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Slaughter and May

In-Depth: Dispute Resolution (formerly The Dispute Resolution Review) provides an indispensable overview of the civil court systems in major jurisdictions worldwide. It examines the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is also forward-looking, with astute analysis of likely future trends and developments.

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Summary

Introduction

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

The United Kingdom comprises four countries – England, Northern Ireland, Scotland and Wales – that 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.

Following a referendum in 2016, the United Kingdom ceased to be a Member State of the European Union on 31 January 2020, after some 47 years of membership. The EU-UK Withdrawal Agreement provided for, among other things, a transitional period during which most EU law continued to apply in and to the United Kingdom. The transition period ended on 31 December 2020, but a substantial volume of EU law was transposed into domestic UK law as retained EU law, in many cases in modified form, by the European Union (Withdrawal) Act 2018 as amended by the Retained EU Law (Revocation and Reform) Act 2023, which received royal assent in June 2023.

Bilateral relations between the United Kingdom and the European Union are now governed by the Trade and Co-operation Agreement that entered into force on 1 January 2021 and was given domestic effect by the European Union (Future Relationship) Act 2020.

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.

iii The structure of the courts

Depending on the financial value and nature of a 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. Complex, high-value litigation (including most commercial claims) and appeals from other courts are heard in the High Court. The High Court is divided into three divisions, two of which are relevant for commercial disputes, namely the King's Bench Division and the Chancery Division.[2] Within these Divisions there are a number of specialist courts or lists, including the Commercial Court, the Financial List, the Circuit Commercial Court, the Admiralty Court, the Technology and Construction Court (TCC), the Administrative Court, the Planning Court, the Insolvency and Companies List, and the Intellectual Property List.

The Commercial Court, the Circuit Commercial Court, the TCC, the Admiralty Court, the Financial List and the courts of the Chancery Division (including the Intellectual

Property List, the Business List, and the Insolvency and Companies List) are known collectively as the Business and Property Courts of England and Wales. The Business and Property Courts are based in the Rolls Building in London, as well as in Birmingham, Manchester, Leeds, Bristol, Cardiff, Newcastle and Liverpool. The Civil Procedure Rules (CPRs) emphasise that cases can be tried outside London regardless of their size.

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. The final court of appeal in civil cases (and, in England, Wales and Northern Ireland, criminal cases) is the Supreme Court of the United Kingdom, which was created by the Constitutional Reform Act 2005. The Supreme Court will generally hear only 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.

iv European law and the relationship with European courts

When the United Kingdom left the European Union, the majority of EU law as it applied in and to the United Kingdom at that time was converted into domestic UK law. This 'retained EU law', which included the case law of the Court of Justice of the European Union (CJEU), continued to be supreme over pre-Brexit domestic legislation. The stated purpose of this exercise was to ensure legal continuity and certainty. But the government did not intend this to be a permanent solution.

On 29 June 2023, the Retained EU Law (Revocation and Reform) Act became law. The Act provides for the revocation of some retained EU law, renames the remainder 'assimilated law' and ends the supremacy of that assimilated law over pre-Brexit domestic legislation. Of significance in a dispute resolution context, the Act will also make it easier for courts to depart from retained CJEU case law and related pre-2021 domestic case law. The Court of Appeal will be required to have regard to new, specified factors, including the extent to which the relevant retained EU case law 'restricts the proper development of domestic law'. Previously, appellate courts were permitted to depart from retained EU case law when it appeared 'right to do so', a threshold that was rarely reached in practice. The breadth of the new provision will, for the first time, give litigants the scope to argue for new interpretations of the law in the many areas where retained EU law remains relevant. A new reference mechanism will also permit first instance courts – such as the High Court – to ask the Court of Appeal to settle questions over the proper interpretation of retained EU case law. The government has not yet set a date for the entry into force of these provisions.

The position in relation to the CJEU has now changed significantly. Prior to 1 January 2021, although there was no general right of appeal to the CJEU,[3] a court or tribunal in England and Wales could 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, a case would (often after many years' delay) return to the

referring court or tribunal, which was required to apply the CJEU's ruling, together with any non-conflicting national law, to the facts before it. The court or tribunal was not required to make a reference where previous CJEU decisions had already dealt with the point or where the correct application of EU law was so obvious as to leave no scope for reasonable doubt (referred to as acte clair). The rights of appeal to the CJEU are now significantly curtailed. From the end of the transition period, there is no longer provision for the courts of England and Wales to make reference to the CJEU except in highly limited circumstances.

The European Court of Human Rights (ECtHR) hears cases relating to alleged violations of the European Convention on Human Rights. The ECtHR and the Convention are separate from the European Union and its institutions; therefore, the relationship between the ECtHR and the courts of England and Wales remains unchanged. 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.[4] The decisions of the ECtHR are not binding on courts in England and Wales, although Section 2 of the Human Rights Act (HRA) 1998 requires domestic courts to take into account such decisions. The HRA 1998 came into force in October 2000 with the immediate aim of allowing cases engaging Convention rights to be heard before UK courts. There has been discussion this year regarding the introduction of a 'UK Bill of Rights' to repeal the HRA 1998 and create a domestic human rights framework. As of May 2023, this Bill is reported to have been dropped but may be reviewed and reimplemented by a subsequent government.

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 Philipp v. Barclays Bank UK PLC

In July 2023, the Supreme Court handed down a keenly awaited judgment on a matter of banking practice concerning the 'Quincecare duty'.[5] The decision affirmed the existence of the duty but, in confirming its basis in principles of agency law, clarified its nature and scope.

By the time the decision reached the Supreme Court, the facts of the proceedings were relatively narrow. Mrs and Dr Philipp had fallen victim to a fraud in which they instructed Barclays Bank to transfer £700,000, in two instalments, to foreign accounts from which the money was never recovered.[6] The type of fraud suffered by Mrs and Dr Philipp is known as an authorised push payment (APP) fraud on account of the fact that the client authorises the bank to make the payment, albeit induced by fraudulent means. Over the course of the period in which the transactions were made, Mrs and Dr Philipp were notified by the police that they may be subject to a fraud, and Barclays made various checks before authorisation. Mrs Philipp contended that Barclays owed her a duty under contract and

at common law not to have carried out her payment instructions in the event that it had reasonable grounds for believing that she was being defrauded. That claim was summarily dismissed at first instance, but that decision was overturned by the Court of Appeal.[7]

The Supreme Court considered that the Court of Appeal was wrong as a matter of banking law principle and revisited the underlying decision in Barclays Bank plc v. Quincecare Ltd (Quincecare).[8] The Quincecare case has come to stand for the proposition that a bank has a duty not to ''execute a payment instruction given by an agent of its customer without making inquiries if the bank has reasonable grounds for believing that the agent is attempting to defraud the customer'.[9]

Lord Leggatt, giving the judgment of the Court, distinguished the existing authorities from the present circumstance in which it was the customer herself, not her agent, who gave the payment instructions. His Lordship then went to reconsider the reasoning in Quincecare. First, Lord Leggatt noted that the duty articulated in Quincecare was simply an application of a bank's general duties to 'interpret, ascertain and act in accordance with its customer's instructions'.[10] Moreover, any general duty of reasonable skill and care would be subordinate to the bank's duty to carry out the customer's order to implement the transfer 'because the exercise of skill and care, where there is any scope for it, is directed solely to the effective execution of the order'.[11] Second, Lord Leggatt rejected the court in Quincecare's recourse to policy considerations, which, he said, were properly matters for Parliament, not the courts. Instead, His Lordship sought to establish the 'true basis' for any such duty arising from the principles of agency law. The judgment holds that if a bank is on inquiry that a payment instruction is an attempt to defraud the principal (the customer), the bank will be required to refrain from executing instructions without first verifying the instructions with the principal.[12] On that basis, the appeal was allowed and Barclays was held not to owe a duty to Mrs Philipp (subject to the below).

The decision was clearly influenced by a desire to avoid meddling in matters that the Court considered to be legislative policy. The Court noted recent legislative developments including a voluntary code (known as the Contingent Reimbursement Model Code) and the Financial Services and Markets Act 2023, which provides a reimbursement mechanism in certain cases of APP fraud.[13]

The applications of this case are likely to attract significant attention over the next year. Moreover, the case is not as yet finished. One 'fallback argument' from Mrs Phillip did succeed: the first instance court should not have summarily dismissed her claim that Barclays was in breach of duty in not taking adequate steps to recover the money that had been transferred.[14]

ii R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others

The Supreme Court's decision in R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others (PACCAR)[15] has overturned settled practice in the third-party litigation funding market by re-characterising many litigation funding agreements (LFAs) as damages-based agreements (DBAs). DBAs are valid only where they comply with conditions set out in law. Since most LFAs do not comply with those conditions, the Court recognised that the effect of its decision would be that 'most third

party litigation funding agreements would by virtue of that provision be unenforceable as the law currently stands'.[16]

The decision arose in proceedings before the Competition Appeal Tribunal (CAT) in which two parties sought permission to bring collective proceedings on behalf of the purchasers of trucks who allegedly suffered loss as the result of a cartel among truck manufacturers.-[17] One party sought to bring 'opt-in' collective proceedings, while the other sought to bring opt-in proceedings and, in the alternative, 'opt-out' proceedings. Both parties were supported by third-party litigation funders; the relevant LFAs entitled the funders to a percentage of recoveries in the event that the claims were ultimately successful. As a requirement for bringing collective proceedings, the claimant parties had to convince the CAT of the adequacy of their funding arrangements. The defendants argued that, properly construed, the claimants' LFAs were caught by the statutory definition of DBAs. Because the LFAs did not satisfy the requirements for DBAs, the defendants said they were invalid and unenforceable. In consequence, it was submitted, the claimants' funding arrangements did not meet the relevant threshold that would allow the collective proceedings to be continued.

Both the CAT and the judges of the Court of Appeal rejected the defendants' arguments, held that the LFAs were not DBAs and therefore did not prevent the certification of collective proceedings. The defendants appealed directly to the Supreme Court. The Association of Litigation Funders of England and Wales intervened.

The central issue for the Supreme Court was the correct interpretation of Section 58AA of the Courts and Legal Services Act 1990, which provides that 'damages-based agreements', as defined in that Section, shall be enforceable. That definition required an agreement between 'a person providing advocacy services, litigation services or claims management services and the recipient of those services . . . '. It was clear that a funder did not provide advocacy or litigation services. The question was whether the services provided by a funder in these circumstances would constitute 'claims management services'. That term is defined by Section 419A of the Financial Services and Markets Act 2000 (which replaced Section 4(2) of the Compensation Act 2006).

The defendants submitted that the funders had provided claims management services within the meaning of the Compensation Act 2006 and the Financial Services and Markets Act 2000 by providing 'other services in the making of a claim' (Section 419A(1)) in the form of the 'provision of financial services or assistance' (Section 419A(2)). The claimants contended that the meaning of 'financial services or assistance' is to be 'interpreted as applying in the context of the management of a claim' and that the litigation funders had no role in the management of the claims.

After reviewing the relevant principles of statutory interpretation, Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed) allowed the appeal. The majority analysed the relevant provisions of the Compensation Act 2006 and a broadly contemporaneous statutory instrument that formed part of the same legislative scheme. These indicated that the term 'claims management services' was capable of covering the LFAs. In reaching this conclusion, the Court rejected the use of subsequent legislation, particularly subordinate legislation, in aiding construction.[18] The claimants' argument that the wording of the defined term itself was sufficient to indicate that the services provided under the LFAs properly fell outside the definition was rejected.

Lady Rose dissented and would have dismissed the appeal. Her Ladyship gave an extensive judgment disagreeing with the majority's interpretation of the relevant provisions and relied heavily upon the 'ordinary meaning' of 'claims management services'. Her Ladyship held in relation to Sections 4(3) and 419A(2) that the respondents' construction should prevail. Moreover, Her Ladyship held that Section 58AA(3)(a) provided free-standing grounds for her view.

The majority's judgment has radically upset the status quo for the litigation funding industry. It remains to be seen how practitioners in this area will modify their agreements in order to seek to ensure the enforceability of LFAs, which, hitherto, have provided for funders to receive a percentage of any recoveries.

The implications of PACCAR for collective actions have received two subsequent notable considerations. The first was on an interim application and in the context of an underlying dispute, which will be resolved by arbitration (i.e., not in a public forum).[19] The second decision was Alex Neill Class Representative Limited v. Sony,[20] in which the CAT considered the enforceability of an LFA that was amended post PACCAR. The amendment provided that the funder's fee shall be the greater of a multiple of the amount of funding that the funder is contractually obliged to provide or 'only to the extent enforceable and permitted by applicable law' a percentage of the amounts recovered. The CAT found the amended LFA to be enforceable and that it did not constitute a DBA. In reaching this conclusion, the CAT held that held that PACCAR does not 'have materially wider ramifications for the approach [the CAT] should take to the questions of fulfilment of the Eligibility and Authorisation Conditions' for the grant of a collective proceedings order (CPO).[21] Although it was not necessary in this case, the CAT would have been prepared to sever this provision had it engaged Section 58AA, leaving the remaining LFA enforceable.[22]

iii The Federal Republic of Nigeria v. Process & Industrial Developments Limited

The blockbuster decision of the year arose in the context of a challenge to an arbitral award. On 23 October 2023, Mr Justice Robin Knowles CBE delivered a much-anticipated judgment on the validity of an arbitral award, which, if enforced, would have had a material impact on Nigeria's entire federal budget.

The background to the case is complex and required hearings that took place over the course of three months in early 2023. The matter concerned a gas supply and processing agreement for accelerated gas development (GSPA), which was signed by the Federal Government of Nigeria (Nigeria) and a company registered in the British Virgin Islands known as Process & Industrial Developments Limited (P&ID). Three years into the contract, P&ID brought arbitration proceedings, heard by a distinguished panel, chaired by Lord Hoffmann. The tribunal held that Nigeria had committed a repudiatory breach of the GSPA and that the GSPA was terminated when P&ID accepted that breach; therefore, Nigeria was liable in damages. A quantum award (to which Nigeria's arbitrator dissented) required a payment of US$6.6 billion with interest at a rate of 7 per cent.

When P&ID sought to enforce the awards in England, Nigeria applied to the English court to set them aside under Sections 67 and 68 of the Arbitration Act 1996 on the 'grounds that they were procured by fraud and/or other conduct that is contrary to public policy, and that the Tribunal lacked jurisdiction'.[23]

Although the judgment should be reviewed in full, practitioners should note in particular the findings in relation to Section 68. The Court held that there were three matters that brought the case within Section 68(2)(g) as an irregularity. The first was P&ID providing to the tribunal and relying on evidence before the tribunal that was material and was known to P&ID to be false. The second was P&ID's continued bribery or corrupt payment of a Nigerian government lawyer during the underlying arbitration period. The third was P&ID's improper retention of certain internal legal documents from Nigeria.[24] These three points were held to be 'serious' within the definition of Section 68 of the Arbitration Act. Furthermore, the Court concluded that 'P&ID has the Awards only after and by practising the most severe abuses of the arbitral process'.[25] In that context, it was not difficult for the Court to conclude that the other requisite elements were satisfied.

While the decision is notable on its own facts, as the Court explained, 'the matter touches the reputation of arbitration as a dispute resolution process'.[26] The judge was at pains to stress that he hopes that the decision may provoke 'debate and reflection among the arbitration community, and among state users of arbitration, and among other courts with responsibility to supervise or oversee arbitration'.[27] His Lordship seemed particularly concerned in this case that such a deception has taken place despite the eminence of the tribunal panel. (Speaking after the judgment, the chair of the arbitral panel, Lord Hoffmann, commented that there 'is this great miasma of dishonesty in the background of which you are completely unaware'.[28]) In making further comments on this forum of dispute resolution, Mr Justice Robin Knowles CBE commented that the private nature of the arbitration does not allow for free scrutiny, which is particularly important in state-based contexts, and in some cases may even encourage using an arbitral clause as a device to get an award or settlement.[29]

It should be noted for completeness that the Court expressed concern that the case has been '[d]riven by greed and [those] prepared to use corruption'.[30] Two practitioners were referred to their respective regulators.

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. Court guides 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[31] 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 on the court and division in which the relevant claim is issued and the nature of the claim itself. The commentary below is based on the procedure in the Chancery Division and is only a general summary.

Before even commencing a claim, a claimant should check whether a specific pre-action protocol applies to the type of claim being made (e.g., claims for professional negligence, media and communications matters, and judicial review have specific pre-action protocols that should be followed). Where there is no specific pre-action protocol,[32] 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 defendant or defendants within four months of issue (assuming that the relevant defendant is within the jurisdiction) or within six months if the defendant is outside the jurisdiction (see Section III.vii). 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 injunction to be made via the social networking site Twitter against an anonymous defendant who had impersonated the claimant's blog on that site.[33] In 2019, the Intellectual Property Enterprise Court granted permission for a court order to be served through Instagram. 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 the claimant's case, the relevant facts and the 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 by either the claimant (or an authorised signatory on behalf of the claimant where the claimant is an organisation) or the claimant's legal representative.

Assuming that 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 (assuming that an acknowledgment of service has been filed – also note that this timescale can vary between different courts and, in any event, is 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 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. 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. The court will then 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 for 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 3.12, 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 22 April 2014, except for proceedings where the amount of money claimed or value of the claim as stated on the claim form is £10 million or more.[34] Parties subject to the regime are required to file and exchange budgets setting out estimated costs for each stage in the proceedings. These cost budgets 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.[35] Substantial changes were made to the relevant CPRs and PDs in 2020 to consolidate and streamline the rules around costs budgets, and a template Precedent T was introduced for making applications relating to proposed variations in a costs budget.

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.[36]

iii Court reform

In 2014, the Ministry of Justice announced that between 2015 and 2020, The HM Courts & Tribunals Service (HMCTS) would oversee a series of reforms aimed at modernising and improving the efficiency of courts and tribunals. On 5 March 2019, HMCTS stated that it was extending the completion date of the reform programme to 2023. In March 2023, HMCTS advised that all remaining reforms to the civil, family and tribunal services would be completed by March 2024; in order to meet this timetable, certain projects have been prioritised and others paused. The programme involves 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. Other separate but complementary steps to reform and rationalise court processes are also considered directly below.

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 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 that factually complex or multiparty claims (including fraud and dishonesty claims) are excluded. The intention is that a trial will take place within 12 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.[37] A one-day trial took place eight months after issue, and judgment was handed down two weeks after the hearing, on 18 November 2016. It is also worth noting that an appeal against the judgment was heard in July 2017, quicker than many comparable appeals. The court retains jurisdiction to transfer a claim from the shorter trials scheme as it progresses.[38]

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 to be fulfilled). A claim must:

1. relate to banking and financial transactions where £50 million or over is in issue;
2. require particular judicial expertise in the financial markets; or
3. raise issues of general importance to the financial markets (see CPR Part 63A).

In Property Alliance Group Ltd v. Royal Bank of Scotland plc,[39] 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.

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. It has now been incorporated into PD 63AA on a permanent basis. 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 current cause of action between the parties to the proceedings. The expedited

Financial Conduct Authority v. Arch Insurance (UK) Ltd and others [2021] UKSC 1 test case was the first case to be heard under this scheme.

Witness statements

The wording of the statement of truth that must be signed by a witness when approving the witness statements was amended with effect from 6 April 2020 and again from 1 October 2020 to include a clear warning that proceedings for contempt of court may be brought against those who give a statement of truth without an honest belief in its truth. In addition, witness statements (including the statement of truth) provided by non-English speakers must now be prepared in the witness's own language and be accompanied by an English translation. The process of preparation of the statement, and the date of the translation, must be stated. As of April 2021, witness statements in the Business and Property Courts must comply with PD 57AC, which contains detailed guidance on best practice and requires witnesses and solicitors to declare their compliance with the best practice principles contained in the PD.

iv Digitisation following the covid-19 pandemic

A key focus of the reform process has been the digitisation of the courts. Prior to the outbreak of the covid-19 pandemic and the consequent lockdown restrictions, a number of key developments were already being trialled in England and Wales, including:

1. a new electronic filing and case management system (CE File) in the Business and Property Courts in London and seven other cities. Since 1 July 2019, the system has also become mandatory for professional users in claims issued in the King's Bench Division;
2. the online civil money claims pilot scheme running from August 2017 to October 2024, which tests an online process for unrepresented claimants to start money claims in the County Court with a value of £10,000 or less and for represented claimants to start money claims with a value of £25,000 or less against other represented parties. This will be expanded to cover damages for unspecified claims and civil debt enforcement;
3. a video hearings pilot scheme (PD 51V) was commenced on 30 November 2018, which covers applications to set aside County Court default judgments heard at either the Birmingham or the Manchester Civil and Family Justice Centre. The pilot scheme tests a procedure for these applications to be heard by the court via video link. Members of the public may access a hearing by attending the court in person, where the proceedings are projected on a screen; and
4. the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, which permits judges to delegate a range of work to court staff (such as granting an extension of time or issuing a summons), received royal assent on 20 December 2018, with some provisions coming into force on 20 February 2019.

In response to the need to work remotely during the covid-19 pandemic, HMCTS made several changes to these pilots. For example, judges have been given greater powers to

give directions for cases included in the online civil money claims pilot, and a mediation feature has also been added. HMCTS has been clear that although these changes were expedited as part of the courts' response to the covid-19 pandemic, they build on changes made as part of the ongoing reform programme and will remain in place for the duration of the pilot scheme.

Even after most of the restrictions placed on the public during the covid-19 pandemic have been lifted, many hearings continue to be conducted via telephone or videoconferencing software. It was confirmed in Huber and another v. X-Yachts (GB) Ltd and another [40] that parties and their representatives are permitted to attend hearings held entirely remotely outside the jurisdiction, subject to certain safeguards. The use of remote or hybrid hearings is governed by Section 85A Courts Act 2013 (as amended), and practical guidance for the operation of such hearings in the Business and Property Courts is now set out in a protocol appendix to the Chancery Guide and the Technology and Construction Court Guide. Post-pandemic, these developments have resulted in an emerging corpus of jurisprudence concerning the taking of evidence abroad.[41]

v 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 representative actions where one person brings (or defends) a claim as a representative of others who share the same interest in the claim[42] and for group litigation orders (GLOs)[43] 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 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 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.[44] 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) that 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 is power for the court to order this in accordance with its case management powers under CPR 19 or the parties can agree a test case. An 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 Office of Fair Trading's claim.[45]

Although there have been some high-profile cases involving representative actions and GLOs,[46] 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 (ATE) insurance, third-party litigation funding, conditional fee agreements (CFAs) 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.xi).

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 United Kingdom, allowing private individuals to seek collective redress for breaches of competition law. The regime operates in the 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 a 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 CPO permitting the proceedings to be continued. That order will also specify whether the proceedings are to be opt-in or opt-out. This contrasts with the majority of the European Union (which typically does not support opt-out claims) and may potentially make the United Kingdom a more attractive place for large groups of claimants to commence claims.

In mid-2016, an application was made to commence a £14 billion follow-on claim against Mastercard for damages arising from the European 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. At first instance, the CAT refused to grant the CPO, in a judgment dated 21 July 2017.[47] The CAT 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 [48] (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.

The Court of Appeal overturned this decision in a judgment dated 16 April 2019,[49] stating that the CAT ruling had been too narrow. The Court of Appeal agreed that Pro-Sys Consultants Ltd v. Microsoft Corp provided the correct guidance on the proper approach to claims for aggregated damages. However, the CAT had placed too heavy a burden on the proposed representative at the certification stage, who should not be required to demonstrate more than that the claim had a real prospect of success. The CAT had effectively conducted a mini-trial in requiring detailed specifications as to what data would be available for each relevant retail sector during the infringement period. The CAT had also wrongly directed itself that an aggregate damages award had to be distributed on a compensatory basis; the rights of individual claimants could be vindicated by obtaining the aggregate award itself.

On 25 July 2019, permission was granted for Mastercard to appeal to the Supreme Court. Judgment was handed down on 11 December 2020, and the majority largely upheld the Court of Appeal's decision.[50] This was on the basis that the Supreme Court interpreted suitability as a relative concept and noted that the CAT should have asked itself whether a claim is 'suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages'. Second, the Supreme Court emphasised that the courts should not deprive claimants of a trial merely because of challenges relating to the quantification of harm, this being a 'fundamental requirement of justice . . . often labelled the “broad axe” . . . principle'.

This means that the threshold that a proposed class representative needs to overcome when applying for a CPO has been significantly lowered. Following the Supreme Court decision, the CAT reconsidered and certified Mr Merricks's application. Following Merricks-, the CAT is not generally required to take into account the merits of the proposed class representative's proposed claim when considering an application for a CPO.[51] Nevertheless, a proposed class representative must show that 'collective proceedings are an appropriate means for the fair and efficient resolution of the common issues'.[52]

Further, the decision in Merricks means that the CAT is 'not bound by traditional principles of compensation'. The 'broad axe' principle might require the CAT to 'work with new techniques and principles to achieve practical justice', and individuals may now 'acquire an entitlement to compensation even if there was no proof of loss'.[53] The CAT now applies a 'strongly purposive construction' to Section 47C(2) of the Competition Act 1998, departing 'markedly from traditional concepts of the common law'.[54] The CAT has noted Lord Briggs's explanation in Merricks that 'the critical rationale underlying the collective actions regime was access to justice'.[55]

vi 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.[56]

vii Service out of the jurisdiction

As a general rule, where a defendant is outside England and Wales, he or she can be served with the claim only if the English court has first given the claimant permission. The claimant's application for permission must meet three tests. First, it must demonstrate (to the standard of a good arguable case) that the claim falls within one of the 'gateways' in PD 6B Paragraph 3; for example, it is in respect of a claim made in contract where the contract was made in England. Second, the claimant must show that each cause of action in the claim raises a serious issue that ought to be resolved by a trial. Third, the claimant must persuade the court that England is clearly a more appropriate forum than any other available forum or (if it is not the natural forum) that justice nevertheless requires the case to be tried in England. If the court grants permission to serve out, the defendant, once served, can challenge jurisdiction by making an application under CPR Part 11; the burden will be on the claimant to show that permission was properly granted.

The court's permission is not required for service of the claim form or other documents out of the jurisdiction where the parties have agreed that their disputes will be resolved by the English court. This includes, but is not limited to, disputes covered by choice of court agreements within the scope of the 2005 Hague Convention on Choice of Court Agreements (the 2005 Hague Convention). Separately, CPR 6.32 makes specific provision for service without permission in Scotland or Northern Ireland.

viii Enforcement of foreign judgments

Before the end of the transition period, judgments of the courts of EU Member States, Iceland, Norway and Switzerland were enforceable in the United Kingdom (and vice versa) in accordance with a streamlined process set out in EU law. The Withdrawal Agreement provides that judgments in proceedings started before 1 January 2021 in the European Union and the United Kingdom will continue to be enforceable in accordance with EU law.

Judgments for a sum of money in proceedings started in the European Union on or after 1 January 2021 are enforceable in England and Wales in accordance with the common law rules that apply to all countries with which the United Kingdom has no reciprocal enforcement arrangement (including the United States). The judgment creditor issues a claim in debt in the English court in respect of the sum due under the foreign judgment. Summary judgment will usually then be sought on the claim and the resulting English court judgment enforced against the defendant or judgment debtor.

An exception applies where the judgment in question was in proceedings founded upon an exclusive jurisdiction agreement within the scope of the 2005 Hague Convention. The United Kingdom, European Union, Denmark, Singapore, Ukraine, Mexico and Montenegro are party to the 2005 Hague Convention. Where it applies, a relevant foreign judgment may be enforced in England and Wales upon its registration with the English court. This requires an application to the King's Bench Division of the High Court pursuant to the process set out in CPR 74. Article 9 of the 2005 Hague Convention sets out limited grounds upon which a judgment debtor can resist enforcement.

Judgments for a sum of money from certain Commonwealth countries and other countries that have reciprocal enforcement agreements with the United Kingdom 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 the relevant Act, the judgment is enforceable as though it were a judgment of the English court. A separate procedure applies for enforcing judgments from Scotland and Northern Ireland, under the Civil Jurisdiction and Judgments Act 1982 and CPR 74.

It is likely that the United Kingdom will keep its rules in relation to the recognition and enforcement of foreign judgments under review. In April 2020, the United Kingdom applied to join the Lugano Convention, which would have provided a framework not dissimilar to that which existed before the end of the transition period. The United Kingdom's accession was blocked by the European Commission. In response, the UK government has conducted a consultation process concerning accession to the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. At the time of writing, the government has announced that it intends to proceed in entering the Convention (see below for further information).

ix Assistance to foreign courts

Again, the position in relation to assisting foreign courts in collecting evidence in civil or commercial matters changed as of 1 January 2021, at the end of the transition period following the United Kingdom's withdrawal from the European Union. Previously, courts of EU Member States (other than Denmark) could 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 EU Taking of Evidence Regulation.[57] The grounds for refusing the application were limited (for instance, where a witness has a right not to give evidence under English law or the law of the requesting Member State), and the court was required either to comply with the request or to refuse to do so within 90 days. However, this procedure no longer applies between the United Kingdom and EU Member States, so requests will proceed under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the 1970 Hague Convention). Generally, the English court will exercise its discretion to assist the foreign court; however, the court will not make orders for pretrial discovery or general disclosure or require a witness to do anything he or she would not be required to do in English civil proceedings. Austria, Belgium and Ireland are not signatories to the 1970 Hague Convention, and requests for judicial assistance from and to these countries will need to be in the form of letters rogatory sent to the relevant national court via diplomatic channels.

x Access to court files

As a general rule, members of the public may obtain copies of statements of case and judgments or orders made in public without the permission of the court.[58] 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. In Cape Intermediate Holdings Ltd v. Dring (for and on behalf of Asbestos Victims Support Groups Forum UK),[59] the Supreme Court confirmed that the default position was that the public should be allowed access not only to the parties' written

submissions and arguments but also to documents that were placed before court and referred to during the hearing. The court will carry out a fact-specific balancing exercise, considering on the one hand the purpose of the open justice principle and the potential value of the information in question in advancing that purpose, and on the other any risk of harm that its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

xi 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 in return 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; the United Kingdom has more specialist litigation funding companies than any other jurisdiction.

Case law and practice are still developing in this area and will be a matter of continued concern after the decision of the Supreme Court in PACCAR (see above). Generally, factors in this assessment of these arrangements include:

1. the nature of the funder's involvement in the litigation (control of the litigation must not be ceded to the funder);
2. 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);
3. the amount of profit the funder stands to make (it has been held that 25 per cent may not be excessive);[60]
4. whether there is a risk of inflating damages or distorting evidence;
5. whether the funder is regulated; and
6. 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.[61] 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. It is enforced by the Association of Litigation Funders.[62] Third-party funders may also be potentially liable for the full amount of adverse costs, subject to the agreement between the funder and the litigant. 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.[63] 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. 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). In the past, funders have enjoyed protection from unlimited costs liability, which has been subject to the Arkin cap, which limits a funder's adverse liability to the amount of its investment.[64] However, the case of Chapelgate Credit Opportunity Master Fund Ltd v. Money and others shows that professional funders cannot necessarily rely on the Arkin cap, as the Court of Appeal dismissed a funder's appeal against an order holding it liable for all the respondent's costs from the date of entry into its funding agreement with the claimant, emphasising instead the court's inherent jurisdiction to make costs orders.[65]

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. The following two structures have traditionally predominated.

CFAs

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 they took of earning nothing at all.

As the market has developed, more sophisticated variants of this model have emerged. 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 that 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.

DBAs

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 the 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 was brought into effect. DBAs are valid only if they comply with the requirements set out in the Damages-Based Agreements Regulations 2013.[66]

Conditional and 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 or a DBA 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 for such ATE insurance (so named because it is usually taken out once a cause of action 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 are 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.

Following the Supreme Court's decision in PACCAR (see above), these rules are now subject to significant uncertainty, and practitioners should expect the litigation funding industry to move quickly to restructure their existing arrangements.

xii 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 a 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 the County Court. CPR 47 and the associated PD were amended accordingly.

Legal practice

i Conflicts of interest and information barriers

Conflicts of interest are governed by the rules contained in the Solicitors Regulation Authority's Code of Conduct for Solicitors, RELs and RFLs 2019 and Code for Firms 2019 (for solicitors) and the Bar Standards Board Handbook (for barristers) (last amended 6 April 2023). 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 for solicitors 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. Furthermore, 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 have an 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.

Barristers may act where there is a conflict of interest between an existing client or clients and a prospective client or clients or two or more prospective clients if the potential conflict has been fully disclosed to the parties and they have each provided their informed consent to the barrister acting and the barrister is still able to act independently and in the best interests of each client.

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. Historically, 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 (although this does not mean that the duty of disclosure has not been breached.) Although this position is not expressly restated in the 2019 Codes of Conduct for solicitors, it is clear that 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:

1. effective measures have been taken that result in there being no real risk of disclosure of the confidential information to B; or
2. B, whose information the lawyer or his or her business or employer holds, has given informed consent, either in writing or evidenced in writing, to the lawyer acting, including to any measures taken to protect B's information.

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,[67] 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 three principal money laundering offences. A person (including a firm, corporation or individual) commits a money laundering offence if he or she:

1. conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;
2. 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
3. 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:

1. failure to disclose any of the offences from items (a) to (c) above;
2. 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
3. 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 United Kingdom, or would do so if the conduct occurred in the United Kingdom. Furthermore, 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 an 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 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 EU's Fourth Money Laundering Directive)[68] came into force on 26 June 2017. They were updated in 2019 and 2020 to reflect the EU's Fifth Money Laundering Directive,[69] in particular about registration of trusts.[70] Further amendments came into force in 2022 and 2023 clarifying certain definitions and inserting additional regulations on crypto-asset transfers.[71] These Regulations prescribe 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 Regulations also seek to give effect to the updated Financial Action Task Force

global standards that 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

Prior to the end of the transition period following the United Kingdom's withdrawal from the European Union, the processing of personal data was primarily regulated by the EU General Data Protection Regulation (EU GDPR),[72] the Data Protection Act 2018 (DPA) and certain secondary legislation made under the DPA. The EU GDPR was adopted on 27 April 2016 and entered into force on 25 May 2018 after a two-year transition period.

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

1. both data controllers and data processors have statutory obligations under the EU GDPR;
2. data controllers and data processors must comply with the six data protection principles under Article 5(1) of the EU GDPR and the additional accountability principle under Article 5(2) of the EU GDPR (Principles); and
3. data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data, and to object to the processing of their personal data and to the erasure of their personal data.

The EU GDPR has now been replaced in the United Kingdom with a UK general data protection regime (UK GDPR) under the DPA, which closely mirrors the existing EU GDPR. This means that for the purpose of the EU GDPR, the United Kingdom is now a third country. Data transfers to third countries outside of the EEA are prohibited under the EU GDPR unless the European Commission has made a decision that the data protection laws in such third country are of equivalent adequacy to those under the EU GDPR, or if individual organisations have implemented certain safeguards, such as entering into contracts containing the EU-specified standard conditions. The European Union has decided that the United Kingdom's data protection regime is adequate for these purposes, and adopted decisions under EU GDPR and the Law Enforcement Directive accordingly on 28 June 2021 (the United Kingdom has already confirmed that the European Union has an equivalent adequate regime for the purposes of transfers from the United Kingdom to the European Union). However, the adequacy decisions acknowledge that the United Kingdom's data protection regime may evolve and diverge from that of the European Union. Consequentially, both adequacy decisions require the European Commission to continually review the regime and they include a four-year 'sunset clause' after which time the decisions will expire, unless they are renewed. The decisions are expected to apply until 27 June 2025.

The Information Commissioner's Office (ICO) is charged with policing and enforcing the regime and has been given enhanced powers under the DPA to do so. The ICO's enforcement powers include the ability to serve four types of notices:[73]

1.

an information notice requiring any person to provide information reasonably required for the purpose of investigating a range of compliance failures (notably, there is no general exemption for legally privileged or confidential information);

2. an assessment notice requiring a controller or processor to allow the ICO to enter the premises, be directed to documents, examine documents, be given explanations, observe the processing of information and interview staff;
3. an enforcement notice requiring a controller or processor to take specified steps or refrain from taking specified steps, or both; and
4. a penalty notice requiring a controller or processor to make a penalty payment of up to £17.5 million or 4 per cent of the undertaking's total annual turnover in the preceding financial year, whichever is higher.

Data and personal data are widely defined under the UK 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 UK 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 UK 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 (e.g., 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 and transparent and that the other principles are complied with.

The accountability principle in the UK GDPR contains two elements: first, the data controller is responsible for complying with the UK GDPR and, second, the controller must be able to demonstrate this compliance. Data processors are also liable to the extent that they do not comply with their obligations under the UK GDPR. The subject access rights under the UK

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.

The DPA also covers processing relating to areas outside the scope of EU law (such as national security and immigration). The DPA implemented the EU Data Protection (Law Enforcement) Directive[74] into UK law, setting out requirements for the processing of personal data for criminal law enforcement purposes, and this has been retained.

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 a privileged document for inspection. The recognised categories of privilege that may be claimed by a party in respect of its documents or communications are described below.

i Privilege

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. 6) [75] that legal advice privilege protects confidential communications between a lawyer and client made for the purpose of receiving or giving advice in the relevant legal context. However, the House of Lords did not interfere with the Court of Appeal's previous ruling in Three Rivers (No. 5),[76] which warned that care must be taken when identifying the client for the purposes of legal advice privilege. Particularly in large organisations, but potentially in any organisation, the client may be limited to a defined group of individuals within the instructing entity with the responsibility for seeking or receiving legal advice and not simply any employee or member of the instructing entity. In Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd (ENRC),[77] although the Court of Appeal affirmed that Three Rivers (No. 5) remained good law, it did acknowledge that the case put large corporations in a less advantageous position than individuals and small businesses, and that English law was undesirably out of step with other common law jurisdictions in this regard. In Re the RBS Rights Issue Litigation,[78] the High Court dismissed an application by RBS to withhold from disclosure notes of interviews (which were created in the context of internal investigations).

The High Court decided that legal professional privilege did not apply as:

1. applying Three Rivers (No. 5), 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.

In R (Jet2.com Ltd) v. Civil Aviation Authority,[79] the Court of Appeal clarified that legal advice privilege could apply only where the dominant purpose of the relevant confidential communication was the giving or receiving of legal advice. The dominant purpose requirement had long been established as a necessary ingredient of litigation privilege, but there had been uncertainty as to its applicability in legal advice privilege.

The High Court held in PJSC Tatneft v. Bogolyubov and others[80] that legal advice privilege extends to communications with foreign lawyers, whether or not they are in-house or independent, and the court should not enquire into the extent of their qualification or regulation or whether legal advice privilege applies in their home jurisdiction.

The UK Supreme Court confirmed in R (on the application of Prudential Plc) v. Special Commissioner of Income Tax[81] 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).

Litigation privilege

Litigation privilege arises only when litigation is in existence or contemplation.[82] 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, 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. In WH Holding Ltd and another v. E20 Stadium LLP,[83] the Court of Appeal clarified that litigation privilege did not extend to purely commercial discussions about settlement.

Privilege against self-incrimination

Documents that tend to incriminate or expose a person to criminal proceedings in the United Kingdom or to proceedings for the recovery of a penalty in the United Kingdom (including civil contempt) are 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 that the risk is apparent to the court.[84]

Common interest privilege

Common interest privilege preserves privilege in documents that are disclosed to certain third parties; if a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter, or in litigation in connection with which the document was bought into existence, then the document remains privileged in the hands of the recipient. This applies to both legal advice privilege and litigation privilege.

Public interest immunity

This immunity applies where production of a 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.[85] The procedures for claiming this immunity (which in most practical respects operates as another head of privilege) are set out in CPR 31.19.

Without prejudice communications

Any communications made in a good faith effort to settle proceedings are covered by 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)[86] or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of Brown v. Rice [87] reinforced the principle 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),[88] 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, 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 (e.g., as company secretary).[89] Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.[90]

ii Production of documents

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.

A mandatory disclosure pilot scheme (PD 51U) was in operation for the majority of new and existing proceedings in the Business and Property Courts. This was initially due to run for two years from 1 January 2019 but was extended and on 15 July 2022 was approved on a permanent basis under PD 57AD. The main objectives of the disclosure reforms, which almost entirely replace the old menu-based system, are to reduce 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 is required 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 is 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.[91] 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. In the recent case of Square Global Ltd v. Leonard,[92] it was noted that it is fundamental that the client must not select the relevant documents for disclosure. Further guidance on this disclosure pilot has also been provided by Sir Geoffrey Vos, then Chancellor of the High Court, in a reserved judgment given following a disclosure guidance hearing in the matter of McParland & Partners Ltd and another v. Whitehead.[93] Vos emphasised that parties need to think constructively and cooperatively about what documents are required for fair resolution of the dispute, avoiding 'unduly granular and complex' solutions. He also stressed the difference between issues for disclosure from issues for determination at trial and noted that it is entirely unacceptable for parties to use the pilot as 'a stick with which to beat their opponents' and that such conduct can be expected to be met with immediately payable adverse costs orders.

Cases in which PD 57AD does not apply are subject to the disclosure rules under CPR 31.[94] 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. PD 31A.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 required only 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),[95] 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.

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. PD 31B sets out the procedure that 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 a reasonable search for such documents and any tools and techniques that might reduce the burden and cost of the disclosure of electronic documents.

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 documents under CPR 31.7. In Pyrrho Investments Limited and another v. MWB Property Limited and others,[96] 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. Pyrrho was approved in Brown v. BCA Trading Ltd,[97] which endorsed the use of predictive coding in electronic disclosure. The court also stated that predictive coding would be significantly cheaper than a keyword search and that there was no evidence to suggest that it would be less effective.

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, except for those that 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,[98] 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 v. EE Ltd,[99] 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.

Alternatives to litigation

i Overview of alternatives to litigation

There are a number of forms of alternative dispute resolution (ADR) mechanisms available in England and Wales. The glossary to the CPR defines 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.[100] ADR has achieved acceptance as it is confidential, its outcome is normally subject to agreement of the parties, and it may offer a faster and more cost-effective resolution to a dispute than traditional litigation. The Civil Justice Council ADR Working Group 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 that 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).

Recently, however, the courts have begun to indicate that it may become a requirement for parties to engage in ADR; for example, the decision in Lomax v. Lomax[101] indicated that it was not a requirement for parties to consent for the court to order that they engage in early neutral evaluation. Sir Geoffrey Vos, then Chancellor of the High Court, has stated that, in his opinion, this case inevitably raises the question of whether the court might also require parties to engage in mediation.[102] On balance, the position is that despite a judicial preference for the parties to engage in ADR (particularly mediation), the court will not compel parties to mediate without their consent.[103]

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 (listed in Schedule 1 to 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:

1. 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;
2. Section 40: the parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings;
3. Section 67: a party may apply to the court to challenge a tribunal's substantive jurisdiction; and
4. 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, to vary it or to 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 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) Model Law on International Commercial Arbitration (the UNCITRAL Model Law) 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 United Kingdom) 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,[104] 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.

As explained further in Section VII, the Arbitration Act 1996 has been reviewed in order to ensure that England and Wales remains a preferred destination for arbitration.

iii Mediation

In England and Wales, there are currently 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. However, on 25 July 2023, the

government confirmed that it will make mediation compulsory for small claims of up to £10,000. This will refer parties automatically to a free hour-long telephone session with a professional mediator provided by HMCTS; appropriate sanctions will apply in the event of non-compliance. The small claims mediation service is currently operating an opt-out mediation pilot scheme on these terms. This is in an attempt to free up court capacity and reduce waiting times for cases that do require a hearing.

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 CPRs strongly encourage parties to consider mediation at several stages during litigation, including before formal proceedings commence, when a 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.[105] 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,[106] 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,[107] 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 unreasonable 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,[108] the Court of Appeal made it clear that parties are expected to engage with a serious invitation to participate in ADR and that 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.

In 2008, the EU adopted the Mediation Directive,[109] which applies to all Member States when engaged in cross-border disputes within the European Union. 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. Following the United Kingdom's withdrawal from the European Union and the end of the transition period, this Directive has been repealed from UK law, so there is no dedicated reciprocal regime for mediations arising in respect of cross-border disputes between parties in the United Kingdom and those in EU Member States. However, they will continue to apply to cross-border mediations commenced prior to 31 December 2020. Neither the European Union nor the United Kingdom has currently signed up to the Singapore Mediation Convention, which came into force in September 2020 and aims to reduce issues around the enforcement of cross-border mediated settlement agreements by creating an international framework for their enforcement, although the UK government has indicated that it is giving serious consideration to doing so.

At present, mediators 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. However, there are a number of recognised mediation providers in England and Wales, such as the Centre for Effective Dispute Resolution and the ADR Group, which provide training and maintain lists of their accredited mediators who sign up to a voluntary code of conduct.

iv Other forms of ADR

In addition to arbitration and mediation, there are a range of other processes available to parties seeking to settle their disputes out of court. These include early neutral evaluation, 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 determination, typically a contractually binding determination by a neutral expert of a dispute involving technical or valuation issues; and adjudication, a statutory process that is 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.

Outlook and conclusions

Compared with previous years, the English legal system and its component parts appear to be entering a period of relative stability. The legal uncertainty in relation to Brexit has settled after several years of negotiations, and the effects of the covid-19 pandemic are now thankfully soon to be forgotten. However, it is worth flagging the following substantive changes on the horizon next year.

i Review of Arbitration Act 1996

On 21 November 2023, the Arbitration Bill was introduced into the House of Lords, which, if passed, will modify the Arbitration Act 1996. The Bill is expected to pass during the next parliamentary session. By way of background to this reform, in September 2022, the Law Commission published a consultation paper to review the Arbitration Act 1996. The purpose of this consultation paper was to reconsider the rules of arbitration to ensure that England and Wales remains an attractive jurisdiction for the practice of arbitration. After considering responses, the Law Commission decided to conduct a second consultation exercise, which was narrowly focused on three issues: the proper law of the arbitration agreement; challenges to awards under Section 67 (Challenging the award: substantive jurisdiction); and discrimination.

On 6 September 2023, the Law Commission published its final recommendations. The report noted 'the consensus that the Act works well' and that the Bill is confined to 'a few major initiatives, and a very small number of minor corrections'. The Arbitration Bill contains the changes recommended by the Law Commission and should be reviewed closely by practitioners. In particular, practitioners should note the following significant changes included in the Bill. First, the Bill overturns the decision in Enka v. Chubb,[

110] which concerns the governing law of an arbitration agreement. The Bill adopts the Commission's recommendation that the law that governs the arbitration agreement is (1) the law that the parties expressly agree applies to the arbitration agreement or (2) where no such agreement is made, the law of the seat of the arbitration in question. Second, the Bill codifies the common law that provides for the arbitrator's duty to disclose any circumstances that might reasonably give rise to justifiable doubts as to their impartiality. The Bill does not include a provision codifying confidentiality provisions. Third, a tribunal will now have the express power to issue awards disposing of proceedings summarily on the basis that there are 'no real prospects of success'.

ii Cross-border enforcement of judgments

As noted above, post-Brexit, the EU rules that facilitated the enforcement of English civil judgments in EU Member States (and vice versa) have ceased to apply in and to the United Kingdom. In England, the gap left by the EU rules has largely been filled by the common law. The only remaining international agreement for cross-border enforcement of judgments is the 2005 Hague Convention on Choice of Court Agreements, which has preserved the attractiveness of English exclusive jurisdiction clauses in commercial contracts.

Practitioners in the United Kingdom were largely disappointed by the decision of the European Commission to block their accession to the Lugano Convention. Entry into the Lugano Convention would have provided a broadly similar framework to that which existed pre-Brexit. However, a new agreement negotiated under the auspices of the Hague Conference on Private International Law – the 2019 Hague Judgments Convention – offers a longer-term prospect of a broader international arrangement for the enforcement of commercial judgments. It applies to substantially all money and non-money judgments in civil or commercial matters (not just those where there was an exclusive jurisdiction agreement), and enforcement can be refused on only a handful of grounds.

The Judgments Convention entered into force on 1 September 2023 between Ukraine and the Member States of the European Union (excluding Denmark). Moreover, the Judgments Convention will enter into force in Uruguay on 1 October 2024. It remains to be seen whether the other signatories (which include the United States) will ratify, and so accede to, the Convention.

In December 2022, the UK government began a public consultation on its plans to accede to the Convention. On 23 November 2023, the government announced that it intended to join the Judgments Convention and would seek to do so quickly. This would be a welcome development for many practitioners. Should the United Kingdom accede to the Judgments Convention, which now seems likely, additional safeguards will delay its application as between those states and the existing contracting parties. Moreover, the Judgments Convention provides that it will apply only to judgments in cases that are started after it comes into force between the state in which judgment was given and the state in which the judgment is sought to be enforced. In other words, practitioners should expect delay before the Judgments Convention becomes a mainstay of practice.

iii Digital Markets, Competition and Consumers Bill

The laws in relation to consumer protection in the digital sphere are set for a thorough renovation by way of the Digital Markets, Competition and Consumers Bill. The Bill emerges from a long-standing process that commenced in 2018 with the establishment of the government's Digital Competition Expert Panel. It arises from a concern as to market power of certain technology companies. The Bill is labyrinthine; it stretches over six parts and contains a further 26 schedules, which should be reviewed closely by competition and technology practitioners. Through amendments to the Competition Act 1998 and the Enterprise Act 2002, the Competition and Markets Authority will be granted further additional powers. For instance, it will have the power to designate a firm with 'strategic market status' and then impose further regulation, including the issuance of a finalised breach decision that binds the courts and the CAT. It will also have the power to investigate and fine businesses up to 10 per cent of their global turnover for breaches of consumer law, which is likely to push consumer duties higher up a business's risk agenda (on a par with competition breaches). The Bill, which had its first reading on 25 April 2023, is, at the time of writing, at the report stage in the House of Commons.

Endnotes

1 Damian Taylor is a partner and Patrick Hall is an associate at Slaughter and May. The authors wish to thank Rob Brittain (professional support lawyer) and John Sheridan for their contribution and assistance. Back to section

2 The third division is the Family Division, which deals with matrimonial and other family-related matters. Back to section

3 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. The ECJ remains the Court of Justice and the CFI is now known as the General Court. Back to section

4 The interaction of the UK courts and the ECtHR rose to prominence in 2022 in the high-profile matter ofDance & Battersbee v. Barts Health NHS Trust [2022] EWFC 80, in which an application to stay an order permitting the withdrawal of a comatose child's life support was considered, and ultimately refused, at every level of the Senior Courts and by the ECtHR. Back to section

5 InPhilipp v. Barclays Bank UK PLC [2023] UKSC 25. Back to section

6 Paragraph 1. Back to section

7 Paragraph 2. Back to section

8 [1992] 4 All ER 363. Back to section

9 [2023] UKSC 25, paragraph 5. Back to section

10 See paragraph 97. Back to section

11 See paragraph 64. Back to section

12 See paragraph 97. Back to section

13 See paragraph 21. Back to section

14 See paragraph 119. Back to section

15 [2023] UKSC 28. Back to section

16 Paragraph 13. Back to section

17 See paragraph 4. Back to section

18 Paragraphs 87–94. Back to section

19 *Therium Litigation Funding A IC v. Bugsby Property LLC [2023] EWHC 2627 (Comm).* *Back to section*

20 [2023] CAT 73. Back to section

21 [2023] CAT 73, paragraph 144. Back to section

22 Paragraph 153. Back to section

23 *The Federal Republic of Nigeria v. Process & Industrial Developments Limited [2023] EWHC 2638 (Comm), paragraph 415.* *Back to section*

24 See paragraphs 493–497. Back to section

25 See paragraph 516. Back to section

26 See paragraph 14. Back to section

27 See paragraph 582. Back to section

28 https://globalarbitrationreview.com/article/miasma-of-dishonesty-hoffmanns-comments-nigeria-case. Back to section

29 [2023] EWHC 2638 (Comm), see paragraphs 589–590. Back to section

30 See paragraph 592. Back to section

31 See www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/index.htm. Back to section

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

33 *Blaney v. Persons Unknown (unreported; October 2009).* *Back to section*

34 Note 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 (seeSharp and others v. Blank and others [2017] EWHC 141 (Ch)). Back to section

35 Case law on costs budgeting includesHarrison 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. It was held in Utting v. City College Norwich [2020] EWHC B20 (costs) that an underspend of sums under phases of a costs budget was not a good reason to depart from the budget and subject costs to detailed assessment. In Seekings and others v. Moores and others [2019] EWHC 1476 (Comm), where the defendant sought to revise his cost budget upwards, the court held that there had been no significant developments in the litigation to justify the increase, because the additional work should have been anticipated. Back to section

36 *Lewis v. Eliades (No. 1) [2002] EWHC 335 (QB).* *Back to section*

37 [2016] EWHC 2892 (Comm). Back to section

38 SeeEMFC Loan Syndications LLP v. The Resort Group plc [2022] 1 WLR 717, 737; [2021] EWCA Civ 844, paragraph 111. Back to section

39 [2016] EWHC 207 (Ch). Back to section

40 [2020] EWHC 3082 (TCC). Back to section

41 SeeSocial Work England v. Sannoh [2023] EWHC 1049 (Admin). Back to section

42 CPR 19.8. Back to section

43 CPR 19.21–19.26. Back to section

44 *Emerald Supplies Ltd v. British Airways plc [2010] EWCA Civ 1284. This case was cited and reaffirmed by the Court of Appeal in Lloyd v. Google LLC [2019] EWCA Civ 1599, in which it was held that for a claim brought under the then CPR 19.6, it must be possible to say of any particular person whether they qualify for membership of the represented class of persons by virtue of having the same interest as the representative. The class action did not have to rely on the facts of how each individual had been affected to pass the same interest test. The Supreme Court delivered its decision in Lloyd v. Google LLC in 2021.* ^ Back to section

45 *Office of Fair Trading v. Abbey National plc and others [2009] UKSC 6.* ^ Back to section

46 See, for example, the class actions brought by shareholders of RBS in respect of the 2008 RBS rights issue, 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, and the action brought inLloyd v. Google LLC under Rule 19.6 of the CPR. On the Rights Issue litigation, RBS announced on 5 December 2016 that it had settled with three of the five claimant groups, 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. On the Lloyds/HBOS litigation, the High Court has recently handed down judgment in Sharp and others v. Blank and others [2019] EWHC 3078 (Ch), dismissing the claim against the bank and five of its former directors on the basis that the bank's failure to provide sufficient information to its shareholders had not been causative of any loss. 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 saw 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. Judgment was found against the Post Office and the matter was settled for a sum of £57.75 million in December 2019. In March 2018, the court granted a GLO to manage the legal claims brought against Volkswagen Group UK for financial compensation in respect of the NOx emissions scandal. Over 90,000 car owners joined the action. A trial of two preliminary issues of law was heard in December 2019, and the claim appears to have settled before trial. On 4 October 2019, the court granted a GLO allowing claimants to bring legal action against British Airways following its data breach in September 2018, resulting in the theft of customers' personal data. This is the first UK group action brought under the General Data Protection Regulation seeking to claim compensation for non-material damage. In the Lloyd v. Google action, the court noted that the representative procedure in CPR 19.6 is a 'flexible tool' that may be appropriately adapted as developments in modern technology increase the potential for mass harm. The court also considered that the same interest test should be interpreted purposively and pragmatically, having regard to the purpose of CPR 19.6 to deal with cases justly. On damages, Lord Leggatt considered that it was appropriate to calculate damages in proceedings on a basis common to all persons represented, or that issues of liability may be decided in a collective action but then form the basis for individual claims for compensation. ^ Back to section

47 *Walter Hugh Merricks CBE v. Mastercard Incorporated and others [2017] CAT 16.* ^ *Back to section*

48 [2013] SCC 57. ^ Back to section

49 *Walter Hugh Merricks v. Mastercard Inc [2019] EWCA Civ 674.* ^ *Back to section*

50 *Mastercard Incorporated and others v. Walter Hugh Merricks CBE [2020] UKSC 51.* ^ *Back to section*

51 *Kent v. Apple Inc [2022] CAT 28, paragraph 23.* Back to section

52 *Commercial and Interregional Card Claims v. Mastercard [2023] CAT 28, paragraph 131.* Back to section

53 *Mark McLaren Class Representative Ltd v. MOL (Europe Africa) Ltd and others [2022] EWCA Civ. 1701, paragraph 35.* Back to section

54 *BT Group Plc v. Le Patourel [2022] EWCA Civ 593, paragraph 89.* Back to section

55 *Boyle v. Govia Thameslink Railway [2021] CAT 38, paragraph 12.* Back to section

56 See, for example,Nelson v. Halifax plc [2008] EWCA Civ 1016. Back to section

57 EU Taking of Evidence Regulation (Council Regulation 1206/2001/EC). Back to section

58 CPR 5.4C(1). InR (on the application of British American Tobacco (UK) Ltd and others) v. Secretary of State for Health [2018] EWHC 3586, the court affirmed that it had inherent jurisdiction to grant access to documents on the court file, even though the documents might not technically fall within the scope of the CPR. Back to section

59 [2019] UKSC 38. Back to section

60 *Yeheshkel Arkin v. Borchard Lines Ltd and Others [2005] EWCA Civ 655.* Back to section

61 See http://associationoflitigationfunders.com/code-of-conduct/. An updated version was published in January 2018. Back to section

62 However, inRe Ingenious Litigation [2020] EWHC 235 (Ch), the High Court found that a litigation funder's membership of the Association of Litigation Funders was not sufficient to give confidence that it would meet the liability for security for costs, which has led to questions being raised around the relevance of the organisation. Back to section

63 [2016] EWCA Civ 1144. Back to section

64 *Yeheshkel Arkin v. Borchard Lines Ltd and Others [2005] EWCA Civ 655.* Back to section

65 [2020] EWCA Civ 246. This case followed the earlier judgment inDavey v. Money [2019] EWHC 997 (Ch), in which the High Court clarified that the Arkin cap is best understood as an approach that the Court of Appeal intended should be considered as a means of achieving a just result in all the circumstances, but that it was not a rule to be applied automatically in all cases involving commercial funders. Back to section

66 SI 2013/609. Back to section

67 [2004] EWCA Civ 741. Back to section

68 EU Fourth Money Laundering Directive (2015/849). Back to section

69 EU Fifth Money Laundering Directive (2018/843). Back to section

70 Money Laundering and Terrorist Financing (Amendment) Regulations 2019 and Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020. Back to section

71 Money Laundering and Terrorist Financing (Amendment) Regulations 2019 and Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022. Back to section

72 EU General Data Protection Regulation (Regulation (EU) 2016/679). Back to section

73 Sections 142 to 159 DPA. Back to section

74 EU Data Protection (Law Enforcement) Directive (2016/680). Back to section

75 [2004] UKHL 48. Back to section

76 *Three Rivers District Council and others v. Governor and Company of the Bank of England [2003] EWCA Civ 474.* *Back to section*

77 [2018] EWCA Civ 2006. This sentiment was echoed in the Court of Appeal's more recent decision inCivil Aviation Authority v. R Jet2.com Ltd [2020] EWCA Civ 35. Back to section

78 [2016] EWHC 3161 (Ch). Back to section

79 [2020] EWCA Civ 35. Back to section

80 [2020] EWHC 2437 (Comm). Back to section

81 [2013] UKSC 1. Back to section

82 It is unlikely that the privilege applies to non-adversarial situations;Re L (A Minor) [1997] AC 16. Back to section

83 [2018] EWCA Civ 2652. Back to section

84 SeeR (on the application of River East Supplies Ltd) v. Crown Court at Nottingham [2017] EWHC 1942 (Admin). Back to section

85 *Burmah Oil Co Ltd v. Governor and Company of the Bank of England [1980] AC 1090.* *Back to section*

86 *Oceanbulk Shipping & Trading SA v. TMT Asia Limited [2010] UKSC 44.* Back to section

87 [2007] EWHC 625 (Ch). Back to section

88 [2009] EWHC 1102 (TCC). Back to section

89 *Three Rivers (No. 6) [2004] UKHL 48.* Back to section

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

91 *Compagnie Financiere du Pacifique v. Peruvian Guano Co (1882) 11 QBD 55.* Back to section

92 [2020] EWHC 1008 (QB). Back to section

93 [2020] EWHC 298 (Ch). Back to section

94 InKazakhstan Kagazy plc v. Zhunus [2019] EWHC 878 (Comm), the High Court partially granted an order for specific disclosure apparently under CPR 31.12, noting that the proceedings were subject to CPR 31 when standard disclosure was ordered, even though, 'strictly', CPR 31 no longer applied. Back to section

95 [1980] 1 WLR 627. Back to section

96 [2016] EWHC 256 (Ch). Back to section

97 [2016] EWHC 1464 (Ch). Back to section

98 [2016] EWHC 2759 (Ch). Back to section

99 [2017] 10 WLUK 149. Back to section

100 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 be commenced only with the consent of the parties, it is treated here as an alternative to the formal court process. Back to section

101 [2019] EWCA Civ 1467. Back to section

102 *McParland & Partners Ltd and another v. Whitehead [2020] EWHC 298 (Ch).* Back to section

103 *Mills & Reeve Trust Corporation Limited v. Martin & Ors [2023] EWHC 654 (Ch); see paragraph 10.9 Chancery Guide 2022 (June 2023 revision).* Back to section

104 [2017] UKSC 16. Back to section

105 Available from Oxford University Press. Back to section

106 [2002] EWCA Civ 303. Back to section

107 [2004] EWCA Civ 576. Back to section

108 [2013] EWCA Civ 1288. Back to section

109 Mediation Directive (Council Directive 2008/52). Back to section

110 [2020] UKSC 38. Back to section

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