DISPUTE RESOLUTION IN LONDON

Submitted By: Simon de Broise

Marriott Harrison LLP
80 Cheapside
London
EC2V 6EE
Email: Simon.DeBroise@marriottharrison.co.uk Tel:
+44 (0)20 7209 2000

Website: https://www.marriottharrison.co.uk/
Attorney Bio

Simon is a Partner in the Dispute Resolution team at Marriott Harrison. He represents clients in complex commercial litigation and arbitration, and commonly on disputes which are international in nature. Simon advises clients on disputes across all sectors and has extensive experience in the technology, banking, aviation and asset finance markets.

Simon regularly advises on corporate disputes and contentious insolvency matters, and has acted for and against companies, shareholders, financial institutions, funds and other intermediaries. He is also frequently instructed by start-ups in the fintech, crypto and digital media sectors, where he advises on disputes and assists businesses by identifying potential litigation risks and working with them on strategies to mitigate these risks before a conflict emerges.

The cases that Simon advises on often involve issues of fraud, and he has a great deal of experience seeking urgent remedies on behalf of clients to trace, preserve and recover valuable assets before they can be dissipated.

*This resource is sponsored by the International Society of Primerus Law Firms.

MARRIOTT
HARRISON

DISPUTE RESOLUTION IN LONDON

English law continues to be one of the most frequently adopted choices of law for international contracts across the world. Likewise, the court service in England, and in London in particular, maintains its reputation worldwide as a destination for international litigation. London also remains a very commonly chosen seat for international arbitrations. This note sets out ten key considerations for any person or business considering litigating commercial and corporate disputes in London.

1. LEGAL REPRESENTATION

The first consideration when deciding whether to litigate in London is choosing a lawyer to act on your behalf to advise, assist, and guide you through the litigation process.

In England, "lawyer" is a generic term. It may refer to a solicitor or a barrister; so what is the difference?

A **solicitor**:

- is a qualified legal practitioner who is generally client-facing;
- usually works either on their own as a sole practitioner or as an employee (e.g. associate, senior associate, director) or partner (i.e. self-employed co-owner) in a law firm. Law firms generally have teams of solicitors who work in different areas of law;
- may practice dispute resolution generally or specialize in specific disputes, for example shareholder disputes;
- will be retained by you as their client; and
- will handle the day-to-day running of a dispute resolution matter from the outset, during which they will advise you on the prospects of making a claim all the way down to the trial and enforcement of your judgment.

A **barrister**:

- is also a qualified legal professional;
- is typically self-employed, but generally groups of barristers work within a set of "chambers" in order to pool expenses - although they remain wholly independent from each other;
- is typically a specialist in a narrower area or areas of law than a solicitor, and their work is principally in specialist advice and court advocacy; and
- you will usually need to instruct a solicitor first before instructing a barrister as part of your legal team. In some cases, it may be possible to instruct a barrister on a "direct access" basis, so that they can appear on your behalf in court, but this is less common.

Generally speaking, solicitors will be instructed at the outset of the case, and barristers will be instructed at a later stage when formal court documents need to be prepared.

2. VIABILITY ANALYSIS

It is no less true than in any other jurisdiction that in England you should ensure that the party you seek to claim against, or that is claiming against you, can fulfil any award for compensation or damages or costs order made against it.

At the outset of any litigation, and as it develops, there are a range of methods to be used to assist parties to litigation in tracking the fortunes of their opponents, for example:

- information provided about corporate entities by the Registrar of Companies at Companies House (which is available online);
- personal insolvency searches against individuals online;
- instructing a tracing agent to locate the whereabouts of individuals and track company activity; and
- seeking disclosure from opponents, in some cases in connection with seeking security for your costs from a claimant who is claiming against you using the procedure contained in the court rules.

At the beginning of any litigation, it will be important to assess whether the costs of the litigation are affordable in comparison with the likely outcomes of the litigation itself, and whether the litigation will achieve your objectives.

3. PRE-ACTION CONDUCT

The conduct of litigation in England and Wales is governed by the Civil Procedure Rules ("**CPR**"). These rules will apply at all stages of the litigation, even before there are any court proceedings.

The CPR now contains the Protocol on Pre-Action Conduct ("**Pre-Action Protocol**") that sets out how the parties should conduct themselves from the point at which they think they may have a claim or receive a letter confirming they are a prospective defendant to a claim. The purpose of the Pre-Action Protocol is to narrow and bring into focus the issues between the parties, and encourage the use of alternative dispute resolution techniques, such as mediation. There are specific sets of pre-action rules to follow for certain types of disputes, for example professional negligence claims, judicial review applications, and defamation.

Legal professionals and their clients are obliged to exchange correspondence setting out any claims they have or any defence(s) to claims they are told they face. A prospective claimant should send a letter of claim; a prospective defendant who has received a claimant's letter of claim should reply with a letter of response. These letters must contain concise details of the claim or defence (as appropriate), including giving details of its basis, a summary of the relevant facts relied upon, points about the sums of money or other relief sought or why it should not

be granted, and any related matters. The defendant's letter of response is usually required 14 days to 3 months after receipt of a letter of claim.

Compliance with the Pre-Action Protocol is essential not just because it is good practice, but because the court expects you to comply with it. If a party has failed to comply with the Pre-Action Protocol, the court can consider this fact when giving directions for the management of proceedings and when making orders for costs. Non-compliance could see a party being penalized by the court when assessing costs at the end of a case (see the section entitled "Costs" below).

4. COSTS

Outside of the specialist employment, property and other tribunals, the courts of England and Wales are not a costs neutral jurisdiction. Any party commencing litigation, or seeking some sort of interim relief, takes on a costs risk when doing so. Simply stated, that risk is that the loser of the action will generally be ordered to pay the costs of the winning party unless there is some good reason not to do so.

The CPR contains a number of further rules within that overarching framework. In claims valued at less than £10m, the parties will be expected to prepare a costs budget at the outset of any court proceedings. This budget will need to contain their costs spent to date and their future costs. The purpose of doing so is to establish with some, but not definitive, clarity the costs the parties would have to pay one another in the event that they lost the litigation.

After a trial in any litigation or a determination of an interim application, the court will make an order as to whose costs should be paid and in what amount. The court will only very rarely order the losing party to pay 100% of the winner's costs. Instead, it will generally reduce the amount of costs the winner may claim by reference to whether they were reasonably incurred and proportionate to the matters in dispute.

However, the court may make a different order as it is given a wide discretion under the CPR. This is the point at which the court can take into account a variety of factors from the case to influence its decision. The court will frequently look at the conduct of the parties (including whether it has actively sought to use ADR prior to trial, compliance with the CPR and Protocol on Pre-Action Conduct) and whether it was reasonable for a party to pursue the case in the first place.

Depending on these and other factors, a court may be minded to make an alternative costs order, including penalising a party it deems to have conducted itself poorly.

5. SPECIALIST COURTS

If you do decide to issue court proceedings, you and your legal representatives will need to consider carefully in which court to start proceedings. Issuing in the correct court will help avoid

potential costs consequences and delay of a subsequent transfer to a different court and ensure the claim proceeds in the court to which it is best suited.

The majority of Marriott Harrison's dispute resolution starts in the High Court. If there are subsequent appeals, then it can go up the court system to the Court of Appeal and the Supreme Court.

Two specialist courts within the High Court are important destinations for business disputes:

The Commercial Court, which:

- has a worldwide reputation for hearing business disputes throughout its 125-year history;
- handles complex and high value national and international business disputes, often involving cross-border issues and parties outside England and Wales;
- has 13 specialist judges, each with a background in commercial disputes; and
- is based in the Rolls Building in central London, which boasts many leading court facilities including wholly-electronic filing online, court rooms capable of fully- and partly remote hearings and an efficient administrative division.

The Insolvency and Companies List, which:

- is a specialist court within the structure of the High Court;
- handles cases involving the winding up of companies, company insolvency generally and director disqualification applications; and
- has 15 specialist judges, both in London and across England and Wales in the court's district registries.

Throughout the Covid-19 pandemic, the court systems proved remarkably resilient, embracing virtual hearings and making appropriate arrangements in order to comply with government legislation requiring social distancing and lockdowns. Whilst many of these requirements are not at an end, the courts have retained the capacity to be flexible for on hearing arrangements in particular.

6. SUPPORT FOR FOREIGN PROCEEDINGS

Parties to any proceedings around the world are entitled to apply to the courts in England and Wales under section 25 of the Civil Jurisdiction and Judgments Act 1982 if they believe that their opponents have assets, or that third parties hold information, in England. In so doing, they are entitled in principle to seek many forms of relief, such as freezing injunctions, search and seizure orders, orders against third parties to disclose information, and other similar reliefs.

The English courts will also recognize foreign judgments for the purpose of their enforcement against parties or assets in England and Wales.

There are different regimes involved in the enforcement of judgments in England and Wales from foreign jurisdictions, depending on the jurisdiction in which that judgment was made. In brief, these are as follows:

- the common law rules established in case law apply to judgments from jurisdictions other than those listed below;
- the Civil Jurisdiction and Judgments Act 1982 applies in respect of judgments from Scotland and Northern Ireland;
- the Recast Brussels Regulation and related European legislation applies to any judgments from European Union and certain European Free Trade Association countries made prior to 31 December 2020;
- the Hague Convention generally applies in respect of enforcement of judgments from Mexico, Singapore, Montenegro and, from 31 December 2020, EU countries; and
- the Administration of Justice Act 1920 applies in respect of judgments made in Commonwealth nations such as the Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Jamaica, Malaysia, New Zealand, Nigeria and elsewhere.

Each of these sets of rules have their own procedures to follow.

7. ALTERNATIVE DISPUTE RESOLUTION

The CPR requires the parties to a dispute and their lawyers to assist the court in furthering the overriding objective, namely enabling the court to deal with cases justly and at proportionate cost. The judiciary encourages alternative dispute resolution (**"ADR"**) as a collection of methods by which to resolve disputes other than through the normal litigation process to facilitate this.

There are a range of ADR methods open to parties, including:

- Negotiation;
- Mediation;
- Early neutral evaluation;
- Expert determination; and
- Adjudication.

While the methods differ in approach, the core rationale behind them all is to resolve disputes out of court.

Some of the general pros and cons of ADR include:

Benefits of ADR	Drawbacks of ADR
Shorter timescale for the dispute	Non-binding outcomes
In some cases, cheaper	Lack of suitability to some disputes
Greater control and flexibility for the parties	Risks delaying normal court proceedings
Confidential, and offers the possibility of preserving relationships for the future that may be irreversibly damaged by litigation	Exposing your position or litigation strategy

The Practice Direction on Pre-Action Conduct identifies mediation, early neutral evaluation and arbitration as common ADR processes that should be considered.

This attitude has developed to the point that the Practice Direction on Pre-Action Conduct expressly refers to the court's power to take account of an unreasonable failure to consider ADR. Sanctions could be imposed for such a failure, including the staying of proceedings until steps to ADR have been taken or an order for the party at fault to pay costs.

Both clients and legal professionals should therefore consider at the outset whether proceeding with traditional litigation is necessarily the best course and whether attempts at ADR should be made, especially given the court's preference towards it.

8. APPEALS & ENFORCEMENT

The process of litigation in England will not necessarily end after trial, and nor will the time and costs of litigation either.

Parties to litigation have the right to ask to appeal a judgment, usually on a point of law, to a superior court if they consider that the trial judge has erred. The right of appeal is not automatic under English law and the grounds for seeking an appeal are limited.

Appeals from High Court judgments are made in the Court of Appeal. Unless there is a reason to appeal to the European Court of Justice, the Supreme Court is the final destination for any appeal. There is a strict procedure and short timescale in which to seek permission to appeal a judgment and parties must act promptly.

It may also be necessary to take steps to enforce a judgment after trial, for example if your opponent does not pay sums it is ordered to pay by the court. In this case, the court rules and legislation provide a wide range of tools, including:

- an order to seize and sell goods;
- obtaining a charging order over assets, shares, land or other items;
- an order for a deduction to be made from an individual's earnings and paid directly to you;
- appointment of a receiver; and
- petitioning for the bankruptcy of an individual or the winding up of a company.

The approach to enforcement will be shaped by the nature of the judgment obtained and the assets held by the target individual or company. It can also be necessary to look to enforce English judgments overseas.

9. FUNDING LITIGATION IN LONDON

There is no escaping the reality that litigation can be expensive. The starting point in most solicitor-client relationships is that clients are primarily responsible for their solicitor's and

barrister's fees. It remains widespread practice in the market that those fees will be calculated by reference to the time-charge model, whereby your solicitor will charge a client at her hourly rate for as many hours as the work may take.

Since the 1990s, however, a range of funding options have emerged that are designed to assist clients funding disputes. There are three main alternatives:

- fee arrangements between solicitors and clients, for example conditional fee arrangements whereby clients pay a reduced fee unless certain events take place, often "success" at trial;
- insurance against certain costs in litigation, for example against any costs order requiring you to pay your opponent's costs; and
- litigation funding, such as the funding of the costs of a barrister.

It is generally necessary to discuss appropriate options that will work for a particular case with the solicitor you have chosen to instruct.

10. BREXIT

The UK left the European Union on 31 December 2020. The consequences of the UK's departure from the EU are still evolving, but it has raised a number of questions in the context of litigation in the English Courts.

For example, Britain acceded to the Hague Convention on Choice of Court Agreements on 1 January 2021, with the intended result being that governing law and jurisdiction contractual clauses selecting English law, and jurisdiction of the English Courts, should be enforceable under the Hague Convention. Although this has been the result in respect of exclusive jurisdiction clauses, there remains a question as to whether non-exclusive jurisdiction clauses agreed before 1 January 2021 can be enforced and in what way.

By way of further example, English law has retained some EU law (although the UK Government is currently preparing legislation to remove this). Therefore, questions remain as to which court – whether in England or in Europe – is best qualified to determine any question in connection with the currently retained laws, and how application of EU law in the UK will diverge from EU applications in the future.

IN SUMMARY

England's long history and supportive legal framework for international litigation and arbitration, combined with the reputation of the Commercial Court and the Companies and Insolvency List, means that London remains an attractive destination for litigation. Costs of litigation worldwide have increased significantly over the last 10 years, but costs in London remain competitively priced when taking good advice in the early phases of considering whether to bring a claim at all.

The general information contained herein is intended for informational purposes only. It is not intended to be and should not be construed as legal advice or legal opinion on any specific facts or circumstances.

Copyright © 2023 Association of Corporate Counsel. All rights reserved. Visit www.acc.com.