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ENGLAND AND WALES

Responses submitted by:
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Note by Carter Perry Bailey: The answers in this survey have been tailored to civil claims. Further, because this document is for IADC lawyers, the answers are unless otherwise stated in relation to higher value 'multi-track' commercial claims within the jurisdiction of the High Court, rather than smaller 'fast track' or 'small claims' in the County Court.

1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Common law jurisdiction

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Generally, the UK uses adversarial adjudication.

There is a minor exception in that construction disputes can be adjudicated inquisitorially under Rule 18.11 TeCSA (The Technology and Construction Solicitors' Association). Section 108(f) of the Housing Grants Construction and Regeneration Act 1996 enables (but does not require) such an adjudicator to take the initiative in ascertaining the facts and the law.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Judges are appointed by the (independent) Judicial Appointments Commission. There is no upper or lower age limit for candidates, apart from the statutory retirement age of 70 for all judges. Depending on the post, the minimum requirement is now five years post-qualification legal experience for a District Judge. In addition to practising as a lawyer, relevant experience can now include teaching or researching law. For salaried appointments, sitting as a judge in a salaried or fee-paid capacity for a period of at least two years or 30 sitting days is required. If the applicant has demonstrated the skills required in some other significant way exceptions can be made.

Juries are generally not used for civil matters. In defamation cases a jury may be used if the Judge thinks it appropriate.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

The Civil Procedure Rules (CPR) govern the procedure in England. These are held, along with guidance, in "The White Book", which is used by all practising solicitors in England. The CPR contains "Rules" of law (they have the status of

statutory instruments) to be followed, and "Practice Directions", which are supplemental protocols to those Rules and can be changed by the Rules Committee, to guide practitioners in carrying out the Rules properly.

Commercial Court (part of the Queen's Bench Division of the High Court):

The Commercial Court deals with high value, complex and/or important financial and commercial (including (re)insurance) disputes. The Judges are highly expert practitioners. Special procedures are followed if a case is to be allocated to the Commercial Court. These procedures can be found under the Civil Procedure Rule 58 (CPR 58) and its Practice Direction (PD 58).

The Admiralty and Commercial Courts Guide contains provisions that seek to minimise the costs of complying with the normal pre-action protocols (see below) and a practical case management framework.

Cases in the Commercial Court will be subject to a Case Management Conference ("CMC"). This is a hearing at which the judge will listen to the outline of the dispute and give "Directions" as to how the matter will be conducted until trial. The judge will decide on timings for certain things to be completed, such as the exchanging of witness statements and disclosure lists, and may also refer to cost budgeting at this stage.

Mercantile Courts (regional courts of the Queen's Bench Division of the High Court):

The Mercantile Courts are specialist courts dealing with lower value and/or less complex commercial transactions and disputes, heard by specialist judges with commercial expertise. Rules in relation to the procedures for Mercantile Courts can be found in CPR 59 and its Practice Direction.

Technology and Construction Court ("TCC") (part of the Queen's Bench Division of the High Court):

Rules in relation to the procedures for the TCC can be found in CPR 60 and its Practice Direction. The TCC Guide, published on the Ministry of Justice's website, provides guidance on using the TCC and a framework for litigation. The TCC does not usually accept claims with a value of less than £250,000 (section 1.3.1 of the TCC Guide).

Tribunals:

Tribunals are specialist bodies which hear disputes in particular areas of law.

Generally, tribunals are used: (i) to appeal against Government department or agency decisions; or (ii) for employment disputes; or (iii) for immigration appeals.

The First-tier Tribunal hears disputes regarding government departments and other public bodies. It comprises seven chambers:

1. The General Regulatory Chamber (covering jurisdictions such as charities, copyright licensing, food, information rights and transport)

2. The Health, Education and Social Care Chamber (dealing with, for example, care standards, mental health and

special education needs)

3. The Immigration and Asylum Chamber

4. The Property Chamber (amongst other things, this deals with land registration and matters concerning agricultural land and drainage)

5. The Social Entitlement Chamber (this deals with matters concerning asylum support, criminal injuries compensations, social security and child support)

6. The Tax Chamber (dealing with taxes and MP expenses)

7. The War Pensions and Armed Forces Compensation Chamber

The Upper Tribunal hears appeals from the First-tier Tribunal on points of law (with permission, further appeals can be made to the Court of Appeal). The Upper Tribunal comprises four chambers:

1. The Administrative Appeal Chamber

2. The Immigration and Asylum Chamber

3. The Lands Chamber

4. The Tax and Chancery Chamber

Other Tribunals include the Employment Tribunal (and an Employment Appeal Tribunal), as stated, the Gangmasters Licensing Appeals, the Gender Recognition Panel, the Pathogens Access Appeal Commission, the Proscribed Organisation Appeal Commission, the Reserve Forces Appeal Tribunal and the Special Immigration Appeals Commission.

5. Is arbitration an option and when? If so, what rules are typically used?

Disputes can be referred to arbitration either under an arbitration clause within the contract between the parties, or by ad hoc agreement of the parties. Arbitration and litigation are generally used alternatively. However, arbitration can be used with other forms of ADR, such as using 'Med-Arb'. This is the process by which parties will first attempt mediation but will move into arbitration if mediation is unsuccessful. It is an attempt to work through disputes before arbitration becomes necessary, overseen by a neutral third party trained in Med-Arb.

Institutional rules can be used to govern the arbitration, which provide procedures for how the arbitration should be run. Any institution's rules can be used, but the most common are the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC). Use of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules is also common. If no rules are specified, the arbitration will be governed by the Arbitration Act 1996.

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6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Yes

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

No.

However, CPR Part 1.4(2) imposes an obligation on the Court to further the 'overriding objective' (i.e. broadly, to deal with cases justly). This includes encouraging parties to use alternative dispute resolution methods such as mediation, if the Court considers that this method would be appropriate.

At the pre-action stage, most pre-action protocols (for example, for construction and engineering disputes or professional negligence disputes) require ADR to be considered before proceedings are commenced. In cases that are not covered by a pre-action protocol, Paragraph 4 of the Practice Direction on Pre-Action Conduct (this Practice Direction aims to encourage parties to settle issues before commencing proceedings), which deals with compliance with this Practice Direction or a relevant pre-action protocol, explains that "*the Court may ask the parties to explain what steps were taken to comply [with this Practice Direction or a relevant pre-action protocol] prior to the start of the claim"*.

Refusing (which includes being unresponsive to a suggestion) to mediate may have adverse consequences in relation to costs awarded under the usual 'loser pays' rule. Any refusal must be reasonable. See *Dunnett v Railtrack plc* [2002] EWCA Civ 303.

Paragraph 4.4(3) of the Practice Direction on Pre-Action Conduct lists unreasonable refusal to consider ADR as an act of non-compliance and paragraph 4.6 imposes sanctions for non-compliance with this Practice Direction or a relevant pre-action protocol, such as an order that the party at fault pays the costs, or part of the costs, of the other party or parties. An order may also be made for the party at fault to pay costs on an indemnity basis.

8. What is the process for pre-hearing fact discovery (if any)?

In addition to serving a Claim Form, the Claimant is required to serve Particulars of Claim which outline all the facts on which the Claimant will rely. In response, the Defendants must submit a similar Defence. These are the initial facts which are disclosed. Facts are then proved by evidence at trial; witness statements are used for interlocutory proceedings.

(a) Are there provisions for mandatory document disclosures?

Yes. Disclosure of documents is mandatory (CPR 31). There are three main types of disclosure:

1. Standard Disclosure

In multi-track claims, the parties will usually be required to give standard disclosure. This is disclosure of all 'material' documents which assist or harm the case for any party (CPR 31.6). The Judge will bear in mind the

overriding objective and the need to limit disclosure to what is necessary to deal with case justly.

Under CPR 31.6.3, documents can be divided into four categories:

i. The parties' own documents (documents which a party relies upon in support of their contentions in the proceedings)

ii. Adverse documents (documents which to a material extent adversely affect a party's own case or support another party's case)

iii. The relevant documents (documents which do not fall into categories (i) or (ii) because they do not obviously support or undermine either side's case. They are part of the "story" or background. This category includes documents which, though relevant, may not be necessary for the fair disposal of the case)

iv. 'Train of inquiry' documents (documents which may lead to a train of inquiry enabling a party to advance their own case or damage that of their opponent)

Standard disclosure is limited to categories (i) and (ii).

2. Specific Disclosure

If a party believes that the documents disclosed are inadequate (particularly after further applications have not improved the position), he can apply for specific disclosure (CPR 31.12). The Court may order that a party must do one or more of the following things:

a) Disclose documents or classes of documents specified in the order;
b) Carry out a search to the extent stated in the order;
c) Disclose any documents located as a result of that search

3. Non-party Disclosure

This involves disclosure of documents from a third party who is not involved in the proceedings. The Court may make an order only where:

a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

See CPR 31.17.

'Norwich Pharmacal' Order:

Such an Order (NPO) requires a respondent (who is unlikely to be a party to the proceedings but will have been involved or mixed up in a wrongdoing, whether innocently or not) to disclose certain documents to the applicant. An

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NPO will only be granted where it is "necessary" in the interests of justice. The third party's costs of the exercise will usually have to be paid by the applicant (but are recoverable under 'loser pays' if the applicant succeeds in the case).

Electronic disclosure (e-disclosure) is governed by CPR 31 and PDs 31A and 31B. It covers any document held or contained in any electronic form, for example emails, word documents or information held on portable devices. Parties must complete a 'Directions Questionnaire' which will allow the Judge to decide what order to make in relation to disclosure. The Court may give directions as to how disclosure is to be given and in particular:

- The extent of the searches required
- Whether lists of documents are required
- How and when the disclosure statement is to be given
- In what format documents are to be disclosed (and whether any identification is required)
- What is required in relation to documents that once existed but no longer exist
- Whether disclosure shall take place in stages

Electronic disclosure is considered at an early stage in proceedings, with parties being expected to have discussed the issue in advance of the first CMC.

(b) Is there provision for oral examinations of the parties or others?

Only at trial (see question 19 below). (Parties who file witness statements in interlocutory proceedings can be cross examined but this is truly exceptional.)

(c) Are there limits on the length of oral examinations?

There is no general provision about the length of oral examinations, although the court may limit cross-examination (CPR 32.1(3)) and give directions limiting the length of witness statements (CPR 32.2(3)).

(d) Are witness statements or summaries to be provided before the hearing?

Witness statements are provided for all interlocutory hearings where evidence of fact is required. Additionally, the Court will normally order a party to serve on the other parties any witness statement of the oral evidence upon which the party serving the statement intends to rely in relation to any issues of fact to be decided at the trial (CPR 32.4(2)). When such a witness is called to give evidence, the witness statement will stand as the witness' evidence in chief, unless the Court orders otherwise (CPR 32.5(2)). If a witness is abroad (so no subpoena will be granted), the witness statement will suffice as evidence but the Court will discount its weight since it has not been tested by cross-examination.

9. What is the process for pre-hearing expert disclosure (if any)?

CPR 35.4(2) requires parties who are applying for permission to call an expert to provide an estimate of costs and identify:

a. The field in which the expert evidence is required and the issues which the expert evidence will address; and

b. Where practicable, the name of the proposed expert

(a) Are expert reports or written summaries required to be exchanged?

Expert reports must be exchanged (except in the unusual (in the High Court) cases where a Single Joint Expert is used). A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the Court gives permission (CPR 35.13).

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

Opposing experts are usually challenged within trial, not beforehand. A party may put written questions about an expert's report to the expert within 28 days of service of the expert's report but this is for the purpose of clarification only unless the Court gives further permission (CPR 35.6). The answers to the questions will be taken to form part of the expert's report.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

Directions will usually provide for:

- Exchange of expert reports
- Discussion between the experts for the purpose of requiring the experts to:
    - Identify and discuss the expert issues in the proceedings; and
    - Where possible, reach an agreed opinion on those issues
    - Where not possible to reach an agreed opinion, state why

The Court will usually direct that a joint statement be prepared by the experts setting out the issues on which they agree and those on which they disagree with a summary of their reasons for disagreeing (CPR 35.12).

10. Are there other notable discovery rules?

No.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Yes. There are two types: Case Management Conferences (CMC), conducted at the close of pleadings, and Pre-trial

reviews (PTR).

In almost all Multi-Track cases, there will be a CMC. CMCs are conducted by a judge either in court (requiring physical presence) or by telephone. A CMC in a District or County Court (usually lasting less than an hour) will often be held by telephone (if the facilities permit).

The official figures indicate that on average, it can take between 30 and 59 weeks between a Case Management Conference and the hearing.

Pre-trial reviews ("PTR"s) are not conducted in every case. On average, they are held 10 weeks in advance of trial, if there is one, in order to ensure that the parties have complied with previous Court Orders and Directions.

PTRs are usually before the judge who will later conduct the trial. CMCs are generally before a Master, if the case is being dealt with in the Royal Courts of Justice or, a District Judge if the case is being held in a District Registry of the High Court.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

An application for Summary Judgment (pre-trial motion for judgement) may be made on the whole of the claim or counterclaim or on a particular issue at any time (these are often issued even before service of a Defence). It will succeed if a party can persuade the court (on witness statement evidence) that the other party has no real prospect of success **and** that there is no other compelling reason why the case should be disposed of at trial (see CPR 24 and PD 24)

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

There is no process for rulings on admissibility in advance of the trial – they are made by the judge at the trial. In terms of expert testimony, it is for the Courts to decide whether to admit expert evidence. See question 14 below for the factors that the Court will take into consideration when deciding on admissibility. The judge will decide later which expert is to be preferred (if an obviously inadequate expert were proffered, there might be cost consequences).

14. What is the standard for admissibility of expert evidence?

There is no 'standard' as such in England. 'Loser pays' and expert 'judge only' trials make it unwise to proffer inadequate experts.

The decision to admit expert evidence within the Court is one for the Court to make. This must take into account the costs involved as well as the usefulness of bringing an expert. The following will often be considered:

1. How effective the expert will be in determining disputed issues

2. Will it help in the resolution of the case?
3. The cost.

If the applicant wishes to reply to the written evidence by the respondent, the reply must be filed and served on the respondent at least 3 days before the hearing for judgment (or as ordered). Hearsay evidence cannot be admitted.

There are no specific requirements regarding an expert's qualifications.

Experts appointed by the parties also owe their duty to the Court, not the instructing party (Though this is exceptional, the Court can order disclosure of their instructions and communications if necessary to check that they have worked on this basis).

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Yes. This is usual only in lower value cases. In deciding upon an expert, the Court will consider whether the parties should use a Single Joint Expert (SJE) (PD 35, paragraph 7). The Court will consider the following:

- Proportionality. This is in reference to the above three points mentioned in 14 above.
- Will the use of an SJE be more cost-effective and less time consuming?
- The nature of the evidence – liability or quantum?
- Has an expert previously been appointed?
- Will the use of an SJE allow all the issues to be dealt with and concluded fairly?

When an SJE is instructed, (s)he owes his/her duty to the Court and not to any one party (CPR 35.2(2)). This differs from an agreed expert, which is one agreed by the parties but is only instructed by one party. This party will be responsible for the expert's costs.

Where two or more parties want an expert's opinion on a similar topic, the Court can order this to be given by an SJE (CPR 35.7(1)). Similarly, if the parties cannot agree on an SJE, the Court can:

- Select the expert from a list prepared by the parties, or
- Select the expert another way in its discretion, using Court directions

In high value multi-track cases the parties will usually call their own expert.

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16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Yes, England protects privilege. There are three types:

Legal Advice Privilege:

Legal advice privilege protects:

- Confidential communications
- Between the client and the legal advisor
- For the sole or dominant purpose of giving or obtaining
- Legal advice or assistance on A's rights and liabilities and what the course of action should be

Litigation Privilege:

Litigation privilege protects:

- Confidential communication between
- The client and the legal adviser, or the legal advisor and a third party or the client and a third party
- Where the dominant legal purpose of the communication is litigation which must be pending, reasonably contemplated or existing

Common Interest Privilege:

Joint or common interest privilege protects:

- Privileged information shared between persons with a common interest. The sharing of information does not waive the privilege.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Not Applicable.

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18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

The Court.

19. Briefly describe the trial process?

The trial process depends upon the track to which the case has been allocated. This answer deals with high value multi-track cases.

(a) Are there opening submissions, in what form and of what length?

Opening submissions are made orally but the parties also usually submit written 'skeleton arguments' to the Judge in advance. Oral submissions should not repeat the skeleton arguments. There is no prescribed length. They must be proportionate.

(b) What is the order of presentation of witnesses?

1. Claimant's witness of fact
2. Defendant's witness of fact
3. Claimant's expert witnesses
4. Defendant's expert witnesses

Although this order is the most common, it is possible for all the Claimant's witnesses to be presented first, followed by the Defendant's witnesses (or any order the Court thinks best).

(c) Who conducts examination and in what order?

The examinations are conducted by the advocates representing each party in the case (see question 36). After the Claimant's opening and Defendant's opening (if applicable), examination-in-chief is conducted by the Claimant's advocate (however witness statements usually stand as the examination-in-chief so it is not normally oral). This is followed by cross-examination by advocate(s) for the opposing party(ies). The Claimant's advocate is then usually given the opportunity to conduct a re-examination of the witnesses.

This process is then repeated for the Defendant's witnesses mutatis mutandis.

(d) What is the process for closing submissions?

The same process as that for the opening submissions although it is usually the Defendant's advocate who will begin.

20. Please identify any other notable trial procedures.

None

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21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The person asserting anything must prevail, on the balance of probabilities.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

There are two main heads of damages:

1. General damages – these are damages which cannot be quantified because they compensate for general losses such as pain, suffering, loss of amenity, handicap, etc.

2. Specific/Liquidated damages – these are damages which are quantified or quantifiable, usually to compensate for a financial loss.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Punitive damages (normally called "exemplary damages") are rarely awarded under English Law as the purpose of damages is compensation not punishment. There is no threshold. There are two main instances where punitive damages may be awarded:

1. Where there has been "*oppressive, arbitrary or unconstitutional action by the servants of government*". **Rookes v Barnard [1964] AC 1129 at 1226**

2. Where "*the Defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the Plaintiff.*" **(ibid.)**

Lord Devlin in **Rookes v Barnard** mentioned three criteria:

1. The Claimant must be the victim of punishable behaviour
2. The award should be moderate not excessive
3. The means of the parties.

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

Time limits for bringing a claim are set out in the **Limitation Act 1980**. That Act also sets out circumstances in which the Court can dis-apply a limitation period in individual cases.

Limitation periods vary depending on the nature of the claim being brought. For example, contract and most tort claims must be brought within 6 years; personal injury claims have a limit of 3 years; defamation has a limit of 1 year.

Generally, time starts to run from the day after the day on which the cause of action arises. Once time starts to run, it can only be stopped in certain circumstances such as lack of knowledge due to concealment, lack of mental capacity of one of the parties, or agreement.

The equitable doctrine of laches can bar a Claimant from bringing a claim. If the doctrine of laches is invoked, the Defendant is asserting that the Claimant has unreasonably delayed (a delay usually becomes unreasonable when a claim would become time limited under the Limitation Act 1980) in bringing the claim. However, delay itself is not enough. It must be shown that the Defendant has changed its position due to the delay.

Generally, time stops running for limitation once the Claim Form has been sealed by the Court for the purpose of it being issued. Within the jurisdiction, a Claimant has four months (six months for outside the jurisdiction) to serve the Claim Form.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

In the European Union (EU), the Brussels Regulation (EC 44/2001) determines jurisdiction in relation to Member States. The general rule under the Brussels Regulation is that the Member State in which the Defendant is 'domiciled' will have jurisdiction. This is usually taken to mean an individual's permanent residence or a company's registered office, but that presumption can be rebutted. The "domicile" rule can be ignored where:

1. a consumer is suing a business (consumers can sue where they are domiciled);
2. the parties agree on a jurisdiction;
3. the matter is one of tort (the Claimant can sue where the damage occurred); and
4. the matter is one of contract (the Claimant can sue where the obligation is to be performed or has been performed).

Under the Brussels Regulation, the court in which proceedings were commenced first is 'seised' of the matter, meaning it has control. If another claim is then started in another Member State, the claim must be stayed in that State.

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Under the Brussels Regulation, if a Defendant is not domiciled in a Member State, the jurisdiction of the Courts of each Member State is determined by the law of that Member State (Article 4). This is, however, subject to exclusive jurisdiction rules (which have no regard to "domicile") contained in Articles 22 and 23. Briefly, under Article 22:

1. where the object of the proceedings is rights *in rem* in immovable property or tenancies of immovable property, the Court of the Member State in which the property is situated (however, in proceedings where the object is tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the Courts of the Member State in which the Defendant is domiciled shall also have jurisdiction, provided the tenant is a natural person and that the landlord and tenant are domiciled in the same Member State)

2. where the object of the proceedings is the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the Courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law.

3. where the object of the proceedings is the validity of entries in public registers, the Courts of the Member State in which the register is kept shall have jurisdiction

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the Courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place, shall have jurisdiction (without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State)

5. in proceedings concerned with the enforcement of judgments, the Courts of the Member State in which the judgment has been or is to be enforced shall have jurisdiction

Under Article 23, if the parties, one or more of whom is domiciled in a Member State, have agreed that a Court or the Courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that Court or those Courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

a) in writing or evidenced in writing; or
b) in a form which accords with practices which the parties have established between themselves; or
c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Under the common law, if a Defendant company is not domiciled in England but the Claimant wants to issue proceedings in England, the Claimant must show that it has some connection with England. Such a 'connection' can cover a wide range (for example, having 'assets' in the jurisdiction, such as property or even a bank account, could

demonstrate a 'connection').

There are also some minor situations where a Claimant will not need permission to serve documents (including the Claim Form) outside the jurisdiction (see CPR 6.33, which relates to the courts' powers under the Civil Jurisdiction and Judgments Act 1982, the Judgments Regulation (Brussels Regulation 44/2001) and the Lugano Convention (similar to the Brussels Convention and is applicable when serving on a Defendant domiciled in Iceland, Norway, Switzerland or Denmark) and other conditions which the parties must fulfil in order to serve without permission).

In all other cases, the Claimant must seek permission to serve outside the jurisdiction by applying for a Court Order (see PD 6B which lists general grounds for when permission of the Court is needed, such as when the Claimant wishes to serve the Claim Form on another person who is a necessary or proper party to the Claim).

It should be noted that a Defendant can dispute jurisdiction following service. To do this, a Defendant applies to the court for an Order declaring that the Court has no jurisdiction or should not exercise any jurisdiction that it may have (see CPR Part 11). In the case of *Owusu v Jackson* [2005] QB 801, the European Court of Justice held that the doctrine of forum non conveniens is incompatible with the rules in the Brussels Convention (the predecessor of the Brussels Regulation, which is substantially similar). This is because, where the Courts have jurisdiction based on Article 2 (domicile), there can be no derogation from it except in cases expressly provided for by the Convention/Regulation. However, the position is different in non-Regulation cases; the doctrine of forum non conveniens can be relied on.

Under the common law, jurisdiction over an individual can also be obtained by serving him/her when (s)he is within the jurisdiction (except perhaps when only 'passing through' in transit at an airport, for example).

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

A Defendant may bring other potentially responsible parties into the proceedings through third party proceedings, known as a 'Part 20 Application'. A Defendant *"may make an additional claim without the Court's permission if the additional claim is issued before or at the same time as he files his defence"* (CPR 20.7). If the Defendant wishes to make an additional claim after this point, it will need the Court's permission.

Alternatively, once the main proceedings in which an individual was a Defendant have finished, that person may then bring a claim against other potentially responsible parties for a contribution or to be indemnified. However, a Defendant who waits until this point might be penalised in costs.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

Yes, England has a "loser pays" system (the "English Rule") as to Court costs and legal (and associated) fees (together

'costs'). Costs are dealt with by CPR 44.2(1). Under CPR 44.2, the Court has discretion as to:

a) whether costs are payable by one party to another;
b) the amount of those costs; and
c) when they are to be paid.

Whilst the award of costs is, as stated above, within the Court's discretion, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party on the standard basis (explained below) (CPR 44.2(2)(a)). However, issues such as a party's conduct and compliance with the CPR will have an effect on whether and to what extent the Court follows the general rule.

For interlocutory hearings, the "loser pays" rule may be applied on an application by application basis. Costs at trial may be awarded on an issue by issue basis if the Court thinks fit.

It should also be noted that it is unlikely that the loser will in practice have to pay 100% of the winner's costs. The Court assesses costs either on the standard basis or on an indemnity basis (CPR 44.3). In most cases, standard costs are awarded.

- Standard Basis – The Court will only allow costs which are reasonable and proportionate in amount. Disproportionate costs may be disallowed or reduced even if they were reasonably or necessarily incurred. The burden of proof lies on the receiving party. (The rule of thumb is about 60% of actual costs.)
- Indemnity Basis – The Court will allow costs that were reasonably incurred even though they may be disproportionate. The burden of proof lies on the paying party. (The rule of thumb is about 75% of actual costs.)

The use of Part 36 offers to settle also has an effect on costs. If a Claimant makes an offer which the Defendant does not accept, and later beats that offer at trial, the Defendant will be made to pay costs on an indemnity basis (as opposed to a standard basis) from the last date of the "relevant period" (that being the last day on which the Defendant could have accepted the Claimant's offer), as well as interests on those costs (not exceeding 10% above base rate). In addition, there will be an increase of 10% on the damages awarded to the Claimant, as well as interest on those damages starting at the last date of the "relevant period" (not exceeding 10% above base rate).

Conversely, if the Defendant makes an offer to the Claimant which is refused and the Claimant fails to beat that offer, the Claimant will usually only be awarded his costs on a standard basis until the last date of the "relevant period", at which point the Claimant may then be ordered to pay his own costs as well as the Defendants costs on a standard basis.

28. Are contingency fees allowed?

Contingency fees in England are usually referred to as Damages Based Agreements ("DBAs"). Whilst DBAs are allowed in civil litigation and employment tribunal matters, there are regulations restricting their usage.

In Personal Injury cases, the Claimant's lawyer may only recover from his client a maximum of 25% of the overall damages awarded to the Claimant. In employment tribunal cases, the cap is 35%. In all other cases, the cap is 50%.

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Parties can also enter into what are known as "Conditional Fee Agreements" or "CFAs". These are where a solicitor agrees to charge only a percentage of his fee (or in some cases, he will charge nothing unless his/her client succeeds). If his client is then successful, he will charge the full amount of his costs in addition to a 'success fee', which is an uplift on his general base fees.

There is no recovery of DBAs or CFAs from the Defendant, only from a solicitor's own client.

29. Is third party funding of claims permitted? Under what circumstances?

Third party funding is permissible for all types of dispute resolution. In practice, the funding is only available in cases with a high prospect of success. The main risk to third party funders is that costs may be awarded against the funder if the funded party loses (see CPR 48.2). After The Event ('ATE') insurance is also available (on a commercial basis to offer protection against the loser pays rule (and the premium can sometimes be delayed until, and conditional upon, success – but this too is not (now) recoverable from the loser).

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

There are two types of multi-party actions in England: representative actions and Group Litigation Orders ("GLO"s). Representative actions may be brought *"by or against one or more persons who have the same interest as representatives of any other persons who have that interest"* (CPR 19.6). Group Litigation Orders are for claims which *"give rise to common or related issues of fact or law*" (CPRs 19.10 and 19.11).

The Courts of England are reluctant to allow representative actions as a way of pushing through US-style class actions. For example, the High Court refused permission for a representative action on behalf of direct and indirect purchasers of air freight services from British Airways in *Emerald Supplies Ltd & Southern Glass Produce Ltd v British Airways plc.*). The case affirmed that those represented in a representative action must have the same interest throughout the proceedings.

Multi-party actions are commonly consumer claims for defective goods and services, where many people have been affected by the same product or provider. They are also used where the would-be litigant is deceased or, perhaps, not yet born (CPR 19.1(1)(a) and 19.7(2)(a)).

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Some claims can be commenced by consumer associations or other representative organisations (see question 3). The Enterprise Act 2002 allows such associations or bodies to bring complaints and super-complaints before the Office of Fair Trading ("OFT") and the Competition Appeal Tribunal ("CAT"). Representative actions are dealt with under CPR Part

19(II).

Complaints can be brought before the CAT if the complaint is made on behalf of at least two individuals. They are usually in relation to an infringement affecting (directly or indirectly) goods or services to which an individual received, or sought to receive, otherwise than in the course of a business and were, or would have been, supplied to the individual in the course of a business (Section 19 of the Enterprise Act 2002).

Super-complaints can be brought to the attention of the Office of Fair Trading. These complaints should be in relation to a feature or combination of features of a market in the United Kingdom for goods or services which appear to be significantly harming the interests of consumers (Section 11 of the Enterprise Act 2002).

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

Timings are based on each individual case and can depend on a number of factors, such as complexity of issues, number of parties, volume of documentation, the type of claim and the court involved. According to 'Open Justice', a claim worth more than £10,000 will take, on average, 59 weeks to be resolved. The general rule is that the bigger the claim, the longer it will take.

It should also be remembered that timing can be extended due to interlocutory matters and applications. In some cases there may be other factors to consider which will affect timing, such as jurisdiction.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Yes, a process is available for appeals. Whether the decision being appealed against was a final or interim order will affect the destination of the appeal.

The system distinguishes between appeals due to the wrongful exercise of judicial discretion (primarily but not exclusively in relation to interlocutory decisions) and appeals in relation to findings of facts and law. Appellate Courts are unlikely to overrule a Judge's assessment of oral witness evidence because evidence heard directly by the original trial Judge and evidence recounted to the appeal Judge will differ as the appeal Judge does not have the benefit of hearing evidence being given first-hand. Discretionary decisions will be over-ruled only if deemed decisions which no reasonable judge could have made.

Within both the County Court and the High Court, appeals from junior judges can be made to higher judges. Permission is needed to appeal where the appeal is from a decision of a Judge in the High or County Court (CPR 52.3). An application for permission to appeal should normally be made orally at the hearing at which the decision to be appealed against is made. If that judge refuses permission, it can be sought from the appellate court.

Appeals are made from either court to the Court of Appeal. Appeals from the Court of Appeal are made to the Supreme Court (however, these appeals are only granted for issues of public importance).

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The Judges of the Court of Appeal are:

- The Heads of each Division
    - The Lord Chief Justice of England and Wales
    - The Master of the Rolls
    - The President of the Queen's Bench Division
    - The President of the Family Division
    - The Chancellor of the High Court
- The Lords Justices of Appeal

English judges are appointed from the ranks of distinguished advocates. Promotion to the Court of Appeal and Supreme Court is almost always from the ranks of judges from the courts below. All Lord Justices of Appeal are appointed by the Queen on the recommendation of a selection panel assembled by the Judicial Appointments Commission. In principle, The Heads of Division will have previously been Lord Justices of Appeal. Lord Justices of Appeal will have previously been highly esteemed High Court Judges.

The criteria given are only guidelines. The Judicial Appointments Commission can make and has made rare exceptions. See: http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/coa-judges

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Practice Direction 32, Annex 3 provides Video Conference Guidance and therefore governs videoconferencing facilities in UK Courts for civil proceedings. Not all Courts are equipped with facilities for electronic trials and appeals. The use of videoconferencing should not trump physical presence and regard must be had to efficiency, fairness and overall cost before videoconference technology is utilised in Court.

The parties must comply with Practice Direction 31 in civil cases, which relates to the disclosure and inspection of documents (see question 8).

Aside from videoconferencing, the UK does not conduct fully electronic trials or appeals because physical presence is viewed as critical to ensure fairness. Consent is needed for the use of electronic equipment. Courts are equipped with computer monitors for such purposes. Expert witnesses may be permitted to testify using equipment if abroad and if necessary.

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35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

Where needed, graphics, computer animations and visuals have been used in mediation and litigation but this is very rare because Judges determine the outcome of a case, not juries. They have also been part of expert reports in Court. They are only ever used for technical information or complex issues that require visual aids. Usually, permission is needed before any form of animation or graphics are used in Court.

Theoretically, it is possible for graphics and animation to be used in appeals. However, the writer has not heard of this in practice.

If an expert is to use such material, this will be reflected in the expert's costs. In turn, the cost of the expert must be justifiable in order for the Court to approve recovery in due course.

Regard must be had to the costs of producing such aids and animation as the costs should not be disproportionate to the desired outcome. If there is an accurate but cheaper method available, this should be utilised instead.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

In England there is a solicitor/barrister distinction. Solicitors tend to conduct most of their work in the office and are usually the first port of call for the client. Barristers appear in Court on behalf of the client. Solicitors have certain rights of audience but prima facie no right to be heard at full trial in the High Court, Court of Appeal or the Supreme Court. However, it is possible for solicitors to apply in order to obtain those same rights. Barristers have full rights of audience.

It is usually the solicitor who will liaise with the barrister rather than the client (although there will often be conferences with all three parties present). Most barristers refuse to be instructed except through a solicitor. In higher value cases, less experienced and more experienced barristers often apportion the workload.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Contributory negligence is a defence at common law. However, the common law aspects have been codified under the **Law Reform (Contributory Negligence) Act 1945**. It has therefore been defined under **s.1(1)** as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable

having regard to the claimant's share in the responsibility for the damage."

Broadly speaking, contributory negligence is assessed on a comparative fault basis, i.e. using percentages. This applies whether as between joint tortfeasors or between Claimant and Defendant. With regards to apportionment, **s.1(1)** of the Act states: *"the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."*

Consequently, damages are apportioned according to the level of responsibility the Claimant had in relation to the negligence. Many factors are considered when assessing how blame should be apportioned such as fault, parties' knowledge, mitigating factors etc. 100% contributory negligence is not possible under the Act and has been ruled out by Sedley LJ in *Anderson v Newham College of Further Education* [2002] EWCA Civ 505.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

Yes, service outside the jurisdiction is permitted by "informal" means, provided service is effected in accordance with English law and that of the jurisdiction where service is effected. This is usually quicker and more likely to be effective than if the Hague Convention were followed. See CPR 6.30 – 6.47 and Practice Direction 6 in relation to the procedures to be followed for service of the claim form and other documents out of the jurisdiction.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Generally, if the Court has given permission for the Claim Form to be served outside the jurisdiction, it will usually follow that permission has also been granted for any other relevant document in connection with the case to be exported in the same manner. It is therefore unlikely that further permission will be needed to serve other documents.

The documents will be subject to the privilege as usual (as mentioned above in question 16). There is also an implied undertaking of confidentiality whereby it is acknowledged that the information received will only be used for the purpose of the current litigation. The recipient of the confidential information also undertakes to keep the material in a secure manner using the same security measures as he/she applies to his/her own confidential information. An application may be made to the Court for permission to disclose.

For the purposes of litigation started outside the jurisdiction but which requires documents from within the jurisdiction, the Data Protection Act 1998 and duties of confidentiality prevent some data/documents from being exported. However under s.35 of the Data Protection Act 1998, personal data can be disclosed where the disclosure is required by, or under any enactment, by any rule of law or by the Order of a Court.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

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40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

The Civil Procedure Rules, Practice Directions and accompanying notes to the CPR, available in the White Book (hard copy and in the Westlaw database), encompass all the best practices in the UK. All the main provisions have been addressed by the survey.

Please see http://www.justice.gov.uk/courts/procedure-rules/civil/rules for more information.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

A system of Qualified one-way Costs Shifting (QOCS) was introduced for personal injury claims on 1April 2013. In personal injury claims, if a Defendant successfully defends a claim, (s)he can no longer claim his/her costs from the Claimant (CPR 44.13 to 44.17).

This change is supposedly balanced by the change precluding the Claimant from claiming the premium for ATE insurance. This must be paid out of the Claimant's winnings.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

No. The last changes came into effect (Jackson Reforms) on the 1April 2013 (not all are fully implemented yet).

See: https://www.justice.gov.uk/civil-justice-reforms

Sources used:

- Law Society website
- Lexis PSL Database
- Practical Law Company Database
- McGregor on Damages (18th Edition)
- http://open.justice.gov.uk/
- http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/coa-judges
- http://hsfnotes.com/litigation/jackson-reforms/qualified-one-way-costs-shifting-qocs-for-personal-injury-claims/
- Civil Procedure Rules and Practice Directions (The White Book)
- http://www.cila.co.uk/files/Liability/ADR%20for%20Recoveries.pdf