# THE DISPUTE RESOLUTION REVIEW

Eleventh Edition

**Editor**
Damian Taylor

THE LAWREVIEWS

# THE DISPUTE RESOLUTION REVIEW

ELEVENTH EDITION

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# PREFACE

*The Dispute Resolution Review* provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

**Damian Taylor**
Slaughter and May
London
February 2019

Chapter 9

# ENGLAND AND WALES

*Damian Taylor and Smriti Sriram*[1]

## I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

### i England and Wales, the United Kingdom and the European Union

The United Kingdom (UK) comprises four countries – England, Northern Ireland, Scotland and Wales – which share a common (albeit uncodified) Constitution but have three separate legal systems. England and Wales share a common legal system (often referred to colloquially as 'English law') while Scotland and Northern Ireland each have their own independent system. The Supreme Court of the United Kingdom hears appeals from all three legal systems in civil cases in addition to cases concerning powers devolved to the Scottish, Welsh and Northern Irish executive and legislative authorities. The UK is a Member State of the European Union (EU) and, by virtue of the European Communities Act 1972, certain EU legislation and decisions have effect in the legal systems in force in the UK.[2] This chapter focuses on the legal system in England and Wales only.

### ii Private and public resolution

Disputes in England and Wales may be adjudicated privately (e.g., by an agreed arbitrator) or litigated publicly in the courts. Although the use of private dispute resolution mechanisms is increasing, the courts still determine the vast majority of adjudicated disputes. The courts remain the only forum in which a claim can be determined without the agreement of the other party. Private forms of dispute resolution are considered separately in Section VII, below.

### iii The structure of the courts

Depending on the financial value and nature of the dispute, a party may bring a civil claim in either the County Court or the High Court. Most non-complex civil litigation is dealt with in the County Court through hearing centres in towns and cities throughout England and Wales. Most commercial claims, and all complex litigation, are heard in the High Court, either in district registries located in provincial cities or in the Royal Courts of Justice in London. Recent changes to the Civil Procedure Rules (CPRs) emphasise that cases can be tried outside London regardless of their size. These changes have been made in the context of the launch of the Business and Property Courts, discussed further below. The High Court

1 Damian Taylor is a partner and Smriti Sriram is an associate at Slaughter and May. The authors wish to thank Rob Brittain (professional support lawyer at Slaughter and May) for his contribution and assistance.

2 On 23 June 2016, a referendum was held on the UK's membership of the EU in which a majority of the UK electorate voted to leave. For consideration of the dispute resolution implications, please see Chapter 1.

has jurisdiction to hear any civil case in England and Wales at first instance, and has an appellate jurisdiction in respect of certain matters in the courts below. The High Court is divided into three divisions, two of which are relevant for commercial disputes, namely the Queen's Bench Division and the Chancery Division.[3] Within these divisions there are a number of specialist courts or lists, including the Commercial Court, the Financial List, the Circuit Commercial Court (previously the Mercantile Court), the Admiralty Court, the Technology and Construction Court (TCC), the Administrative Court, the Planning Court, the Companies Court, the Bankruptcy Court, the Intellectual Property Enterprise Court and the Patents Court. The High Court, the Crown Court (which deals with criminal cases) and the Court of Appeal are collectively known as the Senior Courts of England and Wales. The Court of Appeal hears appeals in civil cases from the High Court and, in certain circumstances, from the County Court and various tribunals.

Following changes made in October 2017, the Commercial Court, Circuit Commercial Court, Chancery Division (including Companies Court, Patents Court and Intellectual Property Enterprise Court), TCC, Admiralty Court and Financial List are known collectively as the Business and Property Courts of England and Wales. The individual courts retain their identities, but the work of the Chancery Division has been spilt into seven lists according to the substance of the dispute.[4] There are also Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and Cardiff, with expansions to Newcastle and Liverpool likely in the future.

The final court of appeal in civil cases (and, in England, criminal cases) is the Supreme Court of the United Kingdom, created by the Constitutional Reform Act 2005. The Supreme Court will generally only hear cases that involve a point of law of general public importance; its decisions bind all courts below.

In addition to the courts, a number of statutory tribunals have been established to hear disputes arising under the jurisdiction granted to them by the relevant legislation. The members of the tribunal will often comprise a legally qualified chairperson as well as lay members with appropriate experience. It is often possible to appeal a decision made by a tribunal to the High Court.

### iv Relationship with European courts

There is no general right of appeal to the Court of Justice of the European Union (CJEU),[5] although a court or tribunal in England and Wales may refer questions regarding the interpretation of the Treaty on European Union and the Treaty on the Functioning of the European Union or the validity or interpretation of acts of the EU institutions to the CJEU for a preliminary ruling. Having obtained such a ruling, the case will (often after many years' delay) return to the referring court or tribunal, which must apply the CJEU's ruling, together with any non-conflicting national law, to the facts before it. The court or tribunal

3 The third division is the Family Division, which deals with matrimonial and other family-related matters.

4 These are: business; competition; insolvency and companies; intellectual property; property; trust and probate; revenue; and Chancery appeals.

5 Formerly the Court of Justice of the European Communities (the collective name for the Court of Justice (commonly known as the ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal). Following the Treaty of Lisbon, the collective court is known as the Court of Justice of the European Union (CJEU). The ECJ remains the Court of Justice and the CFI is now known as the General Court.

is not required to make a reference where previous CJEU decisions have already dealt with the point or where the correct application of EU law is so obvious as to leave no scope for reasonable doubt (referred to as *acte clair*).

The European Court of Human Rights (ECtHR) hears cases relating to alleged violations of the European Convention on Human Rights (the Convention). The Court and the Convention are separate from the EU and its institutions. There is no general right of appeal to the ECtHR. A claimant who alleges breaches of the Convention may apply to the ECtHR only after having exhausted his or her rights of appeal in the domestic courts; in England and Wales, this will usually mean that the claimant must have pursued a claim and all available appeals in the domestic courts pursuant to the provisions of the Human Rights Act 1998. The decisions of the ECtHR are not binding on courts in England and Wales, although Section 2 of the Human Rights Act 1998 requires domestic courts to 'take into account' such decisions.

## II THE YEAR IN REVIEW

The past year has produced a number of important decisions by the courts. It is not possible to review all the developments that have taken place, but the following are of particular interest.

### i Rock Advertising Ltd v. MWB Business Exchange Centres Ltd [2018] UKSC 24

The Supreme Court has overturned the Court of Appeal's decision by holding that a No Oral Modification (NOM) clause was legally effective. The Court of Appeal had found that the oral agreement to vary the payments was valid and amounted to an agreement to dispense with the NOM clause. The Supreme Court disagreed, upholding the trial judge's decision that a NOM clause is effective, with the decision providing welcome certainty to contracting parties. The decision also recognises that NOM clauses carry the risk that a party may act on the contract as varied orally.

### ii Morris-Garner & Anor v. One Step (Support) Ltd [2018] UKSC 20

In this case, the Supreme Court has clarified the circumstances in which damages for breach of contract can be assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform (*Wrotham Park* damages). The main judgment explicitly abandons the term 'Wrotham Park damages', in favour of 'negotiating damages'. Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right that has been breached. This may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right that was infringed (as in the case of the breach of a restrictive covenant over land or an intellectual property agreement). The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment. The substance of the claimant's case was that it had suffered financial loss as a result of the defendants' breach of contract (loss of profits and possibly goodwill). While the loss was difficult to quantify, the justices found that it was a familiar type of loss and could be quantified in a conventional manner. The claimant had not lost a valuable asset created or protected by the right that was infringed.

### iii Wm Morrison Supermarkets plc v. Various Claimants [2018] EWCA Civ 2339

In this claim brought by over 5,000 employees of Morrisons against the retailer, the Court of Appeal has dismissed Morrisons' appeal against a High Court ruling that it was vicariously liable for an employee's deliberate disclosure of the claimants' personal data on the internet. Morrisons is liable in damages to the claimants, the quantum of which is to be decided separately. Among the court's findings were:

*a* that the common law remedy of vicarious liability for misuse of private information and breach of confidence was not expressly or impliedly excluded by the Data Protection Act 1998; and

*b* that the employee's actions at work and the disclosure on the internet was a seamless and continuous sequence of events: the steps he had taken and his attempts to hide them were all part of a plan.

This decision will have serious implications for employers who may be vicariously liable for misuse of employee personal data by a rogue employee even if they are otherwise compliant with data protection legislation. Morrisons has indicated that it intends to appeal to the Supreme Court.

### iv Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006

The Court of Appeal has overturned the controversial High Court decision ([2017] EWHC 1017 (QB)) by clarifying that documents prepared during the internal investigation, both by its lawyers and a firm of forensic accountants, are protected by litigation privilege. The Court stated that it is 'obviously' in the public interest that companies should be prepared to investigate allegations of wrongdoing, before going to a prosecutor such as the SFO, without losing the protection of privilege for any documents generated by their investigation. The Court of Appeal recognised that, otherwise, 'the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered' to the prosecuting authority.

### v Belhaj and another v. Director of Public Prosecutions and others [2018] EWHC 513 (Admin) and [2018] EWHC 514 (Admin)

In two related judgments in the same proceedings, the High Court has considered:

*a* whether a waiver of privilege, expressed to be limited to a specific situation, did in fact constitute a broader implied waiver for purposes connected to the specific situation; and

*b* whether the government could reassert privilege over documents (which had been inadvertently disclosed in closed proceedings) so that the claimants were unable to rely on them.

On the first issue, the Court stated where the party entitled to assert privilege intends for any waiver of privilege to be limited, the court will be reluctant to extend the waiver on the basis that an extension is to be inferred. However, arguably, once privilege is waived, it might be taken to have been waived in respect of composite proceedings. On the second issue, upholding the inadvertent waiver threshold of 'obvious mistake' set out in *Al Fayed v. Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, the Court found that

the disclosure of privileged documents had been an obvious mistake as it would have been counterintuitive and improbable for the government to have disclosed part but not all of its legal advice.

### vi Iranian Offshore Engineering and Construction Company v. Dean Investment Holdings SA [2018] EWHC 2759 (Comm)

Dicey, Morris & Collins, *The Conflict of Laws* states at Rule 25(2) that, in a case to which foreign law applies, the court will apply English law in the absence of satisfactory evidence of foreign law. The Court stated that it is necessary for a claimant to plead the existence of, or an intention to rely on, Rule 25(2) at trial. While it is open to a claimant to choose not to plead foreign law if it pleaded a viable cause of action under English law, if a defendant wished to challenge the determination of the claim under English law, it should expressly plead this, setting out the matters particular to the claim which made English law inappropriate. In this case, the defendant had not done so, and they had not pleaded any case denying the appropriateness of applying Rule 25(2) at trial. The fact that foreign law might, in principle, apply to a claim, did not, of itself, disapply Rule 25(2).

## III COURT PROCEDURE

### i Overview of court procedure

Civil procedure in England and Wales is governed by the CPRs and accompanying practice directions (PDs). These are supplemented by guides produced by different courts summarising particular procedures that apply in those courts. They do not have the force of law but courts will generally expect compliance (and may punish non-compliance with adverse costs orders). These and other sources are available online on the Ministry of Justice's website[6] and, with commentary, in The White Book published annually (with interim updates) by Sweet & Maxwell.

### ii Procedure and time frames

Time frames and procedure for claims vary depending upon the court and division in which the relevant claim is issued and the nature of the claim itself; the commentary below is therefore only a general summary.

Before even commencing a claim, a claimant should ensure that one of the pre-action protocols does not apply to the type of claim being made (e.g., claims for professional negligence, defamation and judicial review have specific pre-action protocols that should be followed). Even where there is no specific pre-action protocol,[7] the claimant will be expected first to write a letter before claim to the prospective defendant setting out in detail his or her claim and allowing the defendant a reasonable period in which to respond (what is reasonable may depend on the complexity of the allegations).

Following any pre-action steps, proceedings are started (and the court is treated as seised) on the date that the claimant issues a claim form in the relevant court. The claim form must then be served on the proposed defendant or defendants within four months of

6 See www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/index.htm.

7 See the Pre-Action Conduct and Protocols Practice Direction at www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

issue (assuming the relevant defendant is within the jurisdiction) or within six months if the defendant is outside the jurisdiction (see Section III.vi, Service out of the jurisdiction). It can be served by a range of different methods, including handing it to the defendant in person or by post. The courts have wide discretion in this area: they have, for example, permitted service of an order to be made via the social networking site Twitter against an anonymous defendant who had impersonated the claimant's blog on that site. The claimant must serve particulars of claim with the claim form or within 14 days of service of the claim form; the particulars set out its case, the relevant facts and basis for the claim in law as well as the remedy sought. Both the claim form and the particulars of claim must be verified by a statement of truth signed either by the claimant (or authorised signatory on behalf of the claimant where the claimant is an organisation) or the claimant's legal representative.

Assuming the defendant intends to defend the claim and acknowledges service by the appropriate court form, his or her response is by way of the defence, to be served within 28 days of receipt of the particulars of claim (note that this timescale can vary between different courts and is in any event subject to extension by agreement between the parties or by court order). The defendant should respond in the defence to each of the allegations made in the particulars of claim by either admitting it, denying it (with explanation), or putting the claimant to proof. Following service of the defence, the claimant has a right of reply in relation to any new issues or allegations raised in the defence, as well as a right to defend any counterclaim raised in the defence. The claimant's reply should be served within 21 days of service of the defence (again, subject to extension by agreement or by court order). From this point on, it is not expected that any further statements of case will be exchanged between the parties (unless permission to do so has been granted by the court).

Following the filing of the defence, the court will send a notice of proposed allocation to the parties (CPR 26.3(1)), which will provisionally allocate the claim to a 'track' and require the parties to provide further information about the claim in the form of a directions questionnaire so that it can give appropriate directions as to the conduct of the proceedings and ensure that it is allocated to the correct track. The different tracks are used to ensure that the procedure adopted to trial is proportionate to the importance of the issues and amount at stake. Claims below £10,000 are generally allocated to the small-claims track and are dealt with quickly without many of the CPRs applying; for example, parties typically bear their own costs, most interim remedies are not available, there are limited disclosure obligations and witness statements are not normally exchanged before trial. Claims between £10,000 and £25,000 are generally allocated to the fast track, where the claim will still be processed quickly (trial will usually be set for a date within 30 weeks of the allocation decision) but more extensive preparation is permitted than on the small-claims track and interim remedies are available. The multi-track is reserved for the most important and high-value disputes, and the court will adopt a much more hands-on role in ensuring that the procedure adopted to trial is tailored to the requirements of the case.

For multi-track cases subject to costs management under CPR 3.13, parties will be required to complete a costs budget in the form of a template known as Precedent H. Costs management applies (subject to the discretion of the court to apply or disapply the regime) to most multi-track cases commenced on or after 1 April 2013, except for proceedings where the amount of the money claimed or value of the claim as stated on the claim form is £10 million

or more.[8] Parties subject to the regime are required to file and exchange budgets setting out estimated costs for each stage in the proceedings. These must be approved by the court and effectively cap the amount that the winning party can recover from the losing party at the end of the proceedings unless it can demonstrate a good reason for departing from the budget.[9]

Cases on the multi-track may require one or more case management conferences (CMCs) at which the court will, usually after hearing submissions from the parties, give directions regarding the timetable for disclosure, exchange of factual witness statements and exchange of expert reports (if any), as well as indicating broadly when it expects the trial itself to be listed. For complex matters, it is not unusual for the period between the first CMC and the trial to be at least a year. Once listed, trial dates (across all tracks) are treated as set and only in exceptional circumstances will the court agree to postpone a trial.

CPR 25.1(1) contains a non-exclusive list of interim remedies available from the court, including interim injunctions and declarations, orders for delivery up of goods, orders freezing property, orders for the provision of information and search orders. Interim applications may be made without notice to the person against whom the relief is sought, although the applicant is under a duty to disclose fully and fairly all material facts to the court, even if they are adverse to its case. Overseas lawyers have been encouraged to note that practitioners within this jurisdiction bear this heavy responsibility and that ill-prepared applications are to be avoided.[10]

### iii Court reform

In 2014, the Ministry of Justice announced that between 2015 and 2020, HM Courts & Tribunals Service (HMCTS) would oversee a series of reforms aimed at modernising and improving the efficiency of courts and tribunals. The programme will involve substantial investment in digital technology to allow cases to be managed better, with less paper and fewer delays. This will allow a reduction in the number of court buildings, so generating further savings. The digitisation process is considered below (see Section III.iii, Digitisation, below). Other separate but complementary steps to reform and rationalise court processes are also considered directly below.

#### *Reform of the appeals process*

Secondary legislation came into force on 3 October 2016, and is intended to reduce the time it takes for cases to be heard by the Court of Appeal. The Access to Justice Act 1999 (Destination of Appeals) Order 2016 simplifies the appeals process by ensuring that, in

8 A recent case has held that costs budgeting and proportionality considerations can be taken into account and directed by the Court in certain circumstances, even in cases exceeding £10 million in value (see *Sharp & Ors v. Blank & Ors* [2017] EWHC 141 (Ch)).

9 Recent case law on costs budgeting includes *Harrison v. University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA Civ 792, where it was held that in order to depart from budgeted costs already agreed in the claimant's costs budget at the Costs and Case Management Conference, the established principle of 'good reason' was required. However, costs incurred before a budget would be the subject of detailed assessment in the usual way; there was no requirement for 'good reason' to be shown if there was to be a departure from the approved budget. In *Merrix v. Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB), where a case settled before trial, when assessing costs on the standard basis, a costs judge should not depart from the receiving party's last approved budget unless satisfied that there is good reason to do so.

10 *Lewis v. Eliades (No. 1)* [2002] EWHC 335.

most cases, an appeal will lie to the next highest level of judge. In particular, appeals from a decision of a district judge in the County Court will generally lie to a circuit judge in the County Court (the next most senior judicial rung), while appeals from a circuit judge will lie to the High Court. In the High Court, appeals from a master will lie to a full judge of the High Court, and appeals from a High Court judge will lie to the Court of Appeal. The Civil Procedure (Amendment No. 3) Rules 2016 revised CPR Part 52 accordingly. The new Part 52 made two other important changes:

*a* the removal of the default right to renew, at an oral hearing, a failed paper application for permission to appeal to the Court of Appeal; and

*b* a clarification of the test for grant of permission to appeal in second appeals (i.e., appeals of appeals) such that a 'real prospect of success' must be shown, or there must be some other compelling reason for the second appeal to be heard.

***Shorter and flexible trial schemes***

Two pilot schemes, one for shorter trials, the other for flexible trials, began in the Business and Property Courts in London in October 2015. After three years of piloting, both schemes became permanent on 1 October 2018. The objective of the pilot schemes is to achieve more efficient trials in the context of commercial litigation. This was prompted, in part, by a recognition that comprehensive (and costly) disclosure is not always required for justice to be achieved. The Shorter Trials Scheme is open to cases that can be tried in no more than four days – this means cases in which only limited disclosure and oral evidence is required, and in practice means factually complex or multiparty claims (including fraud and dishonesty claims) are excluded. The intention is that a trial will take place within 10 months of the issue of proceedings, with judgment to follow within six weeks thereafter. The first case directly commenced under the Shorter Trials Scheme in March 2016 was *National Bank of Abu Dhabi PJSC v. BP Oil International Ltd*. [2016] EWHC 2892. A one-day trial took place eight months after issue and judgment was handed down two weeks after the hearing, on 22 November 2016. It is also worth noting that an appeal against the judgment was heard in July 2017, quicker than many comparable appeals.

***Financial List***

In October 2015, the High Court introduced a specialist Financial List for the determination of claims by judges with expertise in the financial markets. There are three criteria for inclusion (only one of which needs be fulfilled). A claim must either:

*a* relate to banking and financial transactions where over £50 million is in issue;

*b* require particular judicial expertise in the financial markets; or

*c* raise issues of general importance to the financial markets (see CPR Part 63A).

The Financial List initiative included a two-year pilot financial markets test case scheme, which was extended in May 2017 for a further three years until 30 September 2020. This permits the court to decide cases that raise issues of general importance to the financial markets in relation to which immediately relevant authoritative English law guidance is needed, even where there is no present cause of action between the parties to the proceedings.

In *Property Alliance Group Ltd v. Royal Bank of Scotland plc* [2016] EWHC 207 (Ch), following a contested application to transfer existing proceedings to the Financial List, the Master of the Rolls (the second most senior judge in England and Wales) clarified that when deciding whether to transfer a case to the Financial List, CPR 30.3 and the overriding

objective must be taken into account. The instant case was transferred to the Financial List even though the total value of the claim was £29 million (below the £50 million indicative threshold). This was because, in circumstances where the issues in the case were of broad significance for the market and a judgment would affect other proceedings already issued or in contemplation, it was desirable that it be dealt with by a judge of the Financial List, in order for the resulting judgment to carry appropriate weight and respect in the financial markets.

***Digitisation***

The digitisation of the courts has continued with:

*a* a new electronic filing and case management system being rolled out across the Business and Property Courts, starting with those located at the Rolls Building in London;

*b* a proposed online court system – intended to deal with straightforward money claims of up to £25,000. The Civil Money Claims Project has committed to delivering a new, largely automated, system for such claims by November 2019;

*c* the introduction of pilot programmes allowing the cross-examination of victims and witnesses of crime to be pre-recorded so as to avoid the pressure of a live hearing. It was announced in March 2017 that because of the success of a pilot scheme for the evidence of certain witnesses (mainly children), it is intended that the number of courts where such witnesses can give pre-recorded evidence will be increased. Also, from September 2017, courts in Kingston, Leeds and Liverpool will pilot pre-recorded cross-examination for complainants and witnesses in respect of certain offences;

*d* a pilot running from August 2017 to November 2019, which has been set up to test an online claims process known as the Online Court. The pilot applies to certain money claims in the County Court; and

*e* the Courts and Tribunals (Judiciary and Functions of Staff) Bill passed in December 2018, which permits judges to delegate a range of work to court staff, such as granting an extension of time or issuing a summons.

### iv Class actions

***Pre-October 2015***

The concept of class actions has been a part of English civil procedure for some time, but does not bring with it many of the characteristics that would, for example, be familiar to a US lawyer. CPR Part 19 sets out the framework for:

*a* representative actions, where one person brings (or defends) a claim as a representative of others who share the same interest in the claim;[11] and

*b* group litigation orders (GLOs),[12] where claims brought by parties that give rise to common or related issues of fact or law are managed together.

Represented persons are not formally parties to the proceedings and are therefore not subject to disclosure obligations or liable for costs (therefore leaving the representative liable for any costs). They do not have to opt in to be represented, although they can apply to the court to opt out. By contrast, parties to claims covered by a GLO are fully fledged parties and are likely

11 CPR 19.6.

12 CPR 19.10–19.15.

to have to pay their share of the common costs of the litigation if they lose. The Court of Appeal confirmed the High Court's rejection of a US-style class action brought against British Airways by two flower importers who sought to bring proceedings as representatives of all direct and indirect purchasers of airfreight services affected by an alleged cartel.[13] The Court upheld the first instance decision to strike out the representative element of the claim as it was not in the interest of justice to bring an action on behalf of a class of claimants so wide that it was impossible to identify members of the class before and perhaps even after judgment. This opposition to US-style class actions has been strengthened by the government's decision to remove provisions in the Financial Services Bill (enacted as the Financial Services Act 2010), which would have extended the options for collective actions in the financial services sector to include 'opt-out' actions.

Orders made in a representative action are binding on all represented persons and may be enforced, with the court's permission, against any other person. Judgments issued in claims subject to a GLO are binding on every party entered on the 'group register' (which will have been established pursuant to the GLO).

A single claim can be selected from any set of similar claims (including those governed by a GLO) to be advanced as a test case. There are no formal rules governing test cases and it is usually the parties who decide which cases will be selected to proceed to judgment while others are stayed pending judgment in the test case. A recent example of a test case was the bank charges litigation where thousands of customers' claims in the County Court were stayed pending the outcome of the OFT's claim.[14]

Although there have been some high-profile cases involving representative actions and GLOs,[15] class-action proceedings of any kind are still relatively uncommon in England and Wales, in part because of the risks of adverse costs orders against unsuccessful claimants and, more generally, the costs of commencing and maintaining proceedings. Parties are increasingly able to mitigate these risks through the increased availability of after-the-event insurance, third-party litigation funding, conditional fee agreements and damages-based contingent fee arrangements with lawyers who are willing to share the risks with their clients in return for a share of any damages (see Section III.x).

13 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ 1284; (2010) 160 NLJ 1651.

14 *Office of Fair Trading v. Abbey National plc and Others* [2009] UKSC 6; [2009] 3 WLR 1215.

15 See the class actions brought by shareholders of RBS in respect of the 2008 RBS rights issue and the shareholders of Lloyds/HBOS in respect of alleged losses suffered as a consequence of Lloyds' acquisition of HBOS in January 2009 and the subsequent recapitalisation of the merged entity. On 5 December 2016, RBS announced that it had settled with three of the five claimant groups in the rights issue litigation, and in April 2017 further settlements occurred with additional shareholders, resulting in an effective settlement of 87 per cent of the claim (by value). The trial on liability began in May 2017; however further settlements were announced in June 2017, and the High Court vacated the trial. The *Lloyds/HBOS* case is still working its way through the High Court. See also, the Equitable Life litigation (in the House of Lords: *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408), where Equitable Life sponsored one defendant, Hyman, to represent around 90,000 of its policyholders to establish the correct interpretation of a life insurance policy it had issued. In January 2017, the High Court granted a GLO that will see a class action against the Post Office regarding claims that sub-postmasters were wrongly punished because of flaws in the Post Office's Horizon computer system. 522 current and former postmasters have attached to the claim as eligible claimants. Also this year, an application was made to the High Court for a group litigation order to pursue Volkswagen Group UK for financial compensation due to the NOx emissions scandal. The application was originally made in January but was then adjourned. The pretrial hearing took place on 27 November 2017, by which time 45,000 claimants had joined the class action.

***Collective proceedings for breaches of competition law***

Section 47B of the Competition Act 1998 as amended came into force on 1 October 2015. It creates a genuine class action regime for the first time in the UK, allowing private individuals to seek collective redress for breaches of competition law. The regime operates in the Competition Appeal Tribunal (CAT) only. It accommodates follow-on damages claims, where a breach has already been established by a regulator, and stand-alone claims, where a claimant must prove breach itself. Claims that would raise the same, similar or related issues of fact or law may be pursued as collective proceedings; they are initiated by a representative of the class of affected persons and it is for the CAT to authorise that representative and make a collective proceedings order (CPO) permitting the proceedings to be continued. That order will also specify whether the proceedings are to be opt-in or opt-out. This places the UK in a minority in the EU (which typically does not support 'opt-out' claims) and may potentially make the UK a more attractive place for large groups of claimants to commence claims.

In mid-2016, an application was made to commence a £14 billion claim against MasterCard for damages arising from the EU Commission's 2007 decision that MasterCard's European Economic Area (EEA) multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning of the European Union. The CPO application was made by Walter Merricks, former Chief Ombudsman of the UK Financial Ombudsman Service, on behalf of approximately 46 million customers (on an opt-out basis). Mr Merricks needed to show that the claims of those he purported to represent raised common issues and were suitable to be brought in collective proceedings. In a judgment dated 21 July 2017, the CAT refused to make a CPO.[16] The judgment considered the commonality requirement and confirmed that it was not necessary for an applicant to show that all of the issues that would arise on an individual claim would be common to every other individual's claim. However, the CAT found that the expert methodology put forward by Mr Merricks on the assessment of damages of all the claims was not suitable as it did not satisfy the test set out by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v. Microsoft Corp*. [2013] SCC 57 (at Paragraph 118):

> *the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.*

It therefore remains to be seen how the procedure (which affords considerable discretion to the CAT in terms of, for example, class certification) will be applied in practice.

16 *Walter Hugh Merricks CBE v. Mastercard Incorporated and others* [2017] CAT 16.

### v Representation in proceedings

Any person who is not a child nor lacks capacity as a result of an impairment or disturbance of the mind has the right to begin and carry on civil proceedings without professional representation. The courts generally seek to accommodate litigants who represent themselves in proceedings.[17]

### vi Service out of the jurisdiction

The court's permission is not required for service of the claim form or other documents out of the jurisdiction where the court has jurisdiction under the Judgments Regulation (Regulation (EU) No. 1215/2012), the Lugano Convention or the Hague Convention on Choice of Court Agreements and the criteria in CPR 6.33 are met:

*a* there are no proceedings between the parties concerning the same claim pending in the courts of any other Member State or Lugano Convention state; and

*b* either (1) the party to be served is domiciled in either the UK or a Member State or a Lugano Convention state (Iceland, Norway or Switzerland); (2) there is a jurisdiction clause giving the English courts jurisdiction; or (3) the English courts have exclusive jurisdiction under Article 24 of the Regulation or Article 16 of the Lugano Convention; or

*c* where each claim against the defendant to be served and included in the claim form is a claim that the court has power to determine under the Hague Convention, and the defendant is party to an agreement conferring exclusive jurisdiction on the English court.

Claim forms must be filed and served accompanied by a statement explaining the grounds supporting service out of the jurisdiction. CPR 6.32 makes specific provision for service without permission in Scotland or Northern Ireland. In all other cases, an application must be made to the High Court for permission to serve a claim form on a party situated outside the jurisdiction. The applicant must establish that it has a good arguable case and that the claim falls within one of the stipulated categories set out in CPR 6BPD.3.1. The categories include claims to enforce a judgment or arbitral award, or for a breach of contract committed within the jurisdiction. The applicant must also satisfy the court that England and Wales is the most appropriate jurisdiction in which to bring the proceedings (i.e., that it is *forum conveniens*) and that there is a serious issue to be tried.

### vii Enforcement of foreign judgments

In broad terms, there are three enforcement regimes available:

*a* By European Regulation or Convention – a judgment on an uncontested money claim issued by a court of a Member State and certified by it as a European enforcement order may be enforced very simply under the European Enforcement Order Regulation as though it was a judgment of the English court. Other judgments may be enforced using the procedure in the Judgments Regulation or the Lugano Convention. This involves making an application to the Queen's Bench Division of the High Court (without notice to the defendant) for registration of the judgment. The grounds on which registration can be challenged are limited; for example, if the judgment was not enforceable in the

17 See, for example, *Nelson v. Halifax plc* [2008] EWCA Civ 1016.

Member State in which it was given or if one of the specific exceptions in Article 45 of the Judgments Regulation apply. The Judgments Regulation in its recast form applies to judgments in proceedings commenced on or after 10 January 2015; such judgments may be enforced more easily without the need for registration at the High Court.

*b* By statute – judgments from Commonwealth countries and other countries that have reciprocal enforcement agreements with the UK may be enforced pursuant to the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 by making an application for registration to the High Court. Once registered under either Act, the judgment is enforceable as though it were a judgment of the English court.

*c* At common law – judgments for a sum of money from all other jurisdictions (including, e.g., the United States) may be enforced at common law. This requires claimants to issue a claim in debt and then apply for summary judgment to enforce the judgment.

### viii Assistance to foreign courts

The English courts will, in certain cases, assist foreign courts to collect evidence in civil or commercial matters. Courts of EU Member States (other than Denmark) may request that the English courts take evidence on their behalf or grant permission for the requesting court to take evidence in England directly under the Taking of Evidence Regulation (Council Regulation 1206/2001/EC). The grounds for refusing the application are limited (for instance, where the witness has a right not to give evidence under English law or the law of the requesting Member State), and the court must either comply with the request or refuse to do so within 90 days.

Courts of non-EU Member States (and courts of EU Member States, if necessary) can request assistance under the Evidence (Proceedings in Other Jurisdictions) Act 1975 in relation to civil or commercial matters. Generally, the English court will exercise its discretion to assist the foreign court; however, the court will not make orders for pretrial discovery, general disclosure or require a witness to do anything he or she would not be required to do in English civil proceedings.

### ix Access to court files

As a general rule, members of the public may obtain copies of statements of case, judgments or orders without the permission of the court.[18] Parties or any person mentioned in a statement of case may apply to the court in advance for a pre-emptive order restricting the release of statements of case to non-parties.

The right of access does not extend to documents attached to statements of case, witness statements, expert reports, skeleton arguments and correspondence between the court and the parties, although members of the public may obtain access with the court's permission. The court will normally grant permission to access documents where the documents are considered to be in the public domain as a consequence of having been read out in public or treated as having been read out in public. In *Cape Intermediate Holdings Ltd v. Dring (Asbestos Victims Support Group),*[19] the Court of Appeal confirmed that the public were not entitled to access documents that were merely referred to, rather than being read out in open court.

18 CPR 5.4C(1).

19 2018] EWCA Civ 1795.

## x Litigation funding

Historically, the common law rules against maintenance (support of litigation by a disinterested third party) and champerty (where the supporting party does so for a share of the proceeds) prevented the funding of litigation by anybody who was not party to the relevant litigation. Today, these restrictions are much narrower and third-party funding has become accepted as a feature of modern litigation.

Case law and practice are still developing in this area, but the approach of the courts has so far been to uphold such arrangements so long as they do not breach the general prohibition on containing an element of impropriety. Relevant factors include the extent to which the funder controls the litigation (e.g., whether they take strategic decisions); the nature of the relationship between the funded party and the solicitor and the extent to which the funded party can make informed decisions about the litigation (this should be a genuine and independent relationship); the amount of profit the funder stands to make (it has been held that 25 per cent may not be excessive);[20] whether there is a risk of inflating damages or distorting evidence; whether the funder is regulated; and whether there is a community of interest between the funder and the funded party.

Lord Justice Jackson recommended in his final report on civil litigation costs, published on 14 January 2010, that a voluntary code should be drawn up to which all litigation funders should subscribe. The Code of Conduct for Litigation Funders was launched on 23 November 2011.[21] The Code contains provisions concerning effective capital adequacy requirements, restrictions upon a funder's ability to withdraw support for ongoing litigation and restrictions on a funder's ability to influence litigation and settlement negotiations. Third-party funders may also be potentially liable for the full amount of adverse costs, subject to the agreement between the funder and the litigator. The Court of Appeal considered the basis and extent of funders' liability to a successful opponent in *Excalibur Ventures LLC v. Texas Keystone Inc and others*.[22] Indemnity costs were awarded against the funded claimants on the basis that their 'spurious' claims had been pursued to trial despite having 'no sound foundation in fact or law'. The Court of Appeal dealt with the issue of whether third-party funders could be made liable on the same basis as an unsuccessful party. Agreeing with the trial judge that the litigation was 'egregious' and a 'war of attrition', the Court of Appeal held that a funder should 'follow the fortunes' of the funded party. A funder seeks to derive financial benefit from the pursuit of a claim, just as much as the funded litigant. It cannot avoid any downside that may instead arise (subject to the 'Arkin cap', which limits a funder's adverse liability to the amount of its investment). In any event, in the matter of liability for indemnity costs it was not appropriate to seek to differentiate between a party to litigation and those who stand behind that party purely on that basis; that would be to misconstrue one of the tests for indemnity costs, which requires a court to consider the character of the action and its effect on the successful party (and not any other party).

Solicitors (and sometimes barristers) acting for clients with the benefit of third-party funding will typically be required, as a condition of that funding, to enter into some form of contingency arrangement in respect of their fees. Two structures, both permitted only insofar as they comply with regulations, predominate:

20 *Arkin v. Borchard Lines Ltd and Others* [2005] EWCA Civ 655.

21 See http://associationoflitigationfunders.com/code-of-conduct/.

22 [2016] EWCA Civ 1144.

*a* Conditional fee agreements (CFAs) are defined in Section 58 of the Courts and Legal Services Act 1990 as agreements between a lawyer and a client by which the lawyer's fees and expenses, in part or in whole, are payable only in specified circumstances (meaning, usually, victory for the client either at trial or by way of settlement). At its most basic, a CFA will provide that a losing client has no liability for its lawyer's fees (no win, no fee) while a winning client will be required to pay its lawyer for work done on the case and, in addition, a success fee, intended to compensate the lawyer for the risk it took of earning nothing at all.

As the market has developed, more sophisticated variants of this model have developed. For instance, a client may agree to pay its lawyer throughout the life of the case, but on the basis of a discount to the lawyer's usual hourly rate. If the client loses the case, it will have no further costs liability to its lawyer. If the client is successful, it will be liable to top up the lawyer's fees to the full hourly rate and, in addition, pay a success fee calculated by reference to the full hourly rate. Regulations set out the form and permissible limits of a CFA. For instance, any success fee may not exceed 100 per cent of the fees which would have been payable to the lawyer had there been no CFA in place.

Under CFAs entered into before 1 April 2013, a winning party could recover any success fee payable to its lawyer from its losing opponent (in addition to the ordinary fees for which the client was liable to its lawyer). Reforms introduced following Lord Justice Jackson's report on civil litigation costs abolished the recoverability of success fees.

*b* Damages-based agreements (DBAs) are a species of contingency fee arrangement in which the amount payable by the client to the lawyer in the event of a successful outcome is calculated as a percentage of the damages received. Arrangements of this kind, in which the contingent payment is expressly linked to level of the client's recovery, were outlawed in all but employment disputes until Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) was brought into effect. DBAs will only be valid if they comply with the requirements set out in the Damages-Based Agreements Regulations 2013 (SI 2013/609).

Contingency fee arrangements do not protect a party to litigation from the risk of adverse costs liability. In other words, a losing claimant with the benefit of a CFA may not have to pay anything to its lawyer, but it will, in the ordinary course, remain liable to pay a large part of the winning party's legal costs. Funded claimants (and sometimes those funding a claim from their own resources) will typically seek to insure against that risk. A large market has grown up for such after-the-event (ATE) insurance (so named because it is usually taken out once a claim has arisen and been formulated). Before the Jackson reforms of 2013, ATE insurance premiums were recoverable from a losing party. The end of recoverability does not appear to have significantly reduced the availability of ATE insurance and it is frequently offered in conjunction with third party funding of a party's own legal costs. The liberalisation of the regime for third party funding and the corresponding development of a market for professional funders is making it easier for claimants to commence and maintain proceedings, particularly in relation to class actions where there can be very many claimants and such funding options represent an opportunity to spread the funding risk.

### xi Bill of costs

In October 2015, as part of the Jackson reforms, a voluntary pilot scheme was introduced at the Senior Courts Costs Office with a view to establishing a new mandatory model form electronic bill of costs based on uniform task-based time-recording codes. This was aimed at reducing the time and expense of drawing up the bill of costs by aligning it with the time-recording technology used in practice. On 6 April 2018, the electronic bill of costs scheme became mandatory in the Senior Courts Costs Office and County Courts. CPR 47 and the associated PD were amended accordingly.

## IV LEGAL PRACTICE

### i Conflicts of interest and information barriers

Conflicts of interest are governed by the rules contained in the Solicitors Regulation Authority's (SRA's) Code of Conduct 2011 (for solicitors) and the Bar Standards Board Handbook (for barristers). Generally, lawyers must refrain from acting in circumstances where there is a real or significant risk that a conflict exists between the interests of two or more different clients in either the same matter or a related matter, or where there is a conflict or a significant risk of a conflict between the lawyer's interests and those of his or her client.

There are two exceptions to this rule whereby lawyers may be permitted to act for two or more clients despite there being an actual or significant risk of a conflict between his or her clients' interests. The first relates to situations in which the clients have a substantially common interest in relation to the matter or a particular aspect of it, as might be the case with a non-contentious commercial transaction. The second is where the clients are competing for the same objective, which if attained by one client will be unattainable to the other (e.g., in the case of bidders competing for the same asset in a private auction).

There are, however, some preconditions that must be met before either exception can be relied on. Most significantly, all relevant issues must be drawn to the attention of clients and they must give their consent in writing. In addition, lawyers must be satisfied that it is reasonable to act in all the circumstances.

If an actual or a significant risk of conflicts of interest exists, it may be possible for an existing client to seek an injunction to prevent the lawyer from continuing to act. Further, if a lawyer is found to have continued to act where there was a real or significant risk of a conflict arising, the retainer may be considered an illegal contract, which would impact on the lawyer's ability to recover fees or to rely on any professional indemnity insurance to respond. In addition, he or she may face disciplinary proceedings before his or her relevant professional body.

Lawyers have a duty to protect all confidential information regarding their clients' affairs, unless disclosure is required or permitted by law or the client consents to the disclosure. In addition, a lawyer who is advising a client must make that client aware of all information material to the retainer of which the lawyer has personal knowledge. Where a lawyer's duty of confidentiality to one client comes into conflict with the duty of disclosure to another client, the duty of confidentiality takes precedence (but this will not mean that the duty of disclosure has not been breached).

In addition, lawyers may not represent a potential client (A) in circumstances where the potential client has an interest adverse to another client (or former client) (B) and the lawyer holds confidential information regarding B that may reasonably be expected to be material to A unless the confidential information is protected by the use of safeguards and:

a A is aware of and understands the relevant issues and gives informed consent; and
b either B also gives informed consent and the lawyer agrees with them what safeguards will be put in place to protect the confidential information, or where the lawyer is unable to seek B's consent, he or she puts in place common law compliant information barriers.

In most cases, a firm will be unable to proceed unless both clients consent, in writing, to the arrangement. In *Marks and Spencer Group plc v. Freshfields Bruckhaus Deringer*,[23] the court confirmed that where a firm is unable to implement effective measures to ensure that its former client's confidential information is protected, the former client may be granted an injunction to prevent the firm from continuing to act for the new client.

### ii Money laundering, proceeds of crime and funds related to terrorism

The key money laundering offences are contained in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000. These ensure that the balance of responsibility for detecting and preventing financial crime rests more than ever before on the firms participating in the UK financial markets, including law firms.

There are essentially three 'principal' money laundering offences. A person (including a firm, corporation or individual) commits a money laundering offence if he or she:

a conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;
b becomes concerned in an arrangement to facilitate the acquisition, retention or control of, or to otherwise make available, the proceeds of criminal conduct or of terrorist property; or
c acquires, possesses or uses property while knowing or suspecting it to be the proceeds of criminal conduct or of terrorist property.

There are also essentially three 'secondary' or third-party offences:

a failure to disclose any of the offences (a) to (c);
b disclosing or 'tipping off' that a report of suspicion of money laundering has been made to the authorities in circumstances where that disclosure might prejudice an investigation; and
c prejudicing an investigation in relation to money laundering or terrorist financing offences.

The POCA offences in particular cast a wide net. Criminal conduct is defined as conduct that constitutes an offence in any part of the UK, or would do so if the conduct occurred in the UK. Further, its scope is not limited to offences that might be considered more serious offences with the effect that it is necessary to report relatively minor offences to the National Crime Agency. The 'failure to disclose' offence is subject to an objective test and will therefore be committed if a person does not actually believe that another person is engaged in money laundering but a jury later finds that he or she had reasonable grounds for knowing or suspecting such activity. Lawyers are not required to make a disclosure if the information

23 [2004] EWCA Civ 741.

or other matter on which their knowledge or suspicion of money laundering was based, or which gave reasonable grounds for knowledge or suspicion, came to them in privileged circumstances.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (which implemented the Fourth Money Laundering Directive (2015/849)), came into force on 26 June 2017. This Regulation replaces the Money Laundering Regulations 2007 and the Transfer of Funds (Information on the Payer) Regulations and prescribes standards that regulated persons (including law firms) must meet in relation to, among other things, client identification, employee training and record-keeping. These are designed to prevent firms from being used for money laundering. The Regulation also seeks to give effect to the updated Financial Action Task Force global standards which promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

### iii Data protection

The processing of personal data is primarily regulated by the Data Protection Act 1998 (DPA) and certain secondary legislation made under the DPA. The DPA implements the EC Data Protection Directive (95/46/EC) into UK legislation. The General Data Protection Regulation (Regulation (EU) 2016/679) was adopted on 27 April 2016 and entered into force on 25 May 2018 after a two-year transition period (see Section VIII.vi, below). The GDPR automatically applies in the UK, irrespective of the UK's future relationship with the EU.

The principal elements of the GDPR can be summarised as follows:

*a* both data controllers and data processors have statutory obligations under the GDPR;

*b* data controllers and data processors must comply with the six data protection principles under Article 5(1) GDPR and the additional accountability principle under Article 5(2) GDPR (the Principles); and

*c* data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data, to object to the processing of their personal data and to the erasure of their personal data.

The Information Commissioner's Office (ICO) is charged with policing and enforcing the regime. The Commissioner's enforcement powers include serving an enforcement notice requiring a data controller to comply with the relevant Principle after a specified period (failure to comply with an enforcement notice is a criminal offence) and, in the case of serious contraventions likely to cause substantial damage or distress, serving a monetary penalty notice requiring the payment of a penalty up to £500,000. Details of most enforcement actions taken by the Commissioner are also published on the ICO's website.

Data and personal data are widely defined under the GDPR such that any electronic information (and some information held in structured hard-copy filing systems) that relates to an identified or identifiable natural person (the data subject) is likely to be personal data. Processing is also widely defined under the GDPR to include anything that can be done with or in relation to data, including obtaining, recording, holding, organising, altering, retrieving, using, disclosing, transferring and destroying data. A data controller is a natural or

legal person, public authority, agency or other body that determines the purposes and means of the processing of personal data. A data processor is a natural or legal person that processes personal data on behalf of the controller.

Access to, analysis of and disclosure of electronic information held by a client (or a third party) by legal professionals for the purposes of advising or acting on a dispute will almost always be subject to the GDPR. This is because such data will usually contain the names, email addresses or other identifying information of the client's employees or customers, or other living individuals and will therefore be personal data. It may also contain sensitive personal data, which is personal data containing information about (among other things) the data subject's racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life or the commission or alleged commission of an offence by the data subject. Additional, more stringent conditions for processing apply in respect of sensitive personal data.

Law firms acting as data controllers or data processors (or both) and the clients who are providing them with personal data (for example, for the purpose of locating relevant documents or evidence in relation to a dispute) need to comply with the new data protection Principles. In the context of dispute resolution practice, the relevant conditions for processing personal data for the purposes of the First Principle include that the data subject consents to the processing, that the processing is necessary in order to comply with a legal obligation, or that the processing is in the legitimate interests of the controller or a third party. Even when one of those conditions is met, the client and law firm will also need to ensure that the processing is otherwise fair, transparent and that the other Principles are complied with.

The new accountability Principle contains two elements: first, the controller is responsible for complying with the GDPR and second, the controller must be able to demonstrate this compliance. Date processors are also liable to the extent that they do not comply with their obligations under the GDPR. The subject access rights under the GDPR can be used as a means to seek relevant information for the purpose of a dispute involving a living individual. Law firms acting in a dispute with an individual and their clients may receive subject access requests by that individual for documents containing personal data relating to that individual. However, information that is subject to legal privilege is exempt from the subject access rights under the GDPR.

## V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Legal privilege in England and Wales is governed by the common law and entitles its holder to refuse to produce the privileged document for inspection. The recognised categories of privilege that may be claimed by a party in respect of its documents or communications are:

### i Legal advice privilege

The House of Lords confirmed in its decision in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 4)*[24] that legal advice privilege protects confidential communications between a lawyer and client made for the dominant purpose of receiving or giving advice in the relevant legal context. However, the House of Lords did not

24 [2004] UKHL 48.

interfere with the Court of Appeal's previous ruling in *Three Rivers (No. 3)*,[25] which warned that care must be taken when identifying the 'client' for the purposes of legal advice privilege. Particularly in large, but potentially in any, organisations, the client may be limited to a defined group within the instructing entity with the responsibility for regular correspondence with the solicitors and not simply any employee or member of the instructing entity. In *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd (ENRC)*,[26] although the Court of Appeal declined to revisit *Three Rivers (No. 5)*,[27] it did acknowledge that there were still outstanding questions (and issues) in relation to this case. In *Re the RBS Rights Issue Litigation,*[28] the High Court dismissed an application by RBS to withhold from disclosure notes of interviews (which were created pursuant to internal investigations). The High Court decided that legal professional privilege did not apply as: (1) applying *Three Rivers (No. 3)*, the notes of interviews were preparatory information gathered from current or former employees who did not form part of the lawyers' client (notwithstanding that the information was collected in order to be shown to a lawyer to enable legal advice to be given to RBS); and (2) the interview notes could not be said to be privileged as 'lawyers' working papers' as it was not sufficiently clear that the notes would give an indication as to the legal analysis or advice undertaken or given to RBS. The UK Supreme Court confirmed in *R (on the application of Prudential Plc) v. Special Commissioner of Income Tax*[29] that legal advice privilege applies only to legal advice provided by members of the legal profession and not to members of other professions who give legal advice in the course of their business (such as accountants who provide tax advice).

### ii Litigation privilege

Litigation privilege arises only when litigation is in existence or contemplation.[30] In those circumstances, any communication between a lawyer and client, or a lawyer or his or her client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider in scope than legal advice privilege in that it may cover communications with third parties and therefore avoids the difficulties in identifying the client inherent in legal advice privilege. In *SFO v. ENRC*,[31] the Court of Appeal held that, in the context of internal investigations, litigation privilege arises where criminal proceedings are in reasonable contemplation. The Court of Appeal further held that, in both civil and criminal contexts, legal advice given for the purpose of avoiding or settling contemplated proceedings was protected by litigation privilege to the same extent as advice given for the purpose of resisting or defending such proceedings.

### iii Privilege against self-incrimination

Documents that tend to incriminate or expose a person to criminal proceedings in the UK or to proceedings for the recovery of a penalty in the UK (including civil contempt) are

25 [2003] EWCA Civ 474.
26 [2018] EWCA Civ [2006].
27 [2003] EWCA Civ 474.
28 [2016] EWHC 3161 (Ch).
29 [2013] UKSC 1.
30 It is unlikely that the privilege applies to non-adversarial situations; *Re L (A Minor)* [1997] AC 16.
31 [2018] EWCA Civ [2006].

generally protected by privilege (although the privilege is subject to statutory exceptions, especially in the context of regulatory investigations). It is sufficient if the document might tend to incriminate or so expose the person, provided the risk is apparent to the court.[32]

### iv Common interest privilege

Common interest privilege arises where communications are made between parties who share a common interest in the legal advice. This will arise where parties share the same interest in litigation (or potential litigation) or in a commercial transaction to which the legal advice relates. In such cases, communications of privileged information between the parties will be privileged even if neither legal advice privilege nor litigation privilege applies.

### v Public interest immunity

This immunity applies where production of the document would be so injurious to the public interest that it ought to be withheld, even at the cost of justice in the particular litigation.[33] The procedures for claiming this immunity (which in most practical respects operates as another head of privilege) are set out in CPR 31.19.

### vi Without prejudice communications

Any communications made in a good faith effort to settle proceedings are covered by the without prejudice privilege. However, the without prejudice rule is not absolute and evidence of without prejudice communications may be admitted in certain circumstances; for example, to determine whether the communications resulted in a concluded settlement agreement (and to interpret the terms of such an agreement)[34] or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of *Brown v. Rice*[35] reinforced that without prejudice privilege applies to communications made during a mediation; however, on the facts, the communications were admitted as evidence to establish whether a settlement had been concluded. In *Farm Assist Limited (in Liquidation) v. the Secretary of State for the Environment, Food and Rural Affairs (No. 2),*[36] Ramsey J clarified that without prejudice privilege is the privilege of the parties and not the mediator. On the facts of the case, the parties had waived the privilege, and so the mediator could not rely upon the privilege to resist a witness summons.

Communications between a company and its qualified in-house legal advisers are capable of being privileged to the extent that the communication concerns the lawyer in his or her legal capacity rather than some other managerial role (for example, as company secretary).[37] However, the European Court of First Instance and ECJ have ruled that such

32 See *R (River East Supplies Ltd) v. Crown Court at Nottingham* [2017] EWHC 1942 (Admin).

33 *Burmah Oil Co Ltd v. Governor and Company of the Bank of England* [1980] AC 1090.

34 *Oceanbulk Shipping & Trading SA v. TMT Asia Limited* [2010] UKSC 44; [2010] 3 WLR 1424.

35 [2007] EWHC 625 (Ch).

36 [2009] EWHC 1102.

37 *Three Rivers (No. 4)* [2004] UKHL 48.

communications are not privileged in relation to Commission competition investigations.[38] Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.[39]

## VI DOCUMENT PRODUCTION

### i Disclosure and inspection

Parties to English litigation are required to produce to their opponent and the court documents within their control upon which they rely. They are frequently also required to produce documents that tend to harm their case. A party is entitled to withhold from inspection documents that are legally privileged (but must still disclose their existence). The relatively expansive nature of document production is reflective of the 'cards on the table' approach that characterises English court procedure.

From 1 January 2019, a new disclosure pilot scheme will apply to the majority of new and existing proceedings in the Business and Property Courts of England and Wales. The main objectives of the disclosure reforms, which will almost entirely replace the old menu-based system, are to improve costs and streamline the process of disclosure. The new rules provide for a two-stage disclosure: initial disclosure and extended disclosure. As a general rule, each party will need to give initial disclosure by providing with their statements of case the key documents on which they have relied (expressly or otherwise), and key documents that are necessary to enable other parties to understand the claim or defence they have to meet. Extended disclosure is not an automatic right: a party seeking disclosure in addition, or as an alternative, to initial disclosure will need to request this from the court. Extended disclosure will be ordered by reference to five disclosure models in relation to issues for disclosure drawn up by the parties. The five models range from a basic 'no search needed' disclosure through to a more onerous train of enquiry approach from *Peruvian Guano*.[40] The new rules also impose express duties on parties and their lawyers, such as confirming document preservation and disclosure of known adverse documents, with sanctions for non-compliance.

CPR 31.4 makes it clear that a document is anything in which information is recorded. Examples of documents include, for these purposes, photographs, emails, text messages and voicemail recordings. CPR 31PD.2A.1 even extends this definition of document to cover metadata (i.e., information about an electronic document that is not visible on its face, such as electronic records of who created the document).

CPR 31.8 provides that parties are only required to produce documents that are or have been under their control. The definition of 'control' includes documents that a party has or had in its possession, or has or had a right to possess, or has or had a right to inspect or copy. In *Lonrho Ltd v. Shell Petroleum Co Ltd (No. 1)*,[41] the court confirmed that a document will be considered to be in a party's control if the party has a presently enforceable right to obtain inspection or copies of the document without the need to consult anyone else. The fact that a document may be situated outside the jurisdiction is irrelevant.

38 See joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission* in the General Court and the subsequent decision of the ECJ in C-550/07 P.

39 *Lawrence v. Campbell* (1859) 4 Drew 485 and *IBM Corp v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413.

40 CPR 31.7.

41 [1980] 1 WLR 627.

The CPR and courts recognise that the disclosure of electronic documents may present unique challenges to parties because of the potential volume of material that might have to be recovered and reviewed and the technical challenges of so doing. CPR 31PD.2A sets out the procedure parties should follow in attempting to define and sensibly restrict the scope of electronic disclosure. Similar provisions are included in the Commercial Court Guide.

Searches for relevant electronic documents may include using specialist software to conduct keyword searches across computers, or even entire servers. It may also involve the restoration of backup tapes (or other electronic archives that are not readily accessible) for the purpose of conducting electronic searches for relevant material.

PD 31B was introduced with effect from 1 October 2010 and encourages the parties to complete an electronic documents questionnaire (EDQ) at an early stage of proceedings, setting out details of material held electronically that they intend to disclose. The EDQ must be supported by a statement of truth. The parties are then expected to discuss the disclosure of electronic documents, including the scope of the reasonable search for such documents and any tools and techniques that might reduce the burden and cost of the disclosure of electronic documents.

### ii Predictive coding

Parties are making increasing use of information technology to assist in the review of large bodies of data. Such technology can take many forms. 'Predictive coding', for example, refers to the use of software to assess the likely relevance of documents to a dispute, so as to limit the time and expense incurred in conducting a reasonable search for disclosable document under CPR 31.7. In *Pyrrho Investments Limited v. MWB Property Limited and others*,[42] Master Matthews approved the use of predictive coding to expedite the search of more than 17 million documents. Ten reasons were given, chief of which was that predictive coding allows parties to search vast amounts of electronic documents at proportionate cost. Courts have since shown an increased inclination to order the use of predictive coding over and above other search methods, such as keyword searches.[43] *Pyrrho* was approved in *Brown v. BCA Trading Ltd*[44] in which the use of predictive coding in electronic disclosure was endorsed. The court also stated that predictive coding would be significantly cheaper than a keyword search and there was no evidence to suggest that it would be less effective.

### iii Privilege lists

Document production is a two-stage process: the parties disclose the existence of relevant documents by serving on each other a list of those documents. They then provide their opponent with copies of all those documents save for those which they have some legal basis for withholding (most commonly, documents over which privilege is claimed). Each document over which privilege is claimed should be described. In *Astex Therapeutics Ltd v. AstraZeneca AB*,[45] the High Court ruled that a generic statement to the effect that the categories of documents referred to in the relevant section of the disclosure list are privileged is insufficient to discharge the requirement under CPR 31.10(4)(a). In *Hutchison 3G UK Ltd*

42 [2016] EWHC 256 (Ch).

43 *Brown v. BCA Trading Ltd* [2016] EWHC 1464 (Ch).

44 [2016] EWHC 1464 (Ch).

45 [2016] EWHC 2759 (Ch).

*v. EE Ltd*,[46] the court refused an application for specific disclosure on the basis that a party could not rely on the court's general management powers to avoid the specific disclosure provisions in CPR 31.12.

## VII ALTERNATIVES TO LITIGATION

### i Overview of alternatives to litigation

There are a number of forms of alternative dispute resolution mechanisms available in England and Wales. The glossary to the CPR defines alternative dispute resolution (ADR) as a 'collective description of methods of resolving disputes otherwise than through the normal trial process'. ADR encompasses a variety of dispute resolution methods ranging from non-binding negotiations, in which there is no third-party involvement, to formal binding arbitral proceedings.[47] ADR has achieved acceptance as it is normally conducted in private, its outcome is normally subject to agreement of the parties, confidential, and it may offer a faster and more cost-effective resolution to a dispute than traditional litigation. The Civil Justice Council ADR Working Group recently considered, and dismissed, the idea of imposing mandatory ADR in its Interim Report, which was published in October 2017. The report notes that in England and Wales there are already a number of ADR processes that are effectively mandatory and introducing compulsory pre-action ADR would be 'too heavy-handed'. The following reasons were cited in the report: the difficulties with avoiding unnecessary cost and hassle, the risk of delay due to difficulties with engaging defendants pre-action and the largely negative feedback about mandatory pre-action systems from jurisdictions such as Italy (which is the only European system with a mandatory pre-action mediation requirement).

### ii Arbitration

The Arbitration Act 1996 (the 1996 Act) restated and aimed to improve the law in England and Wales relating to arbitration pursuant to an arbitration agreement. Certain provisions (those listed in Schedule 1 of the 1996 Act) are mandatory and have effect notwithstanding any agreement to the contrary, whereas other provisions apply only in the absence of any agreement between the parties. Key mandatory provisions include:

*a* Section 9 – a party to an arbitration agreement may apply for a stay of proceedings if proceedings are brought against it in respect of a matter that, under the agreement, should be referred to arbitration. The court in which proceedings are brought shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed;

*b* Section 40 – the parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings;

*c* Section 67 – a party may apply to the court to challenge a tribunal's substantive jurisdiction; and

46 *Hutchison 3G UK Ltd v. EE Ltd* (unreported) 6 October 2017 (Commercial Court).

47 Some practitioners would exclude arbitration as a form of ADR and would emphasise instead the procedural informality of ADR mechanisms. However, since an arbitration can only be commenced with the consent of the parties, it is treated here as an alternative to the formal court process.

*d* Section 68 – a party may apply to the court to challenge an award for 'serious irregularity'.

Section 69 of the 1996 Act permits parties to appeal to the court on a question of law arising out of an award made in the arbitral proceedings, unless they have agreed otherwise. This right to appeal will usually be excluded if the parties have agreed to arbitrate the dispute using institutional rules (see below). A party seeking leave to appeal an award must complete an arbitration claim form within 28 days of the award date stating the reasons for the appeal sought. The court will determine an application for leave to appeal without a hearing unless it appears to it that a hearing is required. On an appeal, the court has the discretion to confirm the award, vary it or set it aside in whole or in part or to remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the court's determination.

Arbitration may be institutional or *ad hoc*. In institutional arbitration, the parties will agree to submit to an institution to administer the arbitration, applying the rules of that institution. The major institutions used in English arbitration are the Chartered Institute of Arbitrators, the International Chamber of Commerce and the London Court of International Arbitration. There are also established arbitral institutions for industry-specific arbitration, including maritime, construction and engineering, and insurance disputes.

In *ad hoc* arbitration, parties may agree all procedural issues themselves. The United Nations Commission on International Trade Law (UNCITRAL) procedural rules are widely used in appropriate *ad hoc* English arbitration.

Section 66 of the 1996 Act (another mandatory provision) governs the enforcement of foreign arbitral awards in England and Wales. It permits the enforcing party to apply to the High Court to enforce the award as if it were a judgment or order of the court to the same effect.

Where an arbitral award is made in a country (other than a country in the UK) that is a signatory to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), that foreign award is recognised as binding and, with the court's permission, may be enforced in England, Wales and Northern Ireland under Section 101 of the 1996 Act. Section 103 sets out the limited circumstances where a court must or may refuse to allow a foreign award to be enforced: for example, if the award was invalid under the governing law of the arbitration or the seat of the arbitration. If the court permits the foreign award to be enforced, the options available on enforcement will be the same as if it were a judgment of the English court.

The New York Convention applies to arbitration in England and Wales. In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp*,[48] the Supreme Court held that the terms of the 1996 Act and the New York Convention did not enable the court to order a partial enforcement of an arbitral award.

### iii Mediation

In England and Wales, there are no rules obliging parties to mediate or determining how mediations are conducted or concluded. Parties are free to agree between themselves all aspects of the mediation process.

48 [2017] UKSC 16.

The potential benefits to parties of being able to resolve their disputes through mediation, even where normal trial processes are contemplated, continue to be recognised by the English courts. The CPR strongly encourages parties to consider mediation at several stages during litigation, including before formal proceedings commence, when the case is allocated to track and at any CMCs. The court may also impose or grant a request for a stay of proceedings pursuant to CPR 26.4 to enable the parties to attempt mediation.

The Jackson ADR Handbook was published in April 2013 following Jackson LJ's recommendation.[49] It has been endorsed by Jackson LJ, the Judicial College, the Civil Justice Council, and the Civil Mediation Council and is the authoritative guide to ADR in England and Wales.

The approach of the court in this area has frequently been to treat mediation and ADR as effectively synonymous terms. In *Dunnett v. Railtrack plc*,[50] the court declined to order that the defeated claimant pay Railtrack's costs because Railtrack had, unreasonably in the court's view, refused to consider an earlier suggestion from the court to attempt ADR. In *Halsey v. Milton Keynes General NHS Trust*,[51] the court stated that it was for the unsuccessful party at trial to demonstrate that the successful party's costs should be reduced because of its failure to consider ADR. Relevant factors when assessing whether ADR was unreasonably refused include the nature of the dispute, the merits of the case, the relative costs of ADR to the case and whether ADR had a reasonable prospect of success. However, in *PGF II SA v. OMFS Company 1 Limited*,[52] the Court of Appeal made it clear that parties are expected to engage with a serious invitation to participate in ADR and they may be penalised in costs if they refuse to do so. In that case, the court refused to award the defendant its costs as it had ignored an offer from the claimant to mediate.

Mediation is becoming increasingly popular in England and Wales for disputes of all sizes. In 2008, the EU adopted Council Directive 2008/52, the Mediation Directive, which applies to all Member States when engaged in cross-border disputes within the EU. The Directive seeks to ensure that Member States facilitate mediation. This includes ensuring that local law does not prevent parties who emerge from unsuccessful mediations from being time-barred from litigation, and that settlement agreements reached in mediation are enforceable under local law.

At present, mediations and mediation services providers are not regulated by a central body, and there are no formal qualifications mediators must possess to be able to practise. In 2004, a voluntary code of conduct for mediators was introduced in EU Member States, and there is increased debate over whether a central regulatory body should be created, along with compulsory training or standardised accreditation for mediators.

### iv Other forms of alternative dispute resolution

In addition to arbitration and mediation, there exists a range of other processes available to parties seeking to settle their disputes out of court. These include early neutral evaluations, a non-binding process intended to provide parties at an early stage in a dispute with an independent assessment of facts, evidence or respective legal merits; expert determinations, typically a contractually binding determination by a neutral expert of a dispute involving

49 Available from Oxford University Press.

50 [2002] EWCA Civ 303.

51 [2004] EWCA Civ 576.

52 [2013] EWCA Civ 1288.

technical or valuation issues; and adjudication, a statutory process, mandatory for disputes arising under specified construction contracts entered into since 1 May 1998. Ultimately, private dispute resolution can take any form that the parties wish. In most cases, the procedures are non-binding and without prejudice, which allows the parties to commence or continue litigation or arbitral proceedings, if necessary.

## VIII OUTLOOK AND CONCLUSIONS

There are a number of upcoming macro-level challenges to the existing state of the English legal system and its component parts, together with some substantive changes to practice and procedure.

### i EU Referendum

The UK electorate's June 2016 vote to leave the EU may have a number of legal and practical implications. Please see Chapter 1 for an analysis of the issues as they relate to the resolution of disputes.

### ii Reform of the courts

In 2014, the Ministry of Justice announced that between 2015 and 2020, HMCTS would oversee a series of reforms in order to modernise and improve the efficiency of courts and tribunals. It is anticipated that the reforms will comprise an upgrade of facilities as well as the modernisation of technology. In the Autumn Statement 2015, the Chancellor of the Exchequer announced a funding package of £700 million to modernise the court estate across the country and to fully digitise services. A number of procedural reform initiatives have already been rolled out, such as the establishment of the Business and Property Courts, the introduction of a two-year pilot for shorter and flexible trials, and the Financial List (which have since been made permanent), as have initiatives aimed at digitising the courts system (see Section III.iii). Reform by The Disclosure Working Group, chaired by Lady Justice Gloster, to address the excessive costs, scale and complexity of disclosure, in the form of a new PD to modernise and streamline the disclosure process takes effect in 2019 (see Section VI). The mandatory disclosure pilot scheme will run in the Business and Property Courts for two years.

### iii Witness statements

A survey is being undertaken by the Witness Evidence Working Group in relation to the use of witness evidence in the Business and Property Courts (High Court, London). The Working Group is seeking court users' views regarding the current rules and practice on factual witness evidence, as well as possible alternatives. Potential reform could address judicial fatigue over unnecessarily lengthy statements or seek to curb the practice of lawyers drafting statements for witnesses to suit the cases being advanced.

**Appendix 1**

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Damian Taylor is a partner in the dispute resolution group of Slaughter and May. He is the co-author of a student textbook on contract law and maintains a keen interest in this subject in addition to restitution and the conflict of laws, which formed the basis of his BCL master's degree in European and comparative law at the University of Oxford.

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