ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2018

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A practical cross-border insight into litigation and dispute resolution work

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Contributing Editors
Greg Lascelles and Tom Jackson, Covington & Burling LLP

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Jane Simmons

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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Continued Overleaf →

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EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of legal privilege in litigation, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 40 jurisdictions, with the USA being sub-divided into eight separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Greg Lascelles and Tom Jackson of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 13

England & Wales


Greg Lascelles


Tom Jackson

Covington & Burling LLP

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The English legal system is based on the common law tradition. The English courts are bound by the principle of precedent (*stare decisis*). Civil procedure in England is governed by the Civil Procedure Rules (CPR) 1998, which are accessible online at http://www.justice.gov.uk/courts/procedure-rules/civil/rules.

The "overriding objective" of the CPR, which courts must always have regard to, is to enable the court to deal with cases justly and at proportionate cost, taking into consideration various factors, including ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate and ensuring that it is dealt with expeditiously and fairly.

The English legal profession is split between solicitors and barristers. Solicitors deal with and represent the client on a day-to-day basis and provide contentious and non-contentious advice on law and legal strategy; barristers are normally instructed for highly specialised advice and for advocacy before the higher courts. Solicitor-advocates may also have rights of audience in the higher courts.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Civil proceedings in England can be conducted in the county courts or the High Court. More sizeable cases are dealt with by the High Court, which is divided into three divisions: the Queen's Bench Division (QBD); the Business and Property Courts (BPC, formerly known as the Chancery Division); and the Family Division. Generally, the QBD deals with general claims in contract and tort and the BPC deals with disputes involving intellectual property, trusts and land (among others).

There are various specialist courts, including the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Companies Court and the Patents Court. The Commercial Court forms part of the QBD, in London, and is generally regarded as the most appropriate forum in England to resolve international commercial disputes. Its practice and procedures are laid down in the CPR and the Commercial Court Guide.

The Financial List, a joint initiative of the BPC and the QBD, was set up at the end of 2015. It is composed of specific judges from the Commercial Court and the BPC and deals with complex financial disputes of over £50m, or which require particular financial market expertise, or raise issues of general market importance. By September 2017, nine judgments had been handed down for cases dealt with in the Financial List.

Appeals lie with the High Court, the Court of Appeal, and the Supreme Court in the last instance. Matters which involve the application of EU law may be referred or appealed to the Court of Justice of the European Union (CJEU) if the outcome of the case will depend on the judgment of the CJEU.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages in civil law proceedings before the English courts are:

- issue of a claim form;
- service of process (i.e. the claim form) on the defendant(s);
- service of the parties' statements of case;
- allocation of the claim to a case management track (depending on the value and complexity of the case);
- disclosure of documents;
- exchange of witness and expert evidence;
- trial; and
- assessment of costs.

The CPR lays down strict procedural requirements for the various stages. These will be addressed where the individual stages are discussed in further detail below. The overall average duration of civil proceedings before the English courts (excluding appeals) varies between one and two years (but can sometimes be less). Appeal proceedings can take substantially longer, particularly if taken to the highest court in England and Wales (the Supreme Court) or if a reference or appeal is made to the Court of Justice of the European Union.

Beginning at the end of 2015, there are two pilot schemes under way for: (i) shorter trials; and (ii) flexible trials in the Courts, dealing with commercial cases. These are testing methods to make commercial matters cheaper and more efficient, and both schemes aim to reduce trial lengths (aiming to conclude cases within a year) primarily through reducing requirements in evidence (documentary and oral) and submissions. Cases heard through the shorter trials scheme to date have demonstrated costs and time savings, typically

meeting the scheme's aim to conclude cases within a year. Both schemes are scheduled to run until 30 September 2018.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The English judiciary takes a favourable approach to exclusive jurisdiction clauses. It will usually: (i) stay proceedings commenced before the English courts in breach of an exclusive jurisdiction clause prescribing a foreign dispute resolution forum; or (ii) grant an anti-suit injunction against proceedings commenced outside the European Union in breach of an exclusive jurisdiction clause in favour of the English courts.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Costs in civil proceedings before the English courts vary considerably, depending primarily upon the size and complexity of the case and the level of fees of the solicitors and barristers instructed. Costs "follow the event", so it is generally the loser who bears most of the costs of the proceedings. Exceptions to this rule exist, primarily depending on the conduct of the prevailing party over the course of the proceedings.

Unless agreed between the parties, costs will need to be assessed by the court. A substantial proportion of the costs incurred will generally be recoverable after assessment, but this is unlikely to amount to a full reimbursement.

The civil litigation costs system was comprehensively reviewed by Lord Justice Jackson, who published his final report in January 2010. The majority of Jackson LJ's recommendations took effect from 1 April 2013, including:

- the abolition of recoverability by the successful party of success fees and after-the-event insurance premiums under agreements entered into on or after 1 April 2013;
- the introduction of contingency fee agreements (also known as damages-based agreements) for contentious work (see questions 1.6 and 1.7 below);
- a new costs management procedure for claims with a value of less than £10 million allocated to the "multi track" (i.e. cases which are more complex in nature and valued in excess of £25,000), with certain limited exceptions;
- an additional costs sanction (equivalent to 10% of the amount awarded up to a limit of £500,000, and then 5% of any amount awarded in excess of that figure, up to a limit of £1,000,000) payable by a defendant who does not accept a claimant's reasonable "Part 36" offer (i.e. an offer to settle made in accordance with Part 36 of the CPR) and fails to beat it at trial (as described more fully at question 10.1 below); and
- a new test of proportionality for recoverable costs.

Where applicable, the new costs management procedure for claims allocated to the multi-track requires parties (except litigants in person) to file and exchange costs budgets setting out costs for each stage of the proceedings, at least 21 days before the first case management conference, if no other date is specified. If a party fails to file a budget when required to do so, they will be deemed as having filed a budget comprising only the applicable court fees. The parties are expected to try and agree their respective budgets, and to revise those budgets if circumstances require during the course of the proceedings. If parties are not able to agree their budgets, or revisions to their budgets, the issues in dispute will be referred to the court.

On 9 March 2015, there was a change to the way Court fees are charged in both "specified" and "unspecified" money claims where the claims are worth more than £10,000. The new Court fee, payable by the Claimant upon issuing the claim, is 5% of the value of the claim, capped at a maximum of £10,000.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The English legal system is open to conditional fee arrangements between lawyers and their clients ("no win, no fee"). These agreements are limited to an uplift on the fees payable. The maximum uplift on a conditional fee arrangement is 100% of the normal fee. However, following the Jackson reforms (see question 1.5 above), the success fee will no longer be recoverable as a cost from an unsuccessful party where the conditional fee agreement was entered into on or after 1 April 2013.

With effect from 1 April 2013, contingency fee agreements (also known as damages-based agreements or DBAs) are permitted for all contentious business, excluding criminal and family proceedings. DBAs are a form of "no win, no fee" agreement between the client and their representative, whereby if the client is unsuccessful there will be no fee, but if the client obtains a "specified financial benefit" the representative will receive an agreed amount. This amount is determined by reference to the amount of financial benefit the client has obtained (i.e. the lawyer will usually receive an agreed percentage of the compensation received by the client).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The English public policy against "champerty and maintenance" aims to restrict the selling and funding of litigation. Champerty means funding an action in return for payment of a share of the proceeds of the action. Maintenance prevents a third party funding litigation in which the funder has no genuine commercial interest.

If a cause of action is assigned and the assignment offends the policy against champerty and/or maintenance (for example, if the assignee is to pass on a share of any proceeds of the litigation to the assignor or if the assignee has no genuine commercial interest in the claim), such assignment would not be valid. Rules prohibiting assignment have been gradually relaxed.

There is a growing trend for litigation to be funded by professional funders of litigation. The following non-exhaustive list of factors will be taken into consideration when determining whether such funding arrangements fall foul of the public policy against champerty and/or maintenance:

- the extent to which the funder controls the litigation;
- the amount of profit the funder stands to make;
- whether there is a risk of inflating damages; and
- whether there is a risk of distorting evidence (particularly relevant if the third party funds expert evidence on a contingency basis).

The general judicial trend is towards recognising the validity of commercial funding and limiting the role of champerty and maintenance in regulating such arrangements (however, should such arrangements infringe champerty and/or maintenance, they will be void and unenforceable). There is increasing pressure for statutory regulation to be introduced in order to control third-party funding.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Once proceedings have been commenced, defendants may apply for security for costs against the claimant. The purpose of granting security for costs is to protect the defendant against the risk of being unable to enforce any costs order which the defendant may later obtain. There are a number of grounds on which security for costs can be applied for, the main ones being:

- the claimant (wherever resident) has taken steps to dissipate his assets;
- the claimant is a company (wherever incorporated) and there is reason to believe that it will be unable to pay the defendant's costs (if ordered to do so); and
- the claimant is resident outside of the UK or the EU.

After one of the grounds is established, the court will have discretion and will take into account:

- if the claimant is resident outside the UK, the ability to enforce any costs order in that jurisdiction;
- whether the claimant is resident in a signatory country to the European Convention on Human Rights, because requiring a party to provide funds that it is unable to raise may amount to a breach of its rights to a fair trial under Article 6(1);
- the likelihood of the claim succeeding;
- whether the claimant is able to comply with the order; and
- whether the claimant's financial position was caused by the defendant's actions.

It should be noted that a claimant can also make an application for security for costs where the defendant has brought a counterclaim.

An order for security for costs will require the claimant to pay a specified sum of money into court or provide a bond or guarantee for the defendant's costs.

The English courts have the power to grant cost orders against a third party in favour of a party to the proceedings. The court has wide discretion in making such orders and will only make such a costs order against a third party when it is just to do so (considering factors such as the amount of control which the third party had over the proceedings and whether it stood to gain from them financially).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Before commencing proceedings, the parties have to comply with certain pre-action procedures. Depending on the nature of the case, the requisite guidance will be set out in the relevant pre-action protocol and practice direction. The intention of the pre-action protocols is to provide a procedure for the exchange of information about the claim before the proceedings are commenced. This assists the parties in agreeing a settlement before commencing proceedings or, failing that, with the management of the proceedings.

The information provided by the intended claimant must be sufficient to enable the intended defendant to investigate and evaluate the prospective claim. The intended defendant's response must be reasoned and contain sufficient comment and detail to enable the intended claimant to evaluate and respond to any settlement offer made.

The court will expect all parties to have complied in substance with the terms of an approved pre-action protocol and will take this into account when making cost orders.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Under English law, limitation is a matter of procedural law and provides a complete defence to a claim. It is for the defendant to plead the defence.

The various limitation periods are laid down by statute, the most important of which is the Limitation Act 1980. The limitation period for contract and tort claims is six years, with the time starting to run respectively from the breach of contract, and generally from the date on which the cause of action occurred. In cases of claims founded on deed, the limitation period is 12 years, with time starting to run from the date of the breach of the deed. In certain limited circumstances, the limitation period may be extended; for example, in cases of fraud or concealment. As a general rule, limitation periods are counted from the day the cause of action arose.

The limitation periods set down in the Limitation Act 1980 are subject to any agreement between the parties to a dispute which varies such limitation periods.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

In England, civil proceedings are started when the court issues a claim form (by stamping it with the seal of the court). However, certain interim remedies are available before the proceedings are commenced (for example, the court may allow inspection of property which may become the subject-matter of subsequent proceedings).

The claim form must contain a concise statement of the nature of the claim, the remedy which the claimant seeks and the value of the claim (if it is a claim for money).

If the defendant is in England, the claimant will have four months to serve the claim form. If the defendant is outside England, the claimant will have six months to do so. If these time limits are not complied with, the claim form expires and needs to be re-issued. However, these time periods can be extended by agreement between the parties or by an order of the court.

The method of service also depends on whether the defendant is in England, in the EU or outside the EU. However, if the defendant has instructed solicitors in England who are authorised to accept service, then the claim form must be served on those solicitors.

If the defendant is in England, the following methods of service are acceptable, with the deemed date of service depending on the method used:

- personal service;
- leaving the document at one of the places specified in the CPR, such as the defendant's usual or last known residence;
- first-class post;

- by fax; and
- email or other means of electronic communications (if expressly accepted by the other side).

A claim form is deemed served on the second business day after completion of the relevant method.

Permission of the English court is not required to serve proceedings on a defendant in the EU provided that the dispute concerns an obligation to be performed or harm done in England. Service may be carried out in accordance with the EU Service Regulation (1391/2007/EC) or by any method permitted by the law of the relevant country. The EU Service Regulation permits service by:

- post;
- direct service (if permitted by the states' domestic law);
- diplomatic or consular agents; and
- transmitting and receiving agencies designated by the state.

Service needs to be effectively carried out under the EU Service Regulation – it cannot be deemed to be carried out.

Permission of the English court is required to serve proceedings on a defendant outside of the EU. Various "gateways" exist which would entitle the court to grant such permission; for example, if the claim is for an injunction ordering the defendant to do or refrain from doing something within the jurisdiction, the contract was made in, or breach of contract occurred in, England or the claim is against a co-defendant who is a necessary or proper party to proceedings in England. England must also be the appropriate forum in which to hear the dispute.

Service may be carried out under the Hague Convention (if the country in which proceedings are to be served is a signatory to the Hague Convention) or through the judicial authorities or the British Consular authority in that country if the law of that country permits. The Hague Convention permits service in the following ways:

- through consular and diplomatic channels;
- by post (but the signatory country may have objected to this);
- through designated judicial officers; or
- under any bilateral agreement concluded between the signatory states.

As to foreign proceedings being served on defendants in England, this depends on whether the proceedings being served are from another EU Member State (in which case the EU Service Regulation will apply) or from outside the EU (in which case the Hague Convention will apply if the proceedings being served are from another Hague Convention signatory).

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Under the CPR, the claimant can apply for pre-action interim remedies if:

- the matter is urgent; or
- it is otherwise desirable to grant the interim remedy in the interests of justice.

Under this heading, the English courts are empowered to grant a wide variety of injunctions, including freezing and search orders.

A freezing order seeks to freeze a party's assets, in particular bank accounts, in England or on a worldwide basis, in order to ensure that should judgment be entered against that party, the judgment can be enforced against those assets. The criteria which need to be satisfied for a freezing order to be obtained are:

- the applicant must have a "good arguable case" in the underlying proceedings;
- there is a real risk that the defendant will dissipate assets; and
- it would be just and convenient in all the circumstances to grant the order.

Applications for such orders are often made without notice to the other party when there is a need for secrecy or in cases of overwhelming urgency. The applicant will be under a duty to provide full and frank disclosure and disclose all material matters to the court if this application is made without notice. The defendant will have a subsequent opportunity to contest any order made.

An application for an interim remedy can also be made in relation to proceedings that are taking place, or will take place, outside the jurisdiction.

3.3 What are the main elements of the claimant's pleadings?

In England, the claimant's main pleadings are referred to as the particulars of claim. The particulars of claim should clearly set out:

- the names and addresses of the parties;
- the facts giving rise to the dispute;
- the claimant's claims and the essential elements of the underlying causes of action;
- sufficient reasoning for the defendant to know what case he has to meet; and
- the relief sought, including interest.

The claimant will also be able to reply to the defendant's defence, and that reply will also form part of the claimant's pleadings.

It should be noted that the case will be confined to the pleaded allegations and the duty is therefore on the claimant to put forward his case in as much detail as possible.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Generally speaking, amendments to a statement of case are allowed at any time before they have been served on the other party. If the particulars of claim have been served, they can only be amended:

- with the consent of the other party; or
- with the permission of the court.

Whilst the court often gives such permission, late amendments (i.e. just before or during trial) can be disallowed by the court. Amendments of causes of action following the expiry of the limitation period are only permissible where the new cause of action arises out of substantially the same facts as those that underlie the original claim.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A claimant may withdraw all or part of its claim at any time by filing and serving a notice of discontinuance on every other party to the proceedings, in most cases without the permission of the court.

The permission of the court is needed in certain specified instances; for example, where the court has granted an interim injunction, any party has given an undertaking to the court, interim payments have been made or whether there are other claimants who have not agreed to discontinue.

A claimant who discontinues the claim is generally liable for the defendants' costs.

Once a claim is discontinued, the court's permission is required for the claimant to make another claim against the same defendant if it

discontinued the claim after the defendant filed a defence and the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defence must state:

- which allegations made in the particulars of claim the defendant denies;
- which allegations the defendant admits;
- which allegations the defendant is unable to admit or deny (but must state the reasons for this inability), but on which he puts the claimant to proof;
- reasons for the denial of any of the allegations made in the particulars of claim and the defendant's defence against those allegations; and
- any alternative versions of the facts underlying the dispute.

Any allegations not addressed in the defence will be taken as admitted unless the defence on that allegation appears from other points made in the statement of defence. The defendant can make a counterclaim, provided he has a cause of action against the claimant and that the parties to the counterclaim can be sued in the same capacity in which they appear in the initial claim. A defence of set-off is available under English law (but this can be excluded by contract).

Where the defendant makes a counterclaim, the claimant will also have to file a defence to counterclaim.

4.2 What is the time limit within which the statement of defence has to be served?

For proceedings served within the jurisdiction, the statement of defence has to be filed at court and served upon the claimant within 14 days of service of the particulars of claim, unless the defendant has expressly acknowledged service of the particulars of claim, in which case the defence only falls due 28 days after service of the particulars of claim. The parties may agree to extend this period by up to a further 28 days. For proceedings served outside the jurisdiction, time limits vary depending on the country of service.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Under Part 20 of the CPR, a defendant may bring a claim (a "Part 20 claim") against a third party for an indemnity or contribution or some other remedy within the context of the existing proceedings, rather than commencing separate proceedings against that party. Once served with the Part 20 claim form, the third party becomes a party to the original action with the same rights of defence as all the other defendants.

Under the Civil Liability (Contribution) Act 1978, one of two persons who are liable for having caused the same damage may bring separate proceedings for contribution against the other person liable within a two-year time limit after the original judgment finding only the first person liable. If successful, the assessment of such contribution from the second defendant, generally, will be such as the court finds to be just and equitable, with regard to the extent of that person's responsibility for the damage in question.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to defend the claim, a default judgment may be entered against him. A default judgment is a judgment in favour of the claimant without a prior trial before the courts.

Default judgment can be obtained if:

- the defendant fails to acknowledge receipt of the claim form within the requisite timeframe; or
- the defendant fails to file and serve a statement of defence within the requisite timeframe.

A default judgment can be set aside if the defendant can show a real prospect of defending himself.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction by issuing an application notice with evidence in support within 14 days of filing an acknowledgment of service (except proceedings before the Commercial Court, where the deadlines are longer). If a defendant wishes to challenge jurisdiction, he should indicate this on the acknowledgment of service and take no further steps in the action (bar the application to challenge jurisdiction). If any other steps are taken, the defendant may be taken to have submitted to the jurisdiction of the English courts.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The CPR contains provisions for the joinder of any number of claimants or defendants as parties to a claim, provided there is a cause of action by or against each party joined.

The court, however, preserves a discretionary power to order separate trials in order to ensure the swift and efficient conduct of the proceedings.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Under the CPR, it is possible to consolidate closely connected claims on a similar subject matter between the same parties. Consolidation is only possible if there is a considerable overlap between the two claims, which are before the court at the same time, and there is a real risk of irreconcilable judgments in the absence of consolidation.

Viable alternatives to consolidation are an order by the court to the effect of sequential judgments on the two claims by the same judge or the stay of one of the claims pending determination of the other claim.

5.3 Do you have split trials/bifurcation of proceedings?

Under the CPR, the English courts have the discretion to allow split trials (for example, between liability and *quantum*) either of

their own motion or upon application by the parties. The court will consider various factors when deciding whether to order a split trial, such as the inconvenience or detriment that such a split may cause, the cost and time saving, and the ease of splitting the issues.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The English courts apply a track allocation system, according to which civil claims are allocated to one of three case management tracks, i.e. (i) the small claims track, (ii) the fast track, or (iii) the multi-track.

The small claims track provides an efficient and inexpensive procedure for simple claims worth no more than £5,000 if issued before 1 April 2013, or £10,000 if issued on or after 1 April 2013. The fast track aims to provide an equally streamlined procedure for resolving disputes which are valued between £5,000 (if issued before 1 April 2013) or £10,000 (if issued on or after 1 April 2013) and £25,000. The multi-track caters for the resolution of disputes whose value exceeds £25,000. However, claims worth less than £50,000 which have been commenced in the High Court will generally be transferred to a County Court, unless there is a specific requirement for them to be tried in the High Court.

Claims brought before the Commercial Court, Technology and Construction Court and Mercantile Court are automatically allocated to the multi-track.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Under the CPR, the English courts are obliged to manage cases actively (and in future it is expected the judiciary will be increasingly proactive in case management with a view to minimising costs incurred; see question 1.5 above). Active judicial case management includes:

- encouraging the parties to co-operate in the conduct of the proceedings;
- identifying the issues that require full investigation and trial and deciding summarily on those that do not;
- encouraging the parties to resort to ADR if the court considers this appropriate;
- facilitating the settlement of the dispute in whole or in part;
- controlling the process of the case in a cost-conscious and efficient manner by setting procedural timetables and giving other appropriate directions;
- keeping the parties' need to attend court to a minimum; and
- making full use of technology.

A whole range of interim applications are available to the parties, including the following:

- interim injunctions (such as freezing and search orders, see question 3.2 above);
- security for costs (see question 1.8 above);
- amendment of a statement of case (see question 3.4 above);
- orders for specific disclosure (see question 7.4 below); and
- costs sanctions and other coercive measures against a party that does not comply with the court's previous procedural directions.

In respect of hearings of one day or less, the court will usually make a summary assessment of the costs of the application the same day as issuing the order applied for.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Under the CPR, the English courts have powers to compel recalcitrant parties to comply with their orders and directions, the most widely used amongst which is the power to award cost orders. Disobeying a court order (or assisting a party to breach an order) may also be a contempt of court, punishable by imprisonment, fine and/or seizure of assets. The courts are also empowered to make a strike out order (see question 6.4 below) or draw adverse inferences in appropriate circumstances.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Under the CPR, the courts are empowered to strike out the whole or any part of a statement of case of their own motion or upon application by one of the parties. More specifically, the court may strike out a statement of case if it appears to the court that:

- the statement discloses no reasonable grounds for bringing or defending a claim;
- the statement constitutes an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- there has been a failure to comply with a rule, practice direction or court order.

Generally, an application for an order striking out a statement of case will be made during the pre-trial stages of proceedings (and often together with an application for summary judgment). However, a court can exercise its power just before trial or even during the course of trial.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Under the CPR, the English courts can enter a summary judgment in favour of the claimant without holding a full trial. This is possible where a claimant can show that the defence has no real prospect of success and there is no other reason why the case should go to trial.

The summary judgment procedure can also be invoked by defendants against weak or unfounded claims that lack any prospect of success and there is no other reason why the claim should be brought to trial.

The courts can further enter summary judgment of their own motion in order to prevent weak or unfounded cases from proceeding.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A claimant may discontinue:

- the whole or only part of the claim; and
- against all or only some of the defendants,

by filing and serving a notice of discontinuance.

Permission from the court is only required in exceptional circumstances, e.g. where an interim injunction has been granted in relation to a claim that is sought to be discontinued. There will be cost consequences if proceedings are discontinued.

The courts have case management powers to the effect of staying the whole or part of the proceedings on application of a party or of their own motion to ensure the efficient conduct of the proceedings. Proceedings are stayed on the acceptance by one of the parties of a "Part 36 offer" (i.e. an offer to settle which – if rejected – can have adverse cost consequences if not beaten at trial).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Under the CPR, the parties to proceedings are under a duty to give advance notice to each other of any material documentation in their respective control. This process is commonly referred to as "disclosure" and historically consisted of exchanging a list of relevant documents ("standard disclosure"), which are or have been in each party's control.

Parties are required to exchange information before the first Case Management Conference on the documents that they have which may be relevant to disclose and how they are going to go about locating and retrieving them. In respect of electronic documents, the parties may decide to exchange the optional Electronic Documents Questionnaire in which each party sets out its proposals for its own, and the other side's, disclosure of electronic documents.

Standard disclosure requires the parties to disclose the following documents:

- those on which a party relies for making its case;
- those which adversely affect its own case or another party's case; and
- those which support another party's case.

The factors relevant in deciding the reasonableness of a search include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document; and
- the significance of any document which is likely to be located during the search.

If a full manual review would be "unreasonable" then searches for electronic documents can be done by keyword searches or other automated methods of searching (and these include predictive coding).

Documents that are not material to the case at hand do not require disclosure.

However, since the implementation of the Jackson reforms on 1 April 2013 (discussed in question 1.5 above), claims allocated to the "multi-track" (see question 6.1 above) will no longer follow the "standard disclosure" process by default. Instead, CPR 31.5(7) provides six categories of order for disclosure, which the court may decide to make. These are:

- an order dispensing with disclosure;
- an order that a party disclose documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
- an order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis;
- an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
- an order that a party give standard disclosure; and
- any other order in relation to disclosure that the court considers appropriate.

Disclosure is followed by inspection of documents which are disclosed, are still in the parties' control and are not protected by privilege, whereby parties can request copies of those documents or physically inspect them (and their originals) where they are stored.

Parties to a dispute may be expected to disclose certain information prior to the commencement of proceedings as part of the pre-action procedures (see question 2.1 above). However, under certain circumstances, a party can also apply to court under CPR 31.16 to seek disclosure from a respondent who is likely to be a party to subsequent proceedings.

In November 2017, the High Court published a proposal for a disclosure pilot in the Business and Property Courts, which is designed to reduce the volume of disclosure required in many cases (and its associated costs). As of December 2017, the proposal is in its consultation stage, but it is intended to be piloted across the Business and Property Courts for a period of two years commencing soon after March/April 2018.

Electronic disclosure

CPR 31.7 requires each party to make a "reasonable search" for "disclosable documents". A "document" also includes a computer file. E-disclosure is the disclosure of electronically stored information.

PD 31B recognises that keyword searches may not be suitable if they find excessive quantities of irrelevant documents (for example, by duplication of documents in email and "cc" email chains), or fail to find important documents which ought to be disclosed (PD 31B.26). In such circumstances, the parties should consider augmenting automated searches with "additional techniques" (for example, by individual review of certain key documents or category of documents), and taking "such other steps as may be required to justify the selection to the court" (PD 31B.27).

Predictive coding

English courts have approved the use of predictive coding while undertaking e-disclosure. Predictive coding allows litigants to employ advanced analytical techniques to carry out disclosure. As such, predictive coding facilitates the review of documents using computer algorithms to produce other likely relevant documents based on the selection of existing relevant documents.

Before carrying out e-disclosure, the parties would normally agree to a predictive coding protocol by defining data size, margin of error and criteria for inclusion of documents (including, date range, custodians, and keywords).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The three principal categories of privilege in civil proceedings are:

- legal advice privilege, covering any confidential communications between a solicitor and his client for the purposes of giving legal advice;

- litigation privilege, covering confidential communications between a client and a third party or a lawyer and a third party provided that litigation was contemplated or pending and the information was for the purposes of the litigation; and
- "without prejudice" privilege, according to which any "without prejudice" communications made orally or in writing with the intention of settlement are privileged and may not be disclosed to the court.

Documents that are classified as privileged must be "disclosed" by listing the existence of such documents (which may be and is most often done in a generic fashion, rather than by specific reference to the particular documents). However, they are not made available for inspection by the other side (if they are, privilege will be waived).

In addition, there is a privilege against self-incrimination, according to which a party may be able to object to the inspection of a document which may expose it to a criminal charge, that is not the object of the existing proceedings.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

A court may make an order for disclosure against a third party under the CPR, where:

- the documents of which disclosure is sought are likely to support the applicant's case or adversely affect the case of one of the other parties to proceedings; and
- disclosure is necessary to dispose fairly of the claim or to save costs.

A court may also order disclosure against a third party pursuant to the Norwich Pharmacal principle. The respondent must be a party who is involved in a wrong-doing, whether innocently or not, and is unlikely to be a party to potential proceedings. An order can be obtained before or after proceedings have commenced and is often used as a means to identify the proper defendant to an action or to extract the necessary information to formulate the particulars of claim.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court's main involvement is in supporting the disclosure process by making disclosure orders. These normally seek to compel a party to perform its disclosure obligations (see question 7.1 above). Under the CPR 31.12, the court may make an order for specific disclosure or specific inspection.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Under CPR 31.22, any documents disclosed in a particular set of proceedings may only be used in those proceedings and for no other purpose. The CPR makes provision for a number of exceptions, including where:

- the document has been referred to by the court in a public hearing, unless the court orders otherwise;
- the court gives permission for the subsequent use of the disclosed documents for purposes other than those for which they were originally disclosed; or
- the parties agree to the subsequent use of the disclosed documents for other purposes.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Under the CPR, the parties are required to make advance disclosure of all material documents before trial (see question 7.1 above). In addition, court directions may require the parties to exchange expert reports and statements of witnesses of fact they seek to rely on at trial. Hearsay evidence is admissible at trial if adequate notice identifying the hearsay evidence is given to the other party in advance.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Types of admissible evidence include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence (i.e. where the witness gives evidence of facts he has not personally experienced for the purpose of proving the truth of those facts), provided an appropriate notice is served prior to the trial (see question 8.1 above).

Under CPR 32.1, the court may control evidence by giving directions as to:

- the issues on which it requires evidence;
- the nature of the evidence which it requires to decide those issues; and
- the way in which the evidence is to be placed before the court.

Under CPR 35.4, leave of the court is required to adduce expert evidence and when a party applies for permission they must provide an estimate of the costs of the proposed expert and identify:

- the field in which expert evidence is required and the issues which the expert will address; and
- where practicable, the name of the proposed expert.

The order granting permission may specify the issues which the expert evidence should address.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Written witness statements for each witness of fact are normally exchanged by the parties before trial and stand as evidence-in-chief of the witnesses to be called. Witnesses presenting evidence at trial are traditionally cross-examined before the court.

Witness evidence via video link is admissible.

Reluctant witnesses may be served with a witness summons compelling them to appear before the court.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The Protocol for the Instruction of Experts (the "Protocol") and the CPR contain various requirements for instructing experts, preparing expert reports and giving expert evidence in court. Leave of the court is

required to adduce expert evidence, and any application for permission will have to comply with CPR 35.4 (see question 8.2 above).

The instructions given to the expert must be clear and set out the purpose of requesting the expert advice or report. The expert must be provided with the Protocol, the relevant provisions of the CPR and the accompanying Practice Direction. Material instructions to experts are disclosable to the other side. Once a party has appointed an expert and this expert has been named, permission will be required to change the expert and such permission will normally only be granted on the condition that any report obtained from the named expert is disclosed.

The requirements imposed by the CPR for expert evidence include that such evidence must be independent, objective, consider all material facts and be updated if the experts' opinions/findings change.

The CPR also requires that expert evidence should be given in a written report (which will stand as the expert's evidence-in-chief). There are various requirements for the form and content of this report under CPR 35.10 and the accompanying practice direction; for example, it must give details of the expert's qualifications and state the substance of all material instructions on the basis of which the report was written.

As part of the Jackson reforms, the courts formally adopted concurrent evidence or "hot tubbing". This means that the court can, at any stage in proceedings and of its own volition, order that experts from like disciplines will give evidence in the witness box at the same time, rather than sequentially.

An expert witness has a duty to assist the court with his expertise. This duty overrides any obligation to the party instructing him.

An expert witness is not the same as an expert adviser. An adviser may be instructed by a party at any stage to advise on specialist or technical issues within his expertise. An expert adviser is not subject to the rules applicable to an expert witness. However, an expert adviser can then be appointed as an expert witness, as long as they are perceived to be independent.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court has the power to make summary and default judgments (see questions 4.4 and 6.5 above).

A court's judgment can be for damages (for example, lost contractual profits) and/or an order that one of the parties perform its outstanding obligations under a contract (i.e. specific performance) and/or any other form of declaratory relief (for example, declaration/statement as to legal rights and obligations).

The English courts are empowered to adopt a wide variety of orders, including the following:

- injunction orders, prohibiting a party from doing a particular act (prohibitory) or compelling a party to perform a particular act (mandatory);
- consent orders, evidencing a contractual agreement between the parties;
- Tomlin orders (a type of consent order which stays proceedings on agreed terms recorded in a confidential schedule); and
- provisional damages orders, which are normally confined to personal injury cases.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The English courts are empowered to award damages for loss suffered, including economic loss. Damages awarded by the English courts are aimed at compensating the victim for the harm suffered, and not to punish the wrongdoer. Where the loss suffered is negligible, damages awarded by the court will be nominal only. As such, punitive damages, whilst permitted, are very rarely awarded.

Traditionally, the English courts have the power to award costs of the litigation in accordance with the "costs follow the event" principle, whereby the loser usually pays the costs (see question 1.5 above). Departure from this principle is justified where the winner has displayed unreasonable behaviour during the course of the proceedings. Cost orders are generally discretionary.

The English courts are empowered to award interest on both damages and costs awards.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic money-judgment can be enforced: (i) by means of a writ or warrant of execution granted by the court against the judgment debtor's goods; (ii) by a third-party debt order against the judgment debtor's bank account; (iii) by attachment of earnings against the judgment debtor's salary; or (iv) by obtaining a charging order.

A declaratory (non-money) judgment is complete in itself, since the relief is the declaration and does not need to be enforced.

A judgment from another EU Member State can be enforced in England under the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), or Regulation (EU) 1215/2012 (the Recast Brussels Regulation) for proceedings instituted on or after 10 January 2015.

The judgments of a number of Commonwealth and certain other countries can be enforced under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

In cases of those countries not covered by the above enforcement regimes (a notable example being the USA) enforcement will be governed by the common law regime. This requires the commencement of fresh legal proceedings (with the foreign judgment being sued upon as a debt). Permission to serve these proceedings out of the jurisdiction may be necessary (see question 3.1 above).

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Under the CPR, an appellant is generally required to apply for permission to appeal. Permission to appeal may only be given if:

- the court considers that the appeal would have a real prospect of success; or
- there is some other compelling reason for which the appeal should be heard.

The application for permission to appeal is normally made after judgment is delivered and if it is refused, the refusal to grant permission to appeal can itself be appealed (this is done on paper).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Although parties are able to make offers to settle at any stage in legal proceedings in whatever way they want, under Part 36 of the CPR, parties are able to make a specific offer to settle which can have certain cost consequences. There are specific requirements governing the content and timing of a Part 36 offer. If the offers are not accepted and the matter goes to trial then, if the outcome at trial is the same or less favourable than was proposed in the Part 36 letter, the party who did not accept will normally have to pay most (but not all) of the other side's legal costs and potentially interest on costs and, in some instances, interest on any damages award.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods of alternative dispute resolution are arbitration and mediation.

The commonly cited advantages of arbitration over litigation in the English courts are privacy (meaning allegations made in the proceedings will not, as a matter of course, be known to the public), speed (due to the fact that the private arrangements made with arbitrators can mean that cases can happen as quickly as the parties and the arbitrators want them to – but this is very case- and party-dependent) and reduced cost (but this is not always the case). A further advantage is that an arbitral award may be easier to enforce in a foreign jurisdiction (under the New York Convention) than an English court judgment.

Mediation has become a widely accepted alternative dispute resolution mechanism in England, which is recognised by the CPR. At its most basic level, mediation is nothing more than a negotiation conducted through an intermediary. The mediation process is entirely confidential and benefits from the "without prejudice" privilege rule, according to which no communications made during the proceedings can be disclosed without the express agreement of the mediating parties in the event that no settlement is reached (save to the extent that there is a later dispute as to whether a settlement was actually reached). If successful, a mediation concludes with a settlement agreement, which is enforceable as a contract (see question 1.5 below).

Expert determination is often used for disputes relating to matters such as rent reviews, valuation of shares in private companies, price adjustments on take-overs, construction contracts and information technology. An expert's determination is final and binding but can be subject to an appeal to the courts on very limited grounds. As opposed to arbitrators, expert determiners render "non-speaking awards", i.e. awards that do not set out (detailed) reasons for the final decision rendered.

Special tribunals exist for special purposes, such as employment and tax. The tribunals' service is equivalent and parallel to the court structure. There are two types of tribunals (the First Tier Tribunal and the Upper Tribunal), which have generic rules of procedure and a coherent system of appeals. The First Tier Tribunal hears appeals from governmental/civil service decision-makers (for example, the Tax Tribunal will hear appeals from decisions of the UK tax authority). The Upper Tribunal is a sort of administrative Court of Appeal. For example, the decisions of the Financial Conduct Authority and Tax Tribunal can be appealed to the Upper Tribunal. Strictly speaking, these are not a form of ADR, but a court process and so shall not be mentioned further.

The services of an Ombudsman are increasingly required in sector-specific industries, for example, within the context of the provision of financial services and utilities. An Ombudsman's powers are provided by statute. He will usually be mandated to facilitate a settlement between the complainant and the relevant provider or in the alternative, where a settlement fails, make a final decision.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings are governed ("law of the seat") by the Arbitration Act 1996, which applies to both domestic and international arbitration. Apart from the Arbitration Act, and depending on the parties' arbitration agreement, various institutional arbitration rules may find application, such as the rules of the London Court of International Arbitration and the Chartered Institute of Arbitrators or those of various London-based trade associations (see part II, question 2.1 below).

Mediation is not governed by any particular set of laws or rules. However, the UK implemented the European Mediation Directive, which applies to cross-border disputes and seeks to protect the confidentiality of the mediation process and ensure that when parties engage in mediation, any limitation period is suspended.

The services of an Ombudsman are governed by the relevant statute that gives rise to his mandate.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In England, virtually all commercial matters are arbitrable. Disputes involving criminal and family law matters are generally considered non-arbitrable.

Similar considerations apply to mediation, except that mediation proceedings are often used to resolve family disputes.

As mentioned previously (see part II, question 1.1 above), the Ombudsman's services are usually sector-specific and provided for by statute.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The courts tend to enforce arbitration agreements. The courts tend to grant anti-suit injunctions against a party that has commenced

court proceedings abroad in breach of an arbitration agreement, unless those proceedings have been commenced in the court of an EU Member State.

The courts further play a supportive role in arbitral proceedings seated in England (unless the parties to the arbitral proceedings agree otherwise), lending their assistance in relation to the preservation of evidence or assets, the granting of interim injunctions and issuing of witness summons if necessary. In particular, the court is often involved before the Arbitral Tribunal is constituted.

Arbitral Tribunals seated in England are empowered to grant interim relief (i.e. orders for parties to do or not to do something before the hearing has actually taken place) and make orders for security for costs.

Mediations generally require agreement by the parties to mediate. However, the court can order the parties to attend mediation. The Commercial Court has been encouraging mediation for the past 20 years and other courts also run schemes that promote ADR.

Where a dispute falls within the scope of a valid expert determination clause, a party will not have recourse to the courts to resolve such a dispute.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

An arbitral award is final and binding but a party can appeal to the courts on a point of law, unless the arbitration agreement excludes this ability. Leave of the court to appeal the award is severely restricted under the Arbitration Act (and can even be excluded by the arbitration agreement) and the applicant must show, among other things, that the determination of the question of law will substantially affect the rights of the parties and that it is just and proper for the court to determine the question/dispute.

The arbitral award may be also challenged on the basis that: the Arbitral Tribunal did not have jurisdiction to decide the dispute; or there was a serious irregularity affecting the Arbitral Tribunal, the proceedings or the award (for example, the Tribunal failed to deal with all the issues that were put to it or was biased).

The New York Convention, to which England is a party, allows the enforcement of an English arbitration award across all the Convention countries in accordance with those countries' own laws. Likewise, the Arbitration Act provides for enforcement in England of an arbitration award rendered in another New York Convention country. The most common method of such enforcement is to seek a judgment of the English court in terms of the award (and that judgment can then be enforced as a judgment of the English court).

Settlement agreements which are reached through mediation are contracts and are therefore enforceable if the requirements for a valid contract are satisfied. Failure to at least consider mediation (or another form of ADR) is likely to lead to the court making a cost order that is detrimental to such a party.

An expert's determination is final and contractually binding on the parties, with very limited availability of an appeal. A court can order that an expert give reasons for the decision where the underlying expert determination clause in the agreement so provides.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major arbitration institution in England is the London Court of International Arbitration (LCIA).

Other more specialised, industry-related arbitration institutions are:

- the London Maritime Arbitrators' Association;
- the Grain & Feed Trade Association;
- the Federation of Oils, Seeds & Fats Association;
- the Sugar Association of London and the Refined Sugar Association; and
- the London Metal Exchange.

The leading mediation institution in England is the Centre for Effective Dispute Resolution (CEDR), which provides mediation services. The Panel of Independent Mediators (PIMs) is an organisation of leading mediators across the country.

Expert determination services can be provided through the CEDR.

Greg Lascelles
Covington & Burling LLP
265 Strand
London WC2R 1BH
United Kingdom

Tel: *+44 207 067 2000*
Email: *glascelles@cov.com*
URL: *www.cov.com*

Greg Lascelles is an experienced litigator whose practice covers international and domestic commercial litigation and arbitration, with particular emphasis on the financial services sector. Mr. Lascelles has advised on investor and partnership disputes, corporate restructurings and disputes relating to equity, fixed income, interest rate, foreign exchange and commodities products. He has also advised on international arbitration matters, both *ad hoc* and institutional, under the LCIA, ICC, CIETAC and ICSID rules.

In addition, Mr. Lascelles has defended clients in regulatory investigations into market abuse, systems and controls and financial reporting. He has acted for clients in collective selling and cartel allegations, fraud and conspiracy, international trust and contractual disputes.

Mr. Lascelles' clients include hedge funds, private equity houses, asset managers, investment banks, brokerage houses, entrepreneurs and major public companies in the financial services and private equity sectors.

Tom Jackson
Covington & Burling LLP
265 Strand
London WC2R 1BH
United Kingdom

Tel: *+44 207 067 2000*
Email: *tjackson@cov.com*
URL: *www.cov.com*

Tom Jackson is an associate in the dispute resolution group of Covington's London office. Mr. Jackson's practice covers a broad range of contentious matters comprising both international commercial arbitration and English High Court litigation. His experience includes contractual, intellectual property, and insurance-related disputes.

In addition, Mr. Jackson assists clients with internal corporate investigations, matters before regulators and enforcement agencies in the UK and internationally, and on the development and implementation of global compliance programmes.

Mr. Jackson has worked for a range of clients in the life sciences, technology, consumer goods, and financial services sectors.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com