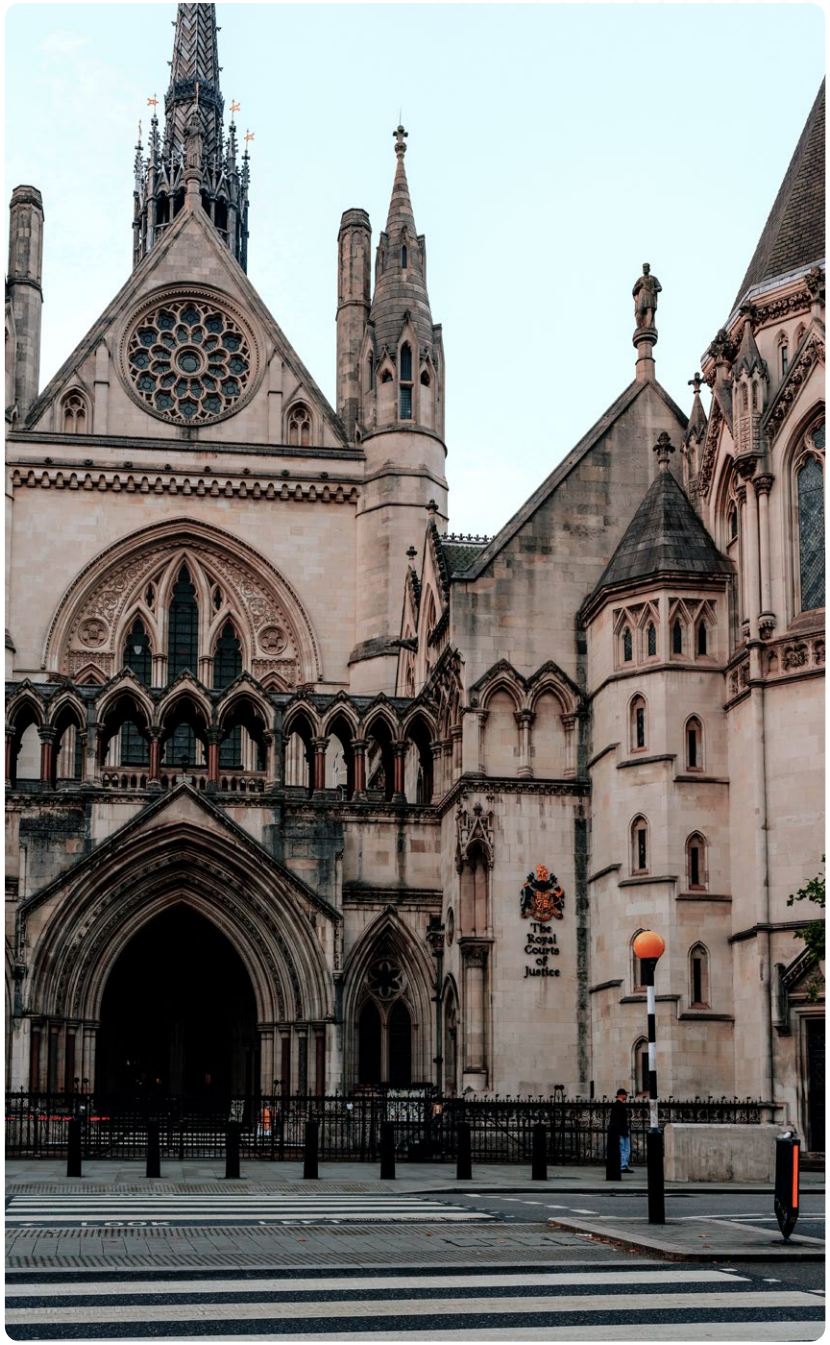

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About the editor

Simon Bushell
Seladore Legal

Simon Bushell of Seladore Legal is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in Chambers UK from the early days of his career. He is frequently lauded in The Legal 500, having been recently inducted into its Hall of Fame for civil fraud expertise and praised as a Leading Individual in commercial litigation. Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes. Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, whereupon he joined Latham and Watkins and became chair of its litigation department in London. Simon has more than 30 years' experience in high-stakes commercial litigation.

Contents

While reading, click this icon to return to the Contents at any time

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United Kingdom

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Gareth Keillor of Seladore Legal is an experienced litigator, who trained and worked at Herbert Smith Freehills until founding Seladore with Simon Bushell and has particular experience of cross-border disputes.

1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

While English litigation and arbitration offer slightly different advantages and disadvantages, both remain very effective and popular methods of resolving complex and high-value domestic and international disputes. Certain industries have a preference towards one method over another. For example, energy and construction disputes often utilise arbitration, given its inherent confidentiality and the ability to engage people with relevant industry experience. Conversely, the financial services industry tend to resolve disputes through litigation, given that it can allow for relatively swift summary judgments in straightforward disputes, such as claims for outstanding debts.

Broadly speaking, litigation has the advantage of enabling a claimant to bring proceedings simultaneously against a number of defendants, even where a defendant may not be a party to the underlying contract (and corresponding jurisdiction clause). Pursuing litigation through the courts allows the claimant access to a highly skilled judiciary through a public process resulting in a decisive outcome. Such outcomes can lead to setting legal precedent, which could be very valuable to a business or industry. In contrast, it is not as straightforward to join third parties to arbitral proceedings, and arbitral awards are confidential and therefore not binding precedents.

While litigation offers these advantages, arbitration offers a more suitable avenue for parties where the ease of enforceability, confidentiality and the involvement of specialist decision-makers is of key importance. Arbitration also gives the parties a high degree of autonomy with how the dispute is approached, allowing for flexibility in respect of the location, timing and language. This flexibility typically means that arbitration proceedings may be resolved quicker than litigation (assuming that summary judgment is not an option) although the degree of autonomy (and the need to pay for the tribunal's fees) will typically mean arbitration proceedings are more expensive to conduct.

In litigation, court decisions can be appealed, which ensures that, as far as possible, the correct decision is reached. While there is generally no appeals process in arbitration, this may be of less concern since arbitration offers the chance of swift finality in the decision process.

"Even post-Brexit. English law is still perceived as being clear, fair and predictable, yet also offers a degree of flexibility that enables businesses to meet their ever-changing demands."

2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?

England has an independent and experienced judiciary, meaning that English law and clauses that submit to the English courts' jurisdiction remain very popular choices in commercial contracts, even post-Brexit. English law is still perceived as being clear, fair and predictable, yet also offers a degree of flexibility that enables businesses to meet their ever-changing demands in a cross-border market.

Nevertheless, dispute resolution clauses have grown more complex in recent years. These clauses can be multi-tiered, incorporating many forms of resolution mechanisms, such as requiring parties to try mediation before commencing formal legal proceedings. Some commercial agreements will contain an 'escalation process' where senior management will be brought in to resolve the dispute (sometimes in good faith) before formal proceedings can even begin. Failure to comply with these multi-tiered resolution mechanisms can result in a breach of contract in and of itself and thus jeopardise any potential claim. Parties must take great care when negotiating such provisions.

After Brexit, the United Kingdom has sought to replicate the legal framework for the mutual recognition of judgments that it previously enjoyed under the 2012 Recast Brussels Regulation, which is applicable between EU member states, and the 2007 Lugano Convention, which is an international treaty between EU member states and three of the EFTA states (Switzerland, Norway and Iceland). To achieve this, the UK made a bid to rejoin the 2007 Lugano Convention; however, in 2021 the European Commission confirmed that it was not prepared to grant such consent.

Although the UK's possible accession to the Lugano Convention is currently at a standstill, the UK has ratified the Hague Convention on Choice of Court Agreements (HCCC), which has already been ratified by the European Union and a number of other countries. In broad terms, countries that have ratified the HCCC will respect exclusive jurisdiction clauses in favour of one another and will typically recognise and enforce judgments obtained across the relevant jurisdictions.

The effectiveness of the HCCC does not compare with the Lugano Convention. As the HCCC only applies to exclusive jurisdiction clauses, difficulties arise where the clauses allow for more than one jurisdiction. Another limitation is that the HCCC can only apply after coming into force in the relevant jurisdiction. This has created confusion in the United Kingdom as it has agreed to the HCCC twice – in October 2015 as a member of the European Union and again in

December 2018 as after Brexit as an independent state. While the HCCC offers helpful clarity for a large number of exclusive jurisdiction provisions, great help may be on the horizon with the UK government considering whether to join the Hague Judgements Convention 2019 (HJC).

The HJC covers the recognition and enforcement of foreign judgments in civil and commercial matters by establishing common rules between contracting states and will enter into force on 1 September 2023. The European Union (excluding Denmark) and Ukraine have ratified the HJC. Should the UK ratify it as well, it will provide businesses greater assurance when entering cross-border contracts and investment relationships. The key benefit of the HJC is that it enables enforcement in instances where there is no exclusive jurisdiction clause. This is not only helpful in instances where contracts allow for multiple jurisdictions or in situations where non-exclusive jurisdiction clause are used (such as financial services contracts) but also will enable enforcement in non-contractual disputes. While the HJC has received a positive reception from legal practitioners, the UK government is yet to announce any decision on whether to join, and if it does, the HJC comes into effect one year from the date of ratification and even then, it will only apply to judgments in proceedings commenced after the effective date.

Despite the complexities post-Brexit, English common law rules in respect to jurisdiction still apply. Broadly speaking, a claimant will require the English courts' permission to serve a defendant out of the jurisdiction. To do so, a claimant is required to demonstrate that there is a serious issue to be tried, that England is the proper forum for the claim and that there is a good arguable case that one or more of the 'jurisdictional gateways' are satisfied. Jurisdictional gateways grant the English court's jurisdiction over foreign defendants where the subject of the dispute is sufficiently connected to England or Wales. The most commonly used gateways are: (1) the claim relates partly

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or wholly to property within the jurisdiction; (2) it involves a contract governed by English law; (3) there is a jurisdiction clause in favour of the English courts; (4) the harm suffered occurred in England or Wales; or (5) a defendant domiciled outside of the jurisdiction is a 'necessary or proper' party to proceedings against other defendants where jurisdiction has already been established (ie, due to a jurisdiction clause or due to their domicile). Jurisdiction can be challenged, usually on the basis of *forum non conveniens* (ie, that the English courts are not the appropriate court to hear the claim).

Jurisdiction and governing law provisions give rise to complex issues, so where a potential dispute has an international aspect, it is advisable to obtain legal advice at the outset.

QUESTIONS

"Despite being smaller than full-scale outfits, boutique firms are regularly instructed in complex, high-profile litigation and arbitration, often in place of more established names. They have proved popular with clients as they offer the expertise of prominent dispute lawyers."

QUESTIONS

3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

The London legal market continues to be very competitive. Previously US based firms were the main challengers to the traditional London-headquartered firms for disputes work, but now there is an increasing number of specialist disputes-only boutiques arising in the city. Despite being smaller than full-scale outfits, these boutique firms are regularly instructed in complex, high-profile litigation and arbitration, often in place of more established names. They have proved popular with clients as they offer the expertise of prominent dispute lawyers, but without the constraints of typical conflict of interest concerns that arise at full-service firms.

There is also an increasing range of funding options available, including damages-based agreements (DBAs), where a law firm agrees to receive a percentage of the damages as its fee.

4 What have been the most significant recent court cases and litigation topics in your jurisdiction?

Philipp v Barclays is a claim for breach of a bank's duty of care to protect its customers from authorised push payment (APP) fraud, known as the *Quincecare* duty. The argument asserted was that the bank ought to have policies in place for the prevention of potential APP fraud and mechanisms in place for reversing these. The judge at first instance was sympathetic to Mr and Mrs Philipp's situation, although decided in favour of Barclay's application to strike out on the basis that it would not be fair to impose liability on the bank because

liability would be based on 'an unprincipled and impermissible extension' of the *Quincecare* duty. The case was appealed to the Court of Appeal, which has reversed the reverse summary judgment. A key determining factor why the first instance judge struck out the claim was that establishing a duty would be unworkable in practice. The Court of Appeal found that the judge had erred in making a ruling on summary basis, but rather that the existence of a duty was to be determined at trial. This is significant because, although it does not explicitly expand on the *Quincecare* duty, it indicates that the duty is not simply confined to situations involving agents of companies. Given that APP fraud is the second most common type of consumer fraud in the UK (after credit card fraud), there could be a rise in the number of claims against banks from victims of these type of frauds; however, clarity on this position is to be delayed as the case has been appealed to the Supreme Court with a decision expected at some point in 2023.

The question of whether commercial parties can avoid or delay performance due to unexpected events has continued to be at the forefront of commercial litigators concerns, not least given the number of covid-19 business interruption claims and disputes resulting from sanctions on Russian businesses and individuals. There are two contrasting High Court cases, both within the context of sports broadcasting commercial contracts, namely *Football Association Premier League Ltd v PPLive Sports International Ltd* and *European Professional Club Rugby v RDA Television LLP*.

In *Football Association Premier League Ltd v PPLive Sports International Ltd*, the court held that the temporary suspension of the Premier League in 2020 and then its subsequent resumption did not amount to a 'fundamental change' to the format of the competition and thus did not trigger the *force majeure* clause within the contract.

Conversely, in *European Professional Club Rugby v RDA Television LLP*, the court found that the threshold was met under the contract as the word 'epidemic' was listed as a *force majeure* event, which was

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determined to include the covid-19 pandemic. These cases show how the English courts decisions will be determined on the specific wording of the clauses.

In *KD Maritaime Limited v Bart Maritime (No. 2) Inc*, the Court of Appeal held that a *force majeure* clause was not triggered when the delivery of a vessel was delayed by government restrictions in India. The court determined that the specific event was a delay or hindrance and while 'inability' can have a temporal element to it, the specific delays in this scenario did not materially undermine the commercial venture. This again shows how the English courts determination will depend entirely on the facts of the scenario and the exact wording of the contract.

Soteria Insurance Ltd (formerly CIS General Insurance Limited) v IBM United Kingdom Ltd is a decision by the Court of Appeal that identifies that claims for wasted expenditure could be read as encompassing claims for loss of profits. The case concerned a delay of the delivery of a new IT system. Due to this delay, the claimant refused to pay

QUESTIONS

an invoice of £2.9 million, and the defendant purported to exercise its contractual right to terminate. The claimant then brought a damages claim for £132 million in respect of wasted expenditure. The first instance judge found that while the defendant had wrongfully terminated the contract, the claimant's claim for wasted expenditure was excluded by the effect of a contractual exclusion clause. On appeal, the judge's decision was overturned in respect of the construction of the exclusion clause as an exclusion clause for loss or profits will not necessarily exclude loss for wasted expense. The court held that a prudent and practical step for parties to take is to include express wording that excludes claims being brought for wasted expenditure.

5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

The English courts are well regarded amongst businesses and corporates as England and Wales has an independent and experienced judiciary that instils confidence in contracting parties. English law is also perceived as being clear, fair and predictable, and is adaptable to suit the needs and challenges of the businesses concerned.

While there are concerns that English litigation can be expensive and time-consuming, there has been an active effort by the courts to implement various processes to control parties' budgets, the scope of disclosure exercises and aim to narrow witness evidence. Courts have introduced the Shorter and Flexible Trials Scheme to deal with cases quickly and more cost-effectively.

"The innovation that was forced upon the English courts during the pandemic has accelerated the integration of technology within the English legal process and forced the English courts to be more technologically literate."

6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

As the disruptive effects of the covid-19 pandemic are slowly disappearing, the UK courts are beginning to look more 'business as usual'. Some changes to case management that were introduced during the pandemic will remain, such as the need for international witnesses to give evidence remotely. The courts are recognising that in-person hearings are seen as vital for the attainment of justice and the resolution of disputes, including face-to-face cross-examination and the simple impact of having physical presence in court. Nevertheless, the innovation that was forced upon the English courts during the pandemic has accelerated the integration of technology within the English legal process and forced the English courts to be more technologically literate. These advances are going to continue to be utilised by the English courts to remain an efficient venue for litigation. For example, the advances in virtual hearings can allow for

evidence to be given by witnesses outside of the UK without the cost concerns of international travel.

The English courts have demonstrated their expertise and pragmatism when considering covid-19 business interruption claims, and there is now a perception among businesses that the English courts have established a policyholder-friendly position when considering these claims, and a perception of an emerging reluctance amongst insurers for having cases resolved in the English courts.

One significant trend for 2022 has been an increase in the number of civil fraud claims. Almost 50 per cent of the banking litigation claims currently before the English courts concern fraud claims. This contrasts with 2016 where fewer than 10 per cent of claims related to fraud. While part of the reason for this is that the covid-19 pandemic provided new opportunities to exploit the financial situation, this trend indicates that there are growing opportunities in the UK to bring a claim for fraud and utilise the tools available, such as worldwide freezing orders, search and seizure orders and disclosure orders.

Another significant development is the introduction of a number of new 'jurisdictional gateways' to allow service out of the jurisdiction, in particular for third party information orders. Changes to the Civil Procedure Rules (CPR) were introduced on 1 October 2022, easing the way for claimants in cross-border litigation to gather information and evidence. A key change has been in extending the reach of *Norwich Pharmacal* orders (NPOs). NPOs are a disclosure order made against third parties to a claim, used to trace property, obtain information relating to the underlying wrongdoing and help identify potential defendants. The changes to the CPR has enabled the gathering of vital information from third parties, such as financial or technical service providers, who have handled assets or information on behalf of the defendants, but these third parties are outside of the jurisdiction, often in jurisdictions with stricter information gathering laws. *Bankers Trust* orders (BTOs) are another form of disclosure

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order which effect has been strengthened by the introduction of the new gateway. BTOs are orders made against a bank for information or documents that could aid in tracing misappropriated assets. With the introduction of the new gateway, NPOs and BTOs can be ordered against overseas defendants and third parties provided that the information sought is to obtain the identity of a defendant or potential defendant or to determine what has happened to the property of a defendant. While the practical effect of the changes are yet to be felt, it is a positive change for potential claimants in cross-border fraud and commercial claims.

7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

Arbitration continues to be a favoured approach to resolving disputes in cross-border investment and commercial relationships, especially where parties agree to include arbitration clauses in commercial

QUESTIONS

> "Another significant development is the introduction of a number of new 'jurisdictional gateways' to allow service out of the jurisdiction, in particular for third party information orders."

contracts. In their most recent report, the LCIA recorded an all-time high number of referrals, showing a doubling of arbitrations pursuant to the LCIA Rules. Additionally, energy and resources, transport and commodities, and finance sectors continue to represent the majority of all cases seen in the LCIA.

Disruptions caused by the Russia–Ukraine war and the economic sanctions imposed on Russia has drastically impacted the energy and commodities markets over the past year. Governments and investors had to navigate the ever-changing sanctions regime, and this had significant knock-on effects on many businesses and commercial ventures. Russia is a key supplier of metals that are indispensable to supply chains of modern manufacturing production, as well as a major supplier of the world's gas and coal. The sudden challenges of continuing the supply of resources has caused many businesses to reassess their business plans.

8 What are the most significant recent developments in arbitration in your jurisdiction?

In the past year, the English courts have made a series of arbitration-related decisions regarding party autonomy. The English courts have demonstrated their preference to respect the contracting parties' autonomy to include arbitration clauses within commercial agreements. *NDK Ltd v HUO Holding Ltd and another* concerned a jurisdictional challenge under section 67 of the Arbitration Act, which restrained a party from pursuing litigation in another jurisdiction. The party attempting to initiate the foreign proceedings argued that the dispute arose out of a separate joint venture agreement and not the original shareholder agreement, which contained the arbitration clause, thus indicating that the dispute was to be exclusively resolved through LCIA arbitration. The court cited the *Fiona Trust* presumption, which provides that rational commercial parties are likely to have intended that any dispute arising out of their relationship was to be decided by the same court or tribunal. The same deference towards party autonomy was shown in the High Court in *Aquavita International SA v Indagro SA*, where a party was prevented from issuing an interim application in a foreign jurisdiction as, while interim applications are commonly allowed in conjunction with arbitration proceedings in order to protect the status quo, these specific foreign proceedings would result in enforcement of substantive rights. If the interim foreign proceedings were allowed, they would have defeated the enforcement of the arbitration.

That being said, the courts have indicated circumstances where they would reject party autonomy. *Soleymani v Nifty Gateway LLC* concerned a consumer's failure to pay for a non-fungible token (NFT) following an online auction run by a New York-based marketplace. The consumer began proceedings in the English court, but the marketplace applied for a stay of proceedings on the grounds that the

claim was within the scope of the arbitration agreement contained in the auction terms. The court rejected these arguments stating that the consumer rights context was an important factor, meaning that the English courts were a more appropriate forum for resolving the dispute than a foreign arbitral tribunal, indicating that the weight that the English courts place on consumer protection within the context of arbitration clauses.

Further important changes are expected over the coming year as the UK Law Commission is considering the reforms to the UK Arbitration Act. The proposals from the Law Commission currently include provisions to allow arbitrators to summarily dismiss claims, codifying the obligation of arbitrators to disclose any conflicts of interest within the Act itself, extending the capacity of the English courts to support arbitration proceedings, and refining the process to challenge the jurisdiction of an arbitrator so that challenges in the courts take place by way of an appeal rather than a full rehearing.

9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

Alternative forms of dispute resolution continue to be very popular with parties in the UK, and the pursuit of these is strongly encouraged by the English courts. This year, the government has made ADR a key area for potential reform in the UK's legal framework, having launched various consultations to consider expanding the scope of ADR, the regulation of ADR and attempts to make it integral to the UK's dispute resolution process.

The Ministry of Justice launched a public consultation to seek views on proposals to introduce mandatory mediation for all small claims in the county court (claims valued at less than £10,000). Under the proposed reform, parties would be required to participate in an hour of free mediation via the telephone.

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With the ever-growing likelihood of mandatory mediation being introduced in the UK, there are calls for increased regulation and monitoring of the mediation industry, such as accreditation and the introduction of a regulator. Specifically, the government published a report announcing wide-ranging changes to the UK's consumer protection regimes of which one the key issues addressed was the recognition that consumer ADR services are currently too complex for lay consumers. The government aims to mainstream ADR for all types of disputes and identified improving consumer awareness, increasing the quality and oversight of ADR and improving the take-up of ADR by businesses in non-regulated markets as the key priorities of the industry.

The government is also currently consulting on whether to sign the Singapore Convention on Mediation (the Singapore Convention). The Singapore Convention is a uniform and efficient framework for the

settlement, recognition and enforcement of commercial mediated settlements across borders. In 2020, the UK mediation sector was estimated to be worth approximately £17.5 billion, and the UK government estimates that mediation could save businesses roughly £4.6 billion per year in management time, productivity and legal fees. The convention came into force in September 2020 and currently has 55 signatories. A government paper published in July 2022 indicated that the government '[proposes] to support UK's intention to ratify the UN Convention on International Settlement Agreements [the Singapore Convention] . . . all of which contribute to our aim to make mediation an essential part of the modern justice system'. It is not clear yet when the UK will sign to the Singapore Convention; however, this supports the expectation that the UK will sign.

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

Not only is litigation funding readily available in the UK, but the market has grown significantly over the past 10 years, and with no shortage of funders, the UK has become a litigants' market. This means that the time where funders could take weeks, or even months, to make a decision on whether to fund a case has started to disappear, with decisions being made a lot faster.

There has also been a shift in attitudes towards litigation funding. Where previously, the thinking was that litigation funding was made available to help smaller and less resourced claimants gain access to justice, litigation funders are being used in a broader range of claims. Large multinational corporates and even some quasi-governmental organisations will use litigation funding as a way to manage their balance sheet or to remove some of the risks of litigation expense and the exposure to costs snowballing.

While there have been no major developments in the regulation of litigation funding, there have been two developments that will have impacts on the litigation funding market in the UK. In July 2022, a Court of Appeal decision confirmed that DBAs cannot be used by defendants. *Candey Ltd v Tonstate Group Ltd* raised the question of whether a defendant can lawfully agree with its lawyers that, if successful at defending the claim, it is lawful to agree to pay part of the money it would have had to pay to the claimant, to its lawyers. The court rejected the appeal, agreeing with the High Court decision stating that the use of DBAs by defendants is precluded by the wording of the Damages-Based Agreements Regulation 2013 and going further by stating that the underlying statutory provisions preclude the use of DBAs by defendants.

There have also been developments in the regulation of litigation funders in the EU. While the proposals will not directly impact proceedings before the English courts, they will have an impact on the UK litigation funding market. First, litigation funders based in the UK who fund proceedings in an EU-regulated jurisdiction will become bound by these regulations. Second, the absence of regulations before the English courts could result in litigation funders preferring to fund claims brought under the jurisdiction of England and Wales as opposed to an EU jurisdiction.

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QUESTIONS

The Inside Track

What is the most interesting dispute you have worked on recently and why?

We are currently working on an enormous hard fought multi-jurisdictional dispute with more than 10 different sets of proceedings and that arises out of an alleged state-backed corporate raid. The dispute has given rise to a number of different types of procedures: insolvency proceedings and appeals, litigation with multiple interlocutory applications, arbitrations and a court challenge to an arbitral award. Not only does this dispute enable us to work with colleagues in a number of jurisdictions, but the interplay between the various jurisdictions and proceedings makes this dispute particularly interesting (and complex!).

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

The changes to the legal funding regime, which have enabled both the enormous growth in litigation funding, and the availability of a much wider range of possible fee arrangements, such as damages-based agreements, have significantly increased the ability of parties to bring proceedings. This has particularly benefited parties who would not otherwise have been able to bring claims, such as liquidators and other insolvency practitioners and the victims of fraud. It is therefore both a significant, and welcomed, development.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

It has been impossible to ignore the recent media comment about ChatGPT. While it is still early days for ChatGPT, it is inevitable that AI will become an increasingly important tool in dispute resolution, for example, in handing large datasets, document review exercises (where it is already often deployed) and also potentially more complex tasks, such as an initial case assessment. That said, the nature of dispute resolution, especially the element of judgment and evaluation decisions (such as how good a witness will be) means it is difficult to see humans being replaced by machines any time soon.