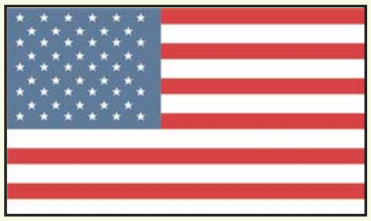
FAQS

LITIGATION



To assist our clients and friends in other jurisdictions, we have identified the questions which are most frequently asked regarding litigation proceedings in England and Wales. Please note that Scotland and Northern Ireland are separate jurisdictions.

If you would like to discuss any of the questions in this guide or if you would like to receive more information about any issues regarding litigation in England and Wales, please contact:

Simon Fitzpatrick
Head of Litigation
Boodle Hatfield, London, England
T: 00 44 (0)20 7079 8162
E: sfitzpatrick@boodlehatfield.com

CONTENTS:

What methods are there for the resolution of disputes in this jurisdiction?

The English Courts are an established jurisdiction for handling complex commercial disputes. The civil law reforms in 1999 aimed to speed up and rationalise the Court process. Some of the reforms included:

- Parties being encouraged to reach a solution prior to proceedings being issued. Therefore there are various provisions aimed at encouraging the parties to get together at an early stage and establish which are the real issues in dispute
- Parties being encouraged to consider alternative dispute resolution. This is becoming more and more widespread and includes arbitration, mediation and expert determination
- The Courts having extensive case management powers. The Court is encouraged to dictate the proceedings from the point of issue and there are tight timetables in place to keep the process moving
- An emphasis on proportionality. The Court seeks to deal with cases in ways which are proportionate to the amount involved. Factors considered include the importance of the case, the complexity of the issues and the financial position of each party
- The Court being able to order that joint experts are appointed to cut costs rather than each party instructing their own expert
- Costs being incurred at an earlier stage. The aim is for a large proportion of the costs to be incurred prior to the litigation being started. In addition there are summary assessments of costs on many of the common pre-trial applications. In brief these costs are payable by the loser of the application to the winner

Which Court is likely to hear large commercial disputes?

The High Court (Chancery Division and Queen's Bench Division, including the Commercial Court). The general rule is that claims over £15,000 may be issued in the High Court, while claims under this amount must be issued in the County Court.

However, claims under £50,000 commenced in the Royal Courts of Justice in London would generally be transferred to a County Court.

What are pre-action protocols?

These are rules of conduct for parties and their legal advisers in respect of certain types of claim. They set out steps which should be taken before proceedings are issued. They only apply to certain discrete categories of case at present but the parties are under an obligation to comply with the spirit of them and there are rules applying to all cases which again

require the parties to act reasonably. Should a party not comply with a pre-action protocol they may suffer costs sanctions.

How are proceedings commenced?

In this jurisdiction parties are encouraged to avoid proceedings at all costs. Therefore a claimant should send a "letter of claim" which sets out the basis of their claim in some detail and provide copies to the other side of any documents which are relevant to the case. This is to encourage discussion at any early stage. The Court will look unkindly on a party who simply commences proceedings without sending a letter of claim first.

Is a party to a dispute obliged to disclose all documents in its possession whether helpful or adverse to its case?

The general rule is that a party must carry out a reasonable search for documents and must generally disclose to its opponent:

- documents on which it relies
- documents which adversely affect its or another party's case
- documents which support another party's case

The litigant must certify the extent of the search carried out and that, to the best of its knowledge, it has complied with its duty of disclosure. The provisions also cover electronic disclosure.

Are any documents privileged (that is, they do not need to be shown to another party)?

The general rule is that a party is not required to permit inspection:

- if a document is a communication between a lawyer and his client for the dominant purpose of obtaining or giving legal advice. This privilege extends to a lawyer's working drafts and notes, instructions to a barrister and any copies of the lawyer's advice circulated within the client organisation provided confidentiality is maintained
- if litigation is under way or in reasonable prospect at the time a document is generated, as a wider privilege is available. Any document prepared for the dominant purpose of obtaining or giving advice in connection with the proceedings or collecting evidence for use in them will be privileged. This includes communications between the lawyer or client and a third party
- of correspondence between co-defendants as this is usually privileged
- of documents that might tend to incriminate a party, as they are generally privileged
- of documents the disclosure of which would be injurious to the public interest
- of communications between parties aimed at resolving the dispute, as these are generally privileged. Communications of this type are usually headed, or expressed to be, "without prejudice" but this is not a precondition for them being treated as such

What remedies are available? Are any of these available at an interim stage (that is, before the full trial)?

The main remedies available in commercial disputes are:

- damages
- injunctions
- declarations
- possession orders (orders seeking possession of land or property)

Injunctions may take various forms. The most common type is a prohibitory injunction, preventing the defendant from taking certain steps. There are also mandatory injunctions, requiring the defendant to do something (although the Courts are more wary of granting such an injunction), and "quia timet" injunctions, requiring the defendant to take steps to stop harm occurring.

At trial the Court has the power to grant a perpetual injunction. Interim injunctions are also available, including:

- Freezing Injunctions: these prevent a defendant dealing with his assets so as to defeat the claimant's claim
- Search Orders: these allow claimants' solicitors to enter and search the defendant's premises (supervised by an independent solicitor) to remove specified material. They are being used particularly in the intellectual property field, to seize material produced in breach of copyright. It should be noted that these are difficult instruments to wield as the Court considers them a draconian remedy. Therefore the evidence in support has to be very strong and there are significant sanctions for abuse

How much does litigation cost?

The cost of taking a typical commercial case to trial is likely to cost more than in most other jurisdictions. Indeed the cost may well run into hundreds of thousands of pounds. This is largely the result of the adversarial procedure and the structure of the litigation process.

There is no scale fee for litigation. A party only pays for the work done. English lawyers on the whole deal on the basis of hourly rates.

Management time involved in litigation is not recoverable.

How does a trial work?

The trial will be presided over by one Judge. This Judge decides all the questions of fact and law. In the adversarial system each party in turn presents its evidence and legal arguments to the Judge. Each party is also given an opportunity to sum up at the end of the trial. When this has been done, the Judge will deliver his judgment. Usually a Judge will require time in which to consider his judgment and the trial will be adjourned until a convenient date when the judgment will be given. There are limited grounds on which an appeal can be made.

Is the loser liable to pay the winner's costs?

The general rule is that the loser will be ordered to pay the costs of the successful party. If such an order is made, costs are agreed or assessed and as a rule of thumb the loser will pay about half to three quarters of the successful party's legal costs. The Court can, however, make a different order as to costs to take into account conduct and any part of the case in which the otherwise successful party has not succeeded. Account may also be taken of pre-action conduct. Therefore reasonable conduct at all times is encouraged.