Our latest briefing focused on UK construction disputes summarises recent changes to court procedure and news on alternative dispute resolution (ADR) processes.

If you would like any further information on the topics below, please contact one of the team listed under "Key Contacts".

- Litigation procedure
- Court reform
- Arbitration procedure
- ADR news
- Brexit issues

### Litigation procedure in the Technology and Construction Court

#### TCC Guide revision 4 published

- The latest revision (number 4) to the Technology and Construction Court Guide (second edition) (TCC Guide) has been updated to include the TCC's guidance note on procedures for public procurement cases at Appendix H. The TCC Guide, which should be read alongside Civil Procedure Rules Part 60, can be accessed here. (Note: while Appendix H has been added to this latest revision, this latest document still references older versions.)

#### Application of electronic filing system widened

- Electronic filing became compulsory for professional users in the Queen's Bench Division in London from 1 July 2019. For more information, read our spring 2019 summary here.

#### Extending fixed recoverable costs in civil litigation reform

- The government is consulting on Sir Rupert Jackson's fixed recoverable costs (FRC) proposals including the extension of FRC to civil cases valued up to £25,000 in damages in the fast track, and expanding the fast track to include simple "intermediate" cases valued between £25,000 and £100,000 in damages. In its response to this consultation, the Law Society of England and Wales (Law Society) has recommended that the courts need more
time before extending FRC to civil litigation cases. While generally supportive of FRC for low value and non-complex claims, the Law Society believes that litigants in more complex claims and vulnerable/less well-off litigants could lose access to justice.

**Court reform**

- The HM Courts and Tribunals Service (HMCTS) intends to extend its digital reform programme to 2023. The government launched the reform programme in 2016 to improve accessibility and efficiency of the justice system, not least by harnessing "the enabling power of technology". In its recent Reform Update newsletter, the HMCTS set out its goals for this year which (in relation to civil claims) includes extending the E-Filing service to the Court of Appeal (Civil Division) (amongst other courts) and starting an opt-out mediation pilot in Civil Money Claims Online (CMCO) which will offer dispute resolution for claims less than £300. The CMCO has already dealt with more than 62,000 money claims under £10,000 since April 2019 and is expected to be extended to deal with a wider variety of claims.

- More people look set to deal from online court reform through the Courts and Tribunals (Online Procedure) Bill which had its second reading in the House of Lords in May 2019. This new legislation will make it even easier for court users to apply for small money claims or divorce online. The bill "sets up a new committee which will help people navigate online court systems" and enables cases "to be progressed more efficiently and financial savings made". The government aims to issue easy to understand guidance to ensure online services are as simple as possible to navigate and increase access to justice. (Source)

- The Law Commission has published its 2019-20 Business Plan. Its goals are "to ensure that the law is fair, modern and clear; be a forward-looking organisation; for the Law Commission to be a great place to work; and to promote good corporate governance".

**Arbitration procedure**

**New toolkit for international arbitrators on corruption and money laundering**

- What happens when an arbitrator suspects corruption in a commercial arbitration that might influence the underlying dispute? The Competence Centre Arbitration and Crime at the University of Basel has considered this issue and published a toolkit for arbitrators on corruption and money laundering in international arbitration. It provides a road map for the arbitrator to address the issues systematically and to find a solution which accords with the applicable laws. Authors Mark Pieth and Kathrin Betz explain how to become aware of corruption and money laundering in a case, the concept of corruption, money laundering and bribery and the consequences for an arbitration if these offences were to be established. Click here to access their report.

**New Guidelines for Witness Conferencing from the Chartered Institute of Arbitrators**

- The Chartered Institute of Arbitrators launched its Guidelines for Witness Conferencing in April 2019. The Guidelines include a checklist of issues to consider, directions that could be adopted to frame the process and explanatory notes. Prepared by a diverse and experienced committee, the Guidelines are a detailed but practical tool intended "to assist tribunals, parties and experts achieve an effective and efficient witness conference and to minimise the risks of the process going awry".
New Construction Industry Council Model Mediation Agreement and Procedure

- We wrote about the Construction Industry Council (CIC)'s proposals for a model mediation agreement and procedure in our article, "Model Mediation Agreements", (first published by Construction Law in May 2019). You can read that article here.

The CIC has now published the first edition of its Model Mediation Agreement and Procedure. The CIC's aims are to offer "an innovative approach to the low cost resolution of disputes, containing unique features in respect of people and process which empower the mediator and the parties". The process is underpinned by the appointment of an approved mediator from the CIC panel of mediators, the mediator's role as guardian and guide of the mediation process, and a cap on mediation fees.

Low value disputes adjudication schemes

- Meanwhile, two schemes for dealing with low value disputes (LVD) with a cap on the adjudicator's costs are on the table:
  - the Technology and Construction Solicitors' Association (TECSA) has introduced an adjudication service for disputes on money claims up to £100,000. The service will run as a pilot for six months and will cap the adjudicator's fees on a sliding scale from £2,000 (for claims under £10,000) to £5,000 (for claims between £75,000 and £100,000 (excluding VAT and interest)). See the TECSA guidance note here; and
  - the CIC is developing an LVD model adjudication procedure (LVD MAP) for application to disputes less than £50,000. A consultation on the proposals ended in early July 2019.

Encouraging mediation in Scotland's civil justice system

- Scottish Mediation has issued a report, "Bringing mediation into the mainstream in civil justice in Scotland", which explores how to encourage greater use of mediation in Scotland's civil justice system. Similar to the issues found in promoting mediation in England, the report identifies a number of structural and cultural challenges in bringing mediation into the mainstream and proposes ways to address them:
  - **structural challenges** – coordinating uniform implementation, proportionate costs/incentivising mediation, clearer signalling of quality standards, consistent messaging in rules and legislation; and
  - **cultural challenges** – changing professional receptiveness, building wider awareness in society and embodying a new dispute resolution culture.

The recommendations (see pages 5 to 7) include, for example, introducing a degree of compulsion into the system to encourage parties to consider mediation (where mediation is appropriate) and the establishment of an Early Dispute Resolution Office to review cases and direct them to mediation where appropriate. Despite making detailed proposals, the report's introduction concludes: "The important thing about mediation is that it is informal and flexible unlike many other more costly processes. Therefore care must be taken to encourage and enable, with a light touch, and not to over-regulate, lest the whole point of it is lost."
Scottish private member's bill on mediation

- A private member’s bill was introduced into the Scottish parliament in May 2019 by Margaret Mitchell MSP. The Mediation (Scotland) Bill is intended “to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator”. The bill is accompanied by a consultation document and underlines Ms Mitchell’s determination to increase the understanding of mediation and use the bill to make a significant positive impact on the use, consistency and cost-effectiveness of mediation services in Scotland.

CEDR insights into alternative dispute resolution

- What is the status of modern-day dispute resolution approaches in the corporate sector? This was the focus of a recent consultation carried out jointly by Conflict Prevention and Resolution (CPR) and the Centre for Effective Dispute Resolution (CEDR) over the winter of 2018-2019. The resulting report, "Insights into Alternative Dispute Resolution", considered the results of two studies: a survey of the attitudes and dispute resolution practices of some of CPR’s corporate members and a CEDR survey of the experience and attitudes of commercial mediators in the US and UK.

Direct negotiation remains the preferred route to dispute resolution. Arbitration, particularly valued for its confidentiality and the enforceability of awards, is the preference for cross-border disputes (although 20 per cent of them settled through mediation). This finding shows the role mediation can play while arbitration is pending, but also after exchange of pleading or disclosure. Success rates reported by UK mediators were an aggregate settlement rate of 89 per cent (74 per cent on the day; 15 per cent settling shortly afterwards).

Singapore Convention

- The CEDR report also flagged up the work of UNCITRAL on dispute settlement and the proposed United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), due to be signed in August 2019 and to come into force after ratification by three UN member states. The convention would recognise the legal status of written international agreements recording settlement reached in mediation in a similar way to the recognition of international arbitral awards under the New York Convention.

Brexit

"English law is good for business": London remains leader of international dispute resolution

In May 2019, the Rt Hon Sir Christopher Clarke gave the third Jonathan Hirst memorial lecture: "London – the venue of choice for international disputes in the year ahead?" Airing his strong belief that London’s dispute resolution system is the best, he went on to explain:

- that the system benefits from the relative certainty of English law and an independent, impartial and fair-minded judiciary. This combination has given the system "a justifiably strong, worldwide reputation” which has placed it in a dominant position in the international dispute resolution market. The highly competent judiciary provides clear, well-reasoned decisions and London supplies a "copious supply” of experienced, able, commercial legal practitioners;

- the expense of the process can be one of the downsides, but the cost should be weighed against the combined
benefits of disclosure, oral cross examination, oral advocacy, the loser pays rule and the absence of automatic appeal;

- arbitration, the range of arbitral proceedings, the availability and range of mediators, and range of mediation bodies;

- English law is good for business in support of which several cases were cited as examples. "Our courts, particularly at the highest level, have developed the law based on broad considerations of policy, proportion and justice in a manner which is alive to the needs of the business community."

The Rt Hon Sir Christopher Clarke also referenced the uncertainties and complications that Brexit might cause, especially in relation to applicable law, jurisdiction and recognition of judgments. He did, however, believe these questions "capable of sensible resolution when some modicum of sense returns". The attractions of English law, the quality of our judicial and court system, and the plentiful supply of talented lawyers will not change after Brexit.

### The future for the UK’s jurisdiction and English law after Brexit

Still on the topic of dispute resolution after Brexit, the Chancellor of the High Court of England, Sir Geoffrey Vos, recently reviewed "the future for the UK’s jurisdiction and English law after Brexit ". In his speech, he explained the factors affecting a party’s choice of law and jurisdiction, including the rule of law, an essential element of which is a functioning independent legal system operated by high quality independent judges; the costs and speed of the legal system; for judgments to be recognisable overseas so that they are enforceable. Noting that the enforceability of London arbitration awards will not be affected by Brexit (because the New York Convention will continue to be applicable), Sir Geoffrey therefore focused on:

- the effect of Brexit on London as a seat for international arbitrations after Brexit; and

- the question of the enforcement of UK judgments in EU member states after Brexit.

In brief, his answer was the effect would not be as great as could be expected. Brexit will not affect the independence and excellence of our judiciary. London’s domestic procedural systems will continue to be suited to international dispute resolution. English law will remain certain, predictable and consistent. English common law as it applies to commercial disputes will be unaffected by Brexit (although UK regulations may differ after Brexit). However, the UK cannot afford to sit on its laurels – we need to embrace new technologies to preserve the rule of law, streamline our legal systems and create efficiencies.

For more on Brexit, see our Brexit portal: https://www.dentons.com/en/issues-and-opportunities/brexit.

Back to top

### Your Key Contacts

**Akin Akinbode**  
Partner, London  
D +44 20 7320 3934  
M +44 7585 654 482  
akin.akinbode@dentons.com

**Gurbinder Grewal**  
Partner, London  
D +44 20 7320 3936  
M +44 7585 965483  
gurbinder.grewal@dentons.com

**Kirsti Olson**  
Partner, Edinburgh  
D +44 33 0222 1922  
kirsti.olson@dentons.com

**Esther McDermott**  
Partner, London  
D +44 20 7320 3938  
M +44 7733 307347