Client guidance note

Guidance note for parties outside the jurisdiction

This publication gives general guidance only. It may not always apply and should not be relied on in place of specific legal advice.

Parties who conduct business internationally will need to consider which law will govern their contracts and decide on the best forum to resolve any disputes which may arise.

This guidance note is intended to provide general advice on the advantages of choosing the law of England and Wales to govern commercial contracts and the jurisdiction of the English courts to determine disputes.

Read our guidance note below.

Introduction

Parties who conduct business internationally will need to consider which law will govern their contracts and decide on the best forum to resolve any disputes which may arise. The law and courts of England and Wales are often a preferred choice even if the parties have no particular links to these countries. This guide sets out the benefits of choosing English law and the English court system for large commercial contracts and disputes and explains in what circumstances the English courts will have jurisdiction.

Why choose the law of England and Wales?

Freedom to agree contract terms: The principle of freedom of contract means that parties are free to agree any terms they choose – those terms will be binding whether or not a party has made a bad bargain. There is limited scope for terms to be implied into the contract or for any agreed terms to be overwritten unless for example, they go against public policy or are for an illegal purpose. Other civil law systems are more rigid and prescriptive.

Precedent: English law is comparatively transparent, stable, certain and predictable. The reason for this is that there is a comprehensive common law system developed from both statute and a strong body of case law. The precedent system means that decisions of higher courts bind future decisions of the same court on similar facts, and bind all lower courts until there is another authoritative statement of the law. Judgments are reported and accessible allowing commercial parties to be able to predict with a greater degree of certainty than in many other court systems, how contract terms would be interpreted and how the law would be applied

to particular circumstances or disputes.

Flexibility: The common law system is more flexible than other statute based law which allows the law to evolve and address changes to commercial practices and technological developments. Where there is no other prior authority, judges decide what the law is.

Rights of third parties: The Contracts (Rights of Third Parties Act) 1999 allows third parties to enforce contract terms and recover their own losses, even if they were not a party to the contract but it conferred a benefit on them. English law also allows parties to expressly contract out of this Act, or limit who can benefit from its provisions providing more certainty.

English language: The English language is widely spoken and is considered the language of international business. Statutes and case law written in English are therefore easily accessible to many parties.

Internationally accepted: English law is widely accepted and used in international business which is likely to reduce the need for parties to investigate the law in detail prior to entering into contracts.

English jurisdiction: Although the High Court is experienced in hearing evidence of foreign law and deciding issues in accordance with that law, if parties wish their disputes to be resolved in the English courts, it is sensible to choose English law as the governing law for a contract to avoid the need for expensive expert evidence on an alternative law.

Limitation period: The Limitation Act 1980 clearly sets out the period within which a claim must be issued failing which it will be out of time and bound to fail. The limitation periods vary depending on the type of claim. Claims in contract must be commenced within 6 years of the breach of contract.

Making English law applicable

To make English law apply to a contract an appropriate clause should be included to this effect, making reference to the law of England and Wales (but not the UK or Great Britain as there is no such law). If no governing law is expressly chosen by the parties, the 'conflict of laws' rules will determine which law applies. These rules are complex and disputes about which law applies can be costly. It is therefore advisable for parties to expressly agree a governing law in their contract.

The attraction of the English courts

Specialist courts and judges: High value and complex cases are dealt with in the High Court, which includes the Business and Property Courts of England and Wales. These courts encompass the specialist courts being the Commercial Court, the Chancery Division and the Technology and Construction Court. In London these courts operate together in the Rolls Building on Fetter Lane, forming the largest specialist centre for financial, business and property litigation in the world.

The Commercial Court has specialist and experienced judges who routinely deal with complex and international commercial cases often involving multiple parties and those from outside the jurisdiction, and they are equipped to apply foreign law when required.

There are no juries in civil cases and claimants must prove their case on the balance of probabilities.

Independence: The English courts have independent and highly competent judges who were senior legal practitioners themselves. Judges decide cases using their own judgment of the facts and issues, but taking

into account statute and precedents in similar cases.

Transparency: High court decisions are reported which ensures transparency and means that decisions are relatively predictable. It is important to note that court hearings are heard in public save for very limited circumstances. Further, any non-party can obtain a copy of any judgments or orders made at public hearings and copies of statements of case. Other documents on the court file are available if the court grants permission.

Value for money: The court fees are good value for money considering the quality of process and judges particularly when compared to other forums such as arbitration.

Civil Procedure Rules: The court process is governed by the Civil Procedure Rules usually referred to as the CPR. The overriding objective is for cases to be dealt with justly and at proportionate cost. Some specialist courts have their own court guide which must also be followed.

A flow chart of the usual court process is set out in the Appendix.

Pre-action conduct: The CPR requires parties to cooperate with each other by exchanging information and documents before proceedings are issued, thereby encouraging the resolution of disputes at a very early stage. The proposed claimant is required to send a letter of claim to the proposed defendant setting out the basis of the claim, a summary of the facts, the amount claimed and how it has been calculated or any other remedy sought.

The proposed defendant should provide a response within a reasonable time confirming whether the claim is accepted or the reasons why all or part of it is not accepted, and provide details of any counterclaim. The parties should also exchange key documents which are relevant to the dispute.

There are specific protocols for certain types of dispute such as professional negligence or construction disputes.

Any failure to comply will be taken into account by the judge when directions are made for the management of the case and the court may penalise a defaulting party by making a costs order against them.

Efficiency and proportionality: Once a claim is issued, the court actively manages the case and sets a timetable to ensure that it proceeds quickly and efficiently towards trial in accordance with the overriding objective. The allocated judge will monitor the case to trial and seek to identify the issues in dispute at an early stage and control costs.

Length of proceedings: The typical path of a claim may take around 12-18 months from the issue of proceedings up to a trial depending on the complexity of the matter, the number of parties and interim hearings. There are relatively short lead times between applying for a hearing date and the hearing taking place but this varies according to the length of court time needed.

Security for costs: The court has power in some circumstances to order a claimant to provide security for the other party's costs as a condition of proceeding with the claim, usually by paying money into court by a certain date.

Summary judgment and strike out: In cases where it is clear that there is either no case to answer or no

defence, these procedures allow such cases to be determined at an early stage without proceeding to a full trial. These cases are therefore dealt with more quickly than in other jurisdictions which do not have equivalent procedures.

Interim remedies: The English courts allow parties to apply for interim remedies such as injunctions to stop a party taking action or force a party to take action, orders to freeze assets worldwide and search and seizure orders to allow parties to obtain and preserve evidence. Interim orders can be obtained quickly and in very urgent cases without the need to give the other party prior notice.

Disclosure: Parties are required to adhere to a 'cards on the table' approach by disclosing to each other all documents which are relevant to the case whether or not they support or are harmful to their own case. Whilst this can be an onerous task in some cases where documents are voluminous, it ensures fairness and that all parties have access to all key (non-privileged) documents to assess the merits of their case before trial.

There is also some limited scope for pre-action disclosure where proceedings are contemplated in order to help a party decide whether to issue a claim.

Once proceedings are issued, a party can seek an order for specific disclosure of documents beyond the limits of standard disclosure. The court will take into account factors such as the financial position of the parties, the burden and cost on the disclosing party, the importance of the case and the complexity of the issues.

Privileged communications: English lawyers are required by their professional conduct rules to keep all client matters confidential save for very limited circumstances such as where disclosure is ordered by a court or the client consents.

Any discussions or correspondence between a party and their legal advisers do not have to be disclosed to the court or any other party. Communications with third parties for the purpose of getting advice or collecting evidence for use in the litigation are similarly privileged.

All 'without prejudice' communication between parties in an attempt to settle a case is also privileged and does not have to be disclosed to a judge, meaning that any concessions made by the parties are not brought to the attention of the judge until the question of costs is considered.

Witness evidence: If a party wishes to submit oral evidence at trial, then it should disclose this evidence in written format. Witness statements must be certified as true by the witness. Statements are exchanged several weeks before the trial to allow the parties time to review the contents thoroughly and prepare to address it at trial.

Expert evidence: Expert evidence is permitted with the court's prior permission although all experts have an overriding duty to the court rather than the party instructing them. The court may order the parties to instruct an expert on a joint basis rather than each party instructing their own expert. With permission, experts can be called to give oral evidence at trial.

Trial and cross-examination: Each party's barrister will set out their case and call the witnesses and experts that they seek to rely on. Unlike many other civil courts, witnesses and experts can be cross-examined by the opposing barrister ensuring that all evidence is properly tested. Each party's barrister then

sums up the evidence and makes submissions on the law. The judge makes a decision based on the evidence and arguments before them. Judgment may either be given immediately or reserved until a later date when the judge has reflected on the issues.

Loser pays the winner's costs: The losing party will generally be ordered to make a contribution towards the winner's reasonable costs. This helps deter claims without merit or speculative claims.

The costs of the proceedings are usually determined at the end of a trial, save for interim hearings. Judges have a wide discretion in respect of costs, and take into account several factors such as whether parties have acted unreasonably, refused attempts to mediate the dispute or made or refused settlement offers.

For hearings that last up to one day, the judge will usually assess the costs at the end of the hearing based on schedules of costs prepared by the parties and order that those costs are paid by the losing party, normally within 14 days. In all other cases the judge will usually make a costs order stating that if the amount of the costs cannot be agreed between the parties, then the costs are to be assessed by a specialist costs judge.

A claim can be withdrawn at any time. Unless otherwise agreed, the claimant will be liable to pay the defendant's costs up until the date of withdrawal, however costs are usually dealt with as part of a negotiated settlement.

Alternative dispute resolution and settlement: The court encourages parties to use an ADR procedure if appropriate and will facilitate the use of such a procedure by ordering a stay of the proceedings to give the parties the opportunity to try and narrow the issues or settle the matter entirely. Failure to consider ADR without good reason can result in adverse costs consequences.

Mediation is most frequently used by parties seeking a confidential settlement with the assistance of an independent mediator appointed on a joint basis by the parties.

Any party may make a settlement offer to the other party at any time before or during proceedings and there are many advantages of making such offers, the main one being to prevent costs escalating.

Part 36 procedure: There are automatic costs consequences in some circumstances under what is known as the Part 36 procedure. If for example the losing party has previously made a formal Part 36 offer to pay the same or a greater sum than is ordered by the judge at trial (and therefore it turned out to be a reasonable offer) but it was not accepted, the party making the offer is entitled to payment of its costs by the other party for the period following the offer because had it been accepted, those costs would not have been incurred. There are therefore significant advantages for parties in making a Part 36 offer as it provides some costs protection and puts pressure on the other party to accept it.

Appeals: The right to appeal is limited. Permission to appeal must usually be obtained and is not a given. This means that parties are more likely to receive a final decision in the first instance.

Enforceability: A judgment of the English courts can be easily enforced within the EU under the Brussels 1 Regulation and the European Enforcement Order. Outside the EU, England is party to a number of reciprocal arrangements with other jurisdictions providing for mutual recognition of judgments and enforcement.

When do the English courts have jurisdiction?

Defendants domiciled within the jurisdiction

- The English courts have jurisdiction if a defendant is domiciled in England. The defendant will not be able to challenge this jurisdiction.
- If there are multiple defendants based in different EU member states, the English courts will have jurisdiction to determine the matter against all defendants if at least one defendant is domiciled in the jurisdiction and the claims against the other defendants are so closely connected that they should be heard together to avoid the risk of irreconcilable judgments.

Defendants domiciled in another EU member state

The English courts will have jurisdiction if:

- There is a clause in the relevant contract conferring exclusive jurisdiction on the English courts;
- The obligation which is subject to the dispute was to be performed in the jurisdiction;
- The harmful act in tort cases occurred in the jurisdiction; or
- The defendant can be served with the claim form while in England even if just visiting. However, the defendant could argue that the English courts should not exercise their jurisdiction if there is a more appropriate forum (the doctrine of '*forum non conveniens*').

Defendants domiciled outside the EU

The English courts will have jurisdiction if:

- The court grants permission for the defendant to be served with the claim form out of the jurisdiction. The claimant would have to show:
- there is a serious issue to be tried against the defendant and the claim has a real prospect of success;
- there is a good arguable case that the claim falls within one or more of the 'jurisdictional gateways' set out in the CPR such as:
- The contract in question is governed by English law or contains a term conferring jurisdiction on the English courts;
- In tort claims the damage was sustained within the jurisdiction or resulted from an act committed within the jurisdiction; and
- England is clearly the appropriate forum for the case and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The court will take a number of factors into account including:
    - the personal connections the parties have to the countries relevant to the dispute;
    - the facts of the dispute in terms of where events took place;
    - factors affecting convenience or expense, such as the location of witnesses and documents;
    - the applicable law; and
    - whether the matter would receive a fair trial in another jurisdiction.

Funding and insurance options

English law firms now offer a range of billing and funding options to suit parties to disputes including:

- **Hourly billing / fixed fees:** This is the usual method of billing on a time spent basis. Hourly rates vary between law firms and according to the experience and expertise of the solicitor. English solicitors are required to give a general estimate of costs where possible and provide regular updates

on costs incurred. Fixed fees may also be available for specific pieces of work or stages.

- **Conditional fee agreements:** For claims that a law firm considers to have good merit, legal fees (or a percentage of them) under a CFA will only be payable if there is a successful outcome. No costs, or reduced costs, are paid if the claim is unsuccessful. Some CFAs may also have a success fee payable to the law firm of up to 100% of the ordinary costs to take account of the risk to the law firm of recovering nothing and the fact that some fees have been deferred.
- **Contingency fee arrangement:** This is an arrangement between solicitors and clients where solicitors are paid a percentage of damages recovered. It can only be used before proceedings are issued or if there are no proceedings to settle the dispute.
- **Third party funding:** There are a number of companies who offer to fund all or part of litigation costs in return for a percentage of damages recovered.
- **After the event insurance:** This is insurance purchased after an event giving rise to a claim. In cases where there is a CFA, this covers having to pay the opponent's costs if the party is unsuccessful. In non-CFA cases, this protects a party against having to pay the opponent's costs if they lose and/or their own solicitor's costs.

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