[LITIGATION ADR QUESTIONNAIRE - UK]

CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

   Court proceedings are conducted in English.

   Several respected London translation firms, which are recognised by the court, specialise in providing translation and interpreter services for the purpose of putting forward non-English language documentary and oral evidence at court hearings.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

   'Pre-Action Protocols', which form part of the court's rules, set out steps that should ordinarily be taken before issuing proceedings.

   As part of these measures, parties involved in a dispute are encouraged to exchange relevant information and documentation about the matter to allow them to understand each other's position - and make informed decisions about settlement and how to proceed.

   To begin with, the Claimant should usually send a claim or demand letter to the Defendant before deciding whether or not to issue court proceedings. The parties are also expected to make appropriate attempts to resolve the dispute without the need to issue proceedings - for by example negotiation or mediation.

   If these measures are not first complied with, the party that issues the proceedings risks later being financially penalised by the court in costs. Even if he is successful at trial, if the Claimant earlier failed to comply with the Pre-Action Protocols the judge might not order the Defendant to pay any of the Claimant's legal costs.

   Sometimes Defendants seek to make use of the Pre-Action Protocols to persuade the Claimant to delay issuing court proceedings and thereby to postpone the date when ultimately they have to make payment to the Claimant.

   However, where the circumstances make it inappropriate for the Claimant to comply with the Pre-Action Protocols (for example because the Defendant has committed a fraud), the Claimant is fully entitled to issue proceedings straightaway - without first sending a claim or demand letter or otherwise following the pre-action procedures.

3. **What are the costs of civil and commercial proceedings? Who bears the costs?**

   The costs of making or defending a civil or commercial claim all the way to a trial can be high – although the court financially encourages the parties to try to reach a negotiated or mediated settlement rather than proceed all the way to trial. The court is prepared to impose costs penalties on parties who unreasonably refuse to engage in a mediation or who fail to accept a reasonable settlement offer.

   It is also lawful for a Claimant to obtain the financial backing of a professional litigation funder, which might be prepared to invest in his claim – in order to enable the Claimant to pay his legal costs. In return, the Claimant would allow the litigation funder to take a pre-agreed share of the damages (if any) ultimately recovered from the Defendant.

   The general rule is that the party who is unsuccessful at court will be ordered to pay most of the costs of the successful party. However, the court is able to make a different order - for example that the losing party must pay only a relatively small percentage of the winning party's costs.

   In deciding what costs order to make, the judge will consider all the circumstances of the case including the following factors:-

   - the parties' conduct during the dispute;
   - the parties' relative success at trial; and
   - the level of the earlier settlement offers (if any) made by the parties.

4. **What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?**

The court's rules oblige parties involved in proceedings to make a reasonable search for, and make available for inspection (both to the Judge and to the other side), documents which support or harm either party's case and which are, or have been, in their control. This procedure is called disclosure.

Disclosure involves each party drafting a list of the relevant documents – whether they are in paper form or electronic form (including emails, Word documents, Excel spreadsheet, voice mail messages, text messages, databases etc).

The disclosure process includes having to list relevant confidential documents as well as documents that are adverse to one's own case. The lists are then exchanged between the parties, who are entitled to inspect all the non-privileged documents listed.

If a party fails to provide adequate disclosure, he risks his opponent applying to the court for an order that will result in his case being struck out and a costs order being made against him.

5. **What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?**

Witness evidence is statement based rather than by deposition. Witness statements are filed at court and exchanged with the other parties.

In order to save the court's time, it is customary for witness statements to stand as 'evidence in chief'. In other words the written statement itself forms the witness's evidence at trial, without the witness typically having an opportunity to elaborate on its contents or add anything further. Usually the only examination of a witness at trial is cross-examination by the opposing party's barrister. It is therefore essential that witness statements are complete and accurate.

At the end of each statement the witness must sign a 'statement of truth', which is a self-certification in the following terms: "*I believe that the facts stated in this witness statement are true*".

The signing of a statement of truth is a serious matter. Under the court's rules, a statement of truth signed by a witness without an honest belief in the truth of the contents of the statement may render the person who signed the statement subject to proceedings for contempt of court. The potential penalties for contempt of court include a fine and imprisonment.

Witnesses can be compelled by the court to give evidence at trial but this is unusual in commercial disputes.

6. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e.: may not be disclosed to the court)?**

'Without prejudice' privileged settlement offers (which may not be disclosed to the trial judge until after the end of the trial) are usually set out in letters sent between the parties' solicitors. If no settlement is reached and the dispute instead proceeds to a trial, the offer letters can usually be shown to the judge after the end of the trial - on the issue of liability for costs and interest.

If a realistic settlement offer is not accepted, the party who received the offer runs the risk of later being penalised in costs and interest if ultimately at trial he does not do better than the offer that was earlier made to him.

Oral without prejudice privileged settlement offers can be made during, for example, a telephone call between the parties' solicitors. They are also commonly made during a mediation. The court actively encourages the parties to mediate disputes and has the power to order a stay of proceedings for the purpose of enabling a mediation to take place. The courts are prepared to impose costs penalties on those who unreasonably refuse to engage in such a process.

In a mediation a neutral third-party is appointed to help those in dispute reach a negotiated settlement. It is a (confidential and without prejudice/privileged) facilitative process rather than an adjudicative one:

the mediator will not pronounce who is right and who is wrong, although he or she will usually test the parties' views and ensure they fully appreciate the risks and costs implications of proceeding to trial.

7. How can foreign judgments be enforced?

Foreign judgments can be, and regularly are, enforced in the UK. The general principle is that new proceedings must be issued to enforce a foreign judgment (these proceedings are usually commenced at the High Court in London). However, if an express exception to this general rule applies, the foreign judgment simply needs to be registered at the High Court, whereupon it is possible to proceed to enforce the foreign judgment as if it were an English judgment.

Even where new proceedings are required, the foreign judgment is usually treated as an obligation that is actionable in the UK. Accordingly, the foreign judgment is sued upon by the Claimant as a debt and he will usually ask the judge to grant summary judgment – rather than having to incur the greater costs and time of a full blown trial in the UK.

However, it is open to the Defendant to seek to persuade the UK judge that the foreign judgment should not be enforced in the UK (for example on the basis that the foreign court acted without jurisdiction, the Defendant was not duly served with the process of the foreign court and did not appear, the foreign judgment was obtained by fraud or an appeal is pending in the foreign jurisdiction).

[LITIGATION ADR QUESTIONNAIRE - UK]

ARBITRATION

1. Are mediation clauses in commercial contracts binding and enforceable?

In the past, mediation clauses were viewed as unenforceable because of their status as agreements to agree; and (as such) too uncertain to enforce. However, since the court's judgment in the 2002 case of *Cable & Wireless v IBM*, the attitude towards mediation clauses has changed. Today, such clauses are increasingly considered to be binding and enforceable but a lot depends on the wording of the clause. It should be practical and detailed, including setting out the language, location and duration of the mediation. In addition, the clause should state who is to bear the costs of the mediation and the procedure to be adopted for appointing a mediator.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

There is no fixed protocol for mediation. Mediations may be conducted according to established rules of a dispute resolution organisation or rules determined by the mediator or the parties themselves. Parties are often at liberty to amend organisational rules and derive their own procedures. As such they have autonomy over the procedure, which often makes mediation seem preferable to litigation.

A neutral third-party is appointed as the mediator - to facilitate the negotiations and help the parties reach a compromise. The mediator describes the process to the parties and outlines the procedure according to which the mediation will be carried out. In cases in which litigation is pending, the matter of the suspension of pre-trial activity must usually be addressed.

After initial joint meetings between the mediator and the disputing parties, the mediator will hold individual meetings with each party, in which risks and proposed settlements are discussed.

If a settlement is reached, the parties and the mediator will draw up a document detailing the agreement. Until this point, the mediation is non-binding, and either party can reject any proposed settlement offer and walk away from the mediation. Should this happen, negotiations can recommence later or the mediation can terminate in favour of other methods of ADR - or litigation.

3. Are arbitration clauses in commercial contracts binding and enforceable?

Yes. For an arbitration agreement to be enforceable under the 1996 Arbitration Act, the only formal requirement is that the agreement is recorded 'in writing', a term which is very widely defined. Court proceedings will be stayed in favour of arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. However, if a party has taken any steps in those court proceedings to answer the substantive claim, it thereby loses its right to have the court proceedings stayed.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

Both types are frequently used. Because of the presence of a number of well-established arbitration institutions, institutional arbitration is probably the most used when the stakes in the dispute are high.

5. Which arbitration institutes are most popular?

The principal arbitral institutions are:

- The London Court of International Arbitration (LCIA: www.lcia.org)
- International Chamber of Commerce (ICC: www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/)

- Chartered Institute of Arbitrators (CIArb: www.ciarb.org)
- International Centre for Dispute Resolution (ICDR: www.adr.org/icdr)

There are also a number of specialist organisations administering arbitrations in areas such as commodities, insurance, construction and shipping. Examples are:

- London Metal Exchange (LME: www.lme.com)
- The London Maritime Arbitrators Association (LMAA: www.lmaa.org.uk)
- The Grain and Feed Trade Association (GAFTA: www.gafta.com)
- Insurance and Reinsurance Arbitration Society (ARIAS: www.arias.org.uk)

6. What influence can the parties have on the identity of the arbitrator(s)?

The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire. If or to the extent that there is no such agreement, the following provisions apply:

- If the tribunal is to consist of a sole arbitrator, the parties jointly appoint the arbitrator within 28 days after service of a request in writing by either party to do so.
- If the tribunal is to consist of two arbitrators, each party appoints one arbitrator within 14 days after service of a request in writing by either party to do so.
- If the tribunal is to consist of three arbitrators, each party appoints one arbitrator within 14 days - and the two so appointed then appoint a third arbitrator as the chairman of the tribunal.
- If the tribunal is to consist of two arbitrators and an umpire, each party appoints one arbitrator within 14 days - and the two so appointed appoint an umpire at any time after they themselves are appointed; and do so before any substantive hearing - or forthwith if they cannot agree on a matter relating to the arbitration.

If these procedures for appointing arbitrators fail, an application can be made to the court for an arbitrator to be appointed under section 18 of the Arbitration Act 1996. Where institutional rules apply, the missing arbitrator will be appointed by the relevant institution.

7. In what language are arbitration proceedings conducted?

The parties can agree on any language. Failing such agreement, the tribunal will determine the language. It is usually English.

8. What types of pre-arbitration measures are available and what are their limitations?

Section 44(1) of the Arbitration Act 1996 provides that the court has, in support of arbitral proceedings, the same power it has in court proceedings in making orders for the following:

- the taking of evidence of witnesses;
- the preservation of evidence;
- the inspection of property;
- the sale of any goods the subject of the proceedings; and
- the granting of an interim injunction or the appointment of a receiver.

If the matter is urgent the court may, on the application of a party (or proposed party) to the arbitral proceedings, make such orders as it considers necessary for the purpose of preserving evidence or assets. If the case is not urgent, the court will usually only act on the

application of a party to the arbitral proceedings if notice is first given to the other parties and to the tribunal.

In any case the court will act only if or to the extent that the arbitral tribunal has no power, or is unable for the time being, to act effectively. If the court considers it appropriate, its order under section 44 of the Arbitration Act shall cease to have effect in whole or in part on the order of the tribunal.

9. What are the costs of arbitration proceedings and who bears these costs?

Section 63 of the Arbitration Act provides that the parties can agree what costs of the arbitration are recoverable between the parties. Costs include the fees and expenses of the arbitrator(s) and any arbitral institution, as well as the legal or other costs of the parties (including fees of expert witnesses and translators, travel costs, hearing venue fees, transcriber charges etc). Failing such agreement, the tribunal can determine recoverable costs on such basis as it thinks fit but it must specify that basis, the items of recoverable costs and the amount of those costs.

Unless otherwise agreed, costs are allocated on the basis that they should follow the event, i.e. the unsuccessful party pays the successful party's costs unless it appears that this is not appropriate in the circumstances.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

The parties can agree whether there should be disclosure and, if so, the scope of it. Failing such agreement, the tribunal has a wide discretion in determining whether there should be any disclosure and, if so, what documents should be disclosed. In general, the parties are expected to disclose the documents upon which they will rely and then make disclosure requests to the tribunal if necessary. The disclosure requests are usually set out in a 'Redfern schedule'. The courts are not empowered to grant pre-action disclosure in respect of disputes which are to be referred to arbitration.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

Witness evidence (both factual and expert) is a common feature of English arbitration proceedings. Written witness statements and reply statements are frequently exchanged between the parties. Witnesses are generally expected to be available to attend oral hearings - to be examined by their own counsel and cross-examined by counsel for the other side.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

Settlements discussions are usually conducted in writing and between the parties' representatives. Such correspondence is privileged. Upon reaching a settlement, parties can ask the tribunal to record the agreement in an award.

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

Under section 66 of the Arbitration Act 1996, an award made by the tribunal pursuant to an arbitration agreement may, with the permission of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where such permission is given, judgment may be entered in the terms of the award. However, permission to enforce an award will not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

Unless the parties have agreed to exclude the right to appeal, either party may challenge or appeal an award on three narrow grounds:

- the tribunal lacked substantive jurisdiction;
- there was a serious irregularity affecting the tribunal, the arbitration proceedings or the award; or
- to the extent that the parties did not waive this right, on a question of English law.

Appeals are, however, rare and (with the English courts traditionally supporting arbitration) they succeed even more rarely. An appeal must be made within 28 days by application to the Commercial Court, which is a division of the High Court.