

Contents

1	Introduction	1
1.1	The New Procedural Code ('CPR 1998') and the Woolf Reforms	1
1.2	Enduring Features of the English Civil Justice System	3
1.3	Changes and Challenges Association with the Civil Procedure Rules (1998)	3
1.4	Six Phases of English Civil Proceedings	8
1.5	Concluding Remarks	23
2	Principles of Civil Justice	25
2.1	Introduction	25
2.2	Article 6(1), European Convention on Human Rights	26
2.3	Other Aspects of European Influence on English Civil Procedure	32
2.4	UNIDROIT/American Law Institute Project (2000–2006)	40
2.5	Author's First List of Principles: Principles of Civil Procedure (1994)	44
2.6	Author's Second List of Principles: English Civil Procedure (2003)	45
2.7	A Fresh Start: Four Fundamental Aims of Civil Justice	45
2.8	Concluding Remarks	47
3	First Instance Proceedings	49
3.1	Introduction to Accelerated Relief Concerning the Substance of the Claim	50
3.2	Interim Payments	50
3.3	Interim Injunctions	52
3.4	Default Judgments	55
3.5	Preliminary Issues	57
3.6	Summary Judgment	58
3.7	Striking Out Claims or Defences	59
3.8	Disclosure	62

- 3.9 Pre-action Protocols 64
- 3.10 Pre-action Judicial Orders for Disclosure 64
- 3.11 Disclosure Against Non-parties 65
- 3.12 Assessment of Pre-action and Non-party Disclosures 67
- 3.13 Disclosure of Documents During the Main Proceedings 68
- 3.14 Privileges in General 70
- 3.15 Legal Advice Privilege 71
- 3.16 Litigation Privilege 75
- 3.17 Experts 80
- 3.18 Roles of the Court and Experts 82
- 3.19 The ‘Single, Joint Expert’ System 84
- 3.20 Court Assessors 87
- 3.21 Party-Appointed Experts 88
- 3.22 Selection and Approval of Party-Appointed Experts 89
- 3.23 Disclosure of Party-Appointed Expert Reports 91
- 3.24 Discussions Between Party-Appointed Experts 94
- 3.25 Factual Witness Immunity 99
- 3.26 Trial 100
- 3.27 Evidence at Trial 103

- 4 Appeals and Finality 107**
 - 4.1 Appeals 107
 - 4.2 Res Judicata: ‘Cause of Action Estoppel’
and ‘Issue Estoppel’ 115
 - 4.3 Preclusion of Points That Should Have Been
Raised: The Rule in Henderson v. Henderson (1843) 118
 - 4.4 Other Aspects of Finality 119

- 5 Costs 121**
 - 5.1 A Time of Change 122
 - 5.2 Costs-Shifting Rule 122
 - 5.3 Security for Costs 123
 - 5.3.1 Factors Relevant to the Exercise of the
Discretion to Order Security for Costs 124
 - 5.3.2 Claimant Resident Outside England and
Outside the Territories of the European
Union or the Lugano Convention 125
 - 5.3.3 Security for the Costs of an Appeal 126
 - 5.4 Protective Costs Orders and Costs Capping 126
 - 5.5 Discretionary Costs Decisions 127
 - 5.6 Standard and Indemnity Costs 128
 - 5.7 Costs Against Non-parties 128
 - 5.8 ‘Wasted Costs’ Orders Against Lawyers and Experts 129
 - 5.9 Conditional Fee Agreements 130
 - 5.10 Assessment of the English Conditional Fee System 135
 - 5.11 Comparison with USA Contingency Fees 137
 - 5.12 The Jackson Report (2009–10) 138

- 6 Enforcement of Court Judgments and Orders 141**
 - 6.1 Money Judgments 141
 - 6.2 Enforcement of Injunctions 145
- 7 Protective Relief 151**
 - 7.1 Introduction 151
 - 7.2 Freezing Relief 152
 - 7.3 Search Orders 161
 - 7.4 Civil Orders for Custody of Passports 165
- 8 Multi-party Litigation 167**
 - 8.1 Three Forms of English Multi-party Litigation 168
 - 8.2 Representative Proceedings ('Opt Out') 169
 - 8.3 Group Litigation Orders ('Opt In') 178
 - 8.4 English Rejection (2009) of Generic 'Opt Out'
Class Action 184
 - 8.5 Conclusion 186
- 9 Mediation 187**
 - 9.1 The Spectrum of ADR 187
 - 9.2 Disputants' Duty to Consider Mediation 191
 - 9.3 Mediation's Growth in England 193
 - 9.4 Mediation and Settlement Scepticism 197
 - 9.5 Mediation Agreements 201
 - 9.6 Pre-action Duty of Parties to Consider ADR 203
 - 9.7 Occasions for Judicial Encouragement of Mediation 204
 - 9.8 Judicial Order to 'Stay' Court Proceedings to
Facilitate Mediation 205
 - 9.9 Costs Sanctions for Failure to Pursue Mediation 206
 - 9.10 Privileged Mediation Discussion 211
 - 9.11 English Reception of the European Mediation Directive 214
 - 9.12 Concluding Remarks 215
- 10 Arbitration in England 219**
 - 10.1 Introduction 219
 - 10.2 Confidentiality 221
 - 10.3 Party Selection: Of the Panel, Governing Norms,
and Arbitral Procedure 225
 - 10.4 Arbitration Clauses 227
 - 10.5 Anti-suit Injunctions Concerning Offending
Proceedings Outside the European Union 228
 - 10.6 Anti-suit Injunctions Concerning Offending
Proceedings Within the Europe Union 231
 - 10.7 Damages for Breach of an Arbitration Clause 235
 - 10.8 Speed and Efficiency 237
 - 10.9 Finality 237
 - 10.10 Freezing Relief and Arbitration 240

- 10.11 Recognition and Enforcement of Arbitration Awards Under the New York Convention (1958) 241
- 10.12 Conclusion 247
- 11 Connections Between Courts, Arbitration, Mediation and Settlement: Transnational Observations 249**
 - 11.1 Introduction 249
 - 11.2 Courts and the Appointment of Arbitrators 251
 - 11.3 Courts and Anti-suit Remedies to Support Arbitration Agreements 251
 - 11.4 Courts and Protective Relief to Support Arbitration . . . 253
 - 11.5 Courts Providing Support for the Gathering of Evidence for Use in Arbitration 259
 - 11.6 Recognition and Enforcement of Foreign Arbitral Awards Under the New York Convention (1958) 261
 - 11.7 Effect of a National Court’s Annulment of a Domestic Arbitral Award 262
 - 11.8 Mediation Before Commencement of Arbitration 264
 - 11.9 Mediation When Arbitration is Pending 265
 - 11.10 The Conservative View: Arbitrators Should Not Combine the Function of a Mediator 265
 - 11.11 Parties Consenting to Arbitrators Acting Also as Mediators: The Transnational Rise of the Chameleon ‘Neutral’ 267
 - 11.12 Institutional Support for Contractually Mandating Arbitrators to Facilitate Settlement 271
 - 11.13 Concluding Remarks 274
- Bibliography 275**
- Leading Contributors to English Civil Justice 281**
- Index 293**