



The Law Society
of England and Wales

England and Wales: The jurisdiction of choice

dispute
resolution

sponsored by

Herbert Smith

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The Ministry of Justice is committed to supporting the legal sector's success on the international stage. **I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world.**

Our courts, particularly those in London, play host to many parties from overseas: at the specialised Commercial Court, a staggering 80% of cases involve a foreign claimant or defendant. Of course, that has a knock-on effect and the success of the legal services sector plays an unquantifiable role in helping London to maintain its position as a major centre for global commerce.

This brochure sets out the reasons for our success and lets people know why it is in their own interests to use English law and to settle their disputes here. People come here because they want to conduct their business in a country that offers a flexible and dependable legal system. In ever more complex, sophisticated and inter-related markets, English commercial law provides predictability of outcome, legal certainty and fairness. It is clear and is built upon well-founded principles, such as the ability to require exact performance and the absence of any general duty of good faith. People also come here because they know they will find first class, highly specialised lawyers, arbitrators and mediators and they recognise that a decision from an English court carries a guarantee of judicial excellence and integrity.

There is a real success story here and the Law Society are right to trumpet it. I hope that you will join them in spreading the message.

A handwritten signature in black ink, which appears to read 'Jack Straw'.

The RT Hon Jack Straw MP,
Secretary of State for Justice and Lord Chancellor

INTRODUCTION

As business becomes increasingly global, companies need to consider a wide choice of laws, procedures and legal systems when selecting their external legal advisers, choosing the governing law for a contract, the best forum in which to resolve their dispute or their preferred means of dispute resolution.

To help you choose the law, jurisdiction or seat of arbitration for your dispute this document sets out the benefits of the English law and court system and of London as a seat of international arbitration.

English Law - the international law of choice:

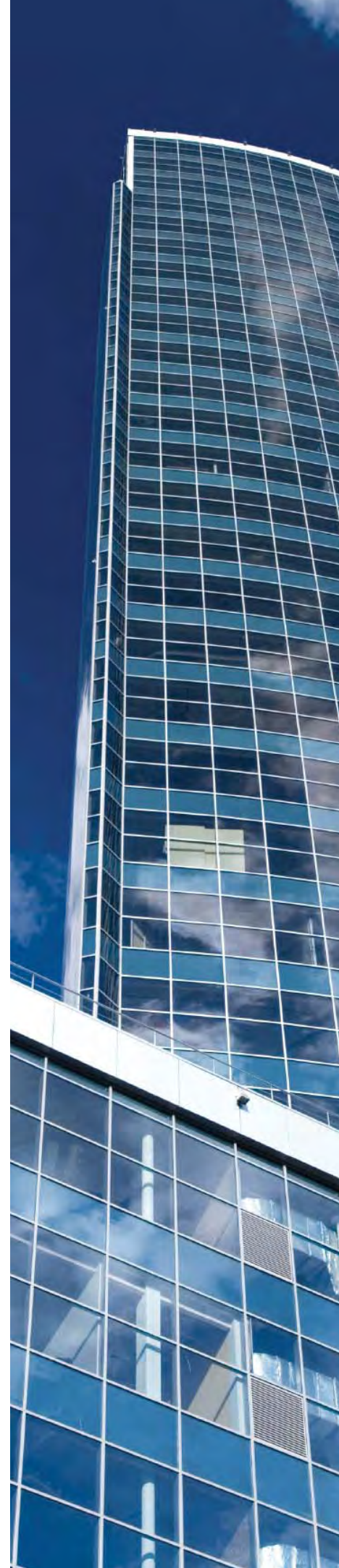
- Predictable and transparent
- Flexible
- Based on freedom of contract, supporting commerce

English Courts - the international forum of choice:

- Judges experienced in international disputes
- Thorough but proportionate procedures
- World class legal advisers

London - the internationally preferred seat of arbitration:

- Clear legislative framework and judicial support for arbitration
- Neutral forum for international disputes
- World class arbitrators, legal advisors and arbitration organisations



Why choose English law?

English is the language of international business

English is one of the most widely spoken languages in the world. Proceedings conducted in English, interpreting English language statutes and cases, are easily accessible for commercial parties.

English law is transparent and predictable

English law has developed from a combination of statute and case law in which publicly decided cases (whether interpreting statutes or building on previous case law) form part of a body of law, known as the common law.

English law gives guidance on almost every issue. Parties (especially commercial parties) can predict, with greater certainty than in many civil law systems, whether a proposed course of action is likely to be lawful or unlawful.

English law offers more flexible arrangements

English law is based on the principle of freedom of contract which is more flexible than many civil law systems, which rely on a more rigid and prescriptive civil code.

In English Law, a contract is generally accepted to be valid unless it is for an illegal purpose or is otherwise contrary to public policy. The key principle of 'freedom of contract', where parties are bound by the terms of their agreement, is attractive to commercial parties. English law allows the parties to agree the proportion of benefits which may accrue to either party, allowing the parties much greater flexibility of arrangements than under many civil codes.

English law supports the needs of modern commerce

As a common law system, judges decide what the law is when there is no other authoritative statement of the law. A decision of an appellate court binds future decisions of the same appellate court on similar facts, and binds all lower courts reviewed by that appellate court until there is another authoritative statement of the law (by the legislature or a higher court), known as the doctrine of precedent.

A common law legal system means that the law can evolve more quickly than statute based law in order to adapt to current practices and behaviour as demanded in a modern society.

How to ensure any dispute about your contract is dealt with under English law and before the English courts

To ensure English law forms the legal basis of a contract between parties, an appropriate clause should be included in the contract. How any disputes that may subsequently arise are to be resolved can also be provided for by the insertion of specific dispute resolution clauses in commercial contracts. We give examples in *Appendix A*.

“English law... is more flexible than many civil law systems, which rely on a more rigid and prescriptive civil code. ”

CHAPTER 2 : The English Court System

Why choose the English court system?

English judges have a worldwide reputation for quality

The judiciary in the UK are respected throughout the world for their impartiality and their experience and skill in dealing with complex cases. Judicial independence is a key principle of the UK constitution. Judges decide cases according to their own judgement of the issues, free from outside influence and governmental control. Judicial appointments in England are made by the Judicial Appointments Commission (JAC) which is an independent Non-Departmental Public Body, launched in 2006 to maintain and strengthen judicial independence. The JAC ensures that the selection of candidates for judicial office is free from any political involvement.

English judges are recruited from the ranks of senior legal practitioners with many years of experience at the highest levels of practice. In contrast to many civil law systems, there is no career judiciary.

Specialist judges and courts are another feature of the English court system, including a commercial court used to handling cases with an international dimension, often involving multiple parties and applicable laws. The English civil court structure is set out in *Appendix B* and examples of international cases heard in the Commercial Court are contained in *Appendix C*.

English court judgments are respected internationally and an English judgment can be enforced in many key international jurisdictions

English judgments have a worldwide reputation for quality. This is due to the combination of high quality English judges and English civil court procedures which thoroughly test the evidence. English judgments are often highly persuasive in courts in other jurisdictions.

An English judgment can be easily enforced within the European Union by virtue of the Brussels 1 Regulation and the European Enforcement Order. Outside the EU, the UK is party to a number of reciprocal arrangements allowing for mutual recognition and enforcement.

Under English law, discussions with your lawyer are subject to confidentiality and covered by legal privilege

English lawyers are bound by their professional rules to keep the affairs of their clients, and former clients, confidential unless:

- the information is already (properly) in the public domain;
- the client consents to the disclosure; or
- the disclosure is required by law or is ordered by a court of competent jurisdiction.

Legal professional privilege is firmly established in English law as a fundamental human right. Confidential communications between a lawyer and his or her client coming into existence for the purpose of giving or getting legal advice are privileged. Also privileged, in a litigation context, are communications with third parties for the purpose of giving or getting legal advice or collecting evidence for use in the litigation. Attempts to settle disputes are also protected from disclosure by rules on without prejudice communications.

CASE STUDY

Judgment was delivered in favour of a large global oil company in one of the largest energy insurance disputes of recent years concerning the negligence of its insurance broker. The case concerned an offshore construction open cover insurance facility under which the oil company claimed losses of some \$239m in the course of constructing 26 offshore oil and gas projects across the globe. The action culminated in a 12 week trial in the Commercial Court in London where all the issues were explored before an experienced Commercial Court judge. The ensuing judgment contained important commentary on the circumstances in which insurance brokers owe a duty of care, and had implications for other professional service providers.

CASE STUDY

A major German-based chemical company asked an English law firm to take action to revoke the UK patent for the active ingredient of a major pharmaceutical product of international importance. Although the company was principally based in Germany, and the patent owner had an equivalent patent there (as well as in most jurisdictions), the company particularly wanted to obtain judgment in the English Patents Court revoking the UK patent, because it believed this would be highly persuasive in Germany and throughout Europe. In other words, judges in those countries look to see what the English Patents Court decides and are likely to follow it.

The company also believed that they were more likely to get the correct decision in England. This was partly because of the quality of the Patents Court judges, and partly because the procedure thoroughly tests the evidence, especially the expert evidence.

England is an established centre for mediation and ADR

English courts recognise the benefits of mediation and other forms of Alternative Dispute Resolution (ADR) in helping parties to settle cases outside the court process. Even after litigation has commenced, there are a number of stages when the court can stay proceedings to enable the parties to mediate.

Mediation confidentiality means that even if parties fail to reach an agreement and the court process is reactivated, the content of the mediation meetings generally cannot be disclosed to the judge.

England has a well established body of high quality mediators. The majority of mediators have been accredited by at least one of the main mediation providers, who also offer training. A mediator who is a member of a regulated professional body, such as the Law Society or Bar Council, will be subject to their professional codes of conduct which ensure minimum standards and they will be required to have indemnity insurance.

English disclosure obligations seek to achieve a balance between ensuring key evidence is disclosed whilst avoiding disproportionate cost

English procedure rules require that the parties should have access to all relevant, non-privileged documents, including those of their adversary. Often referred to as a 'cards on the table' approach, this gives parties the advantage of access to the documentation necessary to evaluate the strengths and weaknesses of their case in advance of the trial. In certain circumstances, the court rules allow for pre-action disclosure, where a party wishes to see documents held by a potential defendant in order to decide whether or not to issue proceedings. The rules also provide for potential disclosure by non-parties when proceedings are under way.

The disclosure rules in England take a midway course between the US which has onerous and wide-ranging disclosure obligations and civil law jurisdictions which often have little or no right to disclosure.

Standard disclosure in English courts requires a proportionate search of:

- *a party's own documents* - the documents on which a party relies
- *adverse documents* - documents which adversely affect his or her own or another party's case or support another party's case; and
- *required documents* - documents which a practice direction requires him or her to disclose.

The court may make an order for specific disclosure going beyond the limits of standard disclosure if it is satisfied that standard disclosure is inadequate but such an order will not be made readily. One of the clear principles underlying the court rules is that the burden and cost of disclosure should be minimised. The court will, therefore, seek to ensure that any specific disclosure ordered is proportionate in the sense that the cost of such disclosure does not outweigh the benefits to be obtained from such disclosure. The court will seek to tailor the order for disclosure to the requirements of the particular case allowing for: the financial position of the parties; the importance of the case; and the complexity of the issues.

Witnesses (and sometimes documents) in foreign jurisdictions may also be called in evidence before the English courts by use of letters of request. A letter of request is a request to a court in another jurisdiction to take evidence and transmit that evidence to the requesting court. As such, a party to the English proceedings may apply to the English court to issue a letter of request to the relevant foreign court so that an unwilling witness can be examined.

CASE STUDY

A Chinese textile company terminated a long-standing contract with their European distributor and paid what they believed was due under the terms of the contract. The distributor claimed it was entitled to further compensation under certain regulations, which the textile company disputed. Eager to settle the matter and maintain a positive relationship, the parties mutually agreed to try mediation.

Particular features

A well established English mediation group appointed a mediator with particular experience in contract disputes.

An assistant was also appointed who, besides having experience in Chinese industry, was fluent in Mandarin.

The mediation

The parties used the opening joint session to fully explain their positions and the mediator, sensing the cathartic importance of this, let the session go on longer than was usual.

The mediator met privately with the parties' lawyers to draw up the form of a settlement, but although figures were produced, they were vastly different.

Through a series of private sessions, the parties slowly decreased and increased their respective offers but it seemed that a stalemate had been reached.

After further negotiations both parties accepted a final sum of £750,000 and an agreement was drawn up by the lawyers to form part of a consent order.

CHAPTER 2 : The English Court System

Cross-examination is available in English courts to test written evidence

Cross-examination can be a crucial tool in testing an opponent's written evidence and is not available in many civil law systems. Together with effective disclosure, it enables all the key issues to be presented and the evidence relating to them to be properly tested.

Case management by judges ensures efficient progress of cases

The court is under a duty to actively manage cases and judges seek to monitor cases through to trial.

Case management by the court includes: identifying disputed issues at an early stage; fixing timetables; dealing with as many aspects of the case as possible on the same occasion; controlling costs; disposing of cases summarily where they disclose no case or defence; dealing with the case without the parties having to attend court; and giving directions to ensure that the trial of a case proceeds quickly and efficiently. The court will expect the parties to co-operate with each other.

As a result of changes to procedures over the last 10 years, cases that are not settled by the parties reach trial more quickly than they did previously. The availability of summary judgment and strike outs also means that weak cases can be disposed of more quickly than in jurisdictions which do not have these procedures.

CASE STUDY

An English law firm represented defendants (3 companies incorporated in Madeira controlled by a joint venture between US, Spanish, French and Japanese companies) in relation to a dispute concerning a Liquefied Natural Gas facility in Nigeria in a claim brought by 5 Nigerian and German contractors. The only link with the UK was the choice of law and jurisdiction clause in the contract. An application on behalf of the defendants was made for further and better particulars of claim. This was successful and the claimants were required to prove cause and effect, as opposed to merely presenting a global claim. The judge ordered a redraft of the particulars and, upon receipt of these, the defendants made a further application for particulars. At this point, the case settled. The Commercial Court in London played a key role in ensuring the case was properly set out, thereby enabling the parties to take an informed view on the merits and settle their dispute.



“ As a result of changes to procedures over the last 10 years, cases that are not settled by the parties reach trial more quickly. ”

CHAPTER 2 : The English Court System

English courts offer speedy interim injunctions and a range of remedies for international cases

English courts can grant a range of interim injunctions including:

- asset freezing injunctions (including on a worldwide basis)
- search and seizure orders (to obtain and preserve evidence)
- prohibitory injunctions (preventing a party taking action)
- mandatory injunctions (forcing a party to take action).

In urgent cases, an order can be obtained very quickly and, in appropriate cases, without initial notice to the other party.

English courts offer short and reliable lead times between applying for a hearing date and the hearing taking place

The current waiting time in the Commercial Court, for example, for a case to be heard once it is confirmed as being ready for trial differs depending on the length of time needed i.e. a one day trial is currently 8 weeks, for a 2 to 10 day trial it is 32 weeks and for a longer trial it is 40 weeks. In 2006, 246 cases were given a trial date, 171 were settled or adjourned at the request of parties and 75 trials took place. The number of claims issued that year in the Commercial Court was 1005.

Information courtesy of the Ministry of Justice.

Cross-border disputes can be tried in English courts whatever the governing law

Parties may agree to select England and Wales as the jurisdiction in which to resolve their dispute whatever the law governing their dispute. The English High Court is experienced in hearing evidence of foreign law and deciding issues in accordance with that law.

CASE STUDY

An English law firm acted for defendants in successfully defending Commercial Court proceedings brought by an investment fund. The matter was dealt with very efficiently: the case commenced in September 2005, the trial took place in October 2006 and judgment was handed down in November 2006. The matter was appealed to the Court of Appeal and judgment handed down in July 2007.

Also see case study on page 13 re the case of Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd.



“ The English High Court is experienced in hearing evidence of foreign law and deciding issues in accordance with that law. ”

English courts deter weak or speculative claims through the rules of 'loser pays' and 'pay as you go' and an absence of jury trials and punitive damages

The losing party in a civil case in England generally has to pay the winning party's reasonable costs. If the parties cannot agree on a figure, the court decides what is fair. For interim matters brought before the court, England has a 'pay as you go' system. In hearings that last one day or less (the vast majority of interim hearings) the court will summarily assess costs and the loser has to pay within a specified time frame, normally 14 days. Since its introduction, this has substantially reduced the number of interim applications. The remaining overall costs of the proceedings are usually determined on settlement of the action or at the end of a trial.

The 'loser pays' rule acts as a powerful disincentive to unmeritorious claims, discouraging speculative claims and keeping UK dispute resolution balanced as between claimant and defendant. This, together with the absence of juries and punitive damages in civil trials, has discouraged the development of a pro-plaintiff bar.

The court has a wide discretion on costs, and many factors can be taken into account. For example, when assessing an award of costs, a judge can disallow or reduce the amount of costs claimed by a successful party where that party has acted unreasonably or has not pursued fair and proper attempts at achieving a negotiated or mediated settlement of the dispute.

The most common reason for departing from the general rule is that the unsuccessful party has previously made a formal offer to pay the same or greater sum than is finally awarded. In that case, the party making the offer is entitled to its costs from the other party for the period following the offer.

The court also has power to order that a claimant, in certain circumstances, provide security for the other party's costs. An order will usually require the claimant to pay money into court or provide some other security, within a specified period, as a condition of proceeding with the claim.

There are limitations to the right to appeal an English judgment

Generally, appeals against first instance decisions are not of right and permission to appeal must be obtained. This means commercial parties are likely to obtain a final decision in a relatively short period.

London is a pre-eminent financial and commercial centre, with easy access, first class facilities and leading international litigation and arbitration practitioners

London is one of the two biggest and most important financial cities in the world, home to the world's oldest insurance market, Lloyd's and, in recent years, the London financial markets have been renowned for their expertise and innovation.

London is also home to a large body of world class, international law firms that offer multi-disciplinary and often multi-jurisdictional legal advice to international businesses. Legal advice has long been recognised as being central to all financial and business transactions. English international law firms are highly valued for the skill and expertise they offer in advising their international clients at pre-contract stage, in the negotiation and preparation of contractual documentation and in resolving disputes.

CASE STUDY

The case of *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* progressed to summary judgment in the Commercial Court in London within 9 months of proceedings being issued, had been determined by the Court of Appeal within 15 months and was finally settled when leave to appeal to the House of Lords was refused within 21 months.

In his judgment in the Commercial Court, Mr Justice Morison noted that *"This court, obviously, is well used to disputes about foreign law and, if necessary, it will determine what a judge in a foreign court would decide."*

It was further noted in the judgment given by Lord Justice Potter in the Court of Appeal that *"English law is a law commonly adopted internationally as the governing law for banking and commercial contracts, having a well-known and well-developed jurisprudence in that respect which is not open to doubt or disputation on the basis of religious or philosophical principle."*

Following the successful conclusion of proceedings, Shamil Bank praised the speed and efficiency of the English court system, as well as the quality of the judges. Juma Abull, Head of Remedial Management at Shamil Bank, who was closely involved in the case said:

"I was extremely impressed with the fair and common sense manner in which the proceedings were carried out, and the court processes were instrumental in bringing the dispute to a swift and successful conclusion. The fact that we were able to obtain a final judgment in less than two years helped enormously in recovering the debt owed to the Bank."

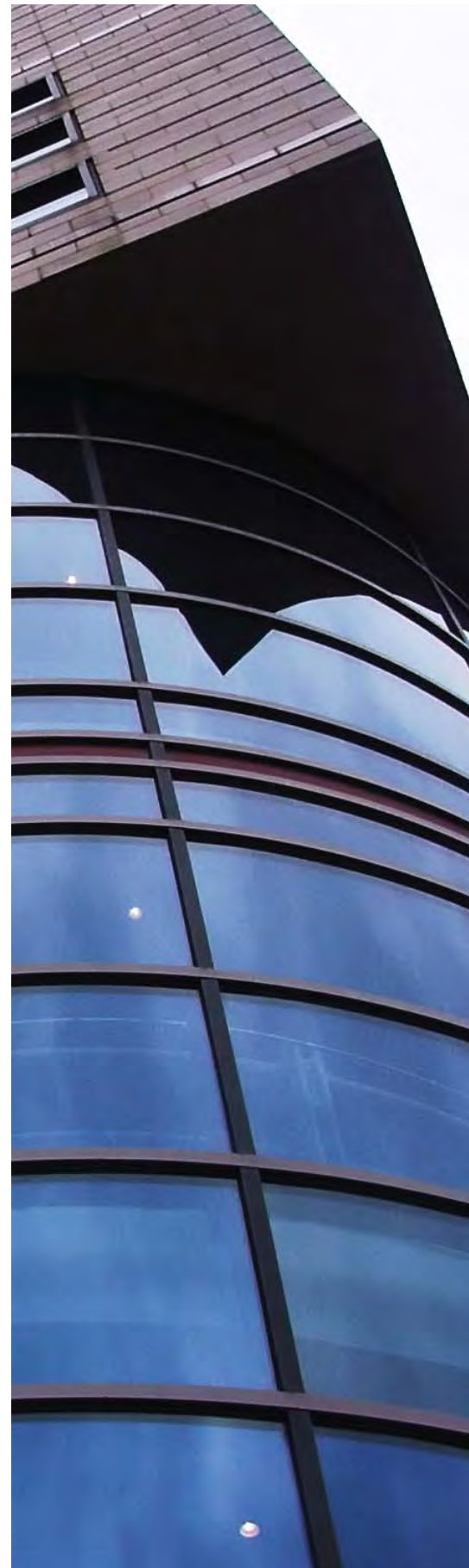
CHAPTER 2 : The English Court System

England has a fairly light touch regulatory system that many companies prefer. When transactions go wrong, many international companies choose England and Wales as the forum for the resolution of their disputes. Two thirds of cases litigated in the Commercial Court involve one or more international parties.

The biggest dedicated business court in the world will be situated in Fetter Lane near the Royal Courts of Justice and is due to open in 2010. The new Business Court will match and maintain London's world-class reputation as the first choice for business law and will provide a dedicated centre of excellence that will continue to build on London's reputation for high quality legal expertise in international business law cases. For the first time, the specialist jurisdictions of the High Court dealing with business disputes will be brought together under one roof.

The new 'super court' - believed to be around four times bigger than its nearest competitor - will provide 29 courtrooms, 12 hearing rooms (for related work such as bankruptcy hearings), 44 public consultation rooms, waiting facilities for parties involved in proceedings, as well as administrative office space for court staff and judicial accommodation. The new building will also provide enhanced acoustic standards in courtrooms, improved natural daylight and ventilation and will have upgraded IT facilities.

In addition, a major project is underway to enable electronic filing and document management in all English courts.



Reasons for choosing London as the seat of arbitration

The Arbitration Act 1996 provides a valuable framework for arbitration

Arbitration falls somewhere between litigation (as it is an adjudicatory process) and ADR (as it is privately agreed rather than state ordered). It is particularly appropriate for disputes arising out of complex transactions with highly technical content as the parties can appoint arbitrators who have considerable experience of the subject matter of the dispute. It is commonly used in the insurance, construction, engineering, oil, gas and shipping industries. It is increasingly used in banking and financial services.

The Arbitration Act 1996 provides a framework where no other rules are specified in the arbitration agreement and provides a mechanism for the enforcement of arbitration awards in the UK.

The English judiciary support arbitration

The English judiciary are pro-arbitration and exercise a 'light-touch' which can be relied on when London is the seat of arbitration.

Arbitration awards where London is the seat of arbitration can be easily enforced abroad

The UK is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. There are 142 member countries and the Convention provides a robust mechanism for enforcing arbitral awards in courts worldwide.

London provides a neutral forum in which to determine disputes between non-English parties

London is often chosen as the seat of arbitration for disputes between parties of different nationalities because it is rightly perceived as being a neutral forum within which to resolve international disputes. It is common for the parties to each nominate one arbitrator and for the nominees to select a chairman of a nationality different from that of the parties.

Arbitration in London is confidential and informal

Arbitration is particularly appropriate where the parties wish to have their disputes resolved privately, thus maintaining confidentiality of sensitive commercial information, rather than in the public arena.

London has an international reputation for experienced and expert arbitrators to resolve international disputes

London is renowned for its choice of specialist and experienced arbitrators. Many will be members of, or trained by, the Chartered Institute of Arbitrators, an internationally recognised body that provides high quality training for arbitrators. Many arbitrators will be highly skilled members of the legal profession. Others will be technical experts in industry. It is also possible to appoint Commercial Court judges as arbitrators, thus gaining the benefit of their knowledge and experience in adjudicating in disputes, without the need to go through a formal court process.

CASE STUDY

In 2003, arbitration, under the auspices of the International Chamber of Commerce, was used to resolve a dispute brought against a global energy major by one of its licensees. The dispute centred on an alleged fraudulent misrepresentation in relation to the grant of a petrochemical license. The energy major was represented in this case by an English arbitration team. Although the seat was officially in Zurich and the parties, witnesses and experts were spread throughout the world, all hearings were held in London due to the superior resources and infrastructure that the city offers for arbitration.

This arbitration was particularly high value, with damages of more than \$400m claimed, and serious reputational issues were at stake. It was also technically complex and required detailed expert evidence on licensing to be presented to the tribunal. Novel issues of law (both English and Swiss) were developed and applied and proceedings were conducted with regard to different cultural traditions and approaches throughout the civil and common law worlds.

CHAPTER 3 : Arbitration in London

London has a highly skilled, world renowned legal profession

London is home to a large body of world class, international law firms that offer multi-disciplinary and often multi-jurisdictional legal advice to international businesses.

London has a range of highly respected arbitration organisations and high quality facilities to support arbitration

These organisations provide an effective framework of rules under which disputes can be resolved and provide hearing facilities. Consequently, other facilities needed to support arbitration, such as interpreters and transcribers, are readily available.

The most eminent of these is the London Court of International Arbitration (LCIA) which is one of the longest-established international institutions for commercial dispute resolution. It is also one of the most modern and forward-looking.

Although based in London, the LCIA is a thoroughly international institution, providing efficient, flexible and impartial administration of dispute resolution proceedings for all parties, regardless of their location, and under any system of law.

Its operation and outlook are geared to ensuring that the parties may have complete confidence in its international credentials and in its impartiality.

The LCIA arbitration rules are universally applicable. They offer a combination of the best features of the civil and common law systems, including in particular:

- maximum flexibility for parties and tribunals to agree on procedural matters
- speed and efficiency in the appointment of arbitrators, including expedited procedures
- means of reducing delays and counteracting delaying tactics
- tribunals' power to decide on their own jurisdiction
- a range of interim and conservatory measures
- tribunals' power to order security for claims and for costs
- special powers for joinder of third parties
- fast-track option
- waiver of right of appeal
- costs computed without regard to the amounts in dispute
- staged deposits - parties are not required to pay for the whole arbitration in advance

CASE STUDY

This arbitration did not have its seat in London, but it demonstrates the importance of arbitration and its suitability for high-profile international disputes and that English counsel can be instructed and cases can be run from London, even where cross-border issues are involved.

The long-running dispute between Eurotunnel and the governments of France and the UK over the Sangatte hostel ranks as one of the most politically high-profile, commercially-sensitive and legally complex cases of recent times. In January 2007, Eurotunnel secured a landmark victory - a ruling that marked a major step forward both for international foreign investment law and for Eurotunnel itself. Eurotunnel was represented by an English arbitration team co-ordinated from London, incorporating both London and Paris civil and common law arbitration specialists.

The dispute was resolved through arbitration by a prestigious tribunal of five eminent arbitrators (including a former chairman of the International Court of Justice, a retired judge of the House of Lords and prominent figures in international arbitration) sitting in the Peace Palace in The Hague. The arbitration was *ad hoc*, governed by the UNCITRAL rules and was conducted in both English and French.

Background

Between 1999 and 2002, Eurotunnel's business was severely harmed by massive intrusions into its terminal in France by large numbers of migrants seeking to gain access to the UK through the Channel Tunnel. Eurotunnel complained that the presence of a hostel for the migrants, opened by the French Government close to the mouth of the tunnel, acted as a magnet, and that neither

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To ensure your disputes are arbitrated in London, include in your contracts an arbitration clause which refers to London as the seat of arbitration

If parties wish their disputes to be subject to arbitration in London, a clause to this effect should be included in the contract. It is important to specify both the seat of the arbitration (where it will take place) and the governing law. By specifying that the seat of arbitration will be in London, the arbitration will be subject to the Arbitration Act of 1996, thus enabling the parties to benefit from a modern arbitration law. Examples of contract clauses can be found in *Appendix A*.

>> France nor the UK took the necessary steps to resolve this situation for several years.

To try and recover its losses, Eurotunnel launched arbitration proceedings in December 2003 against the French and UK Governments. The arbitration was based on a provision in the Treaty and the Concession Agreement under which Eurotunnel operated the tunnel.

Decision

The tribunal decided that both the French and the UK Governments were liable under the Concession Agreement. Both had failed to take the necessary steps to maintain conditions of normal security and public order in and around the Eurotunnel terminal. The amount that the Governments will have to pay to Eurotunnel will be decided at a later stage.

This judgment represented a landmark for several reasons. It is the first and only time that two major economies have simultaneously been on the receiving end of an arbitration based on the law of international foreign investment. The arbitration tribunal was perhaps the most eminent ever assembled in this field, and its ruling has established new principles in this important area of law. Also, the ruling represents the first occasion that the Governments – which did not contribute to financing the tunnel – will have to pay money to Eurotunnel, potentially opening the way for the company to win damages worth millions of pounds.

CHAPTER 4 : Types of Disputes

All types of international disputes will benefit from being dealt with under English law and before the English courts:

Contractual Disputes

English law has a highly developed system of contract law, developed over centuries by the common law. Judges in the Commercial Court and the High Court generally have many years experience in interpreting and applying that law in a commercial way.

Fraud

England is a particularly appropriate venue for cases involving allegations of fraud, given the combination of experienced judges, disclosure of documentation from parties and non-parties, availability of freezing injunctions worldwide in appropriate cases, oral cross-examination of witnesses at trial and choice of experienced and well resourced law firms, many with international networks and asset tracing experience.

Finance/Regulatory

London is and has been for many years one of the principal financial centres of the world, home to many major financial institutions including hedge and private equity funds. English law is frequently the law of choice in financial transactions and over the years the English courts have built up substantial expertise and precedent in handling such cases. A recent example is *IFE Fund SA v. Goldman Sachs International* where the High Court and Court of Appeal have ruled on the extent to which financial institutions that arrange and syndicate credit facilities on behalf of their clients make implied representations and/or owe duties of care to banks and financial institutions invited to participate in the credit facility.

Technology and Engineering

Technical construction and engineering disputes are particularly appropriate for dispute resolution by the English courts thanks to the expertise of the specialist Technology and Construction Court (TCC). This court has been headed up by Mr Justice Jackson and more recently Mr Justice Ramsey, both former world class advocates in the field with a wealth of specialist knowledge. The TCC provides expertise, speed of resolution and a wealth of precedent which promotes greater legal certainty in terms of how particular clauses or fact scenarios will be interpreted.

Intellectual Property

The Patents Court of the Chancery Division has led the way for the last decade in modernising and streamlining the way disputes are handled. The Patents Court has a dedicated panel of experienced judges specialist in all intellectual property matters. The EU has failed to adopt a regime for a Community Patent, leaving the system for enforcement of European patents to be dealt with on a territory by territory basis. In contrast, the Patents Court is seen as a very attractive forum to litigate patent disputes within Europe. The UK offers a number of benefits for both claimant patentees and defendants, including looking at questions of validity afresh (rather than relying on earlier European Patent Office decisions), well-reasoned judgments which may give leverage in subsequent proceedings in Europe, and speed of resolution, with trial to a first instance judgment within 12 months (between 6-9 months for more straightforward cases).

CASE STUDY

In 2004, an English law firm successfully defended a patent from an invalidity attack mounted by a generic pharmaceutical company in the Patents Court. The patent protected the formulation of a major pharmaceutical company's best-selling drugs. As a result of the proceedings, the pharmaceutical company obtained a well-reasoned judgment, as well as concessions by its opponent's expert, which it was able to use to great effect in its equivalent actions in other European jurisdictions. Ultimately, as a result of the English court judgment, the generic company discontinued the equivalent European actions.

Insurance

London is one of the principal centres for insurance activity. English law continues to be chosen to govern many insurance and reinsurance contracts and the courts of London therefore have great familiarity with global insurance and reinsurance practices, which are themselves largely UK-orientated. Indeed, English law concepts are adopted in many foreign jurisdictions applying their domestic laws. There is great expertise within the relevant English judiciary, which includes eminent former insurance lawyers who can offer highly credible knowledge and experience.



CHAPTER 5 : Flexibility of Funding Dispute Resolution

In England's modern civil justice system there are various methods of funding available to a litigant. The restricted availability of public funding for contentious matters (disputes) and new legislation have encouraged English solicitors to be innovative in the methods used to fund cases.

Hourly billing

Traditionally, English solicitors have charged fees by reference to the time spent on a matter. Hourly rates vary from firm to firm and, within a firm, will vary depending on the specialist knowledge and experience of the practitioner dealing with the case. Solicitors are required to give you an initial estimate of costs, wherever possible, and to keep you updated on a regular basis with regard to costs incurred.

Conditional fee agreements

Conditional fee agreements (CFAs) may be used so that the level of fee depends upon a particular event, usually winning the case.

A CFA is a type of regulated contingency fee which is permitted for contentious business in England. There are various types of CFAs including:

- **CFA without success fee**
The client must pay ordinary costs if he or she wins and either no costs or reduced costs if he or she loses.
- **CFA with success fee**
The maximum success fee that can be charged is 100% of the ordinary costs (often referred to as the amount of 'uplift'). The success fee is intended to cover two elements: the risk element and the deferred fee element. The client may be able to recover some or all of the risk element from an opposing party. However, the Civil Procedure Rules 1998 provide that the deferment element cannot be recovered from the opposing party.
- **Collective CFA**
A Collective CFA does not refer to specific proceedings but, as and when instructions are given to the solicitor, they can be brought within the agreement. Trade unions or other bulk purchasers of legal services (such as legal insurers) commonly use these types of agreements.

Hybrid Fees

A recent innovation, following the advent of conditional fee agreements, has been the use of hybrid fees. Hybrid fees are an arrangement whereby the firm agrees to split the hourly rate so that a proportion of the fees incurred will be regarded as a conditional fee and the remainder will be charged on a normal charging basis. In effect, this gives a lower hourly charge that has to be met up front, the remainder payable only on success.



CHAPTER 5 : Flexibility of Funding Dispute Resolution

Contingency Fees

A 'contingency fee' is the generic term used to describe any fee arrangements between solicitors and clients where payment of the solicitor's fees is dependent upon the result of litigation or arbitration. It is usually calculated as a percentage of damages recovered. Solicitors are not generally permitted to charge in litigation on a contingency fee basis.

Legal Expense Insurance

One of the biggest advances in funding has been the advent of legal expense insurance. There are two main types.

Before the event insurance

It is now very common for legal expense cover to be available in certain insurance policies, the main ones being motor vehicle insurance and home contents policies.

After the event insurance

This is insurance purchased following an event giving rise to a claim, to cover the risk of having to pay the other side's costs if that particular claim is unsuccessful. There are two types of after the event insurance:-

(a) Other side's costs cover in CFA cases

This is insurance cover against a client having to pay the opponent's costs if the client is unsuccessful in a claim brought under a conditional fee agreement.

(b) Opponents and/or own costs cover in non-CFA cases

This type of cover is available where there is no CFA and the client wants protection against having to pay the other side's costs if they lose and/or their own solicitor's costs.

Other Commercial Funding

In certain circumstances, third party companies may agree to fund all or part of litigation costs in return for a percentage of damages recovered.



APPENDIX A : Specimen Clauses

Proper Law and Jurisdiction

Short form - English law

This agreement shall be governed by and construed in accordance with English law.

Short form - English law and exclusive jurisdiction

This agreement shall be governed by and construed in accordance with English law and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales.

Short form - English law and exclusive jurisdiction - service of proceedings

1. This agreement shall be governed by and construed in accordance with English law.
2. The parties submit to the exclusive jurisdiction of the courts of England and Wales and irrevocably agree that proceedings issued out of the said courts may without prejudice to the rules of service of such courts be served by delivering such proceedings in an envelope addressed to the party to be served at the address for such party set out in the contract.

Alternative form - English law and non-exclusive jurisdiction

1. This agreement shall be governed by and construed in all respects in accordance with English law.
2. In relation to any legal action or proceedings to enforce this agreement or arising out of or in connection with this agreement ('Proceedings') each of the parties irrevocably submits to the non-exclusive jurisdiction of the English courts and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that the Proceedings have been brought in an inconvenient forum.

ARBITRATION

LCIA Recommended Arbitration Clauses

Future disputes

For contracting parties who wish to have future disputes referred to arbitration under the LCIA Rules, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].

Existing disputes

If a dispute has arisen, but there is no agreement between the parties to arbitrate, or if the parties wish to vary a dispute resolution clause to provide for LCIA arbitration, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

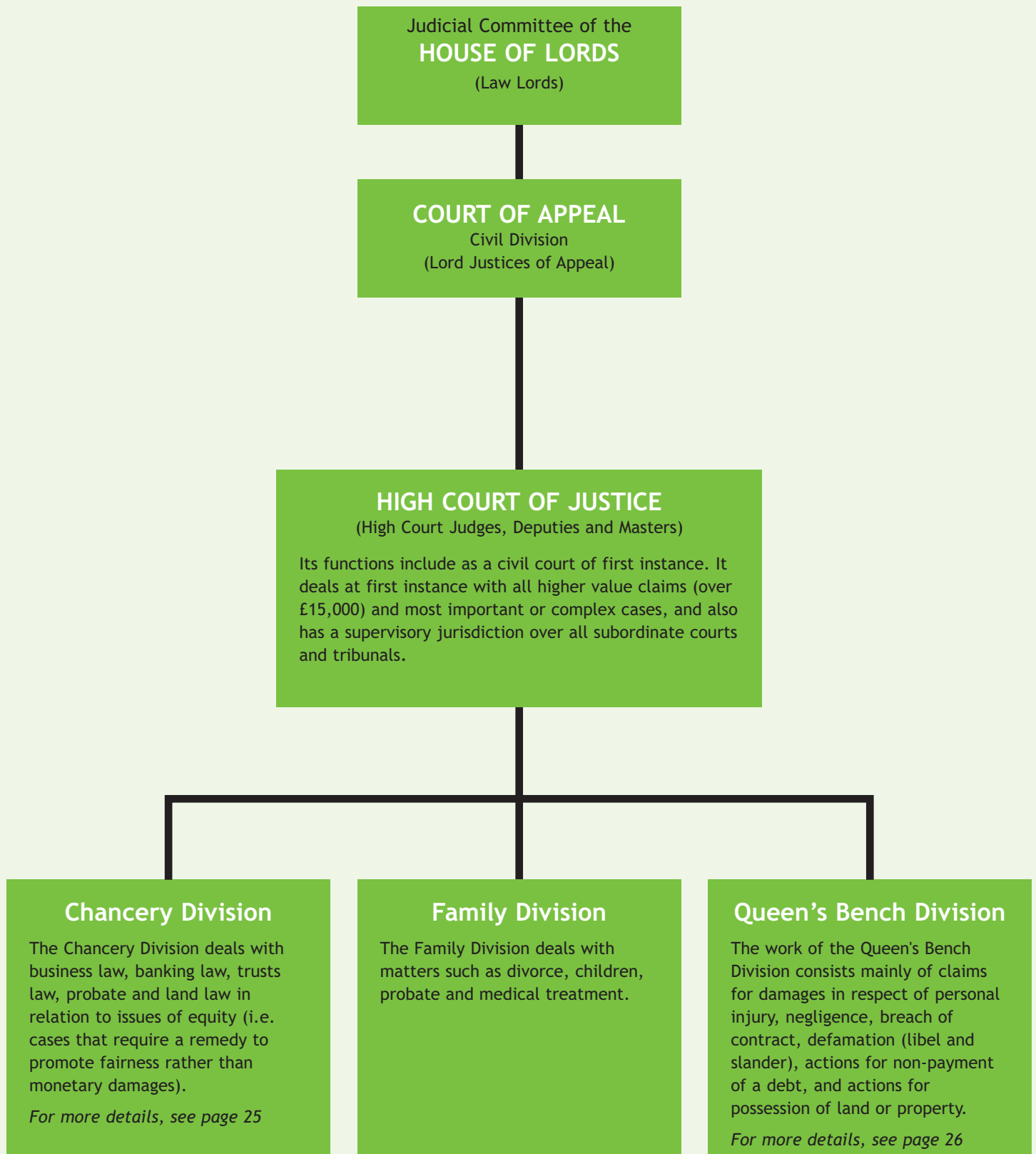
The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract [is/shall be] the substantive law of [].

APPENDIX B : The English Higher Civil Court Structure



APPENDIX B : The English Higher Civil Court Structure

CHANCERY DIVISION

The Chancery Division deals with business law, banking law, trusts law, probate and land law in relation to issues of equity (i.e. cases that require a remedy to promote fairness rather than monetary damages).

A major part of the Division's case-load involves business disputes and commercial fraud which are often complex and involve substantial sums of money. Intellectual property cases involving trademarks, copyright and passing-off claims are also dealt with. All tax appeals from the Tax Appeal Tribunals are assigned to the Chancery Division. The Division is increasingly involved with financial regulatory work and director disqualification and professional negligence and is regarded as a centre of expertise for competition law cases.

Patents Court

This deals with matters concerning patents, registered designs and appeals against the decision of the Comptroller General of Patents.

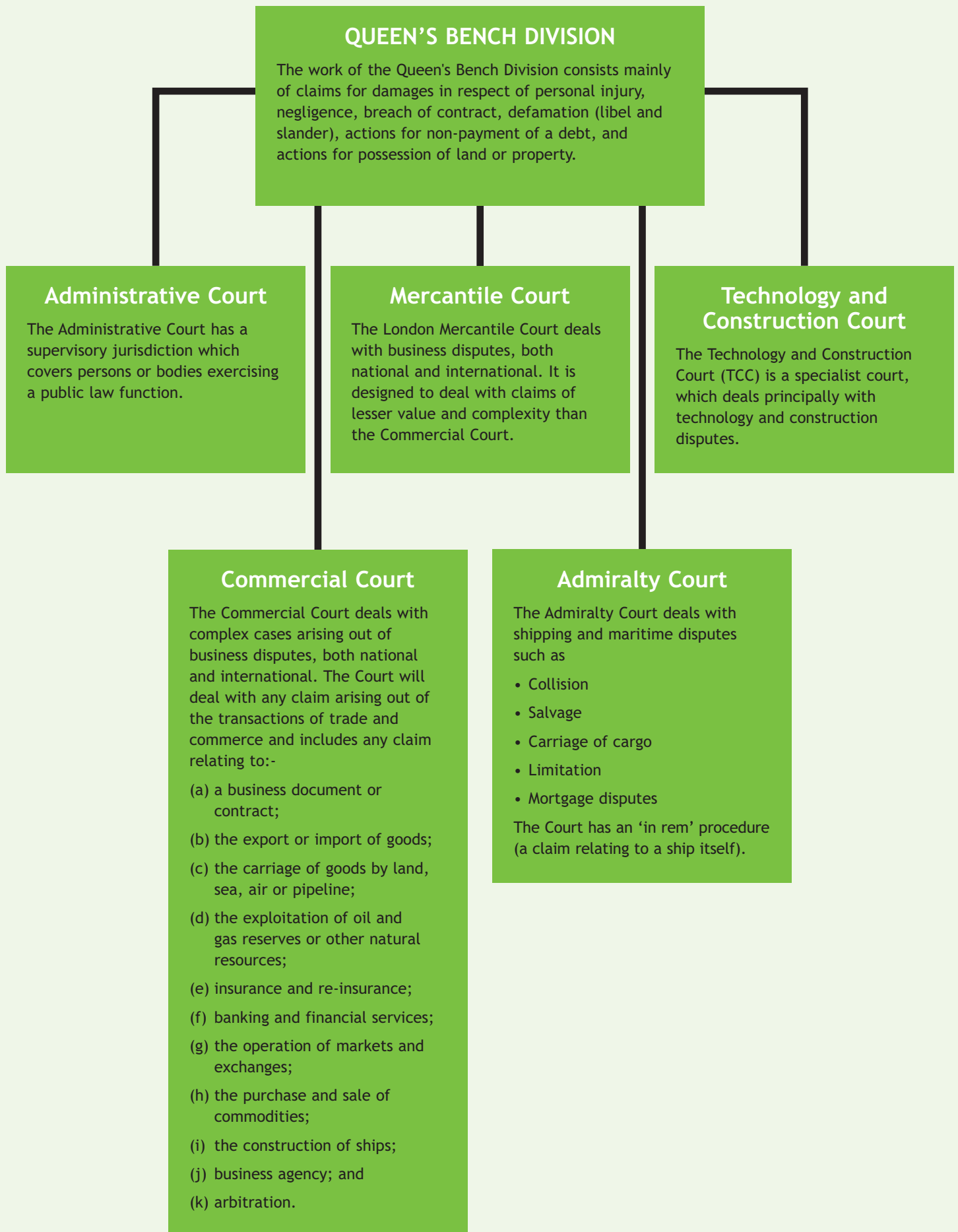
Companies Court

This deals with issues as to the management of companies (many of them international) such as confirmation of reduction of capital or disqualification of directors; winding up of companies that are insolvent; Financial Services and Markets cases.

Bankruptcy Court

This deals with cases relating to insolvent individuals.

APPENDIX B : The English Higher Civil Court Structure



APPENDIX C : Examples of International Cases Heard in the Commercial Court

- AIG Capital Partners Inc & Anor. v Kazakhstan [2005] EWHC 2239 (Comm)
- ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)
- Tavoulareas v Tsavlis & Anor [2005] EWHC 2140 (Comm)
- Tidebrook Maritime Corporation v Vitol SA of Geneva MT “Front Commander” [2005] EWHC 2582 (Comm)
- Tradigrain v State Trading Corporation of India [2005] EWHC 2206 (Comm)
- Anton Durbeck GmbH v Den Norske Bank Asa [2005] EWHC 2497 (Comm)
- Argo Capital Investors Fund Spc v Essar Steel Ltd [2005] EWHC 2587 (Comm)
- Cadre SA v Astra Asigurari SA [2005] EWHC 2626 (Comm)
- ET Plus SA & Ors v Welter & Ors [2005] EWHC 2115 (Comm)
- Fujitsu Computer Products Corp & Ors v Bax Global Inc & Ors [2005] EWHC 2289 (Comm)
- Kensington International Ltd. v Republic of the Congo [2005] EWHC 2684 (Comm)
- Kuwait Airways Corp v Iraqi Airways Corp [2005] EWHC 2524 (Comm)
- Petroleo Brasileiro S.A. & Anor v Petromec Inc & Ors [2005] EWHC 2430 (Comm)
- Primetrade AG v Ythan Ltd [2005] EWHC 2399 (Comm)
- R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA & Ors [2005] EWHC 2586 (Comm)
- Svenska Petroleum Exploration AB v Lithuania & Anor [2005] EWHC 2437 (Comm)
- Tavoulareas v Alexander G Tsavlis & Sons Maritime Company [2005] EWHC 2643 (Comm)
- TTMI Ltd of England v ASM Shipping Ltd of India [2005] EWHC 2666 (Comm)
- Bernuth Lines Ltd v High Seas Shipping Ltd [2005] EWHC 3020 (Comm)
- Covington Marine Corp & Ors v Xiamen Shipbuilding Industry Co Ltd [2005] EWHC 2912 (Comm)
- Axa Re v Ace Global Markets Ltd. [2006] EWHC 216 (Comm)
- Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm)
- R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA & Ors [2006] EWHC 42 (Comm)
- Barbados Trust Company Ltd v Bank of Zambia & Anor [2006] EWHC 222 (Comm)
- Ease Faith Ltd v Leonis Marine Management Ltd [2006] EWHC 232 (Comm)
- National Westminster Bank Plc v Rabobank Nederland [2006] EWHC 218 (Comm)
- Parsons Corporation & Ors v CV Scheepvaartonderneming The Happy Ranger [2006] EWHC 122 (Comm)
- Pentonville Shipping Ltd. v Transfield Shipping Inc (MV Johnny K) [2006] EWHC 134 (Comm)



APPENDIX C : Examples of International Cases Heard in the Commercial Court

- Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd. [2006] EWHC 578 (Comm)

- Sukuman Ltd v The Commonwealth Secretariat [2006] EWHC 304 (Comm)

- ABB Ag v Hochtief Airport GmbH & Anor [2006] EWHC 388 (Comm)

- Brit Syndicates Ltd & Ors v Italaudit SPA & Anor [2006] EWHC 341 (Comm)

- Compagnie Noga D'importation Et D'exportation SA & Anor v Australian and New Zealand Banking Group & Ors [2006] EWHC 602 (Comm)

- Compania Sud American Vapores v Hamburg & Anor [2006] EWHC 483 (Comm)

- Ecuador v Occidental Exploration & Production Co [2006] EWHC 345 (Comm)

- HIH Casualty and General Insurance Ltd. v JLT Risk Solutions Ltd [2006] EWHC 485 (Comm)

- Horn Linie GmbH & Co v Panamericana Formas E Impresos SA & Anor [2006] EWHC 373 (Comm)

- Newsat Holdings Ltd & Ors v Zani [2006] EWHC 342 (Comm)

- Tavoulareas v Tsavlis & Ors [2006] EWHC 414 (Comm)

- Andromeda Marine SA v OW Bunker & Trading A/S [2006] EWHC 777 (Comm)
Oxus Gold Plc (Formerly Oxus Mining Plc) & Anor v Templeton Insurance Ltd [2006] EWHC 864 (Comm)

- Ravennavi Spa v New Century Shipbuilding Company Ltd [2006] EWHC 733 (Comm)

- Republic of Kazakhstan v Istil Group Inc [2006] EWHC 448 (Comm)

- Konkola Copper Mines Plc & Anor v Coromin Ltd. & Ors No.2 [2006] EWHC 1093 (Comm)

- ING RE (UK) Ltd. v R & V Versicherung Ag [2006] EWHC 1544 (Comm)

- Oceanografia SA DE CV v DSND Subsea AS [2006] EWHC 1360 (Comm)

- Petromec Inc v Petroleo Brasileiro SA Petrobras & Anor [2006] EWHC 1443 (Comm)

- Trafigura Beheer BV v Kookmin Bank Co [2006] EWHC 1450 (Comm)

- Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm)

- Kensington International Ltd v Republic of Congo & Anor [2006] EWHC 1848 (Comm)

- WPP Holdings Italy Srl & Ors v Benatti [2006] EWHC 1641 (Comm)

Information courtesy of the report of the Commercial Court and Admiralty Court for 2005-2006.

APPENDIX D : Acknowledgments

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