

## **I. INTRODUCTION TO ENGLISH LAW**

### **I.1 LEGAL SYSTEM**

The English legal system can be distinguished from many other European legal systems as it does not have a codified body of rules which are interpreted by the courts. Rather, English law has come about through a combination of common law, the rule of equity, judicial decisions, Acts of Parliament and, recently, European legislation.

### **I.2 SOURCES OF LAW**

#### **I.2.1 Common Law**

The common law system is based in part on judicial precedent: the lower courts must take account of and follow the decisions made by the higher courts. This means that they are bound by the higher courts' decisions. The lower courts are not bound by their own decisions, although decisions from another lower court have persuasive value.

In terms of the higher courts, the High Court is bound by the decisions of the Court of Appeal and the House of Lords (now known as the Supreme Court); the Court of Appeal is bound by the decisions of the Supreme Court as well as by its own decisions. Supreme Court's decisions bind itself, though may be departed from in appropriate circumstances.

#### **I.2.2 Statute Law**

There are 2 forms of UK legislation: primary legislation (Acts of Parliament) and secondary legislation (which generally deals with putting into effect primary legislation).

#### **I.2.3 European Law**

The European Communities Act 1972 obliges the English courts to give effect to EC law in cases before them. There are a number of situations where an English court could be asked to interpret EC law. A claimant or defendant may wish to rely on it or may be accused of breaching provisions of EC legislation or legislation implementing it.

In addition to the above, pursuant to section 3 of the Human Rights Act 1998 which came into force on 2 October 2000, the courts are now required to interpret all legislation whenever it was enacted in a way which, as far as possible, is compatible with the rights afforded under the European Convention on Human Rights.

### **I.3 LIMITATION PERIOD**

Limitation under English law is governed by the Limitation Act 1980 (as amended). If the relevant period of time elapses without proceedings being issued, the claim will be 'statute-barred'. Although the claimant is still entitled to bring a claim, the defendant will have an implegable defence.

For claims arising in contract or tort, the general rule is that the claimant has 6 years from the date of the cause of action arising to issue proceedings. Generally, the cause of action in contract cases arises at the time of the breach. A cause of action arises in tort when the negligent act or omission complained of occurred.

## **2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION**

### **2.1 JURISDICTION**

#### **2.1.1 English Courts**

The jurisdiction of the English courts to hear proceedings is derived from common law and EC legislation. The basic position is that the English courts have jurisdiction where the claim form was served on the defendant whilst it was domiciled (i.e. present) in England or Wales or where the defendant has submitted to the jurisdiction of the English courts. In some circumstances, the English courts will also have jurisdiction to hear proceedings where the defendant is domiciled abroad: see further below at 2.1.2.

Where proceedings are commenced in the English courts, the defendant may object to the proceedings continuing on the ground that the English courts are not the most appropriate place to hear the dispute.

#### **2.1.2 The European Union**

The jurisdiction of the UK courts in civil or commercial matters involving parties in different EU member states is largely determined by the Brussels Regulation (EC Council Regulation 44/2001) (“the Regulation”) and the Lugano Convention of 1988 as regards the EFTA states. The Regulation was effectively extended to apply to Denmark in July 2007. The Regulation and the Lugano Convention are broadly similar.

The general rule under the Regulation is that a defendant should be sued in his home court i.e. the place where an individual lives or where a company has its registered office or central place of business. However, there are exceptions to this. For example, where there is a claim for breach of contract, the claimant can sue the defendant in the courts of an EU member state where the defendant is domiciled or in the courts of the place of performance of the contractual obligation.

#### **2.1.3 Rest of the World**

Where a proposed defendant is based outside of the EU it is still possible that the defendant may be sued in England and Wales. Generally this will involve applying to the court for permission to serve a claim form outside of the jurisdiction.

The grounds on which a court will allow service out of the jurisdiction are set out in the court rules: the Civil Procedure Rules 1998 (“the CPR”). For example, a party can apply for permission to serve outside of the jurisdiction where a claim is made in respect of a contract which includes a clause submitting to the jurisdiction of the English courts. In every case, irrespective of the ground relied on, the applying party must convince the court that England and Wales is the proper place to hear the dispute.

### 3. LEGAL PROCEEDINGS

#### 3.1 COURT SYSTEM

##### 3.1.1 Magistrates' Court

Magistrates' courts are a key part of the criminal justice system hearing approximately 95% of criminal cases. Magistrates are lay and are guided by a legally qualified court clerk. They do not sit with a jury.

##### 3.1.2 Crown Court

The Crown Court hears more serious criminal cases. The court is composed of a judge and a lay jury consisting of 12 members selected from the electoral roll.

##### 3.1.3 County Court

The County Court deals with civil matters such as: claims for debt repayment; personal injury; and breach of contract concerning goods or property. Claims are for smaller amounts and are generally more straightforward, often with no need for solicitors to be involved.

##### 3.1.4 High Court

The High Court deals with more serious and larger civil disputes and sits in London and other large cities (including Manchester). It is divided into three divisions:

- **Chancery Division** which deals with civil cases only;
- **Queen's Bench Division** which deals mostly with civil cases and includes the Commercial Court which hears complex and high value commercial disputes in areas such as banking and insurance, and the Admiralty Court relating to maritime law; and
- **Family Division** deals principally with matrimonial cases including those involving child custody.

##### 3.1.5 Court of Appeal

The Court of Appeal sits mainly in London. In certain circumstances, it can sit outside of London in another major city. The Court of Appeal consists of two divisions:

- **the Civil Division**, which hears appeals from:
  - the three divisions of the High Court;
  - the County Courts across England and Wales;
  - certain tribunals such as the Employment Appeal Tribunal;
- **the Criminal Division**, which hears appeals from the Crown Court.

##### 3.1.6 Supreme Court

The Supreme Court is the highest criminal and civil court and the final court of appeal in the UK. It sits in London.

## **3.2 CIVIL PROCEDURE**

Litigation in the English courts is governed by the CPR which cover all aspects of the litigation process. The overriding objective of the CPR is to enable cases to be dealt with quickly and proportionately. The CPR applies to most, but not all, forms of litigation.

### **3.2.1 Pre-Action Procedure**

The CPR require detailed statements of practice called “Pre-Action Protocols” to be followed in most cases before a claim is issued. There are currently twelve Pre-Action Protocols which apply to specific areas such as professional negligence claims and construction disputes. Where there is no practice specific protocol for the dispute in question, the parties should usually follow the pre-action procedure set out in the “Practice Direction – Pre-Action Conduct”.

Broadly, the pre-action rules require each party to provide information about the prospective claim with the objective of enabling the parties to avoid litigation by settling the claim, where possible, and to support the efficient management of proceedings where litigation cannot be avoided.

The use of mediation as a tool to try and settle disputes before proceedings are commenced has become increasingly important over recent years. Whilst the courts cannot force the parties to enter into a form of Alternative Dispute Resolution such as mediation, the pre-action rules strongly encourage the parties to settle the issues and consider using a form of Alternative Dispute Resolution: see further section 4 Alternative Dispute Resolution below.

### **3.2.2 Statements of Case and Commencement of Proceedings (CPR 7-10)**

Where proceedings are commenced, the first formal stage in litigation is the issue of the claim form. The claim form is a court document which sets out the most basic details of the claim and which must be completed and sent to the court. The court will stamp the claim form, at which point it becomes formally ‘issued’.

The particulars of claim set out the details of a claimant’s case and can be set out in the claim form itself or in a separate longer document. The claimant must certify in the claim form or particulars whether the requirements of the relevant pre-action protocol have been complied with: see further 3.2.1 Pre-Action Procedure above.

### **3.2.3 Allocation to Track (CPR 27-29)**

Once the court has received the defendant’s defence and any reply from the claimant, the parties are required to fill in an allocation questionnaire. This gives the court certain basic information about the claim such as the approximate value, which witnesses are to be called, whether expert evidence is necessary, how long the parties think the trial is likely to last and an estimate of costs. As a result of the information provided, the court will allocate the case to a “track”.

There are three tracks, each of which is managed differently by the court:

- **Small claims track** where the value of the claim does not exceed £5,000 (or £1,000 for a personal injury claim);
- **Fast track** where the value of the claim is between £5,000 and £25,000;
- **Multi-track** where the value of the claim exceeds £25,000, or those of a particularly complex nature. Cases which are commenced in the High Court are automatically allocated to the multi-track.

### 3.2.4 Directions (CPR 3)

The CPR require the courts to actively manage cases. This is done partly by the issuing of directions (a court ordered timetable) setting out the future procedural steps for the claim. In small claims and fast track matters, the court will usually give standard directions issued without a hearing. In multi-track claims, the court may fix a case management conference where the parties' representatives will attend court to agree a timetable. The court's case management powers are very wide. Failure to follow directions can result in sanctions being ordered by the court against the defaulting party.

### 3.2.5 Disclosure, Witness Statements and Other Evidence (CPR 31-32, 35)

Disclosure is a vital stage in litigation. Each party must disclose to the other (and allow him to see and copy) documents which are relevant to the issues in dispute. Specifically, the obligation is to disclose all documents upon which the disclosing party will rely, documents which adversely affect his own or another party's case and documents which support another party's case. The aim of the disclosure obligation is to ensure that parties are not taken by surprise at the trial and to ensure the court has all relevant information before it to enable it to do justice between the parties. It is often at this stage, when a party sees what documents the other side has, that a case may settle.

One of the directions that the court will give is for the exchange of witness statements and other evidence. A failure to serve a witness statement on a party may result in that witness not being able to give evidence when the case reaches trial.

The court can also give permission for expert evidence to be used. Whether or not expert evidence is required will depend on the type of case and the issues involved. The expert owes an overriding obligation to the court to be impartial and does not owe a duty to the party instructing him. There can be more than one expert witness in each case if there are several areas where the court requires assistance in determining a particular issue.

### 3.2.6 Pre-Trial Checklist and Pre-Trial Review

The pre-trial checklist is a form setting out how the parties intend to conduct the trial and key information needed by the court (such as the availability of witnesses) before the trial commences.

The pre-trial review is a hearing at which the judge gives directions about the conduct of the action in preparation for trial. The court needs to ensure that the case is ready to go to trial.

### **3.2.7 Trial**

At the trial, each side will present its case. When all evidence has been heard, each party will make a closing submission summing up his case. The judge will then consider the evidence and give his decision. A decision can be given immediately but typically the judge will reserve judgment until a later date.

There are two principal issues to be decided following the court's judgment, the issue of costs and, if the claimant is successful, the enforcement of his judgment.

### **3.2.8 Costs and Funding Litigation**

The usual rule is that the losing party reimburses the winning party in respect of all or a proportion of its costs. The usual costs which must be met are: legal fees and disbursements (barristers' fees, court fees, expert witnesses' fees, fees for any other dispute resolution process such as mediation (see further below at 4.2) photocopying and travel expenses).

The liability to pay the costs of the other side can arise in two situations. During a case, applications can be made on an interim basis. The losing party to the application will usually be ordered to pay the other party's costs of that application within 14 days. Otherwise, the liability to pay costs will arise at the end of trial (to be payable by the losing party) or if costs are agreed as part of any settlement.

Commercial litigation in the English courts has traditionally been funded on a privately paying basis where fees are billed by the hour together with disbursements. However, it is now possible to fund commercial litigation by way of a conditional fee agreement ("CFA"). Where a client's case is sufficiently strong and the opponent has the means to pay, it is possible to enter into a CFA with a firm of solicitors whereby the client will typically pay for legal services at a discounted rate if the matter is unsuccessful and only at a higher rate if they win. Under a CFA, if the client wins, they may also become liable to pay a success fee which is an uplift on the fees and is effectively a bonus payment reflecting the risks being taken by the solicitors in respect of their fees. The client will normally be entitled to recover the majority of these costs from the losing party. If the client loses, the client does not have to pay any higher level of fees or the success fee.

The client's exposure to an adverse costs order in respect of his opponent's legal fees and disbursements (as well as his own disbursements in some cases) can be covered by taking out "after the event" insurance. Where both of these new funding structures are used in conjunction with one another, the financial risks of litigation are shared with solicitors and/or insurers and the client benefits significantly in terms of that shared risk and potentially the payment of much lower legal fees.

### **3.2.9 Interim Measures**

As the litigation progresses, the parties may need to apply to the court to determine a particular issue. This is done by way of an interim application. Generally, applications must be made 'on notice' which means that the other party must be informed about the application at least three days beforehand in order to give the party time to prepare any objections it may have which can be submitted at the hearing.

Examples of applications that may be made include:

- an application to set aside a judgment that has been entered in default;
- an application for an interim injunction;
- an application for security for costs;
- an application for summary judgment;
- an application for specific disclosure.

### **3.2.10 Enforcement Proceedings**

There are a number of ways in which a judgment may be enforced. Examples include seizing the judgment debtor's assets (known as execution), obtaining a charging order over the judgment debtor's property or shares, whereby the claimant would have a right to the proceeds of any sale of that property or shares in order to satisfy the judgment insofar as funds are available after prior charges are satisfied. Other alternatives include obtaining an attachment to a judgment debtor's earnings or bringing insolvency proceedings against the judgment debtor.

### **3.2.11 Enforcement of Foreign Decisions**

As a result of reciprocal arrangements, a judgement obtained in an EU contracting state can be recognised in England and Wales where the judgment creditor follows a relatively straightforward procedure.

The procedure for registration and enforcement of a non-EU judgment in England and Wales is set out in CPR Part 74. The party seeking to register the judgment must make an application to the High Court supported by the following written evidence:

- the judgment or a verified or certified or otherwise authenticated copy of it;
- where the judgment is not in English, a translation of it into English certified by a notary public or other "authorised person" or accompanied by written evidence confirming that the translation is accurate.

The written evidence must state and exhibit the information required in CPR 74.4(2) and 74.4(5).

## **4. ALTERNATIVE DISPUTE RESOLUTION**

### **4.1 ALTERNATIVE DISPUTE RESOLUTION**

Alternative Dispute Resolution or ADR is the collective term for the various procedures that can be used to try and resolve disputes with the help of a neutral third party and without the need for a court hearing. The most commonly used method of ADR in the UK is mediation. The other procedures are arbitration, expert determination, adjudication and early neutral evaluation.

Early neutral evaluation is non-binding and similar to mediation but the independent party carries out an appraisal of the case rather than conducts or facilitates a negotiation. Arbitration and expert determination derive from the contractual arrangement between the parties and

their outcome is binding on the parties. Adjudication is a statutory process for disputes in relation to construction contracts.

ADR is more informal than court proceedings and confidential. It can save time and costs in helping parties to resolve a dispute. The court cannot force parties to use ADR but it will encourage the appropriate use of ADR and there can be costs sanctions against parties who unreasonably refuse to participate. The court rules regarding pre-action conduct (see further 3.1 above) strongly encourage the parties to use ADR if appropriate.

## **4.2 MEDIATION**

Of the various forms of ADR; mediation is the most commonly used. It is a voluntary dispute resolution process in which a neutral person (the mediator) tries to help the parties to reach a negotiated settlement. It is to be distinguished from litigation in that it is voluntary and the third party involved is not able to impose a solution. Mediation is a consensual process and is not binding unless and until a settlement agreement is reached.

It is important to note that mediation is not appropriate in all cases, for example, if a party requires a court order compelling someone to do or not do something (an injunction) or if a ruling is required on a point of law.

### **4.2.1 General Procedure**

Typically, an independent third party appointed by the parties will review written statements submitted by each of them. The parties will meet together to put their case and then each party will move to separate rooms and the mediator will move between them. By listening to the views and objectives of each party, the mediator can facilitate a commercially realistic solution.

### **4.2.2 Advantages and Disadvantages of Mediation**

The advantages of mediation are that it is considerably less expensive than litigation. Furthermore, due to its non-confrontational nature, it can enable parties to maintain a business relationship as well as producing a commercially realistic solution. Other advantages are that it is much quicker than litigation, and affords the parties more flexibility.

However, it should also be borne in mind that parties cannot be forced to mediate (although parties who unreasonably refuse to do so may find themselves penalised later during any subsequent litigation). Furthermore, any solution that is reached is not binding until a settlement agreement is entered into, and therefore is not enforceable until that stage. Given the relative speed of mediation, it is possible that not all relevant facts will be disclosed which in turn may lead to a wrong decision.

## **5. ARBITRATION**

### **5.1 ARBITRATION IN ENGLAND**

England and Wales is well regarded both domestically and internationally as an arbitration centre. As such, many of the disputes that come to be arbitrated here may have no connection with England and Wales, other than it is the chosen seat for arbitration.

Often used as a means of resolving disputes in the shipping and construction industries, arbitration may be, and is, used in a broad range of disputes including financial markets, commodities, oil and gas as well as more general commercial disputes.

## **5.2 PROCEDURE**

Arbitration is often attractive to commercial clients as it enables them to resolve a dispute privately (rather than in the courts which generally are open to the public).

Arbitration usually arises from an arbitration clause in a contract between the parties. The clause will provide that where a dispute arises between the parties in relation to the contract, that dispute should be resolved by arbitration rather than litigation in the court. The process and procedures to be followed derive from the terms of the contract and/or Arbitration Act 1996 or some other set of arbitral rules. For example, the London Court of International Arbitration, the Chartered Institute of Arbitrators and the International Chamber of Commerce all have their own bodies of rules.

What is common to any arbitration is that an independent third party (or an arbitral panel of more than one party) is appointed by the parties to the dispute to reach a decision. The decision is binding on the parties. There are only limited rights of appeal in arbitration: see further 5.3 below.

There are typical stages in many arbitrations. However, every dispute is different and there may be a variation of the usual stages in some circumstances. Typically the claimant issues a notice of arbitration to commence the process and, if the other party agrees to arbitrate the dispute, the parties then appoint an arbitrator or arbitral panel.

An arbitration will usually then follow a similar procedural path to litigation. For example, the parties will exchange documents setting out the details of their respective cases in accordance with a timetable that has been agreed by them or given by the arbitrator (if the parties cannot agree). The parties will then serve documents setting out their respective claim or defence and there will be disclosure of documents, exchange of witness statements and expert evidence (where appropriate).

It is usual for a hearing to take place which is very similar to a trial at court in litigation but is not usually quite as formal a process. There are, however, circumstances in which an arbitration can be decided on the basis of documents alone and there is no need for a hearing. At the end of the hearing, the arbitrator or panel will consider the submissions of the parties and the evidence and give an award (their decision). This can be given immediately but is usually given at a later date.

Subject to the parties' prior agreement, the arbitrator may order one party to pay the other's costs. It is not possible for an arbitration agreement to provide for one party to pay the costs of the arbitration in any event.

## **5.3 APPEAL**

The English courts might become involved where a party wishes to challenge an award made by an arbitrator. This generally can only happen after the parties have exhausted any procedures

available pursuant to their arbitration agreement. It should be noted that an arbitrator's decision on the facts is final and will not be interfered with by the courts. Unlike other forms of Alternative Dispute Resolution, an arbitral award is legally enforceable. Under the Arbitration Act, a party may apply to the High Court to enforce an award as if it were a court judgment.

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