs order but usually will not order how much should be paid. If the parties cannot agree the amount, they will submit to a process called detailed assessment. Detailed assessment provides that a costs officer will determine the costs of the case and is a complex process, with steps similar to litigation. As a result, it is lengthy and costly. Few cases proceed to detailed assessment and parties usually agree the amount owed instead.

Track allocation will also affect costs recovery. If a case is allocated to the small claims track, costs recovery is very limited. In the fast and intermediate tracks, costs are usually fixed and CPR 44 is not applicable.

If a defendant is confident of their ability to defend a claim but is concerned about the claimant's ability to pay any costs award at the end of the matter, they may apply in certain circumstances for an order for 'security for costs', which will require the claimant to pay money into court or provide another form of security as a precondition to being able to continue with the claim. Security for costs can also be sought by a claimant against a defendant in respect of a counterclaim.

Parties are also able to protect their positions in relation to their costs burden in the event they are unsuccessful by making offers to settle under CPR 36. Part 36 offers are considered as forming their own 'code'. These offers can be made at the pre-action stage and during the action itself. Under Part 36 of the CPR, settlement offers have specific cost implications.

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. The offer must include interest up to the end of the 'relevant period'.

Part 36 offers are a very important strategic tool in litigation. Multiple offers can be made during the litigation and the costs consequences mean that there are real risks for the receiving party not accepting a sensible offer.

Law stated - 17 June 2024

Funding arrangements

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

English law allows conditional fee agreements (CFAs) for civil litigation matters, where the solicitor's fees (or part of them) depend on the outcome of the case. Usually, the solicitor receives a lower payment or no payment if the case is lost, but a normal or higher than normal payment if the client wins. However, to make CFAs valid, certain requirements must be met. The success fee must be based on a percentage increase of fees charged (not a percentage of damages won), and such increase cannot go beyond 100 per cent of the normal rate. These agreements are becoming more common in commercial cases. The party's costs include a success fee that the losing party does not have to pay, except in rare cases.

Parties can also enter into a damages-based agreement (DBA), where if the party is successful the solicitor receives a percentage of any damages recovered irrespective of what the solicitor's fees are. In commercial cases the amount that can be sought from the client is capped at 50 per cent of the sums recovered. In personal injury cases the cap is 25 per cent. For a DBA to be valid it must comply with the requirements set out in The Damages-Based Agreements Regulations 2013.

In addition, English law also allows litigation to be funded by a third party. Litigation funding agreements (LFAs) are agreements between litigation funders and claimants permitting the litigation funder to recover an amount payable from the proceeds recovered by the claimants if the claim is successful. This is an increasingly common way of funding litigation, in particular for class actions.

In a highly significant ruling, with implications for third-party funders and those bringing collective (class) actions in the Competition Appeals Tribunal (CAT), the Supreme Court held in ***R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*** [2023] UKSC 28) that an LFA, which entitle funders to a percentage of any awarded damages, was a DBA and because it did not comply with the statutory requirement for DBAs was unenforceable for funding collective proceedings in the CAT. Many of the LFAs in existence are likely not to comply with the DBA regime, and as a result will require renegotiation to bring them outside of the statutory definition of a DBA, if indeed this is even possible.

Law stated - 17 June 2024

Insurance

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

Solicitors should discuss with their clients how costs are to be met and consider whether the client's liability might be insured (paragraph 8.6 of the Code of Conduct for Solicitors).

There are two types of legal expenses insurance policies:

- Before the event insurance – legal costs insurance that the client already has in place prior to the litigation. These policies usually involve paying a yearly fee and offer protection for some or all of the client's possible expenses in any future disputes. They are not typically applicable to large-scale commercial lawsuits.
- After the event insurance – insurance that is taken out after a dispute has arisen to meet some of the legal costs and expenses of the case. These policies usually cover the expenses of a party (such as fees for lawyers and experts) and the possibility of paying the legal fees of the other side if the insured loses the litigation.

The extent of coverage will depend on the details of each individual policy.

The insurance cost is not usually paid by the losing side. ATE insurance costs are still recoverable in publication and privacy cases but this exception does not apply to data breach or cyberattack cases, so in those cases, the losing side will not pay the ATE insurance costs (***Warren v DSG Retail Ltd*** [2021] EWHC 2168 (QB)).

Law stated - 17 June 2024

Class action

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

The CPR provide for two formal mechanisms by which collective actions can be brought. The first of these is a representative action brought under CPR 19.6, which can be brought either as an opt-in or an opt-out action. Under this procedure, the representative has to demonstrate that he or she had 'the same interest' as everyone else in the class. A judgment given under such an action is binding on all parties represented unless otherwise stated.

In ***Commission Recovery Limited v Marks & Clerk LLP and Long Acre Renewals*** (the ***CRL*** case), a High Court judge permitted a CPR 19.6 representative action to proceed, despite the fact that those in the purported class did not have identical interests, and that there were some parts of the claim that might need to proceed on an individual basis. The deciding principle, according to the judge, was whether or not the differences gave rise to any conflict of interest that, it was decided, in this case they did not. The decision heavily referenced another important judgment in this area, ***Lloydv Google LLC*** [2021] UKSC 50, which was a claim on behalf of four million Apple iPhone users in respect of a breach of the Data Protection Act 1998. In ***Lloyd,*** the UKSC considered the claim was unsuitable to proceed as a representative action.

Many have hailed CRL as a significant departure from previous case law, but whether or not this precedent is followed largely remains to be seen. The judgment in another attempted representative action, ***Andrew Prismall v Google UK Ltd and DeepMind Technologies Ltd***, which was decided shortly after, has been cited by some as proof that the ***CRL*** case has

had no effect. However, in ***Prismall*** the 'same interest' was not really addressed and so ***CRL*** continues to stand by itself as the High Court's latest word on that subject.

The second mechanism, a Group Litigation Order (GLO), is not a true class action route, but rather a means for the court to manage together large numbers of cases with 'common or related issues of fact or law'. They can only be used where each claimant opts into the litigation, and so can be less attractive to claimant lawyers and funders alike due to the greater upfront work and investment required to build the class and prepare individual claims. It is used where 'same interest' arguments under CPR 19.6 are insurmountable, and is the mechanism of choice in product liability, personal injury and post-data breach claims in recent years. When a judgment is given in relation to a GLO, it is binding on all parties to the GLO unless the court states otherwise.

In addition to the CPR, legislation has been enacted to implement specific collective regimes to ensure an economically viable means of redress is available. The most notable example of this is the Consumer Rights Act 2015, which currently provides the only true opt-out class action regime in the UK. Claims can be filed in the Competition Appeals Tribunal (CAT), if they are based upon a competition law complaint, by a single representative for an entire class. In 2020, the Supreme Court handed down a decision in the case of *Merricks v Mastercard*, which significantly lowered the threshold to be used by the CAT when assessing whether a Collective Proceedings Order (CPO) should be made in relation to a claim. Two major parts of this test, commonality and suitability, had, up until the ***Merricks*** decision, often proved insurmountable for many claims. The result of this was an explosion of cases being filed in the CAT during 2021–2023, a development that is showing no signs of slowing down. Many of these claims are targeting large technology companies probably because they are easier to frame in anti-trust terms as in order to bring a claim in the CAT a party needs to establish an infringement of competition law has occurred. If these claims succeed, they can unlock all the advantages of an opt-out class action regime without the same obstacles regarding 'same interest' that they would likely face in the High Court.

Another notable development is the increase in the size of classes represented. In 2022 alone, the 15 new actions filed in the CAT claimed to represent, in aggregate, 169 million people. However, the Supreme Court decision in the case of*R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* may have put paid to litigation funders taking on these type of claims for the moment. This is because the Court ruled that litigation funding agreements under which payment is calculated by reference to a percentage of the sum recovered (or has some direct relationship with such sum) constitute damages-based agreements (DBA). Many funding arrangements supporting active CAT claims are structured on this basis; this is highly problematic given that, under the Competition Act 1998, DBAs are prohibited for use in opt-out competition class actions. This decision therefore handed new ammunition to CAT defendants, as well as causing a massive headache for funders as they frantically scramble to renegotiate the terms of their funding agreements. While unlikely to prove fatal to the funding of competition class actions, it is likely to fuel further challenges of funding arrangements, given the lack of certainty as to what is and is not a DBA.

Law stated - 17 June 2024

Appeal

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

An appeal is the means by which a party can seek to have the judgment or order obtained from a lower court reviewed by a higher court.

A party that loses a case may appeal to a higher court, depending on the level of the court that made the decision. The County Court, the High Court and the Court of Appeal are the lower courts that can be appealed from, and the Supreme Court is the highest court that can be appealed to. Permission to appeal is usually needed from either the lower court at the time of the decision, or from the appeal court if time limits are followed. For appeals to the Supreme Court, an appellant can apply straight to the Supreme Court for permission if the Court of Appeal denies it.

The appeal court will allow an appeal where one of the following grounds of appeal can be made out (Part 52.21(3) of the CPR):

- the decision was wrong (in that it erred in law, in fact or in the exercise of its discretion) (CPR 52.21(3)(a)); or
- it was unjust because of a serious procedural or other irregularity (CPR 52.21(3)(b)).

Under CPR 52.12(2), the appeal notice must be filed within 21 days of the date of the decision of the lower court which the appellant wishes to appeal.

Law stated - 17 June 2024

Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The procedure for the recognition and enforcement of a foreign judgment depends on whether reciprocal arrangements are made with the foreign country. If not, enforcement will be under the common law.

There is a distinction between recognition and enforcement. If a party only wishes to use the foreign judgment to prevent the matter from being relitigated in the English court, then the judgment needs only be recognised. However, if the party seeks to enforce against assets within the jurisdiction, then the judgment also needs to be enforced. The same principles generally apply to both stages.

Regimes that govern recognition and enforcement of judgments in England and Wales

UK regime	European regime	Statutory regime	2005 Hague Convention on Choice of Law Agreements	Common law

Governs judgments from Scotland and Northern Ireland	Judgments from EU and certain EFTA countries given in proceedings instituted before 31 December 2020	Administration of Justice Act 1920provides recognition of judgments from the recognised foreign courts listed together with the Foreign Judgments (Reciprocal Enforcement) Act 1933 – includes many Commonwealth countries and others such as Israel and India.	Judgments where EU, Mexico, Singapore or Montenegro is designated in an exclusive choice of court agreement	All other jurisdictions (including EU from 1 January 2021 where not referred to previously in this table)

Following Brexit, the majority of the UK's reciprocal arrangements regarding the recognition and enforcement of judgments between it and the EU fell away. Joining the 2005 Hague Convention of Choice of Court Agreements provided an element of reciprocity with regard to exclusive jurisdiction clauses with the EU, although there is debate as to when the Convention applies. The UK asserts that exclusive jurisdiction clauses will be covered from 1 October 2015, the date it joined the Convention as a member of the EU. While the EU submits that the relevant date is 1 January 2021. As there have been no cases yet in the EU considering the point, it is still to be determined.

The UK has also applied to join in its own right the 2007 Lugano Convention between the EU and EFTA countries. While the EFTA states have all agreed, the EU has stated that it is against the UK joining Lugano because participation in the Convention should not be offered to a third-party member that is not part of the internal market. The UK's application remains pending although the EU has not indicated it will revisit its decision.

On 12 January 2024, the UK signed the 2019 Hague Judgments Convention. After ratification, it will take effect in the UK 12 months later and will only cover judgments from proceedings that start after that date. It is designed to provide a reciprocal framework for the recognition and enforcement of national court judgments in civil or commercial matters and applies to judgments emanating from non-exclusive, exclusive and asymmetric jurisdiction clauses. The UK is expected to ratify the Judgments Convention at the end of June 2024. Regulations incorporating the Judgments Convention into domestic law have been laid before Parliament and the relevant changes to the CPR have been drafted.

If no reciprocal enforcement arrangements exist (as is the case with the United States), judgments can be enforced at common law. This enables the creditor to sue on the foreign judgment in the English courts as if it was a debt. This is subject to certain conditions.

To enforce an English judgment in a foreign court local law must be considered. If the judgment falls within the 2005 Hague Convention on Choice of Court Agreements then that Convention will apply. Likewise, if the proceedings began prior to 31 December 2020, the

Recast Brussels Regulation or the 2007 Lugano Convention will apply if the judgment is to be enforced in an EU or EFTA member state court.

Law stated - 17 June 2024

Foreign proceedings

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

To collect evidence in England and Wales for use in civil proceedings in other jurisdictions, the foreign court must issue a Letter of Request. The process national courts should follow on receipt of a request for evidence is governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (EPOJA), which gives effect to the Hague Convention of 1970 on the taking of evidence.

Those seeking to obtain evidence should instruct English solicitors. An application for an EPOJA order for evidence must be made to the Senior Master of the Queen's Bench Division of the High Court (Part 34.19 of the CPR), accompanied with written evidence, and by the original Letter of Request (CPR 34.17).

Law stated - 17 June 2024

ARBITRATION

UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Arbitrations seated in England and Wales or Northern Ireland are governed by the Arbitration Act 1996 (the Act), is broadly based on the UNCITRAL Model Law. The Arbitration Act also includes some other provisions, such as the authority of the tribunal to grant interest and defines an arbitration agreement more widely in that it is not limited to agreements about a 'specific legal relationship'. The Act contains a mixture of mandatory and non-mandatory provisions. If the seat of the arbitration is in England parties must follow the mandatory provisions but may opt out of the non-mandatory provisions and exclude these in their arbitration agreement.

The Law Commission in England & Wales has been consulting on whether changes should be made to the Act to ensure that arbitration law in England keeps pace with international developments. It published its final report, along with a draft Bill, in September 2023. The report concluded that the Act generally works well, and that root and branch reform is not needed nor wanted. Nevertheless, the Law Commission made a number of recommendations for targeted reform. The aim of the changes is to fulfil the policy objective of ensuring that the Act is fit for purpose and that it continues to promote the UK as a leading destination for arbitrations.

The government accepted all the recommendations. The aim of the changes is to fulfil the policy objective of ensuring that the Act is fit for purpose and that it continues to promote the UK as a leading destination for arbitrations. The Arbitration Bill contains the following substantial initiatives:

- codification of an arbitrator's duty of disclosure;
- strengthening of arbitrator immunity around resignation and applications for removal;
- introduction of a power for arbitrators to dispose summarily of issues that have no real prospect of success;
- a revised framework for challenges under section 67 of the Arbitration Act 1996 (where the challenge alleges that the arbitral tribunal lacked jurisdiction);
- a new rule on determining the governing law of an arbitration agreement; and
- clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators.

The Bill was introduced into the House of Lords but proceeded no further due to the dissolution of Parliament at the end of May 2024.

Law stated - 17 June 2024

Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The key requirement of the Act in respect of arbitration agreements is that the agreement must be in writing and that the parties agree to submit all present and future disputes to arbitration (section 5 Arbitration Act 1996). This reflects the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). There is a high degree of flexibility under the Act. An arbitration agreement need not be signed by the parties. A written agreement may also arise merely from an exchange of written communications without the need for a formal document. It is also sufficient for an oral agreement to be recorded in writing by one of the parties or by a third party with the parties' authority.

The Act does not set out the form the arbitration agreement should take but most of the institutions that administer arbitrations will have their own clauses that parties can insert into the main agreement. These may set out who will administer the arbitration, the number of arbitrators and how they will be chosen, the law and seat and the language of the arbitration. A widely used example for arbitration administered under LCIA rules can be found here.

The agreement to arbitrate is considered separable to the main contract it is contained within. This means that should the main contract be declared voidable for some reason the agreement to arbitrate will still be valid.

Usually, the agreement to arbitrate is governed by the law chosen by the parties. In the absence of any such choice, the Supreme Court in ***Enka v Chubb*** held that the agreement to arbitrate is governed by the law chosen to govern the main contract – unless, for example, that law would invalidate the agreement to arbitrate. Otherwise, the agreement to arbitrate will be governed by the law with which it is most closely connected, which is usually the law of the seat. The seat is the place where the arbitration is deemed legally to occur (even if

hearings take place elsewhere or online). It is common for there to be an express choice of law to govern the main contract, and an express choice of seat for an arbitration, but no choice of law to govern the agreement to arbitrate. This can result in an arbitration being seated in England and Wales but, as a result of the decision in ***Enka v Chubb***, for the arbitration agreement to be governed by a foreign law (the law governing the main contract). This might not be the intention of the parties and does not accord with other major arbitral jurisdictions.

The English courts are very supportive of arbitration and will stay a claim issued in the courts if the parties have made a valid agreement to arbitrate the dispute (section 9 of the Act). Since Brexit, this also includes the grant of anti-suit (and anti-enforcement) injunctions to stop foreign proceedings anywhere (including EU countries) if they are issued in breach of an agreement to arbitrate under English law, which makes London a good place for international arbitration.

The enforcement of an arbitration agreement is governed by the New York Convention and therefore Brexit has no effect on the recognition and enforcement of arbitration awards.

Law stated - 17 June 2024

Choice of arbitrator

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

The number of arbitrators appointed depends on the size and complexity of the arbitration. Where a dispute is complex the parties may decide on a tribunal of three arbitrators. Each party will nominate an arbitrator and they in turn will agree on a chairperson.

Where there is no agreement on the number of arbitrators, the Act provides that the tribunal shall consist of a single arbitrator. The parties are free to agree on the procedure for appointing an arbitrator and may, for example, wish to defer to the appointment procedure of the relevant arbitral institution. The fallback position under the Arbitration Act 1996 in absence of an agreed procedure is that the arbitrator should be jointly nominated by the parties within 28 days of service of the request for arbitration. If the parties cannot reach an agreement on the choice of arbitrator, the Act permits either party to apply to court for directions as to tribunal's appointment.

The Act allows a party to object to the selection of an arbitrator, but only after the applicant has tried all other options. The reasons for dismissing an arbitrator under the Act include bias, insufficient qualifications, mental or physical disability, or improper or delayed conduct of proceedings that leads to substantial injustice.

Law stated - 17 June 2024

Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

Parties are free to choose the arbitrator and this is one of the advantages of arbitration over litigation. Often the institution administering the arbitration will have suitable appointees on its panel. As would be expected from a global arbitration centre, London offers a wide selection of arbitrators with various sectoral, linguistic and jurisdictional specialisms. It is notable that non-British arbitrators were selected by the London Court of International Arbitration (LCIA) in 63 per cent of cases in 2022, despite 85 per cent of LCIA arbitrations being substantively governed by English law. It is also not uncommon for judges from the English Commercial Court — the supervisory court for arbitrations seated in England — to sit as arbitrators following retirement.

Law stated - 17 June 2024

Arbitral procedure

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

The Arbitration Act 1996 does not stipulate any substantive requirements for the procedure to be followed. Instead, in absence of an agreement between the parties, the Act confers power to the tribunal to decide all procedural and evidential matters. This is expressly stated to include matters relating to the timing and location of hearings, document production and rules of evidence. However, the tribunal's power to adjudicate procedural matters is subject to its 'general duty' to act fairly and impartially between the parties, and to adopt procedures suitable to the circumstances of the case avoiding unnecessary delay and expense. This is a mandatory duty under the Act and tribunal must act in accordance with it.

Institutional rules may also set out a rough procedure that parties can follow to help the arbitration run smoothly. For an example, see article 14 of the LCIA Rules 2020.

Law stated - 17 June 2024

Court powers to support the arbitral process

What powers do national courts have to support the arbitral process before and during an arbitration?

There are limited circumstances in which the English courts may intervene to support the arbitral process. Some of the court's powers may only be used following the exhaustion of all other arbitral remedies or may only be considered within a limited time period after an arbitration award has been made. For example, under section 12 of the Act, a party can only apply to the court to extend time for commencement of arbitration after exhausting any available arbitral process for obtaining an extension of time.

The court may only intervene in accordance with powers contained in sections 42 to 45 of the Act. These powers are:

- to enforce a peremptory order of the tribunal;
- to secure the attendance of witnesses;
- to make orders in relation to property such as preservation or sale

- to appoint an emergency arbitrator; and
- to determine a question of law arising in the course of proceedings upon the agreement of all parties.

In addition, the court can order freezing injunctions and other interim compulsory injunctions to assist an arbitration. The parties may exclude the application of all powers upon agreement, with the exception of the court's power to secure the attendance of witnesses under section 43 of the Act. This is because the tribunal only has jurisdiction over the parties to the arbitration agreement, and not third parties such as witnesses.

Law stated - 17 June 2024

Interim relief
Do arbitrators have powers to grant interim relief?

The powers available to the tribunal to grant interim relief depend on the arbitration agreement. Parties are free to agree that a tribunal may award any relief on a provisional basis, which the tribunal could grant as a final award. In the absence of an agreement, the Act expressly confers the power to the tribunal to make an interim award for security for costs and to give directions in relation to preservation of property or evidence. These are non-mandatory provisions of the Act and may be disapplied by the parties.

Law stated - 17 June 2024

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

The Act permits the parties to agree the form of the award. In absence of an agreement, the Act simply provides that an award must be in writing, be signed by all arbitrators, contain the reasons for the award, and state the date of the award and seat of the arbitration. If the parties have not agreed otherwise, the tribunal can choose the date for the award under section 54 of the Act and it has to tell the parties as soon as possible after it has made the award. The Act does not prescribe a time limit for the delivery of an award but allows the tribunal or a party to the proceedings to apply for an extension of time for making an award where the arbitration agreement imposes a time limit.

In respect of the timing of the award, the tribunal remains bound by its general duty, which includes avoiding unnecessary delay or expense. Ultimately, the parties may apply to have an arbitrator removed pursuant to the Act if they can prove that the arbitrator's failure to use all reasonable efforts in making an award has or will cause substantial injustice.

Law stated - 17 June 2024

Appeal or challenge
On what grounds can an award be appealed or challenged in the courts?

Unless otherwise agreed by the parties, an arbitral award is final and binding upon them. An award may be challenged only on certain grounds set out in the Act, namely:

• lack of substantive jurisdiction of the tribunal (section 67);

• serious irregularity causing substantial injustice (section 68); or

• appeal on a point of law, but only where not excluded by agreement of the parties or the rules of the arbitral institution as this is a non-mandatory provision (section 69).

These grounds represent a compromise between the finality of an arbitral award, and the need to rectify awards that are unjust, incorrectly decided as a matter of law, or where the tribunal lacked jurisdiction. Sections 67 and 68 are mandatory and cannot be excluded by agreement between the parties. The Commercial Court is the forum for these claims.

The court will consider the forms of serious irregularity that are mentioned in section 68.2 of the Act. The standard for proving serious irregularity is high, and only in exceptional cases will an award be set aside. The applicant must not only prove that a serious irregularity has occurred, but also that the serious irregularity has resulted in significant harm.

The parties are free to exclude an appeal on a point of law under section 69 and the rules of most arbitral institutions exclude an appeal of this nature. If the parties agree that the arbitrator need not give reasons for his or her decision, this is considered to be an agreement to exclude the right of appeal. Further, there is no right to appeal to the court on a question of fact.

Law stated - 17 June 2024

Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The United Kingdom is a signatory to the New York Convention. The Act is unequivocal in that an arbitral award may be enforced in the same manner as a judgment or order of the court. The Act also contains a provision stating that an award obtained in the territory of a state that is party to the New York Convention shall be recognised as binding and may be relied on as a defence or otherwise in legal proceedings. The Act reflects article V of the New York Convention with respect to circumstances in which the enforcement of an arbitral award may be refused, in particular on grounds of public policy.

To enforce the award in England an application is made by the award holder or debtor for an order under section 66(1) of the 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 Act. Investment Treaty Awards are also enforced in a similar manner by virtue of the UK's membership of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention).

A defendant has the right to apply to set aside the enforcement order. However, case law 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.

Law stated - 17 June 2024

Costs

Can a successful party recover its costs?

Unless the parties agree otherwise, the tribunal should award the successful party its costs except where it appears not to be appropriate to the tribunal in the circumstances. In addition to costs, the unsuccessful party will also pay the arbitrator's fees and expenses, and any fees and expenses of the arbitral institution. Any agreement between the parties on cost allocation is valid only if made after the dispute in question has arisen and not at the time of entering into the arbitration agreement itself.

The parties are free to agree on which costs are recoverable, but in absence of an agreement it is up to the tribunal to award recoverable costs on such basis as it thinks fit. In doing so, the tribunal must specify the basis upon which it has acted and itemise costs awarded and the amount relating to each item. The tribunal's discretion in this area extends to whether the conduct of the parties affects the amount to be paid. The Act expressly provides that recoverable costs include the reasonable fees and expenses of the arbitrators unless otherwise agreed.

The court in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) decided that third-party funding costs can sometimes be recovered in arbitration as 'other costs' of the parties under section 59(1)(c) of the Act. The successful claimant could recover all of its third-party funding costs, including a 300 per cent uplift, but the costs had to be reasonable for recovery. The court also held that costs recoverability in arbitration should not depend on what a court would allow in litigation under the CPR.

Law stated - 17 June 2024

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

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

Mediation is popular in England and Wales. There are various institutions within the jurisdiction specialising in mediation services, notably the Centre for Effective Dispute Resolution. Other forms of ADR can also be preferred within certain industry sectors. Construction contracts notably commonly opt for adjudication by an independent adjudicator, resulting in a quick binding decision that can be appealed via litigation or arbitration.

Expert determination is another form of ADR. This allows a relevant expert to determine a technical or specialist issue that is in dispute. It is often used for disputes involving valuation, accounting, engineering or scientific matters.The expert's decision is usually contractually binding unless the parties agree otherwise. As there is no statutory framework for expert determination, the process is largely governed by the parties' agreement.

Commercial parties can also choose to resolve their dispute by early neutral evaluation (ENE). ENE is a form of ADR where a neutral third party provides an assessment of the merits of the case or specific issues in dispute. The evaluator is usually an expert in the field of

the dispute or a senior lawyer with experience in the relevant area of law. The evaluator's opinion is not binding on the parties, but it can help them to narrow the issues, evaluate their positions, and facilitate a settlement. Like expert determination, ENE is most often used for complex or technical disputes that involve questions of law or fact, such as intellectual property, construction or professional negligence.

Law stated - 17 June 2024

Requirements for ADR

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

Parties are encouraged to consider ADR both before and during proceedings, with the potential of adverse costs being awarded for unreasonably failing to consider ADR. However, there is no hard and fast requirement for parties to litigation or arbitration to mediate unless this is required by the dispute resolution clause of the agreement.

The courts encourage parties to explore the use of ADR at all stages of the proceedings, including pre-action to avoid the need to issue a claim at all. From May 2024, for all new civil court claims filed in the County Court, attending a mediation session will become a required step in resolving a money dispute under £10,000. This will be a free, one-hour mediation session with the HM Courts and Tribunal Service Small Claims Mediation Service. The scheme is administered under a new pilot PD51ZE.

In late 2023, the English Court of Appeal in *James Churchill v Merthyr Tydfil Borough Council* held that English courts have the power to stay proceedings and order the parties to engage in mediation. This power, however, is a matter for the court's discretion as to whether making such an order is proportionate to settling a dispute fairly, quickly, and at reasonable cost, and does not impair the essence of the right to proceed to a judicial hearing. Following this judgment, the Civil Procedure Rules Committee has decided to consult on whether the decision should be implemented more formally within the CPR. The consultation closed at the end of May 2024.

On 3 May 2023, the UK signed the Singapore Convention on Mediation. After joining the Convention, the High Court will be able to enforce settlement agreements (if within scope) from mediations worldwide – there will be no need for a party to issue a separate breach of contract claim. This should boost foreign parties' confidence in commercial mediation. The Convention will take effect in the UK six months after ratification. Ratification is expected in late 2024.

Law stated - 17 June 2024

MISCELLANEOUS

Interesting features

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

One of the most interesting features of the English legal system is the split between the work of solicitors, who tend to work directly with clients, and barristers who traditionally conduct the advocacy of a claim in court. This split is starting to erode as more solicitors gain Higher Rights of Audience to become solicitor advocates and are allowed to advocate in more complex cases. Arbitration does not share the distinction and many solicitors conduct advocacy on behalf of their clients in these cases.

Law stated - 17 June 2024

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The Law Commission in England & Wales has been reviewing the Arbitration Act 1996 (the Act). It issued its final report, along with a draft Bill, in September 2023. The report found that the Act generally works well, and that no major overhaul is necessary or desirable. However, the Law Commission suggested some specific reforms. The goal of the changes is to ensure that the Act meets the needs of users, keeps pace with international developments in this area and that it continues to attract arbitrations to the UK. The Arbitration Bill includes the following significant measures such as incorporation of an arbitrator's duty to disclose; provision of a power for arbitrators to dismiss claims or defences that have no real chance of success; a new framework for challenges under section 67 of the Arbitration Act 1996 (where the challenge claims that the arbitral tribunal had no jurisdiction); a new rule on the law that applies to an arbitration agreement (overturning the Supreme Court's decision ***in Enka v Chubb***); and clarification of court powers to assist arbitral proceedings, and to support emergency arbitrators. The Bill was introduced into the House of Lords but proceeded no further as a result of the dissolution of parliament in May 2024. It is not known at this time whether this legislation will continue along the same path if there is a new government.

In 2022, the Online Procedure Rule Committee (OPRC) was set up to make rules governing the practice and procedure for specific types of online court and tribunal proceedings across the Civil, Family and Tribunal jurisdictions. The purpose of the OPRC is to make simple Online Procedure Rules that are accessible and fair, allow for quick and efficient resolution of disputes and support use of innovative methods of dispute resolution. The OPRC is still in the initial phase of their work, but they have indicated that the digital space will have different rules from the Civil Procedure Rules (CPR). The OPRC will devise rules to provide governance to ensure data is collected, controlled, protected and shared properly.

In August 2023, the Civil Justice Council (CJC) produced a report reviewing the efficacy of PAPs and whether they were suitable for the digital age. A second reporting phase, which is yet to begin will focus on reforms to the existing PAPs and whether any new ones should be created such as for high-value commercial claims.

From May 2024, for all new civil court claims filed in the County Court, attending a mediation session will become a required step in resolving a money dispute under £10,000. This will be a free, one-hour mediation session with the HM Courts and Tribunal Service Small Claims Mediation Service. The scheme is administered under a new pilot PD51ZE.

In October 2023, a new intermediate track was introduced for claims with a value between £25,000 and £100,000. A new system of fixed recoverable costs will apply to these claims together with claims allocated to the Fast Track.

The Civil Procedure Rule Committee (CPRC) has proposed an amendment to CPR 5.4(C). Following a consultation on the changes a large number of concerns were raised and as a result the CPRC has decided to delay implementation of the change while it considers these.

In late 2023, the English Court of Appeal in ***James Churchill v Merthyr Tydfil Borough Council*** held that English courts have the power to stay proceedings and order the parties to engage in mediation. Following this judgment the CPRC has decided to consult on whether the decision should be implemented more formally within the CPR. The consultation closed at the end of May 2024.

On 3 May 2023, the UK signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (known as the Singapore Convention on Mediation). After joining the Convention, the High Court will be able to enforce settlement agreements (if within scope) from mediations worldwide – there will be no need for a party to issue a separate breach of contract claim. This should boost foreign parties' confidence in commercial mediation. The Convention will take effect in the UK six months after ratification. Ratification is expected in late 2024.

On 12 January 2024, the UK signed the 2019 Hague Judgments Convention. It is designed to provide a reciprocal framework for the recognition and enforcement of national court judgments in civil or commercial matters and applies to judgments emanating from exclusive, non-exclusive and asymmetric jurisdiction clauses but only after the Convention enters into force. The UK is expected to ratify the Judgments Convention at the end of June 2024, and it will take effect 12 months later. Regulations incorporating the Judgments Convention into domestic law have been laid before Parliament and the relevant changes to the CPR have been drafted.

Law stated - 17 June 2024