Chapter 1

UNITED KINGDOM

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I OVERVIEW

Technology disputes come in a variety of shapes and sizes, frequently arising in relation to service delivery and outsourcing contracts, intellectual property (IP) rights, data protection, software licensing and, more recently, cybersecurity and digital assets. The United Kingdom is a forum of choice for international dispute resolution – both within the technology sector and beyond – and there are specialist courts and dispute resolution services with particular expertise in handling technology-related disputes. Large, complex information technology (IT) disputes and litigation concerning alleged infringements of IP rights continue to be a mainstay of those specialist courts.

Claims for compensation in relation to data protection breaches and the misuse of private information are also common in the United Kingdom. Individuals are increasingly seeking to exercise their rights under the UK data protection regime (i.e., rights under the General Data Protection Regulation (EU) 2016/679 and the Data Protection Act 2018 (the UK GDPR), including a recent attempt to do so through a representative action[2] brought on behalf of approximately four million consumers alleging a loss of control over personal data.[3]

However, the emergence of new technologies means that the English courts are likely to face an increasingly diverse and complex set of technical issues, with the landscape evolving particularly quickly in relation to artificial intelligence (AI), blockchain technology and digital assets. Both the UK government and the European Union are looking at the need to increase the regulation of cryptoasset markets to provide further safeguards to consumers, with the UK government aiming to make the United Kingdom a 'global hub for cryptoasset technology'.[4]

Against that background, this chapter looks at some of the most common types of technology-related disputes, how those claims are resolved by the courts, what alternative

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2 A representative action brought under Part 19.6 of the Civil Procedure Rules (CPR) is where a named claimant pursues an action both on its own behalf and on behalf of a class of individuals who have the 'same interest' in the claim and who have not 'opted out'.

3 *Richard Lloyd v. Google LLC* [2021] UKSC 50. The representative action was dismissed by the Supreme Court as having no real prospect of success in the form in which it had been brought.

4 Former Chancellor of the Exchequer, Rishi Sunak (https://www.gov.uk/government/news/government-sets-out-plan-to-make-uk-a-global-cryptoasset-technology-hub), 4 April 2022. See also the European Commission's proposal for the Markets in Crypto-Assets Regulation (COM/2020/593), which the EU Economic and Monetary Affairs Committee voted to adopt on 14 March 2022.

dispute resolution (ADR) mechanisms are available, emerging trends from 2021 and predictions for the future in relation to technology disputes. Although this chapter comments on a broad range of technology disputes, it focuses primarily on disputes that arise from complex IT and outsourcing projects.

II YEAR IN REVIEW

i Liquidated damages

On 16 July 2021, the Supreme Court handed down its long-awaited decision in *Triple Point Technology*,[5] confirming the orthodox approach to construing clauses which specify the amount of damages that will be payable in the event of delay (liquidated damages clauses). The court held that, unless a contract clearly provides otherwise:

a termination will not extinguish any liquidated damages that have accrued as a result of delays up to the date of termination, regardless of whether work was completed as at that date; and

b in relation to delays after termination, a party can seek damages for breach of contract under the general law.

Given the prevalence of liquidated damages provisions in IT and outsourcing contracts, the decision in *Triple Point Technology* will be of particular interest to the IT community.

ii Damages for loss of control and representative actions

A further seminal Supreme Court decision – this time in relation to alleged breaches of the Data Protection Act 1998 (DPA98) and the use of representative actions in this context – was delivered on 10 November 2021 in *Lloyd v. Google*.[6] In overturning the Court of Appeal's decision, the Supreme Court held that, absent proof of financial loss or distress, damages for loss of control of personal data under Section 13(1) of the DPA98 are not actionable. In addition, while the claim satisfied the 'same interest' test under Rule 19.6(1) of the Civil Procedure Rules insofar as liability was concerned, the requirement that claimants prove individual financial loss was considered a barrier to the claim being brought as a representative action. The decision in *Lloyd v. Google* was welcomed by data controllers and provides clarification in relation to the evolving area of collective redress for consumers.

iii Wasted expenditure and exclusion clauses

In April 2022, the Court of Appeal handed down its judgment in the long-running dispute between CIS and IBM over the failed implementation of a new IT system,[7] overturning the first instance decision that had considered the extent to which a claim for wasted expenditure caused by repudiation was excluded by the contract.[8] Having concluded that

5 *Triple Point Technology v. PTT Public Point Technology* [2021] UKSC 29.

6 See footnote 3.

7 *Soteria Insurance Ltd (formerly CIS General Insurance Limited) v. IBM United Kingdom Ltd* [2022] EWCA Civ 440.

8 *CIS General Insurance Limited v. IBM United Kingdom Limited* [2021] EWHC 347.

wasted expenditure is a recognised and recoverable type of loss (distinct from loss of profits), and that a plain reading of the words in the exclusion clause did not come close to excluding a claim for wasted expenditure, the Court of Appeal emphasised the principle that:

> *the more valuable the right, the clearer the language of any exclusion clause will need to be; the more extreme the consequences, the more stringent the court must be before construing the clause in a way which allows the contract-breaker to avoid liability for what may be his catastrophic non-performance.*

This decision contains useful guidance on the construction of exemption clauses and the different types of loss that may be covered by such clauses.

iv Regulatory and industry developments

The year 2021 also saw several UK government-led consultations and initiatives looking at the need for increased regulation of, and rights associated with, certain emerging technologies. In March 2021, the UK Intellectual Property Office published the results of its first consultation on the interaction between IP rights and AI development and innovation. A further consultation was launched in October 2021, looking at (among other things) the extent to which patents and copyright should protect inventions and works created by AI, and measures to make it easier to use copyright-protected material in AI development to support innovation and research.[9] The UK government has also been considering ways to improve the regulation of digital assets, confirming in January 2022 that 'qualifying cryptoassets' will fall within the financial promotions regime of the Financial Services and Markets Act 2000.[10] The government also announced an insolvency scheme in May 2022 to manage the collapse of certain cryptocurrencies – known as stablecoins – where such assets are considered to have systemic importance to the UK financial system.

v Russia

The impact of economic sanctions on Russian businesses and individuals has also been felt in the technology sector. Following the issue by the Russian government of Decree No. 299, certain licensing rules in Russia have been suspended, enabling the unauthorised use of patents, trademarks and industrial designs in exchange for a 'proportional economic compensation' paid to the IP owner.[11] For owners connected to 'unfriendly countries' (the

9 The question as to whether AI-based machines can make patentable inventions within the meaning of Sections 7 and 13 of the Patents Act 1977 was considered by the Court of Appeal in *Thaler v. Comptroller-General of Patents, Trade Marks and Designs* [2021] EWCA Civ 1374. Approving the decision of the UK Intellectual Property Office, the Court of Appeal held that a patent inventor could only be a natural person and that the naming of an AI machine as inventor did not meet the requirements of the Patents Act 1977.

10 Section 21 of the Financial Services and Markets Act 2000 regulates the making of financial promotions to consumers and provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity or to engage in claims management activity unless the promotion has been made or approved by an authorised person, or is exempt.

11 Russian government, Decree No. 299 of 6 March 2022.

United Kingdom being designated as one of 48 such countries),[12] the compensation has been set by the Russian government at a flat rate of zero per cent, increasing the risk that IP rights will be freely infringed in Russia.[13]

vi Litigation funding

The past year has also seen a steady increase in the volume of claims that attract litigation funding, with patent infringement cases being a particularly strong growth area.

III CLAIMS AND REMEDIES

Technology disputes can give rise to a variety of causes of action, the most common of which are:

a breaches of contract or negligence, or both, in relation to service delivery and outsourcing contracts (e.g., where a service provider fails to meet contractually agreed milestone dates, delivers products that fail to meet the agreed specification or fails to take reasonable skill and care in delivering services);

b acts of infringement contrary to relevant statutory provisions in relation to patents, copyright and other IP rights (e.g., where a patented technology is sold or used without the patent owner's consent);

c breaches of statutory duty under the UK GDPR (e.g., where there has been an unlawful processing of personal data); and

d proprietary and fraud claims in relation to cryptocurrencies and other digital assets (e.g., where bitcoin is obtained by fraud or cryptoassets are stolen).

Claims for negligent or fraudulent misrepresentation, or both, may also arise in the context of IT and outsourcing projects.

Damages remain the most common form of remedy in technology disputes, with the court seeking to put the innocent party in the position it would have been in had the contract been performed or, as the case may be, had the tort not been committed. Damages under English law are compensatory, rather than punitive, in nature, with a claimant generally only able to recover its actual losses. The same loss cannot be recovered more than once even if there are multiple causes of action that resulted in that loss and a claimant is generally under a positive duty to mitigate its losses by taking reasonable steps to avoid or minimise the damage suffered.

With contractual disputes, a claimant may – in addition to seeking damages – also be entitled to terminate the contract (i.e., to treat the contract as at an end, discharging both parties from future performance) if the breach is sufficiently serious or the contract provides

12 Russian government, Order No. 430-p of 5 March 2022.

13 In March 2022, a Russian court rejected a claim brought by Entertainment One UK Limited against a Russian entrepreneur for the unauthorised use of trademarks validly registered in Russia, noting that the 'unfriendly actions of the United States of America and affiliated foreign countries' had directly influenced his decision (*Entertainment One UK Limited v. Ivan Vladimirovich Kozhevnikov*, Arbitration Court of Kirov, Case No. A28-11930/2021).

an express termination right. The terms of a contract may have an impact on the remedies that are available to the parties, including by limiting the amount or excluding types of damages that a party can seek to recover.[14]

Beyond claims for general damages, remedies such as an account of profits (common in IP cases), rectification or erasure of personal data and the restriction or suppression of such data (relevant to data protection breaches), and an order for delivery up or destruction of infringing goods (typical with patent and copyright cases) are also available. Further, the court has the power to order a broad range of interim measures, including injunctions, freeze and search orders, orders requiring a party to produce information or disclose documents, and orders requiring the specific performance of an obligation. Interim injunctions are particularly common in IP disputes where, for example, a party needs to restrain the unauthorised use of its copyright or trade secrets.[15] Injunctions can also be an effective measure in claims concerning the misappropriation of digital assets.[16] Similarly, in service delivery disputes, where a supplier threatens to disconnect a customer's access to business-critical software, the potential availability of injunctive relief is crucially important. It may also be necessary for a customer to seek specific performance or declaratory relief to enforce the exit provisions of a contract and ensure an effective handover of services or assets to a replacement supplier.[17]

IV COURTS AND PROCEDURES

Disputes relating to IT and outsourcing projects brought in England and Wales are typically heard by the Technology and Construction Court (TCC), a specialist division of the Business and Property Court of the High Court of Justice, with its own court guide (the TCC Guide) and judges experienced in claims involving 'issues or questions which are technically complex'.[18] Such claims can be brought in other divisions of the High Court of Justice (and in the county courts), and it may be more appropriate to do so depending on the nature and value of the claim. Claims relating to infringements of IP rights are heard by either the

14 See Section II in relation to the recent decisions of the appellate courts on the construction of liquidated damages clauses (*Triple Point Technology v. PTT* [2021] UKSC 29) and exclusion clauses (*Soteria Insurance Ltd (formerly CIS General Insurance Limited) v. IBM United Kingdom Ltd* [2022] EWCA Civ 440).

15 See *Celgard LLC v Shenzhen Senior Technology Material Co Ltd* [2020] EWHC 2072 (Ch).

16 See *Fetch.ai Ltd and Anr v. Persons Unknown Category A and Ors* [2021] EWHC 2254 (Comm), in which the court held that cryptoassets were a 'chose in action' and granted proprietary injunctive relief to freeze certain digital assets that had been unlawfully transferred from the claimants' Binance accounts, worldwide freezing orders against those knowingly involved in the fraud and third-party disclosure orders.

17 For a case concerning declaratory relief in relation to exit provisions, see *AstraZeneca UK Limited v. International Business Machines Corporation* [2011] EWHC 306 (TCC). See also *Transparently Ltd v. Growth Capital Ventures Ltd* [2022] EWHC 144 (TCC) where the court refused to grant an interim injunction to require a software developer to deliver the source code required for the completion of an IT project.

18 CPR 60.1(3). Practice Direction 60 and the TCC Guide (Paragraph 1.3.1) provide examples of the types of claims that may be suitable to be heard in the TCC.

General IP List of the High Court or the Intellectual Property Enterprise Court (IPEC) (depending on the value of the claim),[19] with the Patents Court hearing patent and copyright disputes.[20]

However, before a claim is issued, parties are generally expected to engage in pre-action correspondence, designed to facilitate the early exchange of information and encourage pre-action settlement discussions. A number of pre-action protocols are in place that set out the steps to be taken before proceedings are commenced, with Practice Direction – Pre-Action Conduct applying generally to civil claims in England and Wales. In addition, for claims issued in the TCC, the parties are required to comply in substance with the Pre-Action Protocol for Construction and Engineering Disputes.[21] Failure to comply with a pre-action protocol could result in the court staying the proceedings until the necessary steps have been taken, making an adverse costs order or imposing such other conditions as the court thinks fit.[22]

A claimant can be excused from complying with any part of the applicable pre-action protocol if, in doing so, its claim would become time barred.[23] The law on limitation periods for civil claims brought in England and Wales is set out in the Limitation Act 1980. For an action founded in contract or tort, the standard position is that a claim must be brought within six years of the cause of action accruing (12 years in the case of actions arising under a deed).[24] A cause of action accrues on the date of breach or, in the case of tort, the date that the claimant suffers damage. The limitation period can be postponed in certain circumstances.[25]

Once proceedings have been commenced, the court will typically allocate the claim to an assigned judge who will primarily be responsible for the case management of the claim. Technology disputes generally follow a similar timeline to other civil claims before the English courts, with the claimant required to serve the claim form and particulars of claim on a defendant in the jurisdiction within four months of the date of issue (six months if the defendant is located outside the jurisdiction). The defendant is also required to file a defence (together with any counterclaim) within either 14 days of an acknowledgment of service being filed or 28 days of service of the particulars of the claim.[26] There are some modifications to the standard procedural timeline for IP disputes heard by either the IPEC or the Patents Court.

19 Generally, the IPEC only hears lower-value claims, with a trial of the issues limited to two to three days and a cap on the amount of the damages that can be sought (IPEC Guide, Paragraph 3.2).

20 Both the Patents Court and the IPEC also have their own court guides.

21 TCC Guide, Paragraph 2.2. Although not mandatory for all cases brought in the TCC, the court generally expects the Pre-Action Protocol for Construction and Engineering Disputes to be followed in the absence of a specific reason to the contrary. Since there are no specific pre-action protocols governing IPEC proceedings, the parties are expected to comply with the Practice Direction – Pre-Action Conduct protocol (IPEC Guide, Paragraph 4.1). There is no equivalent obligation in relation to patent infringement claims.

22 CPR 3.1(3).

23 However, once issued, the court may order a stay of the proceedings to allow the parties to comply with the steps of the applicable pre-action protocol.

24 Limitation Act 1980, Sections 2 (tort), 5 (contract) and 8 (deeds).

25 For example, where the action is based upon the fraud of the defendant, the period of limitation does not begin to run until the claimant has discovered the fraud or could with reasonable diligence have done so (Limitation Act 1980, Section 32(1)(a)).

26 The TCC departs from the general rule that a reply should be filed with the directions questionnaire by requiring the claimant to file any reply within 21 days of service of the defence (CPR 60.5).

Directions to trial – including directions regarding disclosure, the filing of witness statements of fact and expert reports, and the listing of a pretrial review – will usually be set by the court at the first case management conference.[27] The overwhelming majority of civil claims in England and Wales, including technology disputes, are heard and determined by a judge, rather than a jury. The length of the trial and the court's availability will determine when the trial will be fixed, but a typical time frame for a two-week trial in the TCC is approximately 18 months from issue, with claims brought in the Patents Court usually resolved more quickly (around 12 months) and IPEC cases taking approximately 12 to 18 months to reach trial.[28]

V EVIDENCE AND WITNESSES

As soon as litigation is in reasonable contemplation, parties are under a positive duty to preserve all evidence that may potentially be relevant to the issues in dispute and are generally required to disclose to their opponent all relevant documents that are (or have been) in their possession or control. This obligation not only requires a party to disclose documents that are favourable to its own case, but also those documents that adversely affect its case or support its opponent's case, or both. Parties are expected to cooperate with one another and to assist the court so that the scope of disclosure can be agreed or determined in the most efficient way possible and the court has a broad discretion to make a wide range of disclosure orders.[29] It is also possible to obtain disclosure from a third party, provided that the court is satisfied that the documents sought are likely to support the applicant's case or adversely affect its opponent's case and that such disclosure is necessary to the fair disposition of the claim or to save costs.[30]

Since January 2019, the Business and Property Court (within which the TCC sits) has been operating under a disclosure pilot scheme intended to promote a more cost-efficient and cooperative approach to disclosure.[31] That scheme, which will be enshrined in the Civil Procedure Rules from 1 October 2022 onwards when it is formally adopted as Practice Direction 57AD, requires the parties to identify and agree the issues against which documents will be disclosed and the models of disclosure applicable to each of those issues. It applies to all cases issued in the TCC but, unless ordered otherwise, does not apply to IPEC cases. In addition, it does not apply to cases before the Patents Court insofar as it would have the effect of extending the (narrow) disclosure that is typically ordered in patent infringement proceedings.[32]

27 CPR Practice Direction 60, Paragraph 8.1 requires the court to fix the first case management conference within 14 days of the earlier of the filing of an acknowledgement of service, the filing of the defence or the date of the order transferring the case to the TCC.

28 The Business and Property Courts operate two voluntary schemes, which enable certain cases to come to trial in a much shorter time scale – namely, the Shorter Trial Scheme and the Flexible Trials Scheme. Neither scheme will generally be suitable for cases requiring extensive disclosure or reliance on extensive witness or expert evidence (which is often the case with service delivery disputes) and the Shorter Trial Scheme is also said not to be appropriate for IPEC cases (Practice Direction 57AB, Paragraph 2.2(d)).

29 CPR 31.5.

30 CPR 31.17(3).

31 The pilot scheme has been in operation since 1 January 2019 and is expected to run until the end of 2022.

32 See Practice Direction 63, Paragraph 6.1.

Documents may be withheld from inspection on a number of grounds, the most common of which are that documents are subject to legal professional privilege or formed part of 'without prejudice' discussions between the parties.[33] Although documents cannot be withheld from inspection on grounds of commercial sensitivity or confidentiality, certain protections can be put in place to restrict access to such material (for example, by agreeing that disclosure is made within a confidentiality ring ordered by the court).

In addition to the important role that documents play in any technology dispute, it is usually necessary for witnesses to give evidence, initially in the form of a witness statement (in relation to evidence-in-chief) and, ultimately, by the giving of oral evidence at trial (by way of cross-examination).[34] Witness availability can be a particular issue in service delivery disputes, where projects are often staffed with large numbers of independent contractors or service providers who may have moved on to other projects and be reluctant to give up their time to assist with a former employer's dispute.[35] However, assuming that witnesses can be located and are willing to give evidence, the parties will need to comply with the new rules governing the preparation of trial witness statements set out in Practice Direction 57AC. Those rules apply to all trial witness statements signed on or after 6 April 2021, save for any statements produced in relation to a limited number of proceedings.[36]

Given the complex and technical nature of technology disputes, it is very often necessary for the court to also hear evidence from independent technical experts before making findings on the issues in dispute. Such evidence is usually given by way of one or more written expert reports and oral testimony at trial, and the parties can either jointly appoint a single expert or, with the permission of the court (which will commonly be given in complex technology disputes), appoint an expert each.[37]

VI ENFORCEMENT

A party who wishes to enforce a judgment in England and Wales has a variety of enforcement methods available to it. These include:

33 Legal advice privilege covers confidential communications between a client and their lawyer that are made for the dominant purpose of obtaining or giving legal advice (see *The Civil Aviation Authority v. Jet2.Com Ltd* [2020] EWCA Civ 35 where the application of the 'dominant purpose' test to legal advice privilege was recently endorsed). Litigation privilege protects communications between clients or their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated adversarial litigation, which must be in progress or reasonably in contemplation. Further, for litigation privilege to apply, the communications must have been made for the sole or dominant purpose of conducting that litigation (see *Three Rivers District Council and Others v. The Governor & Company of the Bank of England* (No 6) [2005] 1 AC 610; and, more recently, *The State of Qatar v. Banque Havilland SA and another* [2021] EWHC 2172 (Comm)).

34 Unlike in other jurisdictions, such as the United States, depositions of witnesses are not taken in UK proceedings.

35 Although a witness cannot be compelled to assist a party in preparing a case, the court does have the power to summon a witness to appear before the court to provide oral testimony or produce documents in their possession, or both (see CPR 34.2–34.7).

36 This includes IPEC disputes and proceedings in the TCC relating to adjudication decisions concerning construction contracts (see Practice Direction 57AC, Paragraph 1.3(7) and (9); Section 9 of the TCC Guide).

37 See, generally, CPR 35, Practice Direction 35, the Guidance for the Instruction of Experts in Civil Claims and Section 13 of the TCC Guide.

a third-party debt orders (where a third party, who owes the judgment debtor money, pays the judgment creditor in satisfaction of the judgment debt);[38]
b charging orders (where a charge is imposed over a judgment debtor's beneficial interest in certain assets, such as land);
c attachment of earnings (where part of a judgment debtor's earnings is paid into court and released to the judgment creditor); and
d other – less frequently adopted – methods of enforcement, such as writs of sequestration (where enforcement officers take control of a defendant's property).

Depending on the value of the outstanding debt, a judgment creditor may also invoke certain insolvency procedures by first serving a statutory demand on the judgment debtor.[39] Unless prohibited by statute, a procedural rule or practice direction, a judgment creditor can use more than one method of enforcement, either at the same time or sequentially,[40] with the determination of which method or methods to use largely contingent on the extent and location of the judgment debtor's assets.

The ease with which an English judgment can be enforced overseas depends not only on where the judgment is to be enforced, but also on whether proceedings were commenced before or after the end of the Brexit transition period on 1 January 2021. In general, the procedures are as follows.

i Enforcement of pre-Brexit proceedings

An English judgment given in proceedings commenced on or before 31 December 2020 may be enforced in EU Member States under:

a the Brussels Regulation[41] (for proceedings commenced before 10 January 2015);
b the Recast Brussels Regulation[42] (for proceedings commenced after 10 January 2015); and
c the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so far as it related to enforcement in certain dependent territories of EU Member States).

An English judgment commenced on or before 31 December 2020 may be enforced in European Free Trade Association (EFTA) Member States (with the exception of Liechtenstein) under the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[43]

38 A third-party debt order to the value of £2.9 million was recently granted in relation to a fraudulent scheme concerning cryptocurrency (*Ion Science Ltd and Duncan Johns v. Persons Unknown, Binance Holdings Limited, Payward Limited and Mirriam Corp LP (Unreported)*, 28 January 2022 (Commercial Court)).

39 Bankruptcy proceedings can be brought against an individual if the debt owed is £5,000 or more and a company can be liquidated if it owes £750 or more.

40 CPR 70.2(2).

41 Regulation (EC) No. 44/2001.

42 Regulation (EU) No. 1215/2012.

43 The EFTA is comprised of Iceland, Norway, Switzerland and Liechtenstein. The latter is not a party to the 2007 Lugano Convention.

ii Enforcement of post-Brexit proceedings in EU Member States

The enforcement of English judgments in EU Member States changed significantly following the end of the Brexit transition period, when the European regime set out above ceased to apply to the United Kingdom. Although the United Kingdom has applied to re-join the 2007 Lugano Convention and despite the EFTA parties confirming their support, the European Commission issued a non-binding recommendation to the European Parliament and the Council that the United Kingdom's accession application should be rejected.[44] In the meantime, all questions of enforcement and recognition of English judgments in EU Member States are governed by the national law of each of those individual states, any reciprocal enforcement arrangements in place and the 2005 Hague Convention on choice of court agreements (the 2005 Hague Convention).

iii Enforcement outside the EU

On 1 January 2021, the United Kingdom acceded to the 2005 Hague Convention in its own right (it was previously bound by the convention by virtue of its membership of the European Union). The 2005 Hague Convention requires contracting states to recognise and enforce judgments given by a court of another contracting state that has been designated in an exclusive jurisdiction clause. It applies to all EU Member States, Singapore, Mexico and Montenegro, and has also been signed (but not yet ratified) by the United States and China.

In future, it may be possible for a party to rely on the 2019 Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (the 2019 Hague Convention) to enforce an English judgment in an EU Member State (and vice versa). This convention is designed to provide a single global framework for cross-border recognition and enforcement of judgments. On 12 July 2022, the European Council adopted a decision approving the European Union's accession to the 2019 Hague Convention.[45]

VII ALTERNATIVE DISPUTE RESOLUTION

Parties are encouraged to consider ADR from the outset and technology disputes are no exception, with each of the applicable court guides noting the 'significant saving of costs' to which the use of ADR can lead.[46] For cases where the Pre-Action Protocol for Construction and Engineering Disputes applies, parties are required to attend at least one face-to-face meeting during the pre-action phase[47] and the TCC may, at any stage, make an ADR order of its own volitation, requiring the parties to participate in the ADR procedure selected by the court.[48] There may also be contractual arrangements in place that require the parties to follow a tiered dispute resolution procedure before proceedings can be issued (such arrangements are often relevant to service delivery disputes).[49]

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44 European Commission Communication of 4 May 2021 (Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention).

45 See https://www.consilium.europa.eu/en/press/press-releases/2022/07/12/convention-on-the-recognition-of-judgements-council-adopts-decision-on-eu-accession/.

46 See TCC Guide, Paragraph 7.1.2; Patents Court Guide, Paragraph 9.2; IPEC Guide, Paragraph 4.11.

47 Pre-Action Protocol for Construction and Engineering Disputes, Paragraph 9.

48 TCC Guide, Paragraph 7.3.

49 Provided that the contractual provisions are sufficiently clear and certain, a court will enforce a tiered dispute resolution clause (*Cable and Wireless plc v. IBM United Kingdom Ltd* [2002] EWHC 2059

Once proceedings have commenced, the parties can choose to engage in ADR at any stage during the dispute and there is a broad spectrum of ADR mechanisms available, laid out below.

Arbitration is often referred to as being a form of ADR, but this is arguably inaccurate. Arbitration is a contractually agreed process whereby the parties elect to resolve their disputes before an arbitral tribunal (typically comprised of one or three arbitrators) and, in doing so, oust the jurisdiction of the courts to decide the substance of their disputes. In making that binding decision, the parties activate a statutory framework under the Arbitration Act 1996, which forms the backbone of the arbitration process. This framework is then often supplemented by the parties electing to incorporate an internationally recognised set of arbitration procedures or rules (for example, the rules of the International Chamber of Commerce or the London Court of International Arbitration).

Mediation involves a neutral third party (mediator) seeking to help facilitate a mutually acceptable settlement between the parties. The mediator does not typically assess the merits of the case but can form a view on the strength of the parties' respective positions, which could inform the way in which the mediator approaches settlement negotiations.[50] In the TCC, there is a specialist form of mediation carried out by TCC judges, which is known as the Court Settlement Process.[51]

Early neutral evaluation is a non-binding voluntary process whereby an impartial evaluator is appointed to provide the parties with a view of the strengths and weaknesses of their respective cases or of a particular issue arising in the case. With the consent of the parties, a TCC judge may be asked to provide an early neutral evaluation. If the judge does so, that judge will take no further part in the proceedings following that evaluation.[52]

Expert determination can be a useful ADR tool for certain technology disputes, where the involvement of an independent third party with specialist technical knowledge may help to break the impasse. It can be a relatively quick and cost-effective mechanism, and may result in either a binding or non-binding decision depending on the agreed terms of reference. Expert determinations are not, however, suitable for all technology disputes, particularly those that involve a significant amount of factual evidence.

The Digital Dispute Resolution Rules (the DDR Rules) provide for a confidential, binding arbitration (or expert determination) procedure to resolve disputes relating to digital technology such as cryptocurrency and cryptoassets. The DDR Rules are intended to be incorporated into a contract, digital asset or digital asset system and should be read in conjunction with the Arbitration Act 1996. The default rules, which were introduced on 22 April 2021, provide for an expedited ADR procedure, with the respondent being given just three days to submit its initial response to a claim and the arbitral tribunal expected to use best endeavours to issue a binding decision within 30 days of being appointed. This can be done on the basis of written submissions without an oral hearing.

The Society for Computers and Law Adjudication Scheme (SCLA) is, similarly, a relatively new voluntary scheme[53] that is designed to provide a cost-effective and quick way

(Comm); *Ohpen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC)).

50 Parties can agree to forms of evaluative mediation, in which the mediator expresses binding or non-binding views on the case.

51 TCC Guide, Paragraph 7.6.

52 TCC Guide, Paragraph 7.5.

53 The scheme was launched in October 2019 and updated in April 2020.

to resolve disputes arising out of contracts for the provision of technology-related goods and services. The scheme is governed by the SCLA Rules and can incorporated into a contract by agreement between the parties. Disputes are expected to be resolved within three months of a dispute notice being served and there are strict deadlines for challenging any determination, with enforcement of an award taking place through the English courts.

VIII OUTLOOK AND CONCLUSIONS

The English courts are likely to continue to see a broad spectrum of technology disputes being brought both in the medium and long term, including those involving system development and service delivery failures, software licensing, and infringements of IP rights. As blockchain technology and usage develops, cases featuring such emerging technologies are also likely to increase, with the jurisprudence in this space expected to evolve alongside regulation. Cases where the proprietary status of cryptoassets have typically been brought against persons unknown (including for the purposes of applications for interim remedies)[54] may start to be brought against named controllers of cryptoasset wallets and, if so, that could lead to more properly contested hearings between the parties. There is also likely to be a growing body of case law relating to non-fungible tokens (NFTs),[55] including proprietary and licensing disputes[56] and consumer claims concerning NFT marketplaces,[57] as well as the potential application of market abuse laws to the trading of NFTs. In addition, the English courts recently permitted (alternative) service by sending an NFT containing court documents to certain cryptoasset wallets, signalling the courts' willingness to embrace new technologies and adapt to the changing landscape.[58]

A growth in disputes concerning cybersecurity and data protection breaches is also likely, with the UK government's Cyber Security Breaches Survey showing that, in the last 12 months, 39 per cent of UK businesses had identified a cyberattack.[59] While the Supreme Court refused to permit claims under the DPA98 to proceed by way of a representative action in *Lloyd v. Google*, the question as to whether the court's approach would be any different with an opt-out representative action brought under UK GDPR is due to be tested

54 See, for example, *AA v Persons Unknown* [2019] EWHC 3556 (Comm). Due to the decentralised nature of many types of cryptoasset wallet and the difficulties in identifying who controls such wallets, claims are often brought against unknown (and, therefore, unrepresented) defendants.

55 An NFT is a digital asset that is secured and verified on a blockchain (such as a piece of digital art). Unlike a unit of a cryptocurrency (e.g., where one bitcoin is no different from another bitcoin), an NFT is typically unique and not interchangeable with any other token.

56 In *Osbourne v. Persons Unknown and Ozone Networks Inc* [2022] EWHC 1021 (Comm), there was held to be an arguable case that, as a matter of English law, two misappropriated NFTs were proprietary assets.

57 Such a claim was recently brought in *Soleymani v. Nifty Gateway LLC* [2022] EWHC 773 (Comm), which concerned a consumer's claim for (among other things) a declaration that an agreement to arbitrate contained in an NFT auction platform's terms of use was unfair under the Consumer Rights Act 2015.

58 *D'Aloia v. Persons Unknown, Binance Holdings Ltd and Ors* [2022] EWHC 1723 (Ch). One notable advantage of service by NFT is that service is recorded on the relevant blockchain, meaning such a record is publicly available and immutable.

59 See https://www.gov.uk/government/statistics/cyber-security-breaches-survey-2022/cyber-security-breaches-survey-2022.

this year in *SMO v. TikTok*[60] (at least on a summary judgment basis). If that claim survives summary judgment (and any appeal), it could lead to an increase in representative actions being brought for alleged data protection breaches.

60 *SMO (a child represented by Anne Longfield as litigation friend) v. TikTok Inc and Ors* [2022] EWHC 489 (QB).

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Julian Stait serves as co-managing partner of Milbank's London office, and is head of the firm's London litigation and arbitration team. He is recognised as one of Europe's leading dispute resolution lawyers in the main legal directories. Julian specialises in the resolution of large, high-stakes and complex business and regulatory disputes and investigations. He has extensive experience of litigation before the English courts (up to and including the Supreme Court); the resolution of complaints, disputes and investigations before a number of regulatory authorities; international arbitration under the auspices of many of the major institutional rules; and expert determination and other forms of alternative dispute resolution. He has acted on a number of the largest and leading technology, outsourcing and communications cases to come before the English courts; high-profile competition or antitrust cases and investigations; major cross-border investigations; complex banking disputes; major fraud litigation; and other high-profile business disputes.

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Tom Canning is a partner in Milbank's litigation and arbitration group, specialising in international dispute resolution. He has extensive experience of litigation before the English courts (up to and including the Supreme Court, and including all forms of emergency and interim relief) and has represented clients (including as solicitor advocate) in international arbitration proceedings conducted under all of the major institutional rules in an array of different jurisdictions (including, in particular, Asia and the Middle East, where he lived and practiced for several years). Tom has represented both customers and suppliers in some of the most significant IT and telecoms disputes in the UK market (in both litigation and arbitration proceedings), and regularly presents in relation to how best to manage long-term IT and telecoms contracts as well as how to navigate the pitfalls which typically arise.

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