International
Comparative
Legal Guides

Practical cross-border insights into litigation and dispute resolution work

Litigation & Dispute Resolution 2023

16th Edition

Contributing Editor:
Greg Lascelles
Covington & Burling LLP

CDR Commercial Dispute Resolution
ICLG.com

Expert Analysis Chapter

1 **When Will a Defendant Owe a Claimant a Duty to Take Reasonable Care? Recent Changes in How the English Courts Approach This Question**
Greg Lascelles & Alan Kenny, Covington & Burling LLP

Q&A Chapters

6 **Austria**
Pitkowitz & Partners: Dr. Nikolaus Pitkowitz & Roxanne de Jesus

14 **Belgium**
Lydian: Hugo Keulers, Jo Willems, Yves Lenders & Lola Stenuit

22 **Bermuda**
Wakefield Quin Limited: John Hindess

30 **Brazil**
LP LAW | LOPES PINTO ADVOGADOS: Diogo José Nolasco Dominguez

37 **England & Wales**
Covington & Burling LLP: Greg Lascelles & Alan Kenny

52 **Finland**
Borenius Attorneys Ltd: Kristiina Liljedahl & Vilma Haavisto

60 **France**
Laude Esquier Champey: Olivier Laude, Benoit Renard & Gauthier Doléac

70 **Germany**
Willkie Farr & Gallagher LLP: Matthias Schrader, Dr. Johannes Schmidt, Dr. Harry Nettlau & Svenja Wachtel

78 **Ghana**
Juris Ghana Legal Practitioners: Godwin Mensah Sackey, Papa Yaw Owusu-Ankomah & Kwesi Papa Owusu-Ankomah

87 **Greece**
Kyriakides Georgopoulos Law Firm: John C. Kyriakides & Alexia Giagini

97 **Hong Kong**
Kirkland & Ellis: Fergus Saurin & Jacky Fung

106 **India**
Shardul Amarchand Mangaldas & Co.: Shally Bhasin, Chaitanya Safaya & Prateek Gupta

118 **Indonesia**
Sandiva Legal Network: Arthur Wailan Sanger, Mochamad Akbar Fachreza & Jesica Novia Puspitaningrum

125 **Japan**
Nagashima Ohno & Tsunematsu: Koki Yanagisawa & Hiroyuki Ebisawa

134 **Kenya**
Umsizi LLP: Jacqueline Oyuyo Githinji

145 **Lithuania**
WALLESS: Gediminas Dominas & Tomas Balčiūnas

153 **Luxembourg**
Arendt & Medernach: Clara Mara-Marhuenda & Sandrine Margetidis-Sigwalt

161 **Mexico**
OLIVARES: Armando Arenas Reyes & Eduardo Arana Ramírez

171 **Netherlands**
Florent: Yvette Borrius & Chris Jager

180 **Nigeria**
Famsville Solicitors: Woye Famojuro, Temiloluwa Dosumu, Michael Ajinde & Samuel Olawepo

190 **Philippines**
SyCip Salazar Hernandez & Gatmaitan: Ramon G. Songco & Anthony W. Dee

199 **Singapore**
Allen & Gledhill LLP: Afzal Ali, Ho Pey Yann & Daniel Seow

208 **Spain**
Monereo Meyer Abogados: Sonia Gumpert Melgosa & Michael Fries

215 **Switzerland**
BMG Avocats: Rocco Rondi, Guillaume Fatio & Mimoza Lekiqi

224 **Thailand**
Chandler MHM Limited: Waree Shinsirikul, Wanchana Bunditkritsada, Sakolrat Srangsomwong & Chonlawat Rojanaparpal

232 **USA – Connecticut**
Shipman & Goodwin LLP: Kathleen M. LaManna & Diane C. Polletta

243 **USA – Delaware**
Potter Anderson & Corroon LLP: Jonathan A. Choa, John A. Sensing & Carla M. Jones

251 **USA – Illinois**
Much Shelist, P.C.: Steven P. Blonder & Charlotte F. Franklin

258 **USA – Mississippi**
Jones Walker LLP: Neville H. Boschert

266 **USA – Pennsylvania**
Blank Rome LLP: James T. Smith, Rebecca D. Ward, Stephanie C. Chomentowski & Melanie S. Carter

273 **Zambia**
Dentons Eric Silwamba, Jalasi and Linyama Legal Practitioners: Eric Suwilanji Silwamba, Lubinda Linyama, Mailesi Undi & Mwape Chileshe

England & Wales

Greg Lascelles

Alan Kenny

Covington & Burling LLP

1 Litigation – Preliminaries

1.1 What type of legal system does your jurisdiction have? 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 updated regularly, and 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 King's Bench Division (KBD) (formerly known as the Queen's Bench Division (QBD) until the death of Queen Elizabeth II and accession of King Charles III on 8 September 2022); the Business and Property Courts (BPC); and the Family Division. Generally, the KBD deals with general claims in contract and tort and the BPC deal 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, and these all fall under the umbrella of the BPC. The Commercial Court 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.

Appeals lie with the High Court (from the County Court), the Court of Appeal, and the Supreme Court in the last instance.

At the time of publication, matters that involve the application of certain EU laws that were retained after the end of the UK-EU transition period, on 31 December 2020, may be referred or appealed to the Court of Justice of the European Union in certain limited circumstances, as set out in the UK-EU Withdrawal Agreement.

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.

Schemes for: (i) shorter trials; and (ii) flexible trials in the BPC have undergone two-year trials and have now been made permanent. These attempt to make commercial matters cheaper and more efficient, and to reduce trial lengths (aiming to conclude cases within a year) primarily through reducing requirements in evidence (documentary and oral) and submissions.

A mandatory pilot scheme (with certain limited exceptions) relating to disclosure in the BPC began on 1 January 2019, and has recently been made permanent by Practice Direction (PD) 57AD of the CPR. PD 57AD attempts to reduce the costs, scale and complexity of disclosure, and includes obligations to give disclosure at the initial stage of pleadings as well as subsequent options for different disclosure models, with close oversight by the courts, who may impose costs sanctions on parties for non-compliance.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 of England and Wales in breach of an exclusive jurisdiction clause in favour of the English courts. Prior to the end of the UK-EU transition period, on 31 December 2020, the English courts were precluded from granting anti-suit injunctions against proceedings commenced in the courts of another Member State of the European Union; this preclusion no longer applies, and the English Courts granted the first such injunction in August 2022 (however, this could be impacted by the UK's proposed accession to the Lugano Convention).

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 (from that time) of recoverability by the successful party of success fees and after-the-event insurance premiums;
- the introduction of contingency fee agreements (also known as damages-based agreements or DBAs) for contentious work (see questions 1.6 and 1.7 below);
- a costs management procedure for claims with a value of less than £10 million allocated to the "multi-track" (i.e. cases that 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 first £500,000 of damages awarded, or 10% of the first £500,000 of costs where there is no monetary award, and then 5% of any amount awarded in excess of that figure, subject to a limit on the total additional costs sanction of £75,000) 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 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 (CMC), if no other date is specified. Where disclosure is to be provided in the BPC in-line with PD 57AD (see question 1.3 above), costs budgeting for the disclosure phase of the proceedings is not required before the first CMC if this is not practical. If a party fails to file a budget when required to do so, they will be deemed to have 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.

The Civil Justice Council is currently conducting a strategic and holistic review of costs, including on the impact and effectiveness of the rules on costs budgeting, which could result in further reforms to the civil costs system in the future.

The 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 claimants and defendants permitted to enter into contingency fee arrangements and conditional fee arrangements?

The English legal system is open to conditional fee arrangements (CFAs) between lawyers and their clients (sometimes known as a "no win, no fee" fee arrangement), whether they are claimants or defendants. Under a CFA, the lawyer agrees that their legal fees and expenses (or any part thereof) will only be paid in certain defined circumstances, usually in the event of a "success" in the proceedings, howsoever defined. If a "success" occurs, the lawyer is paid their legal fees and expenses at the usual rate, plus an uplift (usually expressed as a percentage of the legal representative's total fees and expenses). The uplift is often referred to as a "success fee".

The maximum success fee on a CFA is 100% of the lawyer's base fee. If there is a prospect of the success fee exceeding 100% of the lawyer's base fee, the CFA will not be enforceable. The success fee is not recoverable as a cost from an unsuccessful party where the CFA was entered into on or after 1 April 2013.

Contingency fee agreements (also known as damages-based agreements or DBAs) may be entered into by claimants (and by defendants, but only when they are advancing a counterclaim, and only then in respect of their counterclaim) for all contentious business, excluding criminal and family proceedings and opt-out collective proceedings in competition class actions. DBAs are an alternative form of "no win, no fee" agreement between the client and their legal representative, whereby if the client is unsuccessful, the lawyer will not be paid for the work done under the DBA, but if the client obtains a "specified financial benefit" (usually damages paid by the losing side, or settlement of a claim), the lawyer 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, up to a maximum of 50% in commercial claims and 25% in personal injury claims). Following a recent court decision, it is possible to have hybrid DBAs, i.e. retainers that contain a contingency or success fee but also contain provisions for payment on a different basis; however, this position is controversial and may be subject to further review in the future. It is also permitted for DBAs to include terms that require the payment of legal fees in the event of early termination of the DBA. Amendments to the regulatory framework for DBAs were proposed in June 2021, following an independent review instigated by the UK Government, but these proposals are yet to be taken forward.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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.

Third-party funders may be subject to adverse costs orders. Recent cases have confirmed that limitations on the exposure of professional litigation funders to adverse costs is not automatic, and the English courts have discretion, in the context of adverse costs, to order a professional litigation funder to pay costs in excess of the amount of their financial contribution to the case.

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 their assets or otherwise make it difficult to enforce a costs order against them;
- 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/or
- the claimant is resident outside of the United Kingdom (UK) but not resident in a state bound by the 2005 Hague Convention on Choice of Court Agreements (Hague Convention).

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

- if the claimant is resident outside of the UK but not in a state bound by the Hague Convention, the ability to enforce any costs order in their 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.

Regardless of the ground(s) relied upon, the court will only grant an order for security if it is satisfied, having regard to all the circumstances of the case, that it is just to do so.

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 costs orders against a third party in favour of a party to the proceedings. The court has wide discretion in making such orders and will consider 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 (or, where no specific pre-action protocol applies, the practice direction on pre-action conduct) and will take this into account when making costs 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

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 accrues, other than where the cause of action accrues part way through a day, in which case that day is excluded and the limitation period is counted from the following day. Where a cause of action accrues at midnight, the following day will count towards the calculation of the limitation period.

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 and Wales, 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 or Wales, the claimant will have four months to serve the claim form. If the defendant is outside England or Wales, 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 depends on whether the defendant is in England or Wales, another part of the UK, or outside of the UK (as explained below). Further, certain rules changed at the end of the UK-EU transition period on 31 December 2020. The explanation below assumes that the proceedings in question were instituted after 31 December 2020 (and also that the proceedings do not relate to consumer contracts or individual employment contracts, in relation to which certain rules are different).

If the defendant has instructed solicitors in England or Wales who are authorised to accept service, then the claim form must be served on those solicitors.

If the defendant is in England or Wales, 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/place of business;
- first-class post (or other service providing for delivery on the next business day);
- by fax; and
- email or other means of electronic communications (if expressly accepted by the other side).

If a claimant cannot effect service by one of the above methods, it may apply to the court for permission to serve by an alternative method or at an alternative place. The courts have shown flexibility in allowing for such alternative service in appropriate circumstances, e.g. where the identity of a defendant is unknown, and have permitted service by various alternative methods, including: Facebook; Instagram; leaving a message in the contact section of a defendant's website; and via a blockchain entry (i.e. "airdropping" a non-fungible token (NFT) into the electronic crypto-currency wallet of a defendant).

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

Other than in limited circumstances (as specified in the CPR), the permission of the English court is not required to serve proceedings on a defendant in a part of the UK outside of England and Wales (i.e. in Scotland or Northern Ireland).

Permission of the English court is not required to serve proceedings on a defendant outside of the UK, if one of the following grounds apply:

- the English court has jurisdiction under the Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on the English court under the Hague Convention;
- the claim arises under a contract that contains a term to the effect that the English court has jurisdiction to determine the claim; and/or
- the English court has jurisdiction notwithstanding that the person against whom the claim is made is not within the jurisdiction, or the facts giving rise to the claim did not occur within the jurisdiction. In practice, this ground is normally reserved for claims relating to a statute that clearly has extraterritorial effect.

Where a claimant may serve proceedings on a defendant outside of the jurisdiction without permission, they must file, with their claim form, a statement (form N510) of the ground(s) on which they rely.

Where none of the above grounds apply, permission of the English court is required to serve proceedings on a defendant outside of the UK. Various "gateways" (currently 25, as set out in paragraph 3.1 of Practice Direction 6B) exist that 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 – or is likely to occur – in, England or Wales, the claim is against a co-defendant who is a necessary or proper party to proceedings in England or Wales, or the claim/application is for disclosure to obtain information from a third party that is needed for proceedings brought in England or Wales, or which are intended to be brought in England or Wales using the information sought. England and Wales must also be the appropriate forum in which to hear the dispute, and there must be a serious issue to be tried.

Service may be carried out under the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) (if the country in which proceedings are to be served is a signatory to the Hague Service Convention) or through the judicial authorities or the British Consular authority in that jurisdiction if the law of that jurisdiction permits. The Hague Service Convention permits service in the following ways:

- through consular and diplomatic channels;
- by post (although 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, the Hague Service Convention will apply if the proceedings being served have been issued by the courts of another Hague Service Convention signatory.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 assets, in particular bank accounts, but increasingly also crypto-assets such as Bitcoin held in digital wallets on digital currency exchanges, in England or on a worldwide basis, against which an existing or prospective judgment of the court, or order for the payment of a sum of money, can or could be enforced. The criteria that need to be satisfied for a freezing order to be obtained are:

- the applicant must already have been granted or have a "good arguable case" for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- the respondent must hold assets (or be liable to take steps that will reduce the value of assets) against which such a judgment or order can or could be enforced;
- there is a real risk that the respondent will dissipate (or take other steps to impair) the 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 respondent 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.

In addition, interim remedies can also be sought and ordered against "persons unknown" in certain circumstances; for example, if it is not possible to identify the names of the proper respondents to the application at the time it is issued. Such an order will only be granted if the category of persons who would be the subject of the order, and the scope of the activities that would be restrained or compelled, are sufficiently clearly defined to be practicable.

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 they have 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 their 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 a statement of case has been served, it can only be amended:

- with the written consent of all the other parties; 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 the same facts or 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.

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 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 the claimant 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 they put 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 they have 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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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

Generally 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. Slightly longer time limits apply for small claims proceedings via the Online Civil Money Claims service. The parties may agree to extend this period by up to a further 28 days. Any further extension requires an application to court. 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 or more persons who are liable for having caused the same damage may bring separate proceedings for contribution against the other person(s) liable within a two-year time limit after an original judgment finding only the first person liable. If successful, the assessment of such contribution from the other defendants who were not found liable in the original judgment, generally, will be such as the court finds to be just and equitable, with regard to the extent of those persons' responsibility for the damage in question. It is also possible for parties who have settled claims to bring claims against third parties seeking an indemnity in respect of, or contribution towards, the settlement sum paid, in circumstances where the third parties are liable for having caused the same damage that is the subject of the settlement.

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 them. 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 themselves.

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 in proceedings before the Commercial Court, where the deadlines are longer). If a defendant wishes to challenge jurisdiction, they 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 £10,000. The fast track aims to provide an equally streamlined procedure for resolving disputes that are valued between £10,000 and £25,000. The multi-track caters for the resolution of disputes whose value exceeds £25,000. However, claims worth less than £50,000 that 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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Claims brought before the Commercial Court, Technology and Construction Court and the Commercial Circuit 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. 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 alternative dispute resolution (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 interim application on the same day as issuing the order applied for.

6.3 In what circumstances (if any) do the civil courts in your jurisdiction allow hearings or trials to be conducted fully or partially remotely by telephone or video conferencing, and what protocols apply? For example, does the court – and/or may parties – record and/or live-stream the hearings and may transcriptions be taken? May participants attend hearings remotely when they are physically located outside of the jurisdiction? Are electronic or hard-copy bundles used for remote hearings?

The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, the CPR and practice directions, and considering the interests of justice on the facts and circumstances of each case. However, during the COVID-19 pandemic, hearings in the civil courts were held remotely by telephone or (more often) video conferencing, wherever possible, and that practice continues in some courts for some hearings. The video conferencing systems used by the courts include (non-exhaustively): Cloud Video Platform; HMCTS Video Hearing Services; Microsoft Teams; Zoom; and court video link.

Current BPC guidance states that the default position for all hearings (other than applications in the Chancery Division Applications Court) in the BPC, of under half a day, is for them to take place remotely. The BPC will consider an in-person hearing in such cases only if there is a particular reason why this is more appropriate. For longer application hearings and trials, parties will be asked to express their preferences, supported by reasons, but ultimately the approach will be a matter for decision by a judge.

CPR 39 contains provisions applicable to all hearings. PD 51Y applies to video or audio hearings, for so long as the UK's Coronavirus Act 2020 remains in effect. Separately, courts and tribunals have powers to allow reporters and other members of the public to observe hearings remotely under the new s.85A of the Courts Act 2003 and the Remote Observation and Recording (Courts and Tribunals) Regulations 2022. The general rule is that a hearing is to be in public (other than in limited circumstances where it is necessary to sit in private to secure the proper administration of justice), should be tape/digitally recorded by the court (unless the judge directs otherwise), and any party or person may obtain a transcript of the recording. No party or person may, without the court's permission, record, live stream, or take photographs (including screenshots) of a hearing, and to do so constitutes a summary offence and a contempt of court, with a maximum sentence of two years' imprisonment. Particular courts have their own specific directions and guidance on preparing for and conducting remote and hybrid hearings.

The court's permission is required in advance of a hearing for private transcribers to attend to create a live transcription, or for parties to attend when they are physically located (i.e. accessing the telephone or video conference) from outside of the jurisdiction. Where a hearing takes place remotely, it is considered public if it is broadcast in a court building, or a media representative is otherwise able to access it remotely, or it is live streamed over the internet (where this is authorised in legislation).

Electronic bundles are used for remote hearings, and the BPC has issued guidance that they are the default for all hearings in the BPC for the foreseeable future. They must comply with the court's guidance on PDF bundles, accessible here: https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf. Particular courts have their own specific directions for how electronic bundles should be compiled, formatted, and delivered.

6.4 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 of which is the power to award costs orders. Disobeying a court order (or assisting a party to breach an order) may also constitute 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 6.5 below) or draw adverse inferences in appropriate circumstances.

6.5 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;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- 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.

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

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.

6.7 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 a 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, as described more fully at question 10.1 below).

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 CMC 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 that 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) 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.

Claims proceeding in the BPC do not follow the "standard disclosure" process or the disclosure process set out in CPR 31.5(7). Instead, PD 57AD applies to proceedings in the BPC (subject to limited exceptions) (see question 1.3 above). PD 57 AD contains the concepts of "initial disclosure" and "extended disclosure". Initial disclosure (unless an exception applies or the parties have agreed to dispense with initial disclosure) requires each party to provide to the other, at the same time as its statement of case, an initial disclosure list of documents, listing and accompanied by the key documents on which it has relied in its statement of case, and the key documents necessary to enable the other parties to understand the claim or defence they have to meet. Known adverse documents do not have to be disclosed when providing initial disclosure (but will need to be disclosed subsequently, at the latest within 60 days of the first CMC), nor do documents that the other side already has. If a party identifies issues in relation to which they seek further disclosure, they may request extended disclosure on an issue-by-issue basis. There are five models for extended disclosure (ranging from limited to expansive).

Disclosure is followed by inspection of documents that are disclosed, are still in the parties' control and are not protected

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 pre-action disclosure from a respondent who is likely to be a party to subsequent proceedings.

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 principal types of privilege that may arise in the context of English civil proceedings are:

- Legal professional privilege, which consists of two limbs:
  - legal advice privilege, which applies to confidential communications (written or oral) between a client (in the case of a company, narrowly defined as those individuals within the company authorised to seek and receive legal advice on behalf of the company) and the client's lawyer where, at the time the communication was created, its dominant purpose was for giving or obtaining legal advice; and
  - litigation privilege, covering confidential communications (written or oral) between parties or their lawyers and third parties, but only if at the time the communication was created, litigation was in progress or in contemplation, the communication was made for the sole or dominant purpose of conducting that litigation, and the litigation is adversarial in nature. A recent case confirmed that legal advice privilege and litigation privilege can apply to the same communication.
- Common interest privilege, which protects communications voluntarily shared between parties and their legal advisors where there is a sufficient mutuality of interest in the subject matter of the communications.
- "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, privileged documents 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 CPR 31.17, 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 under other means (e.g. CPR 31.18) where the third party (i) was involved in wrongdoing, whether innocently or not, and is unlikely to be a party to potential proceedings but may have information relevant to these, and/or (ii) where the third party has information relating to the assets of a claimant who has been defrauded, to enable the claimant to trace their assets. Such orders can be obtained before or after proceedings have commenced and are often used as a means to identify the proper defendant to an action, to extract the necessary information to formulate the particulars of the claim, and/or to identify assets to form the subject of freezing orders or other actions.

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 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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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, and 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 they have 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 that the expert evidence should address.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and 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.

Witness statements that are signed on or after 6 April 2021, and are for use at trials in the BPC, are (with some limited exceptions) subject to the additional requirements in PD 57AC. This includes a requirement for the witness statement to be prepared in accordance with a Statement of Best Practice (SOBP), and the witness and their legal representative must provide a confirmation of compliance with the SOBP. The key aspects of the SOBP are that witness statements should:

- Be limited to testimony as to matters of which the witness has personal knowledge (i.e. if it was experienced by one of their primary senses, or internal to their mind) and which is relevant to issues of fact to be determined at trial.
- Be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshing of memory. This means the witness should only be shown a document if they created or saw it while the facts evidenced by or referred to in their witness statement were still fresh in their mind, so that they would have known if they were accurate or inaccurate. It also means that the witness should be asked open and non-leading questions during any interview with their legal representative concerning the content of the statement, and the discussion in such interview should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representative.
- Be accompanied by a list of all the documents the witness consulted during the preparation of the statement.
- Where it relates to important disputed matters of fact, state in the witness' own words how well they recall matters addressed and whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed.
- Be as concise as possible without omitting anything of significance.
- Refer to documents, if at all, only where strictly necessary, and not quote at any length from any documents or set out a narrative derived from the documents.
- Not seek to argue the case, either generally or on particular points, or include commentary on other evidence in the case.
- Involve as few drafts as practicable.

There are sanctions attached to non-compliance with PD 57AC – the court can: (i) refuse to rely on all or part of the statement; (ii) order the statement to be redrafted; (iii) make an adverse costs order; or (iv) disregard the statement and order the witness to instead give their evidence-in-chief orally at trial.

Despite the strict requirements of PD 57AC, the courts have been clear that parties should only consider bringing an application seeking sanctions for non-compliance where it is readily apparent that the alleged breach is substantial; it is incumbent on parties to try to resolve issues of non-compliance between themselves in the first instance, and the courts look unfavourably on applications that are unreasonable, disproportionate, or utilised as a litigation "weapon".

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. Depositions are not normally allowed in English proceedings.

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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 their expertise. This duty overrides any obligation to the party instructing them.

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 their 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 6.6 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, a declaration/statement as to legal rights and obligations – see question 9.2 below). In certain circumstances, for example, where a defendant is found to be in breach of trust or fiduciary duty, the court may order equitable remedies, such as for the recovery of a specific sum of money from a defendant, or for the defendant to provide the claimant with an account of profits (i.e. to provide to the claimant any net gain obtained by the defendant from their breach).

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 Are the civil courts in your jurisdiction empowered to issue binding declarations as to (i) parties' contractual or other civil law rights or obligations, (ii) the proper interpretation of wording in contracts, statutes or other documents, (iii) the existence of facts, or (iv) a principle of law? If so, when may such relief be sought and what factors are relevant to whether such relief is granted? In particular, may such relief be granted where the party seeking the declaration has no subsisting cause of action, and/or no party has suffered loss, and/or there has been no breach of contract/duty?

The courts are empowered to issue binding declarations at their discretion, including as to the issues outlined in this question (at (i)–(iv)). Declaratory relief may be sought as a stand-alone claim, but is more commonly sought as an initial step before a prospective claimant decides on what substantive action to take, or alongside other forms of relief, such as an injunction or specific performance. Such relief may be sought notwithstanding that the party seeking the declaration has no subsisting cause of action, and/or no party has suffered loss, and/or there has been no breach of contract/duty. Generally, a declaration will only be made on a final basis following trial or at least on satisfactory evidence; however, in rare cases a declaration may be made on an interim basis and/or by consent of the relevant parties, on the basis of admissions, or in default of pleading.

Generally, the courts will only issue declarations where there is a real and present dispute between the parties before the court as to the existence or extent of an existing or prospective legal right between them, and each of the parties would be affected by such determination (i.e. it would serve a useful purpose). Where that is not the case and the declaration relates to a question that is academic or hypothetical, it will generally be necessary for the parties before the court to have consented to the determination and for the court to be satisfied that all those who stand to be affected will have their arguments fully and properly put before the court. In all cases, the courts will consider whether a declaration is the most effective way of resolving the issue(s) raised. A claim for a declaration may be assisted – but not determined – by the fact that damages would not provide adequate alternative relief/remedy, and where the court considers that making a declaration is in the public's interest (e.g. to clarify ambiguity as to the effect of a statute).

9.3 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. 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. Costs orders are generally discretionary.

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

9.4 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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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

In the case of foreign judgments, the potential and process for recognition and enforcement varies from country to country. Judgments from EU Member States and Lugano Convention states are more complicated following the end of the UK-EU transition period on 31 December 2020, after which the recognition and enforcement provisions of the Brussels Recast Regulation, Brussels Regulation, and the Lugano Convention no longer apply (other than in limited circumstances caught by transitional provisions).

A judgment from the court of a country that has acceded to the Hague Convention, where the judgment was issued pursuant to an exclusive choice of court agreement, will be recognised and enforced in England in accordance with the provisions of the Hague Convention. The Hague Convention does not apply to judgments issued pursuant to non-exclusive jurisdictional clauses or "asymmetrical" jurisdiction clauses (which seem unlikely to be considered "exclusive", although this is yet to be finally determined), or to interim remedies such as interim injunctions or freezing orders.

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 circumstances where the above regimes do not apply, recognition and enforcement of a foreign judgment should nonetheless be possible where the judgment is from a court in a country that has entered into a bilateral enforcement treaty with the UK, such as Austria, Belgium, France, Germany, Italy, the Netherlands, and Norway.

In cases of judgments from those countries not covered by any of the above enforcement regimes or mechanisms (a notable example being any judgments from 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).

9.5 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; 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 enhanced cost consequences for the successful party. There are specific requirements governing the content and timing of a Part 36 offer. If a Part 36 offer of settlement is not accepted and, at trial, the party that did not accept the Part 36 offer fails to "beat" the terms of the Part 36 offer, then the enhanced costs consequences under CPR 36 will arise. The party that did not accept the Part 36 offer will normally have to pay most (but not all) of the other side's legal costs on an enhanced basis, plus interest on those costs at up to 10% above base rate. Where the unsuccessful party is the defendant, the court may also order that it pay interest on any damages award, plus an additional amount (up to a maximum of £75,000), calculated by reference to damages in a money claim and costs in a non-monetary claim, as further explained above in question 1.5.

While the courts encourage settlement, they do not supervise settlements directly (other than in very limited circumstances, such as in respect of pure opt-out collective actions for consumer competition claims).

11 Alternative Dispute Resolution

11.1 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 ADR 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 ADR 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, mediation concludes with a settlement agreement, which is enforceable as a contract (see question 11.5 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

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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. They 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.

There are procedural rules that compel or encourage parties to litigation in the English courts to engage in or consider ADR, in certain circumstances and at certain stages in proceedings. A party refusing to engage with ADR may, in certain circumstances, face consequences, such as the court ordering that party to pay additional court costs.

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

For English-seated arbitrations, the law governing the arbitration process is the Arbitration Act 1996, which applies to both domestic and international arbitration. The Law Commission in England and Wales is currently consulting on whether changes are required to update and modernise the Arbitration Act 1996. Apart from the Arbitration Act 1996, and depending on the parties' arbitration agreement, institutional arbitration rules may apply, such as the rules of the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators, or those of various London-based trade associations (see question 11.6 below).

Mediation is not governed by any particular set of laws or rules. Current case law suggests that evidence from mediations may only be disclosed in exceptional circumstances, in the interests of justice. There are no rules that serve to automatically extend claim limitation periods that would otherwise expire during a mediation process, and therefore parties for whom this is a concern should consider taking protective measures, if available, such as entering into a standstill agreement, or issuing proceedings and seeking a stay pending the end of a mediation process. Following the end of the UK-EU transition period on 31 December 2020, the UK is no longer subject to the European Mediation Directive (which previously imposed confidentiality and limitation-related provisions on mediations relating to cross-border disputes).

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

11.3 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 question 11.1 above), the Ombudsman's services are usually sector-specific and provided for by statute.

11.4 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, force parties to arbitrate when they have so agreed, or 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, and to grant anti-suit injunctions against a party that has commenced court proceedings abroad in breach of an arbitration agreement.

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 the 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. For example, parties to small claims (of under £10,000 in value) are automatically referred to the Small Claims Mediation Service which, if the parties agree to mediate, offers one-hour telephone mediation appointments. The UK Government has recently announced – and is consulting on – plans to make such mediation compulsory for all small claims, and has indicated it will consider compulsory mediation for higher value and more complex cases in the County Court.

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.

11.5 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 arbitral award is severely restricted under the Arbitration Act 1996 (and can even be excluded by the arbitration agreement), and there is a high threshold for succeeding in such an application. 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 also be 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 arbitral award (for example, the arbitral tribunal failed to deal with all the issues that were put to it or was biased).

The New York Convention, to which the UK is a party, allows the enforcement of an English arbitral award across all the Convention countries in accordance with those countries' own laws. Likewise, the Arbitration Act 1996 provides for

© Published and reproduced with kind permission by Global Legal Group Ltd, London

enforcement in England of an arbitral 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 arbitral 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 costs 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.

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

The major arbitration institution in England is the LCIA.

Other more specialised, industry-related arbitration institutions include:

- the London Maritime Arbitrators' Association (LMAA);
- the Grain & Feed Trade Association (GAFTA);
- the Federation of Oils, Seeds & Fats Association (FOSFA);
- the Sugar Association of London (SAL) and the Refined Sugar Association (RSA); and
- the London Metal Exchange (LME).

The Society for Computers and Law (SCL), whilst not an arbitration institution, is the default body managing the appointment of arbitrators and experts for arbitrations and expert determinations conducted under the Digital Dispute Resolution Rules (DDRR). Introduced in 2021, the DDRR is a procedural framework designed specifically to facilitate the rapid resolution of disputes relating to novel digital technologies, such as crypto-assets, smart contracts, distributed ledger technologies, and fintech applications.

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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Greg Lascelles advises clients in high-stakes matters with significant financial or reputational risk. His broad-based practice covers complex international commercial litigation, arbitration, regulatory investigations and Parliament Select Committee hearings. He acts for major corporates, financial institutions, entrepreneurs and individuals, and his cases involve disputes relating to interpretation, M&A disputes, bonus and remuneration, Companies Act matters, shareholder disputes, data litigation, securities litigation and disputes involving serious issues of fraud. He has been involved in ground-breaking High Court and FCA disputes relating to market abuse and collective selling, as well as in the Supreme Court on the interpretation of standard contractual clauses. Greg's regulatory matters (including at the FCA, FRC, SFO and Insolvency Service) relate to market abuse and financial statement reporting. As well as regular advice to clients on contract drafting and risk avoidance, he has recently been advising on developments in FDI and national security legislation.

Covington & Burling LLP
22 Bishopsgate
London EC2N 4BQ
United Kingdom

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

Alan Kenny focuses on high-value, complex, multiparty and multijurisdictional matters, advising companies, banks, institutions, and high-net-worth individuals on all stages of dispute avoidance and resolution. He has experience representing clients in: mediation; commercial litigation (before the English High Court and Court of Appeal); and international and trade association arbitration (both *ad hoc* and under a variety of rules). He acts for clients in a broad range of industries with particular experience in financial services, technology, commodities, shipping, life sciences, and media.

Covington & Burling LLP
22 Bishopsgate
London EC2N 4BQ
United Kingdom

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

Covington & Burling LLP is a pre-eminent international law firm with more than 1,300 lawyers and advisors and offices in Beijing, Brussels, Dubai, Frankfurt, Johannesburg, London, Los Angeles, New York, Palo Alto, San Francisco, Seoul, Shanghai and Washington.
In an increasingly regulated world, we have an exceptional ability to navigate clients through their most complex business problems, deals, and disputes. Our distinctively collaborative culture allows us to be truly one team globally, drawing on the diverse experience of lawyers and advisors across the firm by seamlessly sharing insight and expertise.
What sets us apart is our ability to combine the tremendous strength in our litigation, investigations, and corporate practices with deep knowledge of policy and policymakers, as well as one of the world's leading regulatory practices.

This enables us to create novel solutions to our clients' toughest problems, successfully try their toughest cases, and deliver commercially practical advice of the highest quality.

www.cov.com

COVINGTON

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group