COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

United Kingdom LITIGATION

Contributing firm

Slaughter and May

Damian Taylor

Partner | damian.taylor@slaughterandmay.com

Olga Ladrowska

Associate | olga.ladrowska @slaughterandmay.com

This country-specific Q&A provides an overview of litigation laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
LITIGATION

1. What are the main methods of resolving commercial disputes?

The three main methods of resolving commercial disputes in the UK are litigation, arbitration and mediation. Litigation usually commences in the High Court according to the Civil Procedure Rules ("CPR"). Arbitration is governed by the Arbitration Act 1996 and the New York Convention. Both are adversarial processes. Mediation is a non-adversarial structured negotiation led by a neutral mediator with a view to agreeing a settlement. It is also not uncommon for parties to resolve a matter through negotiation either directly or through their legal representatives.

2. What are the main procedural rules governing commercial litigation?

The CPR govern the procedural aspects of litigation. The rules are designed to ensure that cases are dealt with justly and at proportionate cost. The CPR are supplemented by practice directions ("PD") which provide practical guidance on the rules. The general scheme is that individual areas of civil procedure are governed by parts of the CPR, with almost every part being supplemented by one or more PD. The CPR and PD cover all stages of litigation, from initiating proceedings to the appeal process.

3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

A commercial claim should be made in the High Court if it is worth more than £100,000. The trial will be heard before one judge. If the judgment is contested, either party may seek permission to appeal to the Court of Appeal where a case will ordinarily be heard by a panel of three judges. The final court of appeal is the Supreme Court where normally five Justices hear an appeal, but it can be more in special cases (such as the decision on whether Parliamentary consent was necessary to invoke Article 50 and start the BREXIT process, where all 11 sitting Justices heard the case).

4. How long does it typically take from commencing proceedings to get to trial?

The basic timetable is dictated by the CPR, but considerable discretion is left to the court to fix the deadlines for each stage of the litigation process depending upon the complexity of the case. It is not uncommon to take at least 18 months to get to trial even for a relatively straightforward commercial dispute. Other cases can take much longer. Judges treat procedural deadlines seriously and can impose sanctions on parties causing delays (these can include adverse costs orders or, in extreme cases, strike out orders). The Shorter Trials Scheme has proven popular and allows parties in the business and property courts to get from issuing proceedings to judgment in less than a year. It is therefore worth considering this route for relatively simple claims with minimal disclosure and limited evidence. Parties should, however, factor in the time for any appeals, which can be considerable as both the Court of Appeal and Supreme Court are very busy. Alternatively, the Flexible Trials Scheme in the business and property courts is designed to limit disclosure and allow for earlier trial dates, within a more standard procedural framework.

5. Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?

Statements of case are filed on a public register and can (in general) be searched and copied by members of the public. Hearings take place and judgments are handed down in public, other than in exceptional circumstances. The exceptional circumstances include the following situations: where publicity would defeat the object of the hearing; where the hearing involves matters relating to national security; and where the hearing involves confidential information (including information relating

to personal financial matters) and publicity would damage that confidentiality.

6. What, if any, are the relevant limitation periods?

Limitation periods for different types of claims are set out in the Limitation Act 1980. These include a basic six year limitation period for claims relating to contract, tort, or breach of trust. For negligence claims, the limitation period is the later of six years from the date the damage occurred or three years from the date on which the claimant had the requisite knowledge and the right to bring the claim (with an overriding time limit of 15 years from the date of the negligent act or omission). Other limitation periods include one year for claims for defamation and twelve years for claims brought in respect of deeds. Time limits may be extended in certain circumstances (for example, where there has been fraud or deliberate concealment).

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

There are different pre-action protocols for some of the most common types of claims, such as debt claims or professional negligence claims. There is also a general practice direction which applies if there has been no specific pre-action protocol. It ensures that the parties have exchanged sufficient information to understand each other's position, make decisions on how to proceed, attempt to settle issues without proceedings and support the efficient management of proceedings. Compliance with the pre-action protocols is not mandatory but the court might take it into account when awarding costs or considering case management directions. It is therefore advisable to follow the relevant protocol whenever possible (although in some cases, such as when a limitation period is about to expire, it might be necessary to issue a claim and then engage in correspondence with the other side).

8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Proceedings are commenced when the court issues a claim form (by stamping it with the court's seal), as prepared and requested by the claimant. The claim form is the first 'statement of case' which includes the name of the court in which the claimant wants the claim to be heard, the parties' names and addresses, a brief summary of the claim and description of the remedy sought by the claimant. Once the claim form has been issued, the claimant must serve it on the defendant within four months, if the claim form is served within the jurisdiction (or six months if service takes place outside the jurisdiction, in which case the court's permission may be required). Service can be effected by the claimant or the court (but it is advisable for a claimant to serve itself).

9. How does the court determine whether it has jurisdiction over a claim?

The rules on jurisdiction have been affected by the UK's withdrawal from the EU. Broadly, for proceedings initiated on or before 31 December 2020, the courts apply the rules in the recast Brussels Regulation while for proceedings initiated after 31 December 2020, the courts apply the common law rules or the rules set out in the Hague Convention on Choice of Court Agreements. Under the recast Brussels Regulation, the court generally has jurisdiction where the defendant is domiciled in England (subject to lis pendens or the exclusive jurisdiction of other EU courts). The court also has jurisdiction where there is an exclusive jurisdiction clause in favour of England, or a close connection between the defendant or the dispute and England (for example, if the dispute concerns land in England, the contract in dispute was due to be performed in England or the relevant tort took place in England). Under the common law rules, the court has jurisdiction if the claim form is served on the defendant whilst it is physically present in England, if the defendant submits to the jurisdiction voluntarily or if the court gives permission for service out under one of the specific heads of jurisdiction (which broadly require showing a connection between the defendant or the dispute and England). Unlike under the recast Brussels Regulation, under common law rules the court has considerable discretion to refuse to exercise its jurisdiction on the basis that England is not the most appropriate forum to hear the dispute. The Hague Convention on Choice of Court Agreements applies where there is an exclusive jurisdiction agreement between the parties designating a particular court to resolve a particular dispute.

10. How does the court determine what law will apply to the claims?

Broadly, following the UK's withdrawal from the EU, the choice of law rules set out in Rome I and Rome II Regulations continue to apply as the UK has retained

them in domestic legislation. Rome I Regulation applies to contractual obligations and Rome II Regulation applies to non-contractual obligations. The general rule under Rome I Regulation is that parties are able to choose the law governing their commercial relationship. In the absence of such a choice, Rome I provides specific rules for determining governing law for various types of contracts (for example, for sale of goods the governing law is the law of the country where the seller has its habitual residence). The general rule under the Rome II Regulation is that the law applicable to non-contractual obligations is the law of the country in which the damage occurs or is likely to occur. However, the rule is subject to a few exceptions, including one providing that if the relevant tort (or delict) is "manifestly more closely connected" with another country, the law of that other country shall apply.

11. In what circumstances, if any, can claims be disposed of without a full trial?

The court has extensive powers of active case management, enabling it to strike out the whole or part of a statement of case which has no reasonable grounds or is likely to obstruct the just disposal of the proceedings. The court can also give summary judgment against a claimant or defendant where it determines that there is no real prospect of success and there is no other reason the case should go to trial. "Real prospect" is quite a low threshold in practice and has been interpreted to mean that the case is not fanciful.

12. What, if any, are the main types of interim remedies available?

The main types of interim remedies are interim injunctions, which can either require a party to do a specific act or to refrain from doing a specific act. Examples of interim injunctions include an order that a party preserves certain relevant evidence or (in more extreme cases) allows another party to take copies of that party's IT systems, and an order that "freezes" some or all of a party's assets (the so-called "freezing injunctions" are particularly effective in cases of suspected fraud where money and other assets can be preserved until the claim is determined).

13. After a claim has been commenced, what written documents must (or can) the parties submit and what is the usual timetable?

The claimant must submit a document called particulars of claim, outlining its case. The document can be served with the claim form or within 14 days after the claim form has been served. Once the defendant has been served, it has 14 days to file a defence (or 28 days, if it chooses to file an acknowledgement of service first). If there are further relevant points to plead, the claimant may file a reply. Following the pleadings stage, both parties must also submit directions questionnaires, which help the court decide which court or division is most appropriate to hear the case.

14. What, if any, are the rules for disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

All documents which are or have been in the party's control, and which harm or support its or another party's case, must be disclosed in litigation. This includes privileged documents. However, a party can withhold privileged documents from inspection by the other side; so even though the other side knows about the existence of those documents, it cannot view them. Types of privilege include privilege against self-incrimination, public interest immunity, legal professional privilege, litigation privilege and common interest privilege. A Disclosure Pilot Scheme is in force in the business and property courts until 31 December 2022. It is designed to encourage a proportionate and bespoke approach to disclosure and accordingly, to address the time and cost challenges often presented by large numbers of electronic documents.

15. How is witness evidence dealt with in commercial litigation (and, in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

Witnesses can be summoned to attend court. However, the normal procedure is for each side to produce and exchange written witness statements on which they rely well in advance of trial. These can be drafted by solicitors for the parties but should reflect the witnesses' own words. The witness then typically confirms this evidence in person at trial, together with giving any additional oral evidence, and then the other side is allowed to cross-examine the witness. Depositions are permitted in front of a judge, an examiner of the court or any other person the court appoints, but they are unusual. In April 2021 new rules on witness statements were introduced for trial witness statements in the

business and property courts. They aim to reduce lengthy and "over-lawyered" witness statements and require, among other things, that a witness statement lists any documents that the witness has referred/been referred to when preparing it.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is permitted at the court's discretion as their primary role is to assist the court on technical matters. Experts owe a duty to exercise skill and care and to comply with the CPR and relevant code of ethics. They have an overriding duty to help the court – a duty which overrides any obligation to the person instructing them or paying them. In complex cases it is not unusual for each side to instruct their own expert on one or more issues, although the court has the power to order a single expert to be instructed jointly. Experts typically exchange written reports and then seek to agree a joint statement on points on which they agree and disagree. They are then cross-examined separately at trial or, as part of a process called "hot tubbing", they appear simultaneously and answer common questions from both counsel and the judge.

17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?

Permission to appeal must be given by the court before a decision can be appealed. An application for permission to appeal can be made either to the lower court at the hearing at which the decision to be appealed was made or to the appeal court. If an application is made to the appeal court, it must be requested in the 'appellant's notice'. This must be filed within 21 days to appeal to the Court of Appeal against a county court or High Court decision. Appeals to the Supreme Court must be made within 28 days.

18. What are the rules governing enforcement of foreign judgments?

The rules on enforcement of foreign judgments have been affected by the UK's withdrawal from the EU. Broadly, for proceedings initiated on or before 31 December 2020, the recast Brussels Regulation governs the enforcement of judgments originating from the EU member states. Under the recast Brussels Regulation, judgments given in one member state are freely enforceable in another member state with only minor administrative steps required. For judgments given in proceedings initiated after 31 December 2020 in the EU or other foreign judgments, enforcement is usually governed by common law rules. Under the common law rules, a foreign judgment is enforceable only if it is final and conclusive (and for a sum of money). In cases where jurisdiction of the foreign court was based on an exclusive choice of court agreement, the Hague Convention on Choice of Court Agreements may also be relevant to the enforcement of judgments from EU member states, Mexico, Singapore and Montenegro.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?

Generally, the costs of litigation can be recovered from the other side as the costs are awarded to 'indemnify' the winning party for the cost and expenses incurred in vindicating or defending their rights. However, it is rare that the winner will be fully indemnified (a general rule of thumb is 50-70% recovery). There is a general 'no profit' rule providing that the costs awarded can never exceed the solicitors' and client's costs. In determining costs, the court considers a variety of factors (including the party's conduct during trial).

20. What, if any, are the collective redress (e.g. class action) mechanisms?

There are various procedural mechanisms which can be used to bring a 'group action' in the UK: joint claims by multiple claimants; consolidation of separate claims into one set of proceedings which can be managed together; group litigation orders ("GLOs") where multiple individually commenced claims have common or related issues of fact or law; and representative claims where one representative acts on behalf of one or more persons with the same interest in the claim (but the "same interest" is interpreted very narrowly). There is also a much more liberal collective actions regime for competition law claims pursued in the Competition Appeal Tribunal ("CAT"). The CAT has a wide discretion to certify claims initiated on behalf of, for example, victims of a cartel, on an opt-out or opt-in basis, and approve collective settlements where appropriate.

21. What, if any, are the mechanisms for joining third parties to ongoing

proceedings and/or consolidating two sets of proceedings?

The procedures to add third parties to ongoing proceedings or to consolidate two sets of proceedings are outlined in the CPR. Court approval is generally required (although Part 20 Defendants can be added without permission at the time of filing the defence). To add parties to ongoing proceedings, the court must find that it is 'desirable' to add the new party to resolve the matter. The test for joint claimants is that the claims can be 'conveniently' disposed of in the same proceedings. For a group litigation order to be made, the issues must be common or related.

22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

Third party litigation funding is permitted, however it must not breach the rule against 'maintenance and champerty', which means that there must be no element of impropriety or corruption of justice. This is a complex and developing area. "Nuisance" claimants who "buy up" claims they have no legitimate interest in will not be permitted to proceed. Generally, litigation funders should follow the 'Code of Conduct for Litigation Funders' produced by the Association of Litigation Funders. Third party funders can be made liable for costs incurred by the other side. Litigation funding is becoming increasing common in class action disputes (including cartel damages cases and securities cases).

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?

The UK courts initially experienced significant difficulties and delays, though business continuity steps have been implemented in response to the pandemic. Following the easing of lockdown restrictions, the courts are conducting some face-to-face hearings with relevant social distancing measures implemented. However, many cases are still being conducted remotely (by audio or video conference). Other cases adopt a hybrid approach where some participants are physically present at the court and others join remotely. These approaches have been facilitated by provisions in the UK's emergency Coronavirus Act 2020, new Practice Directions in the Civil Procedural Rules, and other informal guidance. Initially, the courts appeared reluctant to allow longer, more substantive trials (especially those involving large legal teams, complex issues or extensive witness evidence) to proceed remotely. Consequently, a number of hearings and trials were adjourned, creating a backlog of cases. However, these delays appear to have largely been cleared despite the courts remaining very busy. In terms of substance of the litigation, following the outbreak of COVID-19, there has been an increase in insolvency procedures, as well as disputes surrounding contractual performance arising from force majeure terms in contracts.

24. What, in your opinion, is the main advantage and the main disadvantage of litigating international commercial disputes?

One of the main advantages of the English courts is their global reach. London's status as a global commercial centre means that defendants face a heavy price if they do not obey the court's orders as significant commercial actors can rarely afford to be unable to come to London or have assets in the jurisdiction. This makes London a popular forum for fraud cases, where the power to compel worldwide asset preservation and disclosure is key. Costs are the main disadvantage, although London is not alone in this and parties can mitigate the high costs of litigation by having up front conversations with their legal advisors about the economies of litigation (which may involve utilizing, for example, the Shorter Trial Scheme) and potential alternatives (such as mediation or settlement).

25. What, in your opinion, is the most likely growth area for disputes for the next five years?

A likely growth area for disputes will be in class actions. These are more established in jurisdictions such as the US, Canada and Australia but procedures are now in place in England to make claims easier to commence and manage, and law firms and litigation funders are more adapt at gathering and funding classes. There have been significant developments in the class action regime in the CAT recently, which resulted in a material increase in the number of competition class action proceedings.

26. What, in your opinion, will be the

impact of technology on commercial litigation in the next five years?

Disclosure review exercises are most likely to be affected as technology assisted review has gained increased recognition and other automated techniques are adopted by parties and, most importantly, the court, to sift through the vast quantities of available data. Also, automated processes, such as intelligent research tools and “smart” contracts have and will continue to take over some tasks previously performed by junior lawyers. This will place an even greater emphasis on lawyers to focus on the specific problems faced by their clients and tailor their advice carefully in order to work as efficiently as possible.

27. What, if any, will be the long –term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?

The COVID-19 pandemic has necessitated widespread and immediate changes to the way in which commercial litigation was conducted in the courts. During the last year, parties and the judiciary have adapted to the use of remote hearings (as further set out in response to question 23) and as lockdown restrictions are being eased it remains to be seen whether, and to what extent, remote and/or hybrid hearings will continue to be adopted in commercial litigation disputes. Given the investment that has been made into implementing procedures to facilitate remote hearings, it is likely that remote hearings will continue to play a role in future commercial litigation. Members of the judiciary seem relatively keen to embrace digital dispute resolution as a further mechanism by which to ensure cases are dealt with at a proportionate cost but continue to emphasise that face-to-face hearings remain the “gold standard”.

Contributors

Damian Taylor
Partner
damian.taylor@slaughterandmay.com

Olga Ladrowska
Associate
olga.ladrowska @slaughterandmay.com