DISPUTE RESOLUTION IN
UNITED KINGDOM

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Simon has a strong reputation for his commercial awareness, and strategic thinking which is coupled with his team leadership skills in managing large, complex cross-border issues.

Simon is general editor of *International Fraud and Asset Tracing, Getting the Deal Through: Complex Commercial Litigation* and is co-author of *Disclosure of Information: Norwich Pharmacal and Related Principles*, and regularly speaks at conferences and seminars.

Simon is regarded as a ‘leading individual’ in *The Legal 500 UK 2017* for his civil fraud expertise, and is recognised as a ‘Recommended Lawyer’ for his banking litigation, commercial litigation, and international arbitration work. He has been consistently ranked in Bands 1 and 2 for his civil fraud expertise in the *Chambers and Partners UK Guide* over many years, and is also ranked in the *Guide for Litigation*. He has been regularly featured in *Who’s Who Guide to the World’s Leading Business Lawyers*.

Neil is an international arbitration lawyer and commercial litigator with particular experience in managing high value cross-border disputes.

Neil has extensive experience in international commercial arbitration, including LCIA, ICC, CIETAC, SIAC, SCC, UNCITRAL, ad hoc proceedings, ancillary or enforcement proceedings before the English courts, claims under investment treaties and cases concerning state entities and state immunity. Neil regularly prepares written pleadings and acts as advocate in arbitration hearings.

Neil has particular expertise in the energy sector and oil and gas disputes and has acted in matters involving: exploration and production, joint ventures, oilfield services, pipeline transportation, investment treaty claims and disputes concerning carbon emissions. Neil also has considerable experience in corporate or finance disputes (particularly relating to M&A transactions and shareholders’ agreements), and technology, media or telecoms disputes (including contractual disputes, royalty audits and disputes over rights).

Neil is recognised in *The Legal 500 UK 2017* as a key contact for public international law, and is co-author of the leading textbook *International Arbitration: A Practical Guide*. 
GTDT: What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? To what extent are treaty claims increasing?

Simon Bushell and Neil Newing: The principal methods for dispute resolution in England and Wales are litigation and arbitration. Mediation has also become popular in the past decade or so, either as a mechanism for resolving an ongoing dispute that has escalated into a proceeding, or as a first step before such escalation.

Parties who are particularly concerned about the enforceability of an eventual decision, or have reason to require confidentiality, are likely to opt for arbitration over litigation. Litigation before the High Court has traditionally been a very attractive solution for parties who are looking for a process that will reach conclusive and reasoned decisions (subject to appeal) supported by a high-quality judicial and legal infrastructure.

Arbitration continues to evolve as a popular method of dispute resolution in England, and the degree of party autonomy gives flexibility over how disputes are conducted. Moreover, the English courts are highly supportive of the arbitral process and will rarely interfere, as is evident from the very small number of successful applications to set aside arbitral awards. Equally, the enforcement of an arbitral award (whether made in England or abroad) is generally a process that is straightforward (which is not always the case in other jurisdictions).

There is undoubtedly a competitive tension between litigation and arbitration in England. Both methods have their virtues and shortcomings, and they continue to evolve in an effort to meet the perceived demands. For example, certain arbitral institutions and governments have promoted specialist commercial or finance-focused tribunals and the English High Court has introduced a specialist financial court, the Financial List, which hears disputes involving the banks and financial markets. In this regard, different industries tend to have different preferences: the financial services sector tends to favour litigation, particularly due to the ability to seek a summary determination of simple claims such as the enforcement of loans; while the ability to choose a decision maker with relevant industry expertise, together with the confidential nature of the proceedings, tends to make arbitration more favourable for those in the energy and construction sectors.

Ultimately, choice of forum can be a complex and subtle process, and the global trend is towards an increasingly fragmented market. Expert determinations and adjudications are also increasingly popular for certain disputes, such as earn-out provisions in a post merger and acquisition contract.

Treaty claims generally have increased in the past decade or so, but these are played out primarily before international tribunals. The existence of such claims has, however, become much more widely recognised and discussed, and has also become a political issue in the consideration of whether private tribunals are the appropriate forum for the resolution of issues in the public interest.

GTDT: Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients’ preferences? Has Brexit affected choice of law and jurisdiction?

SB & NN: The English courts continue to uphold contractual choices of law and methods of dispute resolution. English law is a favoured substantive law choice by commercial parties all over the world. The Singapore Academy of Law’s January 2016 survey of lawyers working on cross-border deals found that over 45 per cent of the respondents preferred stipulating English law as the governing law in their transactions.

Singaporean law followed with support from 25 per cent of the respondents, and New York trailed with only 7 per cent. Contractual principles developed under English law are widely known and respected. However, governing-law clauses can also cover non-contractual issues between the parties. The UK is a signatory to the Rome II Convention, which stipulates that, in the absence of any agreement to the contrary, the law applicable to non-contractual obligations will be the law of the place where the relevant damage or loss occurs.

This rule can have some unintended consequences if parties to a contract end up in a dispute involving non-contractual consequences. By adopting a governing-law clause that is wide enough to cover non-contractual disputes, the parties are removing any uncertainty caused either by finding that they suffer loss in a place with an unfamiliar system of law or where the place where the loss suffered cannot easily be determined.

Broad governing-law clauses are increasingly favoured. Currently the autonomy of a party to elect a governing-law clause is regulated by EU legislation. In the wake of the Brexit vote, it remains to be seen how the attitude of parties will change, if at all. The incumbent UK government has, however, indicated its intention to incorporate the provisions of both Rome I (on contractual obligations) and Rome II into domestic law following Brexit. As such, it appears likely that choice of law clauses will continue to be upheld, unaffected by Brexit.

In terms of jurisdiction clauses, as stated, the English courts are the preferred venue (either on an exclusive or non-exclusive basis) for commercial disputes and have historically been a popular choice. It is quite possible that the UK’s recent decision to seek an exit from the European
Union could have an impact on choice of forum. It will be difficult to predict developments until we know whether the exit (to be negotiated over an extended period of possibly several years) will be ‘hard’ (no or limited access to the free market) or ‘soft’ (a fuller withdrawal from the EU).

Under a hard Brexit scenario, the UK would lose the benefit of the EU’s harmonised approach to jurisdiction and enforcement of judgments throughout the EU member states. This might have a negative effect in terms of choosing the English courts if there are obstacles in the way of enforcing any judgment elsewhere in Europe. On the other hand, the same will be true in reverse. If the market perceives English court judgments as being devalued, arbitration clauses may prove even more popular (although the major banks are still resistant to arbitration in general).

A hard Brexit now seems highly unlikely and in broad terms the UK government appears committed to maintaining harmony in terms of the enforcement of UK judgments across the EU and vice versa, and to maintaining the existing jurisdictional regime. Several EU member states, such as France and Germany, have indicated an intention to establish specialist English language commercial courts as an attempt to make themselves attractive as commercial centres following Brexit.

Arbitral proceedings seated in England and Wales are governed by the Arbitration Act 1996, and cross-border enforcement of arbitral awards is dealt with under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, neither of which are affected by Brexit. A 2015 survey undertaken by White & Case with Queen Mary University London found that London is by far the most popular seat for arbitration (45 per cent of respondents) and there is no reason to believe that will be any different following Brexit.

**GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?**

**SB & NN:** The disputes market in London is increasingly competitive because of the sheer number of individual lawyers, the increasing number of international law firms who have sought to establish a litigation presence in London, and the recent growth in ‘conflict-free’ litigation boutiques.

London has long enjoyed a pre-eminent reputation for commercial dispute resolution - a consequence of popularity in English law, and a complement to the UK’s place at the heart of the global trading and financial markets.

However, in recent years several jurisdictions have sought to position themselves as alternatives to London. These include Dubai (and in particular, the Dubai International Financial Centre), Qatar (the Qatar Financial Centre) and Singapore (the Singapore International Commercial Court and the Singapore International Arbitration Centre). In addition, London faces a competitive challenge from institutions that have established specialist finance-focused tribunals such as PRIME Finance, JAMS Financial Markets Group, and the financial service sector of the American Arbitration Association. London has attempted to reinforce its pre-eminent position with the creation of the Financial List, which was announced in 2015.

The Financial List is a specialist finance and banking court, situated in the Rolls Building in London, where proceedings may be issued in the Commercial Court or Chancery Division. For a claim to be placed onto the Financial List it must: be worth £50 million; require expertise in the financial markets; or raise issues of general importance to the financial markets. Twelve specially nominated judges (six from each of the Commercial Court and Chancery Division) preside over the Financial List. Having a docketed judge who has specialist knowledge of financial disputes is a welcome development for legal professionals and their clients alike as the English courts take strides to ensure that its judiciary are sensitive to not only the legal issues at play, but also the financial issues that underpin the disputes that they are hearing.

A notable development affecting disputes lawyers in recent times is the growth in collective action, and, in particular, following damages claims arising from cartel investigations. Currently, the English courts are extremely well placed to determine these cases based on
violations of EU competition law. The claimants could include classes from across the EU who claim to have suffered loss. The English courts are a favoured venue for such claims because of the renowned quality of the judicial process and legal infrastructure, as well as the advantageous rules (to claimants) on disclosure (or discovery), which are not generally available in the vast majority of courts in other member states. Even upon Brexit, it is quite possible that breaches of EU competition law will continue to be actionable in the UK, against both a UK anchor defendant plus additional defendants from the UK and beyond.

In recent months, the Chancellor of the High Court of Justice, Sir Geoffrey Vos has made a number of public pronouncements signalling a serious determination to seek to maintain the pre-eminent reputation of the High Court in the context of commercial disputes, in spite of Brexit and other factors. For example, the newly branded Business and Property Courts have been launched at the beginning of this year, and the commercial focus of the High Court has been expanded outwards to other important business hubs elsewhere in the UK, such as Birmingham and Manchester. In addition, Sir Geoffrey has expressed a strong desire to ensure that the UK judiciary are well equipped to tackle commercial disputes that arise out of transactions which are based on distributed ledger technology or smart contracts. This is clearly a fast-moving area, and already the arbitration fraternity are making out their case for being best suited to resolving such disputes. I am less convinced, given that in the large, more existential disputes that are likely to materialise, a ‘real world’ process will likely be necessary, as opposed to a digital one.

**GTDT: What have been the most significant recent court cases and litigation topics in your jurisdiction?**

**SB & NN: Privilege**

English law recognises two forms of legal professional privilege: (i) legal advice privilege, which covers communications between a client and the client’s lawyer for the purpose of giving or receiving legal advice; and (ii) litigation privilege, which covers communications between lawyer and client or between either of them and a third party, created for the dominant purpose of conducting litigation, where such litigation is in progress or reasonably in contemplation, and provided that such litigation is adversarial and not investigative or inquisitorial. The House of Lords (as it then was) in the seminal Three Rivers case in 2004 narrowed the scope of legal advice privilege by restricting who qualified as the ‘client’ and what counts as ‘legal advice’. In the case of Director of the Serious Fraud Office v Eurasian Natural Resources Corp (ENRC) Ltd [2017] EWHC 1017 (QB), the High Court has now clarified the scope of litigation privilege.

This case related to a criminal investigation being undertaken by the Serious Fraud Office (SFO) following a report made by ENRC of potential corruption discovered during an internal investigation. A dispute arose over whether communications between the lawyers conducting the internal investigation and employees of ENRC were privileged. One of the key questions that the Court had to determine was whether, at the time of the investigation, litigation was reasonably contemplated such that litigation privilege would apply.

Mrs Justice Andrews held that litigation privilege did not apply. She decided that a criminal investigation by the SFO was not adversarial litigation – it was a preliminary step taken before any decision to prosecute is taken. As such, there can have been nothing more than a general apprehension of future litigation. Critically, Andrews J found that ENRC had failed to establish that at the relevant time it was aware of circumstances that rendered litigation between itself and the SFO a real likelihood rather than a mere possibility. She further found that in any event the documents had not been created with the dominant purpose of being used in the conduct of such litigation, and that litigation privilege will not extend to documents created for obtaining legal advice as to how to avoid contemplated litigation.

This has, however, been a controversial decision, not least because there is a concern that it will discourage parties from internally investigating potential wrongdoing and self-reporting. The decision is currently being
Conspiracy to injure by unlawful means

There are two forms of the tort of conspiracy in English law: (i) lawful means conspiracy, where the sole or predominant purpose of the conspiracy must be to cause injury to the target (albeit not via any unlawful acts); and (ii) conspiracy to injure by unlawful means, where the conspirators agree to use unlawful means against the target, but where causing damage to the target does not need to be the predominant purpose (provided that damage is actually suffered). In *JSC BTA Bank v Khrapunov* [2018] UKSC 19, the Supreme Court has made two important clarifications concerning the latter tort of conspiracy to injure by unlawful means.

The case involved a claim by the bank that Mr Khrapunov had assisted his father-in-law, Mr Ablyazov, in breaching a worldwide freezing order that the bank had obtained against Mr Ablyazov, by conspiring with him to hide or dissipate assets. Mr Khrapunov sought to set aside the claim on two grounds: first, that a breach of the freezing order did not constitute unlawful means; and second, that in any event the English court did not have jurisdiction under article 5(3) of the 2007 Lugano Convention. Article 5(3) provides that a defendant may be sued in tort in the courts of the place where the harmful event occurred, which means either the place where the damage occurred or the place of the event giving rise to the damage. Mr Khrapunov argued that the event giving rise to the damage was the alleged hiding or dissipating of the assets, which took place outside of the UK.

The Supreme Court first confirmed that breach of the freezing order, which constitutes contempt of court, qualified as unlawful means for the purpose of the tort. The Court held that it did not depend on whether the unlawful means would give rise to an independent cause of action, but that the real test is whether there is a just cause or excuse for combining to use unlawful means. Second, the Supreme Court confirmed that for the purposes of the Lugano Convention (which would likely also be the position under the Recast Brussels Regulation as it uses similar wording) the place where the event giving rise to the damage took place for the purpose of this tort is the place where the conspirators hatched their agreement. This was the harmful event that sets the tort in motion. As that was found to have taken place in England, the Court had jurisdiction.

As a result of this decision, parties who assist others in breaching court orders could find themselves liable for damages in conspiracy.

Criminal dishonesty

The Supreme Court has set a new test for dishonesty in criminal proceedings that will now also be applied in civil claims. For over 30 years, the test applied was that set out in *R v Ghosh* [1982] QB 1053: to determine whether objectively, according to the standard of ordinary reasonable and honest people, what the individual did was dishonest; and then subjectively whether the individual realised that such ordinary honest people would regard his or her behaviour dishonest. The Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 has decided that this test is wrong.

The case related to Mr Ivey’s use of ‘edge-sorting’ to improve his odds of winning at cards. Mr Ivey requested the croupier to rotate cards in a certain manner which, unbeknownst to the croupier, would enable Mr Ivey to use this technique to guess the value of the card. Using this technique, Mr Ivey won a substantial amount of money, but the casino refused to pay him on the basis that he had been cheating. Mr Ivey said it was a legitimate technique and not cheating, and argued that he had not been dishonest (on the basis of the *Ghosh* test). Mr Ivey lost at first instance and on appeal, on the basis that dishonesty is not a necessary legal element of cheating in the context of gambling, and so it was irrelevant whether or not he had been dishonest.

The Supreme Court agreed with the previous courts on this point, and could have stopped there. However, the Court took the opportunity to look at whether Mr Ivey had, in fact, been dishonest and in doing so reset the correct test for dishonesty. In holding that the *Ghosh* test is no longer good law, the Court was concerned that the subjective nature of that test meant that the less the defendant’s standards conform to what society in general expects, the less likely he was to be convicted of dishonest behaviour. The Court also saw no reason why there should be different tests for dishonesty in criminal and civil proceedings. As such, the Court decided that the proper test for dishonesty in criminal proceedings is to first ascertain (subjectively) the individual’s knowledge or belief as to the facts, but that the conduct itself is then to be assessed by applying the (objective) standards of ordinary decent people. Thus the test is now an objective test, but which is to be assessed in light of the individual’s subjective knowledge or belief of the relevant facts.

Group litigation orders

The increase in collective class actions continues to gather pace. Under English court rules, the court may make a group litigation order (GLO) in circumstances where there are, or are likely to be, a number of claims that could be managed by the court in a coordinated way as part of a group. If the court decides to exercise its discretion to make a GLO, it will provide directions about establishing a group register that sets out the claims that will be managed under the GLO. It is this concept of a group register that differentiates UK GLOs from US class actions. Under a GLO, claimants have to make an election to ‘opt in’ to the proceedings and be placed on the register by a cut-off date set by the court. Once an individual...
is on the group register pursuant to a GLO, that claimant will then be bound by any judgment or order made in relation to the claim unless the court rules otherwise. In the US by contrast, there is no requirement for individual claimants to be identified, as one (or several) named plaintiffs may file an action on behalf of an entire proposed class. Therefore by their nature in a US class action one law firm and one plaintiff may bring an action on behalf of an entire class. While it is possible for the class to be split into different groups this is not particularly common.

Difficulties with the opt-in system under GLOs have emerged, as each claimant must opt in to the claim, they are under no obligation to use the same legal team as other claimants on the register and may instruct their own team. A prominent example of numerous claimants being represented by differing legal teams in a dispute before the High Court proceeding pursuant to a GLO concerns the £4 billion RBS rights issue, following the acquisition of ABN Amro. There were five separately represented groups of claimants following the splintering of a group of institutional investors in November 2015. Achieving a consensus around strategy for multiple claimant groups can prove difficult.

There seems to be little doubt, however, that class actions in the UK are here to stay. There are currently ongoing group actions against Tesco (false accounting), VW (emissions), and numerous actual or threatened claims in connection with violations of data privacy.

GTDT: What are clients’ attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

SB & NN: Clients who litigate in London tend to be highly sophisticated companies and individuals who are well versed with issues that accompany the various dispute resolution processes. No longer do clients labour under the misconception that arbitration is cheaper than litigation. Clients appreciate strict court timetables that are set early on in proceedings at the case management conference (CMC). Given potential adverse cost consequences, deadlines in the High Court tend to be respected by parties, as the court remains committed to ensuring that cases are dealt with justly and not subject to unwarranted delays. The tight control on costs in litigation are also greatly appreciated by most clients. Generally, parties to commercial claims must file a costs budget at the CMC that sets out what they expect their costs to be for each stage of the litigation (ie, for pleadings, witness and expert statements and the hearing). The costs budget is (heavily) scrutinised by the presiding judge to ensure that the costs of the litigation are proportionate to
the dispute at hand. Once the budget has been approved by the court, the parties are under an obligation to operate within that budget. In the event that a party thinks that they may exceed the amount that has been approved by the judge, they must apply to court to have the budget increased or face the potential consequences of not being able to recover the extra costs incurred in the event that they are successful in the litigation. It is the tight control over costs and time frames that clients value in litigation.

The disclosure process has long been viewed as a major factor in the rising costs of litigation, and steps have been taken recently to give the courts more flexibility to order alternative disclosure regimes to enable the parties to limit costs, and create efficiencies. Unfortunately, well-resourced defendants are often more than happy to burden a claimant with mountains of paper, in the hope of creating delay and confusion and, of course, an increased work burden. Disclosure remains a critical battleground in major commercial cases.

Another critical feature of litigation in the English courts is the carefully reasoned decision-making process, and the transparency that goes with it. Parties to litigation in the High Court need to be prepared for a process in which their evidence is heavily scrutinised by a highly experienced judge, not to mention the media (if the case is newsworthy). If a judge finds a witness’s evidence hard to believe, he or she will say so, and such findings can be devastating. Many cases settle at the door of the court for this reason.

Attitudes towards arbitration continue to be positive with clients regularly referring their disputes to arbitration. Some clients generally value the finality of arbitration, while others prefer disputes to arbitration. Some clients generally value the finality of arbitration, while others prefer to know that they can appeal against what they perceive as a perverse decision. The difficulty with appealing against arbitral awards is demonstrated in a recent Supreme Court case where the court ultimately upheld the tribunal’s award and dismissed an appeal based on section 69 of the Arbitration Act 1996.

**GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.**

**SB & NN:** The advent of the Financial List has seen the introduction of a compelling new dispute resolution product being launched in the High Court, namely the Test Case Scheme (TCS), which allows parties to resolve a legal issue for which there is currently no precedent, before it becomes an actual dispute. This allows parties to obtain legal certainty on an issue without having to reveal (potentially) commercial sensitive information that they may otherwise have to in litigation. The TCS offers parties a limited exposure to liability on costs. The parties to these theoretical disputes each bear their own costs. The TCS pilot was recently extended until 30 September 2020, as the senior judges consider that it will be of value and that it could prove especially useful in dealing with issues that arise from Brexit.

Two other schemes currently piloted in the High Court, the Shorter and Flexible Trial Procedures Pilot Schemes, point to efforts being made to streamline processes with the aim of making the system more user-friendly. The schemes will be in operation until September 2018. Under the Shorter Trial scheme, suitable cases are expected to reach trial within approximately two months after the CMC, and have judgment handed down within six weeks after the trial, with tight controls on disclosure and oral evidence, and trial being held for a maximum of four days. This scheme is suitable for cases that do not require extensive disclosure or witness or expert evidence, and in the first year of the pilot there have been 10 cases issued and transferred into the scheme. Under the Flexible Trial scheme, parties are able to adapt the procedures currently provided for under the Civil Procedure Rules by agreement to suit their particular case.

Lord Justice Briggs on 27 July 2016 published the final report of his Civil Courts Structure Review, suggesting a number of avenues for reform, including the centralisation of enforcement procedures across all courts into a single court. One of his other key proposals is an ‘Online Court’ where claims under £25,000 can be entirely dealt with (including determination and judgment) online. While this is still some way from being fully implemented, a pilot scheme for making claims of up to £10,000 online was commenced in April 2018.

Finally, a compulsory pilot scheme for disclosure is due to be rolled out in the Business and Property Courts in 2018. A common complaint of English court litigation is the significant amount of cost and time incurred by parties in complying with standard disclosure. Previous attempts to reduce this by offering alternative options to standard disclosure have failed to have the desired impact, and thus a disclosure working group chaired by Lady Justice Gloster has come up with new proposals for reform. These include: ‘basic disclosure’ with the statement of case of key documents on which a party relies (unless it would be more than 500 pages); the agreement of a List of Issues for Disclosure for any ‘extended disclosure’ that is said to be required beyond those key documents; and a greater control by the Court on whether the type of extended disclosure sought (from a list of options) is reasonable and appropriate fairly to resolve an ‘Issue for Disclosure’, taking into account factors such as the likelihood of documents existing that have probative value, the ease and expense of their retrieval and the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost. There is also proposed a duty to disclose known adverse documents (without the need for a search), whether or not these have been requested.
GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

SB & NN: A recent trend in arbitral proceedings (as with court litigation) is the increased use of third-party funding. This has become potentially more interesting in arbitration, however, following the decision of *Essar v Norscot* [2016] EWHC 2361 (Comm). In that case, following a successful arbitration, Norscot sought and was awarded its costs from Essar by the arbitrator, including all costs payable by Norscot to a third-party litigation funder on success. This included the uplift payable to the funder. Essar brought an application to set aside the costs award in the English Commercial Court, but that application was dismissed, and the award was upheld on the basis that the Arbitration Act 1996 gives an arbitrator the general power to award ‘legal or other costs’. This potentially makes obtaining litigation funding in arbitration much more attractive if all costs can be recovered from the other side. It is noted though that it was very relevant to both the arbitrator and the court that Essar had effectively through its conduct forced Norscot to obtain funding, and most commentators are of the view that costs are unlikely to be awarded to such an extent where that is not the case. The case has also generated much debate within the arbitration community on whether, and how, the identity of funders should be disclosed in arbitration, both from a conflict of interest point of view (to ensure that arbitrators are properly impartial and independent) and also to enable non-funded parties to assess costs risks.

Another trend that has been developing over recent years is the increased use of tribunal secretaries. This has led to concerns being raised about the proper role of secretaries and whether arbitrators are improperly delegating any decision making functions to them. The Commercial Court was required to consider this in the case of *P v Q and ors* [2017] EWHC 194 (Comm). This case was an application under section 24 of the Arbitration Act to remove all of the arbitrators due to an alleged improper delegation of decision-making to the tribunal secretary. The applicant also sought disclosure of a number of documents between the tribunal and the secretary, but the Court refused this on the basis that they were not strictly necessary to decide the application, and that they would only order disclosure form arbitrators in wholly exceptional cases (particularly in cases of institutional arbitrations where the rules frequently include provision for the confidentiality of the tribunal’s deliberations which the parties have agreed to). The Court dismissed the application to remove the arbitrators as there was no evidence of a failure properly to conduct proceedings or
THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

It is very difficult to pick out one specific case as more interesting than others. I am very fortunate to work in an outstanding commercial environment that gives me exposure to some fantastic and diverse clients – no two days are ever the same in my office! In the past year, I have been very focused on one particular dispute in the Commercial Court that arises out of the sale of a controlling stake in Formula 1 in 2005.

My client, an investment vehicle specialising in telecoms and media assets, claims that its bid for a controlling stake was derailed by a corrupt agreement reached between Mr Bernard Ecclestone and Dr Gerhard Gribkowsky, the banker responsible for the sale of the controlling stake, owned by German bank, Bayerische Landesbank (BLB).

My client alleges that Mr Ecclestone took steps to ensure that BLB’s shares were sold not to my client but to a company approved by Mr Ecclestone – in the end, CVC Capital Partners.

In June 2012, Dr Gribkowsky confessed to accepting secret payments arranged by Mr Ecclestone and a vehicle owned by the Ecclestone family trust, Bambino Holdings Limited (also a defendant to my client’s claims). Mr Ecclestone initially denied all knowledge of the secret payments, but later claimed that Dr Gribkowsky tried to ‘shake him down’ by threatening to disclose to HMRC details of his relationship with Bambino which would have led to a significant tax liability for Mr Ecclestone. In a separate earlier trial, in London in February 2014, Mr Justice Newey rejected Mr Ecclestone’s ‘shakedown’ defence as ‘thoroughly implausible’. Shortly afterwards, Mr Ecclestone faced criminal proceedings in Germany in relation to the secret payments, but that trial was suspended mid-way through upon Mr Ecclestone offering to make a payment of USD 99 million to the Bavarian government.

My client now understands that, while it was in negotiations with BLB in the period April to June 2005, Mr Ecclestone reached what Mr Justice Newey described as a ‘corrupt arrangement’ with Dr Gribkowsky. Following negotiations, my client submitted an offer to BLB on 29 June 2005 and received a letter of rejection dated 13 July 2005, referring to an apparent but unexplained failure to meet BLB’s conditions. From that point, my client was stonewalled, and efforts to engage with BLB were largely ignored. CVC Partners emerged as a potential bidder in around September 2005. My client is seeking substantial damages from Mr Ecclestone and Bambino. In addition, my client claims damages against BLB on the basis that they are liable for the actions of Dr Gribkowsky. Mr Ecclestone continues to maintain his ‘shakedown’ defence, while BLB admit that there was a corrupt arrangement, but deny liability. The trial is set to take place in October 2019.

One of the pleasures in handling the case is the quality of the legal talent employed by all of the defendants. Everyone is managing to stay on their toes.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

A key challenge, particularly in the wake of Brexit, is to maintain the popularity of the English courts as an appropriate venue for the resolution of international disputes. It worries me that in one or two areas our rules could make it easier to pursue claims with an international element. I do not think, for example, that security for costs orders should be too readily made against claimants on the sole basis that they are resident outside of this jurisdiction. I would also like to see the courts make broader disclosure orders that can be served outside of the jurisdiction in cases of serious international fraud.

It is important that we continue to attract major complex commercial disputes to this jurisdiction regardless of whether the UK is the centre of gravity, or whether the dispute is wholly concerned with overseas parties and assets.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

So much of what I do involves complex international disputes, with parties and assets spread across the world. It is key to approach such cases with a multi-jurisdictional outlook from the outset, and to ensure that consideration of the issues and strategy is not limited only to the particular systems of law or jurisdictions that you are familiar with, for example, those where you practice. It is important for clients to have access to the broadest views and for their chosen advisers to consider what other systems of law or jurisdictions may be relevant and could offer alternative options that may assist in the resolution of the dispute.

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GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

SB & NN: Two recent cases in the English courts raise interesting issues. In *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16, the Supreme Court clarified when an award creditor will be able to seek payment by the award debtor of security for the award during proceedings where the enforcement of an arbitral award is challenged in the English courts. In this

substantial injustice. The case serves as a reminder that section 24 is a steep hurdle, but it has led to institutions revisiting their rules and guidance on the appointment of tribunal secretaries, with the London Court of International Arbitration (LCIA) publishing new guidance at the end of last year to clarify the role of the tribunal secretary.
case, IPCO sought enforcement of an award against NNPC, who resisted it on the basis that it would be contrary to public policy to enforce it, pursuant to section 103(3) of the Arbitration Act. IPCO sought payment by NNPC of security while enforcement was adjourned to determine that question. The Supreme Court held that IPCO was not entitled to security, as there was nothing in either sections 103(2) or 103(3) (nor in the underlying provisions of article V of the New York Convention, which those sections effectively replicate) that provides a power to make an enforcing court’s decision on an issue raised under those provisions conditional on an award debtor providing security in respect of the award. This was to be contrasted with section 103(9), which is where enforcement is adjourned due to an application to set aside the award being made in the court of the seat, which specifically provides that security may be ordered in those circumstances.

In A v B [2017] EWHC 3417 (Comm), the Commercial Court decided that, under the LCIA Rules, a single arbitration request was not valid to refer disputes under two distinct contracts to arbitration. In such circumstances, the claimant must serve separate requests (and pay separate registration fees) and then seek consolidation if necessary. This contrasts with other institutional rules, such as those of the ICC, which specifically allow for disputes under multiple contracts to be referred to arbitration in one single request. It is likely that as a result of this case the LCIA will amend its rules to ensure that it remains competitive with other institutions in this regard.

The most significant recent development in arbitration, however, comes not from the English courts but from the Court of Justice of the European Union (CJEU). In March 2018, the CJEU rendered its decision in the case of Slovak Republic v Achmea (Case C-284/16), ruling that arbitration clauses in bilateral investment treaties (BITs) concluded between two EU member states are invalid. The reasoning for this is threefold:

(i) The primacy and autonomy of EU law requires that disputes potentially involving EU law must be determined within the judicial system set out in the EU treaties, namely national courts or tribunals, and the CJEU;

(ii) BIT tribunals may be required to interpret and apply EU law (as it is part of each member state’s national law); but

(iii) BIT tribunals are not a court or tribunal of a member state within the scope of article 267 of the TFEU and so are not competent to make a reference to the CJEU on EU law issues.

As such, the CJEU decided that the arbitration clause in the BIT before them failed to ensure that disputes would be decided within the judicial system of the EU, with the result that this had an adverse effect on the autonomy of EU law, and so was incompatible with EU law.

This decision has potentially far-reaching consequences, possibly precluding investment treaty arbitration in any form where it involves two member states (whether under BITs or other relevant instruments, such as the Energy Charter Treaty). The judgment has already received wide debate and commentators are not agreed on the precise scope of this decision, but what is clear is that it will have implications for this jurisdiction (primarily for investors from the UK who have invested in other EU countries) while the UK remains a member of the EU (and thus subject to the supremacy of the CJEU), but potentially also once the UK leaves the EU as it is not yet clear whether it will continue to apply after that date to investments that were made while the UK was part of the EU.

GTDT: How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

SB & NN: ADR has become increasingly popular as a user-friendly, cost-effective and flexible forum for dispute resolution. Although the 2016 CEDR Seventh Mediation Audit concludes that there has not been as spectacular a growth rate of mediation compared with previous years, it confirms that mediation is ‘firmly established in the dispute resolution landscape’. This is further demonstrated by arbitral institutions, such as the London Court of International Arbitration and the International Chamber of Commerce (ICC), adopting their own mediation rules. For example, the ICC reports that since 2012, under the ICC ADR Rules, the centre has administered mediation proceedings involving over 70 different nationalities of parties. In addition, there is an increasing trend of commercial parties using expert determination to resolve disputes concerning, for example, the valuation of shares in private companies and price adjustments in takeovers. Expert determination allows for technical or specialist disputes to be resolved in a quicker forum than litigation. Further, adjudication has been widely used in the construction sector as it allows disputes to be resolved on an interim basis. Mediation is also popular for construction disputes – there is a specific Pre-Action Protocol for construction and engineering disputes requiring parties to consider ADR procedures and the Technology and Construction Court guide also encourages ADR. By contrast, the banking sector tends to prefer to refer disputes to the Commercial Court and, more recently, to refer them to the Financial List – the specialist forum for financial disputes that we mentioned earlier. In addition, there is less use of ADR in this sector partly because parties take advantage of the summary judgment procedure to quickly dispose of disputes, which is not a feature of ADR.