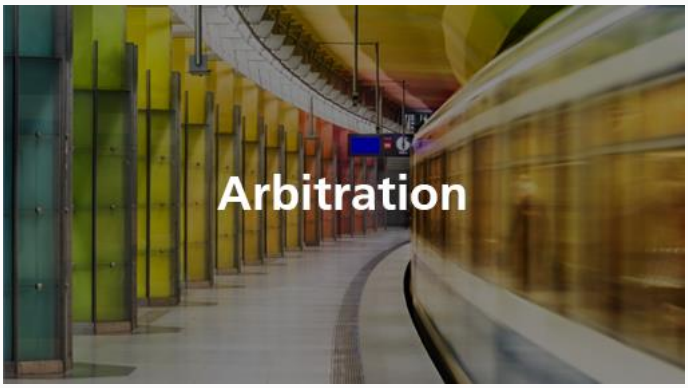
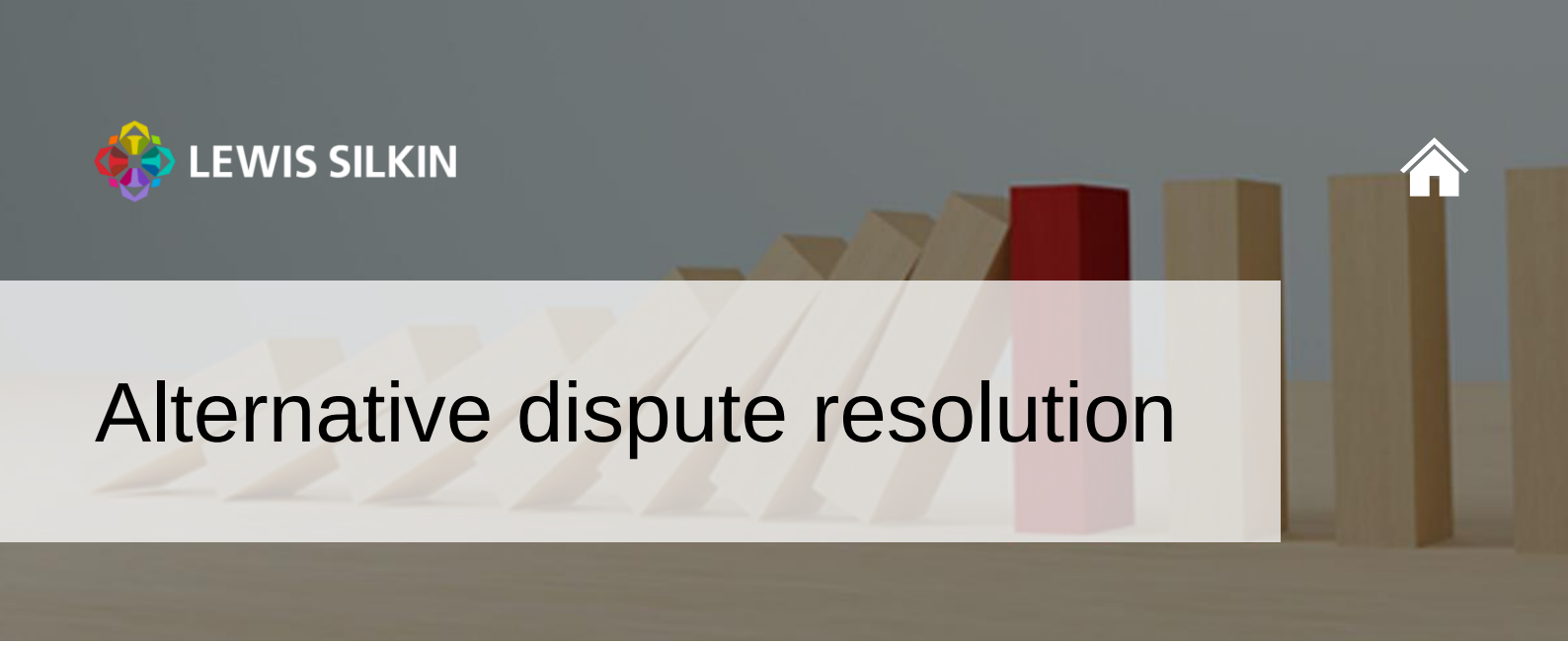
LEWIS SILKIN

Litigation trends

Our Dispute Resolution team has compiled an overview of some of the key themes we are seeing in the litigation landscape of England and Wales. Click on the tiles below to navigate our guide and to access further resources on each topic.

Our experienced team is available to discuss any questions you may have - please **contact us**.





Alternative dispute resolution

It is increasingly likely that ADR is going to become a compulsory part of the litigation process

In August 2023, the Civil Justice Council ("CJC") published Part 1 of its Review of Pre-Action Protocols. One of its key proposals was the replacement of the current Practice Direction – Pre-Action Conduct with a new General Pre-Action Protocol, which would apply to all cases that do not fall within a specific pre-action protocol. The General Pre-Action Protocol would require engagement in alternative dispute resolution prior to issuing proceedings.

In terms of the requirement for compulsory ADR in complex and high value commercial litigation, in response to feedback from the profession regarding the appropriateness of compulsory ADR in such cases, there will be consultations on the need for a specific pre-action protocol and what should be contained in such a protocol. The output of these consultations will be considered in Part 2 of the CJC's review. Change as a result of this review therefore may take some time.

Alongside this, the judiciary are driving to have ADR incorporated into the digitised court system (see Continued digitalisation of the justice system in England and Wales) and the Government have announced the compulsory use of mediation in small claims in the County Court.

On 29 November 2023, the Court of Appeal handed down its judgment in *Churchill v Merthyr Tydfil County Borough Council and others* [2023] EWCA Civ 1416 and confirmed that the court does have the power to order parties to engage with each other in a non-court-based dispute resolution process with a view to settling the issues between them. In considering such an order, the court must be satisfied that the order does not impair the Claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. This is a significant decision in English litigation – our article summarising the issues arising can be found here.

Our Alternative Dispute Resolution Service

Lewis Silkin has an outstanding team of lawyers specialising in all aspects of commercial disputes, with vast practical experience of modern litigation and ADR, with a number of the team being CEDR accredited mediators. We are now using our expertise to offer ADR services bespoke to these unprecedented times. In particular, we can ensure that parties who are facing early-stage contentious issues receive appropriate help, such as settlement facilitation assistance, early neutral evaluations and mediation. Further details of our **LS Resolve** service can be accessed here.

Continued digitalisation of the justice system in England and Wales

The future of the justice system is that court and tribunal processes will be operated entirely on a smart digital system

It is envisaged for the justice system as a whole that the court and tribunal processes will be operated entirely on a smart digital system, the benefits of which include greater access to justice, greater efficiency of resolving disputes (lower costs, less time to resolution and associated wider economic benefits), greater transparency and providing a justice system which can help contribute to the rule of law in an increasingly technological society.

The pre-action stage will be completely online and will consist of a variety of portals. At the initial stages, it is anticipated that users can be provided with "Early Legal Services and Advice", such advice is expected to be provided by AI.

The Master of the Rolls, Sir Geoffrey Vos has called for integration of alternative forms of dispute resolution into the digital system. He suggested that AI can, and should, drive an integrated dispute resolution process. It is anticipated that AI will be used at every stage of the digital justice system, including in the Business and Property Courts. Our article on the digitisation and use of AI in the Business and Property Courts can be found here.

Online Procedure Rules and an Online Procedure Rules Committee ("OPRC") have been legislated for in the Judicial Review and Courts Act 2022. Sir Geoffrey Vos announced that the OPRC will oversee the creation of an end-to-end digital journey to help people resolve disputes more quickly and efficiently and provide the necessary governance for the digital justice system as it develops. He refers to it as his "online funnel" vision.

Sir Geoffrey Vos commented in a speech in June 2023 that the OPRC will need to consider whether there should be rules concerning the use of AI in the production of legal submissions. At the launch of a shared vision for the future of the civil and family courts and tribunals system by the Lord Chancellor and senior judiciary on 20 November 2023, it was noted that advances in technology, including "*safe and appropriate uses of AI*", would be used to support users to access high quality information, understand their options and take appropriate steps.

Current online pilots for the issue and management of claims are as follows:

- **Online Civil Money Claims Pilot (CPR PD51R)** - Operating until 1 October 2024 in the County Court to test an online claims process for amounts up to £25,000 (£10,000 for unrepresented parties).
- **Damages Claims Pilot (CPR PD51ZB)** - Operating until 1 October 2024 in the County Court in respect of damages claims where parties are legally represented.
- **Small Claims Paper Determination Pilot (CPR PD51ZC)** - Operating until 1 June 2024 in six pilot courts - enables the Court to direct that a small claim be determined without a hearing.

In October 2023, the Law Society of England and Wales published a green paper which outlines proposals for the civil justice system and suggestions for reforms. These reforms include an online diagnostic tool for dispute resolution processes. The consultation period is open until 5 January 2024.

Environmental, social and corporate governance

Litigation relating to ESG issues is on the rise

There has been an increase in strategic 'climate litigation' in the Courts of England and Wales. However, as detailed in our recent article, two recent attempts to use claims under existing company legislation as a platform for climate litigation against company directors have been strongly rebuffed by the courts. These cases concerned derivative claims, whereby shareholders in a company bring a claim against the company's directors on the company's behalf for breaches by the directors (i.e., the alleged failure to mitigate climate risk). Client Earth appealed the High Court's unfavourable decision in its case against Shell, but was ultimately refused permission by the Court of Appeal.

These actions may well increase. For example, Extinction Rebellion announced earlier in 2023 a move away from disruptive tactics. Might we expect to see them in Court in the future?

Class actions are also increasing in relation to ESG issues. Recent examples include a claim arising out of the collapse of the Fundao Dam, claims against household name companies (Tesco, Dyson) regarding working conditions and a claim against a water company (Severn Trent) on behalf of households which may have been overcharged on their water bills.

Back in October 2021, our Dispute Resolution team signed the 'Greener Litigation Pledge', which seeks to reduce the carbon footprint of court disputes, with signatories taking active steps to minimise greenhouse gas emissions. We are part of the working groups to:

- engage with the courts to review and change civil procedure rules and court guides; and
- investigate how technology can be used to support the objectives of the Pledge.

Costs and litigation funding

There have been some interesting developments in this area - some key cases on litigation funding agreements have been decided and the fixed costs regime has been extended

Supreme Court ruling on litigation funding agreements

- On 26 July 2023, the Supreme Court ruled in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 that litigation funding agreements, where the funder plays no part in the conduct of the litigation but their remuneration is based on a percentage of any damages recovered, are Damages Based Agreements (DBAs). Therefore, unless such agreements comply with the relevant statutory regime, they will be unenforceable. This decision has far-reaching ramifications as it is possible that many existing litigation funding agreements will be affected.
- Shortly after the ruling, on 31 August 2023, the Department for Business and Trade released a statement providing that: "*The Department is aware of the Supreme Court decision in Paccar and is looking at all available options to bring clarity to all interested parties*". Accordingly, on 15 November 2023, an amendment was proposed to the Digital Markets, Competition and Consumers Bill, which deals with DBAs in opt-out collective proceedings before the Competition Appeal Tribunal. Further steps by the Government may be taken.
- Further cases on litigation funding agreements have already been seen before the Courts. Our article on the cases of *Diag Human SE and another v Volterra Fietta (a firm)* [2023] EWCA Civ 1107 (regarding a Conditional Fee Agreement) and *Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627 (Comm) (regarding a DBA) explores these decisions in more detail.

Fixed costs regime extended

- The fixed costs regime was extended from 1 October 2023 to cover civil litigation claims with a value of up to £100,000. The amount of recoverable costs is based on the stage at which the case is finally resolved, plus a percentage of the claim value.
- A new intermediate track has been introduced for cases within the regime with a value between £25,000 and £100,000. This has introduced a more streamlined procedure, with efficiencies including restrictions on volumes of pages and more limited disclosure, in order to seek to keep the costs of these cases proportionate to their value.

LS Unlock

Lewis Silkin has committed to an initiative called LS Unlock. It is an alternative approach to fees which is designed to help individuals and businesses pursue or defend significant commercial claims by removing or reducing the cost risk of litigation. LS Unlock comprises a free initial assessment of significant commercial disputes together with a menu of alternative fee arrangements which can reduce and, in certain cases, eliminate the upfront cost of pursuing or defending a claim.

Artificial intelligence in litigation

AI is extremely relevant in the legal market generally and is being increasingly used by law firms in the UK, including in a litigation context

According to The Lawyer's UK 200 report, 41.9% of firms have implemented AI initiatives in specific departments or on specific projects and 9% have implemented AI across the business. Of those firms which have not yet implemented AI, 39.1% are actively planning to do so.

The Master of the Rolls, Sir Geoffrey Vos, predicted earlier in 2023 that AI may be used to take some judicial decisions. Court of Appeal Judge, Lord Justice Birss recently used ChatGPT to produce a summary of an area of law and used it in a judgment. More recently, Sir Vos addressed how further digitisation of the claims process and use of AI could benefit the Business and Property Courts and the larger cases dealt with in these courts. Our article discussing this can be found here.

We are starting to see examples of the unsuccessful use of AI by participants in legal proceedings in England and Wales. For example, a party in a tax appeal cited nine cases which had been 'hallucinated' by an AI tool. It is therefore unsurprising that guidance on the use of AI has been issued to judicial office holders. Our article summarising this guidance can be found here.

The rapid development and uptake of AI has taken place against a backdrop of legal uncertainty, with many potential legal and regulatory issues arising from its use. In relation to generative AI, questions include the extent to which the creation and use of AI models is consistent with the rights of those whose creative works have been used to 'train' the models. Litigation has commenced in the US and UK which may provide clarity on the legality of AI image generation tools.

Neil Parkes, one of our Dispute Resolution Partners, recently commented on the pending US case, *Universal Music & Concord v Anthropic*, relating to the alleged use by Anthropic of copyrighted music lyrics to train its AI systems. Neil predicts that we will see "*more cases of this type, including in the UK, particularly as the development and use of AI tools trained using data continues at a significant pace*".

In a highly anticipated decision delivered just before Christmas, the UK Supreme Court has unanimously confirmed that an artificial intelligence machine cannot be named as an inventor within the meaning of the UK Patents Act 1977. Our article summarising the decision can be found here. To avoid disputes, the Government is working on a code of practice on copyright and AI.

AI – your legal experts

Creativity, technology and innovation are at the heart of everything we do at Lewis Silkin. Our team of experienced lawyers is well-equipped to navigate the legal complexities and implications of the rapidly evolving AI landscape.

From startups to multinational corporations, we provide tailored legal solutions to the legal challenges posed by AI technology. We advise on a wide range of matters, including workplace usage policies, algorithmic discrimination, ethics, privacy and IP issues surrounding data sources. Access our AI resources for further information.

Arbitration

No substantial reform is proposed of Arbitration legislation in England and Wales, but the High Court has called for reflection to ensure sufficient safeguards are in place following a recent challenge by Nigeria

Proposed reform of the Arbitration Act 1996

On 6 September 2023, the Law Commission of England and Wales published its final report which contains recommendations to reform the Arbitration Act 1996. The Government requested a review of the Act in order to ensure that it is fit for purpose and to ensure that it continues to promote the UK as a leading destination for commercial arbitration. Comprehensive reform is not deemed necessary. As summarised by the Law Commission:

We heard repeatedly from consultees that the Act works well, and that root and branch reform is not needed or wanted. Accordingly, we have confined our recommendations to a few major initiatives, and a very small number of minor corrections.

As detailed in our recent article, it was confirmed in the King's speech that the Arbitration Bill will form part of the Government's forthcoming legislative programme. The Bill had its first reading in Parliament on 21 November 2023.

The Federal Republic of Nigeria v Process & Industrial Developments Limited [2023] EWHC 2638 (Comm)

On 23 October 2023, the High Court handed down a judgment upholding a claim by Nigeria that three arbitral awards were procured by fraud and in a manner contrary to public policy. Nigeria challenged the awards under section 68 of the Arbitration Act 1996. Knowles J produced an extensive and damning judgment, towards the end of which he commented as follows (paras 582 and 583):

> *The facts and circumstances of this case, which are remarkable but very real, provide an opportunity to consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value involved is so large and where a state is involved.*
>
> *The risk is that arbitration as a process becomes less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud. The present case shows that having (as here) a tribunal of the greatest experience and expertise is not enough. Without reflection, then a case such as the present could happen again, and not reach the court.*

Consultation on the use of AI in Arbitration

The Silicon Valley Arbitration and Mediation Center extended the deadline for public feedback on its Guidelines on the Use of AI in Arbitration to 15 December 2023 for individuals and 15 February 2024 for institutions. These guidelines "*are meant to serve as a point of reference for arbitral institutions, arbitrators, parties and their representatives (including counsel), experts, and, where relevant, other participants in the arbitral process*" and provide a model clause which can be incorporated into procedural orders such that they become applicable to participants to an arbitral proceeding.

Contact our team

If you would like to discuss any of the trends covered in this document with one of our experts, please reach out to a member of the team listed below.

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