DISPUTE RESOLUTION 2023

Consulting editors

Oliver Browne and **Anna James**

This publication is intended to provide general information on law and policy. The information and opinions it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

Enquiries concerning reproduction should be sent to customersuccess@lexology.com. Enquiries concerning editorial content should be directed to the Content Director, Clare Bolton – clare.bolton@lbresearch.com.

START READING

© Law Business Research Ltd 2023

Jurisdictions

Global overview 1
Martin Davies and Alanna Andrew
Latham & Watkins LLP

Armenia 3
Aram Orbelyan, Lilit Karapetyan and Ani Hambartsumyan
Concern Dialog Law Firm

Australia 18
Peter Lettieri, Heather Richardson and Jonathan Kenny
Kalus Kenny Intelex

Austria 34
Klaus Oblin and Per Neuburger
OBLIN Attorneys at Law

Bahrain 52
Aamal Al Abbasi, Ahmed Alfardan and Maryam Al Bastaki
Newton Legal Group

Belgium 66
Olivier Vanhulst, Julien Hislaire and Rodrigo Belle Gubbins
White & Case

Bulgaria 86
Tsvetelina Dimitrova and Petya Stankova
Georgiev Todorov & Co

Cayman Islands 101
Paul Kennedy and Katie Logan
Campbells

China 117
Jan Holthuis,and Li Jiao*
BUREN NV

Cyprus 144
Andreas Erotocritou, Antreas Koualis and Irena Markitani
AG Erotocritou LLC

Denmark 162
Morten Schwartz Nielsen and Kasper S R Andersen
Lund Elmer Sandager

Egypt 182
Ehab Yehia
Soliman, Hashish & Partners

England & Wales 192
Oliver Browne and Anna James
Latham & Watkins LLP

Germany 235
Heiner Kahlert and Maximilian Wegge
Martens Rechtsanwälte

Greece 252
Christos Paraskevopoulos
Bernitsas Law

Hong Kong 277
Bryan O'Hare, Pui Yip Leung, Rachel Yeung and Wing Lui
Hill Dickinson

India 301
Shaneen Parikh, Vikash Kumar Jha, Akhil Mahesh, Nikhil Aradhe and Varalika Dev
Cyril Amarchand Mangaldas

Indonesia 321
Mahareksha S Dillon, Joseph Hendrik and Talitha A Ekadhani
SSEK Law Firm

Israel 338
Alon Pomeranc and Reut Beitz
Lipa Meir & Co

Japan 350
Akira Tanaka and Kazuroo Shiraishi
Anderson Mōri & Tomotsune

Liechtenstein 366
Matthias Niedermüller and Alexander Milionis
Niedermüller Rechtsanwälte | Attorney at Law

Published July 2023

Malaysia 387
Datin Jeyanthini Kannaperan, K Shanti Mogan, Yee Mei Ken, Jimmy S Y Liew and Sathya Kumardas
Shearn Delamore & Co

Monaco 407
Donald Manasse
Donald Manasse Law Offices

Panama 419
Khatiya Asvat and Joaquín De Obarrio
Patton Moreno & Asvat

Philippines 434
Manolito Alvarez Manalo and Joan Roshen M Dueñas
Ocampo, Manalo, Valdez & Lim Law Firm

Romania 450
Alina Tugearu and Cosmin Vasile
Zamfirescu Racoţi Vasile & Partners

Serbia 465
Nenad Stanković, Sara Pendjer and Luka Marosiuk
Stankovic & Partners NSTLaw

Singapore 480
Angelia Thng and Edmund Jerome Kronenburg
Braddell Brothers LLP

South Korea 515
Gee Hong Kim, Jinhee Kim, Mary Kosman and Sang Yong Jun
JIPYONG LLC

Spain 530
Pedro Rodero Rodríguez, Cristina Camarero Espinosa, Marta Rodrigo Lavilla and Marina Blaya González
Ontier

Sweden 550
Andreas Eriksson and Gustav Tranvik
TIME DANOWSKY Advokatbyrå AB

Thailand 566
Pisut Rakwong and Supachoke Pongdasakorngamjai
Pisut & Partners

United Arab Emirates 582
Amal Al Raisi, Charlotte Foster and Celine Abi Habib Kanakri
Kennedys Law LLP

United States – California 605
Peter S Selvin and Alice M Hodsden
Ervin Cohen & Jessup LLP

United States – New York 629
Thomas E L Dewey and Christopher P DeNicola
Dewey Pegno & Kramarsky LLP

Published July 2023

Global overview

Martin Davies and **Alanna Andrew**
Latham & Watkins LLP

RETURN TO CONTENTS

During the covid-19 pandemic we saw the courts, and their users, embrace the efficiencies of technology, with litigators becoming well versed in electronic working and virtual hearings. Three years on, there has been a shift back to in-person court hearings, but it is clear that the pandemic expedited the drive to modernise court systems, and interim measures introduced during the pandemic are fast becoming the new 'norm'. For example, 'hybrid' hearings are now a common alternative to fully in-person hearings, particularly for interim applications and case management conferences, and the livestreaming of court proceedings is no longer the exclusive preserve of the Supreme Court. It will be interesting to see what further changes come following the completion of HMCTS's Reform Programme in March 2024.

Continuing with the theme of modern technology, the rapid growth in the use of crypto-assets and block chain technology has seen a steady uptick in crypto-related disputes, particularly those concerning crypto-currency fraud. These disputes present unique challenges, ranging from questions of jurisdiction, to difficulties as regards asset-tracing and enforcement. In July 2022, the Law Commission of England and Wales published a consultation paper on digital assets, which included proposals to recognise digital assets as a distinct category of personal property (provisionally called 'data objects'). The final report is due to be published in 2023.

The effects of Brexit caused uncertainty around the recognition and enforcement of judgments across borders, compounded by the European Commission indicating in 2021 that it would oppose the UK's accession to the Lugano Convention 2007. There may, however, be some clearer skies ahead. On 15 December 2022, the UK government published a consultation paper seeking views on its plan for the UK to become a contracting state to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Convention 2019). The response was overwhelmingly positive, with practitioners viewing the UK's accession to the Hague Convention 2019 as critical to ensuring that the UK remains a jurisdiction of choice for international dispute resolution. Although the UK's position on the Hague Convention 2019 is encouraging, and may prove prescient, the international uptake of the Convention remains limited, so any adoption of it by the UK may not be the perfect panacea.

Open justice and transparency continue to be hot topics, and 2023 brings with it the first anniversary of the National Archives Find Case Law website, a publicly accessible platform of new court and tribunal decisions from the UK Supreme Court, the Court of Appeal, the High Court and the upper tribunals that went live in April 2022. The platform published over

Read this article on Lexology

4,000 judgments in its first year, attracting a wide variety of users, including many from non-legal backgrounds such as researchers and historians, as well as those interested in reading first-hand the cases that have made it into the national headlines.

LATHAM & WATKINS

Martin Davies	martin.davies@lw.com
Alanna Andrew	alanna.andrew@lw.com

99 Bishopsgate, London EC2M 3XF, United Kingdom
Tel: +44 207 710 1000
www.lw.com

Read more from this firm on Lexology

Read this article on Lexology

Armenia

Aram Orbelyan, Lilit Karapetyan and Ani Hambartsumyan
Concern Dialog Law Firm

RETURN TO CONTENTS

Summary

LITIGATION	4
Court system	4
Judges and juries	4
Limitation issues	4
Pre-action behaviour	5
Starting proceedings	5
Timetable	6
Case management	6
Evidence – documents	6
Evidence – privilege	7
Evidence – pretrial	7
Evidence – trial	7
Interim remedies	8
Remedies	8
Enforcement	9
Public access	9
Costs	9
Funding arrangements	10
Insurance	10
Class action	10
Appeal	11
Foreign judgments	11
Foreign proceedings	11
ARBITRATION	**12**
UNCITRAL Model Law	12
Arbitration agreements	12
Choice of arbitrator	12
Arbitrator options	13
Arbitral procedure	13
Court intervention	13
Interim relief	13
Award	13
Appeal	14
Enforcement	14
Costs	15
ALTERNATIVE DISPUTE RESOLUTION	**15**
Types of ADR	15
Requirements for ADR	16

Read this article on Lexology

MISCELLANEOUS 16
Interesting features 16

UPDATE AND TRENDS 16
Recent developments and future reforms 16

LITIGATION

Court system

1 | What is the structure of the civil court system?

The civil court system in Armenia is three-tiered. Particularly, the court of general jurisdiction of the first instance is the lowest tier, followed by the court of appeal and, finally, the court of cassation, which is the supreme instance of the system.

Generally speaking, there are no subdivisions of the courts depending on the nature, subject matter or the size of the courts. Yet, there are specialised courts in Armenia each of which, particularly, hear cases that related to bankruptcy issues. Further, it is noteworthy that there are administrative courts in Armenia that hear administrative cases only.

The hierarchy of courts within the said three-tier structure is as follows: Decisions of the court of first instance are appealed before the court of appeal, and the decisions of the court of appeal respectively before the court of cassation.

The number of judges that hear the case on each level are as follows: in the first instance, the case is heard by one judge. In the appeal court depending on whether the appealed decision is interim or on the merits of the case, the number of judges is one and three respectively. The Court of Cassation hears the case with nine judges.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The institute of jury is not used in the court proceedings of Armenia irrespective of the subject matter and the nature of the case.

The judge presides over the question, hears and examines the case, evaluates the evidence in the case and issues interim or final (on merits) judicial acts. In civil court cases, the judge has a passive rather than inquisitional role (as opposed to administrative law proceedings where the judge hears the case in an *ex officio* manner).

Limitation issues

3 | What are the time limits for bringing civil claims?

The general period of statute of limitations is three years in Armenia. The law in certain instances further indicates longer or shorter periods for bringing claims. The Civil Code of

Armenia explicitly prohibits the parties to change any of the statute of limitation periods and the instances of suspension thereof can solely be determined by law (and not the agreement of parties).

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Overall, the party's right to bring action before the court is not specifically conditioned by any pre-action obligations. Yet, in case the agreement between the parties indicates pre-judicial negotiations, the parties must comply with this. In the opposite case, the court may return the claim and request pre-judicial settlement negotiations. In the opposite case, no such requirement is determined.

Furthermore, the parties are entitled to bring applications of exercising preliminary security of claim before bringing the claim itself (Preliminary Security), whereunder the applicant may request the court to exercise certain measures to secure the claim to be brought in future. Besides, when it comes to securing evidence, although there is no process to secure the evidence through the court (before the claim has been initiated), the evidence can also be secured through the notaries in Armenia.

In the meantime, when it comes to pre-action disclosure or document exchange orders, such processes are not established under the law.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings begin with the filing of a lawsuit (claim) or application by the claimant before the court of first instance of the respective jurisdiction. The claimant is obliged to send a copy of the claim to the respondent and provide proof of sending the claim along with the submitted claim. After the court has accepted the case into its jurisdiction, it must notify the parties engaged of the court's decision within three days of adoption thereof. Thus, at this point, the parties are notified of the commencement of the proceedings before the court.

Regarding the court's capacity to handle the cases, since the distribution of court cases is done through an automatic system, the human factor in the distribution of cases is absent, therefore judges or their capacity issues cannot influence the said process. In the meantime, when it comes to the overload of the judges to hear the case, indeed, Armenian courts do face certain capacity issues, which may, in some instances create obstacles for hearing the disputes in a timely manner.

The state has various proposals which are indirectly aimed at easing the capacity issues of the courts. One such initiative was illustrated in the change of the Law on Arbitration. In a nutshell, it was recently adopted that Arbitral Institutions can refer their arbitral awards directly to enforcement (for cases with the value of up to 5,000,000 Armenian dram), without

the need for the courts to issue an enforcement act. Considering the very large number of local arbitration award enforcement-related cases, this is supposed to ease the capacity of courts.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The procedure before the courts commences with the submission of the claim by the claimant. The claim then is added to the official court system (within 24 hours of submission) and thereafter distributed to a certain judge (via an automatic system). Within seven working days, upon the date when a certain judge is appointed to hear the case, the court shall adopt a decision on either accepting the claim into its jurisdiction, returning the claim or refusing hearing of the claim.

The documents submitted to the claim or the evidence supporting the claim can be attached to the claim itself, or submitted by the claimant to the court at a later stage. Similarly, the respondent may attach documents supporting their arguments to their response or submit it to the court within judicial proceedings. In either case, the general rule allows parties to submit documents throughout the hearings of the court of first instance. Subsequently, when the court adopts a decision on the distribution of the burden of proof, it provides the parties with time to provide further evidence. This is the last point where the parties may submit new documents to the court. Past this point, the parties may submit new evidence in very exclusive cases only.

Case management

7 | Can the parties control the procedure and the timetable?

Generally, the judicial process and the deadlines for each of the steps are regulated under the law in detail. The approach is that the courts should comply with these timetables and carry out the process in the manner prescribed by the law.

Regarding the party's ability to control the process and timetables, the parties may bring motions asking the court to adopt alternative timing or procedural steps. Yet, the judge's authority with respect to such motions is merely dispositive and they do not have to accept such motions. As to the ability of the party to ensure that the courts comply with specified procedures and timetables, they again may motion the court to comply with the established processes and in case there is a gross breach, bring disciplinary actions against the judge.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The person participating in the case is obliged to disclose to the court of first instance and other persons participating in the case and, if possible, provide the evidence known to him or her at the moment, to which he or she refers as a basis for proving his or her claims and

objections, before the end of the period established by the decision on the distribution of the burden of proof.

Furthermore, the Civil Procedure Code of the Republic of Armenia explicitly determines that a party to the case does not have the right to destroy or disguise any evidence or in other manner create obstacles for acquiring or observing such evidence. In the presence of such facts, the negative consequences of the fact to be proved being disputed shall be borne by the obstructing person.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

When it comes to the content of legal advice itself it cannot be considered as evidence. However, if certain evidence necessary for the case includes legal advice, it still can be requested.

Overall, in case the court requests the parties to submit evidence, they must comply with such request. In the alternative case, the court (in the existence of the other party's motion) may issue an enforcement act to acquire the evidence or change the burden of proof to the detriment of the party who fails to provide the evidence. This is applicable irrespective of the type of secrecy of such evidence. In the meantime, the court shall hear the case in closed (confidential) hearings.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

The party may collect written evidence (including preserve those through the notary) or acquire expert examinations prior to initiation of judicial proceedings. Further, the attorney may inquire about persons who have information on the case and provide the written minutes of such communication to the court at a later stage. The list of tactics of 'preserving' or acquiring written evidence is not exhaustive here, however, the parties do not have a specific obligation to exchange this with the opposite parties prior to the commencement of judicial proceedings.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

The types of evidence are:

- the testimony of the witness;
- written evidence;
- material evidence;
- photographs (films), recordings and videos;

- expert's conclusion; and
- the specialist's explanation.

Therefore, the law allows the witnesses can give their testimony orally and may enforce such witnesses to appear before the court. As for the experts, they must provide a written report if requested by the decision of the court and may further be questioned by the court on the conclusions of the expert opinion if needed.

Interim remedies

12 | What interim remedies are available?

The law indicates certain interim measures for the parties to the case. Particularly:

- the parties to a case are entitled to bring a motion before the court on preserving evidence if they are convinced that the provision of certain evidence may become difficult or impossible at a later stage;
- the claimant is entitled to bring a motion to exercise a measure of security of the claim, if the failure to exercise such measures may render or complicate enforcement of the decision of the court at a later stage, or lead to a change in the actual or legal status of the property that is the subject of the dispute or cause significant damage to the claimant; or
- the respondent, if a security measure against it has been exercised, can submit a motion to request security (counter security) for their possible damages.

Remedies

13 | What substantive remedies are available?

The remedies under Armenian law, as determined under the Civil Code, are:

- recognition of the right;
- restoring the situation that existed before the violation of the right;
- preventing actions that violate the right or create a danger for its violation;
- applying the consequences of invalidity of a void transaction;
- declaring the disputable transaction invalid and applying the consequences of its invalidity;
- declaring the act of the state or local self-government body invalid;
- by the court not applying the act of the state and local self-government body that contradicts the law;
- forcing to fulfil the duty in kind;
- compensating damages;
- confiscation of penalty;
- terminating or changing the legal relationship; and
- in other ways provided by law.

Broadly speaking, although punitive damages are not explicitly determined under the law, contractual and in certain specific instances (eg, labour law) statutory punitive damages may be available for the party who has suffered damage due to the actions of the opposing

party. Furthermore, the Civil Code of the Republic of Armenia defines a default interest rate that will be charged upon a party who has failed to comply with their payment obligations and the court will exercise such penalty in a 'money judgement' if requested by the claimant.

Enforcement

14 | What means of enforcement are available?

In case of failure of the party to voluntarily comply with the judgment, the court may issue an enforcement act based on the motion of the other party. In such a case, the expenses of the compulsory enforcement are borne by the debtor.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

As a general rule, the judicial process in Armenia is public. This includes the publicity of the hearings and access of third parties to the case files once the case has been completed.

In the meantime, in order to protect the private life of the trial participants, including the minors, commercial secrets or the interests of justice, as well as state security, public order or morals, the court may examine the case or a part of it in a closed confidential hearing. This may occur at the initiative of the court or based on the request of the parties to the case. The use of video and audio telecommunication means is prohibited in a closed court session.

In case the case is heard in closed hearings, the decision of the court is not published, but the final part thereof shall be published on the official judicial information website (datalex.am), except for the cases when it contains a secret protected by law. The final part of the final judicial act, containing the secret protected by law, is published in a closed session.

Costs

16 | Does the court have power to order costs?

Judicial costs consist of state fees and other costs related to the examination (eg, attorney fees, fees of expert examination) of the case. Claims related to court costs are submitted exclusively within the given case. Along with the final judgment rendered by the court, the court shall also address the costs and distribute those among the parties (which depends on the outcome of the case).

When assessing the costs, the court looks either at the expense actually borne by the other party (eg, state fee) or evaluates the reasonableness of the cost (eg, attorney costs).

Regarding the security provided to the respondent for their costs, if a security measure against it has been exercised, can submit a motion to request security (counter security) for their possible damages.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Generally speaking, the law does not prohibit success fee arrangements with the attorneys representing their clients before the case. This is not an unusual arrangement, and in certain instances, the attorneys opt-in for success fees. Regarding third-party funding and sub-types thereof, there is no explicit prohibition under the law to engage third-party funding, therefore, the parties are free to do so.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

The law does not prohibit the provision of insurance for the party's legal costs. However, we do not have any information on whether there are such insurance coverages offered by insurance companies in Armenia.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

In Armenian law, the criteria for collective suits are defined. When a claim is filed by a minimum of 20 individuals, it is considered a collective suit. In such cases, the claim is jointly submitted by at least 20 co-claimants against the same respondent or co-respondents. The collective suit focuses on a common subject matter and grounds for the claim. However, it's important to note that this differs from a class action lawsuit, as the specific claimants are always identified and the case does not involve the rights of other parties as a class. While the law does not explicitly specify an opt-in or opt-out mechanism, the regulations indicate that these claims are typically submitted through a power of attorney signed by all co-claimants, suggesting an opt-in mechanism.

It is worth mentioning that representatives in collective suits can include not only the claimants themselves but also non-governmental organisations that are concerned with protecting rights in a particular field. Co-claimants also have certain rights regarding the termination of representation, although it should be noted that their case will still be heard even if they choose to terminate representation. If one of the claimants wishes to terminate or replace their representative, the court will separate their claim and hear it as a separate case.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The decisions of the court of first instance (the final judgements always and the interim judgements if specified by law) may be appealed before the Court of Appeal. The grounds for appeal are as follows:

- violation or incorrect application of material law norms;
- violation or incorrect application of procedural law norms; and
- newly appeared or new circumstances.

The decisions of the Court of Appeal can be appealed further before the Court of Cassation. The grounds for bringing a Cassation appeal are the same. In the meantime, the Court of Cassation shall accept the appeal into consideration exclusively in the cases where the court finds that (1) the decision of the Cassation Court on the issue raised in the appeal may be essential for the uniform application of the law and other regulatory legal acts; or (2) there is a fundamental violation of human rights and freedoms.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The Civil Procedure Code of the Republic of Armenia defines the process of recognition of Foreign Judgements. Particularly, Judicial acts made in civil cases by the courts of foreign countries are recognised, and judicial acts requiring execution are also executed in the Republic of Armenia.

The court may recognise and enforce such judgements if there is an international agreement of the Republic of Armenia or on the basis of reciprocity.

The law indicates the presumption of the existence of reciprocity unless proven otherwise by the motion of the party against whom the decision has been made.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The law allows obtaining oral and documentary evidence in foreign countries for the cases heard in Armenia and vice versa. This is conducted based on various two- and multi-party international agreements concluded by the Republic of Armenia.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Republic of Armenia Law on Commercial Arbitration has been drafted based on the UNCITRAL Model law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement shall be in writing. The law further allows the parties to conclude Arbitration agreements by executing one document or via sending letters, emails or other communication means, provided that one part, where one party invokes the existence of an arbitration agreement and the other party does not object to it.

Further, a reference in a contract to a document containing an arbitration clause shall be deemed to be an agreement to arbitrate provided that the contract is in writing and the reference is such as to make the said clause a part of the contract. The arbitration agreement is considered to have been concluded in writing also if the written proposal of one party about the arbitration agreement has been accepted by the other party in any form.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In case the parties have not agreed on the number of arbitrators, the tribunal shall consist of three arbitrators.

As regards the rules of appointment of the arbitrators, the following default rules shall apply:

- In the case of arbitration with three or more arbitrators, each party shall appoint an equal number of arbitrators, and the appointed arbitrators shall, by a majority vote, appoint the last arbitrator to act as chairman of the tribunal. If one party does not appoint an arbitrator within 30 days of receiving the request of the other party to appoint an arbitrator, or the arbitrators appointed by the parties do not reach an agreement on the appointment of the last arbitrator within 30 days after the date of their appointment, then at the request of the party, the appointment is made by the Court of General Jurisdiction of Armenia.
- in the case of arbitration with a sole arbitrator, if the parties do not agree on the appointment of the arbitrator, the appointment shall be made by the Court of General Jurisdiction of Armenia.

The decision of the court on the appointment of an arbitrator is not subject to appeal. In the meantime, the parties do have a right to challenge specific arbitrators, particularly

when there are circumstances that raise reasonable doubts about the impartiality or independence of the arbitrator, or they do not have the appropriate qualifications defined by the agreement of the parties.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The law defines only very few minimal requirements for a person to be qualified as an arbitrator. Particularly, the person shall be at least 25 years old and have higher education. A person who does not have capacity or has limited capacity, or is convicted for a crime, as well as is under investigation cannot be appointed as an arbitrator.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Republic of Armenia Law on Arbitration law contains substantive requirements with which the parties must comply if the law of Armenia is applicable to the process.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

In a number of instances, the court may intervene during an arbitration:

- When appointing an arbitrator;
- When a party to an arbitration agreement applies to the court to produce documents or evidence or solicit the presence of a witness, with the support of the court;
- When an arbitral award is challenged before the court; or
- When the award is recognised and/or enforced by the court.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless otherwise stipulated by the agreement of the parties, the arbitral tribunal, upon the motion of each of the parties, may render an interim decision on security measures that it considers sufficient.

Award

30 | When and in what form must the award be delivered?

The law does not provide specific requirements as to the time of rendering the award by the tribunal. The majority of votes render the award in case of more than one arbitrator. The award shall be in writing and signed by the sole arbitrator or arbitrators. In the case of more

than one arbitrator, the award may be signed by the majority of the arbitrators only, provided that the reasons for the absence of the other signatures are indicated in the award.

Once the award is rendered, an original copy thereof shall be sent to each party, signed by the arbitrators in accordance with the above procedure.

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitral award may be set aside by the court only if:

- the party making the application furnishes proof that:
    - a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Armenia, or
    - the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
    - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
    - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the law; or
- the court finds that:
    - the subject matter of the dispute is not capable of settlement by arbitration under the law of Armenia;
    - the award is in conflict with the public policy of this state; or
    - the decision adopted by a court on the matter of setting aside an arbitral award is not subject to appeal before courts of higher instance.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Under the laws of Armenia, domestic awards are subject to enforcement and foreign awards are subject to recognition and enforcement. Particularly, the interested party may bring an application before the court to recognise and (or) enforce the arbitral award. The grounds for rejection of the application are the same as the grounds for setting aside an award.

It is noteworthy, that recently a major change was adopted with respect to the enforcement of domestic awards. Particularly, upon the change, the arbitral institutions are entitled

to send their domestic awards straight to enforcement (to the Compulsory Enforcement Service) without the need to apply to the court for issuing writ of execution. The rule is applicable to the award of up to 5,000,000 Armenian dram. The change is a part of the state policy to use arbitration to alleviate the burden of courts.

Costs

33 | Can a successful party recover its costs?

A successful party in the arbitration will be entitled to recover their costs. The arbitral tribunal shall address the issue of recovery of costs in the final arbitral award. The costs can include arbitration costs, costs of engaging experts and attorney fees.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The institute of mediation is regulated under the law (with respect to the certification of mediators). In certain instances, mediation is also a mandatory means that the parties shall go through before being able to apply to the court. In the meantime, it must be noted that mediation is still not too common and is not used by the parties in Armenia very commonly.

In Armenia, Financial System Mediator's office is established by the Central Bank of Armenia (CBA) which resolves disputes between financial institutions established by CBA and their clients. As such, it is not a mediation process (although the name says mediator) but rather a Financial Ombudsman. Still, in the financial sector, this is a very popular means of alternative dispute resolution aimed at the protection of the rights of customers.

Furthermore, although not a classical means of alternative dispute resolution (ADR), the parties in certain instances must lead amicable negotiations before applying to the court. Particularly, when the agreement of the parties indicates amicable negotiations, they must carry out these negotiations and only after that be able to apply to court.

Regarding adjudication, it is not established under the law but in certain sectors (especially in cases where construction contracts are concluded based on the International Federation of Consulting Engineers books, where processes include having a dispute adjudication board) adjudication is indeed used.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In certain instances, the parties do need to participate in ADR processes before they can bring claims before the courts. Particularly, in case mediation or amicable negotiations are established under the agreement between the parties, they must undergo the process before they have a right to apply to court. Furthermore, during judicial processes, the Court may require the parties to go to mandatory mediation. Finally, in certain instances (eg, in certain family law cases) mandatory mediation may also be applicable.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The change related to the domestic arbitral awards for small claims being submitted directly to Compulsory Enforcement Service by Arbitral Institutions is currently one of the most discussed topics with respect to dispute resolution. Further changes in the sector have included the change to the law of State Duty, whereunder new rates for state duties were established. The proposed changes currently still not adopted include regulations for applying to mandatory mediation in certain instances, as well as more use of electronic means within a procedure.

Aram Orbelyan	aram.orbelyan@dialog.am
Lilit Karapetyan	lilit.karapetyan@dialog.am
Ani Hambartsumyan	ani.hambardzumyan@dialog.am

1 Charents Street, Office 207, 0025, Yerevan, Armenia
Tel: +37455500580
www.dialog.am

Read more from this firm on Lexology

Australia

Peter Lettieri, Heather Richardson and Jonathan Kenny
Kalus Kenny Intelex

RETURN TO CONTENTS

Summary

LITIGATION	19
Court system	19
Judges and juries	20
Limitation issues	20
Pre-action behaviour	21
Starting proceedings	21
Timetable	21
Case management	22
Evidence – documents	22
Evidence – privilege	23
Evidence – pretrial	23
Evidence – trial	23
Interim remedies	24
Remedies	24
Enforcement	24
Public access	25
Costs	25
Funding arrangements	25
Insurance	26
Class action	26
Appeal	27
Foreign judgments	27
Foreign proceedings	28
ARBITRATION	**28**
UNCITRAL Model Law	28
Arbitration agreements	28
Choice of arbitrator	29
Arbitrator options	29
Arbitral procedure	29
Court intervention	30
Interim relief	30
Award	30
Appeal	30
Enforcement	31
Costs	31
ALTERNATIVE DISPUTE RESOLUTION	**31**
Types of ADR	31
Requirements for ADR	31

Read this article on Lexology

MISCELLANEOUS	32
Interesting features	32
UPDATE AND TRENDS	32
Recent developments and future reforms	32

LITIGATION

Court system

1 | What is the structure of the civil court system?

The civil court system in Australia includes federal and state jurisdictions. There are also specialist tribunals at both the state and federal level.

The federal jurisdiction includes:

- Federal Court, which has jurisdiction to hear almost all civil matters arising under Australian federal law. At first instance, most matters are heard by one judge. Appeals are heard by the Full Court of the Federal Court requiring three or more judges.
- Federal Circuit and Family Court, which hears disputes involving family law, migration law, administrative law, admiralty law, bankruptcy, consumer law, human rights, some industrial and employment matters, intellectual property and privacy law.

Australia's states and territories have inferior courts which have limited jurisdiction, expressed in statute. These are known as the magistrates' or local court and county or district court. The magistrates' or local court handles smaller matters. The county or district court, which is the intermediate court in the court hierarchy, has jurisdiction over most matters with a set monetary threshold.

The Supreme Court of Australia's states and territories is the highest court in that state or territory and hears the most complex civil cases and appeals from state courts and tribunals. Specialist lists are managed by judicial officers with experience in that area of law.

The civil jurisdiction of state and territory Supreme Courts is unlimited; however, usually smaller claims are heard by lower courts.

Appeals are heard by the Court of Appeal or the Full Court of a Supreme Court. Only the High Court can review decisions of the Court of Appeal or Full Court of a Supreme Court.

The High Court of Australia is the highest court and its decisions are binding on all lower courts. The High Court's original jurisdiction includes constitutional matters. It hears appeals from the appellate divisions of the Federal Court and the state and territory Supreme Courts. Leave to appeal to the High Court is required.

Specialist tribunals at state and federal level are established by legislation and hear specific disputes. For example, the Fair Work Commission is a national workplace relations tribunal which hears applications by employees in relation to employment and offers alternative

dispute resolution forums for employees and employers. The Administrative Appeals Tribunal conducts reviews and hears appeals of administrative decisions made under Commonwealth laws, such as decisions made by government bodies and departments.

Most states also have a Civil and Administrative Tribunal to hear specific disputes, for example, relating to leases, domestic building and smaller consumer matters.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Judges of Australian courts preside over court proceedings either alone, as part of a panel or with a jury. Judges are required to make independent assessments of the facts presented to them and interpret and apply statute and common law. In doing so, judges must act with impartiality to administer justice.

Judges do not play an inquisitorial role, rather solicitors and barristers as officers of the court, gather and present evidence to the judge to assist them in making findings of fact and law. Judges are independent from other arms of government.

Judges of Federal Courts are appointed by the Governor-General in Council. Judges of state courts are appointed by the Governor in Council for each particular state.

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods are governed by statute. Broadly speaking, each state and territory has a Limitation Act or Limitations of Actions Act.

The time limit for the limitation period will depend on the nature of claim and are vastly different. For example, a claim for personal injury, recovery of money secured by a mortgage, under a mortgage all have different limitation periods.

In Victoria, actions for breach of contract or for tort must not be brought after the expiration of six years from the date on which the cause of action accrued pursuant to section 5 Limitation of Actions Act 1958 (Vic). However, an exception to this is expressed in section134 of the Building Act 1993 (Vic), which provides that a 'building action' cannot be brought more than 10 years after the date of issue of the certificate of final inspection.

Some claims to the Fair Work Commission must be brought within 21 days of termination of employment.

Practitioners should refer to relevant legislation when considering limitation periods.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Parties to a dispute are required to take genuine or reasonable steps to resolve a dispute before issuing a proceeding. This may include the exchange of information, correspondence or documents or discussions between the parties.

Pursuant to section 6 of the Civil Dispute Resolution Act section 6 of the Civil Dispute Resolution Act2011 (Cth), an applicant to a proceeding in the Federal Court of Australia must file a genuine steps statement at the time of filing an application which sets out the steps taken to try to resolve the issues in dispute.

Further, legal practitioners are bound by the obligations set out in the relevant civil procedure rules of their state. For example, Victorian lawyers must observe the overarching obligations set out at Part 2.3 of the Civil Procedure Act 2010 (Vic).

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are commenced by filing an originating document, such as an originating motion, writ or application with the relevant court or tribunal and payment of a filing fee. Once filed, the claim documents are then served on the defendants, either personally or by post depending on the jurisdiction.

Following the covid-19 pandemic, the courts and tribunals at all levels have experienced a degree of backlog in hearing matters.

Courts and tribunals have permanently adopted some of the processes that were introduced to assist navigate the covid-19 restrictions such as electronic or virtual hearings and electronic filing systems, which also assist with the listing of disputes in a timely manner. Many courts now conduct short procedural hearings via video conference rather than in person to support efficiency.

However, some courts that deal with larger volumes of matters continue to be impacted by a heavy case load. For example, a lack of resourcing in the Victorian Civil and Administrative Tribunal (VCAT) caused lengthy delays with matters being listed for hearing.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The typical civil proceeding is likely to include the following steps:

- filing a claim and service of claim documents;
- filing of a defence;

- a directions hearing to set a timetable for the proceeding;
- mediation or conciliation;
- discovery, or an exchange of relevant documents;
- the filing of witness statements; and
- trial.

The timeframe for a civil claim will vary depending on the jurisdiction and the complexity of the claim, the volume of documents, number of witnesses and complexity of evidence.

Case management

7 | Can the parties control the procedure and the timetable?

In Australia, parties exercise some control over the procedure and timetable of their case. However, that control is limited by the rules and practice notes governing each court or tribunal.

Australian courts exercise ultimate authority to set deadlines and make procedural rulings. The parties and their lawyers have a statutory duty to work with the court, and among themselves, to facilitate the just and efficient resolution of disputes.

This cooperation requires disputing parties (and their lawyers) to consider the best way of managing their case, including alternative dispute resolution (eg, mediation). The core objective of the court, and the parties, is to reduce costs and delay.

Civil procedure rules enable courts to manage litigation. A failure to comply with court orders may result in sanctions against a party.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

In Victoria, the destruction of documents which are likely to be required in evidence in a legal proceeding is an indictable offence section 254 Crimes Act 1958 (Vic).

Further, under both Australian common law and statute, parties must preserve documents and other evidence, including those unhelpful to their case, in order to comply with their discovery obligations, namely the process of compulsory disclosure.

Through the process of discovery, parties are required to discover documents which support their position and which are prejudicial to their case or support the case of another party.

The obligation to discover documents in a proceeding is ongoing and accordingly if documents come into a party's possession after discovery has been made, there is an obligation to make supplementary discovery.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Under both common law and statute, confidential communications passing between a client and lawyer attract legal professional privilege if:

- documents were produced for the dominant purpose of providing legal advice; or
- the dominant purpose is to provide legal advice relating to actual, anticipated or pending legal proceedings.

At common law, legal professional privilege extends to documents that a lawyer has created, but not yet communicated or provided to the client.

Legal professional privilege may apply to communications or documents involving in-house legal counsel only insofar as they meet the dominant purpose test. However, a party claiming privilege over in-house counsel communications and documents must establish that the in-house counsel was:

- acting in a strictly legal capacity, and not in an operational or commercial capacity; and
- sufficiently independent from the organisation in order to be acting as an independent legal adviser.

If legal professional privilege applies, no disclosure obligations exist barring an express statutory exception, waiver or illegal purpose.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

In most Australian courts and tribunals, parties exchange affidavits, statutory declarations or witness statements before trial. Usually, witnesses sign such documents under oath or affirmation.

Where a party seeks to rely on expert evidence, notice of the evidence must be provided to the court and other party prior to trial, usually in the form of a signed expert statement.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

If a witness becomes hostile, a party may seek leave of the court to question them as though it were a cross-examination. In these circumstances, the hostile or unfavourable witness may only be questioned about matters arising from the prior cross-examination.

Interim remedies

12 | What interim remedies are available?

Interim injunctions protect a party's rights via orders to maintain the status quo pending the outcome of a dispute before the court.

An interim injunction may be required, for example, to prevent the imminent publication of material or to prevent the demolition of a building.

Freezing orders prevent the disposal of funds or assets and search orders permit the search of a premises for evidence that may otherwise be destroyed. Such applications are usually ex parte.

Superior courts have jurisdiction to grant interim relief to support foreign proceedings in defined circumstances.

Remedies

13 | What substantive remedies are available?

Damages are monetary judgments awarded to compensate a plaintiff for a loss suffered or to put them in a position they would have been in but for the wrong doing of a defendant.

Exemplary or 'punitive damages' are rare and only awarded when the defendant has engaged in conduct that shows a disregard for the other person's rights, or an intention to harm.

In a claim for damages, interest can also be awarded pursuant to statute.

Costs are in the discretion of the court. Courts will usually make orders requiring the unsuccessful party to pay the costs of the successful party.

Enforcement

14 | What means of enforcement are available?

There are a range of enforcement options, from judicial enquiry through to bankruptcy or liquidation of the debtor.

On application, a Court may make orders for the examination of a debtor, or for a warrant to seize and sell a debtor's assets or property, or compel an employer or third party to divert payments otherwise due to the debtor, to pay off the debt.

If the judgment debt is A$10,000 or more against an individual, or A$4,000 or more against a company, the personal insolvency or corporate insolvency legislation can be used to bankrupt or wind up the debtor.

Public access

15 Are court hearings held in public? Are court documents available to the public?

All court proceedings are open for the public to attend, with a few exceptions. A judge can decide to keep a case private in the interests of justice.

Most court filed documents can be publicly inspected and copied on payment of a fee. Some documents are confidential and may require a court order to allow inspection.

A Judge may grant a suppression order to prohibit the publication of particular evidence or information to prevent prejudice to the administration of justice, for national or international security, or to protect a person's safety. Documents that are subject to a suppression order cannot be publicly accessed.

Costs

16 Does the court have power to order costs?

The courts have broad powers to award costs at any time in a proceeding. Costs are generally awarded against an unsuccessful party.

Costs are usually assessed by a taxing master or specialist costs court (or by an external costs assessor regime), and usually by reference to an itemised fixed scale of costs, that may differ from how a party is charged costs by their solicitor.

Recent developments amongst some Australian courts and specialist lists have sought to manage the costs of litigation by reducing the reliance on a fixed scale in favour of legal costing guidelines or by imposing the regular disclosure of a party's costs to the court.

When a defendant has reasonable concerns that a plaintiff may not have the means to meet an adverse costs order, the defendant can apply for security for costs, to protect their ability to recover costs.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee', or 'conditional' cost agreements, involving the payment of an uplift fee are available and are commonly used by plaintiff firms to assist with financial hardship.

Contingency fee arrangements, where a lawyer is paid a percentage of the client's recovery are generally prohibited, with the exception of 'group costs orders' in Victorian class actions, by leave of the court.

The use of a third party or litigation funder is permitted, and the use of commercial funders is particularly prevalent in class actions.

Australian courts have criticised funding agreements when the commission is deemed to be excessive. A judge has the power to reduce the funder's commission to an amount they consider to be fair and reasonable.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal Expenses Insurance (LEI) is a particular class of insurance that provides coverage for expenses that a party may incur throughout a legal dispute.

LEI will often cover a party's own legal costs, as well as providing coverage against any exposure to having to pay an opponent's legal costs following an adverse costs order.

Typically, corporations will also insure for professional indemnity, directors' and officers' liability and public liability which policies typically offer coverage for a party's legal costs.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions or 'representative' or 'group' proceedings are now prominent within Australia as an essential method of facilitating access to Australia's civil justice system.

Class actions in Australia may be commenced in the Federal Court of Australia (under Part IVA of the Federal Court of Australia Act 1976 (Cth)) or in the State Supreme Courts, following state-based regulations.

The requirements for commencing a proceeding under the Federal and state regimes are substantially the same and include where:

- seven or more persons have claims against the same defendant(s);
- the claims are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims give rise to at least one substantial common issue of law or fact.

In addition, under the relevant regimes:

- The proceeding should be brought by a class representative (or more than one, where there are differences between sub-groups of members) on behalf of all class members.
- There need be only one substantial common issue of fact or law between class members.
- Once a proceeding has been commenced, it will continue until finally resolved by judgment or settlement.

The filing of class actions have steadily increased largely due to the prevalence of third-party litigation funding.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

An appeal can only be made if the original decision contains an error of law. This may include the incorrect application of a principle of law or a finding made that was not supported by the evidence.

The relevant court's legislation establishes the appeal procedure and whether an appeal can be made of right or whether leave of the court is required for an appeal.

Judgments may be appealed to a higher court, such as the appellate Courts of the Supreme Courts of each state, or the Full Court of the Federal Court of Australia, by any party to the proceeding.

The High Court of Australia is the final Court of appeal. Appeals to the High Court are permitted only by special leave that is granted in matters of public importance, interpretation of the Commonwealth Constitution, or instances of inconsistent application of the law across States and Territories.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The Foreign Judgments Act 1991 (Cth) and the Foreign Judgments Regulations 1992 (Cth) establish the scope and procedure for the enforcement of foreign judgments.

The Agreement for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994 permits the mutual recognition of civil and commercial judgments from the United Kingdom, provided they involve the payment of money.

The Trans-Tasman Proceedings Act 2010 (Cth) facilitate the registration of New Zealand judgments in Australia.

Where a reciprocal agreement is not applicable, recognition and enforcement of foreign judgments within Australia is regulated by statute and common law.

Some foreign judgments may be enforced under common law principles.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Australia is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (Hague Evidence Convention).

A party to a civil matter may approach a court that is also a signatory to the Hague Evidence Convention and issue a letter of request for an Australian court to obtain oral or documentary evidence. This letter of request must comply with Australian rules for taking evidence. If successful, the Australian court will order the production of the requested evidence.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Australia is a Model Law state. International arbitration is governed by the International Arbitration Act 1974 (Cth) (IAA) that gives the Model Law the force of law in Australia.

Domestic commercial arbitration is separately governed by uniform legislation enacted in all states and territories, that substantially reflects the Model Law, with some departures to accommodate the domestic context. The domestic uniform legislation follows the structure and character of the Model Law and is marked up with reference to the Model Law.

Both the IAA (section 16) and domestic legislation (section 2A) recognise the international nature of the Model Law and permit reference to UNCITRAL documents and working groups to aide in its interpretation.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Following the Model Law, to be enforceable an arbitration agreement must be in writing. However, a liberal approach is adopted, so long as the content is in written form, including electronic communications or by the exchange of statements of claim and defence (where the agreement is not denied) and whether or not concluded orally or by conduct.

To be binding, an arbitration agreement must also contain a procedure that compels the parties to arbitrate, it is not enough that arbitration is but a possibility.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the agreement is silent, either one or three arbitrators are appointed.

For international arbitrations, three arbitrators are appointed, with each party appointing one arbitrator and the appointees then appoint a third.

Under section 10(2) of the domestic arbitration legislation, one arbitrator is appointed. If the parties cannot agree on an arbitrator, either party can apply to the court for the appointment.

For both international and domestic arbitrations, an arbitrator may only be challenged in limited circumstances, such as if there is reasonable doubt about an arbitrator's qualifications, impartiality or independence, and where a party is involved in the appointment, only if that circumstance is discovered after the appointment.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

There are a number of arbitration institutions, such as Australian Centre for International Commercial Arbitration (ACICA), that organise and assist parties to select experienced arbitrators, including non-legal experts. Senior barristers and retired judges are also commonly engaged as highly experienced arbitrators.

ACICA is the only prescribed nominating authority for the appointment of arbitrators for international arbitrations.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Parties are free to agree on the procedure to be followed for arbitration, and although the domestic legislation provides for a process in default of agreement, it is generally subject to any agreement. The domestic arbitration law extends the Model Law by imposing an obligation on parties to act in aide of proper conduct and with due expedition, and not to wilfully do or cause any delay or prevention of an award being made.

In addition, parties must be treated with equality and be given a reasonable opportunity to present their case.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Under both the international and domestic arbitration laws, Courts may only intervene during an arbitration where the Model Law or domestic law permits. This can include in a limited capacity matters such as the appointment of arbitrators, jurisdiction, capacity, enforcement of interim measures, the taking of evidence and matters concerning procedural fairness or natural justice.

These grounds cannot be overruled by a party's agreement.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Both the Model Law and the domestic law grant the arbitral tribunal with a range of powers to order 'interim measures' to preserve the status quo, evidence, or assets from which an award may be satisfied, or to prevent harm or prejudice to the arbitration process.

The domestic law extends the Model Law by making specific reference to orders such as for security for costs, discovery and interrogatories, and the giving of evidence by affidavit.

Award

30 | When and in what form must the award be delivered?

The award must be in writing and signed by the arbitrators and state the reasons on which the award is based, unless the parties have agreed no reasons are to be given. The award must also give its date and place of arbitration. There are no time limits as to its delivery.

Appeal

31 | On what grounds can an award be appealed to the court?

Under the domestic law, the parties may by agreement appeal to the court on questions of law.

Otherwise, the grounds to set aside an award are limited to those provided in the Model Law, that includes grounds such as incapacity, invalidity of the arbitration agreement, exceedances of the terms of reference, failure to give notice or errors in the arbitral composition or process.

In addition, an award may be set aside if it is not capable of settlement by arbitration under the law of the State or if it conflicts with the public policy of the state.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The High Court has recognised the enforceability of international arbitration awards. See, *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.* [2023] HCA 11.

A party seeking to enforce an international award can apply to the Federal Court of Australia or the Supreme Court of any Australian State or Territory. Domestic awards are enforceable by application to the Supreme Courts of any State or Territory, irrespective of where they are made.

On application, the courts must recognise and enforce an award, unless one of the limited grounds for refusal apply, including if the award is not capable of settlement by arbitration under the law of Australia, or if it conflicts with public policy.

Costs

33 | Can a successful party recover its costs?

The arbitral tribunal has broad discretion to award and assess the amount of costs a party may recover, and to whom and by whom costs are paid. It is not limited to any costs scales or rules used by any court that may assist with orders or the taxation of costs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Non-judicial alternative despite resolution (ADR) processes are widely embraced in Australia and throughout its legal systems. The most common ADR processes used are mediations, conciliations, arbitration and expert referrals, and there has been recent uptake in some courts and specialist lists to encourage early neutral evaluation.

The most common sources of ADR are mediation and conciliation, on account of their widespread use as part of the compulsive processes of Australian courts and tribunals, to lessen the burden on state resources and on litigants to proceedings.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Courts and tribunals throughout Australia recognise the value of ADR as an essential part of effective case management.

Read this article on Lexology

Usually, mediation or conciliation is required to be completed by the parties either as a precondition to the right to commence proceedings, or before litigants are permitted to proceed to a trial or hearing.

In proceedings in the Federal Court of Australia, for example, the parties must demonstrate to the court that they have taken genuine steps to resolve a dispute before commencing proceedings. A mediation or judicially-assisted conciliation is also usually ordered during the course of proceedings.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Although Courts in Australia are based upon a traditional adversarial model, alternative (appropriate) dispute resolution (ADR) procedures are broadly embraced in much of the Australian legal system's rules and processes, to assist with the early resolution of disputes before judicial intervention becomes necessary.

Retired judges and specialist or senior counsel are valued for their expertise as effective mediators, arbitrators and expert referees, as an alternative to judicial resolution.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The extensive shutdowns across Australian jurisdictions during the covid-19 pandemic resulted in significant congestion and delays throughout the Australian judicial system, that have led to changes in the way litigants engage with the judicial system in the interests of efficient case management and expediency.

Courts and tribunals have required and continue to require virtual hearings on an ad-hoc basis, for both interlocutory and final hearings. Some courts have regularised the hybridisation of virtual and in-person hearings as part of their rules and practices.

Although online access to court files and filing processes were reasonably common prior to the pandemic, these systems are now universally adopted.

The jurisdiction of State-based tribunals has come under scrutiny in light of the High Court's decision in *Citta Hobart Pty Ltd v Cawthorn* [2022] 96 ALJR 476, where it was held that state-based tribunals were restricted from exercising judicial power in relation to matters

Read this article on Lexology

arising under a Commonwealth law, on Constitutional grounds. This has required a significant mobilisation effort on the part of tribunals to refer active matters out to state courts.

The High Court has also cemented Australia as pro-arbitration state by recognising and upholding the enforcement of an international award made against a nation-state, in the recent decision of *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.* [2023] HCA 11, further promoting its international standing for efficient dispute resolution.

Peter Lettieri	plettieri@kkilawyers.com.au
Heather Richardson	hrichardson@kkilawyers.com.au
Jonathan Kenny	jkenny@kkilawyers.com.au

Level 1, 4 Riverside Quay, Southbank Vic 3006, Melbourne, Australia
Tel: + 61 03 8825 4800
w ww.kaluskennyintelex.com.au

Read more from this firm on Lexology

Austria

Klaus Oblin and Per Neuburger

OBLIN Attorneys at Law

RETURN TO CONTENTS

Summary

LITIGATION	**35**
Court system	35
Judges and juries	35
Limitation issues	36
Pre-action behaviour	36
Starting proceedings	36
Timetable	37
Case management	37
Evidence – documents	37
Evidence – privilege	38
Evidence – pretrial	38
Evidence – trial	38
Interim remedies	39
Remedies	39
Enforcement	39
Public access	40
Costs	40
Funding arrangements	41
Insurance	42
Class action	42
Appeal	42
Foreign judgments	43
Foreign proceedings	44
ARBITRATION	**44**
UNCITRAL Model Law	44
Arbitration agreements	44
Choice of arbitrator	45
Arbitrator options	45
Arbitral procedure	45
Court intervention	46
Interim relief	46
Award	47
Appeal	47
Enforcement	48
Costs	48
ALTERNATIVE DISPUTE RESOLUTION	**48**
Types of ADR	48
Requirements for ADR	49

Read this article on Lexology

MISCELLANEOUS	49
Interesting features	49
UPDATE AND TRENDS	49
Recent developments and future reforms	49

LITIGATION

Court system

1 | What is the structure of the civil court system?

On the first level, civil proceedings are initiated before either the district court or the regional courts.

District courts have jurisdiction in most disputes relating to tenancy and family law (subject matter jurisdiction) and in matters with an amount in dispute of up to €15,000 (monetary jurisdiction). Appeals on points of fact and law are to be made to the regional courts. If a legal question of fundamental importance is concerned, another final appeal can be submitted to the Supreme Court.

Regional courts have monetary jurisdiction in matters involving an amount in dispute exceeding €15,000 and subject matter jurisdiction in intellectual property and competition matters, as well as various specific statutes (the Public Liability Act, the Data Protection Act and the Austrian Nuclear Liability Act). Appeals are to be directed to the higher regional courts. The third and final appeal goes to the Supreme Court.

With respect to commercial matters, special commercial courts exist only in Vienna. Apart from that, the above-mentioned ordinary courts decide as commercial courts. Commercial matters are, for example, actions against business people or companies in connection with commercial transactions, unfair competition matters and the like. Other special courts are the labour courts, which have jurisdiction over all civil law disputes between employers and employees resulting from (former) employment as well as over social security and pension cases. In both commercial (insofar as commercial courts decide in panels) and labour matters, lay judges and professional judges decide together. The Court of Appeal in Vienna decides as the Cartel Court on the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court as the Appellate Cartel Court. In cartel matters, lay judges also sit on the bench with professional judges.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Compared to common law countries, the role of Austrian judges is rather inquisitorial: to establish the relevant facts, judges can order witnesses to appear at a hearing, unless this is opposed by both parties, or otherwise appoint experts at their own discretion. In some proceedings, the tribunal will consist of a panel involving 'expert' lay judges, especially in antitrust cases, and 'informed' lay judges in labour and public interest matters.

Read this article on Lexology

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods are determined by substantive law.

Claims are not enforceable once they become statute-barred. The statute of limitations generally commences when a right could have been first exercised. Austrian law distinguishes between long and short limitation periods. The long limitation period is 30 years and applies whenever special provisions do not provide otherwise. The short limitation period is three years (which can be extended or waived) and applies, for example, to accounts receivable or damage claims.

The statute of limitations must be argued explicitly by one party, yet must not be taken into consideration by the initiative of the court (ex officio).

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

No, there is not. However, as a matter of general practice, a claimant will give notice to his or her opponent before commencing proceedings.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

The proceedings are initiated by submitting a statement of claim with the court. The statement of claim is considered officially submitted upon receipt.

Service is usually effected by registered mail (or, once represented by a lawyer, via electronic court traffic, namely an electronic communication system connecting courts and law offices). The document is deemed served at the date on which the document is physically delivered to the recipient (or available for viewing).

Within the European Union, the Service Regulation (Council Regulation (EC) 1393/2007 of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters) applies. Service to international organisations or foreigners enjoying immunities under public international law is effected with the assistance of the Austrian Ministry for Foreign Affairs. In all other cases, service abroad is effected in accordance with the respective treaties (particularly the Hague Service Convention).

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The statement of claim is filed with the court and passed on to the defendant, along with an order to file a statement of defence. If the defendant replies in time (four weeks from receipt), a preparatory hearing will be held, which mainly serves the purpose of shaping the further proceedings by discussing the main legal and factual questions at hand as well as questions of evidence (documents, witnesses and experts). In addition, settlement options may be discussed. After an exchange of briefs, the main hearings follow.

The average duration of first instance litigation is one year. However, complex litigation may take significantly longer. At the appellate stage, a decision is handed down after approximately six months. In this regard, there are no expedited trial procedures available in Austrian civil litigation.

Case management

7 | Can the parties control the procedure and the timetable?

The courts allocate the cases in accordance with criteria defined on a regular basis by a particular senate.

Proceedings are primarily controlled by the judge in charge of the schedule. The judge orders the parties to submit briefs and produce evidence within a certain period of time. If necessary, the experts are also nominated by the judge. However, the parties may file procedural motions (eg, for a time extension), yet may also agree on a stay of the proceedings.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

If a party manages to show that the opposing party is in possession of a specific document, the court may issue a submission order if:

- the party in possession has expressly referred to the document in question as evidence for its own allegations;
- the party in possession is under a legal obligation to hand it over to the other party; or
- the document in question was made in the legal interest of both parties, certifies a mutual legal relationship between them, or contains written statements that were made between them during negotiations of a legal act.

The presentation of other documents may be refused if they concern family life, the opposing party would violate obligations of honour by presenting the document, the disclosure of documents would lead to the disgrace of the party or of any other person or involves the risk of criminal prosecution, or if the disclosure violates any state-approved obligation of secrecy of the party from which it is not released or infringes on a business secret (or for any other reason similar to the above).

There are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure. Lastly, rules on pre-action disclosure do not exist.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Following the attorneys' professional confidentiality rules, there is no obligation to produce documents unless the attorney advised both parties in connection with the disputed legal act. Attorneys have the right of refusal to give oral evidence if information was made available to them in their professional capacity.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

No – evidence is taken during the course of the litigation, not before. The parties are required to produce the evidence supporting their respective allegations or where the burden of proof is on them, respectively.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

The main types of evidence are documents, party and witness testimony, expert testimony and judicial inspection. Written witness statements are not admissible.

There are no depositions and no written witness statements. Therefore, witnesses are obliged to appear at the hearing and testify. Witnesses are examined by the judge followed by (additional) questions by the legal representatives of the parties.

Restrictions on this obligation exist (eg, privileges for lawyers, doctors, priests or in connection with the possible incrimination of close relatives).

While the (ordinary) witness gives testimony concerning facts, the expert witness provides the court with knowledge that the judge cannot have. Expert evidence is taken before the trial court. An expert witness may be requested by the parties yet also called on the judge's own motion. An expert witness is required to submit his or her findings in a report. Oral comments and explanations must be given during the hearing (if requested by the parties). Private reports are not considered to be expert reports within the meaning of the Austrian Code of Civil Procedure; they have the status of a private document.

As there is no room for concurrent evidence, no such rules exist.

Interim remedies

12 | What interim remedies are available?

The granting of interim measures is regulated by the Austrian Enforcement Act. In general, Austrian law provides for three main types of interim measures:

- to secure a monetary claim;
- to secure a claim for specific performance; and
- to secure a right or legal relationship.

The parties may turn to the court for assistance with safeguarding evidence both before and after a statement of claim has been filed. The required legal interest is considered established if the future availability of the evidence is uncertain or if it is necessary to examine the current status of an object.

Remedies

13 | What substantive remedies are available?

Restitution in kind will be ordered by the court at the request of the creditor only if it is possible or feasible to perform. Compensation can be ordered for material damage, comprising actual loss or lost profits, or both, depending on the degree of fault of the breaching party. Compensation for non-material damage can be awarded for pain and suffering, non-material damage resulting from injury to sexual self-determination, significant violations of privacy, and others. It should be also noted that article 82 of the General Data Protection Regulation provides for possible compensation for non-material damages.

Parties may also negotiate a contractual penalty payable in the event of the debtor's failure to (properly) fulfil contractual obligations. The judge retains the power to reduce an excessive contractual penalty.

The statutory interest rate payable on monetary judgments is set at 4 per cent per year. However, monetary claims deriving from commercial transactions are subject to a higher interest rate in addition to the statutory base interest rate. The higher interest rate for such cases is determined by the Austrian National Bank. Punitive damages are not available.

Enforcement

14 | What means of enforcement are available?

The enforcement of judgments is regulated by the Austrian Enforcement Act.

Austrian enforcement law provides for various types of enforcement. A distinction is made between a title to be enforced directed at a monetary claim or at a claim for specific performance, and against which asset enforcement is to be levied.

Generally, the usual methods for enforcement are:

- seizure of property;
- attachment and transfer of receivables;
- compulsory leasing; and
- judicial action.

With respect to immovable property, three types of enforcement measures are available:

- compulsory mortgage;
- compulsory administration, with the goal of generating revenue to satisfy the claim; and
- compulsory sale of an immovable asset.

With respect to movable property, Austrian law distinguishes between:

- attachment of receivables;
- attachment of tangible and movable objects;
- attachment of claims for delivery against third-party debtors; and
- attachment of other property rights.

The amendment of the Austrian Enforcement Act in 2021 introduced a new position: the administrator in enforcement cases, who is nominated by the court. The administrator is responsible for determining the assets and conducting the proceedings. He or she has the same powers as a bailiff, except for compulsory rights (forcibly opening locked doors). The applicant must therefore no longer explicitly specify the assets that are to be seized but can instead apply for an 'enforcement package', which entails the compilation of a list of assets by the enforcement administrator.

Austrian law does not allow for the attachment of certain specific receivables, such as nursing allowance, rent aid, family allowance and scholarships.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

In most cases, court hearings are open to the public, although a party may ask the court to exclude the public from the hearing, provided that the party can show a justifiable interest for the exclusion of the public.

In principle, file inspection is only permitted to parties involved in the proceedings. Third parties may inspect files or even join the proceedings if they can demonstrate sufficient legal interest (in the potential outcome of the proceedings).

Costs

16 | Does the court have power to order costs?

In its final judgment, the court will order who will have to bear the procedural costs (including court fees, legal fees and certain other costs of the parties (eg, costs for the safeguarding of evidence and travel expenses)). In principle, however, the prevailing party is entitled to

reimbursement by the losing party of all costs of the proceedings. The court's decision on costs is subject to redress, along with or without an appeal on the court's decision on the merits.

According to the Austrian Court Fees Act, the claimant (appellant) must advance the costs. The amount is determined on the basis of the amount in dispute. The decision states who should bear the costs or the proportion in which the costs of the proceedings are to be shared.

Lawyers' fees are reimbursed pursuant to the Austrian Lawyers' Fees Act irrespective of the agreement between the prevailing party and its attorney. Thus, the reimbursable amount may be lower than the actual payable legal fee, as any claim for reimbursement is limited to necessary costs. There are no rules on costs budgets; therefore, there are no requirements to provide a detailed breakdown for each stage of the litigation.

Upon request, a claimant residing outside the European Union may be ordered to arrange for a security deposit covering the defendant's potential procedural costs unless bilateral or multilateral treaties provide otherwise. This also does not apply if the claimant has its residence in Austria, the court's (cost) decision is enforceable in the claimant's residence state or the claimant disposes of sufficient immovable assets in Austria.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Unless agreed otherwise, lawyers' fees are subject to the Austrian Lawyers' Fees Act. Agreements on hourly fees are permissible and common. Lump sum fees are not prohibited but are less commonly used in litigious matters. Contingency fees are only permissible if they are not calculated as a percentage of the amount awarded by the court (*pactum de quota litis*).

Legal aid is granted to parties who cannot afford to pay costs and fees. If the respective party can prove that the financial means are insufficient, court fees are reprieved or even waived, and an attorney is provided free of charge.

Third-party financing is permitted and usually available for higher amounts in dispute (minimum approximately €50,000), yet it is more flexible regarding fee agreements. Fee agreements that give a part of the proceeds to the lawyer are prohibited.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance for legal costs is commonly available in Austria and may – depending on the individual insurance policy – cover a wide range of costs arising out of legal proceedings, including the party's costs and potential liability for the counterparty's costs.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

In 2020, the EU Directive 2020/1828 (Directive on Representative Actions) came into force. However, as of the time of writing, this Directive has not yet been implemented into Austrian law.

Although the Austrian Code of Civil Procedure does not contain any provision on class actions, the Austrian Supreme Court held that a 'class action with a specific Austrian character' is legally permissible. The Austrian Code of Civil Procedure allows a consolidation of claims of the same plaintiff against the same defendant.

A joinder may be filed if the court has jurisdiction for all claims, the same type of procedure applies or the subject matter is of the same nature regarding facts and law.

In addition, there is also the possibility of a national class action under the Consumer Protection Act. Legitimate associations may proceed against unlawful provisions in standard terms and conditions and sue for injunctive relief against unlawful business practices.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

There are ordinary appeals against the judgment of a trial court and appeals against the judgment of an appellate court. Procedural court orders can be challenged as well; the procedure in principle follows the same rules as appeals.

An appeal against a judgment suspends its legal validity and – with few exceptions – its enforceability. As a general rule, new allegations, claims, defences and evidence must not be introduced (they will be disregarded). Other remedies are actions for annulment or for the reopening of proceedings.

An appeal may be filed for four main reasons, including:

- procedural errors;
- unjustified exclusion of evidence;
- incorrect statement of facts; and
- incorrect application of the law.

Following an appeal, the appellate court may set aside the judgment and refer the case back to the court of first instance, or it may either alter or confirm the judgment.

Finally, a matter may only be appealed to the Supreme Court if the subject matter involves the resolution of a legal issue of general interest, namely if its clarification is important for purposes of legal consistency, predictability or development, or in the absence of coherent and previous decisions of the Supreme Court.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

In addition to the numerous bilateral and multilateral instruments that Austria has concluded, the Austrian Enforcement Act, the Austrian Code of Civil Procedure and the Austrian Jurisdiction Act govern the recognition and enforcement of foreign judgments. In the case of a conflict between statutory law provisions and applicable treaty provisions, the latter will prevail. Although Austrian case law is not binding, it is given careful consideration.

Austria is a signatory to many bilateral and multilateral instruments. The most important in this regard is the Brussels Ia Regulation (Regulation (EU) No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)). The Brussels Ia Regulation lays down uniform rules to facilitate the free circulation of judgments in the European Union and applies to legal proceedings instituted on or after 10 January 2015.

The Brussels Ia Regulation replaces Council Regulation (EC) No. 44/2001 of 22 December 2000 (the Brussels I Regulation, together with the Brussels Ia Regulation and others, 'the Brussels regime'), which remains applicable to all legal proceedings instituted prior to 10 January 2015.

The basic requirements for enforceability include the following:

- the award is enforceable in the state of issuance of the judgment;
- an international treaty or domestic regulation expressly provides for reciprocity between Austria and the state of issuance in the recognition and enforcement of judgments;
- the document instituting the proceedings was properly served on the defendant;
- the judgment to be enforced is produced with a certified translation; and
- there are no grounds on which to refuse recognition of enforceability.

A party seeking enforcement must request leave for enforcement from the respective court. The application for a declaration of enforceability must be submitted to the court of the place where the debtor is domiciled. The party may combine this request with a request for an enforcement authorisation. In such a case, the court will decide on both simultaneously.

Once a foreign judgment has been declared enforceable in Austria, its execution follows the same rules as those for a domestic judgment, meaning that the enforcement of judgments is regulated by the Austrian Enforcement Act.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

In the European Union, the procedure for obtaining oral or documentary evidence from other jurisdictions is regulated by the Evidence Regulation (Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters). In this regard, the regulation applies to both oral and documentary evidence and stipulates that judicial assistance requests may be communicated directly between the courts.

Bilateral treaties may apply for judicial assistance requests outside of the European Union.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes – the Austrian Arbitration Act (contained in the Austrian Code of Civil Procedure (ACCP)) substantially reflects the UNCITRAL Model Law on International Commercial Arbitration, while granting a great degree of independence and autonomy to the arbitral tribunal.

Unlike the UNCITRAL Model law, Austrian law does not distinguish between domestic and international arbitrations, or between commercial and non-commercial arbitrations. Special provisions apply to employment and consumer-related matters (these are found under sections 618 and 617 ACCP, respectively).

More generally, the Austrian Arbitration Act is contained in sections 577 to 618 ACCP. They provide the general framework for arbitration proceedings for both domestic and international arbitrations.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be in writing (section 581 ACCP). The formal requirements for an enforceable arbitration agreement are found under sections 581 to 585 ACCP.

An arbitration agreement must:

- sufficiently specify the parties (they must be at least determinable);
- sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes);
- sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and

- be contained in either a written document signed by the parties or in telefaxes, emails or other communication exchanged between the parties, which preserve evidence of a contract.

Special provisions apply to consumers and employees (these are found under sections 617 and 618 ACCP respectively).

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The ACCP provides for default provisions for the appointment of arbitrators. If the arbitration agreement is silent on the matter and absent an agreement by the parties, the Austrian arbitration law provides for a tribunal consisting of three arbitrators (section 586(2) ACCP).

The parties are free to agree on the procedure for challenging the appointment of an arbitrator (section 589 ACCP). In this regard, an arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed upon by the parties. A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made, or after its participation in the appointment.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Whether designated by an appointing authority or nominated by the parties, arbitrators may be required to have a certain experience and background regarding the specific dispute at hand. Such requirements may include professional qualifications in a certain field, legal proficiency, technical expertise, language skills or being of a particular nationality.

Many arbitrators are attorneys in private practice; others are academics. In a few disputes, concerning mainly technical issues, technicians and lawyers are members of the panel.

Qualification requirements can be included in an arbitration agreement, which requires great care as it may create obstacles in the appointment process (ie, an argument about whether the agreed requirements are fulfilled).

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to agree on the rules of procedure (eg, by reference to specific arbitration rules) within the limits of the mandatory provisions of the ACCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal will,

subject to the mandatory provisions of the ACCP, conduct the arbitration in such a manner as it considers appropriate.

Mandatory rules of arbitration procedure include that the arbitrators must be, and remain, impartial and independent. They must disclose any circumstances likely to give rise to doubts about their impartiality or independence. The parties have the right to be treated in a fair and equal manner, and to present their case. Further mandatory rules concern the arbitral award, which must be in writing, and the grounds on which an award can be challenged.

Further, an arbitral tribunal must apply the substantive law chosen by the parties, failing which it will apply the law that it considers appropriate.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Austrian courts may only intervene in arbitration matters when they are expressly permitted to do so under sections 577 to 618 ACCP. Both the competent court and an arbitral tribunal have jurisdiction to grant interim measures in support of arbitration proceedings. The parties can exclude the arbitral tribunal's competence for interim measures, but they cannot exclude the court's jurisdiction on interim measures.

The enforcement of interim measures is in the exclusive jurisdiction of the courts.

The intervention of courts is limited to the issuance of interim measures, assistance with the appointment of arbitrators, review of challenge decisions, decision on the early termination of an arbitrator's mandate, enforcement of interim and protective measures, court assistance with judicial acts that the arbitral tribunal does not have the power to carry out, decision on an application to set aside an arbitral award, determination of the existence or non-existence of an arbitral award and recognition and enforcement of awards.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes – an arbitral tribunal has wide powers to order interim measures on the application of one party if it deems it necessary to secure the enforcement of a claim or to prevent irretrievable harm. In contrast to the interim remedies available in court proceedings, an arbitral tribunal is not limited to a set of enumerated remedies. However, the remedies should be compatible with enforcement law to avoid difficulties at the stage of enforcement. In this regard, the arbitral tribunal may request any party to provide appropriate security in connection with such measures to prevent frivolous requests (section 593(1) ACCP).

The arbitral tribunal – or any party with the approval of the arbitral tribunal – may request a court to perform judicial acts (eg, service of summons or taking of evidence) for which the arbitral tribunal does not have the authority.

Award

30 | When and in what form must the award be delivered?

The form requirements for arbitral awards are found under section 606 ACCP and are in line with default provisions. The form requirements stipulate that the arbitral award must:

- be in writing;
- be signed by the arbitrators involved in the proceedings;
- display its date of issuance;
- display the seat of arbitral tribunal; and
- state the reasons upon which it is based. The arbitral award has the effect of a final and binding court judgment (section 607 ACCP).

Appeal

31 | On what grounds can an award be appealed to the court?

The only available recourse to a court against an arbitral award is an application to set aside the award. This also applies to arbitral awards on jurisdiction. Courts may not review an arbitral award on its merits. The application to set aside is to be filed within three months from the date on which the claimant has received the award. There are no appeals against an arbitral award.

An arbitral award shall be set aside if:

- no valid arbitration agreement exists or if the arbitral tribunal denied its jurisdiction even though a valid arbitration agreement existed;
- a party was incapable of concluding a valid arbitration agreement;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the case;
- the arbitral award deals with a dispute that is not covered by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement or the submission of the parties to arbitration;
- the constitution or composition of the arbitral tribunal was in violation of the respective rules; and
- the arbitration proceedings were conducted in violation of Austrian public policy.

Furthermore, an award can be set aside if the preconditions exist under which a court judgment can be appealed by filing a complaint for revision pursuant to section 530(1), Nos. 1–5 ACCP. This provision determines circumstances under which criminal acts led to the issuance of a certain award. An application to set aside an award on these grounds must be filed within four weeks of the date on which the sentence on the respective criminal act became final and binding.

An award may also be set aside if the matter in dispute is not arbitrable under domestic law.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The procedure for the enforcement of arbitral awards is set out in both the ACCP (section 614) and the Austrian Enforcement Act (section 409).

Foreign arbitral awards are enforceable on the basis of bilateral or multilateral treaties that Austria has ratified – the most important of these legal instruments being the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 and the European Convention on International Commercial Arbitration of 1961. In this regard, enforcement proceedings are essentially the same as for foreign judgments.

Domestic arbitral awards are enforceable in the same way as domestic judgments.

Costs

33 | Can a successful party recover its costs?

With respect to costs, arbitral tribunals have broader discretion and are, in general, more liberal than courts. The arbitral tribunal is granted discretion in the allocation of costs but must take into account the circumstances of the case, in particular, the outcome of the proceedings. As a rule of thumb, costs follow the event and are borne by the unsuccessful party, but the tribunal can also arrive at different conclusions if this is appropriate to the circumstances of the case.

The ACCP is silent on the type of costs that might be subject to reimbursement. Where costs are not set off against each other, as far as possible the arbitral tribunal must, at the same time as it decides on the liability for costs, also determine the amount of costs to be reimbursed. In general, attorneys' fees calculated on the basis of hourly rates are also recoverable.

An exception to the above rule is found under section 609(2) ACCP, which empowers the arbitral tribunal to decide upon the obligation of the claimant to reimburse the costs of the proceedings if it has found that it lacks jurisdiction on the grounds that there is no arbitration agreement.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The main extra-judicial methods provided for by statute are arbitration, mediation (mainly in family law matters) and conciliation boards in housing or telecommunication matters.

In addition, various professional bodies (lawyers, public notaries, doctors and civil engineers) provide for dispute resolution mechanisms concerning disputes between their members or between members and clients.

Mediation is governed by the Civil Law Mediation Act. However, a solution reached with the assistance of the mediator is not enforceable by the court.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

No, there are no general requirements under Austrian law providing for obligatory settlements or requiring parties to consider alternative dispute resolution before commencing arbitration or litigation. However, it is not uncommon that judges – at the beginning of trial – informally encourage parties to explore settlement options or turn to mediators first.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Not applicable.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

One of the most recent developments in Austrian litigation is the civil procedure amendment, which came into force on 1 May 2022.

The main purpose of the amendment was to adjust the Austrian Code of Civil Procedure (ACCP) to the ongoing digitalisation of the judiciary. In addition, the changes aim to facilitate the conduct of proceedings and improve access to justice, as well as to simplify the law to make it easier for users to find what they are looking for and to gain a better overview of the legal situation.

The ACCP was not changed completely. Some of the most relevant amendments, in summary, are the following.

The expansion of the digital file management system was an important step towards digitalisation. The main goal here was to become as efficient and paperless as possible. Digital files had already been in use before (eg, signatures in trials), however, they were limited in certain regards.

It is no longer required to always transfer the original document to the court. Nevertheless, in some cases, the law still demands originals to be submitted. Originals should also be transferred when copies are impossible to make or not beneficial for the cause. The courts are able to order the presentation of the original if there seems to be a signature missing or when the copy is questionable in general.

Furthermore, when a party refers to a document which is only in its possession, the opponent may request to have a copy of it transferred. However, the original document must only be submitted to the court in exceptional cases. This should contribute to the reduction of paper documents.

The use of digital files makes the transfer of hard copies of legal documents to the counterparty and the court trivial because the digital versions can be sent instead.

The regulations on insight into files have also been expanded insofar as the parties are now to be granted electronic insight into the digital files relevant to the decision.

Additionally, the use of qualified electronic signatures was also introduced to replace handwritten ones.

Since the amendment, courts have to audit if expert witnesses are working to capacity. If an expert witness still has a defined outstanding workload, the court has to appoint a different expert witness. More precisely, if, at the time of selection, it becomes apparent that the expert has not yet submitted the written expert opinion to the court or the public prosecutor's office in more than 10 proceedings, although the respective order to provide the expert opinion was issued more than three months ago, the expert may not be appointed. In this way, the quality of expert opinions is guaranteed and proceedings become more efficient by a wider distribution of expert witnesses' workloads. There are exclusions from this rule if there are understandable reasons for the delay.

Up to this point, a court settlement in a district court could be reached on the content of a written agreement achieved in mediation proceedings on a civil matter. This possibility of concluding even uncontested settlements in court has now been extended to written settlements reached before a body competent for alternative dispute resolution under section 4 of the Alternative Dispute Resolution Act.

Klaus Oblin klaus.oblin@oblin.at
Per Neuburger per.neuburger@oblin.at

Josefstädter Straße 11, Vienna 1080, Austria
Tel: + 43 1 505 37 05 0
https://oblin.at/

Read more from this firm on Lexology

Read this article on Lexology

Bahrain

Aamal Al Abbasi, Ahmed Alfardan and Maryam Al Bastaki
Newton Legal Group

RETURN TO CONTENTS

Summary

LITIGATION 53
Court system 53
Judges and juries 54
Limitation issues 54
Pre-action behaviour 54
Starting proceedings 55
Timetable 55
Case management 56
Evidence – documents 56
Evidence – privilege 56
Evidence – pretrial 57
Evidence – trial 57
Interim remedies 57
Remedies 57
Enforcement 57
Public access 58
Costs 58
Funding arrangements 58
Insurance 58
Class action 59
Appeal 59
Foreign judgments 60
Foreign proceedings 60

ARBITRATION 60
UNCITRAL Model Law 60
Arbitration agreements 60
Choice of arbitrator 61
Arbitrator options 61
Arbitral procedure 62
Court intervention 62
Interim relief 62
Award 62
Appeal 62
Enforcement 63
Costs 63

ALTERNATIVE DISPUTE RESOLUTION 63
Types of ADR 63
Requirements for ADR 64

Read this article on Lexology

MISCELLANEOUS 64
Interesting features 64

UPDATE AND TRENDS 64
Recent developments and future reforms 64

LITIGATION

Court system

1 What is the structure of the civil court system?

Civil courts in Bahrain have the jurisdiction to resolve administrative, civil and commercial disputes. They are also responsible for disputes relating to the domestic relations and personal status of non-Muslims (ie, family law disputes).

The jurisdiction of civil courts in Bahrain is assigned to multiple courts depending on the nature and size of claims. In terms of hierarchy, civil courts in Bahrain consist of the Court of Cassation, the High Civil Appeals Court, the High Civil Court, the Lower Civil Court, the Urgent Matters Court and the Court of Execution. Each court has circuits that are dedicated to disputes of a certain nature. By way of example, the First Circuit of the Court of Cassation is responsible for administrative, commercial and rental disputes; meanwhile, the Fourth Circuit of the Court of Cassation is responsible for labour disputes. This assignment of jurisdiction is revised periodically by a decision from the Deputy Chair of the Supreme Judicial Council.

The Urgent Matters Court and the circuits in the Lower Civil Court and Execution Court are generally composed of one judge. Other courts usually include one or three judges. In some exceptional cases, some courts can include more than three judges. In addition to the different level of courts referred to above, a case management directorate is responsible for the preliminary stage of cases of a certain nature. These cases include:

- civil and commercial disputes that:
    - include a commercial company (including foreign commercial companies) as a party;
    - include an insurance company, commercial bank or a licensed financial institution or financial or banking company (excluding cases related to vehicle accidents insurance);
    - relate to shares, bonds, other securities and negotiable instruments;
    - relate to trademarks, commercial agencies and intellectual property rights;
    - relate to arbitration or mediation in commercial contracts;
    - relate to transport agreements and maritime and aviation disputes; and
    - relate to failing or suspended real estate development projects that include off-plan property sale; and
    - employment disputes.

The Case Management Directorate would consider the parties' pleadings, hear witness testimonies, prepare a report on the case and refer the case to the competent court to issue its ruling.

Separately, the jurisdiction of civil courts can be determined based on the value of the dispute. The Lower Civil Court has jurisdiction over disputes with a value of less than 5,000 Bahraini dinars, along with other disputes of a minor nature. The Higher Civil Court has jurisdiction over other civil and commercial disputes that do not fall within the jurisdiction of the Lower Civil Court.

Excluding bankruptcy and reorganisation disputes, any dispute that exceeds 500,000 Bahraini dinars must be referred by law to the court of the Bahrain Chamber for Dispute Resolution, if the dispute:

- involves a financial institution licensed by the Central Bank of Bahrain;
- is considered an international commercial dispute; or
- is between two companies incorporated pursuant to Bahrain's Commercial Companies Law.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The role of a judge can best be described as inquisitorial – unlike in an adversarial system where the judge takes on a passive role. Judges in Bahrain may directly cross-examine witnesses in the manner they consider appropriate. Separately, there are no juries involved in civil actions brought before the courts of Bahrain.

Limitation issues

3 | What are the time limits for bringing civil claims?

In general, the time limit for bringing a civil claim is 15 years. Specific time limits can apply to claims of a certain nature. For example, the time limit for decennial liability claims against contractors and engineers is three years. Tort claims must also be brought no later than three years from the date the injured party is aware of the injury or the identity of the liable party (or 15 years from the date of the tort whichever is earlier). Whereas, according to the Labour Law, claims for unfair dismissal must be made no later than 30 days from the date of dismissal.

Parties may not agree to time limits that are different from those specified in law.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Contractual parties may agree that any dispute between them must be mediated before any legal action is taken. In certain cases, a party may be required to notify the other party of a breach before commencing legal action. For example, unless agreed otherwise, a party is

not entitled to claim damages for late payment in a contract of sale unless they have notified the other party of the breach.

Parties are also permitted to appoint an expert on their own or in agreement with the other party to the dispute, before any legal action is taken.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings in Bahrain are commenced upon registration of a duly completed statement of claim (or appeal as the case may be) and payment of the applicable court fees through the court's online portal. Service of the claim is carried out by the Case Registration Directorate at the Ministry of Justice, Islamic Affairs and Waqf.

Parties to the proceedings are notified personally or, in respect of companies, private corporations, charities and other juridical persons, notices are directed to their legal representative, or in their absence to any person present in the juridical person's premises. If the process agent is unable to locate the person to whom notice is directed, they may instead serve their agent, employee, co-residents, spouse, relatives or in-laws. If the service agent is unable to serve any of the above individuals, they may affix the notice to the address of the relevant party.

If legal service cannot be completed as set out above, the court may direct that legal notice be carried out by publication in the court's announcements board, the official gazette or a daily newspaper. Parties domiciled outside of Bahrain can be served through the embassy of their country of domicile, or by electronic means. As of 2018, parties may be served by electronic means (text message or email), and such means are now routinely used to serve parties in Bahrain.

Authorities in Bahrain have taken significant steps to ensure that cases are resolved in a timely manner, and those measures have proved to be successful. As a result, the period between the commencement of a case and a decision from the competent court has been reduced significantly since 2021.

Timetable

6 What is the typical procedure and timetable for a civil claim?

A timetable for proceedings is put in place by the Case Management Directorate, which would ordinarily include deadlines for each party to submit their pleadings (including closing written statements) during the case management phase of the proceedings.

Once the case is referred by the Case Management Directorate to the competent court, the court would exercise its discretion to adjourn the case as required to allow the parties to continue submitting their pleadings, requests, witness testimonies or expert reports.

The case management phase of the proceedings should not exceed two months from the date the case is registered; however, this period may be extended by no more than two additional months pursuant to the parties' agreement or a decision from the Case Management Directorate. Additionally, judgments in employment disputes must be issued by the High Civil Court no later than 30 days from the date of the first hearing before it.

Case management

7 | Can the parties control the procedure and the timetable?

No, the parties do not have any input on the schedule adopted by the Case Management Directorate. Once the case is referred to the competent court, the parties may request an extension for submission of pleadings or requests, which the court has the discretion to reject or approve.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no explicit duty in the law to preserve documents. Separately, parties can be compelled to disclose documents in their possession if: such documents must be disclosed by law; documents belong to both adverse parties in the proceeding (eg, agreements between both parties); or if they are relied on by the other party in any stage of the proceedings. This obligation to disclose documents is different from disclosure or discovery of documents in common law jurisdictions in terms of the scope of documents disclosed and the enforcement of the obligation to disclose, as a party is only compelled to disclose documents requested by the adverse party in the case. Additionally, it is uncommon for parties to rely on the above provisions during proceedings.

Third parties, including public entities, may also be compelled by court order to disclose documents. Shareholders are also entitled to request the defendant or third parties to disclose documents in their possession during a claim against directors of a shareholding company or a claim to nullify resolutions of the general assembly of a shareholding company.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

It is uncommon for parties to request the disclosure of documents from the other party in the proceeding; therefore, the question of whether a party would be required to disclose a confidential document has not been considered by the Court of Cassation in Bahrain. Notwithstanding, we do not expect that parties would be required to disclose what would be considered a privileged document in common law jurisdictions (eg, any document that includes legal advice). Notably, any information to which a witness is privy to because of their profession, cannot be disclosed in witness testimony, unless it relates to a felony or misdemeanour.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Expert reports can be submitted by the claimant along with the statement of claim; however, they are not exchanged by the parties before the commencement of proceedings. Witness testimonies, which are usually submitted in person before the court, are made during the course of the proceedings.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Witnesses are expected to give their testimony in person unless the Court authorises a written statement, whereas experts are expected to submit a written report. The court is authorised to request the expert to respond to questions to address any error or insufficiency in their report. Furthermore, the court may enable the parties to submit written questions to the expert. Experts can be ordered to provide a testimony in person by an order from the court acting on its own accord or based on a request from the parties.

Interim remedies

12 | What interim remedies are available?

Parties can request the competent court to order a precautionary attachment on the debtor's assets or a travel ban on the debtor, or to appoint a receiver on attached or disputed assets. The courts of Bahrain have the jurisdiction to order interim remedies in Bahrain, even if such remedies are related to proceedings in another jurisdiction.

Remedies

13 | What substantive remedies are available?

Specific performance, damages and restitution are all remedies that are available to the claimant in legal proceedings. Courts in Bahrain can order punitive fines on a debtor that withholds the specific performance of an obligation, if such performance is possible and can only be carried out by the debtor. Injunctions can also be requested by the parties, although they are uncommon in Bahrain.

Enforcement

14 | What means of enforcement are available?

A default attachment is imposed on the debtor's bank account and assets once a request for enforcement is made. The debtor's assets are subsequently sold, and the proceeds of such sale are then used to enforce the judgment. Additionally, parties can request the court to order punitive fines or institute a travel ban on the debtor.

Read this article on Lexology

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are held in public, although the court can order that certain hearing are held on camera based on a request from the parties or on its own accord, if such measure is necessary to maintain public order, morals or privacy of familial matters. Access to court documents is restricted to the parties, but certain court judgments (including most judgments of the Court of Cassation) are available on the website of the Supreme Judicial Council.

Costs

16 | Does the court have power to order costs?

Claimants and appellants are required to pay the court's fees when they register their case. Courts have the discretion to order some or all parties to bear the court's fees, attorney fees and translation fees in their ruling. Court fees are ordinarily borne by the unsuccessful party in the proceedings, and are calculated based on a percentage of the amount claimed in accordance with the Judicial Fees Law, subject to a cap of 200,000 Bahraini dinars. Court fees in cases of a certain nature (eg, bankruptcy cases) are fixed. A fixed amount of 30 Bahraini dinars is payable as a court fee for claims without a determined value.

Attorney fees awarded by the courts of Bahrain are nominal and do not usually represent the full amount of attorney fees incurred by a party. There has been a recent trend by the courts of Bahrain to increase the amount of attorney fees ordered by the court, but such amounts remain insufficient to cover the actual cost of attorney fees incurred by a party.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency and conditional fees are proscribed by the Advocacy Law. Furthermore, third-party funding is not a common practice in Bahrain.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance policies can cover all or part of a party's legal costs.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class action suits are not common in Bahrain as is the case in most civil law jurisdictions. Notwithstanding, the Labour Law permits collective labour disputes, which must be first mediated and if such mediation is unsuccessful can be referred to the Collective Labour Disputes Council. If the dispute is not resolved by the Collective Labour Disputes Council within 60 days, the dispute is referred to a tribunal formed by six members appointed by certain bodies (including public authorities such as the Supreme Judicial Council and the Ministry of Labour).

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, rulings can be appealed for any reason before a higher court unless prohibited by law. For example, rulings in labour disputes from the High Civil Court cannot be appealed before the Court of Appeals; they can only be challenged before the Court of Cassation.

Additionally, rulings from the Lower Civil Court can only be appealed if: there is a breach of jurisdiction rules that are considered part of public order in Bahrain; for any reason that leads to the ruling being considered null and void; or any procedural breach that affects the court's ruling. Some cases can only be appealed in specific circumstances or for specific reasons set out in the law. For example, the Bankruptcy and Reorganisation Law only permits appeals in certain circumstances.

Parties can additionally request the court that issued the ruling to reconsider it, if:

- the other party cheated or committed deceit and such action affected the court's ruling;
- an admission of forgery of any of the documents relied on in the court's ruling is made or if this forgery is established by a court ruling;
- perjury by a witness is established by a court ruling;
- a party obtains decisive documents that were withheld directly or indirectly by the other party;
- the court orders relief that was not requested by either party or if the court's order exceeds the relief requested by either party; or
- conflicting rulings from one court in a dispute related to the same subject matter and that involves the same parties in the same capacity, unless this conflict arose owing to new evidence that led to the conflicting ruling.

Rulings from the High Appeal Court or the High Civil Court (in its capacity as an appeal court for rulings issued by the Lower Civil Court) can be challenged before the Court of Cassation if: the judgment is based on a breach of law, or error in enforcing or construing the law; or for any reason that leads to the ruling being considered null and void, or any procedural breach that affects the court's ruling.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Bahrain is a signatory to a number of reciprocal recognition treaties, including both multilateral and bilateral treaties. These treaties include the Gulf Cooperation Council Convention for the Execution of Judgements, Delegations and Judicial Notifications (1995), the Riyadh Arab Agreement for Judicial Cooperation (1983) and the Hague Convention for the Pacific Settlement of International Disputes (1907).

Foreign judgments are enforced in accordance with the same conditions that apply to the enforcement of Bahraini judgments in the jurisdiction of the court that issued the judgment. A request to enforce a foreign judgment is made to the Higher Civil Court. Such judgments are only enforced if:

- the courts of Bahrain have no jurisdiction over the dispute in respect of which the judgment was issued, and the court that issued the judgment has jurisdiction over the dispute in accordance with its laws;
- the parties in the dispute were notified and represented correctly;
- the judgment is final in accordance with the laws of the country in which it was issued;
- the judgment does not conflict with a judgment issued by the courts of Bahrain; and
- the judgment does not conflict with public order or morals.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

A party can request the Court of Urgent Matters to issue a ruling to document evidence that the party may be unable to preserve and rely on in future legal proceedings.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Bahrain adopted the UNCITRAL Model Law in its entirety in its Arbitration Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement can be entered into in any form, including verbally, provided it is documented in writing. The arbitration agreement must include an agreement by the parties to resolve all or certain disputes that have arisen or may arise, in respect of a specific legal relationship, to arbitration. Arbitration agreements are subject to the conditions of contract;

the parties must have the legal capacity to and must consent to the arbitration agreement, and the object and consideration of the arbitration agreement must be valid.

The Arbitration Law adds that the following would constitute an arbitration agreement that is documented in writing:

- an arbitration agreement documented through an accessible form of electronic communication provided that the agreement is retrievable;
- if, in the course of exchanging pleadings, a party alleges that an arbitration agreement exists and the other party does not refute its existence; or
- if reference is made in an agreement to an arbitration clause contained in a separate document for the purposes of incorporating that clause into the agreement.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Unless agreed otherwise or provided otherwise by the arbitration rules selected by the parties (if any), a tribunal is composed of three arbitrators. Parties can agree on the procedures for appointing arbitrators. If the tribunal is composed of three arbitrators, each party would be expected to appoint one arbitrator and the two arbitrators must agree on the third arbitrator. The High Civil Court is authorised to appoint an arbitrator if either party fails to nominate one or if the appointment of a third arbitrator has not been agreed. If the tribunal comprises one arbitrator, the High Civil Court is authorised to appoint the arbitrator, if the parties are unable to agree on their appointment.

Parties can challenge the appointment of an arbitrator if there are doubts on their impartiality or independence, or if they do not possess the requisite qualifications agreed by the parties. A party that appointed an arbitrator or participated in their appointment may only make a challenge due to reasons discovered after their appointment. Unless different procedures have been agreed by the parties, an arbitrator's appointment must be challenged no later than 15 days from the date the challenging party becomes aware of the constitution of the tribunal or of the reasons for its challenge.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Parties are free to select any person as an arbitrator unless they agree to minimum requirements that must be satisfied in any arbitrator appointed by them. Parties can additionally agree to exclude potential arbitrator(s) based on their nationality. It would be prudent of the parties to appoint an arbitrator who possesses the requisite skill and qualifications to satisfy their obligations as arbitrator.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Law does not include detailed procedural requirements for arbitral proceedings, unlike those found in the rules of arbitration centres. The parties can agree on the procedures of the arbitration, and if no such agreement was made by the parties, the tribunal has the discretion to follow any procedures it considers appropriate, without disregarding the provisions of the Arbitration Law.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Courts have the discretion to appoint and remove arbitrators, enforce interim measures issued by the tribunal, order interim measures and assist the tribunal in obtaining evidence. The parties can agree to assign the authority to appoint arbitrators, where such authority lies with the court, to another body (eg, arbitration centre).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

The tribunal is authorised to order interim measures following a request from either party. These measures include:

- restoring or maintaining the status quo until the dispute is resolved;
- ordering a party to take, or refrain from, any action that would prevent current or imminent harm or prejudice the arbitral proceedings;
- preserving assets that could be subject to a subsequent award; and
- preserving evidence that is material to the resolution of the dispute.

Award

30 | When and in what form must the award be delivered?

There is no time frame imposed by the Arbitration Law for the issuance of a final award. Notwithstanding this, the parties can agree that the tribunal must issue an award within a certain time frame. The final award must be made in writing and signed by the sole arbitrator, or where multiple arbitrators have been appointed, by the majority of members of the tribunal, provided that reasons for any missing signature are set out in the award.

Appeal

31 | On what grounds can an award be appealed to the court?

Arbitral awards can be set aside by the courts of Bahrain provided that the party challenging the award can provide sufficient evidence that:

- either party to the arbitration agreement did not have the requisite legal capacity or that the arbitration agreement is null and void under the selected governing law or, if a governing law has not been agreed by the parties, the arbitration agreement is deemed null and void under the laws of Bahrain;
- it was not duly or correctly notified of the appointment of an arbitrator or the arbitral proceedings in general, or was otherwise incapable of presenting its case;
- the award deals with a dispute that is not contemplated by or included in the arbitration agreement or addresses decisions excluded from the scope of the arbitration agreement, provided that if such decisions are severable from those which fall within the scope of the arbitration agreement then the court's rejection of the award must be limited to the invalid decisions; or
- the composition of the tribunal or the proceedings conflict with the arbitration agreement (provided that the agreement does not breach the mandatory provisions of the Arbitration Law), or if such matters were not agreed by the parties to the arbitration agreement, if the composition of the tribunal or the proceedings conflict with the Arbitration Law.

Notwithstanding the above, the High Civil Court may set aside an arbitral award if it finds that the subject matter of the dispute cannot be the subject of an arbitration under the laws of Bahrain, or if the arbitral award conflicts with the public policy of Bahrain.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Enforcement of an award is made by way of a decision from the President of the High Civil Court following their review of the award and the arbitration agreement. A party seeking to enforce an award must make an application to the High Civil Court. The application must include the arbitration agreement and the award.

Costs

33 | Can a successful party recover its costs?

The Arbitration Law is silent on costs. However, the tribunal may award costs in accordance with the applicable institutional rules or governing law.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Mediation was introduced in Bahrain by way of Legislative Decree No. 22 of 2019. Mediation is also provided for under the Labour Law, where the parties (usually employees) can refer employment disputes to the Directorate for Resolution of Employment Disputes in the

Ministry of Labour and Social Development. Mediation is considered a developing method of alternative dispute resolution.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no requirement for the parties to consider any form of alternative dispute resolution before or during litigation or arbitration proceedings, unless agreed otherwise by the parties. The court may suspend the case and refer the dispute to mediation if agreed by the parties.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The outbreak of the covid-19 pandemic forced judicial authorities in Bahrain to digitalise their systems and infrastructure. These measures implemented as a result of the pandemic have continued to date. All pleadings are now submitted online by the parties. Communication between the court and the parties' counsel is made online, and counsel for each party can make requests to the court using the Electronic Government's portal. Court decisions, schedules, case files and transcripts are all now available online.

Separately, to encourage parties to consider mediation as an alternative method of dispute resolution, court fees are waived if the parties reach a settlement during the course of a mediation held after legal proceedings have been initiated.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

On 6 March 2023, the Minister of Justice, Islamic Affairs and Endowments issued a monumental decision expanding the permitted use of the English language during proceedings brought before the Bahrain Chamber for Dispute Resolution (BCDR) and the Courts of Bahrain, provided certain requirements are met.

Second, the BCDR recently introduced new arbitration rules that came into effect on 1 October 2022. The new set of rules saw the introduction of a requirement to disclose any

third-party funding arrangements, and expressly set out the authority of the arbitral tribunal to order security for costs. These novel provisions are in line with global arbitration trends and international best practice.

With respect to proposals for dispute resolution reform, the Supreme Judicial Council of the Kingdom of Bahrain and the Supreme Court of the Republic of Singapore have recently announced a potential collaboration to facilitate the establishment of the Bahrain International Commercial Court (BICC). Modelled after the Singapore International Commercial Court, the BICC would be tasked with resolving international commercial disputes. There have not been any announcements yet on when such reforms would be implemented.

Aamal Al Abbasi	aamal.alabbasi@newtonlegroup.com
Ahmed Alfardan	ahmed.alfardan@newtonlegalgroup.com
Maryam Al Bastaki	maryam.albastaki@newtonlegalgroup.com

Floor 48, Harbour Towers, East, Bahrain Financial
Harbour, Manama, Kingdom of Bahrain
Tel: +973 17006571
https://newtonlegalgroup.com

Read more from this firm on Lexology

Read this article on Lexology

Belgium

Olivier Vanhulst, Julien Hislaire and Rodrigo Belle Gubbins
White & Case

RETURN TO CONTENTS

Summary

LITIGATION	67
Court system	67
Judges and juries	68
Limitation issues	68
Pre-action behaviour	69
Starting proceedings	69
Timetable	69
Case management	70
Evidence – documents	70
Evidence – privilege	70
Evidence – pretrial	71
Evidence – trial	71
Interim remedies	71
Remedies	72
Enforcement	72
Public access	72
Costs	73
Funding arrangements	73
Insurance	74
Class action	74
Appeal	75
Foreign judgments	75
Foreign proceedings	77
ARBITRATION	**77**
UNCITRAL Model Law	77
Arbitration agreements	77
Choice of arbitrator	78
Arbitrator options	78
Arbitral procedure	79
Court intervention	79
Interim relief	80
Award	80
Appeal	80
Enforcement	82
Costs	83
ALTERNATIVE DISPUTE RESOLUTION	**83**
Types of ADR	83
Requirements for ADR	83

Read this article on Lexology

MISCELLANEOUS 84
Interesting features 84

UPDATE AND TRENDS 84
Recent developments and future reforms 84

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Belgian judicial system was modelled on the French one and can be described as follows.

At the top of the judicial hierarchy sits the Supreme Court, which hears appeals on points of law and may not review the case on the merits. The Supreme Court has jurisdiction provided that all appeals have been exhausted. It does not settle the dispute but merely confirms the judgment being reviewed or quashes it and remands the dispute to another court at the same level of jurisdiction.

Below are the five courts of appeal, each located in one of the five major judicial areas: Brussels, Liege, Mons, Ghent and Antwerp. They deal with all civil, commercial and criminal cases. Similarly, there are five labour courts of appeal, also allocated between the five judicial areas. They have jurisdiction over all judgments issued by lower labour courts.

Below the courts of appeal are the 13 courts of first instance. They are allocated between the 12 judicial districts. In practice, each judicial district has its own court of first instance, with the exception of Brussels, which has two courts of first instance, one being Dutch-speaking and the other being French-speaking. A court of first instance has general jurisdiction over all matters in which the disputed amount exceeds €5,000 (with the exception of a few disputes that are expressly reserved by law to other jurisdictions) and with certain disputes over which it has exclusive jurisdiction, regardless of the amount in dispute, such as claims for authorisation to enforce arbitral awards and foreign judgments.

In addition, there are nine labour tribunals and nine business courts, also allocated between the 12 judicial districts. A business court has general jurisdiction over all disputes between businesses regarding matters in which the disputed amount exceeds €5,000, except when the dispute belongs to the exclusive jurisdiction of another court. It also has exclusive jurisdiction over disputes relating to, among others, intellectual property and claims against directors (ie, regardless of the amount in dispute). Cases before a business court are handled by chambers composed of three judges: one professional judge and two lay judges (usually business people).

At the bottom of the judicial hierarchy sit the 162 justices of the peace, which jurisdictions cover the 162 judicial cantons. These are small claim courts that deal with matters in which the disputed amount does not exceed €5,000 (with the exception of a few disputes that are expressly reserved by law to other jurisdictions) and with certain disputes over which they have exclusive jurisdiction, regardless of the amount in dispute, such as rental disputes,

Read this article on Lexology

certain family disputes and consumer credits. Judgments handed down by a justice of the peace may be appealed before the court of first instance or the business court, depending on the subject matter of the dispute, provided that the disputed amount exceeds €2,000.

In addition to the above, Belgium also has a specialised administrative court, namely the Council of State, and a Constitutional Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Under the principle of party disposition, the parties exercise sole control over legal proceedings. They delimit the subject matter of the dispute. As a result, the role of the judge is simply to advocate the dispute between the parties: they may not rule on matters that were not brought to them by the parties or award more than was claimed by the parties. They must also respond to all factual and legal arguments brought before them. Failing to do so would be considered as a denial of justice. Finally, the judge is also entrusted with the task of protecting the interest of society as a whole by making sure that public policy is not violated.

Belgian civil litigation is adversarial in nature (although the judge is entitled to intervene to some extent), meaning that each party is responsible for submitting the evidence on which it bases its claim. In theory, the judge should then be able to identify and apply the law to decide the case. Although not required to do so by law, lawyers tend to support their claim by discussing points of law at length. As a result, the main role of the judge is to oversee the production of evidence and prevent discussions that are irrelevant.

Judges are appointed by the King under the conditions and in the manner specified by law. They are appointed for life. The different ways to be appointed as a judge vary depending on the experience of the candidate as a lawyer or an in-house counsel. The Superior Council of Justice is tasked with selecting the best candidate for the vacant position.

In Belgium, jury trials are not available in civil law cases.

Limitation issues

3 | What are the time limits for bringing civil claims?

The most common limitation periods are:

- 30 years (in some cases 10 years) for claims relating to the recovery or protection of real estate property;
- five years for tort claims as of the day on which the plaintiff became aware of the injury as well as of the identity of the person liable for his or her injury and, in any case, no later than 20 years following the events; and
- 10 years for most other claims, including contractual claims.

One should, however, be careful not to make any mistakes as many specific mandatory provisions deviate from the above-described general principles.

Read this article on Lexology

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Belgian law does not require any action to be taken before commencing legal proceedings. There is also no pretrial discovery process in Belgium.

If the prospective plaintiff fears that the defendant may dissipate assets, move assets out of the jurisdiction or become insolvent, the plaintiff is allowed to request precautionary attachment of the defendant's assets by filing an ex parte application before the attachment judge (ie, a division of the court of first instance) having territorial jurisdiction.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In most cases, a writ of summons will have to be served on the defendant. The writ of summons is prepared by the plaintiff and served on the defendant by the bailiff. It generally contains a summary of the facts, legal arguments, claims and relief sought. The bailiff is also charged with enrolling the case at the court's docket. The law requires that the defendant be left with a minimum of eight days between the day of service and the day of the first preliminary hearing. In urgent cases, this period can be shortened to two days.

In some cases, the law provides that proceedings can be initiated by filing of an inter partes petition directly with the court, which then sends a notice to the defendant by registered mail.

Finally, in very limited cases, proceedings may be initiated by filing an ex parte request with the court (eg, to request exequatur of a foreign judgment or of a foreign arbitral award).

The Belgian justice system has been undergoing reforms relating to digitalisation and the reduction of the backlog of the judiciary (especially that of the Court of Appeal of Brussels), but full implementation remains outstanding. This backlog can delay the adjudication of a dispute for several years. Belgium has been condemned several times by the European Court of Human Rights for its enormous backlog.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

After service, the parties will be requested to attend a preliminary hearing where the parties or the court will set the procedural timetable determining the deadlines by which written briefs must be filed by each party.

There is no specific procedure for small claims, although article 735 of the Belgian Judicial Code provides for a fast-track procedure. This procedure is not limited to small claims but rather to claims that do not require lengthy discussions (ie, in particular, simple claims, uncontested claims, interim measures and language issues).

After the exchange of briefs, a date will be set for the oral pleadings of the case. Please note that the business court generally sets an interlocutory hearing in between the preliminary hearing and the oral arguments to verify that the case is ready to be heard by the court.

Although the judgment should, in principle, be issued within one month of the closure of the proceedings, the Brussels business court usually takes more time (ie, two to four months).

Proceedings generally last between (at least) 12 and 18 months.

Case management

7 | Can the parties control the procedure and the timetable?

Under the principle of party disposition, the power of initiative rests mainly within the parties, particularly with the claimant. The court will not take any initiative and will act only if a party has requested it to do so. For example, the parties may ask jointly for the postponing of the case for an indefinite period. The court also sets the procedural calendar only when the parties do not reach an agreement on it.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The Belgian Judicial Code does not provide for discovery or pretrial disclosure proceedings. In addition, there is no general duty to preserve documents and other evidence pending trial. However, such obligation may result from other specific laws, such as tax and accounting laws forcing companies to keep records and accounts for a certain period of time.

As a general rule, the burden of proof rests with the claimant. However, parties have an obligation to act loyally in the production of evidence. Production of a specific document or data can also be ordered by the court or at the request of a party whenever there is a credible, specific and consistent presumption that a party (or a third party) holds it.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Communication between lawyers who are a member of the Flemish (OVB) or the French and German Bar (OBFG) and their clients is privileged under Belgian law and will not be admissible in court. The privilege extends to any information received by the lawyer (in their capacity as lawyer) or obtained in the context of the provision of legal advice, legal proceedings or any dispute in general. It may include correspondence, emails, notes, advice or recordings. Disclosing such information is even subject to criminal sanctions under Belgian law. To avoid any doubts, it is common practice to mark the document as being privileged as clearly as possible.

Correspondence between lawyers in their capacity as counsel is also confidential and cannot be brought to court. Such confidentiality may, however, be lifted in a limited set of circumstances.

Article 5 of the act of 1 March 2000 creating the Belgian Institute for In-House Counsel provides for the confidentiality of legal advice given by in-house counsel, for the benefit of their employer and in the framework of their activity as legal counsel. Confidentiality is therefore more limited.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

There is no pretrial discovery process in Belgium.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

In Belgium, arguments are generally developed in writing and parties rarely call on witnesses. Whenever they do so, they produce written statements (affidavits) that are filed with the court and added to the list of exhibits. The court may also decide to hear witnesses at the request of a party or ex officio. In such case, the judge will administer the oath to the witness and take their deposition. There is no right of cross-examination under Belgian law. Questions to witnesses must first be filed with the judge, who is charged with deciding whether they are relevant. The credibility of witnesses' statements is left to the appreciation of the judge. They cannot be ignored but are generally given less credit than statements supported by written documents.

Experts may be appointed by the court ex officio or at the request of the parties. After being appointed, the expert will typically meet with the parties, carry out an investigation and, finally, submit a preliminary report to the parties. Parties have the right to reply by submitting comments (including by producing party-appointed reports) before the final report is filed by the court-appointed expert. Please note that the court is not bound by the expert's findings.

Interim remedies

12 | What interim remedies are available?

Interim remedies can be requested before the chair of the competent court (both in first instance and in appeal) in inter partes proceedings. In such case, the claimant must prove that (1) urgent relief is needed; (2) he or she has a prima facie case against the defendant; and (3) the balance of interests is in favour of granting the requested measures (which cannot affect the substance of the case and must be of a temporary nature).

Under exceptional circumstances, these measures can even be obtained ex parte (eg, because the adverse party needs to be taken by surprise). As such, attachment or

garnishment measures are available as a pretrial remedy if the claimant can show that he or she has a prima facie claim against the debtor and there is a risk that the debtor may become insolvent or try to avoid payment.

Remedies

13 | What substantive remedies are available?

Belgian civil law is based on the idea of fair compensation for damages and unjustified enrichment. There is no system of punitive damages. Immaterial losses may be compensated, but the mechanism is based solely on the idea of a fair compensation for damages suffered.

Enforcement

14 | What means of enforcement are available?

Since the reform of 2015, any judgment may, in principle, be enforced without being final (ie, the judgment can still be appealed or has already been appealed). This means that contrary to what prevailed before the reform, filing an appeal does not have any automatic suspensive effect.

In practice, enforcement is usually carried out by a bailiff, who (1) collects payment by laying attachment(s) and garnishment(s) on the debtor's assets and receivables and (2) serves the order for specific performance and collects the non-compliance penalties (if any).

The judgment creditor will ultimately be in a position to force the debtor into bankruptcy.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Article 148 of the Belgian Constitution provides that court hearings shall be public. Exceptionally, the law or the court itself may depart from this general principle in the interest of the rights of minors, the right to privacy or the protection of moral or public order.

Even though the Belgian Judicial Code provides that judgments shall be delivered in public, in practice, however, judgments are rarely made available to the public. Publicity depends on the judges and lawyers working on the case. In addition, court clerks tend to refuse to provide a copy of the judgment if a special interest is not demonstrated. This was supposed to be remedied by the law of 5 May 2019, which aimed at creating a publicly available database where all judgments would be made available after having been previously anonymised (see the proposed version of article 782-bis of the Belgian Judicial Code). This law was supposed to enter into force on 1 September 2020. However, the Belgian legislator decided to postpone its entry into force, first to 1 September 2021 and then to 1 September 2022.

Lastly, please note that court filings such as submissions, expert reports and witness testimonies are not made public in Belgium.

Read this article on Lexology

Costs

16 | Does the court have power to order costs?

The court has the power to order the unsuccessful party to pay the costs of the proceedings and may even do so ex officio. However, the different costs that the unsuccessful party may incur are exhaustively listed under article 1018 of the Belgian Judicial Code and include the following:

- costs of filing, registration and service;
- costs of all investigation measures (including costs of expertise and witness deposition, if any);
- procedural indemnity consisting of a lump sum aiming at contributing to the lawyer's fees of the successful party (ranging from €180 to €18,000 for monetary claims and amounting to €1,440 for non-monetary claims); and
- registration fee of 3 per cent of the total payable amount, provided that such amount is in excess of €12,500.

The cost of civil proceedings in Belgium is therefore relatively low compared with other (common-law) countries.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

As per article 446-ter of the Belgian Judicial Code, contingency agreements under which the determination of lawyers' fees depends exclusively on the outcome of the case to be litigated are prohibited. However, it is generally accepted for Belgian lawyers to enter into contingency agreements provided that the success fee is limited to a reasonable amount and that such agreement provides for a minimal remuneration of the lawyer, regardless of the outcome of the case.

Belgian law does not contain any specific provision dealing directly with third-party funding, and its admissibility has, to our knowledge, never been reviewed by Belgian courts. This creates uncertainty, which might explain why third-party funding has remained relatively limited. Other factors include the limited amount of damages awarded by domestic courts, the tremendous backlog of the Court of Appeal of Brussels and the regulation of the contingency fees agreement for lawyers.

In addition, the Belgian Civil Code provides that one against whom a litigious right has been assigned may obtain a release from the assignee by reimbursing them the actual price paid for the assignment, plus costs and reasonable expenses, plus interest calculated from the date on which the assignee paid the price of the assignment made to them.

Read this article on Lexology

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance for legal costs (either for its own costs or for its potential liability for an opponent's costs) has long been available in Belgium and is very common.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The possibility to file class actions was introduced in Belgium in 2014 in the Belgian Code of Economic Law (BCEL).

The BCEL contains an exhaustive list of the types of claims based on which class actions may be filed. More precisely, such actions can be filed only in the case of:

- potential violations by an undertaking of its contractual obligations; or
- potential violation by an undertaking of certain Belgian and European laws and regulations that are exhaustively listed in article XVII.37 of the BCEL (the Laws). The Laws relate to, for example, competition law, market practices and consumer protection, products and services safety, consumers' health and energy. In this regard, it appears from the preparatory work of the Class Action Law that the legislator selected the Laws because they all provide (some) protection to consumers' rights.

The BCEL thus limits the types of claims that may be filed as class actions to certain violations committed by undertakings. The defendant in a class action will therefore always be an undertaking, which the BCEL defines as (1) any natural person exercising a professional activity as a self-employed person; (2) any legal person; or (3) any other organisation without legal personality, with certain exceptions. For instance, the federal state, the regions and the communities are excluded from the definition of undertaking.

Finally, a class action may only be brought on behalf of a group of (1) consumers or (2) small and medium-sized enterprises (SMEs) by a representative of the group members (the Group Representative). The claimant in a class action (ie, the Group Representative) can therefore act only on behalf of consumers and SMEs, to the exclusion of any other person or entity.

So far, few class actions have been initiated. More precisely, since the entry into force of the law of 28 March 2014 that introduced class action under Belgian law, only 10 of these actions have been filed. Two of these actions were filed in 2015, three in 2016, one in 2017, two in 2018, one in 2019 and one in 2020. Class actions are thus relatively rare and there are currently no signs that they will become more frequent in the near future. However, it remains to be seen whether Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers adopted by the European Parliament on 25 November 2020 (the Directive) will have any impact on the frequency of class actions once it is implemented in Belgian law. At this stage, we anticipate that the implementation of the Directive is unlikely to bring any major increase to the number of class actions filed, considering that Belgian law is already substantially in line with the Directive.

Read this article on Lexology

Out of the 10 class actions filed to date only one action has been decided on the merits (and the Court of Appeal rejected the claim as unfounded), four have been settled, four are still pending and one has been declared inadmissible.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

All judgments can, in principle, be appealed on the merits and on the application of the law (ie, appellate courts hear the case de novo) provided that the lower court issued a judgment on a claim amounting to more than €2,000 (justice of the peace) or €2,500 (court of first instance and business court). The appellant does not need to obtain permission to file an appeal.

There is a right of further appeal to the Court of Cassation on limited grounds (ie, on the application of the law but not on the merits of the case).

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The procedures to obtain recognition and enforcement of a foreign judgment in Belgium vary depending on the country in which the judgment was rendered.

Judgments issued in the European Union

Judgments issued in a member state of the European Union on or after 10 January 2015 will be recognised and enforced in Belgium in accordance with Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Under this instrument, judgments given in a member state shall be recognised in Belgium without any special procedure being requested. In addition (and most importantly), judgments given in a member state and enforceable in that state shall be enforceable in Belgium without the need to request a declaration of enforceability. In practice, the requesting party will only have to provide to the enforcing court a copy of the judgment and a standard certificate delivered by the court that rendered the judgment.

The person against whom enforcement is sought may, however, resist enforcement on the grounds set out in article 45, which are limited and which prohibit the judge to re-examine the case on the merits.

Judgment issued before 10 January 2015 will have to be enforced under Regulation (EC) No. 44/2001 of the European Council on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, which required to obtain exequatur before being able to enforce the judgment in a foreign member state. Similar rules apply under the Brussels Convention and the Lugano Convention.

Read this article on Lexology

Judgments issued outside of the European Union

Judgments issued in a third country party to an international convention to which Belgium is also a party

Judgments issued outside of the European Union in a country that is party to an international convention on the enforcement of foreign judgments to which Belgium is a party must be enforced under such international convention. In this respect, we note the existence of the Hague Choice of Court Convention, which currently applies to all EU member states and, inter alia, Mexico.

Judgments issued in a third country with which Belgium does not have a treaty

In the absence of any international treaty, foreign judgments are enforced in Belgium in accordance with the rules laid down in the Belgian Code of Private International Law. In practice, a request for exequatur must be filed with the competent court of first instance together with the following documents:

- a certified copy of the foreign judgment;
- if the judgment was handed down by default, evidence that the claim was served or notified to the other party; and
- evidence that the judgment is enforceable in the country of origin and that it has been served or notified to the other party.

Domestic courts can refuse to enforce a foreign judgment on the following grounds:

- incompatibility with Belgian international public policy;
- violation of due process;
- the judgment was issued as a result of an attempt to avoid the application of a mandatory law that would apply under Belgian private international law;
- the judgment is not final;
- conflicting domestic or foreign judgment;
- the claim was initiated abroad after a claim had been brought before Belgian courts between the same parties and with the same object;
- Belgian courts had exclusive jurisdiction to hear the case;
- jurisdiction of the foreign court was founded solely on the defendant being present or having assets in the foreign jurisdiction, without any relation between that presence or those assets and the claim; or
- enforcement would be contrary to the grounds for refusal provided for under articles 39, 57, 72, 95, 115 and 121 of the Belgian Code of Private International Law.

Such procedures tend to go quite quickly in Belgium. A decision is generally obtained within one week from the application. The person against whom enforcement is sought may challenge the decision of the court of first instance within a period of one month from the date of service of the enforcement order.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Rules to obtain evidence in Belgium in support of proceedings in another member state of the European Union or in another member state in support of proceedings in Belgium are laid down in Regulation (EC) No. 1206/2001 on cooperation between the member states in the taking of evidence in civil and commercial matters (the Regulation).

If evidence needs to be collected in a state that is not bound by the Regulation, Belgium applies the Hague Convention of 1 March 1954 on civil procedure (or any applicable bilateral treaty).

In the absence of any treaty between Belgium and the other jurisdiction, Belgium will enforce foreign requests pursuant to the relevant provisions of the Belgian Judicial Code.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Arbitration in Belgium is governed by the law of 24 June 2013 that entirely replaced articles 1676–1723 of Part VI of the Belgian Judicial Code, which contained the (former) Belgian law on arbitration. It entered into force on 1 September 2013 and applies to arbitration proceedings initiated after that date.

The goal of the 2013 reform was to bring the rules in line with recent changes in international practice and the 1985 UNCITRAL Model Law while increasing the attractiveness of Belgium as a place for arbitration. However, instead of simply copying the 1985 UNCITRAL Model Law, the Belgian legislator took into account specificities of Belgian arbitration practice. As such, Belgian arbitration law is not limited to international commercial arbitration but applies instead to all types of arbitration, whether domestic or international.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Belgian law contains no formal requirement for arbitration agreements to be valid. This is illustrated by article 1681 of the Belgian Judicial Code, which defines arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.' Arbitration agreements may therefore be concluded orally, as long as their existence can be established (eg, by witness or through performance of the agreement). They may also be inserted in the general conditions of a sale and purchase agreement, provided that one can demonstrate acceptance.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Where the parties have not agreed on the number of arbitrators, the arbitral tribunal shall be composed of three arbitrators (article 1584 of the Belgian Judicial Code).

As to their appointments, if the parties have not settled the question in the arbitration agreement, they may do so once the dispute arises. If they do not agree at that time, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of the appointment of the second arbitrator, the appointment shall be made by the president of the court of first instance, ruling on the request of the most diligent party (article 1685(3) of the Belgian Judicial Code). This decision cannot be challenged, unless the president of the court of first instance decides that there are no grounds for an appointment (article 1680(1) of the Belgian Judicial Code).

An arbitrator may be challenged only on the following grounds (article 1686 of the Belgian Judicial Code):

- circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality; or
- he or she does not have the qualifications required by law or agreed to by the parties.

Any challenge may be brought until the rendering of the award but only for a reason of which it becomes aware after the appointment was made (article 1686(2) of the Belgian Judicial Code). In this respect, the parties are free to agree on a procedure for challenging an arbitrator. Absent any agreement, Belgian law provides for a default procedure detailed under article 1687 of the Belgian Judicial Code.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Belgian law does not require any specific qualifications in order to be appointed as an arbitrator. Thus, apart from legal capacity and the general requirements of independence and impartiality, the parties have the utmost freedom. They may, for example, determine the required qualifications in the arbitration agreement or preclude certain persons from acting as an arbitrator by reason of their nationalities. Absent any agreement, the parties have complete freedom to appoint whoever they believe is best fit for the task.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The vast majority of the procedural rules set out in Part VI of the Belgian Judicial Code apply only in the absence of any contrary agreement between the parties (either by setting the procedural rules themselves or by making reference to a set of arbitration rules prepared by a specific institution). However, the parties are legally required to be treated with equality and each party shall be given a full opportunity of presenting its case, pleas in law and arguments in conformity with the principle of adversarial proceedings (article 1699 of the Belgian Judicial Code). In addition, the parties may not derogate from the general requirement of independence and impartiality of the arbitrator(s) (article 1685(2) of the Belgian Judicial Code).

Absent any agreement on the procedure, the arbitral tribunal may determine the rules of procedure as it deems appropriate, subject to the provisions of Part VI of the Belgian Judicial Code (article 1700 of the Belgian Judicial Code). These rules are set out in chronological order:

- the arbitration agreement (articles 1681–1683);
- the composition of the arbitral tribunal (articles 1684–1689);
- the conduct of the proceedings (articles 1699–1709-bis);
- the arbitral award and the termination of the proceedings (articles 1710–1715);
- the challenges that may be initiated against the arbitral award (articles 1716–1718); and
- the recognition and enforcement of arbitral awards (articles 1719–1721).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Domestic courts can intervene during arbitration proceedings to:

- order urgent interim relief (article 1683);
- appoint an arbitrator whenever (1) a party fails to act as required; (2) the parties or the party-appointed arbitrators are unable to reach an agreement; or (3) a third party, including an institution, fails to perform any function entrusted to it under the applicable procedure (articles 1585(3) and 1585(4));
- rule on the withdrawal of an arbitrator after they accepted their mission (article 1685(7));
- rule on the challenge of an arbitrator (article 1687(2));
- settle any controversy relating to an arbitrator's failure or inability to act (article 1688(2));
- order all necessary measures for the taking of evidence (article 1708); and
- impose a time limit on the arbitral tribunal to render its award (article 1713(2)).

Interim relief

29| Do arbitrators have powers to grant interim relief?

Unless otherwise agreed by the parties, the arbitral tribunal may order any interim or conservatory measures it deems necessary. The arbitral tribunal may also amend, suspend or terminate an interim or conservatory measure, regardless of whether it granted the measure itself or whether it was granted by a domestic court.

However, the arbitral tribunal may not authorise attachment orders as these fall under the exclusive jurisdiction of domestic courts. In addition, please note that the arbitral tribunal may not order ex parte interim measures. The possibility for domestic courts to order urgent interim measures, when not excluded by the parties, is therefore of great importance. In this respect, article 1698 of the Belgian Judicial Code provides that domestic courts shall have the same power to grant interim measures in relation to arbitration proceedings as they have when seized in matters relating to court proceedings. As a result, interim measures shall be granted by domestic courts only if urgency so requires.

Award

30| When and in what form must the award be delivered?

The parties may determine the time limit within which the arbitral tribunal must render its award, or the terms for setting such a time limit. Failing this, if the arbitral tribunal is late in rendering its award, and a period of six months has elapsed between the date on which the last arbitrator has been appointed, the president of the court of first instance, at the request of one of the parties, may impose a time limit on the arbitral tribunal.

The award shall be made in writing and shall be signed by the arbitrator. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

The award shall state the reasons upon which it is based. In addition to the decision itself, the award shall contain, inter alia:

- the names and domiciles of the arbitrators;
- the names and domiciles of the parties;
- the object of the dispute;
- the date on which the award is rendered; and
- the place of arbitration determined in accordance with article 1701, paragraph 1.

A copy of the award shall be communicated to each party by the sole arbitrator or by the chair of the arbitral tribunal in accordance with article 1678 of the Belgian Judicial Code.

Appeal

31| On what grounds can an award be appealed to the court?

Under Belgian law, an arbitral award may be challenged in three ways.

Rectification/interpretation

First, the parties may request the arbitral tribunal to rectify any material error in the award or, if so agreed by the parties, to give an interpretation of a specific part of the award. This must be done within one month of the communication of the award unless another period of time has been agreed upon.

Appeal

Second, the parties may appeal an arbitral award before another arbitral tribunal. This will be allowed only if such possibility was expressly provided for in the arbitration agreement. In such case, the appeal must be lodged within one month of the communication of the first award. In practice, however, this is extremely rare as most arbitration agreements provide that the award shall be final (ie, the parties cannot request an arbitral tribunal to determine the merits of the case for a second time).

Request for setting aside

Third, in accordance with article 1717 of the Belgian Judicial Code, the parties may request the court of first instance to set aside the award (ie, to file a claim for annulment). Under article 1717, an award may be set aside only on the following grounds:

- there is no valid arbitration agreement;
- the party making the application was not given proper notice of the arbitral proceedings or was otherwise unable to present its case, unless it is established that the irregularity has had no effect on the arbitral award;
- the award deals with a dispute that does not fall within the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement (and, in that case, only those parts of the award may be annulled if they can be separated from the decisions on matters that do fall under the arbitration agreement);
- the award is not reasoned;
- the arbitral tribunal was not set up or the arbitral proceedings were not conducted according to the applicable rules, unless, in the latter case, the irregularity had no impact on the award;
- the arbitral tribunal has exceeded its powers;
- the subject matter of the dispute is not arbitrable;
- the award is contrary to Belgian rules of international public policy; or
- the award was obtained by fraud.

In theory, a claim for annulment may be filed only when the award can no longer be challenged before the arbitrators. It must be filed before the court of first instance within three months of the communication of the award to the party requesting the award to be set aside. Please note that when asked to set aside an arbitral award, the court of first instance may suspend the proceedings for a specific period of time in order to enable the arbitral tribunal to resume the arbitral proceedings or to eliminate the grounds for annulment.

Finally, please note that article 1718 of the Belgian Judicial Code provides that the parties may exclude any application for the setting aside of an arbitral award. However, this may be done only whenever none of the parties is a natural person of Belgian nationally or a natural

person having his or her domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

In accordance with articles 1719–1721 of the Belgian Judicial Code, authorisation to enforce an arbitral award, either Belgian or foreign, may be requested before the court of first instance by means of an ex parte application. An original or a certified copy of the award must be filed.

Article 1721(3) of the Belgian Judicial Code provides that a treaty concluded between Belgium and the country where the arbitral award was rendered takes precedence over domestic rules. Belgium has adopted the New York Convention subject to reciprocity and will apply the convention to both commercial and civil disputes. In addition, Belgium signed several bilateral conventions regarding the recognition and enforcement of foreign arbitral awards. This provision must be read together with the 'more favourable law' provision of the New York Convention, which provides that the convention does not take precedence over legislation that is more favourable to recognition and enforcement.

Pursuant to article 1721 of the Belgian Judicial Code, enforcement of the award may be denied only on the following grounds:

- there is no valid arbitration agreement;
- the party against whom the claim for leave to enforce is made was not given proper notice of the arbitral proceedings or was otherwise unable to present their case, unless this irregularity had no impact on the award;
- the award deals with a dispute that does not fall within the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement (and, in that case, only those parts of the award may be annulled if they can be separated from the decisions on matters that do fall under the arbitration agreement);
- the award is not reasoned whereas such reasons are prescribed by the rules of law applicable to the arbitral proceedings under which the award was rendered;
- the arbitral tribunal was not set up or the arbitral proceedings were not conducted according to the applicable rules, unless, in the latter case, the irregularity had no impact on the award;
- the award has not yet become compulsory for the parties or has been annulled or suspended by a court in the state where it was rendered;
- the arbitral tribunal has exceeded its powers;
- the subject matter of the dispute is not arbitrable; or
- the recognition or the enforcement of the award would be contrary to rules of Belgian international public policy.

As with any other ex parte judgment, it can be appealed by the party against whom enforcement is sought before the same court (the court of first instance) (ie, a third-party opposition may be filed before the same judge). The judgment cannot, however, be appealed before the Court of Appeal (but can nevertheless be contested before the Court of Cassation).

In practice, Belgian courts tend to look favourably upon enforcing awards and do not apply the grounds listed above extensively.

Costs

33 | Can a successful party recover its costs?

Pursuant to article 1713(6) of the Belgian Judicial Code, the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. Unless otherwise agreed by the parties, these costs shall include the fees and expenses of the arbitrators, the fees and expenses of the parties' counsel and representatives, the costs of services rendered by the instances in charge of the administration of the arbitration and all other expenses arising from the arbitral proceedings. Legal scholars generally consider that such costs must be reasonable.

Belgian arbitration law does not specifically address third-party funding. It could be argued, however, that given the general terms of article 1713(6), third-party funding costs could be taken into account by the arbitral tribunal.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

In international commercial disputes, the most common type of alternative dispute resolution (ADR) used in Belgium is arbitration. The practice of resorting to conciliation or mediation is also expanding beyond the scope of small family matters (which, for obvious reasons, have always been prone to resort to these two types of ADR). This may be explained by the substantial increase in the procedural indemnity having to be paid at the end of domestic litigation as well as the tremendous backlog of the Court of Appeal of Brussels.

In addition, please note that arbitration clauses in Belgium regularly provide that the parties shall recourse to conciliation or mediation before resorting to arbitration. If such prerequisite has not been complied with and provided that the respondent invokes this irregularity in *limine litis*, the arbitral tribunal will be forced to suspend its mission.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

When the parties have agreed to ADR, domestic courts will generally give effect to their agreement. In the absence of any agreement, domestic courts may suggest and encourage resorting to a certain type of ADR. In 2018, the Belgian parliament decided to reform certain provisions of the Belgian Judicial Code in order to promote alternative forms of dispute

resolution. As of 12 July 2018, article 1734 now provides that the judge may order the parties to resort to mediation. As the parties may only oppose it jointly, it is sufficient for one party to be in favour of mediation to obtain a court order imposing it on the parties. In practice, however, this possibility is rarely used in commercial matters. The 2018 reform also amended article 444 of the Belgian Judicial Code, which now forces lawyers to consider ADR before going to trial.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Not applicable.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The reform of the Belgian Civil Code is still under way. As part of this reform, the rules on evidence have been updated and entered into force on 1 November 2020. On 1 September 2021, the law of 4 February 2020 containing Book 3, 'Goods', of the Civil Code also entered into force. On 1 January 2023, Book 8 'Contracts' entered into force. Further reforms relating to, inter alia, tort law and special contracts will shortly be approved by the Belgian parliament.

New reforms of the Belgian judicial system are also expected to take place to further pursue the digitalisation of the Belgian judicial system and reduce the current backlog of cases, though little progress has been made in the past year.

WHITE & CASE

Olivier Vanhulst	olivier.vanhulst@whitecase.com
Julien Hislaire	julien.hislaire@whitecase.com
Rodrigo Belle Gubbins	rodrigo.belle.gubbins@whitecase.com

Wetstraat 62 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 2 239 26 20
www.whitecase.com

Read more from this firm on Lexology

Read this article on Lexology

Bulgaria

Tsvetelina Dimitrova and **Petya Stankova**

Georgiev Todorov & Co

RETURN TO CONTENTS

Summary

LITIGATION 87

Court system 87
Judges and juries 87
Limitation issues 88
Pre-action behaviour 88
Starting proceedings 88
Timetable 89
Case management 89
Evidence – documents 90
Evidence – privilege 90
Evidence – pretrial 91
Evidence – trial 91
Interim remedies 91
Remedies 91
Enforcement 92
Public access 92
Costs 92
Funding arrangements 93
Insurance 93
Class action 93
Appeal 93
Foreign judgments 94
Foreign proceedings 94

ARBITRATION 94

UNCITRAL Model Law 94
Arbitration agreements 95
Choice of arbitrator 95
Arbitrator options 95
Arbitral procedure 96
Court intervention 96
Interim relief 97
Award 97
Appeal 97
Enforcement 98
Costs 98

ALTERNATIVE DISPUTE RESOLUTION 99

Types of ADR 99
Requirements for ADR 99

Read this article on Lexology

MISCELLANEOUS 99
Interesting features 99
UPDATE AND TRENDS 100
Recent developments and future reforms 100

LITIGATION

Court system

1 What is the structure of the civil court system?

There are subdivisions within the civil court system according to the subject matter and the size of the claim. Commercial disputes are heard by the commercial chambers formed at each court on a decision by the General Assembly of the Judges. If the dispute is commercial, it is subject to different rules of procedure under the Civil Procedure Code (CPC), which include additional claim motions and additional responses to the claim motion. If a commercial dispute exceeds 25,000 Bulgarian levs, the claim is submitted to the district court.

The structure of the civil court system consists of three instances. If the case is subject to a regional court at first instance, the decision of the regional court shall be subject to appeal to a district court. On the other hand, if the case is subject to a district court at first instance, the decision of the district court shall be subject to appeal to a court of appeal. Decisions of the second instance court with a value exceeding 20,000 levs for commercial disputes or 5,000 levs for civil disputes are subject to cassation under specific grounds laid out in the CPC.

Cases before the regional courts are heard by one judge, unless otherwise provided by law. If a district court sits at first instance, the case is heard by one judge. If the district court sits at second instance, the case shall be heard by three judges, unless otherwise provided by the law. The courts of appeal and the Supreme Court of Cassation sit as a panel of three judges, unless otherwise provided by law.

In Bulgaria, there are no specialist commercial or financial courts

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

The main principle in civil proceedings is the principle of disposition. The ex officio powers of the judges are limited. The court shall perform their ex officio powers only to the extent that it is needed for the development and finalisation of the proceedings. The judge shall monitor if the proceedings are admissible and duly performed by the parties. The court shall assist the parties to clarify the lawsuit in the factual and legislative aspects. The law does not allow the participation of a jury in civil proceedings.

Limitation issues

3 | What are the time limits for bringing civil claims?

The limitation periods in Bulgaria are governed by the Obligations and Contracts Act. This act provides for a five-year limitation period in general. As an exception, claims for labour remuneration, damages, liquidated damages resulting from non-performance of contracts, and rent, interest and other scheduled payments are extinguished after a three-year limitation period.

The limitation period runs from the day on which the claim becomes actionable. If it is agreed that the claim becomes actionable following an invitation, the limitation period begins to run from the day on which the obligation arose. For claims arising from tort, the limitation period begins to run upon discovering the offender. For claims for liquidated damages for default, the limitation period begins to run from the last day for which the liquidated damages are assessed. An action for damages must be brought within one year in claims relating to forwarding contracts, contracts of carriage, contracts for commodity control and depository contracts.

An agreement that shortens or extends the established limitation periods and waiving the limitation before it has expired is invalid.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

No.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings start with the filing of a claim before the court. The claim is reported to a judge who verifies the admissibility of the claim. If the claim does not meet the requirements of the CPC, the claimant has one week to remedy the irregularities. If the claimant fails to do so, the claim shall be returned. If the requirements are met, the court sends a copy of the claim together with attachments to the defendant who is instructed to submit a written response within one month. If the proceedings are commercial, then the defendant has two weeks to file a response. The claimant is then entitled to file an additional claim in another two weeks to which the defendant can respond (double exchange of claim documents).

Although the courts based in Sofia are occupied with cases, Bulgarian courts have the capacity to handle their caseload. In most cases, they do not experience capacity issues.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

After the claim is filed before the court, it is reported to a judge who verifies the admissibility of the claim. If the claim does not meet the requirements of the CPC, the claimant has one week to remedy the irregularities. If the claimant fails to do so, the claim motion and attachments are returned.

If the requirements are met, the court sends a copy of the claim together with the attachments to the defendant, who is instructed to submit a written response within one month. If the proceedings are commercial, then the defendant has two weeks to file a response. The claimant is then entitled to file additional claims in another two weeks, to which the defendant can respond (double exchange of claim documents).

After verifying the regularity and admissibility of the claim, as well as the other requests and objections of the parties, the court issues a ruling on all preliminary questions and on the admission of evidence. The judge schedules the case in open court for which they call the parties, to whom a copy of the ruling is delivered. The court may notify the parties of its draft report on the case, as well as instruct them to undertake mediation or other means of amicable dispute settlement.

The court postpones the case if the party and their attorney cannot appear due to an obstacle that the party cannot remove.

An open session is then held to clarify the facts of the dispute. The claimant can clarify and supplement the claim motion, as well as present evidence related to the objections raised by the defendant. The defendant can present new evidence if it was impossible to have stated and presented it with the reply to the claim motion. After evidence has been collected, the court again invites the parties to reach a settlement. If a settlement is not reached, the court proceeds to the verbal contest. When the case has been clarified, the court ends the verbal contest and sets a day for announcing its judgment. At the request of one of the parties, the court can set a suitable time limit for the submission of written pleadings in relation to any factual or legal complexity. The decision is announced through the Register of Court Decisions, which is public and freely accessible.

Case management

7 | Can the parties control the procedure and the timetable?

The parties initiate the proceedings of their own volition, and determine the subject matter of the lawsuit and the range of the assistance needed from the court. Nevertheless, they do not have the right to control the timetable of the proceedings. The parties can only stop the proceedings for six months by mutual agreement and can request prolongation of the terms granted by the court to take action if sufficient grounds exist.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The standard of proof depends on the type of claim. When filing the claim in first instance proceedings, the claimant must:

- state the evidence and the specific facts that are intended to be proven; and
- present all the written evidence in support of its claim.

At the first open hearing, the claimant can clarify and supplement the claim motion, as well as point out and present evidence related to the objections raised by the defendant. The defendant can present new evidence at the hearing if it was impossible to have stated and presented it with the reply to the claim motion. The claimant cannot present evidence after the first open hearing if they were already in possession of, or should have known about, such evidence.

The required standard of proof is set out under article 146 of the CPC. Either before or during the first open hearing, the court prepares and submits a report to the parties, setting out:

- the rights and facts that are recognised and not disputed by the parties;
- the facts that do not need to be proved (that is, those that are public and well known, and those known to the court); and
- how the burden of proof is allocated for the facts that must be proven (each party must determine the facts on which it bases its claims or objections).

On appeal, the court of appeal rules on the validity and admissibility of the first instance judgment. The court of appeal can only rule on the issues that are stated in the appeal.

The requests of the parties for the admission of evidence of facts that are not relevant to the decision of the case, as well as untimely requests for the admission of evidence, are rejected by the court by ruling.

The parties may request the other party or third parties to present to the court documents within their possession. If the court obligates the party to do so, failure to present the requested document may be considered by the court to the detriment of the said party.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The information contained in documents between a lawyer and a client is confidential and privileged. Nevertheless, if a document is part of the case file, the other party is entitled to access it.

In addition, presentation of a document can be refused if the content of the document:

- is related to circumstances relating to the private or family life of the party; or
- could lead to disgrace or criminal prosecution against the party, or against their relatives.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

No.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

When filing the claim in first instance proceedings, the claimant must present all the written evidence.

At the first open hearing, the claimant can clarify and supplement the claim motion, as well as point out and present evidence related to the objections raised by the defendant. The defendant can present new evidence at the hearing if it was impossible to have stated and presented it with the reply to the claim motion. The claimant cannot present evidence after the first open hearing if they were already in possession of, or should have known about, such evidence.

Witnesses must give oral evidence. Each witness is examined separately in the presence of the parties who appeared.

The expert is obliged to present the conclusion at least one week before the court session. The expert presents their conclusion orally. The parties may ask questions to clarify the conclusion.

Interim remedies

12 What interim remedies are available?

The interim remedies available are the following:

- placing a ban on the sale of real estate;
- distraint (restraint or seizure) of the defendant's movable objects and receivables; and
- other appropriate measures determined by the court, including stopping a vehicle from being moved or suspending the execution of documents.

Remedies

13 What substantive remedies are available?

The applicable remedies depend on the type of claim motion. The compensation in general encompasses lost profit and damages suffered, provided that they are linked to the

specific behaviour or wrongdoing of the opposing party. Statutory interest is payable on a money judgment.

Enforcement

14 | What means of enforcement are available?

The effective decisions and rulings of the courts are subject to enforcement by obtaining a writ of execution. If the court order is disobeyed, the bailiff shall start execution upon a request of the interested party on the grounds of a presented writ of execution or another act, subject to execution. In their request the creditor shall state the way of execution. They may state at the same time several ways of execution, only if this is necessary in order to satisfy their claim. During the procedure, they may also point other ways of execution. The bailiff is obliged to invite the debtor to voluntarily perform their obligation within a two-week term. If the debtor does not voluntarily perform their obligation in this term, the creditor may direct the bailiff to proceed with enforcing the court order.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court proceedings are public. The court can, of its own motion or at the request of one of the parties, order either the case hearing or certain actions to be undertaken in closed session if any of the following applies:

- the public interest demands it;
- the protection of the privacy of the parties, their families or of persons in custody requires it;
- the case concerns a trade, industrial, invention or fiscal secret, the public announcement of which would harm legitimate interests; or
- there are reasonable grounds to do so.

Court documents are not available to the public.

Costs

16 | Does the court have power to order costs?

The court rules on expenses after the end of each part of the case. The fees paid by the claimant, as well as the expenses for the proceedings and the attorneys' remuneration, are paid by the defendant proportionally to the successful part of the claim. Defendants are also entitled to claim payment of the costs incurred by them in proportion to the rejected part of the claim. No security for costs is required, but a guarantee may be requested for imposing interim measures.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The remuneration for legal assistance provided by a lawyer is determined by free bargaining on the basis of a written agreement with the client. In any event, such an agreement cannot provide for a remuneration lower than those provided for in Ordinance No. 1 of 9 July 2004 on the minimum amounts for lawyer remunerations.

The fees for filing a claim in Bulgaria are typically 4 per cent of the amount at stake in the claim. Parties do not typically need third-party funding, although this is not forbidden, but the third party cannot take a share of the proceeds of the claim.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Some insurance companies in Bulgaria provide legal expenses insurance.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The CPC regulates collective claims. A collective claim can be brought on behalf of persons injured by an offence, where the number of these persons cannot be precisely defined but is determinable. At a closed session, the court:

- accepts as participants in the proceedings other injured parties;
- allows parties or organisations for the protection of injured parties or of damaged collective interests to declare their wish to participate in the procedure within the determined term; and
- excludes injured parties who, within the determined term, have declared that they will bring a separate procedure.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The grounds for appeal are a void, inadmissible or incorrect decision of the first instance court. The appeal must be lodged within two weeks of service of the decision. The decision of the court of appeal is subject to a cassation appeal before the Supreme Court of Cassation if the appellate court ruled on a substantive or procedural issue that is:

- decided in contradiction with the mandatory practice of the Supreme Court of Cassation and the Supreme Court in interpretative decisions and rulings, as well as in contradiction with the practice of the Supreme Court of Cassation;
- decided in contradiction with acts of the Constitutional Court of Bulgaria or the Court of Justice of the European Union; or
- important for the correct application of the law, as well as for the development of the law.

Regardless of the above-mentioned prerequisites, the appellate decision is admissible for cassation appeal in cases of probable void status or inadmissibility, as well as in cases of obvious incorrection.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The procedures to enforce a foreign judgment in Bulgaria are the following:

- Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
- The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007; and
- the Bulgarian Code of Private International Law.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The procedure is governed by:

- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters;
- the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970; and
- the Bulgarian Code of Private International Law.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The arbitration law in Bulgaria is mainly governed by the Bulgarian International Commercial Arbitration Act (ICCA), which is based on the UNCITRAL Model Law and implements its principles and most of its recommendations. However, there are certain differences between the ICCA and the UNCITRAL Model Law, among which are the following:

- Bulgarian law does not apply the concept of nullity in respect of arbitration awards;
- the ICAA does not provide an opportunity for the suspension of the setting-aside proceedings for a chance to be given for additional actions that may eliminate the grounds for setting aside; and
- although not explicitly provided in the ICAA, case law holds that, when the award is challenged on a ground that affects only a part of it and this part is separable and relatively independent from the rest of the award, only this part of the award may be set aside.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

According to article 7, paragraph 2 of the ICCA, the arbitration agreement must be in written form. The agreement may be incorporated in a contract as an arbitration clause or it could be a separate agreement. In addition, it is deemed that the agreement is in writing when it is evidenced in a document signed by the parties, or in the exchange of letters, telex, telegrams or other communication means. It shall also be considered that the arbitration agreement is evidenced in writing when the defendant accepts in writing or by declaration, recorded in the minutes of the arbitration hearing, that the dispute shall be settled by the arbitration or in the case that the defendant participates in arbitration proceedings without challenging the arbitration jurisdiction.

The arbitration agreement must comply with the requirements of the law for its validity, namely requirements for the legal capacity of the parties, form of the agreement and capability of the dispute to be settled by arbitration.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The arbitral tribunal may consist of one or more arbitrators, the number of which is determined by the parties. Where the parties have not determined their number, the arbitrators shall be three. In the absence of agreement on the procedure, each party appoints one arbitrator and the two arbitrators appoint the third.

If the challenge of an arbitrator by a party is rejected by the arbitral tribunal, the party who initiated it may request, within seven days of receiving notification of the decision, the Sofia City Court to decide on the challenge. The court considers the petition in compliance with Civil Procedure Code (CPC) rules in respect of appeal of rulings. The applicability of the rule providing for a court review of the tribunal's decision on the challenge of an arbitrator may not be derogated by the parties.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

A person must fulfil all of the following criteria to become an arbitrator:

- be a legally capable person of full legal age;
- not have been convicted of an intentional crime of a general nature;
- have a university degree;
- have at least eight years of professional experience; and
- possess high moral qualities.

In the case of arbitration between parties with residence or a seat in Bulgaria (domestic arbitration), a foreign national may not be an arbitrator (except in cases where a party to the dispute is an enterprise with predominantly foreign shareholders). The parties may agree that the dispute will be arbitrated by an arbitrator or arbitrators with specific qualifications. The rules of the arbitration courts may provide for requirements to be satisfied by the arbitrators (eg, to be legal professionals). Usually, Bulgarian courts of arbitration maintain a list of arbitrators.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Based on the UNCITRAL Model Law, the ICAA provides basic rules covering all stages of the arbitral process, leaving the parties with vast possibilities to modify or replace most of them with other rules to be agreed among the parties. There are only several mandatory provisions related to the fundamental principles of the arbitration or the public order from which the parties to all arbitral proceedings cannot deviate, such as:

- the scope of the arbitration;
- the courts of law intervention;
- the form of the arbitral agreement;
- the challenge of an arbitrator; and
- the termination of the powers of the arbitral tribunal.

Setting aside the arbitral award, and recognition and enforcement of the arbitral award, are also mandatory and apply to all arbitral proceedings situated in Bulgaria. Thus, the parties are entitled to choose, among other things:

- an arbitration court or arbitration ad hoc to determine the number of arbitrators;
- the appointment procedures, including the appointment institution;
- the procedural rules to be followed during the case, including the rules for taking evidence; and
- the language and the seat of arbitration.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Bulgarian courts do not have the power to intervene in procedural issues that arise during an arbitration proceeding. Under specified circumstances (set out in article 47, paragraph 1, items 4 and 6 of the ICCA), the Supreme Court of Cassation may subsequently (when considering the challenge of the award) assess compliance with the mandatory rules concerning

the composition of the arbitral tribunal and the notification of the parties for appointment of an arbitrator or commencement of the arbitration proceedings.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

In principle, the courts of law are competent to pronounce interim measures. Although, according to article 21 of the ICAA, the arbitral tribunal may order one of the parties to undertake appropriate measures for securing the rights of the other, under Bulgarian law, the provisional measures ordered by an arbitral tribunal seated in Bulgaria may not be enforced. CPC rules on the enforcement of provisional measures are applicable only when the measures are ordered by a court of law. The ICAA does not provide for specific types of provisional measures. Nevertheless, the most effective and most frequently ordered ones – garnishments and real estate liens, among others – may be ordered only by the courts of law and imposed by bailiffs.

Award

30 | When and in what form must the award be delivered?

Where the arbitrators are more than one, the award is rendered by the majority, unless the parties have agreed otherwise. The arbitrator who does not agree with the award shall set out a dissenting opinion in writing. If a majority cannot be constituted, the award is rendered by the presiding arbitrator. The award must contain reasons, unless the parties have agreed otherwise or it is an award rendered on agreed conditions. The award is signed by the arbitrator or the arbitrators. In the case of arbitration with the participation of more than one arbitrator, the signatures of the majority of the members of the arbitration tribunal shall be considered sufficient if the signatories have stated the reason for the missing signature. An award by consent may be pronounced on the basis of a joint request of the parties enclosed with the settlement agreed upon. There is no need to provide reasons in this case.

Appeal

31 | On what grounds can an award be appealed to the court?

The award may be challenged only on limited grounds, which are equal to those prescribed by the UNCITRAL Model Law and the European Convention on International Commercial Arbitration, and only within a limited period of time – three months from the day on which the claimant received the award. The grounds for challenging the award are listed in article 47 of the ICAA and are the following:

- the party lacked capacity at the time of the conclusion of the arbitration agreement;
- the arbitration agreement had not been concluded or is void pursuant to the law chosen by the parties and, in the case of an absence of such a choice, pursuant to this law;
- a party had not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or, due to reasons beyond its control, it could not participate in the proceedings;

Read this article on Lexology

- the award settled a dispute that had not been provided for in the arbitration agreement, or contains decisions on issues beyond the scope of the dispute; or
- the constitution of the arbitration tribunal of the arbitration procedure was not in conformity with the agreement between the parties unless it contradicted the imperative provisions of this law (ie, the ICAA) and in the absence of an agreement in the case that the provisions of this law had not been applied

It should be noted that, in the latest amendments to the ICCA, article 47, paragraph 2 provides that arbitration decisions handed down in disputes, the object of which is not subject to arbitration, shall be void.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The New York Convention was signed by Bulgaria on 17 December 1961 and has been in force since 8 January 1962. Upon ratification, Bulgaria made a reservation pursuant to article 1, paragraph 3, item I of the convention, so that the New York Convention is applicable to arbitral awards issued in the territory of another contracting state. It is applied in respect of awards issued in the territory of non-contracting states on the basis of strict reciprocity (ie, only to the extent to which those states grant reciprocal treatment of Bulgarian arbitral awards).

The relevant national legislation is the ICAA. Article 51, paragraph 2 of the ICAA refers to the international instruments to which Bulgaria is a party in respect of the recognition and enforcement of foreign arbitral awards. As a result, no implementing legislation has been enacted. The New York Convention is directly applied by the Bulgarian courts and thus any risk of incorrect implementation in the national legislation has been avoided.

Costs

33 | Can a successful party recover its costs?

The parties can agree on the allocation of costs. Where agreement is not reached, the arbitral tribunal can decide on costs at its own discretion and in accordance with the rules of the relevant arbitral institution. The allocation of costs is based on the principle that the costs (arbitration fees and expenses, expenses for gathering evidence, and reasonable attorneys' fees made) are to be borne by the unsuccessful party. There are no statutory restrictions on third parties funding claims. It is the obligation of the party that brings the claim to provide evidence for the payment of the applicable fee and the source of the funds is not examined. Contingency fees are legal and are used in Bulgaria in relation to civil and commercial claims in front of national courts. To the best of our knowledge, there are no professional funders active in the Bulgarian market for legal services.

Read this article on Lexology

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

In the past few years, large commercial enterprises have come to typically prefer arbitration as a faster and more efficient dispute resolution method. Arbitration is governed by the Bulgarian International Commercial Arbitration Act, which is based on the UNCITRAL Model Law. Mediation has been recently more widely advertised as an alternative dispute resolution (ADR) method but, due to some imperfections of the Bulgarian Mediation Act, it is not typically used. The Mediation Act implements Directive 2008/52/EC on mediation in civil and commercial matters.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no requirement for the parties to litigation or arbitration to consider ADR before or during proceedings. ADR applies only upon the agreement of the parties.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Bulgarian legislation encourages dispute resolution through an agreement between the parties. The court shall invite them to conclude an agreement several times during the litigation proceedings. Moreover, according to article 78, paragraph 9 of the Civil Procedure Code, if the case is finalised by an agreement, half of the deposed state fee shall be paid back to the claimant. The court agreement shall have the effect of an effective decision and shall not be subject to appeal before a higher instance.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Under article 124 of the Constitution of Bulgaria, the Supreme Court of Cassation shall exercise supreme judicial supervision as to the accurate and equal application of the laws by all courts. According to article 124, paragraph 1 of the Judiciary System Act, the colleges of the Supreme Court of Cassation shall in presence of contradictory or erroneous jurisprudence on the interpretation or application of the law adopt an interpretative judgment. These are binding on judicial and executive bodies, on local government bodies and on all bodies that issue administrative acts. Some of the key cases of the past year are the following:

- Interpretative Decision No. 3 of 5 January 2022 on Interpretative Case No. 3/2020 of the Supreme Court of Cassation;
- Interpretative Decision No. 5 of 21 January 2022 on Interpretative Case No. 5/2019 of the Supreme Court of Cassation;
- Interpretative Decision No. 2 of 18 March 2022 on Interpretative Case No. 2/2020 of the Supreme Court of Cassation;
- Interpretative Decision No. 4 of 14 April 2022 on Interpretative Case No. 4/2019 of the Supreme Court of Cassation;
- Interpretative Decision No. 1 of 27 April 2022 on Interpretative Case No. 1/2020 of the Supreme Court of Cassation;
- Interpretative Decision No. 2 of 23 June 2022 on Interpretative Case No. 2/2018 of the Supreme Court of Cassation; and
- Interpretative Decision No. 4 of 23 November 2022 on Interpretative Case No. 4/2021 of the Supreme Court of Cassation.

Tsvetelina Dimitrova ts.dimitrova@georg-tod.com
Petya Stankova pstankova@georg-tod.com

27 Parchevich, PO Box 151, Sofia 1463, Bulgaria
Tel: +359 2 937 65 27
www.georg-tod.com

Read more from this firm on Lexology

Read this article on Lexology

Cayman Islands

[Paul Kennedy] and [Katie Logan]
Campbells

RETURN TO CONTENTS

Summary

LITIGATION	102
Court system	102
Judges and juries	102
Limitation issues	103
Pre-action behaviour	103
Starting proceedings	103
Timetable	104
Case management	105
Evidence – documents	105
Evidence – privilege	105
Evidence – pretrial	105
Evidence – trial	106
Interim remedies	106
Remedies	106
Enforcement	107
Public access	107
Costs	107
Funding arrangements	108
Insurance	109
Class action	109
Appeal	110
Foreign judgments	110
Foreign proceedings	111
ARBITRATION	**111**
UNCITRAL Model Law	111
Arbitration agreements	111
Choice of arbitrator	111
Arbitrator options	112
Arbitral procedure	112
Court intervention	112
Interim relief	113
Award	113
Appeal	114
Enforcement	114
Costs	115
ALTERNATIVE DISPUTE RESOLUTION	**115**
Types of ADR	115
Requirements for ADR	115

Read this article on Lexology

MISCELLANEOUS 116
Interesting features 116

UPDATE AND TRENDS 116
Recent developments and future reforms 116

LITIGATION

Court system

1 What is the structure of the civil court system?

The main civil court of first instance is the Grand Court of the Cayman Islands (the Grand Court), which sits full-time with between six and eight judges, recruited from the Cayman Islands and other Commonwealth jurisdictions. The Grand Court has a specialist Financial Services Division, which deals with cases concerning mutual funds, exempt insurance companies, financial services regulatory matters, applications relating to trusts, corporate and personal insolvency, enforcement of foreign judgments and arbitral awards and applications for evidence pursuant to letters of request from other jurisdictions. Grand Court cases are almost always dealt with by a judge sitting alone. Certain small civil claims worth less than CI$20,000 can be dealt with by a magistrate in the Summary Court.

Appeals from the Grand Court are heard in the Cayman Islands Court of Appeal (the Court of Appeal), which generally sits three or four times a year (and can, on payment of enhanced fees, be convened more often to deal with urgent matters). The Court of Appeal has a bench of approximately six justices of appeal, all of whom are recruited from outside the Islands and are usually sitting or retired Superior Court judges or justices of appeal from other Commonwealth nations. The Court of Appeal usually sits with a panel of three justices of appeal.

Appeal from the Court of Appeal is to the Judicial Committee of the Privy Council in London (the Privy Council).

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

Proceedings are usually adversarial in nature, and the judge does not normally have an inquisitorial role. The judge will listen to the evidence and legal submission of the parties, and make a reasoned decision, which is often handed down in written form.

Judges are selected in accordance with Part V of the Constitution. Judges and magistrates are appointed by the Governor, acting on the advice of the Judicial and Legal Services Commission. Positions are advertised openly, in many Caribbean and Commonwealth jurisdictions (including the United Kingdom). The selection process takes the form of a significant application form, shortlisting and interview. There are no specific diversity initiatives, but the Constitution contains a prohibition on discrimination, and the international nature of the candidates tends to favour a diverse bench in any event.

Read this article on Lexology

Section 21 of the Judicature Act provides that a party may apply for the case to be tried by a jury (of seven), but this course of action is exceptional. Juries are selected from registered electors and must be under the age of 70. Sections 8 to 21 of the Judicature Act set out a comprehensive process for the selection of jurors. Attorneys who are actively engaged in litigation practice are among those persons exempt from jury service.

Limitation issues

3 | What are the time limits for bringing civil claims?

The Limitation Act provides that the time limit for bringing civil claims in tort (apart from defamation and personal injuries) and contract is six years from the date of accrual of the cause of action. Claims brought in equity (such as claims for breaches of fiduciary duty) will usually be subject to a six-year period by analogy. Claims brought in relation to documents under seal have a 12-year limitation period. The time limits may be extended in cases of fraud or deliberate concealment of the facts giving rise to a claim.

It is possible for parties to enter into 'standstill' agreements, to suspend the running of time, and a party may elect not to take advantage of a limitation defence if it wishes.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There are no formal or mandatory pre-action steps that must be undertaken prior to the issue of proceedings. Although a party's pre-action conduct might be a factor that the court takes into account at the conclusion of the proceedings in the exercise of its discretion when making costs orders. Parties may bind themselves by contract to seek to resolve disputes by mediation or other forms of alternative dispute resolution before issuing proceedings if they choose to do so.

There is only very limited scope for compelling pre-action discovery. In rare cases, usually where a complainant knows that a wrong has been committed against him or her but is unaware of the precise identity of the wrongdoer, and a third party, through no fault of his or her own, has become embroiled in the tortious act, the court may order the third party to disclose information concerning the tort and the wrongdoer by making a *Norwich Pharmacal* order, following a line of cases first developed in England. *Anton Piller* (or search) orders are also available in appropriate cases.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Most civil claims are commenced by the issue of a writ by the plaintiff, with certain actions being started by originating summons (in cases where the facts of the matter are unlikely to be in dispute, or where that procedure is required by legislation). Insolvency proceedings are begun by petition. It is the plaintiff's (or petitioner's) responsibility to serve the other

parties with the originating process once it has been issued by the court office. Originating documents are generally valid for four months from the date of issue (or six months, where the document is required to be served abroad and permission is granted by the court to do so). The originating process must generally be served personally by delivery to the hands of the individual. The originating process may be served on a Cayman Islands company by delivery to its registered office in the Cayman Islands. If a party cannot be found, the plaintiff may apply to the court for permission to serve the document by an alternative method, for example, by advertisement in a local newspaper.

The courts generally have capacity to handle their caseload, and 'acting' judges can be and often are appointed on a temporary basis by the Governor to ensure that sufficient judges are available. The most pressing issue concerning the capacity of the courts is a lack of sufficient and adequate courtrooms. It is acknowledged by the government that additional modern court facilities are required and a building has been acquired for that purpose, but it is not yet clear when those facilities will be ready and available for use.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

In an action commenced by writ, the plaintiff must prepare a 'statement of claim' setting out the facts upon which his or her cause of action is based. This statement of claim may either be endorsed on the writ or presented as a separate document (known as a 'pleading'). If the statement of claim is not endorsed on the writ, the writ must contain a short statement giving sufficient information to the defendants to identify what the action is about (known as a general endorsement). Once the writ is served, the defendants have 14 days (or longer if the writ is served abroad) to file an acknowledgement of service with the court office. Once that is done, if the statement of claim was served with the writ, the defendant has 14 days (or such other period as the parties agree or the court directs) to file and serve a defence, which may also include a counterclaim. The plaintiff has a period of time (again, 14 days or such other period as the parties agree or the court directs) to file and serve a reply and defence to counterclaim if necessary. At this point, the pleadings are deemed to be closed and the plaintiff must file a summons for directions with the court within one month. The summons for directions is the parties' opportunity to formulate a timetable for the remainder of the action. They may either agree or seek directions for discovery of documents, oral discovery and interrogatories (if any), exchange of witness statements and experts' reports (if required) and a pretrial timetable for the preparation of trial documents, legal submissions and other matters. Simple cases can be completed in this way in a fairly short timescale (say, six to nine months), but complex matters, particularly if they are multi-party and multi-jurisdictional, can take much longer.

Matters begun by originating summons and by petition are usually dealt with on the basis of affidavit rather than oral evidence, and can often be completed more quickly. A key factor in the length of time it takes to complete a case is the availability of court time, which can be limited.

Case management

7 | Can the parties control the procedure and the timetable?

To a large extent, they can. The parties will often agree the case management timetable without the need for a hearing on the summons for directions and can agree to vary the timetable by consent while it is running its course. In the event of non-compliance with a timetable, the parties can apply to the court for orders imposing sanctions ('unless' orders) in the event of further non-compliance.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Preservation and discovery of relevant documents form an important part of the litigation process. An attorney has a personal obligation as an officer of the court to ensure that his or her client complies with his or her obligations concerning discovery, including the obligation to disclose all relevant documents as opposed to just those that help the client's case or harm their opponent.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Several categories of documents attract privilege, including legal advice privilege (legal advice that would be privileged whether or not litigation was in train), litigation privilege (which protects documents generated as a result of contemplated or pending litigation), without prejudice (which is a form of privilege preventing production of communications aimed at settling disputes) and the privilege against self-incrimination. Legal advice (as opposed to other more general advice) given by in-house counsel will be protected by legal professional privilege provided that the circulation group is sufficiently contained so that the dissemination of the advice within an organisation cannot be construed as a waiver of that privilege.

Documents that are confidential and fall within the scope of the Confidential Information (Disclosure) Act 2016 may not be disclosed without the permission of the party to whom the confidence attaches, unless the court orders otherwise.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Generally speaking, yes. It is usual at the summons for directions stage for the parties to agree, or the court to order, that statements of witnesses of fact be mutually exchanged on a certain date after time for consideration of documents and information obtained by discovery. Thereafter, a timetable will be set for the exchange of experts' reports, which

can either be simultaneous or sequential, depending on the nature of the case; for without prejudice meetings of experts to take place to attempt to narrow the issues in dispute; and for the composition of a joint statement of experts of like discipline to set out areas on which they are agreed and on which they disagree, and if they disagree, the reasons why. It is then often agreed or directed that the experts may serve supplemental experts' reports dealing with matters that have arisen during the course of their discussions.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The principal method for giving evidence at trial, whether factual or expert, is orally in person. Facilities can be made available for overseas witnesses to give their evidence remotely via a video connection. Each witness will give his or her evidence-in-chief (usually by confirmation that the matters set out in his or her written, signed statement or report are true to the best of his or her information and belief, making any corrections or clarifications and usually being asked a few questions by his or her own counsel). The witness will be cross-examined by opposing counsel, before being asked questions by his or her party's counsel in re-examination, where questions are limited to clarifying or correcting matters that have arisen in cross-examination.

Interim remedies

12 | What interim remedies are available?

A broad range of interim remedies is available, including freezing injunctions, *Norwich Pharmacal* (disclosure) orders and orders for interim payments. As a result of a series of cases in 2015, the Grand Court Act and Grand Court Rules were amended to provide that the court may now grant interim relief in the absence of substantive proceedings in the Cayman Islands (free-standing relief), to make it easier for the court to grant interim relief in support of foreign proceedings.

The Grand Court Rules also permit a number of other interim remedies, such as applications for default and summary judgment, and applications to strike out proceedings or pleadings on various grounds.

In corporate insolvency proceedings, liquidators may be appointed on a provisional basis, either for the purpose of promoting a restructuring (and avoiding an official liquidation) or to protect assets or prevent mismanagement pending the hearing of the winding-up petition.

Remedies

13 | What substantive remedies are available?

Apart from damages, the court has jurisdiction to grant a number of other remedies, including permanent injunctions, declarations, accounts and enquiries and restitutionary remedies. Aggravated and exemplary damages are available but rarely awarded. Interest is

payable on damages either pursuant to contractual arrangements (if any) or at a statutory rate (which is varied from time to time) pursuant to the Judicature Act.

Corporate insolvency procedures may lead to winding-up orders, or a range of alternative orders pursuant to section 95(3) of the Companies Act, if grounds for winding up are established, but the court is of the view that another remedy, such as the purchase of the petitioner's shares, is more appropriate.

Enforcement

14 | What means of enforcement are available?

Enforcement of money judgments within the jurisdiction can be undertaken by way of execution against goods (a writ of *fieri facias*), garnishee proceedings (to capture sums owed by third parties to the judgment debtor), charging orders over real estate or other property, such as shares in Cayman Islands companies (which lead to orders for the sale of the property), the appointment of a receiver, sequestration or attachment of earnings. Disobedience of a court order such as an injunction can lead to committal to prison. Winding-up or bankruptcy proceedings can also be started using a judgment debt (and on other grounds).

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Trials of writ actions and final hearings of petitions and originating summonses (ie, most cases) are held in open court and are accessible by the public. When a trial or hearing takes place by video conference, which has become common since the covid-19 pandemic, the hearing is played live in a courtroom. Other hearings, including most applications for directions, interim relief and case management, are held in chambers, but members of the public may apply to the court for permission to attend, or can attend by agreement of the parties.

Writs and other originating process and judgments are open to inspection by the public. Other court documents are not generally available to members of the public, but those interested can apply to the court for permission to inspect the court files. The clerk of the court may determine those applications administratively unless he or she considers that the matter should be referred to a judge. The applicant must provide a concise statement of the reason for the request to inspect. In winding-up proceedings, the court file is open to specified categories of persons (including admitted creditors and shareholders), but not to the public.

Costs

16 | Does the court have power to order costs?

The court has power to order costs, and has very wide discretion in so doing, although the presumption is that the losing party will pay the successful party's costs. Unless the amount of costs is agreed between the parties, the costs are referred to the clerk of the court, or his

or her nominee, for assessment by way of taxation, pursuant to Order 62 of the Grand Court Rules and the Court Costs Rules and Practice Directions.

Costs are payable either on the standard basis (the successful party bearing the burden of showing that its costs were reasonable), or on the indemnity basis if the court is satisfied that the paying party has conducted the proceedings (or that part of them to which the costs order relates) improperly, unreasonably or negligently. If indemnity costs are awarded, the burden of proof shifts to the paying party to establish that the costs were unreasonable. If standard costs are awarded, the Court Costs Rules provides upper limits for the hourly rates of attorneys based on seniority, and for certain disbursements. Rules exist to prevent the duplication of effort by attorneys if overseas attorneys (usually Queen's Counsel) are retained. Brief fees and refreshers (barrister's per diem rates) are not recoverable, and barristers' time must be accounted for in time units.

The court has power to order a claimant to provide security for costs on application by the defendant and frequently does so, although awards for security for costs against foreign plaintiffs are generally limited to a relatively nominal sum equivalent to the cost of registering a costs order in a foreign jurisdiction for enforcement. It also has power to order a defendant to provide security for the costs of a counterclaim. Interim costs orders have become frequent since their introduction to the Grand Court Rules.

The current costs regime was introduced in 2002 and has been amended (albeit not significantly) from time to time.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The rules in relation to litigation funding arrangements in the Cayman Islands have been revolutionised by the passing of the Private Funding of Legal Services Act, 2020 (the Act) and Private Funding of Legal Services Regulations (2021) (the Regulations). Part 4 of the Act repeals any offence or tort under the common law for maintenance or champerty. The Act also allows for litigation funding and conditional fee agreements to be entered into without court approval and, importantly, permits contingency fee arrangements for the first time. The previous common law rules, which we described in previous editions of this guide, no longer apply.

The Act governs contingency fee arrangements (CFAs) (the definition of which includes conditional fee agreements) and litigation funding agreements (LFAs). The Act defines the 'proceedings' to which it applies broadly as including those before any court or comparable tribunal or functionary, and includes arbitration proceedings.

A CFA is an agreement providing for some or all of an attorney's fees to be payable at the conclusion of the case only if the relevant litigation is successful, typically providing for a 'success fee' payable to the attorney.

Part 2 of the Act confirms that an attorney may enter into a CFA with a client under which the attorney's remuneration is contingent (in whole or in part) on the successful disposition or completion of the matter. Section 4 records that restrictions are imposed by the Regulations on the percentage of any recoveries or property in which an attorney may participate (being 33 per cent of the total amount awarded or value). However, under section 4(4), an attorney and client may jointly apply for a court sanction to approve a CFA that contravenes these restrictions. The court may consider any relevant factors, but must have regard to the nature and complexity of the proceeding and the expense and risk involved in the proceeding, and in any event cannot approve a CFA under which the attorney would receive more than 40 per cent of the total award or proceeds recovered.

An LFA is defined in subsection 16(1) of the Act as an agreement under which a funder agrees to fund in whole or in part the provision of legal services to a client by an attorney under which the client agrees to pay a sum to the funder in specified circumstances.

Subsection 16(2) requires that an LFA be in writing; that it complies with any prescribed requirements in the Regulations; and that the sum to be paid by a client (upon success) shall include either any costs payable to the client in relation to the relevant proceedings, and an amount calculated by reference to the funder's anticipated expenditure, or a percentage of the recoveries or property.

These are significant and welcome changes that are likely to impact the litigation landscape in the Cayman Islands for many years to come. Anecdotal evidence suggests that CFAs have not yet come into widespread use and only a small number of firms are so far willing to offer them.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance, whether before or after the event, is permissible and is gradually becoming more and more common.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The Cayman Islands do not have a form of 'class action' as the term is understood in the United States. However, it is possible for parties with the same interest in proceedings to bring 'representative proceedings', in which one person acts as the plaintiff on behalf of the group. Defendants can also be sued in a representative capacity. Use of this procedure in the Cayman Islands has, historically, been rare in ordinary litigation, although it is adopted more regularly in insolvency proceedings.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties have an appeal from a 'final' order (eg, a judgment following a trial) as of right. Appeals from interlocutory or interim orders are possible with the permission of the court, which must initially be sought from the first instance Grand Court judge at the hearing of the application in question, or by way of summons within 14 days of the decision appealed against. The applicant must show that there are arguable grounds for appeal, whether as a result of an error of law or fact, or mixed fact and law.

If the Grand Court judge refuses permission, a written, and then an oral, application may be made to the Court of Appeal.

The Court of Appeal Rules were significantly improved and updated in 2014, particularly with regard to the procedures for obtaining leave to appeal. Leave must be obtained to appeal from the Court of Appeal to the Privy Council, either confirming the appellant's right to appeal or granting special leave. In a number of recent cases, the Court of Appeal has denied special leave to appellants who must then apply separately to the Privy Council for special leave, which is only granted where there is an arguable point of law of general public importance.

The Privy Council has issued a series of detailed amended Practice Directions governing its procedures, and these are available on its website.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments are currently enforced at common law by the issue of a writ based upon the unpaid foreign judgment debt. These proceedings must be initiated in the Financial Services Division.

These judgments are generally enforceable where they are rendered by a court of competent jurisdiction, final and conclusive, and of a nature that the principles of comity require the domestic court to enforce.

The Law Reform Commission has suggested various amendments to the largely redundant Foreign Judgment Reciprocal Enforcement Act (which only applies to certain courts of Australia) to place matters on a solid statutory footing and make reciprocal recognition of foreign judgments more easily available. These have not yet found favour with the legal and financial services community, and a bill put forward in 2014 to legislate for these changes has not yet been enacted.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Apart from the interim orders referred to above, and subject always to the provisions of the Confidential Information (Disclosure) Act also referred to, the Grand Court will supervise formal letters of request from foreign courts and will also conduct depositions pursuant to letters of request in some circumstances pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (SI 1978/1890), which extended to the Cayman Islands the provisions of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 2012 is based on the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Generally speaking, an enforceable agreement must be in writing and signed by the parties, or contained in a series of communications that provide a record of the agreement. Arbitration agreements can also arise if pleaded in a court document and not denied by the opposing party. Further, if parties agree orally by reference to terms that are in writing and that incorporate an arbitration clause, the arbitration clause is deemed to be an agreement in writing.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the contract is silent as to the appointment of an arbitrator, the parties are free to agree the identity and number of arbitrators. If they cannot do so, the Arbitration Act provides for a default position of a single arbitrator. If the parties are unable to agree on the identity of an arbitrator or arbitrators, the Arbitration Act provides for the 'appointing authority' (currently the Grand Court) to appoint the arbitrators on application and with regard to a number of factors. These include the subject matter of the dispute, the availability of the arbitrator, the identity of the parties, any suggestions made by the parties, any qualifications requested by the agreement of the parties and any other factor likely to secure the appointment of an independent and impartial arbitrator.

Sections 18 to 20 of the Arbitration Act provide a mechanism to challenge the appointment of an arbitrator on grounds of lack of impartiality, independence or agreed qualifications, ill health, failure or refusal to conduct the proceedings or delay. The application is made to the tribunal in the first instance, and then to the Grand Court, Financial Services Division. There is no appeal from an order of the Grand Court in this instance.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties are free to choose their arbitrators, and in default, the court may do so. The parties are not limited to arbitrators who are based in the Cayman Islands, and may choose from the wide pool of arbitrators available internationally. However, there are a number of qualified and experienced arbitrators available in the Cayman Islands, most of whom are members of the Cayman Islands Association of Arbitrators and Mediators, or the Cayman Islands' chapter of the Chartered Institute of Arbitrators. The pool of arbitrators available is therefore wide and would meet the needs of complex arbitration.

Consistent with the shift towards the greater use of arbitration, the Cayman International Arbitration Centre is expected to open its doors in the near future, providing world-class specialist hearing facilities, its own arbitration rules and case administration services.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Act provides in general terms that the tribunal shall act fairly and impartially, allow each party a reasonable opportunity to present their case, conduct the arbitration without unnecessary delay and conduct the arbitration without incurring unnecessary expense. It also provides for majority decisions in tribunals with more than one member if the parties so agree. Other than those general guidelines, the parties are largely free to agree the procedure and rules of evidence and law to be adopted by the tribunal. If they do not agree, the Arbitration Act contains a series of default procedures and powers that the tribunal must adopt.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Apart from the provisions concerning the appointment and removal of the tribunal, the court has a number of powers in relation to the conduct of an arbitration, including to:

- stay legal proceedings brought in contravention of an arbitration agreement;
- order that interpleader proceedings be determined in accordance with any relevant arbitration agreement;
- extend time for commencing arbitration proceedings if limits imposed by the contract would cause undue hardship;
- review a tribunal's positive finding as to its own jurisdiction;

- enforce a tribunal's orders and directions, including security for costs and interim relief;
- issue a subpoena to compel a witness to attend at arbitration and to compel that person to attend before the court for examination if he or she fails to comply or produce documents;
- order security for the amount in dispute;
- grant interim relief, including for prevention of dissipation of assets (or grant any other interim injunction or interim measure);
- enforce interim measures granted by the tribunal;
- extend the time for making an award;
- enforce consent awards;
- assess (tax) the costs of the arbitrator in certain circumstances;
- make awards of costs if arbitration proceedings are aborted and make provision for the costs of the arbitration so that an award may be released;
- order property recovered as a result of the arbitration to stand as security for legal fees;
- determine any substantial question of law in the course of the proceedings;
- enforce the award as if it were a judgment of the court; and
- set aside the award if a New York Convention ground is made out.

Many of these powers can be excluded by agreement of the parties.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless the parties agree otherwise, the tribunal has power, by section 44 of the Arbitration Act, to:

- grant interim relief to maintain or restore the original position of a party pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Award

30 | When and in what form must the award be delivered?

Unless otherwise agreed by the parties, the tribunal may make more than one award at different points in time during the proceedings. If it makes multiple awards, the tribunal must specify in the award the issue, claim or part of a claim that is the subject matter of a particular award.

Awards are required to be in writing and signed – in the case of a sole arbitrator, by the arbitrator him or herself or, in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators if the reason for any omitted signature is stated. The award must give reasons for the decision, unless the parties have agreed that reasons are not necessary or the award is an award on agreed terms. The date of the award and the seat

of the arbitration must be stated in the award and the award will be deemed to have been made at the place of the arbitration.

After the award is made, a copy of the award signed by the arbitrators must be delivered to each party. At the request of any party to an arbitration agreement, the appointing authority may certify an original award registered with it, certify a copy of any relevant original arbitration agreement or arrange for the translation and sworn certification of any award or agreement not stated in the English language.

Appeal

31 | On what grounds can an award be appealed to the court?

The parties may contract out of the right to appeal if they wish, but if they do not, a party may, with the permission of the Grand Court, appeal to the Grand Court on a question of law arising out of an award. The Arbitration Act sets out a number of factors to be considered by the court when granting permission to appeal, and the Grand Court may not grant permission unless it is satisfied that:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one that the arbitral tribunal was asked to determine; and
- on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong; or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt, and, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The order made on such an application is appealable only with further leave of the Grand Court or with leave of the Court of Appeal, but the Court of Appeal may only grant leave if it is satisfied that the point of law concerned is one of general importance, or that there is some other special reason that it should be considered by the Court of Appeal. Final appeal rests with the Privy Council.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A domestic award made by an arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is given, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked jurisdiction to make the award. In relation to foreign arbitral awards, the provisions of the Foreign Arbitral Awards Enforcement Act 1997 enact the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into Cayman Islands law. An action on the award may also be commenced by writ. There have been no recent changes in enforcement procedures.

Costs

33 | Can a successful party recover its costs?

Unless a contrary intention is expressed, every arbitration agreement shall be deemed to include a provision that the costs of the arbitration shall be at the discretion of the arbitral tribunal. The tribunal would usually follow the same principles as to the award of costs as applied by a judge.

The parties are free to agree the costs that might be recovered. In the absence of agreement, the losing party will normally be ordered to pay the successful party' legal costs and disbursements (taxed by the arbitrator if necessary) and the costs and expenses of the tribunal. There has been no decision in the Cayman Islands concerning the recovery of third-party funding costs incurred as a result of arbitration. However, it is possible that the court would follow the decision of the English Commercial Court in *Essar Oil Fields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), in which the judge held that the words 'other costs' in section 59(1)(c) of the Arbitration Act 1996 were broad enough to encompass third-party funding costs. While we would expect the court to be sympathetic to parties seeking to claim these costs, the Arbitration Act 2012 does not include a provision similar to the English provision, and accordingly, it is by no means a foregone conclusion that they could be recovered without the agreement of the parties.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative dispute resolution (ADR) is a relatively new concept in the Cayman Islands and is taking some time to reach critical mass. There is a Cayman Islands Association of Mediators and Arbitrators, which is willing to act as an appointing body, but the number of appointments to date has been quite small. A mediation scheme for family cases has been developed by the Judicial Administration. A small number of commercial mediations take place, but they are by nature confidential, and it is difficult to obtain firm information on numbers.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is currently no mandatory requirement to attempt ADR prior to or during litigation or arbitration and no power to compel parties to attempt it. Parties may bind themselves by contract to do so if they wish. If requested by all parties, the court or tribunal may stay the proceedings for ADR to be attempted. The Grand Court has introduced practice directions

for the use of judicial mediation although the authors are not aware of judicial mediation having been employed to date.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Grand Court Rules are based upon the Rules of the Supreme Court of England and Wales 1999, modified accordingly. There has been no attempt at a wholesale reform of court procedures as happened in England and Wales with the adoption of the Civil Procedure Rules.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Recent changes to the Cayman Islands' restructuring regime for companies, which came into force on 31 August 2022, introduced rules allowing for the appointment of a dedicated 'restructuring officer'. This replaces the provisional liquidation regime (which had previously been used where a company was pursuing restructuring) and resolves some of its difficulties – simplifying the process, reducing cost and promoting certainty of outcome.

Sir Anthony Smellie KC recently stepped down as Chief Justice of the Cayman islands after 25 years in the role. He was replaced by Chief Justice Margaret Ramsay-Hale.

Campbells

Paul Kennedy pkennedy@campbellslegal.com
Katie Logan klogan@campbellslegal.com

Floor 4, Willow House, Cricket Square, Grand
Cayman KY1-9010, Cayman Islands
Tel: +1 345 949 2648
www.campbellslegal.com

Read more from this firm on Lexology

Read this article on Lexology

China

Jan Holthuis and Li Jiao*
BUREN NV

RETURN TO CONTENTS

Summary

LITIGATION	118
Court system	118
Judges and juries	119
Limitation issues	120
Pre-action behaviour	121
Starting proceedings	121
Timetable	122
Case management	123
Evidence – documents	123
Evidence – privilege	124
Evidence – pretrial	124
Evidence – trial	125
Interim remedies	125
Remedies	126
Enforcement	127
Public access	128
Costs	128
Funding arrangements	129
Insurance	130
Class action	130
Appeal	131
Foreign judgments	131
Foreign proceedings	132
ARBITRATION	**133**
UNCITRAL Model Law	133
Arbitration agreements	133
Choice of arbitrator	134
Arbitrator options	135
Arbitral procedure	135
Court intervention	136
Interim relief	137
Award	137
Appeal	138
Enforcement	139
Costs	140
ALTERNATIVE DISPUTE RESOLUTION	**141**
Types of ADR	141
Requirements for ADR	141

Read this article on Lexology

Published July 2023

MISCELLANEOUS 141
Interesting features 141
UPDATE AND TRENDS 142
Recent developments and future reforms 142

LITIGATION

Court system

1 | What is the structure of the civil court system?

In China, the people's courts are judicial organs exercising judicial power on behalf of the state. In accordance with the Organic Law of the People's Courts, the people's courts are divided into:

- the Supreme People's Court;
- local people's courts at various levels; and
- specialised people's courts.

Local people's courts at various levels are divided into high people's courts, intermediate courts and primary people's courts. Specialised courts in China currently include military courts, railway courts, maritime courts, financial courts, intellectual property courts and internet courts.

China implements a court system characterised by four levels and two instances of trials.

'Four levels' refers to the four levels of courts divided based on their descending order of power, namely:

- the Supreme People's Court, located in Beijing, the premier appellate forum and court of last resort, which mostly hears cross-provincial cases;
- high people's courts, mostly at the level of provinces, autonomous regions and special municipalities;
- intermediate courts, mostly at the level of prefectures and municipalities; and
- primary people's courts, at level of autonomous counties, towns and municipal districts.

'Two instances of trials' means that each case has, at most, two trials. Once the litigants challenge the judgment of first instance made by a local court, they can appeal the case to the next higher level court only once. Once an appeal is filed, the appeal court must hear the case. The judges shall hear and give their determination on both fact-finding and law application.

The subject matter, nature or size of the claim will decide which level of court such claim shall be brought to for the first instance trial. For example, an intermediate people's court shall have jurisdiction as a court of first instance over the following types of civil cases:

- major cases involving foreign parties;

Read this article on Lexology

- cases with significant impact in the areas over which the courts exercise jurisdiction; and
- cases determined by the Supreme People's Court to come under the jurisdiction of the intermediate people's courts.

A high people's court shall have jurisdiction as a court of first instance over civil cases with significant impact in the areas over which they exercise jurisdiction.

The Supreme People's Court shall have jurisdiction as the court of first instance over the following types of civil cases:

- cases with significant impact on the whole country; and
- cases that the Supreme People's Court deems it should try by itself.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

In China, an inquisitorial system is adopted in the judicial system whereby the judges take dominant roles in trials and are actively involved in fact-finding by questioning the parties, advocates of the parties and witnesses. This is in contrast to the adversarial system adopted by most common law countries where the fact-finding process is controlled by the parties, and the judge or jury remains neutral and passive throughout the proceeding.

China's judicial system does not have a jury. The bench plays the role of both fact-finding and law application. There are two kinds of procedures at first instance trials. One is the formal procedure (officially translated as 'ordinary procedure') and the other is the summary procedure. The summary procedure is a simplified procedure that is used in the basic-level courts and their detached tribunals.

A summary procedure is usually presided over by a single judge or a panel, while a formal procedure is usually presided over by a three-judge collegial panel. Ordinary people (people's jurors) are sometimes chosen to adjudicate civil cases under the leadership of a professional judge. However, their role is different from that of a jury in the common law system. They enjoy the same rights as regular judges and hear cases on both fact-finding and application of the law.

Generally, people's jurors may be appointed to the collegial panel to participate in the trial of those cases:

- involving group interest;
- involving public interest;
- concerning the general public; and
- having other major potential social impacts.

People's jurors are selected from citizens who are not legal professionals with certain requirements for age, education and historical record of conduct. As every court has a list of eligible people's jurors, the selection process for each case is randomly carried out by a computer. In addition, for special cases for which people's jurors with specific professional

knowledge are required, the people's court may randomly select the jurors from people's jurors with the required professional knowledge.

Limitation issues

3 What are the time limits for bringing civil claims?

According to the Civil Code, effective as of 1 January 2021, the ordinary limitation period for civil claims is three years; although special rules, either shorter or longer than three years, will apply to certain types of disputes.

The limitation periods for some specific types of cases are set out by other laws as follows:

- claims for product liability: two years; and
- claims for disputes arising from an international contract for the sales of goods or a contract for the import and export of technology: four years.

The above limitation periods start from when the claimant knows or should have known the facts giving rise to his or her claim and who the accused is. In any event, if more than 20 years have passed since the date of the occurrence of facts giving rise to the claim, the court shall not offer any protection. However, there is an exception for product liability claims. The right to claim compensation for damage caused by defective products shall be void 10 years after the products are delivered to the first consumers, unless the product's expressly stated warranty is longer.

The law provides rules to suspend the limitation period if, within the last six months of the limitation period, a right holder is unable to exercise the right to claim owing to existence of any of the following obstacles:

- force majeure;
- the right holder with no or limited capacity for performing civil juristic acts has no legal representative, or his or her legal representative dies or loses the capacity to perform civil juristic acts or the right to representation;
- neither a successor nor an administrator of estate has been determined after the opening of succession;
- the right holder is controlled by the obligor or other persons; and
- other obstacles resulting in the failure of the right holder to exercise the right of claim.

The limitation period shall expire six months after the causes of such suspension are eliminated.

In addition to suspension, the limitation period can be interrupted according to law. The limitation period is interrupted if legal proceedings are initiated or if a party demands or agrees to the fulfilment of its obligations. The limitation period commences anew from the time of interruption and the limitation period can be interrupted repeatedly.

Article 197 of the Civil Code further regulates that the periods, calculation methods and reasons for suspension or interruption in respect of the limitation period shall be prescribed

by law, and those agreed by and between the parties shall be null and void. A party's prior waiver of the benefit of the limitation of action shall be null and void.

Furthermore, even if the statute of limitations has expired, the plaintiff can still file a lawsuit. The people's court shall accept the filing when the lawsuit is within the scope of civil lawsuits to be accepted and cannot voluntarily dismiss the plaintiff's claim on the ground that the statute of limitations has expired.

Pre-action behaviour

4 Are there any pre-action considerations the parties should take into account?

By law, generally, there are no mandatory pre-action requirements imposed before the civil proceeding can be issued, except for in the following cases:

- shareholder derivative lawsuits: the shareholder must first request the (board of) supervisors or the board of directors (executive director) to initiate the proceeding unless in the case of an emergency; and
- labour disputes: a labour dispute shall be first brought before the labour dispute arbitration committee for arbitration before proceeding to the court.

In practice, most civil disputes (suitable for mediation) will first be submitted to mediation. In Shanghai Courts, parties to the cases of labour dispute, road accident, family, small debt and other simple cases are required to go through the pre-litigation mediation. If no agreement is reached, then thle whole case will go to trial and the people's court will render a judgment without delay.

There are also some pre-action measures available to the party to assist in bringing an action. For example, for the purposes of a smooth investigation during the proceeding, the enforceability of the judgment and the suspension of damage caused to the party, such party can apply to the court for preservation of evidence, preservation of property and relevant injunctions before the action is initiated, depending on the circumstances and in the event of an emergency.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

On 1 May 2015, the case acceptance system was reformed from a case-filing review system to a case-filing registration system. Under the case-filing registration system, the proceeding will commence when the people's court registers and files the complaint by the claimant. The court decides whether to file and register the complaint by the claimant on the spot or within seven days at the latest. If the complaint is dismissed by the court, the claimant is entitled to appeal against the court's decision to the higher court within 10 days.

When the court decides to accept a filing, it must inform the parties, orally or in the notice of case acceptance or the notice of litigation response, of their rights and obligations to the

litigation. Within five days of its acceptance of a case, the court must deliver a copy of the complaint to the defendant, and the defendant must file a motion of defence within 15 days of receiving the copy of the complaint.

Chinese courts are advancing towards digitalisation with the introduction of an online case filing system. Many courts now offer the option of initiating proceedings online, while some even mandate it. The specific requirements may vary across different courts. For instance, the Qingdao Intermediate People's Court insists on claimants filing their cases through its online system. Similarly, any party applying for compulsory enforcement at the Shenzhen Intermediate People's Court is required to submit their application online.

According to the data released by the Supreme People's Court, the number of cases accepted by courts across the country reached 33 million in 2021, an increase of 170 per cent in 10 years. The volume of cases has always been an issue for judges, especially those in big cities. Capacity issues do not prevent the courts from listing disputes in a timely manner but they exert great pressures on judges, who have to work overtime to schedule hearings and render decisions.

Relieving the pressure on judges is one of the most important topics in judicial reform. To alleviate the capacity issues, it is recommended to increase the proportion of judges, hire more supporting personnel to deal with the greater caseloads, further promote the implementation of multiparty dispute resolution mechanisms, rationally divert cases through litigation source management and strengthen the pre-litigation mediation mechanism.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

A general procedure for a civil claim at first instance shall be concluded within six months of the commencement of the proceeding, which includes the following stages:

- starting proceeding: the civil proceeding starts when the complaint by the plaintiff is filed by the court;
- notice to the defendant and defence: within five days of the acceptance of the case, the defendant shall be given the notice of case acceptance and served with a copy of the complaint; the defendant must file a motion of defence within 15 days of receipt of the complaint; and the court shall deliver a copy of the motion of defence to the plaintiff within five days of the date it receives the motion of defence;
- collegial bench: the parties shall be promptly notified when the members of the collegial bench are decided;
- evidence submission: the period for evidence submission can either be decided by the parties, subject to court approval, or determined by the court (15 days minimum);
- counterclaims (if any): the defendant can file a counterclaim before the end of the period for evidence submission;
- hearing: the court shall notify the parties and other participants in the action three days prior to the hearing. During the court hearing, the procedure is generally divided into investigation of the facts, presentation of evidence and debate; and
- issuing judgment: if a judgment is pronounced in court, the written judgment shall be issued and delivered to the parties within 10 days. If a judgment is pronounced later on

a fixed date, the written judgment shall be issued to the parties immediately after the pronouncement.

If there is a need for an extension under special circumstances, an extension of six months may be granted, subject to the approval of the president of the court. If there is a need for a further extension, the approval of the higher-level court is required.

When special procedure is applied, the court shall conclude the adjudication within one month of the case being accepted or within one month of the expiration of the term set forth in the public announcement.

The period for the trial of foreign-related civil cases by courts shall not be subject to the aforementioned time limits and restrictions.

If a party fails to perform an effective judgment, the other party can apply to the court for enforcement. The time limit to apply for enforcement of a judgment is two years, calculated from the last day of the period specified in the written judgment. If the judgment does not specify the period of performance, the time limit shall be calculated from the day when the judgment takes effects. The laws regarding suspension and termination of the statute of limitation shall also be applicable here.

Case management

7 Can the parties control the procedure and the timetable?

The case management structure in the Chinese court system is established from the top down. An inquisitorial procedure is adopted in the Chinese judicial system in which the parties play a relatively minor role.

According to the Civil Procedure Law, civil litigation can be conducted online upon the consensus of all involved parties. The legal effect of online litigation is equivalent to that of traditional, offline litigation.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no compulsory or statutory duty for both parties to preserve evidence pending trial. Strategically, in civil litigation, one would benefit immensely from preserving evidence in a comprehensive manner.

Under the Civil Procedure Law, if evidence may be lost or it may be difficult to obtain evidence in the future, a litigant may apply to the people's court for the preservation of evidence during the proceedings. The people's court may also voluntarily adopt preservation measures. In urgent circumstances, an interested third party may also file the application. If the preservation measures might cause losses or restrictions of use and circulation to the evidence holder, the party applying for such evidence preservation shall be required by the people's court to provide corresponding security.

In Several Provisions on Evidence for Civil Actions (effective from 1 May 2020), when a litigant submits the documentary evidence and relevant documentations to the court, it must submit copies to the opposing parties. However, the parties are only responsible for sharing documents related to their burden of proof and are not required to provide any documentations related to the facts.

Furthermore, a party may apply to the people's court to order the other party to provide documentary evidence. That application will be approved if the party controls the documentary evidence and one of the following circumstances exists:

- documentary evidence has been cited by the party controlling the documentary evidence in the litigation;
- documentary evidence has been prepared for the interests of the applicant;
- there is documentary evidence that the applicant is entitled to consult or obtain in accordance with the law;
- there are account books and original vouchers for bookkeeping; or
- other circumstances under which the people's court deems that documentary evidence shall be submitted.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

'Privilege' often refers to attorney–client privilege, meaning a client's right to refuse to disclose, and to prevent anyone from disclosing, confidential communications between him or her and his or her attorney. The concept of 'privilege' does not exist in China, which means that legal advice from an attorney or an in-house lawyer is not protected or privileged.

Both the Lawyer's Law and the Civil Procedure Law stipulate that an attorney must keep public and commercial secrets and must not breach the privacy of the parties. However, article 75 of the Civil Procedure Law provides that any corporate entity or individual who has information about the case is obliged to testify in court. This means that an attorney may be forced to disclose or testify on confidential or privileged information in court.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Upon a court's acceptance of a case, both parties may be required to produce evidence in support of their claims or defence, including written evidence from witnesses and experts. This would be achieved by serving a court notice to each party, containing a statutory period for evidence submission. However, this period could be extended by submitting an application in due course. According to article 224 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China, a people's court may prepare for the hearing of a case by organising the exchange of evidence, holding a pretrial conference, etc, upon the expiration of the period for response.

Read this article on Lexology

If the parties apply for the exchange of evidence, the people's court may organise the exchange. For cases with more evidence or in complex cases, the people's court will organise it.

If the people's court finds that a hearing is required, the litigants may be required to define the focus of the dispute through the exchange of evidence. The date of the exchange of evidence shall be the date on which the duration for the presentation of evidence expires. The timing of the evidence exchange may be agreed upon by the parties through negotiation, subject to the approval of the people's court, or may be determined by the people's court. After the receipt of the evidence submitted by the other party, if there is any rebuttal evidence to be submitted, the people's court shall arrange for another exchange of evidence.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence should be presented at the stage of 'investigation', which is conducted by the people's court. In principle, each piece of evidence shall be presented in the original and cross-examined, unless the original cannot be provided for objective reasons, in which case a verified copy may be presented in lieu of the original. For each piece of evidence, cross-examination should be directed to and centred around three main aspects: authenticity, legitimacy and relevance.

The burden of proof lies with the party asserting the claim. Therefore, in most cases, the first obligor of evidence presentation is always the plaintiff, who must try his or her best to obtain evidence and present it in court. In some cases, the burden of proof shall be borne by the opposing party, the defendants. The most common cases of reversal of the burden of proof are as follows:

- in a dispute over a work-related injury, the employer must prove that it is not work-related, not the employee; and
- in a dispute over patent infringement of a new product, the alleged infringer must prove the difference between the product manufacturing methods.

It is compulsory for witnesses to testify and be cross-examined at trial unless witnesses are subject to exceptions. If a pretrial evidence exchange meeting is held, witnesses may also testify at the meeting. By contrast, an expert witness is only required to testify in court when the parties object or the court deems it necessary. If an expert is unable to attend the hearing for legitimate reasons, he or she must submit a written reply. The oral statement or the written reply, whether made at the hearing or in the pretrial meeting, will be deemed oral evidence.

Interim remedies

12 | What interim remedies are available?

Interim remedies refer to measures available to the parties before the final resolution of their legal dispute, mainly to prevent evidence, property or actions of the parties from being

damaged or dissipated. In accordance with the Civil Procedure Law, these interim remedies can be granted on an urgent basis before litigation is commenced, and the party must bring a lawsuit within 30 days of the date when a pre-action order is made.

Preservation of property, once initiated successfully, will often take the form of sealing up, detaining or freezing, thereby limiting any future transfer, removal or alteration of such assets without courts' prior approval. This preservation applies to both pre-action and post-action proceedings, which means a party may submit an application before or after a claim is formally brought to court. In this regard, preservation of property has similar characteristics and functions as freezing injunctions.

The aim of action preservation is to order one party to act or not to act in a particular way. Action preservation can be held before or after the commencement of the proceeding. However, currently, it is only possible in intellectual property disputes to reserve an act (injunction) before proceeding.

In addition, a court order may also be obtained for preserving relevant evidence if there is a high likelihood that the evidence would be destroyed or it would become difficult to locate its whereabouts. This could be achieved by sealing, detaining, taking photographs, making sound recordings or visual recordings, making reproductions, conducting authentication, forensic inspection or drawing up written statements.

A court adopting preservation measures may order the applicant to provide security, and if the applicant does not provide security, the court will rule that the application be thrown out. Preservation security includes real estate mortgage, deposit and property preservation liability insurance.

Such remedies are also available in support of foreign proceedings. Considering that overseas creditors usually do not have real estate in China, and the payment process of overseas funds to China is complicated, overseas entities can use property preservation liability insurance as a security method, which is convenient and efficient to operate.

For claims involving overdue alimony, maintenance, child support, medical expenses or employee payments, or other urgent matters, courts may issue a preliminary enforcement order. This means that a preliminary payment would be made from one party to the other before the merit of the case is officially adjudged. Conditions should be met before an order can be granted, considering both the applicants' dependence on life or impacts on business operation and the financial capacity of the party against whom the application is made.

Remedies

13 | What substantive remedies are available?

Depending on the nature of disputes, common substantive remedies include damages, declarations, permanent injunctions and specific performance.

In civil litigation, remedies are mostly compensatory, with punitive damages as an exception. However, according to the opinions of the Supreme People's Court on strengthening the punishment of intellectual property infringement, in the field of intellectual property, if

the circumstances are serious, the punitive damages claimed by the right holder shall be supported according to law and have a deterrent effect, increasing the importance of punitive damages against intentional infringement.

Interest is commonly payable, particularly when the outcome of the judgment is of a monetary nature. According to the different legal bases of substantive law and procedural law, interest can be divided into general debt interest and delayed performance interest. The former refers to the interest determined in the effective judgments in accordance with the substantive law (such as the Civil Code), and the latter refers to the interest that the enforced person needs to pay due to the delay in performance in the enforcement procedure according to article 253 of the Civil Procedure Law.

Enforcement

14 | What means of enforcement are available?

There are a wide variety of measures to enforce a judgment, including:

- to detain, freeze, transfer or sell judgment debtors' property;
- to withhold judgment debtors' lawful income in a proportionate manner;
- to evict judgment debtors from the house or land so occupied or used; or
- to compel performance or arrange third parties to perform at the expense of the judgment debtors, etc.

After the case enters the enforcement procedure, the court can take enforcement or restrictive measures against the person subject to the execution upon application or ex officio. For example, the court can:

- issue a property declaration order to force the person subject to enforcement to report in writing his or her savings, income, real estate, property rights and other property conditions within the time limit specified;
- summon (detain) the person subject to enforcement for questioning to find out his or her property situation and ability to perform his or her obligations;
- restrict the consumption of the person subject to enforcement when he or she fails to fulfil the payment obligation within the time limit specified;
- put the person subject to enforcement on the list of persons subject to enforcement for dishonesty;
- restrict the person subject to enforcement from leaving the country;
- fine or detain the person subject to enforcement;
- post a bounty announcement to find the enforceable property of the person subject to enforcement;
- publish in the media the information of the person subject to enforcement not fulfilling his or her obligations; and
- punish the person subject to enforcement with the crime of refusing to execute the judgment, if he or she was found to be capable of executing the judgment.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Hearings in civil proceedings must be accessible to the public, except for cases involving state secrets, privacy issues or topics otherwise stipulated under the law.

For divorce cases and cases concerning trade secrets, public hearings shall not be held if a prior application is filed by a party.

Court documents such as judgments and orders are available to the public via an official website. There are also other websites and databases from which judgments and orders can be downloaded. Other court documents, such as witness statements and pleadings, are generally not available to the public. With proper authorisation, qualified Chinese lawyers may have access to these documents following relevant procedural steps. Recording or duplicating these documents is permitted.

Costs

16 | Does the court have power to order costs?

According to article 6 of the Measures for Payment of Litigation Fees, the litigation fees that the parties shall pay to the people's court include: case acceptance fees, application fees (fees paid by the parties when applying for special litigation procedures, such as enforcement of judgment or preservation measures), transportation expenses, accommodation expenses, living expenses and loss of work allowances for witnesses, appraisers, translators and adjusters appearing in court on the date designated by the people's court. These litigation costs shall be borne by the losing party, unless the winning party voluntarily bears it. The amount of fees shall be determined by the court according to the unified national standards.

The court has no power to order attorney fees except for in the following two situations: (1) when the parties have agreed in a contract that when a dispute related to the contract occurs, the attorneys' fees incurred by the winning party shall be borne by the losing party, and the court may order the losing party to bear the attorneys' fees as agreed; or (2) when the law explicitly prescribes that the losing party shall bear the attorneys' fees of the winning party (a reasonable part, but not all). According to the laws and relevant judicial interpretation, among others, the following circumstances or types of cases belong to this situation: personal injury compensation cases, copyright infringement cases, trademark infringement cases, patent infringement cases, unfair competition cases, contract disputes in which the creditor exercises their right of revocation, and legal aid cases.

In China, the plaintiff is not required to provide security for the defendant's expenses during the litigation, but if the plaintiff applies to the court for preservation of the defendant's properties before or during the litigation, the court may order the plaintiff to provide certain security in accordance with the law.

Read this article on Lexology

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In China, there is a risk agency charging method that can be chosen by and between lawyers and clients. The risk agency charging method means: no win, no fee. The lawyer can charge a fixed amount or a certain percentage of the client's final realisation of the creditor's rights or the reduced debt. The total maximum amount of attorneys' fees charged must comply with the provisions of the Opinions on Further Regulating Lawyer's Service Fees:

- when the target amount is less than 1 million yuan, the total maximum amount of attorneys' fees charged must not exceed 18 per cent of the target amount;
- when the target amount is more than 1 million yuan but less than 5 million yuan, it must not exceed 15 per cent of the target amount;
- when the target amount is more than 5 million yuan but less than 10 million yuan, it must not exceed 12 per cent of the target amount;
- when the target amount is more than 10 million yuan but less than 50 million yuan, it must not exceed 9 per cent of the target amount; and
- when the target amount is more than 50 million yuan, it must not exceed 6 per cent of the target amount.

The risk agency charging method must not be applied in the following cases:

- marriage or inheritance;
- requests for social insurance benefits or minimum living security benefits;
- requests for child supports, alimonies, pensions, relief funds or compensation for work-related injuries; or
- requests for employment remunerations, etc.

China's legal system does not have any system or rules similar to the common law principles of prohibiting maintenance and champerty. Although there is no inherent legal obstacle to the development of third-party funding, the legitimacy of third-party funding is currently not legally clarified, and no regulatory measures have been taken.

In practice, a number of institutions provide third-party litigation support services, which include formulating litigation plans through case background investigation and risk assessment, bearing various expenses of the case, obtaining corresponding benefits based on the outcome of the case and providing litigation support for lawyers. Bangying Litigation Investment, established in 2015, and the Dingsong Commercial Dispute Resolution Platform, established in 2016, are examples of such institutions.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal cost insurance in China is not as developed as in some Western countries, and it is rarely used in litigation.

However, the mechanism of liability insurance for property preservation in litigation has developed rapidly and is being used more and more in litigation. In liability insurance for property preservation, the applicant for property preservation purchases liability insurance products from an insurance company whose qualifications are recognised by the court, and the insurance company issues a letter of guarantee to the court to assume the property damage caused to the defendant if the preservation proves to be wrong.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Under the Civil Procedure Law, there are concepts of 'joint action' and 'representative action'.

If there are two or more parties on one or both sides, the subject matter of the action is the same or of the same category and the court considers that the case can be tried as a joint action, the case shall be tried as a joint action, subject to the consent of the parties.

Representative action is a kind of joint action. In a representative action, one party consists of numerous persons and the action may be brought by a representative elected by these persons. The procedural acts of this representative shall be binding on all members of the party that he or she represents. However, before the representative changes or relinquishes the claims, or recognises the claims of the opposing party or participates in mediation, the consent of the parties he or she represents must be obtained. In China, collective actions mostly occur in labour disputes, especially in cases of equal pay for equal work.

A recent steady development of class actions has occurred in the securities industry. Article 95 of the new Securities Law, promulgated on 28 December 2019, basically follows the provisions above on joint action and representative action. When an investor files a securities civil compensation lawsuit pertaining to a false statement or other legal grounds, if the subject matter is of the same type and there are multiple persons in one party, a representative may be appointed for the lawsuit pursuant to the law. It further stipulates the mechanism of a special representative lawsuit. An investor protection institution may be appointed by more than 50 investors to participate in the action as a representative to register with the people's court for the right holders confirmed by the securities registration and clearing institution, unless the investors explicitly express their unwillingness to participate in the lawsuit. The special representative action, which is characterised by 'implied participation and express withdrawal', introduces the concept of 'withdrawal of class action' for the first time in the Chinese legal system. On 31 July 2020, the Supreme People's Court issued the Provisions on Several Issues Concerning Representative Actions Arising from Securities Disputes, which further refined this mechanism. On 12 November 2021, the first instance judgment of the *Kanymei Pharmaceutical* case was issued. This case is the first case in China's capital

market to apply the special representative action procedure for securities disputes, which has opened up a feasible legal remedy channel for a large number of claimants with the same cause of action.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, Chinese courts follow the two instances of trial system, as prescribed by law. Normally, the first instance judgment or ruling is not final. If a party disagrees with a first instance judgment or ruling made by a local people's court, it shall have the right to appeal to the people's court at the next higher level within a certain period.

To exercise the right of appeal, the party must meet the following conditions:

- an appeal must be filed by a person who has the right to appeal;
- only the first instance judgment or ruling can be the subject of appeal; a meditation agreement cannot be the subject of an appeal;
- an appeal must be filed with the statutory time limit: 15 days for judgment, 10 days for ruling and 30 days for parties that are not present in China; and
- when a party appeals to a higher court, it must file with a petition stating the grounds for appeal.

The second instance judgment or ruling becomes legally effective immediately and shall be final. However, if the party that considers a legally effective judgment or ruling to be wrong, it may apply to the people's court at the next higher level or the original court for a retrial. Nevertheless, the application for a retrial does not mean that the enforcement of the judgment or ruling is suspended. The court shall conduct a retrial only when the application for retrial by a party falls under any of the circumstances explicitly stated in the law, for instance: there is new evidence that is sufficient to overturn the original judgment or ruling; an error was found in the application of the law in the original judgment or ruling; or the original judgment or ruling is not formed on the basis of due process.

Foreign judgments

21 What procedures exist for recognition and enforcement of foreign judgments?

It is not easy to enforce a foreign court judgment in China. A foreign judgment holder can file a petition and demand a competent Chinese court to enforce and recognise his or her foreign judgment, but the Chinese court can only recognise and enforce the foreign judgment if a bilateral enforcement treaty or arrangement exists between China and the country or region where the judgment was made; a multilateral convention exists that was signed by China; or the country where the foreign judgment was given had enforced judgments of Chinese courts previously, which is the principle of reciprocity.

Regarding multilateral conventions, on 12 September 2017, China signed the Hague Convention on Choice of Court Agreements, which is pending approval by the National People's Congress. On 2 July 2019, Chinese delegates, together with delegates from 80

other countries, signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Regarding the principle of reciprocity, the first time this principle was relied upon by Chinese courts was in 2014. After the High Court of Singapore ruled to recognise a judgment made by the Suzhou Intermediate People's Court, Jiangsu Province, the Nanjing Intermediate People's Court, Jiangsu Province, ruled to recognise a civil judgment made by the High Court of Singapore in accordance with the principle of reciprocity. In recent years, China's judicial system has become increasingly open to promote economic development and communication. In 2015, the Supreme People's Court noted that:

> *If the countries along the 'Belt and Road' have not yet concluded any agreement on mutual legal assistance with China, people's courts may, in accordance with the intent of international judicial cooperation and exchange as well as the promise by the other countries to provide judicial reciprocity to China, carry out the pilot practice that the people's courts in China provide judicial assistance to the parties in other countries in advance, actively promote the formation of reciprocity relations and actively promote and gradually expand the scope of international judicial assistance.*

Regarding bilateral treaties, a considerable number of foreign cases are recognised and enforced successfully by Chinese courts by these means. Examples include the mutual legal assistance agreements between China and Poland, China and Russia, and China and the United Arab Emirates.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Obtaining evidence in China for use in foreign proceedings falls under judicial assistance as prescribed by the Civil Procedural Law. It must be conducted through following channels:

- Bilateral treaties: foreign parties could apply for mutual legal assistance in accordance with bilateral treaties concluded between China and foreign countries. For example, the Treaty on Criminal Judicial Assistance between Australia and China, which entered into force in 2007. This application is usually submitted to the Ministry of Justice, which would then review and determine whether the evidence obtainment would infringe the legal principles and national interests of China.
- International convention: according to the Hague Evidence Convention, the application for evidence collection is submitted by the application court to the central organ of its own country, which will in turn transfer the application to the Ministry of Justice. After receiving the application, the Ministry of Justice will pass it on to the Supreme People's Court for approval. If approved, it will then be transferred to a lower court for execution.
- Diplomatic channel: an embassy or consulate of a foreign country based in China may serve documents on a citizen of a foreign country and carry out an investigation and collection of evidence, but it must not violate Chinese laws and must not adopt mandatory measures.

- International cooperation: foreign countries can submit evidence applications to China through informal channels, such as the police or anti-corruption authorities. However, this assistance is based on the principle of reciprocity.
- Except for the circumstances stipulated above, no foreign agency or individual can carry out service of documents, investigation and collection of evidence in China without the consent of the relevant administrative authorities.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

China's Arbitration Law is not enacted based on the UNCITRAL Model Law, but the latter does have a great influence on the enactment of the former.

The Arbitration Law deviates from the UNCITRAL Model Law in the following aspects, among others:

- Both the court and the arbitration commission are entitled to rule on the validity of an arbitration agreement, and the ruling by the court is prioritised under the Arbitration Law.
- An ad hoc arbitration is generally not permitted or recognised under the Arbitration Law. An exception to this is that, on 9 January 2017, the Supreme People's Court issued the Opinion on the Provision of Judicial Protection to the Development of the Free Trade Zone, article 9, which allows two parties registered in free trade zones to resolve their disputes through ad hoc arbitration, provided that the dispute is resolved in a specific place, under specific arbitration rules and by specific people.
- The arbitral tribunal or arbitration institution has no power to grant the interim measures, the application of which by a party must be forwarded to a competent court through the arbitration institution for determination under the Arbitration Law.
- The scope of arbitrability is narrower under the Arbitration Law. For example, the Arbitration Law excludes disputes arising from personal rights, such as marriage, adoption, guardianship, maintenance, inheritance, infringement of right of publication, revision and authorship.
- Under the Arbitration Law, both procedural irregularities and limited substantive reasons are grounds based on which a domestic arbitral award may be set aside or refused for enforcement, while only serious procedural irregularities are listed as grounds under the UNCITRAL Model Law in the same regard.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An effective arbitration agreement must be in writing (no matter if stipulated in a contract or provided in a separate agreement) and include the following elements:

- the expression of the parties' intention to submit for arbitration;
- the matters to be arbitrated; and

- the arbitration commission agreed by the parties.

In addition, an arbitration agreement shall be invalid if any of the following circumstances occur:

- the matters agreed upon for arbitration are beyond the scope of arbitration prescribed by law;
- an arbitration agreement is concluded by persons without or with limited capacity for civil acts;
- one party forces the other party to sign an arbitration agreement by means of duress;
- the parties agree that a dispute may be submitted to an arbitration agency for arbitration or filed with the people's court for commencement of legal proceedings; unless one party submits for arbitration, and the other party fails to object before the arbitration tribunal commences the first hearing;
- an arbitration agreement provides for two or more arbitration agencies, and the parties are unable to agree on the choice of an arbitration agency; or
- an arbitration agreement has not specified or has not specified clearly items for arbitration or the choice of an arbitration commission, and the parties concerned failed to conclude a supplementary agreement.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Under the Arbitration Law, an arbitral tribunal may comprise three arbitrators or a sole arbitrator. In practice, unless otherwise stipulated by arbitration rules or agreed by the parties, three arbitrators will in general be appointed.

For the arbitral tribunal comprising three arbitrators, each party shall select or authorise the chair of the arbitration institution to appoint one arbitrator. The third arbitrator (ie, the presiding arbitrator) shall be selected jointly by the parties or be nominated by the chair of the arbitration institution in accordance with a joint mandate given by the parties.

If the parties fail to appoint an arbitrator within the time limit set under the arbitration rules, the arbitrators will be appointed by the chair of the arbitration institution.

The parties to the arbitration can apply for the withdrawal of the arbitrator after the appointment if the arbitrator is found to be improper or impartial in accordance with article 34 of the Arbitration Law. However, an application for withdrawal shall be submitted prior to the first hearing with the statement of reasons. If reasons for the withdrawal only became known after the commencement of the first hearing, an application for withdrawal may also be submitted before the conclusion of the last hearing.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The pool of candidates of each arbitration institution is composed of Chinese and foreign arbitrators.

For Chinese residents who are eligible to be appointed as an arbitrator, they must be fair and honest persons who should satisfy one of the following conditions as stipulated by law:

- have passed the Chinese bar exam and obtained the legal professional qualification, and have engaged in arbitration work for eight years;
- have worked as a lawyer for eight full years;
- have worked as judges for eight years;
- are engaged in legal research or legal teaching with a senior academic title; or
- have legal knowledge and are engaged in professional work relating to economics and trade with a senior academic title or at the equivalent professional level.

For a foreign resident appointed as an arbitrator in the domestic arbitration institutions, the law does not specify the conditions and requirements; however, they must be equipped with comparable qualifications as required for Chinese arbitrators.

In addition, the arbitration institution prepares the panel lists of arbitrators according to their different specialisations, which ensures the needs of complex arbitration.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Law, Chapter IV, titled 'Arbitration Procedure', provides the rules on the following procedural matters:

- application and acceptance:
  - requirements for application of arbitration;
  - list of documents;
  - acceptance of arbitration and distribution of arbitration rules;
  - dismissal or modification of the arbitration claim;
  - property preservation; and
  - attorney entrustment;
- composition of the arbitral tribunal:
  - number of arbitrators;
  - appointment and removal of arbitrators; and
  - withdrawal of arbitrators; and
  - hearing and arbitral awards:
  - notification and service;

- recording of hearings;
- evidence rules;
- expert rules;
- evidence preservation;
- reconciliation; and
- time limit, content and signature of arbitral awards.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The court may intervene during arbitration under the following circumstances and grounds:

- Ruling on the validity of the arbitration agreement: at the request of a party, the court may rule on the validity of the arbitration agreement; if both the arbitration institution and the court are requested by the parties to rule on the validity of the arbitration agreement, the court shall give the ruling (article 20 of the Arbitration Law).
- The issuance and enforcement of interim measures: when interim measures such as an interim injunction, evidence preservation and property preservation are applied during the arbitration, such application shall be forwarded to the competent courts through the arbitration institution for issuance and, later, enforcement (articles 28 and 46 of the Arbitration Law; articles 81 and 100 of the Civil Procedure Law).
- Setting aside an arbitral award: a party to the arbitration may request the competent intermediate people's court to set aside an arbitration award within six months of receipt of the award if this party can furnish evidence to prove the existence of any of the circumstances listed in article 58 of the Arbitration Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements).
- Enforcement of an arbitral award: if one party fails to execute the arbitral award, the other party may apply to a competent court for enforcement (article 62 of Arbitration Law).
- Refusing enforcement of an arbitral award: at the enforcement stage of an arbitral award, a party against whom the enforcement is sought can request the court to refuse the enforcement of an arbitral award, if this party can furnish evidence to prove the existence of any of the circumstances listed in article 237 of the Civil Procedure Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements), or in article 5 of the 1958 New York Convention (for foreign arbitral awards excluding those that are seated in Hong Kong, Macao and Taiwan, which are subject to different arrangements given or concluded).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Interim measures, such as an interim injunction, evidence preservation and property preservation, are allowed before and during the arbitration proceedings. However, the arbitrators or the arbitration institution have no powers to issue or enforce evidence preservation and property preservation (articles 26, 46 and 48 of the Arbitration Law). Before commencing arbitration proceedings, the application for these interim measures must be

directly requested by the parties to the court, where the respondent resides, or where the property or evidence in question is located. However, during arbitration proceedings, the application for interim measures may only be made through the arbitration institution, and parties to an arbitration may not directly request interim measures from the courts except in limited circumstances; for example, in arbitrations administered by the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission or the China Maritime Arbitration Commission, parties may apply for interim measures directly to the International Commercial Court under the Supreme People's Court during the arbitration proceedings.

For other interim measures that are not specified, the process generally follows the specific rules of the arbitration institution and can be decided by the arbitration tribunal.

Award

30 | When and in what form must the award be delivered?

The Arbitration Law does not set forth a time limit within which the award must be rendered. It leaves the relevant arbitration rules formulated by the arbitration institutions to deal with this matter.

Under their current arbitral rules, the China International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission and the China Maritime Arbitration Commission all set a six-month limit for international proceedings and a four-month limit for domestic proceedings.

According to article 54 of the Arbitration Law, an award must be delivered in writing with the following information set forth therein:

- the claims for arbitration;
- the facts of the disputes;
- the grounds upon which an award is given;
- the results of the judgment;
- the allocation of the arbitration fees; and
- the date of the award.

If the parties agree not to include in the award the facts of the dispute and the grounds on which the award is based, these matters may be omitted in the award. In addition, the award must be signed by the arbitrators and sealed by the arbitration institution. The arbitrator who disagrees with the award has the choice of whether or not to sign.

Appeal

31 | On what grounds can an award be appealed to the court?

An award is final and binding once it is rendered and it cannot be appealed. However, a party may request the intermediate people's court where the arbitration institution is domiciled to set aside an award under the grounds set forth by law.

Read this article on Lexology

Depending on the nature of the award, the grounds upon which the award is set aside or refused for enforcement vary.

For a domestic arbitral award without foreign-related elements, a court may rule to set aside or refuse to enforce it if a party can furnish evidence to prove that there exists any of the following circumstances:

- there is no arbitration agreement between the parties;
- matters decided in the award exceed the scope of the arbitration agreement or are not under the jurisdiction of the arbitration institution;
- the composition of the arbitral tribunal or the arbitration procedure is contrary to the legal procedure;
- the evidence on which the award is based is falsified;
- the other party has concealed evidence that is sufficient to affect the impartiality of the award; or
- the arbitrators have demanded or accepted bribes, committed illegalities for personal gain or perverted the law in making the arbitral award.

For a domestic arbitral award with foreign-related elements, a court may set aside or refuse to enforce it if a party can furnish evidence to prove that any of the following circumstances exist:

- the parties have neither stipulated an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- the party against whom the application of setting aside or enforcement is sought was not requested to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his or her opinions for reasons for which he or she is not responsible;
- the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration;
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the jurisdiction of the arbitration institution; or
- if the people's court determines that the enforcement of the award would be against the public interest.

A court cannot set aside a foreign arbitration award but may refuse to enforce it under the grounds set out in article V of the New York Convention.

In addition, there are circumstances that result in the failure of enforcement, and the court may make a ruling rejecting the application for enforcement if:

- the subject of the rights and obligations is not clear;
- the specific amount of payment is not clear or the calculation method is not clear, resulting in the specific amount not being figured out;
- the particular thing to be delivered is not clear or cannot be determined; or
- the standard, target and scope of performance of action are not clear.

If the arbitration award determines a continuation of the performance of the contract but does not specify specific contents, such as the rights and obligations that are to be continued

to be performed, the specific method of performance and the deadline, resulting in the failure of enforcement, the court may also reject the application for enforcement.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic awards

If an award is not complied with, the applicant may apply to the intermediate people's court where the respondent is domiciled or where the respondent's property is located (or the basic-level people's court appointed) to enforce it.

If the respondent applies to the competent court to set aside the arbitral award at the same time that the applicant has applied for enforcement, the enforcement proceedings will be suspended. If the court rules to vacate the arbitral award, the enforcement proceedings will be terminated. If the court rejects the application to set aside the award, the enforcement will resume.

The time limit to apply for enforcement is two years from:

- the last day of the performance period specified in the arbitral award;
- the last day of each performance period if the arbitral award requests performance in instalments; or
- the effective date of the arbitral award if the award does not specify a period for performance.

In the last six months of the time period available to apply for enforcement, if an application for enforcement cannot be filed because of a force majeure event or other obstacles, the calculation of the time limit will be suspended and will resume after the suspension causes are eliminated.

If the parties reach a settlement, or one party requests the performance of the award or agrees to perform the award, the time limit for applying for enforcement will be started again.

The proposed ruling of any intermediate people's court or any specialised people's court after review not to enforce or set aside the domestic arbitral award shall be reported to the high people's court within its jurisdiction for review; the final ruling shall be made based on the opinions given by the high people's court after it has reviewed the proposed ruling.

Foreign awards (including awards made in Hong Kong, Macao and Taiwan)

China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention).

Separate arrangements with Hong Kong and Macao (which is treated as a different jurisdiction for the purposes of arbitration) were entered into in 2000 and 2007 respectively, which both adopt the same general principles as the New York Convention (ie, the Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland

and the Hong Kong Special Administrative Region and the Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region).

The Supreme Court has issued a judicial interpretation about the recognition and enforcement of arbitral awards made in Taiwan.

The non-enforcement of foreign arbitral awards and the setting aside or non-enforcement of domestic arbitral awards with foreign-related elements are both subject to a reporting mechanism established by the Supreme People's Court in 1995. According to the reporting mechanism, if there is a proposed ruling by any intermediate people's court or any specialised people's court not to recognise and enforce a foreign arbitral award or setting aside or not to enforce a domestic award with foreign-related elements, that proposed ruling shall be reported to the high people's court within its jurisdiction for review; if the high people's court intends to agree with the proposed ruling after review, it must report the ruling to the Supreme People's Court for final review. The final ruling must be made based on and following the review opinion given by the Supreme People's Court. As of December 2017, the Supreme People's Court has unified and applied the same reporting mechanism to domestic arbitral awards without foreign-related elements, which means that setting aside or non-enforcement of a purely domestic award must be finally decided by the Supreme People's Court.

Costs

33 | Can a successful party recover its costs?

According to article 9 of the Arbitration Fee Collection Measures of Arbitration Institutions, fees paid to the arbitration institution must, in principle, be borne by the losing party. However, if a party only partially wins, the arbitration tribunal shall determine the allocation of fees based on the parties' liabilities and the percentage of the party's success.

The arbitration rules of an arbitration institution also involve the recovery of costs by a successful party. For example, article 52(2) of the 2015 Arbitration Rules of the China International Economic and Trade Arbitration Commission provides that the arbitral tribunal has the power to decide in the arbitral award that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The main alternative dispute resolution (ADR) alternatives to civil litigation in China include negotiation, mediation and conciliation. Mediation is a signature element in China's amicable dispute resolution system, which has been a preferred dispute resolution throughout Chinese history and remains widely used today.

In China, judicial mediation is quite common and is frequently adopted by the courts in the case management system.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Parties to litigation or arbitration are not required by law to consider ADR before or during proceedings.

The court or tribunal cannot compel the parties to participate in an ADR process.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

When a claim is filed to the court, rather than bringing it to a full trial of civil proceeding, the parties concerned can ask the judges for judicial mediation, provided that it is requested under the free will of, and voluntarily by, the parties and the facts concerned are clear. Complex civil procedures are lessened if the dispute is solved through judicial mediation, which is more effective. If a mediation agreement is reached by the parties, the court shall prepare a written mediation statement confirming the mediation agreement, which has the same effect and enforceability as a judgment.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Jurisdiction over intellectual property and foreign-related civil and commercial cases

The 'Several Provisions of Supreme People's Court on the Jurisdiction of Intellectual Property (IP) Cases of First Instance', effective from 1 May, 2022, categorises the jurisdiction of IP cases into three groups:

- Highly technical, significant, complex, and difficult IP cases fall under the purview of nationwide IP courts, intermediate people's courts in provincial capitals, and intermediate courts designated by the Supreme People's Court (SPC). These cases might

include patents, new plant varieties, technology secrets, computer software ownership, infringement disputes, and monopoly disputes.
- Cases necessitating a level of specialisation, encompassing disputes over design patents and well-known trademarks, are under the jurisdiction of nationwide IP courts, immediate people's courts and primary people's courts as approved by the SPC.
- Ordinary IP cases, which may involve copyright contracts, copyright ownership, copyright infringement, and trade secret contracts, fall under the jurisdiction of primary people's courts as designated by the SPC.

On November 14, 2022, the SPC released the 'Several Provisions on Several Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases'. This document further defined the jurisdiction for first-instance foreign-related civil and commercial litigation based on the monetary value involved and regional economic disparities in China.

- Primary People's Courts in Beijing, Shanghai, Tianjin, Chongqing, Jiangsu, Zhejiang, Fujian, Shandong and Guangdong preside over first-instance civil and commercial cases involving up to 40 million Chinese yuan. Courts in other regions handle similar first-instance cases up to 20 million Chinese yuan.
- Intermediate People's Courts in the aforementioned cities oversee cases involving 40 million Chinese yuan or more, while those in other regions take on first-instance cases of 20 million Chinese yuan or above.
- The Higher People's Court has jurisdiction over cases involving 5 billion Chinese yuan or more.

The Draft Amendments to Civil Procedure Law

The 'Amendments to Civil Procedure Law (draft)' was announced on December 30, 2022. Major changes include clarifying rules for judicial technical staff participation in cases, expanding reasons for case dismissal, refining false lawsuit regulations and improving appeal and retrial procedures. To align with the PRC Civil Code, the draft introduces a process for appointing estate administrators. It also adjusts how foreign-related civil litigation is handled.

Chengdu-Chongqing Financial Court was formally established

Chengdu-Chongqing Financial Court was formally established as the third financial court in China, following the Shanghai and Beijing Financial Courts. It became operational on 1 January 2023. This court, the first cross-provincial financial court in the country, was established due to the complexities and high stakes involved in financial cases. These cases demand highly skilled and experienced judicial personnel and require the collaboration of financial regulatory authorities. The establishment of the Chengdu-Chongqing Financial Court not only meets the need for specialised jurisdiction and professional division of labour but also promotes consistency in judicial measures and perspectives.

* *The authors would like to thank Qian Yu, Deken Shanghai Law Firm, for her assistance with this chapter*

Read this article on Lexology

Jan Holthuis j.holthuis@burenlegal.com
Li Jiao l.jiao@burenlegal.com

Zhong Yu Plaza Room 1602, North Gongti Road 6, Beijing 100027, China
Tel: + 86 10 852 357 80
www.burenlegal.com

Read more from this firm on Lexology

Read this article on Lexology

Cyprus

Andreas Erotocritou, Antreas Koualis and Irena Markitani
AG Erotocritou LLC

RETURN TO CONTENTS

Summary

LITIGATION	145
Court system	145
Judges and juries	145
Limitation issues	146
Pre-action behaviour	147
Starting proceedings	147
Timetable	148
Case management	149
Evidence – documents	149
Evidence – privilege	149
Evidence – pretrial	149
Evidence – trial	150
Interim remedies	150
Remedies	150
Enforcement	151
Public access	151
Costs	151
Funding arrangements	152
Insurance	153
Class action	153
Appeal	153
Foreign judgments	154
Foreign proceedings	154
ARBITRATION	**154**
UNCITRAL Model Law	154
Arbitration agreements	154
Choice of arbitrator	155
Arbitrator options	156
Arbitral procedure	156
Court intervention	156
Interim relief	157
Award	157
Appeal	157
Enforcement	158
Costs	158
ALTERNATIVE DISPUTE RESOLUTION	**158**
Types of ADR	158
Requirements for ADR	159

Read this article on Lexology

MISCELLANEOUS 159

Interesting features 159

UPDATE AND TRENDS 160

Recent developments and future reforms 160

LITIGATION

Court system

1 | What is the structure of the civil court system?

The court system in Cyprus currently has two tiers. The lower tier, the subordinate courts, is composed of the district and specialised courts. The second and final tier is the Supreme Court.

The district courts have jurisdiction to hear first instance civil actions, which do not fall under the exclusive jurisdiction of a specialist court. First instance civil proceedings before district courts are heard by a single judge.

The specialised courts include the Labour Court, the Family Court, the Rent Control Court, the Military Court and the newly formed Administrative Courts, which acts as the Administrative and Tax Courts.

In addition, in May 2022, the House of Representatives in Cyprus passed Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court. The law creates two new specialised courts, namely the Commercial Court and new Admiralty Court, focusing on commercial and maritime law disputes respectively. The operation of the Commercial and Admiralty Courts is due to commence in the next months (but the exact date is yet to be announced).

The Supreme Court acts as the final appellate court, with jurisdiction to hear and decide on appeals from subordinate courts. Appeals, unless otherwise decided, are heard by a panel of three judges.

Until 30 June 2023, the Supreme Court also acted as the Supreme Constitutional Court.

Further to the latest reforms being implemented in the Cyprus justice system, the Supreme Court, from 1 July 2023, will be split into the new Supreme Constitutional Court and the new Supreme Court. At the same time, from 1 July 2023, a new Court of Appeal will be established which will act as an appellate court with jurisdiction to hear and decide on appeals from first-instance courts. Appeals from the Court of Appeal will be made either to the new Supreme Court or the new Supreme Constitutional Court, depending on the nature of the matter to be decided, provided an issue of public interest or importance arises or this is required in view of conflicting case law.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The Cypriot trial system is adversarial in nature and, consequently, judges act only as umpires between the parties. There are no jury trials in Cyprus. All civil cases before district courts are tried by a single judge sitting without a jury.

All judges except those of the Supreme Court are appointed by the Supreme Council of Judicature, a body composed of the judges of the Supreme Court. This body is responsible for the appointment, promotion, transfer, discipline and dismissal of judges. From 1 July 2023, the Supreme Council of Judicature will also be responsible for the appointment, promotion, transfer, discipline and dismissal of the judges of the new Court of Appeal.

Supreme Court judges are appointed by the President of the Republic, from within the ranks of the judiciary, upon recommendation from the Supreme Court. From 01/07/2023, the judges of the new Supreme Court and the new Supreme Constitutional Court will be appointed by the President of the Republic from the ranks of the judiciary.

There are currently no formal procedures or initiatives to promote diversity on the bench in Cyprus. The current ratio of male to female judges is approximately 50:50.

Limitation issues

3 | What are the time limits for bringing civil claims?

The time limits within which claims must be brought before a court are currently prescribed by the Limitation of Causes of Action Law of 2012 (Law 66(I)/2012), which entered into force on 1 July 2012. According to article 3 of the 2012 law, the limitation period of a claim commences from the date the cause of action accrued. Article 4 provides for a general time limit of 10 years, unless otherwise provided in the Law of 2012 or any other law. The Law of 2012 and other laws provide for specific time limits for particular causes of action.

For instance:

- torts: there is a six-year limitation period from the date when the cause of action accrued except for cases of negligence, nuisance and breach of statutory duty, where there is a three-year limitation period from the date when the injured person became aware of the cause of action;
- contract: there is a six-year limitation period from the date when the cause of action accrued;
- mortgage, pledge: there is a 12-year limitation period from the date when the cause of action accrued; and
- bills of exchange, etc: there is a six-year limitation period from the date when the cause of action accrued.

The above limitation periods may be extended by the court by two years where the court considers this to be just and reasonable in all the circumstances.

Parties cannot agree to suspend the time limits. Nevertheless, time limits may be suspended if the parties fall within one of the categories provided by article 12 of the Law of 2012 (eg, cohabiting partners, spouses during marriage, or parents and children where the children are minors).

The transitional provisions of the Law of 2012 provide that all limitation periods will start counting from 1 January 2016.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Despite there being no general pre-action protocols or procedural formalities that must be followed prior to the initiation of proceedings in Cyprus, parties must bear in mind that in certain specialist proceedings (eg, winding-up proceedings or tenant evictions), there are specific procedures that must be followed prior to the commencement of the proceedings.

Courts in Cyprus may grant pre-action discovery orders, such as *Norwich Pharmacal* orders, to assist a party in bringing an action.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Commencement of proceedings

Civil proceedings in Cyprus are commenced by filing a writ of summons, which provides for the extent and nature of the claim and the remedy or relief sought, with the registrar of the district court that has jurisdiction to adjudicate upon the case. The writ of summons may be either generally endorsed and include merely the relief sought, or specially endorsed and provide for the particulars of both the relief sought and the basis upon which that relief is being sought.

Notification of commencement and service of a claim

The persons against whom proceedings are commenced are notified of the proceedings via personal service of the writ of summons on them, namely delivery of a copy of the writ to the person being served by a private bailiff.

In general, the writ of summons must be served within 12 months of its filing. The 12-month limit can, however, be extended for an additional six months if the plaintiff obtains permission from the court. The deemed date of service is the date on which the private bailiff served the writ of summons on the person being served.

If personal service is not feasible, an application can be made to the court for an order for substituted or other services (such as service through public advertisement, placing a notice on the board of the court, email or other).

In circumstances where the party to be served is located outside Cyprus, such service shall only be made after leave to do so has been obtained from the court. The court must be satisfied that there is a proper case for service outside Cyprus, that the plaintiff has a prima facie good cause of action against the defendant and that the defendant may be found in a particular country and place outside Cyprus. What is served outside the jurisdiction to a non-Cypriot defendant is not a writ of summons but a notice of a writ of summons.

Courts' caseload

Further to a recent amendment of the Civil Procedure Rules, a 'small track' was established with a simplified procedure for claims under €3,000. The amendment, with a view to making the process more expedient, increased the case management options available to the judges in such cases, allowing them to give summary judgments.

The current delay for civil actions is between three and five years.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Civil proceedings are initiated by filing a writ of summons that must subsequently be served on the defendants. Provided the defendant is within the jurisdiction of Cyprus, he or she is required to enter his or her appearance within 10 days from the date on which the writ of summons was served on him or her.

If the writ of summons is generally endorsed, the plaintiff must file and deliver to the defendant a statement of his or her claim, containing particulars of the relief or remedy that is sought and the basis upon which that relief is being sought, within 10 days from the defendant filing his or her appearance. Subsequently, the defence or the defence and counterclaim of the defendant must be filed and delivered to the claimant within 14 days from the filing of the statement of claim.

If the plaintiff files a writ of summons specially endorsed, then the defendant must file and deliver a defence and, if desired, a counterclaim within 14 days from filing an appearance. In both instances, the claimant may file a reply to the defendant's defence within seven days of delivery of the defence (where there is no counterclaim), and shall file a defence to the defendant's counterclaim and a reply to the defendant's defence within 14 days from the delivery of the defendant's defence and counterclaim.

Once the pleadings are completed, the parties may apply to the court for directions preparatory to the trial, including for discovery and inspection of documents, filing of witness statements etc.

During the main trial of a typical proceeding, each side is allowed to present its witnesses, who may be subject to cross-examination by the other side. Once all testimony is completed, the parties will be invited to present their final submissions to the court in support of their arguments.

During the proceedings, various interlocutory applications may be filed by the parties. If such applications are opposed by the other party, a hearing will be conducted for the court to determine whether to issue the requested orders or allow the applications.

Case management

7 | Can the parties control the procedure and the timetable?

The procedure and the timetable of the claim are dictated by the court. Nevertheless, the timetable of a claim can be influenced by the number of interlocutory applications or other procedural steps of either party in the proceedings.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Any party may apply to the court for an order directing any other party to any cause or matter to make discovery on oath of the documents that are, or have been, in his or her possession or power relating to any matter in question therein. That application can be made at any time after the commencement of the proceedings. There are no particular classes of documents that do not require disclosure, but the discovery is subject to privilege and admissibility rules. If a party ordered to make discovery of documents fails to do so, he or she cannot later be at liberty to submit evidence in the action or allow any document that he or she failed to discover to be inspected, unless the court is satisfied that he or she had reason for not disclosing the said document.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

A document may be covered by privilege, and as such, a party may refuse to produce it for inspection, on any one of the following grounds:

- litigation privilege;
- legal professional privilege;
- without prejudice communications;
- self-incrimination privilege;
- public interest immunity; and
- confidential nature.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Parties do not normally exchange evidence from witnesses prior to trial, except for situations where it is their intention to adopt written statements in the course of the examination

of the witnesses they have called upon to give oral evidence and the court has ordered that such statements are exchanged between the parties prior to the hearing.

With regard to experts, the reports of those witnesses are usually exchanged prior to trial, as their cross-examination is based on the content of their reports.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The general rule is that all evidence, whether oral, documentary or real, must be brought before the court during the hearing of an action. That evidence must be the best possible evidence at hand, must be admissible and must be relevant to the facts in issue. Witnesses, whether expert or of fact, are called to the court for examination or to produce a certain piece of evidence. The witness is first examined by the party that has called him or her and may then be cross-examined by any other party in the proceedings. The witness may then be re-examined by the party at whose instance he or she was called to give evidence.

For an expert witness to give evidence before the court, it must be shown, to the satisfaction of the court, that expert evidence is necessary for the proceedings to be disposed of and that the person in question has the necessary knowledge and skills to give such evidence. The expert may bring to court an expert report, which he or she then adopts under oath.

Interim remedies

12 | What interim remedies are available?

Cyprus courts have a wide discretion to issue any interim orders they deem just and reasonable in all circumstances, including the following:

- freezing injunctions (with either local or worldwide application);
- prohibitory and mandatory injunctions;
- appointment of an interim receiver or a provisional liquidator;
- search orders; and
- orders for the discovery and inspection of documents.

Interim remedies are available in support of foreign proceedings, where the courts have jurisdiction in that regard by virtue of a Cyprus law or a relevant international or bilateral treaty. In particular, interim relief can be sought in aid of foreign proceedings in the European Union, Norway and Switzerland by virtue of relevant European regulations, and in aid of international arbitration proceedings by virtue of Cyprus law.

Remedies

13 | What substantive remedies are available?

The following substantive remedies are available, inter alia:

- declarations of rights or liabilities between the parties;
- general or special damages as compensation for any losses or injuries suffered by the plaintiff;
- orders for restitution of any gains or benefits acquired by the defendant;
- injunctive relief; and
- specific performance orders.

Interest is payable on money judgments.

Enforcement

14 | What means of enforcement are available?

A money judgment may be enforced in one or more of the following manners:

- by a writ of movables, namely the seizure and sale of movable property;
- by registering the court's judgment on immovable property in the Land Registry;
- by a writ of sale of immovable property;
- by a writ of attachment, namely the seizure or payment of movables or debts owed to the judgment debtor by a third party;
- by a charging order over shares and an order for the sale of the shares;
- by an order for repayment of the debt in question via monthly instalments; or
- by appointing a receiver by way of equitable execution.

With regard to judgments other than money judgments, compliance with the court's orders may be achieved via contempt proceedings. The court, following a finding of contempt, may order the imprisonment of, the sequestration of the assets of, or the payment of a fine by anyone who does not act in conformity with a court order, including an interim order.

Additionally, a court may remove a person's right to be heard in the proceedings if he or she is found to be in contempt of a court order.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

By virtue of article 30(2) of the Constitution, court hearings are generally held in public. Nevertheless, court documents are only available to the parties to the proceedings.

Costs

16 | Does the court have power to order costs?

The court has wide discretion to award costs, depending on the particular circumstances of the proceedings and the conduct of the parties; however, the general rule is that the losing party bears the costs of the proceedings.

The costs involved in civil court proceedings vary, depending on how protracted the case proves to be and the time dedicated by the lawyer handling the case.

The amount of costs awarded by the court is calculated on the basis of court fixed-fee scales, depending on the value of the claim. These describe the service provided throughout the proceedings and set out the minimum and maximum charges for each particular step.

Despite this, in practice, the costs recovered on the basis of the court's scales only cover a very small portion of the actual costs, including legal fees, paid by the client for the purposes of the proceedings. This is the case especially in commercial litigation where the value of the claim is very high.

An application for security for costs can be made by a defendant against a claimant (and by a claimant against a defendant in respect of a counterclaim that is not merely in the nature of a set-off) at any stage of the action where:

- the respondent is ordinarily resident outside of Cyprus or any other European member state;
- the respondent has no assets in Cyprus to satisfy any order as to costs that is made against him or her;
- the respondent is acting through a nominal plaintiff or defendant; and
- where the court orders security for costs to be given, it may stay the proceedings until such security is given and may dismiss the proceedings where the time period for providing such security has expired.

The current framework on costs was revised in 2017.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Funding of litigation proceedings is normally arranged for by the parties. A lawyer may negotiate his or her legal fees for litigation proceedings and can reach any special arrangement or retainer freely with his or her client, failing which the matter will be governed by the rules of the court and the court's fixed-fee scales.

The Cypriot courts have not yet considered the issue of conditional or contingency fee agreements; however, it is assumed that such arrangements are not permissible, as they offend the equitable principle against champerty. Champerty is an agreement where a person who maintains an action takes, as a reward, a share in the property recovered in the action. Accordingly, lawyers involved in the conduct of litigation are precluded from taking a share in the property recovered in the action pursuant to a conditional fee agreement.

Similarly, third-party funding is not available in Cyprus because of the application of the aforementioned principle of champerty, which, coupled with the principle of 'maintenance',

aims to restrict the selling and funding of litigation (the principle of 'maintenance' precludes a person from maintaining a case without just cause or excuse). On that basis, third-party funding and assignment of a cause of action are not permissible.

However, the matter is not regulated and there is no case law or other precedent on the above.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Although it is permissible to take insurance to cover legal costs, this course is not normally followed in Cyprus and may not be practically available.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may be authorised by the court to sue or defend in such cause or matter, on behalf or for the benefit of all persons so interested, provided a power of attorney signed by the persons to be represented is filed in court.

In such proceedings, the persons represented shall be bound by the judgment of the court and the same may be enforced against them in all respects as if they were parties to the action.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

An appeal of any interim decision must be brought within a strict time limit of 14 days from the date the relevant judgment or order was issued. Any other appeal of a judgment on the merits of the case must be brought within 42 days from the date the relevant judgment was issued. The court may, upon a relevant application, extend the time limit for filing an appeal.

Appeals are brought by filing a written notice to the registrar of the court appealed from. That notice shall specify the part of the judgment or order being appealed and the grounds of appeal. The notice shall then be served on any party that is directly affected by the appeal.

The appellant may appeal the whole or part of any judgment or order. An appeal may be made against the findings of specific facts if the appellant considers that there was insufficient evidence to support the decision, or it may be made against specific points of law.

Appeals are currently heard by the Supreme Court and there is currently no right to further appeal.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment or order issued by a European court can be recognised and enforced in Cyprus pursuant to the provisions of the European Judgment Regulations and other European regulations on specialised proceedings (such as the European Regulations on Insolvency Proceedings). As the Judgment Regulations do not require any specialised procedure for the recognition of foreign judgments, normally, European court judgments can be directly enforced in accordance with the local procedures.

A non-European judgment or order may be recognised and enforced in Cyprus pursuant to bilateral or multilateral agreements that Cyprus has ratified. Alternatively, a separate action may be initiated in Cyprus regarding the same cause of action brought in the foreign jurisdiction.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Pursuant to bilateral or multilateral treaties or EU regulations, Cyprus courts may provide assistance in connection with foreign proceedings via the gathering of evidence in Cyprus, on the basis of letters rogatory or other letters of request sent by the foreign court.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The law governing domestic arbitrations, Chapter 4, was enacted when Cyprus was a British colony and is, therefore, very similar to the English Arbitration Act 1950.

In 1987, Cyprus adopted UNCITRAL's Model Law on International Commercial Arbitration, dated 21 June 1985, by enacting the International Commercial Arbitration Law No. 101/87. The legal framework governing international commercial arbitration proceedings is, therefore, almost identical to the UNCITRAL Model Law. In that regard, Law No. 101/87 adopts the Model Law's guiding footnote with respect to the meaning of the term 'commercial'.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Both Chapter 4, which applies to domestic arbitrations, and Law No. 101/87, which applies to international commercial arbitrations, provide for an arbitration agreement in 'writing'.

Law 101/87 defines an 'arbitration agreement in writing' as follows:

An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Chapter 4 does not define the term 'arbitration agreement in writing'.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Appointment of an arbitrator

In international commercial arbitrations, pursuant to Law No. 101/87, where the arbitration agreement does not specify the composition of the arbitral tribunal, the arbitral tribunal shall be constituted of three arbitrators.

If there is no specified procedure for the appointment of the arbitral tribunal, the default appointment procedure provided for under article 11(3) of Law No. 101/87 applies as follows:

- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court.
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the court.

Domestic arbitrations, pursuant to Chapter 4, are heard by a single arbitrator, where the arbitration agreement is silent on the matter. Article 10 of Chapter 4 provides that Cypriot courts will intervene in the appointment process if:

- the parties fail to agree on the appointment of an arbitrator where the arbitration agreement provides for the appointment of a single arbitrator;
- an arbitrator appointed by the parties refuses to act or is incapable of acting or passes away and the parties fail to appoint another in his or her place;
- the parties or two arbitrators fail to appoint an umpire or a third arbitrator; and
- the appointed umpire refuses to act or is incapable of acting or passes away and the parties or the arbitrators fail to appoint another in his or her place.

Challenge on the appointment of an arbitrator

In international arbitrations, pursuant to Law No. 101/87, the exemption of an arbitrator may be proposed to the arbitral tribunal only where circumstances exist that give rise to

justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties. If the arbitrator in question does not resign or the other parties in the arbitration proceedings do not agree with the exemption proposal, the arbitral tribunal rules upon the exemption proposal.

In domestic arbitrations, pursuant to Chapter 4, any party may challenge the appointment of an arbitrator and request his or her dismissal if he or she fails to act with due speed in pursuing the arbitral proceedings and issuing the arbitral award. Additionally, the court may remove an arbitrator who has acted improperly or has handled the case badly.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

There are no provisions in domestic arbitration laws limiting the parties' options when choosing an arbitrator. Nevertheless, the arbitration agreement may limit the options of the parties in that regard.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Law No. 101/87 incorporates all mandatory provisions of the UNCITRAL Model law in international commercial arbitrations. For example, article 18 requires that the parties are treated with equality and that each party is given an opportunity to present its case; article 24(1) provides a party with the right to request a hearing; and article 26 provides a party with a right to appoint and question an expert, etc.

Chapter 4 does not contain any mandatory provisions for the arbitral process to be followed but provides Cypriot courts with extensive supervisory jurisdiction over domestic arbitrations.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

In international commercial arbitrations, the courts may intervene in the instances prescribed by Law No. 101/87. The main purpose of such an intervention is to ensure the proper conduct of the international arbitration, for instance by assisting in the constitution of the tribunal, deciding on the jurisdiction of the tribunal, assisting in the taking of evidence and ruling upon the validity of the arbitral award.

In domestic arbitrations, under Chapter 4, Cypriot courts have extensive supervisory jurisdiction and may intervene, upon the application of one of the parties, for the purpose of issuing, inter alia:

- orders for the production of documents;
- orders for submitting evidence by affidavits;

- orders for the examination on oath of any witness or the examination of a witness outside the jurisdiction;
- orders for the inspection of property that is the subject matter of the arbitration; and
- discovery orders.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Pursuant to article 17 of Law No. 101/87, an arbitral tribunal in an international commercial arbitration may, upon the application of any of the parties, issue any necessary interim measures with regard to the subject matter of the dispute.

A tribunal in domestic arbitration, operating under Chapter 4, has jurisdiction to issue any interim order, including an order for the appointment of a receiver.

Award

30 | When and in what form must the award be delivered?

Timing for the award

There is no specific time limit for rendering an award under either Chapter 4 or Law No. 101/87. Nonetheless, there may be contractual limits within which such awards must be rendered.

Form of an award

Pursuant to article 31 of Law No. 87/101, an international commercial arbitration award must state the reasons upon which the award is based unless the parties have agreed otherwise or the award is an award on agreed terms. Furthermore, the award must be in writing, contain the date and place of the arbitration and be signed by all arbitrators.

Chapter 4 is silent on the form and content of domestic arbitral awards.

Appeal

31 | On what grounds can an award be appealed to the court?

In domestic arbitrations, pursuant to Chapter 4, an award may be set aside by the court where the arbitrator has acted improperly or has handled the case badly or the arbitration proceedings were conducted irregularly or the arbitral award was issued irregularly.

In international commercial arbitrations, pursuant to Law No. 101/87, an award may be set aside on the same grounds as those provided in UNCITRAL Model Law, namely:

- incapacity of the parties;
- invalidity of the arbitration agreement;

- lack of sufficient notice of the proceedings to one of the parties or other denial of a party's right to present its case (due process);
- lack of jurisdiction of the tribunal;
- the tribunal's constitution or the procedure followed for the arbitration is contrary to the arbitration agreement or the Law No. 101/87;
- non-arbitrability of the subject matter of the dispute under the laws of Cyprus; or
- the award is contrary to the public policy of Cyprus.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

As a contracting party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations of 1958 (the New York Convention), Cyprus is bound to enforce awards issued in foreign states that are contracting parties to that convention.

The New York Convention is incorporated in articles 35 and 36 of Law No. 101/87. As per article 35, the party seeking the recognition and enforcement of a foreign award must submit a relevant application supported by an affidavit, attaching the original or a certified copy of the arbitral award and the arbitration agreement as well as the translation of the same in Greek.

In domestic arbitrations, under Chapter 4, an award may, with the leave of the Cypriot court, be enforced in the same manner as a Cyprus judgment or order to the same effect. In that case, a judgment may be entered in the same terms as the terms of the award.

Costs

33 | Can a successful party recover its costs?

Overall cost allocation rests with the tribunal unless the parties agree otherwise. The general rule is that costs follow the event and are usually dealt with by the arbitration award. The costs that are generally recoverable, subject to the arbitration agreement between the parties, are the fees and expenses of the tribunal, the fees and expenses of the arbitral institution, and the parties' legal and other costs, including costs relating to witnesses and the hearing.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The methods of alternative dispute resolution that are available in Cyprus today are primarily arbitration and mediation.

The most widely used method is arbitration, which is mainly used by parties in various commercial fields including construction, shipping, insurance and trade. The referral of an issue to arbitration depends upon the existence of a valid and binding arbitration agreement between the parties. The arbitration process is conducted in a rather formal but strictly confidential manner that resembles litigation. The arbitral tribunal issues a decision (the arbitral award), which is binding upon the parties, after both parties have introduced evidence and presented their case before it.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Even though there is no general requirement for parties to litigation to consider alternative dispute resolution before or during the proceedings, according to article 15(1)(a) of the Law on Certain Aspects of Mediation in Civil Matters (Law No. 159(I)/2012), a court before which litigation proceedings are carried out may invite the parties to the litigation to present themselves before it and inform the court as to the possibility of resolving their dispute by means of mediation.

In practice, the courts will generally refrain from forcing any party, directly or indirectly, to participate in alternative dispute resolution processes.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In 2015, Orders 30 and 25 of the Civil Procedure Rules were repealed with a view to expediting the case management stage of the proceedings and limiting the current delay in adjudicating civil cases. The repealed provisions of the said Orders apply with regard to all actions filed from 1 January 2016.

Further to the repealed provisions of Order 30, there is a strict time limit of 90 days from the date the pleadings are deemed 'closed' within which the claimant must issue a notice with request for procedural directions. In case of failure, within 15 days thereafter, the defendant may request the dismissal of the action. If the defendant does not proceed as such, the action will be considered abandoned and be dismissed by the court.

Upon the issuance of the notice for directions by the plaintiff and within 30 days from service of the same on the defendants, the defendants shall file a specified form with request for procedural directions.

A directions hearing must be held within 60 days from the issuance of the notice of directions by the plaintiff. During that hearing, the judge issues procedural directions on the

matters requested by the parties. No party is permitted to request directions during the directions' hearing on any matter he or she did not request any directions with his or her relevant notice or form.

Thereafter, a further directions hearing shall be held for directions on the evidence to be given at trial, including directions for the filing of a list of proposed witnesses together with a summary of the evidence to be given by each.

The new provisions further provide for strict deadlines regarding the duration of examination, cross-examination and re-examination of witnesses.

The repealed Order 30 also provides for a fast-track procedure with respect to claims with value up to €3,000, which should generally be heard only on the basis of written evidence.

Further to the repealed provisions of Order 25, it is now permissible for a claimant to amend his or her writ of summons after its issuing but prior to its service without the leave of the court. Any party may also amend its pleadings once after the exchange of the pleadings and prior to the issuing of the notice for directions (pursuant to Order 30) without the leave of the court. Any party may amend its pleadings at any time thereafter upon the court's leave and merely where a bona fide error was made or where the court is satisfied that specific facts were not in existence when the document was first filed.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

A number of reforms for the modernisation of the civil court system and the civil procedure rules have been recently adopted and are due to be put in force in the next months.

One of the major reforms is the establishment of the Commercial Court with jurisdiction to hear commercial and corporate disputes of substantial value. The Commercial Court is expected to take up the large volume of commercial cases with cross-border characteristics, within the frames of which applications for interim orders are usually pursued.

At the same time, a new Admiralty Court have been established which will take over maritime cases from the current Supreme Court.

The House of Representatives in Cyprus passed the Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court in May 2022 while the operation of the Commercial and Admiralty Courts is due to commence in the next months (but the exact date is yet to be announced).

Additionally, from 1 July 2023, the current Supreme Court will be split into the Supreme Constitutional Court and the new Supreme Court. At the same time and from 1 July 2023,

the newly established Court of Appeal will begin to operate. The new Court of Appeal will act as an appellate court with jurisdiction to hear and decide on appeals from first-instance courts. Appeals from the Court of Appeal may then be made either to the new Supreme Court or the new Supreme Constitutional Court, depending on the nature of the matter to be decided. As a result, a third tier will be in operation for the first time within the Cyprus court system.

In the context of the restructuring and modernisation of the Cyprus justice system, a number of proposals for the formalisation of the process by which the judges are being appointed, promoted, disciplined and dismissed are also being pursued, with a view to promoting transparency and diversity within the judiciary.

Further to the above, the lockdown measures in response to the covid-19 pandemic have expedited the implementation process of reforms on remote court hearings and electronic filing of court documents. Directions and procedural hearings have been taking place remotely for some time now while, from late 2021, electronic filings have been made possible through the electronic platform known as i-justice. All civil proceedings filed from 01/02/2022 should be filed through the i-justice platform while a permanent electronic platform, known as e-justice, is currently being developed and is expected to be put in operation for all cases in the near future.

Finally, the new Civil Procedure Rules, which have been approved by the Supreme Court on 19 May 2021, will be put in force from 1 September 2023. It is clarified that the present chapter has been drafted on the basis of the current Civil Procedure Rules in force pre-September 2023.

EROTOCRITOU

ADVOCATES - LEGAL CONSULTANTS

Andreas Erotocritou	andreas.erotocritou@erotocritou.com
Antreas Koualis	antreas.koualis@erotocritou.com
Irena Markitani	irena.markitani@erotocritou.com

6th Floor 1 Arch Kyprianou and Ayiou Andreou Corner,
Loucaides Building, Limassol 3036, Cyprus
Tel: +357 25 370 101
www.erotocritou.com

Read more from this firm on Lexology

Read this article on Lexology

Denmark

Morten Schwartz Nielsen and Kasper S R Andersen*
Lund Elmer Sandager

RETURN TO CONTENTS

Summary

LITIGATION	163
Court system	163
Judges and juries	164
Limitation issues	165
Pre-action behaviour	165
Starting proceedings	166
Timetable	167
Case management	167
Evidence – documents	168
Evidence – privilege	168
Evidence – pretrial	169
Evidence – trial	169
Interim remedies	169
Remedies	170
Enforcement	171
Public access	171
Costs	171
Funding arrangements	172
Insurance	173
Class action	173
Appeal	174
Foreign judgments	174
Foreign proceedings	175
ARBITRATION	**175**
UNCITRAL Model Law	175
Arbitration agreements	176
Choice of arbitrator	176
Arbitrator options	177
Arbitral procedure	177
Court intervention	177
Interim relief	178
Award	178
Appeal	178
Enforcement	179
Costs	179
ALTERNATIVE DISPUTE RESOLUTION	**179**
Types of ADR	179
Requirements for ADR	180

Read this article on Lexology

MISCELLANEOUS 180
Interesting features 180
UPDATE AND TRENDS 181
Recent developments and future reforms 181

LITIGATION

Court system

1 What is the structure of the civil court system?

The Danish courts are composed of the Supreme Court, two high courts, the Maritime and Commercial Court, the Land Registration Court, 24 district courts, the Appeals Permission Board, the Special Court of Indictment and Revision, the Danish Judicial Appointments Council and the Danish Court Administration.

The courts are governed by the Danish Administration of Justice Act. They do not have specialised subject matters. The district courts, high courts and the Supreme Court handle all types of cases, but certain cases may be handled by a department within the courts that has specific knowledge of that type of case. Furthermore, it is possible in a first instance case that the court may decide that the court, at the main hearing, must be acceded by two expert lay judges, whose expertise is deemed to be of importance to the case. Certain requirements must be fulfilled.

The high courts and district courts

As a main rule, cases commence in the district courts, which are each situated in their judicial district in Denmark. On very few occasions, cases may start in one of the two high courts (western or eastern), if the subject matter of the case is of general public importance and the case is considered to be of principal nature, so an appeal is made to the Supreme Court.

The general rule is that a case can be tried in two instances. When a case is appealed from a district court to a high court, it is possible for the high court to dismiss an appeal, if there is no prospect of the court reaching a different verdict than the district court and the appeal does not concern fundamental legal questions, or where no other general reasons exist in favour of hearing the case before the high court.

Appeals allowed by the Danish Appeals Permission Board cannot be dismissed by the high courts. If the case started before the district court concerns a matter of general public importance or of principal nature, it may be appealed twice. It is also possible to have the Supreme Court hear the case, as a third instance, if this is permitted by the Danish Appeals Permission Board.

The district courts will be presided over by at least one judge and the high courts by at least three judges.

Read this article on Lexology

The district courts have different subdivisions according to subject matter, such as the housing court, the probate and bankruptcy courts and the bailiff's court.

Small claims of a principal amount not exceeding 50,000 kroner are decided by the district court under simplified procedural rules, which aims to accelerate the process and extend the general availability of the courts to the public.

The Supreme Court

The Supreme Court is the court of highest instance in the legal system. Through its rulings, the Supreme Court mainly determines the guidelines for processing similar cases in the district courts and the high courts.

The Supreme Court will be presided over by at least five judges.

The Maritime and Commercial Court and others

The Maritime and Commercial Court decides on cases concerning maritime and commercial matters with an international trade aspect or international parties, or both. Furthermore, cases concerning the Danish Trade Marks Act, the Danish Design Act, the Danish Marketing Practices Act and the Danish Competition Act are heard by the Maritime and Commercial Court. In addition, the bankruptcy division of the Maritime and Commercial Court hears cases concerning bankruptcy, suspension of payments, compulsory debt settlement and debt rescheduling arising in the greater Copenhagen area. Decisions from the Maritime and Commercial Court may be appealed directly to the Supreme Court. In addition to the above-mentioned courts, there are also specialist courts, such as the Labour Court, which decides cases involving matters between employers' organisations and trade unions.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The system is based on the adversarial approach, where judges have a passive role and are only to judge based on the facts and evidence presented by the parties in court during the proceeding. It is not possible for the court to render a decision based on evidence that has not been presented by the parties. Besides delivering judgment, judges also head the trial and oversee the process. During witness testimony, judges can question the witnesses.

Judges are obliged to guide a party who is not legally represented when needed. This guidance covers only procedural issues and does not include legal advice regarding the merits of the case. In small claims cases under 50,000 kroner the guidance of the judge is extended to also consider the merits, to accelerate the process.

Juries are only involved in some types of criminal cases and not in civil law proceedings.

It is a possibility in some cases to use expert lay judges if the case calls for specific knowledge and if the courts find it relevant. Such a request must be made within a brief period of time after the initiation of the case, and no later than at the pretrial hearing, as a request otherwise is most likely to fail.

The selection process for the judges is handled by the Judicial Appointment Council, an independent council with the task of submitting recommendations to the Minister of Justice regarding the appointment of judicial posts. It follows from article 43 of the Administration of Justice Act that recruitment is based on an overall assessment of the candidates' qualifications for the post in question. This will place a decisive emphasis on the applicants' legal and personal qualifications. The breadth of the applicants' legal basis of experience must also be emphasised, and it should be included in the assessment that judges should have different legal backgrounds.

Limitation issues

3 | What are the time limits for bringing civil claims?

As a main rule, there are no specific time limits for bringing civil claims under the Administration of Justice Act, and all claims can be brought before the court, if the claim itself has not ceased to exist (eg, because of the lapse of a time-limitation period or inactivity in the form of estoppel).

The limitation period for monetary claims is determined in the Danish Limitation Act (Chapters 3 to 4), and is, as a main rule, three years although it may be extended to 10 years. The limitation period begins at the earliest time when the claim could be made. The 10-year limitation period requires a judgment, written confirmation with acknowledgment of claim. A written notice or dunning letter is not sufficient to bring the three-year limitation period to stop, as this requires legal action or confirmation from the debtor.

Parties are free to agree to suspend the limitation period if the agreement is regarding an identified claim and after limitation has begun to run. A general waiver of the limitation periods is not possible under Danish law.

In some specific cases, a time limit exists if the lawsuit follows a decision by an administrative board or a special tribunal. Examples include decisions made by a municipality's rental board. Such decisions must be brought before the courts no later than four weeks after the decision was made. A similar time limit of eight weeks applies for decisions made by the Public Procurement Board before the courts. If the deadline expires, the decision of the administrative board is final. Other examples exist in Danish law.

The courts will not ex officio try the above limitations when the case is filed. A party who has a case filed against him or her beyond any time limit must raise the issue in their first written reply in the dispute. The matter may then be subject to a separate formality proceeding at the sole discretion of the courts.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

As a main rule, there are no definite pre-action considerations to be considered before commencing proceedings by filing a writ of summons with the court.

An exception to the main rule is monetary collection claims. As a pre-action consideration, the claimant must submit a demand by letter to the debtor with a deadline for payment of at least 10 days and information that further costs will be imposed if payment is not made. If the requirement is not fulfilled there will be a cost issue, as the creditor will not be able to claim full costs of the case. Furthermore, in cases for collection of rent, there is a special requirement involving the notice given to the tenant.

The parties may request the court to assist with a pretrial expert opinion before filing a claim. These opinions will be allowed to be presented to the court in a later trial regarding the merits of the dispute. The option is relevant in many situations where there is a special need to secure evidence for the claim. This could be in situations where the object of the expert opinion (eg, perishable goods) may not exist when the actual trial takes place.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are commenced by handing in a writ of summons stating the claim, the factual aspects of the dispute, the legal arguments, evidence and suggestions from the claimant as to the form of the proceedings in court (the number of judges, expert lay judges, etc). Also included are the exhibits on which the case is to be based. The writ of summons must be handed in via an online platform provided by the Danish Courts Administration.

The plaintiff must at the same time transfer a court fee, the size of which is based on the claim. When the case is scheduled to be heard at the final hearing, a second court fee of the same amount is to be paid.

The writ of summons is then served on the defendant digitally; however, this requires the defendant to sign off digitally. If the defendant does not sign off digitally, the writ is served by a judicial officer. This must be done in person to the defendant or to a member of his or her household. If the defendant is not a person, it must be served on the head of the legal entity or on an authorised staff member. It is possible for the court to make use of different serving mechanisms, hereunder letters, telephone notices, digital communications and personal notifications.

The process is handled by the court. After the writ of summons has been served, the defendant is granted at least two weeks to submit the defence. The court informs the parties via the digital platform, which therefore is simultaneously.

For small claims of a principal amount not exceeding 50,000 kroner the process is significantly simplified. For all claims under 50,000 kroner utilising the small claims process, the fee is a one-time payment of 500 kroner.

The courts monitor their capacity and aim to handle all cases within the shortest period. In situations where there is a capacity problem, the courts have usually recruited more judges or referred the cases to other venues. There is currently no issue regarding the capacity of the Danish courts.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Civil claims begin with the plaintiff filing a writ of summons in the court of jurisdiction via the digital platform. The court will then serve the writ on the defendant. From the time of service of the writ of summons, the defendant normally has two weeks to file a statement of defence. Any deadlines are clearly stated when viewing the case on the digital platform.

If a petition for extension is not filed, the defendant shall state his or her defence in a reply within two weeks. Following this initial upload of documents to the digital platform, the parties may upload further written replies and rejoinders. The courts oversee this process and set appropriate deadlines for these replies, taking the specific situation into account. Typically, a party is given a deadline of three to four weeks. This may be extended at the request of the party.

The courts may also offer the parties court-based mediation. For further information see the Danish Administration of Justice Act (Chapter 27). Participation in mediation is voluntary and requires the acceptance of both parties. Should one party turn down the offer, this will not harm the party in a subsequent court case.

If deadlines are not met, the court might decide to render a default judgment or decide on issues to the detriment of the party breaching the deadline.

When the initial documents and arguments are exchanged, the court may call the parties to a pretrial hearing during which the parties are to discuss the legal and factual conditions of the case. The rest of the procedure is also to be scheduled, including the date for the hearing of the case. It is intended that specific requests for evidence, hereunder expert opinions, are to be handled at this meeting.

The parties are usually free to produce more arguments and evidence up to four weeks before the scheduled hearing.

In most cases, the court will ask for a case summary. This document specifies legal arguments and production of evidence, including a list of witnesses. Typically, the summary shall be delivered no later than two weeks before the case is heard.

Following the hearing, the court has up to four weeks in the district court, and eight weeks in the high courts, to deliver the ruling. The ruling is given in writing, and must contain a short summary of the proceedings and the arguments on which the court based its ruling. Typically, the arguments are quite short.

Case management

7 | Can the parties control the procedure and the timetable?

As a main rule, the parties have the freedom to control the timetable and procedure of the dispute before the court.

The Administration of Justice Act sets out several guidelines to be followed if the parties cannot agree. These also act as default procedures if the parties do not decide on the procedure. If the parties, for example, agree to stay the proceedings because of settlement negotiations or to await a rule in another dispute, the court will accept this.

The only limitation on the parties' autonomy is the courts' obligation to handle proceedings within a reasonable time frame in accordance with the European Convention of Human Rights, article 6. In practice, the courts will thus not accept extensions, even if agreed between the parties, for unlimited periods of time. If one party has an interest in finalising the dispute, however, the court will then have to enforce one or even several strict deadlines. If the deadlines are not met, this will result in either a default judgment or decisions on factual, formal or evidential issues to the detriment of the party not meeting the deadline.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no general obligation to preserve documents or evidence pending a trial. However, in accordance with legislation concerning bookkeeping and tax, there is an obligation to preserve financial statements and documents for at least five years.

Parties must share documents on which they base their claim or defence. This is part of the presentation of material to the court. This does not include an obligation to submit potentially damaging documents on their own initiative.

If a party believes that the other party is in possession of relevant documents for the claim or defence, the party may ask for an order of discovery of documents. The party asking for such an order must specify the need for the documents and make it plausible that the other party is in possession of the documents. If an order is given and the party fails to produce the documents, this may work to the detriment of the party.

A Danish order for the discovery of specific documents is unlike the Anglo-Saxon regime of discovery.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Certain documents are privileged. This includes documents containing:

- state information from public employees without permission from the relevant authority;
- information that has come to the attention of priests, doctors, defence attorneys, court mediators and attorneys in the exercise of their duties;
- information on persons connected to a party; and
- information on journalists regarding their sources, etc.

Regarding in-house lawyers, the issue is now settled following the *Akzo Nobel/Across* ruling (European Court of Justice C-550-07). The following information from both national and foreign in-house lawyers and advisers can be seen as privileged:

- correspondence exchanged with external legal advisers;
- internal notes reporting the content of a message from or to an independent lawyer; and
- preparatory documents, even if they have not been exchanged with an external lawyer, but only if the company can demonstrate that these documents were created with the sole purpose of seeking legal advice from a lawyer in exercise of the right of defence.

The court has the final decision regarding whether a document is privileged.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties do not normally exchange written evidence prior to the trial. If a case requires an expert opinion, the opinion may be produced pretrial, and it is exchanged prior to the trial, but the obtaining of such involves the court.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

As a main rule, evidence at trial must be given as oral evidence. In second instance cases, the testimony given by the witnesses will be used as a starting point for additional questions for the witness. In cases before the Supreme Court, testimony is presented in a written transcript of the oral testimony. If there is a need for additional witness testimony, the Supreme Court must allow for such steps.

Hearings start with the claimant presenting the case, including a recital of the documentary evidence. Written evidence is thus read aloud wholly, or just the relevant parts, at the presentation of the dispute to the court. Afterwards, witness testimony is given with the possibility of cross-examination and questions from the judges. Witnesses are not allowed to be in the courtroom prior to giving testimony.

As a main rule, expert witnesses must also give their statement orally before the court. As part of the expert statement, however, a written statement answering specific questions is usually given by the expert. Therefore, the testimony given by an expert witness will be based on the written statement, which is then reaffirmed before the court. If the parties do not wish to ask additional questions, the expert is not called to give an oral statement, as it would be irrelevant evidence.

Interim remedies

12 | What interim remedies are available?

As interim remedies, the parties can file for injunctions ordering parties to cease or commence certain actions. Further, the parties may also file for search orders, which requires fulfilment of the requirements in the Administration of Justice Act.

For all interim remedies, the party asking for the measure must prove or make it plausible that the injunction or order shall be filed so as not to further damage the party, and additionally prove or make it plausible that if the injunction or order is not made, the purpose is missed.

Following any interim remedy, a lawsuit must be filed confirming the interim injunction. The deadline for this is two weeks if it involves prohibition of certain actions, and one week with the freezing of assets.

The remedies are fully available to support foreign proceedings if they fulfil the requirements for a national remedy.

In relation to infringement of intellectual property rights, a licensee may request the bailiff's court to initiate investigations for ensuring evidence of an alleged infringement. The party requesting the bailiff's court to initiate such investigation must prove or make it plausible that an infringement has been made and the extent of the infringement (see the Administration of Justice Act, Chapter 57a). The rules according to infringement of intellectual property rights apply mainly to:

- infringement of copyright or related rights;
- violation of design, including Community design;
- infringement of trademarks, including Community trademarks, and collective marks;
- violation of corporate names;
- patent infringements; and
- infringement of utility models.

Following the investigations, a lawsuit must be filed to finally prove the infringement and thereby also the legitimacy of the preliminary securing of evidence. The deadline is four weeks after the bailiff's court announced that the investigations were completed, unless the licensee withdraws the pursuit.

Remedies

13 | What substantive remedies are available?

The parties have two types of claims available as substantive remedies.

The main one is a claim for damages suffered in the form of a claim for payment, including the payment of a contract price, a reduction in price and damages.

The second remedy is a claim for a party to recognise an obligation to do or not do certain actions, or to recognise the rights of a party.

Parties cannot ask for punitive damages as they may in the Anglo-Saxon legal tradition. Damages are only awarded based on actual losses suffered and proven.

The only exception is if the parties have agreed on a certain penalty clause in a contract. Such a penalty may, however, not exceed what is fair. If it is seen to be unfair it can be declared to be void.

If a claim for interest is made by the party regarding a claim for payment, it can be awarded. On monetary claims, interest is claimed from the filing of the cases until payment is made. If the

claim prior to the filing has also incurred interest, this will be calculated until the filing of the case and included in the claim.

Enforcement

14 | What means of enforcement are available?

If court decisions are neglected or disobeyed regarding payment and actions, the party making the claim may have it enforced though the bailiff's court, which has the right to use necessary force. The bailiff can execute a levy against the debtor's property or place the creditor in the possession of specific items, including real property.

A claim for payment is, as a main rule, enforceable two weeks after the judgment is made, if the decision has not already been appealed.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are generally open to the public and only limited by the physical limitations of the actual courtroom.

In exceptional circumstances, the court may decide that only parties to the case may attend the hearing. For example, cases involving divorce or legal separation are never held in public. Aside from this, it would be rare for court proceedings to be closed to the public.

Anyone is free to review the conclusion of a judgment if a request is made within one week of the judgment being delivered. More information is available under section 41a of the Administration of Justice Act. Typically, only the conclusion of the ruling is made available to the public. Court replies, pleadings and written evidence are not available.

Costs

16 | Does the court have power to order costs?

As part of any ruling, the court will decide on the matter of costs.

The awarding of costs is based primarily on the value of the dispute. The court will consider, among other things, the amount of time spent during pretrial hearings and during the final hearing, the complexity of the case, and the extent and inclusion of experts.

The high courts have produced a memorandum containing guidelines and fee bands for civil cases, which the district courts adhere to. The memorandum can be found on the courts' webpage. Decisions on costs may be appealed separately without appealing on the merits of the case, as long as the decision regards an amount higher than 20,000 kroner. If the amount is at or below that amount, it would be necessary to apply for a permission to appeal the cost issues. Such an application would have to be made within two weeks after the decision.

Security need not be provided for the defendant's cost. If the claimant is a foreign national from outside the European Union, the court may require that the claimant post security for the potential costs of the defendant, if the defendant demands this in its defence statement. Furthermore, a narrow exception is applicable if the claimant is a company with limited liability and considered to have been potentially established to avoid paying cost if the case is lost. In that situation, the court could decide that security must be provided. The amount of a potential security for a claimant from outside the European Union is estimated and decided by the court. The court uses the memorandum containing guidelines and fee bands for civil cases. For claims above 5 million kroner, the court calculates the security with 46,340 kroner until the first million and 3 per cent of the rest. According to cases with significant economic values, the courts have earlier reduced the costs by one-third of the costs according to the memorandum containing guidelines and fee bands for civil cases. The determination of the legal costs will be based on the nature and scope of the case. In case law the courts have reduced legal costs from 28 million kroner to 10 million kroner, leaving room for an individual assessment.

In general, the amount of costs awarded in civil disputes does not cover the actual costs incurred by the parties, which is known in other legal territories. Even a successful party must thus expect to pay additional costs in larger disputes.

There are no new rules on the question of cost, but the topic is, as always, discussed by lawyers.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

As a rule, lawyers may not claim a fee that is larger than that which is fair in relation to the case, taking into consideration the importance of the claim to the client, the size of the claim and the nature and amount of work that has been included. This is based on the principle in article 126(2) of the Administration of Justice Act.

If the fee is seen as fair, the lawyer is allowed to make any fee agreement he or she wishes. This will include monetary success fees of all types. The only limitation is that a lawyer may not receive a fixed part or percentage of an award given. It is naturally possible to agree on 'no cure, no pay' for cases.

Agreements regarding third-party funding are possible. However, they are not used in practice.

Litigation funding is beginning to have more progress in the Danish court. In a new verdict from the High Court, a parent company funded its subsidiary's legal costs in a case against the Danish Business Authority. The subsidiary company lost the case and then the parent company was responsible for the payment of the costs to the Danish Business Authority. A third party that provides financing for litigation may therefore potentially incur liability for the payment of legal costs to the counterparty under the fulfilment of certain requirements, hereunder taking into consideration the cost in regard to the specific litigation.

In bankruptcy estates, litigation funding has been approved, as a tool, and can therefore be used.

Factoring is more commonly used, where the claim is sold to a professional party.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance is available and quite common. Insurance will usually cover the legal expenses of the policyholder and the legal costs awarded to the opponent.

Most insurance is subject to maximum coverage and self-excess. Further, the costs covered are usually limited to the costs awarded by the court. If additional costs are incurred, the policyholder must bear these costs. Insurance is available to both private individuals and commercial entities.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Denmark introduced the possibility of class actions in 2008. According to the Administration of Justice Act, section 254b, subsection 1, a class action may be brought when:

- several persons have uniform claims against the same individual or entity: see section 254a;
- all claims have jurisdiction in Denmark;
- the court has jurisdiction over one of the claims;
- the court has subject-matter jurisdiction regarding one of the claims;
- class action is deemed to be the best way of dealing with the claims;
- the class action members may be identified and informed about the case in a suitable manner; and
- a representative for the class action may be appointed: see section 254c.

In a new decision, the High Court deemed under which circumstances several individual persons have uniform claims in accordance with the potential responsibility for a prospectus in connection with a public offering. According to this ruling, uniformity based on responsibility for a prospectus is when:

- the person has bought the shares of his or her own account and risk at the time of the initial public offering or closely related to the initial public offering;
- the person was in possession of the shares at the date of the bankruptcy; and
- the person had jurisdiction in Denmark, when the company went bankrupt.

Class actions require that the class representative can argue that the conditions above are fulfilled and that each member of the class also fulfils the requirements.

A class action is conducted by a representative appointed by the court on behalf of the class. The system is based on the opt-in principle, contrary to the opt-out principle known in the United States. Only the parties who have signed up and actively joined the lawsuit are included.

Furthermore, parties with similar claims or multiple claims between parties (or their affiliated entities) may be handled during the same proceedings. This is a way of limiting the litigation costs. Each dispute will result in a separate ruling.

There are no developments in the procedural rules for class actions, but more class actions are being filed.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

As a main rule, judgments in civil cases may be appealed once to the court of instance one above. Judgments made by the district courts may be appealed to the high courts, and judgments made by the high courts and the Maritime and Commercial Court as court of first instance may be appealed to the Supreme Court.

The high courts have access to reject appeals, regardless of the economic value, unless the parties have indicated conditions that make it likely that the case may have a different outcome than in the district court.

Parties appealing judgments involving claims of under 20,000 kroner must obtain a special permit from the Appeals Permission Board to appeal.

Appeal from the district courts to the high courts must be done within four weeks of the judgment being given or from the time where the Appeals Permission Board approved the application for an appeal. The same rules apply to appeals from the high courts to the Supreme Court.

A default judgment cannot be appealed, although the case can be reopened if a request is made within four weeks and in special circumstances up to one year after the judgment.

Permission for a second appeal may, upon application, be given by the Appeals Permission Board. The permission is only given in special circumstances and if the case deals with matters of importance and principle.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign ruling will be recognised and enforced in Denmark if either a convention or national Danish rules granting recognition provides for recognition. The Minister of Justice has been authorised by the Administration of Justice Act, sections 223a and 479, to implement regulations regarding granting recognition and enforceability. The authorisation has, however, never been exercised by the Minister of Justice, and the recognition of foreign civil judgments is, therefore, currently only regulated by international treaties and conventions.

A judgment from a country within the European Union (or EFTA) is, as a main rule, enforceable in Denmark. (See article 33 of the Brussels I Regulation, which lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial

matters in EU member states.) Denmark has not entered the Brussels II regulation regarding jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. This is why a judgment from a country within the European Union based on matrimonial matters, etc, is not enforceable in Denmark.

Denmark is also a signatory of the Lugano Convention, which came into effect in Denmark on 1 March 1996. The Lugano Convention extends the sphere of mutual recognition and enforcement of civil judgments beyond the borders of the EU, encompassing six of the then-seven member states of EFTA (Austria, Finland, Iceland, Norway, Sweden and Switzerland, explicitly excluding the then-seventh member, Liechtenstein). As is the case with the Brussels I Regulation, the Lugano Convention solely regulates the recognition and enforcement of civil judgments among EU member states and three of the four member states of EFTA; namely, Iceland, Norway and Switzerland.

Between the Nordic countries, recognition is regulated by the Nordic Convention on the Recognition of Civil Judgments of 1933.

If a reciprocal agreement does not exist, a judgment issued in a country outside of the EU or EFTA will, as a main rule, not be enforceable in Denmark.

There are also specific conventions relating to, inter alia, family law, succession law and bankruptcy.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Denmark is a party to the 1970 Hague Convention on the Collection of Evidence Abroad in Civil or Commercial Matters, through which courts in other ratifying states may request evidence taken in Denmark. The rules apply if a formal request is made by a foreign court.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Act of 2005 is primarily based on the UNCITRAL Model Law of 1985 with some differences. For example, there are no formal requirements to an arbitration agreement in section 7 of the Arbitration Act. Further, it should be mentioned that the Arbitration Act has not been updated with regard to the 2006 amendments of the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Parties may enter into an arbitration agreement both before and after a dispute has arisen. There is no in-writing requirement under the Arbitration Act; however, there might be lex specialis laws that require otherwise, such as the Merchant Shipping Act. Arbitration agreements are not valid in contracts with consumers.

Furthermore, under the New York Convention of 1958, there is an in-writing requirement. Arbitration agreements entered into in Denmark thus need to be in writing to be enforced under several other jurisdictions.

Arbitration agreements in the event of bankruptcy may raise the question under which circumstances the arbitration agreement is valid, when a party goes bankrupt and the bankruptcy estate does not enter into the agreement containing the arbitration clause. Arbitration agreements that regulate bankruptcy, clawback claims, retention of title and offsetting, are not considered valid against a bankruptcy estate.

In case law, the High Court decided whether an arbitration agreement was binding on a bankruptcy estate that charged outstanding invoice claims without the estate having entered into an mutual agreement with the counterparty.

The High Court found that a bankruptcy estate is not bound by the arbitration agreement entered into prior to the bankruptcy if the dispute concerns clawback claims, retention of title or offsetting. If, on the other hand, the dispute is independent of the bankruptcy because the claim is based on the rules on deficiencies, then an arbitration agreement entered into prior to the bankruptcy is binding on the bankruptcy estate regardless of whether the bankruptcy estate has not entered the agreement.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The parties are free to determine the number of arbitrators. If no agreement has been reached, arbitration will consist of three arbitrators (see section 10, subsection 2 of the Arbitration Act). If the parties have agreed upon institutional arbitration, the number of arbitrators will be determined by the chosen institution.

If the parties have not agreed upon the appointment of arbitrators, as a main rule each party appoints one arbitrator within 30 days of having received a request from the opposing party. The two party-appointed arbitrators thereafter appoint the chair within 30 days of being appointed (see section 11, subsection 2 of the Arbitration Act). If the party-appointed arbitrators cannot agree upon the chair, each of the parties may request that the national courts appoint the remaining arbitrator or arbitrators (section 11, subsection 3).

The appointment of an arbitrator may only be challenged if circumstances exist that give probable cause to believe that the arbitrator is not impartial or independent, or if the arbitrator does not possess the qualifications to which the parties have agreed (section 12, subsection 2 of the Arbitration Act).

Furthermore, a party cannot challenge the appointment of its party-appointed arbitrator if the grounds for doing so were known at the time of appointing the arbitrator.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The number of arbitrators and the qualifications depend on the arbitration institution designated in the arbitral clause. The Danish Institute of Arbitration handles cases of all subject matters and has a pool of candidates, which is deemed sufficient to meet the needs of complex arbitration. It could be considered that Denmark is a small jurisdiction, which could potentially lead to difficulties in finding qualified arbitrators. This is not the case.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Under the Arbitration Act, the only mandatory provisions in regard to the procedure are that each party shall be treated equally and that each party shall be given full opportunity to present its case (see section 18 of the Arbitration Act).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

As a general rule, the court has no competence in disputes that are to be settled by arbitration (see section 4 of the Arbitration Act). However, there are exceptions in the Act.

If requested by a party, the court may implement interim remedies or enforcement, even though according to the agreement the dispute is to be settled by arbitration (see section 9).

Furthermore, the court may intervene in matters of appointing arbitrators (see section 11, subsection 3), objections against the arbitrator (section 13, subsection 3) or the competence of the tribunal (see section 16, subsection 3), or orders as to costs (section 34, subsection 3).

Regarding the arbitration award, the court may set aside the award in accordance with the rules in section 37, subsection 2-4; for example, if the dispute, owing to its nature, cannot be settled by arbitration.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. At the request of a party, the arbitrators have the power to grant interim relief (section 17 of the Arbitration Act). However, the arbitrators cannot enforce it. For a party to enforce interim relief, a request must be submitted to the national courts, which thereafter will hear the dispute on that matter.

The fact that the dispute according to the parties' agreement should be settled by arbitration does not bar the national courts from hearing the dispute regarding interim relief (see section 9 of the Arbitration Act). Consequently, a party may obtain a freezing order or an injunction in accordance with the provisions of the Danish Administration of Justice Act.

Moreover, a party may also be granted an order of enforcement, providing that the conditions under the Danish Administration of Justice Act are met.

Award

30 | When and in what form must the award be delivered?

The award is to be made in writing and is to be signed by the arbitrator or the arbitrators (see section 31 of the Arbitration Act). Furthermore, it must state the date and the place of arbitration. Lastly, after the award has been made, a copy is to be signed by the arbitrators and delivered to each party.

The time limit for receiving the copy is primarily relevant with regard to section 33, concerning corrections of errors in computation, typographical errors, etc, within 30 days.

Moreover, each party may, unless otherwise agreed within 30 days after receiving the award, request that the tribunal issue additional awards regarding claims presented during the proceedings (see section 33, subsection 3).

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitral award is final and cannot be appealed to the court. The national court enforces the award; however, pursuant to section 37 of the Arbitration Act, an award may be rendered unenforceable if certain conditions are met (eg, if the tribunal was not competent in accordance with the arbitration agreement). Section 37 of the Arbitration Act is, with few alterations, an adoption of article 34 of the UNCITRAL Model Law.

Additionally, an award may be set aside if a court finds that the subject matter of the dispute is not eligible for settlement by arbitration, or if the award is manifestly contrary to public policy in Denmark.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Denmark is party to the New York Convention of 1958. The rules of enforcement of foreign awards have been adopted into the Arbitration Act and, pursuant to section 38, both Danish and foreign arbitration awards are enforceable in Denmark. Awards from states not party to the New York Convention of 1958 are also enforceable in Denmark (see section 38 of the Arbitration Act).

A request for enforcement shall be sent to the court governing the jurisdiction where the party in breach has his or her residence or place of business. The request shall be in writing and include a duly certified copy of the award and of the arbitration agreement, if it is in writing.

If the award is not in Danish, the court will require a duly certified Danish translation.

The bailiff's court may refuse enforcement if one of the conditions mentioned in section 39 of the Arbitration Act is met; this section is based on article 36 of the UNCITRAL Model Law.

There are no changes in the options regarding enforcement.

Costs

33 | Can a successful party recover its costs?

Rules about costs are governed by the Arbitration Act, part 7. The parties are jointly and severally liable for the costs of the arbitration tribunal (see section 34, subsection 2 of the Arbitration Act). The arbitration tribunal will allocate the costs to the parties and may choose to award one of the parties some or all of the costs (see section 35).

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The commonly used types of ADR are mediation and court-based mediation. To solve a dispute by regular mediation, the parties are brought together using a non-court-based mediator. The mediator is commonly an attorney at law who is educated as a mediator, and the mediator helps the parties to negotiate and find a solution to the conflict. If the parties can find a solution, the mediator will draft the agreement.

The court-based mediation is voluntary and an alternative to dispute resolution in court. The parties have to agree to try to resolve the conflict in court-based mediation. The process is led by a judge or an attorney at law and the 'mediator' does not decide the case, but instead helps the parties find a solution to the conflict that they can agree on.

The claimant must pay a fee based on the value of the case, but the assistance from the mediator is free.

The court must decide whether a case may be conciliated and only if the court assumes the result would be negative may it abstain from conciliation.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There are no requirements for the parties to consider ADR before or during proceedings. Neither a court nor a tribunal is able to compel the parties to participate in ADR proceedings.

If the parties want to participate in court-based mediation, it is required that: a subpoena is filed; both parties agree to resolve the dispute by court-based mediation; and the court assesses that the case is suitable for court-based mediation.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

A new law on court fees entered into force on 1 October 2021. The new law on court fees applies to all cases brought after 1 October 2021. The purpose of the law is to simplify the rules on court fees.

Under the new law, all court fees that were previously calculated as a percentage of the value of the case have been replaced by fixed fees.

In the new court tax law, when a civil lawsuit is filed in the first instance, a court fee of 1,500 kroner must be paid. If the case has no economic value, or if the financial value does not exceed 100,000 kroner, the law only proposes a court fee of 750 kroner.

In addition, a fee must be paid when the time of the trial is set.

Economic value of the case (kroner)	Court fee (kroner)
100,001–250,000	3,000
250,001–500,000	8,000
500,001–1,000,000	14,000
1,000,001–2,000,000	35,000
2,000,001–3,000,000	60,000
3,000,001–4,000,000	85,000
4,000,001–5,000,000	110,000
5,000,001–6,000,000	135,000
Over 6,000,000	160,000

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Not at present.

* *The information in this chapter was accurate as at 31 March 2022.*

Morten Schwartz Nielsen msn@les.dkl
Kasper S R Andersen kra@les.dk

Kalwebod Drygge 39-41, Copenhagen 1560, Denmark
Tel: +45 33 300 200
www.lesadv.dk

Read more from this firm on Lexology

Read this article on Lexology

Egypt

Ehab Yehia
Soliman, Hashish & Partners

RETURN TO CONTENTS

Summary

LITIGATION 183
Court system 183
Judges and juries 183
Limitation issues 184
Pre-action behaviour 184
Starting proceedings 184
Timetable 184
Case management 185
Evidence – documents 185
Evidence – privilege 185
Evidence – pretrial 185
Evidence – trial 185
Interim remedies 186
Remedies 186
Enforcement 186
Public access 186
Costs 186
Funding arrangements 187
Insurance 187
Class action 187
Appeal 187
Foreign judgments 187
Foreign proceedings 187

ARBITRATION 188
UNCITRAL Model Law 188
Arbitration agreements 188
Choice of arbitrator 188
Arbitrator options 188
Arbitral procedure 188
Court intervention 189
Interim relief 189
Award 189
Appeal 189
Enforcement 190
Costs 190

ALTERNATIVE DISPUTE RESOLUTION 190
Types of ADR 190
Requirements for ADR 190

Read this article on Lexology

MISCELLANEOUS	190
Interesting features	190
UPDATE AND TRENDS	191
Recent developments and future reforms	191

LITIGATION

Court system

1 | What is the structure of the civil court system?

Civil courts in Egypt are divided into three main types of court as follows:

- partial courts, which are composed of one judge and render verdicts in civil claims of an amount no more than 100,000 Egyptian pounds, as well as other specific claims;
- preliminary courts, which are composed of at least three judges and render verdicts in civil claims that exceed the scope of the partial courts; they also render verdicts in the appeal of decisions of the partial courts; and
- courts of appeal, which are composed of at least three judges and render verdicts in the appeal of decisions of the preliminary courts.

All courts usually have subdivisions according to subject matter (lease, compensation, proof of signature, etc).

The economic courts are a special type of court, incorporated in 2008, that exclusively render verdicts in civil claims and in criminal cases concerning specific economic laws (eg, the Companies Law, the Financial Lease Law, the Central Bank Law and the Telecommunication Law).

According to the initial draft of a new labour law to be issued in 2022, a special employment court shall be created.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The role of the judge in partial courts, and the tribunals chief in both preliminary courts and courts of appeal, is usually to review the claim to ensure the court's competency and that the procedural conditions are met. Thereafter, the judge shall review the documents submitted by the parties and render either a final or a preliminary verdict for each claim. The final verdict is the verdict that will end the claim (eg, acceptance or refusal), while the preliminary verdict is a verdict that does not end the claim (eg, referring the matter to an expert or to investigation).

The Egyptian judicial system does not apply the jury system.

Read this article on Lexology

Limitation issues

3 | What are the time limits for bringing civil claims?

The general rule for the time limit to bring a civil claim is 15 years, unless otherwise determined by law.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

According to the Civil Code, the general rule is that the creditor may not claim from the court performance of the obligation nor compensation except after legally giving the debtor notice to perform his or her obligation. If this rule is not followed, the court shall not accept the claim.

However, the parties may agree in the contract that this notice shall be assumed in specific cases. In such a case, the creditor does not need to notify the debtor before raising his or her claim.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

The claimant must submit his or her claim to the court and notify the defendant of the claim. The claim must include the full information of the claimant, the name of the defendant, the date of submission, the competent court, and the case facts, claims and legal basis.

In practice, the courts in Egypt are overloaded. However, the Ministry of Justice and court chiefs are improving the courts' capacity to handle their caseloads by incorporating new tribunals and specialised courts (eg, economic and labour courts).

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The claim starts with the notice of claim served to the defendant, and the defendant may then start submitting his or her defence and counterclaims (if applicable). Thereafter, both the claimant and the defendant submit their responses or counterclaims, or both, to the court. Once the court finds that the facts of the matter are clear, and the claimant and defendant do not request the submission of any further documents, the court will render its judgment.

If the court did not decide to mandate an expert, the timetable of a normal claim is six months. If the court decided to refer the case to an expert, the case may take over a year.

Case management

7 Can the parties control the procedure and the timetable?

According to the applicable laws, no. However, in practice, if both the claimant and the defendant agreed on a timetable (eg, to grant them time before the next hearing) or a specific procedure (eg, to delegate an expert) and they requested it jointly from the court, the court will most likely accept it, if the requested procedure or timetable is in accordance with the law.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The claimant may not register his or her claim at court unless the original copies, or at least photocopies, of the documents supporting his or her claim are attached. If not, the court will most likely not accept the case.

The court may not oblige any of the parties to submit any document, unless requested by a party and the document is a common document. The document is deemed common if it specifies their rights in relation to each other.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Yes, any communication between any party and his or her attorney, even if in-house, is privileged. Moreover, lawyers are prohibited from testifying in court except if asked to testify by their clients.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

No, Egyptian law does not require such an exchange.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

If the court decides to hear witnesses in a specific matter of the claim, the court will render a preliminary judgment referring the case to investigation and will stipulate a date for the parties to bring their witnesses to prove the relevant matter.

If the court decides to refer the case to an expert, the court will render a preliminary verdict specifying the expert's specialty, the matter to be examined and the time for examining this matter. Once the expert finishes his or her examination, he or she will prepare a report and submit it to the court, which the parties are entitled to review and submit objections against.

Interim remedies

12 | What interim remedies are available?

Interim freezing of the debtor's property, and any of the debtor's property that is in possession of a third party, is available.

Remedies

13 | What substantive remedies are available?

If claimed, an interest rate of 4 per cent in civil matters and 5 per cent in commercial matters might be included in the judgment. The interest rate, if pre-stated in the contract, may not exceed 7 per cent.

Enforcement

14 | What means of enforcement are available?

The claimant executes the civil judgment through the court bailiff based on the writ of execution issued by the execution judge of the competent court.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are held in public unless otherwise decided by the court. However, out of all the court documents, only judgments are available to public.

Costs

16 | Does the court have power to order costs?

The general rule is that courts order costs against the losing party. However, if the losing party did not dispute the claimed matters, courts may decide costs against the winning party.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

This is not regulated for in Egyptian law and is very rare in practice.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

This is not regulated for in Egyptian law and is very rare in practice.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The Labour Law is the only law that regulates class actions. It provides for actions by employees against their employer.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties can appeal judgments rendered by a court of first instance if the value of the case exceeds the final amount.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

There are multiple bilateral agreements between Egypt and other countries that entitle a claimant to direct enforcement of a foreign judgment. If no agreement is in place, a case shall be raised through the same procedures for the recognition and enforcement of foreign judgments.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

This is not regulated for in Egyptian law, and it depends on the other jurisdiction.

Read this article on Lexology

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, but there are a number of differences related to the applicability of the Arbitration Law, the number of arbitrators and the basis of nullifying an arbitration award.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The following comprise the formal requirements:

- the agreement must be in the form of a written document or another written means of communication;
- the scope of matters to be subject to arbitration must be defined;
- the parties to the arbitration agreement must have legal capacity; and
- the object of the arbitration must be a matter that can be reconciled.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Three arbitrators are appointed.

If not agreed, each party must appoint an arbitrator, and the arbitrators of both parties must agree on and appoint the third arbitrator.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Arbitrators are selected in accordance with the arbitration agreement. If not regulated, they are selected in accordance with the rules of the Arbitration Law.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Yes, the Arbitration Law contains substantive requirements for the procedure to be followed.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The competent court is entitled to:

- issue interim actions before or during the arbitration procedure if requested by any of the parties;
- appoint the sole arbitrator if the parties could not agree on one, or appoint the third arbitrator if the two appointed arbitrators could not agree on one;
- decide on the discharge of any arbitrator if requested by one of the parties for disqualification or non-performance of his or her duties;
- decide on the extension of the duration of arbitration or the termination of the arbitration procedures if the arbitration did not end during the specified timeline; and
- decide on the annulment of the arbitration judgment.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, if accepted before the arbitration by the parties to it.

Award

30 | When and in what form must the award be delivered?

The award must be written, signed and issued within the arbitration duration.

Appeal

31 | On what grounds can an award be appealed to the court?

An award can be appealed to the court if:

- the arbitration clause is absent, is void or voidable or exceeds the statute of limitations;
- either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control, or failure to observe due process;
- the tribunal did not apply the agreed applicable law to the dispute;
- the composition of the arbitral panel or the appointment of the arbitrators contradicts the applicable law or the parties' agreement;
- the arbitral award included matters not falling within the scope of the arbitration clause; or
- it contradicts public order provisions in Egypt.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The claimant must submit the award with the other required documents to the competent court requesting the writ of execution.

Costs

33 | Can a successful party recover its costs?

This is not regulated for in Egyptian law.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Mediation is commonly used.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Mediation is an obligatory first procedure before economic court proceedings.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

There were no developments in the past year.

SOLIMAN, HASHISH & PARTNERS
LAW FIRM

Ehab Yehia e.yehia@shandpartners.com

2nd Floor, Plot No.15, Ninetieth Street, New Cairo, Egypt
Tel: +202 2812 4499
www.shandpartners.com

Read more from this firm on Lexology

England & Wales

Oliver Browne and Anna James

Latham & Watkins LLP

RETURN TO CONTENTS

Summary

LITIGATION	193
Court system	193
Judges and juries	195
Limitation issues	196
Pre-action behaviour	197
Starting proceedings	198
Timetable	200
Case management	201
Evidence – documents	203
Evidence – privilege	206
Evidence – pretrial	208
Evidence – trial	210
Interim remedies	211
Remedies	211
Enforcement	212
Public access	212
Costs	213
Funding arrangements	215
Insurance	218
Class action	219
Appeal	220
Foreign judgments	221
Foreign proceedings	222
ARBITRATION	**223**
UNCITRAL Model Law	223
Arbitration agreements	223
Choice of arbitrator	224
Arbitrator options	225
Arbitral procedure	225
Court intervention	225
Interim relief	226
Award	226
Appeal	227
Enforcement	228
Costs	229
ALTERNATIVE DISPUTE RESOLUTION	**230**
Types of ADR	230
Requirements for ADR	231

Read this article on Lexology

MISCELLANEOUS 232
Interesting features 232

UPDATE AND TRENDS 232
Recent developments and future reforms 232

LITIGATION

Court system

1 What is the structure of the civil court system?

The civil court system is made up of a number of courts and tribunals, which range from specialist tribunals such as the Employment Tribunal and the county courts, through to the High Court, the Court of Appeal and the Supreme Court. A claim will be issued or heard in one of these courts or tribunals depending on the nature, value and status of the claim.

There are approximately 130 county courts (including combined courts), each of which hears cases in certain geographical catchment areas. Cases in the county court will ordinarily be heard in the county court located closest to where the defendant resides. Money claims with a value up to and including £100,000 and claims for damages for personal injury with a value up to £50,000 must be started in the county court. These thresholds are subject to exceptions: for example, claims falling within a specialist court that raise questions of public importance or that are sufficiently complex to merit being heard in the High Court. Equitable claims up to a value of £350,000 must also be started in the county court. The above thresholds indicate that parties are encouraged to commence proceedings in lower courts where possible, but provide that complex, high-value litigation remains unaffected.

The Civil Procedure Rules (CPR) clarify which county court must hear specialist claims, such as probate, intellectual property and claims in certain insolvency proceedings.

The High Court has three divisions: the King's Bench Division, the Chancery Division and the Family Division.

As of April 2023, there were approximately 71 judges in the King's Bench Division and 17 judges in the Chancery Division. The Family Division consists of 20 High Court judges in addition to the president of the Family Division, who all have exclusive jurisdiction in wardship.

The King's Bench Division deals with most claims in contract and in tort.

The Chancery Division deals with claims involving land, mortgages, execution of trusts, administration of estates, partnerships and deeds, corporate and personal insolvency disputes and companies work, as well as with some contractual claims (there is some overlap with the King's Bench Division in respect of contractual claims).

There are specialist courts within the High Court, including the Commercial Court, the Admiralty Court and the Technology and Construction Court in the King's Bench Division, and the Bankruptcy Court, Companies Court and Patents Court in the Chancery Division.

Read this article on Lexology

In addition, in October 2015, a specialist cross-jurisdictional Financial List was created to handle claims related specifically to the financial markets and to address the particular business needs of parties litigating on financial matters. The objective of the Financial List is to ensure that cases that would benefit from being heard by judges with particular expertise in the financial markets or that raise issues of general importance to the financial markets are dealt with by judges with suitable expertise and experience. A test case scheme was piloted in the Financial List until September 2017. Under this scheme, parties could seek declaratory relief without the need for a cause of action. Now, a claim may be brought on the basis that it raises issues of general importance to the financial markets. Interested parties may intervene in the proceedings. There is also a general rule that parties bear their own costs. Claims in the Financial List may be started in either the Commercial Court or the Chancery Division.

As of July 2017, the Business and Property Courts were launched as an umbrella for the specialist courts, lists of the High Court and some of the work of the Chancery Division, and include the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Financial List, the Business List, the Insolvency and Companies List, the Intellectual Property List, the Revenue List, the Property Trusts and Probate List and the Competition List.

The Civil Division of the Court of Appeal hears appeals from the county courts and from the High Court.

An extensive review of the structure of the civil court system commissioned by the Lord Chief Justice was undertaken by Lord Justice Briggs and published in July 2016 (the Briggs Report). The Briggs Report set out recommendations to modernise the current system (in particular, to encourage the development of digital systems to transmit and store information and to create easier access to justice for individuals and small businesses) and suggested urgent measures to ease the current workload of the Court of Appeal.

As a result of the Briggs Report, changes to the appeals process came into force on 3 October 2016. These included changes to the route of appeal so that, subject to certain exceptions, appeals from both interim and final decisions in the county court now lie with the High Court instead of the Court of Appeal. More recently, His Majesty's Courts & Tribunals Service (HMCTS) is undergoing a court reform programme, scheduled for completion in March 2024, which aims to introduce new technology to make the court system more efficient and accessible to the public. As part of these reforms, it is now possible to apply via HMCTS online services for a divorce, money claim or appeal to the tax tribunal. In November 2019, the Ministry of Justice set out its proposed evaluation of the HMCTS court reform programme, exploring the effect of the reforms on outcomes and costs for users of the courts. An interim report was published in 2021, followed by a progress report in March 2023, with a final report planned for 2024.

Another key suggested change of the Briggs Report was the creation of an online court that would deal with simple claims up to a value of £25,000. The intention was that this would be a largely automated system that would be used by litigants in person without needing to instruct a lawyer. Whether this will be a separate court or a branch of the county court remains under discussion.

In November 2015, electronic working was introduced at the Royal Courts of Justice at the Rolls Building, London, as the Electronic Working Pilot Scheme. The Scheme was amended in November 2017 and will run until 6 April 2024 after being extended on 2 December 2022. Also under discussion is the increase of the threshold for issuing a claim in the High Court to £250,000, with a further increase to £500,000 at a later stage, as well as applying this threshold to all types of claims. However, at the time of writing, no such changes have been announced.

A number of temporary schemes were brought in to address the global covid-19 pandemic, including PD51Y (Video or Audio Hearings in Civil Proceedings during the Coronavirus Pandemic), PD51Z (Stay of Possession Proceedings, Coronavirus) and PD51ZA (Extension of Time Limits and Clarification of Practice Direction 51Y). These schemes are no longer in force.

The Supreme Court is the final court of appeal. It hears appeals from the Court of Appeal (and in some limited cases directly from the High Court) on points of law of general public importance.

The Judicial Committee of the Privy Council, which consists of the justices of the Supreme Court and some senior Commonwealth judges, is a final court of appeal for a number of Commonwealth countries, as well as the United Kingdom's overseas territories, Crown dependencies and military sovereign bases.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Judges are appointed by the Judicial Appointments Commission, an executive, non-departmental public body sponsored by the Ministry of Justice. The application process involves qualifying tests and independent assessment, and candidates must meet the eligibility and good character requirements.

A Judicial Diversity Committee was set up in 2013 with the aim of promoting diversity on the bench. The 2022 Judicial Diversity statistics report that 35 per cent of court judges and 50 per cent of tribunal judges are female. The proportion of women remains lower in senior court appointments (30 per cent for the High Court and above). As at 1 April 2022, 5 per cent of judges were from Asian backgrounds, 1 per cent were from black backgrounds, 2 per cent were from mixed ethnic backgrounds and 1 per cent were from other ethnic minority backgrounds. The proportion of ethnic minorities is lower for senior court appointments (5 per cent for the High Court and above) compared to others 70 per cent of court judges and 69 per cent of tribunal judges were aged 50 and over, with 35 per cent aged 60 and over in courts and 36 per cent in tribunals.

Civil cases are generally heard at first instance by a single judge. Exceptions include claims for malicious prosecution, false imprisonment and, exceptionally, if a court so orders, defamation. In these cases, there is a right to trial by jury.

Although the introduction of the CPR in 1999 has, to some extent, altered the role of the judge in civil proceedings by encouraging the court to take a more interventionist management role, the civil justice system remains adversarial. Accordingly, the judge's role during

the trial is generally passive rather than inquisitorial. Lord Denning pointed out in *Jones v National Coal Board* [1957] 2 QB 553 that 'the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large'.

Nevertheless, the case of *Kazakhstan Kagazy Plc & Ors v Zhunus* (Rev 1) [2015] EWHC 996 (Comm) emphasises the courts' increased involvement in scrutinising the conduct of parties during proceedings. In that case, Walker J gave guidance on the approach expected from parties to commercial litigation, which included advice that 'solicitors and counsel should take appropriate steps to conduct the debate, whether in advocacy or in correspondence, in a way which will lower the temperature rather than raise it'.

Judges in England and Wales have a fundamental duty under the English common law doctrine of stare decisis to interpret the law with regard to precedent. In practice, this means that a court should follow previously decided cases that considered similar facts and legal issues to ensure (as far as possible) consistency in the administration of justice.

Limitation issues

3 | What are the time limits for bringing civil claims?

Most limitation periods are laid down by the Limitation Act 1980 (as amended). The general rule for claims in contract and in tort is that the claimant has six years from the accrual of the cause of action to commence proceedings. Exceptions include the torts of libel, slander and malicious falsehood, for which there is a one-year limitation period. The limitation period for making a personal injury claim is three years.

In contract, the cause of action accrues on the date of the breach of contract, whereas in tort it accrues when the damage occurs (unless the tort is actionable without proof of damage).

The limitation period for a claim under a deed is 12 years from the breach of an obligation contained in the deed.

Usually, if the limitation period for a claim has expired, the defendant will have a complete defence to the claim. However, where any fact relevant to the claim has been deliberately concealed by the defendant, or where an action is based on the alleged fraud of the defendant, the limitation period does not commence until the concealment or fraud is actually discovered or could have been discovered with reasonable diligence.

Under CPR 17.4 (2), if a party wishes to amend its claim to introduce a new cause of action after the limitation period has expired, the court will not allow the amendment unless the new cause of action arises out of (substantially) the same facts as are in issue at the time of the amendment. The Court of Appeal has clarified this in the case of *Libyan Investment Authority v King* [2020] EWCA Civ 1690 in which it held that parties seeking to introduce a new claim after the expiry of the relevant limitation period cannot rely on previously struck out pleadings to demonstrate that the new claim arose out of substantially the same facts.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

The parties must consider the potential impact of their behaviour at the pre-action stage of any dispute, and consider at an early stage that the rules governing pre-action conduct apply to the prospective legal claim under consideration.

They should comply with the relevant pre-action protocol or, where a pre-action protocol is silent on the relevant issue or there is no specific pre-action protocol for the type of claim being pursued, a party should follow directions in the Practice Direction on Pre-Action Conduct and Protocols (PDPACP). There are potentially serious consequences for failing to comply with the PDPACP, including significant costs penalties.

Pre-action protocols outline the steps that parties should take to seek information about a prospective legal claim and to provide such information to each other. The purpose of pre-action protocols is to encourage an early and full exchange of information about prospective claims, and to enable parties to consider using a form of alternative dispute resolution (ADR), narrowing down or settling claims prior to commencement of legal proceedings. They also support the efficient management of proceedings where litigation cannot be avoided.

There are currently 14 protocols in force specific to certain types of proceedings; for example, construction and engineering disputes, professional negligence claims and defamation actions. As a general rule, the parties should consider carefully which protocol is most applicable to their proceedings. The Pre-Action Protocols are routinely updated to reflect best practice and are supplemented, from time-to-time, by pilot schemes or other similar provisional proceedings. On 27 October 2020, the Civil Justice Council (CJC) announced a review of the pre-action protocols. An interim report was published in November 2021, outlining options for reforming the Practice Direction on Pre-Action Conduct and existing pre-action protocols (PAPs), and for introducing new PAPs for certain claims. A final report has not yet been published.

During pre-action exchanges, parties are typically provided with information about each other, which may amount to 'personal data' for the purposes of the General Data Protection Regulation (EU) 2016/679 (GDPR), which has been retained in domestic law following the withdrawal of the United Kingdom from the European Union. The UK GDPR sits alongside an amended version of the Data Privacy Act 2018. Parties should be aware of their obligations under the UK GDPR in this regard and seek appropriate counsel where necessary. In cases not covered by any approved protocol, the PDPACP provides general guidance as to exchange of information before starting the proceedings. Although the PDPACP is not mandatory and only states what the parties should do unless circumstances make it inappropriate, the parties will be required to explain any non-compliance to the court, and the court can always take into account the parties' conduct in the pre-action period when giving case management directions and when making orders as to costs and interest on sums due. The PDPACP typically applies to all types of claim, except for a few limited exceptions. Prior to the commencement of proceedings, a prospective party may apply to the court for disclosure of documents by a person who is likely to be a party to those proceedings, but must satisfy a number of tests, which limits the applicability of this route to many cases.

An extra weapon in the claimant's armoury is the *Norwich Pharmacal* order. That order can be sought where the claimant has a cause of action but does not know the identity of the person who should be named as the defendant. In those circumstances, the court may order a third party who has been involved in the wrongdoing, even if innocently, to disclose the identity of potential defendants or to provide other information to assist the claimant in bringing the claim.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are commenced by the issue of a claim form, which is lodged with the court by the claimant and served on the other party.

There are various prescribed versions of the claim form, depending on the types of claim being issued. The claim form provides details of the amount that the claimant expects to recover, full details of the parties and full details of the claim, which may be set out either in the claim form itself or in a separate document called the particulars of claim. The claim form and particulars of claim must be verified by a statement of truth, which is a statement that the party submitting the document believes the facts stated in it to be true.

Claimants must take care that the particulars of claim comply with the CPR and with court guidelines as they may be otherwise subject to an adverse costs order, or, if they are found to be sufficiently irrelevant, incomplete or in breach of the rules, struck out (*Ventra Investments Ltd (In Liquidation) v Bank of Scotland Plc* [2017] EWHC 199 (Comm)).

A fee is payable on submission of the claim form, which varies based on the value of the claim. For claims above £10,000, the court fee is based on 5 per cent of the value of the claim in specified money cases (subject to a maximum of £10,000). Claims exceeding £200,000 or for an unspecified sum are subject to a fee of £10,000. In certain circumstances, court fees can be reduced for persons who fulfil the relevant financial criteria, such as those with a low income or low savings. Court fees may also be slightly reduced for the online submission of a claim form, applicable for any money claims up to a value of £100,000.

As of 25 April 2017, issuing claims and filing documents in the Chancery Division, Commercial Court, Technology and Construction Court, Circuit Commercial Court and Admiralty Court (the Rolls Building Courts) is only possible through the online filing system, CE-File. Online filing has been mandatory since 30 April 2019 for all professional users issuing claims in the Business and Property Courts regardless of location, since 1 July 2019 for those issuing claims in the King's Bench Division in London, and from 14 February 2022 for professional users issuing claims in the Court of Appeal. Under the courts' CE-Filing system, parties can file documents at court, including claim forms, online 24 hours a day, every day. For a claim form to be served on the defendant a claimant must take steps as required by the rules of the court to bring the documents within the relevant person's attention. Service is effected via a number of methods, depending on the location of the defendants. Defendants domiciled in England and Wales will normally be served via post (but other methods of service, such as service upon a defendant in person, are available). The Supreme Court case (*Barton*

v Wright Hassall LLP [2018] UKSC 12) serves as a reminder to prospective claimants to follow the rules on service set out in the CPR. In that case, the Court of Appeal refused to validate service by email on the basis that the fact that the claim had been effectively brought to the notice of the defendants was not sufficient reason to validate. The Supreme Court upheld the Court of Appeal's decision. CPR 6APD.4 provides that where a document is to be served by 'fax or other electronic means', the party to be served or its solicitor must previously have indicated in writing that it is willing to accept service by such means (and any limitations, for example file size) and given the number or address to which it must be sent.

A claim form must be served within four months of filing if it is to be served within the jurisdiction and six months if it is to be served outside the jurisdiction. It is possible to apply for permission to extend the period of time for service, but usually any application should be made before the relevant period expires.

Service out of the jurisdiction is a complicated area. In many cases permission to serve out of the jurisdiction is required.

Prior to the end of the transition period, proceedings could be served on a defendant outside the jurisdiction without permission if the English court had jurisdiction under any of the instruments comprising the European regime, in particular the Recast Brussels Regulation, which broadly determines jurisdiction where the defendant is domiciled in a member state (subject to some important exceptions). From 31 December 2020, defendants domiciled in the European Union may no longer be served by way of the EU Service Regulation (1393/2007). The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 came into force on 31 December 2020, meaning that where a defendant is domiciled outside the European Union, a claimant may be required to obtain permission from the court to serve the claim outside of the jurisdiction.

From 1 January 2021, it is necessary to obtain the court's permission to serve the claim form outside the jurisdiction where there is a jurisdiction clause in favour of the English courts, except where the Hague Convention applies (CPR 6.33(2B)), or where the claim form was issued, but not served, before the end of the transition period and CPR 6.33(2) applied. Once permission is received, a claimant must follow the rules of service laid down by applicable conflict of laws rules (eg, the Hague Convention). Certain formal requirements (such as translation of the claim documents) must be complied with when serving documents outside the jurisdiction according to the Hague Convention.

On 6 April 2021, the Civil Procedure (Amendment) Rules 2021 (SI 2021/117) came into force, amending CPR 6.33(2B). This amendment allows the claim form to be served outside the jurisdiction without the court's permission where the contract contains a jurisdiction clause in favour of the English courts and where the Hague Convention does not apply.

On several occasions, it has been held that service of court documents via social media platforms, such as Twitter or Facebook, is acceptable, as long as certain requirements are fulfilled (such as the claimants showing that they have attempted service by more conventional means, or that there was good reason for them not doing so).

Timetable

6 | What is the typical procedure and timetable for a civil claim?

If the defendant wishes to dispute the claim, he or she must serve a defence. In most cases (though the timetables differ between different courts, each of which publish their own specific guides), the defendant has at least 28 days from service of the particulars of claim to serve his or her defence, as long as an acknowledgement of service is filed within 14 days of service of the particulars of claim.

The timetable for service of a defence may be extended by agreement between the parties (by a limited number of days) or, where the court agrees to such extension, following application by the defendant.

The court will allocate the case to the small claims track, the fast track or the multitrack, depending on various factors, including the financial value and complexity of the issues in the case. The court may allocate the case before or at the first case management conference (CMC).

The CMC enables the court to consider the issues in dispute and how the case should proceed through the courts. At the CMC, the court makes directions as to the steps to be taken up to trial, including the exchange of evidence (documentary disclosure, witness statements and expert reports). The court will fix the trial date or the period in which the trial is to take place as soon as is practicable.

Cases can come to trial as quickly as six months from issue of the claim form. Often, however, complicated cases, such as those with an international aspect or disputes of high value will be given a trial date or window that is typically up to two years after the CMC.

Following a successful pilot scheme in the Rolls Building Courts, the Shorter Trial Scheme became permanent in the Business and Property Courts nationwide from 1 October 2018. Under this scheme, suitable cases are expected to reach trial within approximately eight months following the CMC and have judgment handed down within six weeks after conclusion of the trial. The maximum length of the trial is four days, including time set aside for the judge to read into the materials. The scheme is designed for cases that do not require extensive disclosure or witness or expert evidence. Under the Shorter Trial Scheme, the costs management provisions of the CPR do not apply and an abbreviated, issue-based approach is taken towards disclosure, with no requirement for parties to volunteer adverse documents for inspection.

The Flexible Trial Scheme has also become a permanent fixture within the Business and Property Courts, with parties being able to adapt procedures by agreement to suit their particular case and proceedings.

The aim of both schemes is to achieve shorter and earlier trials for commercial litigation within England and Wales, at a reasonable and proportionate cost.

Case management

7 | Can the parties control the procedure and the timetable?

considerable powers, including control over the issues on which evidence is permitted and the way in which evidence is to be put before the court. Nevertheless, there is some scope for the parties to vary by agreement the directions given by the court, provided that such variation does not affect any key dates in the process (such as the date of the pretrial review or the trial itself). In certain business disputes, the parties also have the option of bringing proceedings under the Flexible Trials Scheme, which allows the parties to adapt various procedures by agreement.

The CPR impose a duty on parties to assist the court in active case management of their dispute.

Compliance with rules and sanctions for non-compliance

Following the Jackson Reforms, it is extremely important to comply with all rules and orders that the court prescribes, as any errors and oversights will not be easily overlooked, and it may be difficult to obtain relief from sanctions imposed for non-compliance.

The Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 was the high point in the court's tough new approach to granting relief from sanctions, with parties being refused relief for minor procedural breaches.

However, the test was set out by the Court of Appeal the following year in the leading case of *Denton v TH White Ltd* [2014] EWCA Civ 906. Under this three-stage test, the court will consider the seriousness of the failure to comply and why the default occurred, and will evaluate all the circumstances of the case to enable the court to deal justly with the application for relief. The underlying rationale behind the restatement of this test was to reinforce the understanding among litigants that the courts will be less tolerant of unjustifiable delays and breaches of court orders.

Although the courts continue to take a strict approach when deciding whether to grant relief from sanctions, the parties will most likely not be allowed to take their opponents to court for minor procedural breaches. The court will not refuse relief from sanctions simply as a punitive measure (*Altomart Limited v Salford Estates (No. 2) Limited* [2014] EWCA Civ 1408).

Nevertheless, strict adherence to the timetable is required by all parties, lest the court impose costs sanctions. For example, in *Zodiac Training Ltd v Third Eye Technologies Ltd and another* [2011] *EWHC 881 (TCC)* the court imposed a costs penalty on the claimant for late service of evidence.

The High Court decision in *Kaneria v Kaneria* [2014] EWHC 1165 (Ch) (as applied in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 2886 (Ch)) has clarified that an extension will not be granted simply because it was requested. The Court of Appeal has further clarified that it will not readily interfere with a first instance order imposed in respect of non-compliance with court orders or time limits, time extensions and relief from sanctions, where the first instance judge has made that order having exercised their discretion

in relation to a case management decision (*The Commissioner of the Police of the Metropolis v Abdulle and others* [2015] EWCA Civ 1260). For a recent example of the High Court dismissing an appeal against an unsuccessful application for relief from sanctions, see *Smith v Baker* [2022] EWHC 2592 (KB).

However, under the CPR, the parties have the flexibility to agree short time extensions in certain circumstances without needing to seek court approval, provided they do not impact on any hearing date.

Significant or tactical delays will not be tolerated. Notable examples include the Court of Appeal judgment in *Denton v White*, and the High Court decision in *Rattan v Carter-Ruck Solicitors* [2019] 5 WLUK 633.

The parties should also be cautious when attempting to take advantage of the other party's breach. In *Viridor Waste Management v Veolia Environmental Services* [2015] EWHC 2321 (Comm), a defendant refused to consent to an extension of time for service of the particulars of claim (which had been brought to the attention of the defendant but had not been properly served) where a new claim would have been time-barred. The court penalised the defendant in indemnity costs for seeking to take advantage of the claimant's mistake.

Lastly, amendments to the CPR in force as of 6 April 2017 provide that a claim or counter-claim is liable to be struck out if the trial fee is not paid on time.

Costs management

The CPR also impose various costs management rules to promote effective case management at a proportionate cost. Parties to all multitrack cases valued under £10 million, for example, are required to comply with additional rules, in particular the preparation of a costs budget. However, cost management rules do not apply to proceedings under the Shorter Trials Scheme unless agreed to between the parties and subject to permission by the court. The costs budget should be in the prescribed Precedent H form annexed within the CPR.

Any party that fails to file a budget in time will be treated as having filed a budget in respect of applicable court fees only, unless the court orders otherwise, restricting the party's ability to recover costs in the event of a successful outcome. In the case of *BMCE Bank International plc v Phoenix Commodities PVT Ltd and another* [2018] EWCH 3380 (Comm), the court confirmed that failure to file a costs budget is a serious and significant breach for which there has to be very good reason. In this case, the claimant's solicitors filed the costs budget two weeks late and without explanation on the morning of the CMC, and when questioned by the judge it was determined that the partner with conduct of the claimant's claim had been abroad on business. The court found that this was not a good enough reason to consider granting relief. However, in *Manchester Shipping Ltd v Balfour Shipping Ltd and another* [2020] EWHC 164 (Comm), the court granted relief to defendants who filed their costs budget 13 days late on the basis that the parties had not communicated as to when costs management should be considered and as a result the defendants' default was inadvertent and not egregious.

For cases valued at £10 million or more, the court may exercise discretion as to whether a costs budget is required. The parties can also apply for an order requiring costs budgets to be served (see *Sharp v Blank* [2015] EWHC 2685 (Ch)).

Read this article on Lexology

From 6 April 2016, budgets for claims worth £50,000 or more should be filed no later than 21 days before the first CMC pursuant to CPR 3.13(1)(b). Where the claim is for less than £50,000, the budgets must be filed and served with the parties' directions questionnaire (pursuant to CPR 3.13(1)(a)). There will also be a requirement to file budget discussion reports, which indicate what is agreed and disagreed in terms of proposed budgeted figures, no later than seven days before the first CMC.

Under costs management rules, parties must exchange budgets and come to an agreement on them. However, it should be noted that budgets may nevertheless be scrutinised by the court to ensure they are proportionate and reasonable.

In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others* [2015] EWHC 481, the judge reduced a claimant's budget by over 50 per cent on the basis that it was not reasonable, proportionate or reliable. In addition, the claimant was criticised for including too many assumptions and caveats in its budget, as this was deemed to be calculated to provide maximum room to manoeuvre at a later stage. Advisers should therefore be aware of the importance of filing accurate and proportionate budgets in view of the court's wide costs management powers.

Case law suggests that a costs budget of about half the amount of the claim is proportionate (see, for example, *Group Seven Ltd v Nasir and others* [2016] EWHC 520 (Ch), although the judge in that case made clear that there is no mathematical relationship between the amount of the claim and the costs incurred when it comes to deciding what is proportionate).

The relevant provisions of the CPR were updated in November 2019 to note that, as part of the costs management process, the court may not approve costs incurred up to and including the date of the costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.

The parties should also approach the preparation of a costs budget carefully, as current case law is not consistent as to whether retrospective permission to revise the budget will be granted. Revision of a budget due to an error is extremely difficult.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Evidence – Disclosure Pilot Scheme and PD 57AD

From 1 January 2019, the Business and Property Courts introduced a mandatory Disclosure Pilot Scheme (DPS) (subject to limited exceptions) pursuant to Practice Direction 51U (PD 51U). The DPS was originally scheduled to run for two years from 1 January 2019 but was extended in July 2020, in an unamended form, until 31 December 2021. In July 2021 the 133rd Practice Direction Update extended the DPS for a further year, until 31 December 2022.

In July 2022 it was announced that the DPS had been approved and that from 1 October 2022 it would be incorporated into the Civil Procedure Rules – substantially in the form of PD 51U – as a new Practice Direction 57AD (PD 57AD).

PD 57 AD applies to existing and new proceedings in the Business and Property Courts of England and Wales, and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. PD 57AD will not disturb an order for disclosure made before 1 October 2022 or before the transfer of proceedings into a Business and Property Court, unless that order is varied or set aside. For disclosure in any proceedings in any other court, the existing CPR provisions in CPR 31 remain in force.

A party's legal representatives are obliged under both CPR 31 and PD 57AD to notify their clients of the need to preserve disclosable documents. 'Document' is widely defined and includes electronic communications and metadata. Accordingly, it is very important that the parties consider document retention and new document creation carefully from the outset. If a document is destroyed during the course of proceedings, or even when litigation is in reasonable prospect, the court may draw adverse inferences from this fact.

The process of disclosure allows the parties to formally state which specific documents, or more generally which types of documents, exist or have existed. Once an obligation to disclose documents has arisen, the party has an obligation to disclose all relevant documents (both paper and electronic). This is an ongoing obligation until the proceedings are concluded; therefore, if a document that should be disclosed comes to a party's notice during the proceedings, he or she must notify the other party.

A party's duty of disclosure is limited to documents that are or have been in its 'control', which includes documents that a party has a right to possess or to inspect. The Court of Appeal has upheld a decision that, where personal devices belonging to the defendants' employees and ex-employees potentially contained relevant documents within the defendants' 'control' for the purposes of disclosure, the court had jurisdiction to order the defendants to request the employees and ex-employees deliver up those devices for inspection by the defendants' IT consultants (*Phones 4U Limited v EE Limited* [2021] EWCA Civ 116).

Under both CPR 31 and PD 57AD, a party can apply to the court for an order requiring disclosure by a non-party to proceedings (known as a 'third-party disclosure order'). Such an application must be supported by evidence and will only be made if the documents in respect of which disclosure is sought are likely to support the applicant's case (or adversely affect the case of another party), and the disclosure is necessary for the fair disposal of the proceedings or to save costs. For a recent discussion of the rules in respect of third-party disclosure orders and non-parties located outside of the jurisdiction, see *Gorbachev v Guriev* [2022] EWCA Civ 1270.

Process for proceedings subject to CPR 31

A 'disclosure report' must be filed and served by the parties not less than 14 days before the first CMC. The disclosure report must be verified by a statement of truth and must contain information regarding the nature of the documents to be disclosed, their whereabouts and estimates of the costs involved in giving standard disclosure (including electronic disclosure).

There is also a requirement that the parties convene, at a meeting or by telephone, at least seven days prior to the first CMC to seek to agree a disclosure proposal.

Although CPR 31 includes a 'menu' of disclosure options, in practice the usual order made by the court is for standard disclosure. This requires a party to carry out a reasonable search for documents and disclose all the documents on which the party relies, or which adversely affect its own case, adversely affect another party's case or support another party's case.

A party to whom a document has been disclosed has a right to inspect that document except where the document is no longer in the control of the party who disclosed it, or where that party has a right or a duty to withhold inspection of it (eg, if the document is privileged), or where it would be disproportionate to permit inspection of the particular category of documents. Inspection is a separate procedural step to disclosure and is the process by which the party who has disclosed a document allows the other parties to view the originals or provide copies of any documents disclosed.

The CPR give the courts significant powers over the conduct of the disclosure process. For example, under CPR 31.5, the court has flexibility to reduce the scope of disclosure to ensure proportionality and generally further the overriding objective of dealing with cases justly and at a proportionate cost. Extensive disclosure is limited in both the Shorter Trial and the Flexible Trial Schemes.

The court also has the power to impose alternatives to the standard disclosure process. For example, the court may order wider-ranging disclosure of documents (likely to be rare) or dispense with disclosure altogether (only likely to be appropriate in the most straightforward cases). Ultimately, the court can make any order for disclosure it considers appropriate.

Process for proceedings subject to PD57AD

PD 57 AD introduces the concept of 'initial disclosure'. This involves each party providing to all other parties an initial disclosure list of documents. The list is to be provided simultaneously with the statement of case, and will list the key documents on which a party has relied and that are necessary to enable the other parties to understand the claim or defence that they have to meet. There are several circumstances where initial disclosure is not required, most notably when the parties agree to dispense with it.

Extended disclosure may be used in situations where the court is persuaded that it is appropriate to fairly resolve one or more of the issues for disclosure as identified by the parties. Extended disclosure involves five models of disclosure. The models range from an order for no disclosure to the widest form of disclosure (requiring production of documents that may lead to a train of enquiry).

A further aspect of PD 57 AD is the replacement of the electronic disclosure questionnaire (as exists under CPR 31) by a disclosure review document (DRD). Parties should complete a joint DRD to list the main issues for the purposes of disclosure, exchange proposals for extended disclosure, and share information about where and how documents are kept. The parties are required to complete a DRD prior to the CMC, which lists all issues for disclosure to be decided in the proceedings and decides which of the five models for extended disclosure is appropriate to achieve a fair determination of those issues.

Read this article on Lexology

PD 57AD does not include inspection as a separate procedural step. This reflects the fact that, usually, electronic copies of the disclosed documents will be provided with the list of documents, and there will not be a separate production process. However, the court will still order the inspection of original documents in appropriate cases (see, for example *Emirates NBD Bank PJSC and another v Hassan Saadat-Yazdi and others* [2023] EWHC 747 (Comm)).

The court has similar powers to manage the disclosure process under PD 57AD as it does under CPR 31. PD 57AD.6.9, for example, provides for the court to determine any point at issue between the parties about disclosure.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The disclosing party may withhold documents protected by legal privilege from inspection by the other party or the court.

Legal professional privilege covers two principal categories: legal advice privilege and litigation privilege.

Legal advice privilege attaches to confidential communications between a client and his or her lawyer for the purpose of giving and receiving legal advice.

This includes advice from foreign and in-house lawyers, provided that they are legally qualified (eg, not accountants providing tax law advice), and are acting as lawyers and not as employees or executives performing a business role. In *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm), the High Court held that legal advice privilege extends to communications with foreign lawyers, whether or not they are in-house, provided they are acting in the capacity or function of a lawyer. There is no additional requirement that foreign lawyers should be 'appropriately qualified' or recognised or regulated as 'professional lawyers' within their jurisdiction.

Only communications with the client are protected, and the meaning of client has been construed narrowly in an important case in which communications between a lawyer and some employees of the client company were held to fall outside legal advice privilege (see *Three Rivers DC v Bank of England* [2003] EWCA Civ 474). This decision has been criticised by practitioners as being unduly narrow and has been rejected in the Hong Kong Court of Appeal. In England and Wales, the narrow approach remains binding and has been confirmed in *Re RBS (Rights Issue Litigation)* [2016] EWHC 3161 (Ch).

The Court of Appeal confirmed in *R (Jet2.Com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 that communications or documents must have been created or sent for the dominant purpose of seeking legal advice to fall within the definition of legal advice privilege; the same principle (the dominant purpose test) will apply in cases of litigation privilege. The privilege is not limited to advice regarding a party's rights and obligations, but extends to advice as to what should prudently and sensibly be done in the relevant legal context.

In 2015, the High Court took a wide approach to legal advice privilege by confirming that elements of documents that do not ordinarily attract privilege will nevertheless be privileged if it can be shown that they formed part of the 'necessary exchange of information' between lawyer and client, the object of which was giving legal advice as and when appropriate (*Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 3187 (Ch)).

Litigation privilege attaches to communications between client and lawyer or between either of them and a third party if they came into existence for the dominant purpose of giving or receiving legal advice or collecting evidence for use in litigation. The litigation must be pending or in reasonable contemplation of the communicating parties, meaning that there must be a 'real likelihood' rather than a 'mere possibility' of litigation occurring. In *Kyla Shipping Co Ltd and another v Freight Trading Ltd and others* [2022] EWHC 376 (Comm), the claimant had commissioned an expert's report in connection with an internal shareholder dispute. The expert's report later became important in the context of separate litigation proceedings and the claimant attempted to withhold inspection of the report by asserting litigation privilege. The judge held that at the time the expert's report was commissioned, it could not be said that litigation was in the reasonable contemplation of the parties. The claimant was therefore unable to assert litigation privilege over the document.

In some circumstances, litigation privilege can also be asserted by non-parties to litigation, such as a victim of an alleged crime. The High Court recently confirmed in *Al Sadeq v Dechert LLP* [2023] EWHC 795 (KB) that the relevant question is whether the non-party has a sufficient interest in the litigation such that it seeks legal advice and communicates with third parties to obtain information for the purposes of that legal advice.

In 2020, the Court of Appeal confirmed that documents attached to emails will not be covered by legal professional privilege solely on the basis that the email itself is privileged; a non-privileged attachment must be disclosed notwithstanding that it may have been attached to a privileged email (*Sports Direct International Plc v Financial Reporting Council* [2020] EWCA Civ 177).

Legal professional privilege will be negated by an abuse of the normal attorney–client relationship under the 'iniquity principle', that is, when communications are made for wrongful, for example, fraudulent, purposes. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm), the iniquity caused by the litigant's concealment and deceit in relation to their assets put the advice outside the normal scope of professional engagement and justified an order for disclosure of documents that would otherwise have attracted legal professional privilege. For a more recent consideration of the iniquity exception to privilege, see *Al Sadeq v Dechert LLP* [2023] EWHC 795 (KB).

Legal professional privilege had been in a relative state of flux following a controversial High Court decision by Andrews J in the case of *Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd* [2017] EWHC 1017 QB (ENRC). The High Court decision in that case narrowed considerably the scope of legal professional privilege in the circumstances of internal investigations in finding that documents created during the course of an internal investigation prior to the commencement of criminal proceedings by the Serious Fraud Office (SFO) were not privileged and should be made available for inspection. On appeal, the Court of Appeal overturned the High Court's decision, concluding that litigation privilege did apply to the documents in question, as they had been created by ENRC for

the dominant purpose of resisting or avoiding criminal proceedings. The court held that businesses need to be able to investigate possible wrongdoing without the fear of creating material that might potentially incriminate them in later proceedings (once the investigation has concluded).

Prior to the Court of Appeal decision, Andrews J's determination on litigation privilege in the High Court was regarded as controversial and was not accepted in the subsequent case of *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland* [2017] EWHC 3535 (Ch). In his judgment, Sir Geoffrey Vos, Chancellor of the High Court, distinguished that case from ENRC on its facts. He appeared to reject the proposition that documents created to try to settle the litigation, and for the purpose of being shown to the other side, could never attract litigation privilege.

There are other grounds of privilege, including in respect of documents that:

- contain 'without prejudice' communications between the parties, intended to resolve the dispute;
- pass between a party to legal proceedings and a third party where both parties share a common interest in the proceedings (for instance, third-party litigation funders);
- pass between co-parties to legal proceedings;
- would tend to incriminate a party criminally; or
- would be adverse to the public interest.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

The parties must exchange written statements of evidence prior to trial. Ordinarily, at the CMC, the court gives directions regarding the exchange of written witness statements and experts' reports, including the number of expert reports that each party is entitled to rely on as evidence, the subject matter that should properly be considered in expert evidence, and the date by which the parties should file any relevant witness and expert evidence.

If a witness statement is not served within the time specified by the court, the witness may not be called to give oral evidence at trial unless the court gives permission.

Where the parties wish to rely on expert evidence on a particular issue the courts have the power to allow separate experts for each party or to appoint a single joint expert. The single joint expert will be instructed to prepare a report for evidence on behalf of two or more of the parties instead of each party appointing their own expert witnesses.

Similarly, a party who fails to apply to the court to rely on an expert's report will require the court's permission to call the expert to give evidence orally or use the report at trial. This is likely to have adverse cost consequences for the party that failed to seek the permission of the court at the CMC.

The courts have express powers to identify or limit the issues for witness evidence, identify which witnesses may give evidence and limit the length of witness statements. In addition,

parties seeking permission for expert evidence to be adduced will have to identify the issues the evidence will address and provide a cost estimate. The court may also cause the recovery of experts' costs to be limited, in accordance with the emphasis on proportionate cost pursuant to the overriding objective.

A witness statement is the equivalent of the oral evidence that the witness would give if called to do so, and as such, must be written in a language in which the witness is sufficiently fluent. If a witness statement is in a foreign language, a party wishing to rely on it must file the statement, together with a certified translation, with the court. For a recent discussion of the rules relating to foreign language witness statements see *Correia v Williams* [2022] EWHC 2824 (KB).

On 6 April 2021, new rules on witness evidence came into force in the Business and Property Courts (through a new Practice Direction 57AC and accompanying Appendix, which contains a statement of best practice). The new rules affect the content of witness statements and the manner in which witness evidence may be taken, including:

- a trial witness statement must be in the witness's own words and, if practicable, be in the witness' own language;
- a witness statement must contain only evidence as to the matters of fact of which the witness has personal knowledge, and only insofar as those matters need to be proven at trial by witness evidence. It is not acceptable to provide lengthy commentary on disclosure documents, nor to use the statement for the purposes of comment or persuasion;
- a witness statement must contain a list of the documents that the witness has referred to or has been referred to for the purposes of providing the evidence set out in that witness statement;
- a statement should be prepared in such a way as to avoid any practice that might alter or influence the recollection of the witness, other than by refreshing the witness's memory with documents to the extent that would be permissible if the witness were giving evidence-in-chief;
- an expanded form of statement of truth has been introduced, confirming that the person making the statement understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth; and
- witness statements will need to be endorsed by a certificate of compliance with PD 57AC signed by the 'relevant legal representative' confirming that they have explained the purpose and proper content of a witness statement to the witness and believe that the witness statement complies with PD 57AC (including the Appendix) and paragraphs 18.1 and 18.2 of PD 32 (PD 57AC, paragraph 4.3).

The courts are reluctant to strike out a witness statement for non-compliance with PD 57AC, except for the most serious breaches. Instead, they may be more willing to order that the statement be partially redacted or replaced with a compliant version. For example, in *Kieran Corrigan & Co Ltd v OneE Group Ltd and others* [2023] EWHC 649 (Ch) the court acknowledged that the defendants' original witness statements included 'serious' breaches of PD 57AC. The defendants were ordered to pay the claimant's costs of the application on the indemnity basis but replacement statements were permitted.

Where a party is served with a witness statement that it believes is non-compliant with PD 57AC, it should raise its concerns promptly with the opponent and attempt to reach an agreement, before raising the breach with the court. The High Court considered this point in *Curtiss and others v Zurich Insurance Plc and others* [2022] EWHC 1514 (TCC) where it criticised the making of 'oppressive and disproportionate applications, resulting in the incurring of very substantial and quite unnecessary costs', and awarded costs on the indemnity basis.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Factual and expert witnesses are generally called to give oral evidence at trial.

Their written statements will normally stand as evidence-in-chief, so the witness does not need to provide oral evidence on the matters set out in their statement. However, a witness who provides any oral evidence has the opportunity, if granted the court's permission, to amplify his or her witness statement and give evidence relating to new matters that have arisen following service of the witness statement on the other parties. The opposing party can cross-examine the witness, following which the party calling the witness has the opportunity to re-examine that witness. The witness may also be asked questions by the judge.

In certain circumstances, the court may permit witnesses to give evidence via video link from abroad (*Hilden Developments Ltd v Phillips Auctioneers Ltd and another* [2022] EWHC 541 (QB)).

At the trial, the judge may also allow both parties' experts' evidence to be heard together (ie, 'concurrent expert evidence', also known as 'hot-tubbing') by way of a judge-led process, although in practice this has not been readily embraced by the courts. Revised provisions governing the procedure for hot-tubbing came into force on 22 November 2017. Among other changes, these provisions permit the court to set an agenda for hearing expert evidence, which may be on an issue-by-issue basis.

The court may permit experts to give evidence remotely. In *Optis Cellular Technology LLC and others v Apple Retail UK Ltd and others* [2022] EWHC 561 (Pat), both parties instructed experts, of which one gave evidence in person and another remotely. Meade J mentioned (though no party raised the issue) that he did not believe that there was any unfairness caused to the expert who gave evidence remotely.

A party may rely on a witness statement of fact at trial even where a witness is not subsequently called to give oral evidence. The relevant party must inform the opposing parties, who may apply to the court for permission to call the witness for cross-examination. Where a party fails to call a witness to give oral evidence, the court is likely to attach less weight to his or her statement and in certain circumstances may draw adverse inferences from the witness's failure to give oral evidence.

Read this article on Lexology

Interim remedies

12 | What interim remedies are available?

The court has wide powers to grant the parties various interim remedies, including interim injunctions, freezing injunctions, search orders, specific disclosure and payments into court. Interim remedies are governed by CPR Part 25.

Interim measures are often used to prevent the dissipation of assets or evidence, and usually English courts will only make orders relating to property within the jurisdiction. However, in exceptional circumstances, the English court will make a worldwide freezing injunction if the respondent is unlikely to have sufficient assets within the jurisdiction to cover the applicant's claim. The English court may also grant interim relief (typically in the form of freezing injunctions) in aid of legal proceedings anywhere in the world.

When seeking a freezing injunction (or indeed, any interim remedy) on a without notice basis, applicants must comply with the duty of full and frank disclosure. This duty requires that all material issues must be presented to the court in a full and fair matter, including those issues that are adverse or detrimental to the applicant's position or interests. In *Fundo Soberano de Angola & ors v Jose Filomena dos Santos & ors* [2018] EWHC 2199 (Comm), the English High Court confirmed that the duty of full and frank disclosure is a serious and onerous obligation that applies to applicants and their legal advisers alike who, together, must make the fullest inquiry into the central elements of their case. The parties should consider this duty very carefully before making any interim application on a without notice basis.

The court also has the power to grant injunctions against 'persons unknown', that is, defendants who cannot be identified. The case of *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 provided further guidance on the necessary requirements for the grant of such an injunction, as identified in *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515. The court decided that it may prohibit otherwise lawful behaviour where necessary to secure effective protection for claimants' rights. The importance of clarity and precision in the drafting of those injunctions was also stressed by the court.

Remedies

13 | What substantive remedies are available?

Common remedies awarded by the courts are damages (the object of which is to compensate the claimant, rather than to punish the defendant), declarations, rectification, rescission, subrogation, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction), and orders for the sale, mortgaging, exchange or partition of land. Punitive damages, aiming to punish the defendant, may be available in very limited circumstances, for instance in cases involving oppressive action or deliberate torts. Interest may be payable on pecuniary awards.

Enforcement

14 | What means of enforcement are available?

Once a judgment has been obtained from a court in civil proceedings in England and Wales, the judgment can be enforced in a variety of ways. If the judgment is for a payment of a sum of money and the debtor has assets that can be easily obtained and sold for value, the court can issue a writ or warrant of control to command an enforcement officer to take control of and sell the debtor's goods. These are wholly administrative processes that do not require a judicial decision.

A third-party debt order can be obtained and operates to prevent funds reaching the debtor from a third party by redirecting them to the creditor instead.

The court can enforce a charging order, which imposes a charge over the debtor's interest in any land, securities or funds. This usually acts to prevent the debtor from selling any land with a charge over it without first satisfying the creditor. This is most effective when the debtor is the sole owner of any applicable assets.

An attachment of earnings can be employed by the court, which would order that a proportion of the income of the debtor be deducted like a tax from the debtor's salary by the employer and paid to the creditor until any relevant debt is satisfied. Alternatively, a creditor can employ a variety of insolvency procedures, such as bankruptcy, appointment of a receiver or a winding-up order.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

The general rule is that hearings take place in public. However, the court can order that a hearing (or part of it) be held in private in some circumstances, where the court considers it necessary 'in the interests of justice' (eg, where notice to the other party would defeat the purpose of the application, such as applications for urgent freezing injunctions). The court can also order a hearing to be held in private if the hearing involves matters relating to national security. The court can also redact parts of judgments relating to confidential issues in appropriate cases.

Following the outbreak of the covid-19 pandemic and the enactment of the Coronavirus Act 2020, the Courts Act 2003 was temporarily amended to allow for remote public access in proceedings conducted by video or audio.

In June 2022, the temporary regime was repealed and replaced with a new permanent regime which gives the courts expanded powers to allow remote public access to in-person as well as video and audio proceedings. The primary legislation is contained at section 85A of the Courts Act 2003 which gives the court discretionary powers to allow the livestreaming of court proceedings to individuals not participating in those proceedings (eg, on You Tube). In fact, the court in *Yilmaz and another v Secretary of State for the Home Department* [2022]

EWCA Civ 300, remarked that remote technology has become 'ubiquitous in all jurisdictions' in court proceedings during the pandemic.

Individuals who want to observe proceedings will need to provide their full name and email address to the court unless the transmission is to designated live-streaming premises. On 28 June 2022 the judiciary published guidance on the main features of the legislation. From 2022, HMCTS has been working with a team of researchers at the University of Oxford to produce a series of audio-visual guides and documentation to better the support available to court users attending online hearings. As a result of the collaboration, five accessible films and a written report were published in March 2022.

Non-parties can obtain any statement of case filed after 2 October 2006 without the permission of the court or notification to the parties.

Statements of case include the claim form, the particulars of claim, the defence, the reply to the defence and any further information given in relation to any of them, but not documents aimed at confining the issues. The meaning of 'statement of case' in this context was examined in *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 397 (Ch), in which the judge distinguished between a particulars of claim (which constitutes a statement of case), and a notice to admit and the response to such notice (neither of which constitutes a statement of case). Accordingly, it was held that a third party was not entitled to copies of the notice to admit nor the response under CPR 5.4C(1).

Permission of the court may be sought to obtain copies of other documents or court records on the court file. Documents attached to a statement of case, witness statements, expert reports, skeleton arguments, notices to admit and response and correspondence between the parties and the court can be obtained by non-parties if the court grants permission. In *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, the Supreme Court held that courts must engage in a fact-specific balancing exercise to determine whether allowing a non-party to obtain such documents or court records would advance the principle of open justice.

A party can also apply for an order restricting a non-party from obtaining a copy of a statement of case, but any such order is confined to statements of case. When filing electronically a party may request that a document is designated where appropriate.

Copies of judgments and orders made in public are available without permission of the court. Supreme Court hearings, and legal arguments and the delivery of the final judgment in Court of Appeal hearings, are allowed to be broadcast live. The Supreme Court has a live streaming service, and an on-demand archive of past hearings that can be viewed online.

In addition, as of 6 April 2016, skeleton arguments (anonymised in family proceedings) are provided to accredited reporters in cases being heard in the Court of Appeal.

Costs

16 | Does the court have power to order costs?

Generally, the unsuccessful party will be required to pay the costs of the successful party. However, the court has wide discretion to order which party should pay costs, the amount

of those costs and when they are to be paid. Even where costs are reasonably or necessarily incurred, if they are deemed disproportionate then the court may nevertheless disallow them. CPR Part 44 details the general costs rules that apply in civil proceedings in England and Wales.

In determining the way in which it makes costs orders, the court will have regard to all circumstances, and specifically the conduct of the parties before and during the proceedings, as well as any efforts made before and during the proceedings to resolve the dispute.

In particular, the courts allow the parties to make certain pretrial settlement offers that are expressly taken into account in relation to costs at any subsequent trial, namely, where the settlement offers are rejected. These rules are set out in Part 36 CPR.

Where a defendant makes a 'Part 36 offer' that is rejected, if the claimant does no better at trial the claimant will generally not recover its costs after the period within which it was possible to accept the Part 36 offer (known as the 'relevant period'), and will be liable to pay the costs incurred by the defendant after the relevant period, and interest on those costs.

If a claimant makes a Part 36 offer that is rejected, and the claimant succeeds either in obtaining an amount equivalent to or better than the Part 36 offer, the claimant is entitled to an enhanced-costs award (that is, a higher rate of recovery, plus interest on both costs and damages up to 10 per cent above the base rate). In addition, the court can impose an additional penalty on the defendant, requiring an additional payment of damages up to a maximum of £75,000.

Following the decision of *King v City of London Corp* [2019] EWCA Civ 2266, disapproving the earlier decision in *Horne v Prescot (No.1) Ltd* [2019] EWHC1322 (QB), an offer that excludes interest is not a Part 36 offer and, therefore, a Part 36 offer must include all interest up to the end of the period in question.

Once the court has made an order as to costs, the general rule is that the amount to be paid will be determined by an assessment process unless an amount is agreed to by the parties. The assessment process can be on either a summary or a detailed basis. Summary assessment requires the parties to focus on the cost of proceedings as they progress, with the aim of increasing settlement chances if the parties are aware of the ongoing costs of litigation. Detailed assessment usually takes place after an order for costs is made and thus involves an assessment of costs at the conclusion of proceedings. In relation to hearings that last no more than one day (and cases allocated to the fast track) the general rule (as set out in Practice Direction 44 9.2) is that a summary assessment should occur at the conclusion of the hearing unless there is good reason not to do so.

Subject to the points above, when it comes to making a costs order the court will stipulate an assessment of the successful party's costs on either the 'standard' or 'indemnity' basis:

- on the standard basis, the court will examine whether the costs were reasonable and reasonably incurred, as well as proportionate to the matters at issue; and
- on the indemnity basis, the court resolves any doubt it has regarding disproportionate costs in favour of the successful party, which results in a higher award to the successful party.

Read this article on Lexology

However, the court will not allow costs that have been unreasonably incurred.

A claimant may be required to provide security for the defendants' costs for several reasons. The most common grounds for obtaining an order for security for costs are where:

- the claimant is ordinarily resident out of the jurisdiction but is not resident in a state bound by the Hague Convention; or
- the claimant is a limited company and there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so.

In each case, the court must be satisfied that it is just to make an order for security for costs. There are many factors that the court may consider, such as whether ordering security would unfairly stifle a genuine claim. When considering whether to refuse to order security on such ground, the court must also be satisfied that, in all the circumstances, it is probable that the claim would be stifled (*Pannone LLP v Aardvark Digital Ltd* [2013] EWHC 686 (Ch)).

It is important to note, generally, that a party's conduct in litigation will be considered carefully by the court when exercising its discretion to award costs in line with the Denton principles.

Additionally, from 6 April 2017, the court may record on the face of any case management order any comments it has about the incurred costs that are to be taken into account in any subsequent assessment proceedings.

However, in the Financial List test case scheme, a test case proceeds on the basis that each party bears its own costs.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

English law permits conditional fee agreements (CFAs) in relation to civil litigation matters, whereby a solicitor's fees (or part of them) are payable only in specified circumstances. Usually, the solicitor receives a lower payment or no payment if the case is unsuccessful, but a normal or higher than normal payment if the client is successful.

However, for CFAs to be enforceable, certain formalities must be observed. The success fee must represent a percentage uplift of fees charged (rather than a percentage of damages secured), and such uplift cannot exceed 100 per cent of the normal rate. These agreements are becoming less unusual in commercial cases.

One reason CFAs are still relatively rare in complex commercial cases is the difficulty in defining the concept of 'success' to incorporate an outcome other than simply winning the case.

The success fee element of the party's costs is not recoverable from the losing party, subject to limited exceptions (eg, in cases where the CFA was entered into before 1 April 2013, in insolvency-related proceedings where the CFA was entered into before 6 April 2016, in publication and privacy proceedings where the CFA was entered into before 6 April 2019, and in claims for damages in respect of diffuse mesothelioma). As of 6 April 2016, success fees are no longer recoverable in insolvency-related cases, and as of 6 April 2019, success fees are no longer recoverable in publication and privacy proceedings.

A third party may fund litigation in return for a share of the proceeds of the claim, if successful. If the claim fails, the third party may be liable for the successful defendant's legal costs. Those agreements are upheld provided that they are not contrary to public policy. The common law principles of champerty and maintenance must also be considered when third-party litigation funding is used, for fear of 'sullying the purity of justice'.

The case law in this area is developing, and there is still scope for uncertainty. *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 is a notable case in which the Court of Appeal upheld the lower court's decision ordering the third-party funders to be jointly and severally liable to pay costs on the indemnity basis.

In *ChapelGate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246, the Court of Appeal found that the 'Arkin cap', which caps a litigation funder's liability for adverse costs to the amount of funding that was provided, is not a binding rule to be applied automatically in every case involving a litigation funder. Instead, the court will consider all of the facts of the case, particularly whether the funder had funded the claim in full or in part, in determining whether to cap the litigation funder's liability for adverse costs. In the case of *Montpelier Business Reorganisation v Armitage Jones* [2017] EWHC 2273 (QB), the court ordered a third-party costs order against the 5 per cent shareholder of an insolvent claimant. As the claimant was unable to meet its costs liability, the order was granted on the basis that the shareholder had funded the litigation with a non-arms-length loan, had clearly exercised control over the litigation and stood to gain had the claimant been successful. In the case of *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch), the High Court emphasised that costs orders against non-parties are exceptional and will rarely be made against pure funders. The court noted in that case that the degree of control exercised by funders over the litigation will be a factor in the court's cost order. The court's willingness to make third- party funders liable for the conduct of funded parties could have consequences for the funding market; funders are likely to be more careful as to whom they choose to fund, and the cost of such funding is likely to increase to reflect the funders' increased risk exposure but also to cover after-the-event insurance premiums.

In addition to investing in a claimant's case, third parties may also invest in litigation by way of a payment from a defendant in exchange for taking on a share of the financial risk (both in respect of the claim and legal costs). This type of arrangement, in our experience, is very rare, and developments will be monitored with interest. It is only likely to feature in high-value litigation in which a defendant prefers to make a payment to an investor to reduce its overall litigation risk. Those arrangements may offer significant investment opportunities to professional funders in an industry that continues to evolve.

Lawyers may enter arrangements involving a success fee that is directly attributable to the amount of damages recovered by the client (a contingency fee). These arrangements are known as damages-based agreements (DBAs) and are regulated.

The recovery of the contingency fee is dependent on both the success of the claim and the recovery of sums awarded from the defendant. The solicitor's legal fees are only paid in the event of 'success' (as defined in the DBA) and not during the case.

A DBA must not provide for a payment inclusive of VAT that is more than 25 per cent of the relevant sums recovered in personal injury cases, 35 per cent in employment matters and 50 per cent of the sums ultimately covered in all other civil litigation cases. These caps are only applicable to proceedings at first instance and the figures are a percentage of the amount actually received by the successful party, not a percentage of any order or agreement to pay. The solicitor will only be able to claim a share of money that the client obtains from the litigation, and not any money or assets that the client is able to retain (*Tonstate Group Limited and others v Wojakovski and others* [2021] EWHC 1122 (Ch)). This suggests a limited application for DBAs by defendants. The Court of Appeal effectively confirmed that DBAs cannot be used by non-counterclaiming defendants in the recent case of *Candey Ltd v Tonstate Group Ltd and others* [2022] EWCA Civ 936.

Successful parties should be able to claim from the losing party some or all of their costs on the conventional basis, but must not exceed the DBA fee itself. The successful client will use the recovered costs and damages to discharge the DBA (or part thereof). It is noteworthy that DBAs have come under significant criticism from both the Bar Council and the Law Society, and very few solicitors are entering into DBAs. The Court of Appeal recently confirmed that DBAs may contain provision for payment if a DBA is terminated early by a client, which may ease the concerns of some solicitors and thereby encourage greater use of DBAs (*Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16).

In November 2014, the government announced that it did not intend to make any adjustment to the DBA regulations to expressly permit hybrid DBAs (where additional forms of litigation funding can be coupled with a DBA to fund a case), to discourage litigation behaviour based on a low-risk, high returns approach. However, in February 2019 the government began the process of drafting a new set of DBA regulations. In October 2019, proposed redrafted regulations were published to reform the Damages-Based Agreement Regulations 2013, following an independent review of the existing regulations by Professor Rachael Mulheron and Nicolas Bacon QC. The proposals mark a significant shift in some key areas. Key changes in the current draft include the following:

- a shift away from the success fee model – the legal team will be paid the DBA percentage payment together with their recoverable costs;
- a reduction in the caps mentioned above – from 50 per cent to 40 per cent in commercial cases and from 25 per cent to 20 per cent in personal injury cases;
- hybrid DBAs to be permitted, despite the concerns raised by the Ministry of Justice;
- greater flexibility to agree terms relating to termination of the agreement within the DBAs; and
- availability of DBAs in broader range of claims, including non-monetary claims.

In June 2021, a supplementary report was submitted to the Ministry of Justice for consideration. In the meantime, the Law Society has suspended work on a model DBA and it advises that, until the DBA regulations are amended, care should be taken when entering these agreements. The Law Society has also published information that indicates that barristers are not prepared to risk entering into a DBA even if the case is deserving, leading to questions regarding access to justice in civil proceedings in England and Wales.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance is available for litigation costs. There are two types of legal expenses insurance policies:

- before the event policies – these policies are typically taken out with an annual premium and provide cover for some or all of the client's potential costs liabilities in any future disputes. They are not usually relevant to major commercial litigation; and
- after-the-event (ATE) policies – these policies typically cover a party's disbursements (such as counsel and expert fees) and the risk of paying an opponent's legal fees if the insured is unsuccessful in the litigation.

ATE policies may cover the insured's own legal expenses, although this is less common.

If an ATE insurance policy is entered into on or after 1 April 2013, the insurance premiums will no longer be recoverable from the losing party. There are limited exceptions to this rule for claims involving insolvency (provided the policy was taken out before 6 April 2016), publication and privacy proceedings, and personal injury related to mesothelioma.

In publication and privacy proceedings the recoverability of ATE insurance premiums was expected to be abolished, but these plans have subsequently been delayed indefinitely. In December 2018, the government announced that it was abandoning plans set out in its 2013 costs consultation and instead the recoverability of ATE insurance premiums will remain. The publication and privacy proceedings exception does not cover pure data breach or cyber-attack litigation and therefore parties to such litigation will not be able to recover their ATE insurance premiums from the losing party (*Warren v DSG Retail Ltd* [2021] EWHC 2168 (QB)).

In mesothelioma claims the recoverability of ATE insurance has also been delayed until a review of the likely effect of any abolition of recoverability of premiums has been carried out.

The legality of the recoverability of CFAs and ATE premiums pre-April 2013 has been tested in the Supreme Court case of *Coventry v Lawrence* [2015] UKSC 50. In that case, the Supreme Court was asked to decide whether the pre-April 2013 recoverability of ATE premiums and success fees was incompatible with human rights, specifically the right to a fair trial under article 6 of the European Convention on Human Rights. The Supreme Court decided it was not incompatible, thus preventing an estimated potential 10 million appeals out of time.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions are most commonly brought in personal injury, negligence, product liability, competition and consumer disputes, but now increasingly so in commercial cases. In recent years there has been a marked increase in interest in class action litigation in England and Wales.

There are several mechanisms for pursuing collective redress:

- representative actions – where a claim is brought by or against one or more persons as representatives of any others who have the 'same interest' in the claim;
- group litigation orders (GLO) – the court can make a GLO under CPR 19 where a number of claims give rise to 'common or related issues of fact or law';
- representative damages actions for breach of competition law; and
- collective actions – claims that can 'conveniently' be addressed in the same proceedings by being brought jointly, being consolidated or having one or a small number of claims run as a 'test case', which can then be used to resolve similar claims.

These collective action mechanisms are generally conducted on an opt-in basis, which means that individual claimants must elect to take part in the litigation. Currently, there is no direct equivalent in England and Wales to the US opt-out model of class action. However, litigation funding continues to attract a high profile.

In addition, the Consumer Rights Act, the main provisions of which came into force on 1 October 2015 (and which came fully into effect in October 2016), allows for collective proceedings to be brought before the Competition Appeal Tribunal (CAT) for redress of anticompetitive behaviour, including both opt-in and opt-out. The opt-out collective action regime allows competition claims to be brought on behalf of a defined set of claimants except those who have opted out, albeit that third-party funders are barred from bringing collective actions.

In *Dorothy Gibson v Pride Mobility Products* [2017] CAT 9, an application was withdrawn following an unfavourable judgment rendering any possible class too small. However, in April 2019, the Court of Appeal revived a £14 billion proposed class action lawsuit against Mastercard (heard at first instance as *Merricks v Mastercard Inc* [2017] CAT 16), which was brought following a 2007 decision by the European Commission that multilateral interchange fees charged between banks in relation to Mastercard transactions involved a breach of EU competition law. The case was then heard by the Supreme Court, which upheld the ruling of the Court of Appeal and remitted the case to the CAT for reconsideration of the certification decision in accordance with the Supreme Court's new guidance. This guidance smooths the path to certification in several areas, making it easier for a claim to achieve the necessary threshold of suitability and emphasising the policy rationale for collective actions – to facilitate the vindication of consumer rights. The CAT subsequently granted a collective proceedings order (CPO) application – the very first to be granted on an opt-out basis. It is expected that this case will encourage a greater number of collective proceedings to be launched in the coming years. In the recent case of *Elizabeth Helen Coll v Alphabet Inc*

and others [2022] CAT 39, the CAT granted Elizabeth Coll's application for a CPO in respect of an opt-out class action brought on behalf of an estimated 19.5 million UK consumers against Google. The claim alleges abuse of dominance with respect to Google's Play Store. Significantly, Google withdrew its opposition to certification of the CPO 'in light of recent judgments and Court of Appeal guidance'.

Another significant recent case in this area is *Richard Lloyd v Google LLC* [2021] UKSC 50. Mr Lloyd sought to bring a representative action for damages on behalf of approximately four million Apple iPhone users in respect of an alleged breach of the Data Protection Act 1998 by Google. The Supreme Court unanimously held that the claim was not suitable to proceed as a representative action as there would need to be an individualised assessment of the extent to which Google had unlawfully processed the data of each member of the class. However, the Supreme Court did not rule out the possibility of obtaining declaratory relief in cases such as this.

The issue of collective redress is continuing to attract interest and controversy. Businesses in the United Kingdom continue to be concerned about the new opt-out collective actions for alleged breaches of consumer or competition law, especially as the class action market is likely to continue to increase over the coming years.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

An unsuccessful party may appeal from the county court to the High Court, from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court (as applicable). Permission to appeal generally must be obtained either from the lower court at the hearing at which the decision to be appealed was made, or from the relevant appeal court provided time limits are adhered to. In instances involving appeal to the Supreme Court, an appellant may apply directly to the Supreme Court for permission to appeal if permission is refused from the Court of Appeal.

For permission to be given, the appeal must have a real prospect of success, or there must be another compelling reason for the appeal to be heard. The Civil Procedure Rule Committee (CPRC) decided to increase the threshold for permission to appeal to the Court of Appeal, so as to require a 'substantial prospect of success'. However, that decision was rescinded at the March 2017 CPRC meeting and it was agreed that no further action be taken.

The appeal court will not allow an appeal unless it considers that the decision of the lower court was wrong (which typically means an error of law, but may also encompass an error of fact or a serious error in the exercise of the court's discretion), or was unjust because of a serious procedural or other irregularity in the proceedings.

One of the key areas of concern highlighted by the Briggs Report is the workload of the Court of Appeal, which has increased dramatically over the past six years. Following the recommendations of the Briggs Report for easing the burden on the Court of Appeal, the Access to Justice Act 1999 (Destination of Appeals) Order 2016 changed the routes of appeal

so that, subject to some exceptions, appeals from both interim and final decisions in the county court will lie to the High Court instead of the Court of Appeal.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The procedure necessary to recognise and enforce a foreign judgment in England and Wales depends on the arrangements made with the foreign country in question. The end of the Brexit transition period on 31 December 2020 also brought change in this area, meaning that the position differs depending on whether a given foreign judgment was handed down before or after that date. Examples of the arrangements applicable to foreign judgments from 31 December 2020 or earlier include Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (Recast)), the 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015).

The Brussels Regulation Recast applied to the UK during the UK–EU transition period, but ceased to apply to the UK on a reciprocal basis at the end of the transition period, except as provided for in part three of the UK–EU Withdrawal Agreement in relation to ongoing proceedings.

At the end of the transition period, the Recast Brussels Regulation was converted into UK law as retained EU law, which was amended by UK legislation. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations (SI 2020/1493)) revoked the retained EU law version of the Recast Brussels Regulation, subject to transitional provisions that saved the Recast Brussels Regulation (and, by implication, the 2001 Brussels Regulation) in relation to proceedings commenced before the end of the transition period (as provided for by article 67 of the UK–EU withdrawal agreement).

The enforcement of judgments that are not subject to relevant arrangements is governed by common law, which will thus govern most EU or European Free Trade Area judgments handed down from 1 January 2021, unless and until the UK and EU reach a new agreement. The UK applied to join the 2007 Lugano Convention on 8 April 2020, but the EU (which has a veto over the UK's accession) indicated its opposition to the UK acceding to the Convention on 28 June 2021 by way of a Note Verbale.

As of 10 January 2015, the CPR were amended in line with the Brussels Regulation (Recast) to remove requirements for a declaration of enforceability when enforcing a judgment from a court of an EU member state, though these requirements have continued relevance for judgments in proceedings commenced before that date.

The procedure for making an 'adaptation order', whereby a legal remedy contained in a foreign judgment but unknown to the law of England and Wales may be adapted, for the purposes of enforcement, to a remedy known in English law, has also been included.

The Hague Convention 2005 continues to apply in England & Wales following Brexit, and requires the courts of contracting states to uphold exclusive jurisdiction clauses, and to

recognise and enforce judgments given by courts in other contracting states that are designated by such clauses.

In December 2022, the UK government launched a consultation seeking views on the UK becoming a contracting state to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Judgments Convention 2019) (following the EU and Ukraine's accession in August 2022). UK accession would mean that a judgment of the English courts would benefit from recognition and enforcement by contracting states in circumstances where the parties have concluded a non-exclusive or asymmetric jurisdiction clause in favour of the English courts (thereby 'plugging' the gap left by the Hague Convention 2005, which only applies to judgments given by a court in respect of which there is an exclusive jurisdiction clause). The Hague Judgments Convention 2019 still requires further international uptake before it becomes effective.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Where a witness located in England and Wales refuses to provide evidence for use in civil proceedings in another jurisdiction, the parties may request that the English courts grant an order requiring production of the evidence. The procedure for obtaining such an order differs depending on the jurisdiction in which the proceedings are taking place.

Requests for evidence for use in EU member states (except Denmark) were previously processed according to EC Regulation No. 1206/2001 of 28 May 2001 (the Evidence Regulation). Following the end of the Brexit transition period, the Evidence Regulation has ceased to apply, by virtue of the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493). As a result, the UK will no longer carry out or consent to requests from EU member states under the Evidence Regulation to take evidence from persons in the UK.

Most EU member states are contracting parties to the Hague Convention of 1970 on the taking of evidence. Requests for evidence for use in such EU member states and in jurisdictions of non-EU contracting parties are processed according to the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to this Convention. An application must be accompanied by evidence and a letter of request from a court in the jurisdiction of the proceedings. The letter of request is submitted either to an agent in this country (usually a solicitor) or the senior master of the Supreme Court, King's Bench Division. The solicitor or Treasury Solicitor (as applicable) will make the application to the High Court for an order giving effect to the letter of request.

English law applies to the granting (or refusal) and enforcement of the request.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 1996 (the Arbitration Act) broadly reflects, but does not expressly incorporate, the provisions of the UNCITRAL Model Law, and applies to arbitrations that have their seat in England, Wales or Northern Ireland. The structure and language of the Arbitration Act are similar to those of the UNCITRAL Model Law.

However, the Arbitration Act did not adopt provisions that were considered undesirable or inconsistent with established rules of English arbitration law. Further, the Arbitration Act contains additional provisions, such as the power of the tribunal to award interest. The Arbitration Act also has a broader definition of an arbitration agreement in the sense that it is not confined to agreements in respect of a 'defined legal relationship'.

The Law Commission announced on 30 November 2021 that it would launch a review of the Arbitration Act in the first quarter of 2022. The Law Commission published its First Consultation Paper on the review in September 2022 and its Second Consultation Paper in March 2023.

The Law Commission's formal recommendations are expected to be announced in mid-2023.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Under section 5 of the Arbitration Act, consistent with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), there must be an agreement in writing to submit present or future disputes (whether contractual or not) to arbitration. The term 'agreement in writing' has a very wide meaning; for example, the agreement can be found in an exchange of written communications.

An arbitration agreement is generally separable from the contract in which it is found, as it is regarded as an agreement independent from the main contract and will remain operable after the expiry of the contract or where it is alleged that the contract itself is voidable (see *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm)). This includes where the contract itself is alleged to have been obtained by fraud (see *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20).

Brexit did not impact the approach to determining governing law or drafting governing law clauses. The instruments that previously determined governing law, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), have been implemented in UK domestic law in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/834).

Courts in England and Wales will stay litigation proceedings in favour of arbitration if there is prima facie evidence of an arbitration agreement between the parties.

Prior to Brexit, the English court could grant an anti-suit injunction only to prevent parties from pursuing litigation proceedings in the courts of another country that was not a member state of the European Union or European Free Trade Area in breach of an arbitration agreement. However, following the end of the transition period, in cases brought under English common law rules and in arbitrations, English courts and tribunals can now grant anti-suit (and anti-enforcement) injunctions in support of their proceedings wherever the foreign proceedings are threatened or issued (including EU countries), making London an attractive seat for international arbitration. For example, in *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) the court granted an anti-suit injunction to prevent the addition of the claimant to Spanish court proceedings in breach of an arbitration clause providing for resolution of disputes through London arbitration.

Oral arbitration agreements are recognised by English law, but fall outside the scope of the Arbitration Act and the New York Convention.

Brexit had no effect on the membership of the New York Convention and, therefore, courts in the UK and the EU member states continue to enforce arbitral awards rendered in either jurisdiction in the same way.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Under section 15(3) of the Arbitration Act, if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. The parties may agree a procedure for the appointment of the sole arbitrator. If they do not, the default procedure under section 16 of the Arbitration Act is that one party may serve a written request on the other to make a joint appointment. The appointment must be made within 28 days of the service of such a request in writing. If the parties fail to jointly appoint an arbitrator in that period, either party may apply for an order of the court to appoint an arbitrator or to give directions. The court will rarely make an appointment without seeking guidance from the parties. Typically, the parties will each submit a list of potential arbitrators or request that the court direct that the president of the Chartered Institute of Arbitrators appoint a suitable arbitrator.

Section 25 of the Arbitration Act specifies the limited grounds on which a party may apply to the court to remove an arbitrator, including:

- circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality;
- the arbitrator does not possess the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his or her capacity to do so; and
- the arbitrator has refused or failed properly to conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

Pending the outcome of a challenge, the tribunal can normally proceed with the arbitration and make an award.

The 2021 International Chamber of Commerce Rules of Arbitration (2021 ICC Rules) entered into force on 1 January 2021. Article 12(9) of these new rules empowers the ICC Court to appoint members of the arbitral tribunal regardless 'of any agreement by the parties on the method of constitution of the arbitral tribunal', in exceptional circumstances.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties are free to agree on the identity of the arbitrator or arbitrators. They may also specify an appointment authority and particular characteristics or qualifications. There is a deep pool of experienced, expert arbitrators capable of meeting the demands of complex international arbitration. The pool consists of leading practitioners from international law firms, barristers (the most accomplished of which are King's Counsel) and academics. The Chartered Institute of Arbitrators in London and the London Court of International Arbitration (LCIA), among other institutions, each maintain lists of arbitrators.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Party autonomy is the overriding objective of the Arbitration Act. It is therefore up to the parties to select the rules of procedure that will govern the arbitration.

However, if no express provision is made in the arbitration agreement, it is for the arbitrator to decide procedural and evidential matters.

The tribunal is at all times bound by the mandatory provisions of due process and duty to act fairly and impartially between the parties.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Under the Arbitration Act, the court's role is strictly supportive, and it may only intervene in the arbitral process in very limited circumstances. The court may provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances to support the arbitration.

The court's powers to intervene extend to arbitrations seated in England and Wales and, in certain limited circumstances, to arbitrations seated elsewhere. For example, in *A and B v C, D and E* [2020] EWCA Civ 409, the Court of Appeal allowed an application under section 44(2)(a) of the Arbitration Act compelling a non-party to an arbitration agreement to provide evidence in a New York-seated arbitration.

The majority of the court's powers can be excluded by the parties by agreement. Schedule 1 of the Arbitration Act sets out a list of mandatory provisions that cannot be excluded.

Several of the court's powers under the Arbitration Act may only be exercised once all arbitral remedies have been exhausted or may only be invoked within a limited time period after an arbitration award has been made. For example, under section 12 of the Arbitration Act, a party can only apply to the court to extend time for commencement of arbitration after exhausting any available arbitral process for obtaining such an extension.

Examples of the court's powers in an arbitration include ordering a party to comply with a peremptory order made by the tribunal and requiring attendance of witnesses. Further, the court can order freezing injunctions and other interim mandatory injunctions in support of an arbitration. This was confirmed by the Court of Appeal in *Cetelem SA v Roust Holding Ltd* [2005] EWCA Civ 618, and was followed in *Euroil Ltd v Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless the parties have agreed otherwise, the tribunal has powers to make preliminary orders relating to security for costs, and for the preservation of property and evidence.

If the parties have expressly agreed in writing, under section 39(2) of the Arbitration Act, the tribunal also has the power to order provisional relief, such as payment of money or disposal of property. Most arbitral rules contain an agreement to confer such powers upon the tribunal. Provisional relief is subject to the final decision of the tribunal on the case and may be varied by the tribunal. For a recent (obiter) commentary on the power of a tribunal to make an interim payment order under UNCITRAL rules, see *EGF v HVF and others* [2022] EWHC 2470 (Comm).

Similarly, while the tribunal has no general power to grant interim freezing injunctions under the Arbitration Act, such power may be conferred by express agreement of the parties to the arbitration. Even so, case law has not been conclusive as to whether the parties' agreement to confer on the tribunal the power to grant a freezing injunction will be effective (see *Kastner v Jason* [2004] EWCA Civ 1599).

Award

30 | When and in what form must the award be delivered?

The parties are free to agree on the form of the award, in accordance with section 52(1) of the Arbitration Act. If there is no agreement, the award must at a minimum be in writing and signed by all the arbitrators, contain the reasons for the award and state the seat of the arbitration and the date it is made.

Unless otherwise agreed by the parties, under section 54 of the Arbitration Act, the tribunal may decide the date on which the award is to be made and must notify the parties without delay after the award is made.

The court can order an extension of time for an award to be made under section 50(4) of the Arbitration Act (although this is done only after available arbitral processes have been exhausted and when the court is satisfied that a substantial injustice would otherwise be done).

Where a material application is made to correct an arbitration award under section 57 of the Arbitration Act or an agreed process to the same effect (such as article 27 of the LCIA Rules), and the application leads to a correction of the award, then the 28-day period for challenging the award under section 68 of the Arbitration Act runs from the date of the award as corrected. Where an application to correct an award fails, the relevant date for commencement of the 28-day period is the date on which it is decided that the award should stand without further clarification (*Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324 (Comm)).

Appeal

31 | On what grounds can an award be appealed to the court?

There are limited grounds for an appeal of an award to the court.

A party may challenge an award on the grounds of the tribunal's lack of jurisdiction or because of a serious irregularity in the proceedings that has caused substantial injustice to the aggrieved party. These provisions are mandatory and cannot be excluded by agreement between the parties.

Section 68(2) of the Arbitration Act lists the forms of serious irregularity that the court will recognise. The test for what constitutes serious irregularity is quite onerous, and an award will only be set aside in rare cases (eg, *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm), as applied in *S v A* [2016] EWHC 846 (Comm)). The court in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) confirmed and summarised the position succinctly. Once the applicant has demonstrated that there has been a serious irregularity falling within section 68(2), it must also show that the serious irregularity has caused substantial injustice.

Under section 69 of the Arbitration Act, in limited circumstances, a party may also challenge an award on a point of law. Only appeals on English law are permitted.

An appeal on a point of law must concern an issue of English law, and requires the agreement of all the other parties to the proceedings or the leave of the court. For leave to appeal, the appellant must satisfy four conditions:

- the determination of the appeal will substantially affect the rights of one or more parties;
- the question of law was put to the tribunal;
- the decision of the tribunal was obviously wrong or is a point of general public importance and is at least open to serious doubt; and
- the court is satisfied it is just and proper in all the circumstances to hear the appeal.

Following the hearing of the appeal, the court may confirm, vary or set aside the award, or remit the award to the tribunal for reconsideration.

If the application for leave to appeal is dismissed, the general rule is that only the judge who made the decision can grant leave to appeal to the Court of Appeal.

The parties may – and often do – exclude the right to appeal to the court on any question of law arising out of the award. An agreement to exclude the right to appeal on a question of law is contained in most arbitral rules.

Where the agreement to this effect is included in the arbitration clause, sufficiently clear wording is required: see *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp)* [2009] EWHC 2097 (Comm). For a recent example of an arbitration clause which the court held contained insufficiently clear wording, see *National Iranian Oil Company v Crescent Petroleum Company International Ltd and another* [2022] EWHC 1645 (Comm*)*. The court emphasised that the default position is that the parties do have a right of appeal to the courts.

An agreement that the arbitrator need not give reasons for his or her decision is treated as an agreement to exclude the right of appeal. Further, there is no right to appeal to the court on a question of fact: see *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm). The leading case on what amounts to a question of law is *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 QB 503. In that case, the court distinguished between the ascertainment of the facts in dispute and the ascertainment of the law. Ascertaining the law was held to include the identification of all material rules of statute and common law, of the relevant parts of the contract, and of the facts that must be taken into account when the decision is reached. It is only these matters that may be appealed as a question of law.

Such an appeal may arise from the arbitrator's statement of the law, or an incorrect application of the law to the facts (*Dyfrig Elvet Davies v AHP Land Ltd and another* [2014] EWHC 1000 (Ch)). For a recent example of the courts dismissing an appeal on the basis that it concerned findings of fact, not law, see *Laysun Service Co Ltd v Del Monte International GmbH* [2022] EWHC 699 (Comm).

An application for permission to appeal an award can be rejected on the basis that the application was made out of time: the time for appealing an award runs from the date of the award, not the date of corrections (*Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd and another* [2018] EWHC 538 (Comm)).

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Awards made in a contracting state to the New York Convention will be recognised and enforced in England and Wales following an application by the debtor for an order under section 66(1) of the Arbitration Act to give permission to enforce and subject to the limited exceptions set out in the New York Convention as implemented by section 103 of the Arbitration Act. Similarly, awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) will be recognised and enforced in England and Wales pursuant to the Arbitration (International Investment Disputes) Act 1966, which implements the Washington Convention.

In proceedings for the enforcement of an arbitral award against a foreign state, the state may raise the defence that it is immune from the jurisdiction of the courts of England & Wales under section 1 of the State Immunity Act 1978 (SIA 1978). However, pursuant to section 9 of the SIA 1978 where a state has agreed in writing to submit a dispute that has arisen, or may arise, to arbitration, that state will not be immune from court proceedings in England & Wales which relate to the arbitration, except (1) where a provision to the contrary is made or (2) where the arbitration agreement is made between states. For a consideration of section 9 of the SIA 1978, see *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529.

The Court of Appeal has held that it is not mandatory for an order permitting the enforcement of an arbitration award against a state to be served in accordance with the provisions of section 12 of the SIA 1978. While orders permitting the enforcement of an arbitration award are required to be served pursuant to CPR 62.18(8)(b) and 6.44, the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 or 6.28 (*General Dynamics United Kingdom v State of Libya* [2019] EWCA Civ 1110).

A defendant has the right to apply to set aside the enforcement order. However, case law (for example, *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344) has re-emphasised that refusals to enforce will only take place in clear cases where the grounds of section 103(2) of the Arbitration Act are met.

Commercial arbitration awards made in countries that have not acceded to the New York Convention may also be recognised and enforced in England and Wales at common law.

Partial awards disposing of part but not all of the issues are enforceable in the same way as final awards.

The enforcement of arbitral awards in England and Wales as well as the enforcement of awards issued by tribunals seated in England and Wales is not impacted by Brexit, as the United Kingdom remains a party to the New York Convention.

Costs

33 | Can a successful party recover its costs?

Unless the parties agree otherwise, the tribunal can order one party to pay the costs of the arbitration. The general principle is that the loser pays the costs, which include the arbitrator's fees and expenses, the fees and expenses of the arbitral institution concerned and the legal costs or other costs of the parties. However, this is at the discretion of the tribunal, which will take into account all the circumstances of the case, including the conduct of the parties during the arbitration.

Any agreement that one party should pay the costs of an arbitration is only valid if made after the dispute has arisen.

The High Court decision of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) held that third-party funding costs may under certain circumstances be recoverable in arbitration on the basis that they fall under 'other costs' of the parties under

section 59(1)(c) of the Arbitration Act. In that case, the successful claimant was allowed to recover all of its third-party funding costs, which included a 300 per cent uplift, though it was emphasised by the court that the costs incurred must be reasonable to qualify for recovery.

Additionally, the court in *Essar* clarified that the question of the recoverability of costs in arbitration should not be construed by reference to what a court would allow by way of costs in litigation under the CPR. This non-interventionist approach was followed in the more recent case of *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Mediation

This is by far the most popular form of alternative dispute resolution (ADR). It is a consensual and confidential process in which a neutral third party, who has no authoritative decision-making power, is appointed to help the parties reach a negotiated settlement. It can also be used as an aid to narrow down the matters in dispute and can be initiated before and after court proceedings or an arbitration has been initiated.

The mediation process can also be used in conjunction with arbitration by the parties using a multitiered clause, which involves mediation and then arbitration if needed.

Expert determination

This is the next most popular ADR process and involves the appointment of a neutral third-party expert of a technical or specialist nature to decide the dispute. The third party usually holds a technical rather than legal qualification and acts as an expert rather than a judge or arbitrator. The expert's decision is usually contractually binding on the parties and there is usually no right of appeal.

Early neutral evaluation

This is where a neutral third party gives a non-binding opinion on the merits of the dispute based on a preliminary assessment of facts, evidence or legal merits specified to them by the parties. As part of its general powers of case management, the court also has the power to order an early neutral evaluation with the aim of helping the parties settle the case.

Adjudication

There is a statutory right to adjudication for disputes arising during the course of a construction project. The adjudicator's decision is binding unless or until the dispute is finally determined through the courts or arbitration proceedings, or by agreement of the parties.

Conciliation

This is similar to mediation, except that the neutral third party will actively assist the parties to settle the dispute. The parties to the dispute are responsible for deciding how to resolve the dispute, not the conciliator.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

English courts will not compel a party to engage in ADR if it is unwilling to do so. However, the pre-action protocols require the parties to consider ADR and the parties may be required to provide the court with evidence that ADR was considered. Under the applicable ethical rules, a solicitor should also discuss with his or her client whether ADR may be appropriate.

Once proceedings have commenced, the overriding objective of dealing with cases justly and at proportionate cost requires the court to manage cases, including encouraging litigants to use an ADR process if appropriate (see *Seals and another v Williams* [2015] EWHC 1829 (Ch), where the court encouraged early neutral evaluation).

The court may stay proceedings to allow for ADR or settlement for such period as the court thinks fit.

There may be adverse costs consequences if a party has unreasonably failed to consider ADR, as the court must take into account the conduct of the parties when assessing costs, which will include attempts at ADR. The burden of proof to demonstrate that the use of ADR was unreasonably refused rests with the losing party.

Case law has repeatedly re-emphasised the importance of considering ADR and has examined the cost consequences of failing to do so.

In *PGF II SA v OMFS Company Ltd* [2013] EWCA Civ 1288 (as applied in *R (on the application of Crawford) v Newcastle Upon Tyne University* [2014] EWHC 1197 (Admin)), for instance, it was made clear that simply ignoring an invitation to participate in ADR is generally unreasonable and may lead to potentially severe costs sanctions.

On 12 July 2021, the Civil Justice Council published a report stating that mandatory ADR is compatible with article 6 of the European Convention on Human Rights and could be a 'desirable and effective development'.

On 2 March 2023, the United Kingdom government announced that it would sign and ratify the Singapore Convention on Mediation. If the UK becomes a member state, the High Court would directly enforce settlement agreements (if within scope) from mediations globally – the enforcing party would not need to bring proceedings for breach of contract. It is hoped that joining the Convention will reassure foreign parties of the reliability of commercial mediation. The Convention will come into force in the UK six months after ratification. Ratification is currently expected during 2024.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Historically, there has been a split legal profession in England and Wales. This has meant that solicitors have tended to focus on the provision of legal services directly to clients, while barristers have specialised in advocacy skills.

While this distinction still exists, there is an increasing overlap and, in particular, solicitors will continue to have an increasing role in advocacy before the courts with the development of the 'solicitor advocate' role. Solicitors are granted rights of audience in all courts when they are admitted or registered. However, they cannot exercise those rights in the higher courts until they have complied with additional assessment requirements. The Solicitors Regulation Authority sets the competence standards solicitor advocates must meet and maintain, authorises assessment organisations to test people against those standards, and sets the regulations under which the scheme of higher rights of audience operates.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Fixed Recoverable Costs

An extension of the fixed recoverable costs regime is anticipated in October 2023. The regime is expected to be extended to all civil cases in the fast track up to a value of £25,000 in damages, and to most other simple, fast track cases valued at £25,000 to £100,000 in damages, provided they meet certain criteria.

Disclosure Pilot Scheme Made Permanent

In July 2022 it was announced that the Disclosure Pilot Scheme had been approved and that from 1 October 2022 it would be incorporated into the Civil Procedure Rules – substantially in the form of PD 51U – as a new Practice Direction 57AD (PD 57AD). For disclosure in any proceedings in any other court, the existing CPR provisions in CPR 31 remain in force.

UK Government Consults on Becoming a Contracting State to the Hague Judgments Convention 2019

The UK government launched a consultation seeking views on the UK becoming a contracting state to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This came after the European Commission

indicated that they were opposed to the UK's accession to the Lugano Convention 2007. The Ministry of Justice's response to consultation feedback is expected in the middle of 2023.

Third Party Litigation Funding

The third party funding (TPF) industry in England and Wales has grown significantly in recent years. According to research undertaken by Reynolds Porter Chamberlain in June 2022, UK litigation funders' assets hit a record £2.2 billion in 2021, an 11 per cent increase on the previous year. In the CAT, TPF has been important in facilitating both opt-in and opt-out representative actions. The requirements of third-party funding agreements in such representative actions is an area currently in sharp focus and one which the Supreme Court is expected to address later this year when it rules on an appeal of the judgment in *PACCAR Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299.

The Law Commission's Review of the Arbitration Act

As mentioned, the Law Commission's review of the Arbitration Act is currently in progress. The general expectation is that the arbitral landscape in England & Wales will not see significant change. However, the Second Consultation Paper did include a proposal – posed as a question with requests for practitioner feedback – to introduce a new rule to the Arbitration Act. The proposed new rule would make the law of the arbitration agreement the law of the seat, unless the parties expressly agree otherwise in the agreement. If adopted, the Law Commission's proposal would be a departure from the Supreme Court's decision in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

Crypto-Asset Losses: Consumers Dispute Arbitration Clauses

2022 saw interaction between UK consumer legislation and the international arbitration regime in the context of crypto-currency disputes. The recent case of *Chechetkin v Payward Ltd and others* [2022] EWHC 3057 (Ch) saw the High Court accept jurisdiction to consider a consumer claim for repayment of money lost trading crypto assets, despite the Claimant having agreed to arbitration on the crypto exchange's standard terms and conditions and an award already having been issued in respect of the arbitration. The development of the *Chechetkin* case in 2023 and the trial of the *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ case, which considers similar issues, will likely provide further guidance on the validity of arbitration clauses in the consumer context.

LATHAM & WATKINS

Oliver Browne oliver.browne@lw.com
Anna James anna.james@lw.com

99 Bishopsgate, London EC2M 3XF, United Kingdom
Tel: +44 207 710 1000
www.lw.com

Read more from this firm on Lexology

Read this article on Lexology

Germany

Heiner Kahlert and Maximilian Wegge
Martens Rechtsanwälte

RETURN TO CONTENTS

Summary

LITIGATION	236
Court system	236
Judges and juries	236
Limitation issues	237
Pre-action behaviour	237
Starting proceedings	238
Timetable	238
Case management	238
Evidence – documents	239
Evidence – privilege	239
Evidence – pretrial	239
Evidence – trial	239
Interim remedies	240
Remedies	240
Enforcement	241
Public access	241
Costs	241
Funding arrangements	242
Insurance	242
Class action	242
Appeal	243
Foreign judgments	243
Foreign proceedings	244
ARBITRATION	**244**
UNCITRAL Model Law	244
Arbitration agreements	244
Choice of arbitrator	245
Arbitrator options	245
Arbitral procedure	246
Court intervention	246
Interim relief	247
Award	247
Appeal	247
Enforcement	248
Costs	248
ALTERNATIVE DISPUTE RESOLUTION	**248**
Types of ADR	248
Requirements for ADR	249

Read this article on Lexology

MISCELLANEOUS 250
Interesting features 250

UPDATE AND TRENDS 250
Recent developments and future reforms 250

LITIGATION

Court system

1 | What is the structure of the civil court system?

Except for Germany's highest civil court, the Federal Court of Justice, all civil courts are at state level. The structure is nearly identical in all states: there are district courts, regional courts and higher regional courts. Only in Bavaria is there also a state supreme court, which has jurisdiction over matters that in other states would be decided by higher regional courts.

District courts act exclusively as first instance courts, mainly for disputes with an amount in dispute not exceeding €5,000 (subject to exceptions). Regional courts not only act as first instance courts in most cases falling outside the district courts' jurisdiction, but also have appellate jurisdiction over decisions of district courts. Higher regional courts act as entry-level courts for capital market test cases and for most arbitration-related matters. Their main function, however, is to act as appellate courts for regional court decisions. The Federal Court of Justice, in turn, mainly hears further appeals against appellate decisions.

At district court level, cases are decided by single judges. Regional courts and higher regional courts have chambers composed of three judges; however, in practice, most cases at regional court level are decided by one of the three judges as a single judge. At the Federal Court of Justice, each chamber has six to eight judges, with cases being usually decided by a panel of five.

At higher regional courts and at the Federal Court of Justice, the chambers garner special expertise in certain fields because cases are allocated to the chambers based on subject matter. In addition, for first instance commercial law matters, many regional courts have a specialised chamber that is composed of one professional judge, acting as chair, and two lay judges, who are merchants proposed by the chamber of commerce. Similarly, higher regional courts and the Federal Court of Justice have dedicated chambers for antitrust law disputes.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

There are no juries in civil litigation. The judges control the procedure and, where necessary, render the judgment. Procedurally, they will, inter alia, set the timetable, promote amicable settlements and safeguard the efficiency of the proceedings as well as the parties' due process rights.

Furthermore, judges take a very active role in the taking of evidence. They will hear evidence only on disputed facts that they deem legally relevant, regardless of whether the parties have proffered further evidence. In addition, witnesses and experts are primarily examined by the judge, not by the parties, and expert witnesses are selected and instructed by the court (while parties may submit expert testimony, this qualifies as pleadings rather than evidence).

However, the judge is in the hands of the parties regarding the subject matter of the dispute and the submission of facts. In particular, the court is bound by the parties' requests for relief. Similarly, the parties may remove the case from the court's consideration. Moreover, in principle, judges may only take into account those facts that have been presented by the parties, and they must accept as true those facts that are undisputed between the parties.

Limitation issues

3 | What are the time limits for bringing civil claims?

Under German law, the statute of limitations is a merits issue. The standard limitation period is three years. It begins at the end of the year in which the creditor became or should have become aware of the identity of the debtor and of the circumstances giving rise to the claim. However, different periods apply for certain types of claims. In addition, there are maximum limitation periods that are independent of the creditor's knowledge (mostly 10 or 30 years).

In certain cases, the limitation period may be suspended (eg, during negotiations or legal proceedings) or it may start anew (eg, if the debtor acknowledges the claim). Parties may agree on prolonging limitation periods, but only up to a maximum of 30 years.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There is no pretrial discovery or disclosure (ie, each party must gather its evidence by its own). However, there are certain other mechanisms mitigating the problem of building one's case if one lacks the requisite information:

- Substantive law may, in some cases, provide the other party with certain information rights.
- Courts have the power to order a party to the proceedings or a third party to submit documents or other objects in its possession. In practice, however, such orders are rarely made.
- A party's burden of substantiating and proving its case may be eased or may even shift to the other party in certain cases; for example, if the party bearing that burden cannot reasonably be expected to have access to the relevant information or evidence, or the counterparty took active measures to prevent it from obtaining such access.

Finally, before filing a claim, a claimant should always contact the opposing party and ask for fulfilment of the claim. Otherwise, if the defendant immediately acknowledges the claim once filed, the claimant will need to bear the costs of the proceedings.

Read this article on Lexology

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are initiated by filing a written statement of claim. The statement must indicate at least the parties, the court, the subject matter, the grounds for the claim and the request for relief. However, the matter becomes legally pending only once the statement of claim is served on the respondent by the court. The court will effect service only if the aforementioned formal requirements are met and after the claimant has paid the full court fees.

While German civil courts have a fairly high caseload, they still manage to dispose of cases quite swiftly; on average, first instance proceedings in 2020 took 5.4 months before district courts and 10.5 months before regional courts.

Timetable

6 What is the typical procedure and timetable for a civil claim?

The statement of claim is served on the opposing party together with a first court order, which regularly provides the respondent with a deadline of at least four weeks to file a reply. Before an oral hearing takes place, the parties are usually given the opportunity to file a second round of submissions.

Service of the summons for a hearing must occur at least one week prior to the hearing. Normally, the oral hearing begins with the judge summarising the parties' relevant submissions, providing a preliminary legal assessment and exploring the possibility of resolving the dispute amicably. If no settlement is reached, the parties may then exchange oral arguments.

If relevant facts are disputed, the judge will order the taking of evidence, normally to be conducted at one or more subsequent hearings. At the evidentiary hearing or hearings, the judge may hear the witnesses named by the parties, listen to experts and examine other pieces of evidence. Afterwards, the parties and the judge discuss the results of the taking of evidence. Once the court determines that the parties had the opportunity to present their position on all relevant issues, the court issues its judgment, either at the end of the hearing (very rare) or at a later date. The judgment will be sent to the parties electronically (via a mailbox specially set up for lawyers) or by mail.

Case management

7 Can the parties control the procedure and the timetable?

Judges enjoy extensive freedom in shaping the procedure, subject only to certain statutory limits. The parties' influence on the procedure is largely limited to requesting extensions of deadlines or postponements of hearings. Within the confines of due process, it is within the court's discretion whether to grant such requests. In practice, courts regularly grant at least one (usually generous) extension for each of the main deadlines. Similarly, courts are generally very open towards staying the proceedings in the case of settlement discussions.

Read this article on Lexology

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

All parties have a procedural duty to tell the truth. However, this does not prevent them from making factual pleadings that they only assume (rather than know) to be true. Moreover, parties need not submit all the facts or evidence that may be relevant to the dispute, provided that this omission does not render their submissions so misleading that it amounts to not telling the truth.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

As there is generally no obligation to produce documents, privilege of documents does not exist. However, lawyers have the right to refuse to testify about any circumstances entrusted to them in the context of their appointment. The same applies to in-house lawyers, but only to the extent that such a lawyer became aware of the facts concerned while working for his or her employer as counsel.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

Generally, no.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

The court will take evidence only if the fact to be proven:

- is pleaded with sufficient specificity (no fishing expedition);
- is disputed between the parties;
- is legally relevant in the court's assessment;
- is not known by the judge to be true based on other proceedings before the judge or based on public knowledge; and
- has not yet been proven through other evidence.

A party proffering a witness must specify the facts on which the witnesses will testify. At trial, the witness is requested to share whatever knowledge they have in relation to those facts. The court will ask questions, where necessary, and subsequently invite the parties to ask questions. There is no witness conferencing and no culture of cross-examination.

Expert testimony is proffered by specifying the facts on which an expert shall be heard. The court will then select a suitable expert (unless the parties agree on an expert). Usually, the person appointed as an expert will submit a written expert opinion. In the case of ambiguities or contradictory opinions of different experts, the experts may be heard at a hearing in accordance with the rules on the examination of witnesses.

Interim remedies

12 | What interim remedies are available?

German law distinguishes between two forms of interim remedies – 'seizure' and 'interim injunctions' – both of which are available while (national or foreign) proceedings are pending or imminent.

Seizure serves to secure payment. It allows for the seizing of individual assets or the restriction of a debtor's freedom of movement. Seizure is tantamount to an interim freezing injunction under UK law.

Interim injunctions mainly serve to secure non-pecuniary claims. They are available when there is justifiable concern that a change of the status quo might frustrate the realisation of the claimed right or make its realisation significantly more difficult.

There is no search order in German civil law. However, if a party has a substantive right to information, it can file an 'action by stages'. This action enables the claimant to combine a claim for performance, for which the claimant still lacks information, with a claim for disclosure of the relevant information. A judgment granting disclosure can be enforced like any other judgment.

Remedies

13 | What substantive remedies are available?

There are three different types of actions:

- action for enforcement of a claim (eg, payment or the omission of a certain act);
- action for a modification of rights (eg, annulment of a company resolution); and
- action for declaratory judgment (serving mainly to clarify the existence or non-existence of a legal right).

Punitive damages are not available.

Unless substantive law provides for interest from an earlier date, interest accrues as of the date on which the litigation becomes pending.

Enforcement

14 | What means of enforcement are available?

Depending on the obligation that the judgment relates to, available enforcement measures differ.

In relation to payment obligations, the creditor may request that:

- the movable property of the debtor be seized and sold;
- claims of the debtor against third parties be assigned to the creditor; and
- real estate of the debtor be subjected to forced sale or administration, or that a mortgage be registered in favour of the creditor.

For obligations to surrender an object to the creditor, the bailiff takes the object from the debtor and hands it over to the creditor.

In the case of an obligation to perform an act, the creditor may request authorisation to perform the act him or herself at the debtor's expense. If only the debtor personally can perform the act (or if the debtor is obliged to omit a certain act), the court can order a coercive payment or coercive imprisonment to make the debtor perform or omit the relevant act.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Apart from a few, narrow exceptions (eg, protection of trade secrets), all hearings are public. However, third parties may not access the files of a case without the consent of the parties unless they demonstrate a legitimate interest that outweighs the parties' confidentiality interests.

Costs

16 | Does the court have power to order costs?

The court determines which of the parties must bear which proportion of the court's fees and expenses, and in which proportion either party must (partially or fully) reimburse the other party for its legal fees and expenses. The exact amounts will then be determined in a separate procedure by a judicial officer.

In principle, courts impose costs on the unsuccessful party. If neither party prevails in full, the court will be guided by the percentages by which each party prevailed (comparing the operative part of the judgment with the parties' requests for relief).

Even if a party prevails in full, it will only be reimbursed statutory legal fees (which depend on the amount in dispute), even if the actual fees were higher.

Claimants are required to deposit the full court fees upon filing of the claim. Furthermore, claimants with their habitual residence or seat outside the European Economic Area may be required to provide security for the full costs of the proceedings upon the request of the defendant (subject to certain exceptions).

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In principle, contingency fee arrangements are not permitted, subject only to narrow exceptions. For example, contingency fees are legal if the client would otherwise be discouraged from pursuing legal action, given the economic situation of the client and the financial risks of the proceedings.

Third-party funding closes the gap left by the general prohibition of contingency fees. Funders usually finance court fees and legal expenses and are entitled to a share in the proceeds. By contrast, it is not customary that a claimant sells a proportion of any recovery to investors in return for a fixed upfront payment (or that a defendant pays a fixed sum to offset a proportion of any liability).

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

In 2021, there were 45 insurance companies across Germany offering different types of legal expense insurance. Private legal protection, for example, covers the costs of a legal dispute as a private person, but is limited to certain areas of law and usually covers only the statutory legal fees. Companies frequently take out more extensive corporate legal protection and directors' and officers' insurance.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Collective redress was traditionally viewed critically in Germany, particularly in view of American class actions. This changed to a certain extent on 1 November 2018. Since then, certain qualified institutions in Germany have been entitled to file a 'model declaratory action' with the aim of establishing the existence or non-existence of factual and legal preconditions for business-to-customer claims or legal relationships. A decision on those issues has binding effect for individual claims. However, unless a settlement is reached as a result of the model declaratory action, the parties to individual cases will still need to bring their own actions, even though the model declaratory judgment will considerably limit the scope of issues still to be decided in those individual proceedings.

In addition, on 24 December 2020, Directive (EU) 2020/1828 introduced an EU collective action that will not be restricted to declaratory relief. Instead, claims for damages, repair, replacement, price reduction, termination of contract and reimbursement of payment will also be possible. The Directive should have been transposed into national law by the EU member states by 25 December 2022. In Germany, a draft is currently in the legislative process. From 25 June 2023, the Directive will be directly applicable – irrespective of any transposition by the EU member states.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals are available against final judgments delivered by first instance courts. They are admissible only if the value of the subject matter of the appeal is greater than €600 or the first instance court has granted leave to appeal its judgment.

A further appeal may be filed before the Federal Court of Justice against appellate judgments, but only if the appellate court granted leave to appeal or the appellant succeeds before the Federal Court of Justice with a complaint against the denial of leave. The main requirement for leave is that there are points of law that are of fundamental significance or that require a decision by Germany's highest civil court in the interest of developing the law or ensuring the consistency of jurisprudence.

In principle, appellate courts review the appealed judgment based on the facts established at first instance. The parties may only bring forward new arguments and new evidence if they have not been able to do so at first instance or if new statements are uncontested. However, the appeal court is free to evaluate evidence and may even repeat the taking of evidence. By contrast, the scope of the further appeal to the Federal Court of Justice is limited to points of law.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Judgments from other EU countries, as well as Switzerland, Norway and Iceland, will be recognised and are enforceable in the same way as German court judgments (pursuant to the Brussels I and IIa Regulations and the almost identical Lugano Convention).

Court decisions from the United Kingdom may be recognised and enforced based on the German-British Agreement of 14 July 1960 on the mutual recognition and enforcement of judgments in civil and commercial matters, the Hague Convention of 30 June 2005 on Choice of Court Agreements or German law. Careful consideration should be given to each individual case in terms of the option available for recognition and enforcement and how best to enforce decisions.

Other foreign judgments are recognised only if they are final (ie, not appealable in their state of origin) and if none of the narrow statutory reasons for non-recognition apply (such as violation of res judicata, public policy or basic notions of due process). For a foreign judgment

to be enforceable in Germany, the admissibility of its enforcement must be pronounced by a German court.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

According to the EU Evidence Regulation (No. 1206/2001), courts in other EU countries may request German courts to take evidence for them. The requested court will execute the request in accordance with domestic law. However, the requesting court may also call for the request to be executed in accordance with a special procedure provided for by its domestic law.

With respect to, inter alia, the United Kingdom and Switzerland, the Hague Evidence Convention of 1970 applies. Germany, like most signatories to the Convention, made specific reservations. In particular, it has made a reservation under article 23 of the Convention to the effect that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents.

Apart from that, requests for the taking of evidence may be executed according to the Hague Civil Procedure Convention, any bilateral international treaties or general principles of judicial assistance.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes. While the relevant chapter of the German Code of Civil Procedure is not a verbatim translation of the UNCITRAL Model Law, most differences are as a result of legal technicalities. The most notable substantive differences are the following:

- German law requires a stricter form for arbitration agreements involving consumers;
- until the arbitral tribunal is constituted, German law allows each party to request a court ruling on whether the arbitration agreement is valid and covers the dispute at hand; and
- if the arbitration agreement gives one party more influence than the other on the selection of the arbitrators, the other party can request that the court appoint the relevant arbitrator or arbitrators instead.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Unless a consumer is involved, the arbitration agreement meets the form requirement if it is contained in:

Read this article on Lexology

- a document signed by the parties;
- an exchange of (not necessarily signed) correspondence between the parties that provides a record of the agreement, in particular letters, telefaxes or emails; or
- a document sent by one party to the other or by a third party to the parties to the arbitration agreement, provided that:

    - there is a common usage whereby the contents of this document are regarded as agreed upon if no timely objection is made; and
    - no such timely objection is in fact made.

In all three cases, it is sufficient if the relevant document refers to another document containing the arbitration agreement, provided that the reference meets the general requirements under German contract law for an incorporation by reference.

If the arbitration agreement involves one or more consumers, it must either be notarised or be contained in a document that is signed by all parties and does not contain any provision unrelated to arbitration.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Three arbitrators will be appointed, with each party appointing one arbitrator and the co-arbitrators appointing the chair.

The parties are free to agree on the procedure for challenging an arbitrator. If no such agreement exists, any challenge must be submitted to the arbitral tribunal in writing, setting out the reasons for the challenge, within two weeks of the challenging party becoming aware of the facts on which its challenge rests. Moreover, if a party seeks to challenge the arbitrator that it appointed itself, it can only invoke the grounds for challenge that it became aware of after the appointment. If the arbitral tribunal dismisses the challenge, the challenging party may, within one month, request the court to decide on the challenge.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

The only restrictions are that an arbitrator must be an individual person and must not be a party to the dispute (or any of its legal representatives).

Otherwise, parties are free to choose any person as arbitrator, unless the parties themselves have agreed on requirements to be met by the arbitrators. Arbitrators not meeting these agreed requirements can be challenged. However, such requirements are rarely agreed as this may dramatically narrow the choice of available arbitrators. In addition, it can sometimes be difficult to ascertain with certainty if a candidate meets the requirements (eg, whether the arbitrator is fluent in a certain language). The most common qualification agreed upon in domestic arbitration is that the arbitrator has obtained a German law degree

and has passed the bar exam. In international arbitration, parties sometimes agree that the chair should not have the same nationality as one of the parties.

There is quite a large pool of arbitrators in Germany, comprising not only specialised lawyers but also university professors, judges and (to a much lesser extent) technical experts. A number of arbitral institutions seated in Germany, as well as other organisations such as the International Chamber of Commerce Germany, maintain lists of arbitrators, often for special fields of arbitration.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The main mandatory principles are the same as in the UNCITRAL Model Law; namely, that the parties must be treated equally and must be granted a sufficient opportunity to present their case. In addition, German law guarantees the parties' rights to be represented by counsel and to challenge a tribunal-appointed expert for lack of independence or impartiality.

Provided that those principles are respected, the parties can tailor the arbitral procedure to their needs. To the extent that there is neither an agreement of the parties on the procedure nor a fallback provision in German arbitration law, it is for the arbitral tribunal to devise the procedure in its discretion.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The court will intervene to make a final determination on arbitral jurisdiction, provided that this ruling is requested by a party:

- before the constitution of the arbitral tribunal; or
- within a month of an arbitral award on jurisdiction.

Moreover, the court will remove arbitrators upon the request of a party if:

- they are unable or unwilling to perform their duties in due time but fail to resign (and the parties are unable to agree on removing such arbitrator); or
- they are successfully challenged in court for lack of independence or impartiality within a month of the challenging party being notified of the arbitral tribunal's dismissal of the challenge.

In addition, upon the request of a party, the court will appoint an arbitrator if:

- the arbitration agreement gives the counterparty more influence over the selection of the arbitrators than the requesting party; or
- the applicable appointment procedure for the arbitrator fails – in particular, if a party does not appoint its arbitrator or if the parties or co-arbitrators fail to agree on an arbitrator.

Furthermore, the arbitral tribunal (or, with its approval, a party) may request assistance from the court in the form of judicial acts that exceed the powers of the arbitral tribunal (eg, compelling appearance of witnesses, administering an oath to a witness or serving of documents by public notice).

The court's powers as described above cannot be overridden by agreement. However, in some cases, the deadline for the relevant application can be changed by agreement of the parties.

Finally, each party may request interim relief from the court notwithstanding an arbitration agreement or a pending arbitration. According to the prevailing view, the parties cannot validly exclude the court's jurisdiction for interim relief even by way of an express agreement.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, unless the parties have agreed otherwise. However, the court retains parallel jurisdiction on interim relief, and it is usually more effective to seek interim relief in court. This is mainly because an arbitral order for interim relief cannot itself be the subject of enforcement measures; instead, this first requires an order from the court.

Award

30 | When and in what form must the award be delivered?

Unless agreed by the parties, there is no time limit for rendering the award.

The award must be in writing and signed by the sole arbitrator or, in the case of a tribunal, by at least the majority of its members. If not all members of the tribunal have signed the award, the award must indicate the reasons for the missing signatures. While German law also requires the award to indicate the date on which it was rendered and the seat of the arbitration, their omission does not affect the validity of the award. Finally, unless agreed otherwise by the parties, the award must state the reasons on which it is based (failing which, there is a risk that the award may be set aside).

Appeal

31 | On what grounds can an award be appealed to the court?

Arbitral awards cannot be appealed to the court. Therefore, the court will not hear any argument that the arbitral tribunal's decision is incorrect. However, both domestic and foreign awards may be set aside for the narrow grounds provided in article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and article 34 of the UNCITRAL Model Law. In principle, an application for the setting aside of the award must be filed within three months of receipt of the arbitral award.

One of the reasons for setting aside an arbitral award is a violation of public policy. An arbitral award is contrary to national public policy if it violates the elementary foundations of

the German legal system. According to a recent decision by the Federal Court of Justice, the core antitrust provisions (largely equivalent to articles 101 and 102 of the Treaty on the Functioning of the European Union) form part of these elementary foundations. Therefore, domestic arbitral awards are subject to unrestricted factual and legal review by the ordinary courts when it comes to the aforementioned core anti-trust provisions.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Foreign awards, regardless of the country of origin, are recognised and enforced pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, unless another applicable treaty provides more favourable conditions for recognition and enforcement.

Enforcement of a domestic award requires a court order declaring the award enforceable. A request for this declaration will be refused only if there are grounds for setting aside the award (in which case the court will set aside the award in the same proceedings). Importantly, however, if the counterparty has failed to request the setting aside of the award in a timely manner, the court deciding on the enforceability of the award will not take into account any grounds for setting aside except for a lack of arbitrability and a violation of public policy.

Costs

33 | Can a successful party recover its costs?

Unless agreed otherwise by the parties, the arbitral tribunal has discretion as to who shall bear the costs of the arbitration (in which proportion) and whether a party may (fully or partially) recover its legal fees and expenses from the other.

Often, when deciding on those matters, German arbitrators tend to look primarily at each party's rate of success (ie, a comparison of the requests for relief and the tribunal's decisions thereon). However, other factors (eg, inefficient procedural behaviour) may also come into play. Arbitral tribunals are not bound by (but remain free to take guidance from) the German ad valorem tables on legal fees recoverable in state court proceedings.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

While reliable, up-to-date numbers on the actual use of different alternative dispute resolution (ADR) methods are difficult to find, some general statements can be made.

First, arbitration, expert determination and (especially in the construction section) dispute adjudication boards are widespread methods for out-of-court dispute resolution in commercial disputes.

Second, conciliation is a very popular ADR method in business-to-consumer disputes. In particular, there are sector-specific conciliation bodies in industries such as insurance, banking, telecommunications, energy and travel. Moreover, in 2020, Germany created a universal conciliation body for areas in which there is no such sector-specific body.

Third, mediation is still a rather underused ADR method in Germany, even though Germany enacted the Mediation Act in 2012 to further promote the use of mediation. A government assessment of the impact of the Mediation Act in 2017 stated that the number of mediations in Germany had remained at a consistently low level (a survey of more than 1,200 mediators revealed 5,000–7,500 mediations per year). Consequently, while there is a large pool of trained mediators in Germany (at least 70,000, out of which an estimated 7,500 practise as mediators), there are not enough cases to allow a significant number of mediators to make mediation their professional focus.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In principle, there is no legal requirement for parties to consider ADR before initiating court or arbitral proceedings. The only exception, which currently applies in 10 of the 16 German states, relates to very specific scenarios that are rarely relevant to commercial disputes (eg, cases involving amounts in dispute not exceeding €750). In those cases, for a claim in court to be admissible, an unsuccessful attempt must have been made to resolve the dispute through conciliation before a certified body.

Once court proceedings have been initiated, however, the court is empowered in all other cases to refer the parties to a specialised judge (otherwise not involved in the proceeding), who will try and help the parties resolve the dispute through ADR processes. If this attempt fails, the court will decide the case (without the involvement of the specialised judge).

In addition, German businesses often agree in their contracts on multi-tier dispute resolution clauses that require, for example, negotiation, mediation or conciliation, or a combination thereof, before a party can initiate arbitration or litigation. Failure to complete any such agreed pre-arbitration or pre-litigation steps will result in the claim being dismissed as inadmissible (without prejudice to filing the claim again later).

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The German civil court system is well regarded on an international level. For instance, the World Justice Project's Rule of Law Index 2021 ranks Germany third out of 139 countries in the civil justice system. Similarly, Germany has consistently been ranked by the EU as one of the top EU countries in terms of promoting and incentivising the use of ADR methods (2019: fifth place; 2020: fifth place; and 2021: second place). In this regard, it should also be noted that the German Institution for Arbitration (DIS) not only offers institutional rules and corresponding services for arbitration, but also for conciliation, mediation, expert determination and adjudication. In addition, DIS has included an interesting additional feature with the last revision of its arbitration rules: a new annex contains Dispute Management Rules, under which, if both parties agree, DIS will appoint an independent dispute manager who will consult with the parties with a view to helping them agree on the most appropriate dispute resolution mechanism.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In 2021 and 2022, the legal profession saw various reforms relating to dispute resolution. Notably, certain (albeit narrow) exceptions were introduced to the general ban on contingency fees, and since October 2021, litigation funding by lawyers has been rendered admissible to a limited extent.

In addition, major steps have been taken in the digitalisation of the German judicial system. In particular, since 1 January 2022, lawyers have been required to use a special electronic mailbox for their correspondence with the courts. As a result, lawyers must generally file their submissions in electronic form only. By 2026, courts and public authorities will have to maintain their files electronically. Finally, the covid-19 pandemic has significantly increased the use of videoconferencing, which has prompted many courts to install modern technical equipment for this purpose.

martens

RECHTSANWÄLTE

Heiner Kahlert	h.kahlert@martens.legal
Maximilian Wegge	m.wegge@martens.legal

Agnesstr. 14, 80798 Munich, Germany

Tel: +49 89 /452 44 22 0

https://martens.legal

Read more from this firm on Lexology

Read this article on Lexology

Greece

Christos Paraskevopoulos
Bernitsas Law

RETURN TO CONTENTS

Summary

LITIGATION	253
Court system	253
Judges and juries	254
Limitation issues	255
Pre-action behaviour	255
Starting proceedings	256
Timetable	256
Case management	257
Evidence – documents	257
Evidence – privilege	258
Evidence – pretrial	258
Evidence – trial	259
Interim remedies	259
Remedies	259
Enforcement	260
Public access	261
Costs	261
Funding arrangements	261
Insurance	262
Class action	262
Appeal	263
Foreign judgments	263
Foreign proceedings	266
ARBITRATION	**266**
UNCITRAL Model Law	266
Arbitration agreements	266
Choice of arbitrator	266
Arbitrator options	267
Arbitral procedure	268
Court intervention	268
Interim relief	269
Award	269
Appeal	270
Enforcement	271
Costs	271
ALTERNATIVE DISPUTE RESOLUTION	**272**
Types of ADR	272
Requirements for ADR	272

Read this article on Lexology

MISCELLANEOUS 274
Interesting features 274

UPDATE AND TRENDS 275
Recent developments and future reforms 275

LITIGATION

Court system

1 What is the structure of the civil court system?

In the first instance, Greek courts are subdivided into magistrate courts (justices of the peace), single-member first instance courts and multi-member first instance courts. Though there are a lot of exceptions, depending on the nature and subject matter of the dispute, the general rule is that in the ordinary procedure of the civil courts the magistrate courts are competent for monetary disputes up to €20,000; disputes arising out of lease agreements where the monthly rent does not exceed €600; and disputes between joint property owners up to €20,000. The single-member first instance courts are competent for monetary disputes up to €250,000. The multi-member first instance courts are competent for all disputes for which the magistrate courts and the single-member first instance courts are not competent.

Exceptionally, the magistrate courts are also competent for a number of disputes depending on their nature and subject matter and irrespective of the value of the dispute. Likewise, the single-member first instance courts are competent for a number of disputes depending on their nature and subject matter, even if the value of the dispute is above €250,000, in which case it would normally fall within the competence of multi-member first instance courts, and for some other disputes irrespective of whether the magistrate courts or the multi-member first instance courts would otherwise be competent.

As regards disputes that are heard in the special proceedings before the civil courts, such as family and matrimonial disputes, property disputes (arising out of lease agreements, labour disputes, disputes in connection to the payment of fees and credit instruments) and orders for payment or the surrender of the use of the leasehold, the general rule is that either the magistrate courts or the single-member first instance courts will have competence, depending on the value of the dispute in question. There are very few cases in the special proceedings where the multi-member first instance courts will have competence.

For interim measures proceedings and for cases that are heard in a voluntary procedure of a quasi-administrative nature, as a general rule, the single-member first instance courts will have competence.

In the second instance, the single-member first instance courts are competent for appeals against decisions of the magistrate courts within their territory; the single-member appeal courts are competent for appeals against the decisions of the single-member first instance courts; and the three member appeal courts are competent for the hearing of appeals against decisions of the multi-member first instance courts.

Finally, the Supreme Court (Areios Pagos) is competent for appeals in cassation (on points of law) against decisions of any civil court.

There are no specialist commercial or financial courts, but there are special commercial sections in the ordinary procedure of the first instance and appeal courts, while special naval sections (in charge of naval disputes) have been established in the First Instance and Appeal Courts of Piraeus. According to article 13 of Law 4529/2018, published on 23 March 2018, another special commercial section will be established in the future for hearing cases regarding actions for damages under national law for infringements of the competition law provisions of EU member states.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

A Greek court, consisting of one or more judges, as the case may be, will act only at the request of a party and decide on the basis of the factual allegations raised and proven by the parties and their motions, unless otherwise provided by law. The court will also order, even ex officio, the evidence process by any applicable means of evidence that the law permits, even if these were not invoked by the parties. Any procedural acts are done at the initiative of the parties, unless otherwise provided by law. The court is obliged to encourage at any point of the trial and in any procedure the settlement of the dispute and the selection of mediation as an alternative dispute resolution (ADR) method, and to support any relevant initiatives of the parties and to formulate settlement proposals taking into account the factual and legal situation of each case. The judge will:

- conduct the hearing;
- give permission to the parties to speak;
- examine the parties, their legal representatives, witnesses and expert witnesses;
- seek clarifications by the parties on any allegations that are vague or incomplete;
- order at the request of any of the parties or ex officio anything that can contribute to the determination of the dispute, including ordering the parties themselves to be present and to answer questions or provide clarifications;
- declare if and when the hearing has been concluded; and
- issue the decision in due course.

In the voluntary procedure, the inquisitorial system applies and the court may order ex officio any measure suitable for ascertaining the facts, even if not raised by the parties, and especially facts that contribute to the protection of the interested parties, their relationship or the greater public interest.

There is no jury in Greek civil proceedings.

Limitation issues

3 | What are the time limits for bringing civil claims?

Unless otherwise provided by Greek law, the standard limitation period for bringing civil claims is 20 years. However, a shorter limitation period of five years is provided for certain categories of claims, including:

- the claims of merchants and manufacturers for the sale of goods, the execution of works, taking care of the affairs of others and their expenses;
- the claims of farmers, fishermen and others for the sale of the products of their profession;
- the claims of transporters of people or goods for freight and their expenses;
- the claims of hotel, B&B and other owners for the provision of lodging, food and other services, as well as their expenses;
- the claims of those that do not belong in the above categories but take care of the affairs of others or provide services by profession for their fees and expenses;
- the claims of servants and workers for the payment of their wages and expenses;
- the claims of teachers for their fees and costs;
- the claims of institutions for the provision of teaching, fostering, hospitalisation and caretaking, for the provision of their services and their costs;
- the claims of those that take care, foster and raise people, for their services provided and their costs;
- the claims of doctors, nurses, lawyers, notaries, court bailiffs and persons appointed to conduct the affairs of others, for their fees and expenses;
- the claims of the litigants for any prepayments made to their lawyers;
- the claims of factual and expert witnesses for their fees and expenses;
- interest and dividends;
- any rents;
- all kinds of wages, late amount due, pensions, alimonies or payment made periodically; and
- the claims of persons to whom work is provided for their prepayments made against future claims.

Any limitation period is interrupted if the debtor recognises the claim in any way and if an action is filed before the Greek courts. The parties cannot agree to disapply the statute of limitation or to set a longer or shorter limitation period or to make the terms of the statute of limitation harsher or lighter. However, it is possible to waive the right to invoke the statute of limitations after that time has lapsed.

Owing to the covid-19 pandemic, by law, all limitation periods were suspended from 13 March 2020 to 31 May 2020 as well as from 7 November 2020 to 5 April 2021.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

By means of articles 3, 6 and 7 of Law 4640/2019 published on 29 November 2019, as amended and in force at the time of writing, regarding the prior recourse to mediation,

before making a submission to a court, authorised attorneys must notify their clients in writing of the possibility to resolve a dispute, in whole or in part, via mediation. This obligation applies to any civil and commercial disputes of a national or cross-border nature, existing or future, which are at the parties' disposal. In addition, for disputes falling under the mandatory scheme, authorised attorneys must notify their clients in writing of their obligation to attend the mandatory initial mediation session. Those attorneys' informative notes must be attached to the civil action and submitted to the court. If the attorneys' informative notes are not submitted to the court at the time of filing of the civil action, they must be produced by the time of submission of the claimant's written pleadings and no later than the hearing. The mediation minutes drafted by the mediator must also be produced by the time of submission of the pleadings. If the claimant does not meet either of the aforementioned obligations, the hearing of the case is declared by the court as inadmissible.

As regards the steps available to a party to assist in bringing an action, although pre-action exchange of documents is not provided in Greek law, it is possible for a party to request the production of documents either during the pending trial proceedings or even before, by means of a separate legal action or an application for interim measures in urgent cases, provided that the party making this request pre-action has a legal interest to be informed of the content of a document in the possession of another, that is, if the document was drafted in the interest of the party requesting it or certifies a legal relationship that relates to him or her or relates to negotiations for that legal relationship entered into by the applicant or a third party intervening for the latter.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are commenced when the writ of action is deposited at the secretary of the court to which it is addressed or is deposited electronically and a copy thereof is served on the defendant.

Greek courts have a long history of issues with handling the caseload in a timely manner and, in spite of a number of reforms and initiatives attempted, those issues remain to a great extent. The last major reform was through Law 4335/2015, effective as of 1 January 2016, which has undergone various amendments, the last of which were effective as of 1 January 2022, and which provided, inter alia, for the abolition of the examination of witnesses at the hearings, as this was thought to cause delays, and for new, shorter timetables.

Timetable

6 What is the typical procedure and timetable for a civil claim?

A claim that is heard in the ordinary procedure must be served to the defendant within 30 days or, if the defendant resides abroad or is of unknown address, within 60 days. Written pleadings, together with any supporting documentation, powers of attorney, affidavits, exhibits, etc, drafted in Greek or together with their (full or partial, as the case may be) legal

Read this article on Lexology

translation in Greek, must be filed by the parties within 90 days, or, if the defendant resides abroad or is of unknown address, within 120 days of the above deadline of the claim's service to the defendant. Additional pleadings and rebuttals can be filed 15 days after the filing of the pleadings, together with any additional documentation. Both the filing of pleadings and rebuttals must take place no later than 12pm on the last day of the above-mentioned deadlines. Subsequent to the above deadlines, allegations or allegations evidenced via documents or judicial confession may be filed through additional pleadings 20 days prior to the hearing at the latest. The rebuttal to the above additional pleadings must be filed 10 days prior to the set hearing at the latest. Interventions (joinders), summonses to the trial, announcements of the trial or counteractions are filed and served on all parties within 60 days, or, if the defendant or any of his or her joinders reside abroad or are of unknown address, within 90 days from the filing of the claim. Interventions made after a summons to the trial, or an announcement of the trial, must be filed and served on all parties within 90 days, or, if the defendant or any of his or her joinders reside abroad or are of unknown address, within 120 days from the filing of the claim. Within 15 days from the closing of the case file, the judge (or in the case of a multi-member court, the panel of the court and its judge rapporteur) must be appointed and the hearing date must be set no later than 30 days after the end of the above deadline, or if this is not possible because of the caseload of the court, at a later date, as necessary. This 30-day deadline for setting the hearing date is in practice not met by most Greek courts because of their caseload, and delays, ranging from a couple of months to up to one year in some cases, have unfortunately become the norm. The courts' decisions are in writing and are issued after the hearings, usually between three to eight months thereafter.

Case management

7 | Can the parties control the procedure and the timetable?

The parties can extend the timetable of the procedure, that is, the relevant deadlines set by law or by the court, if the parties agree to that and only if the court also agrees, or if the court so decides absent any agreement of the parties, taking into account the circumstances of each case. Extending deadlines for judicial remedies is not possible.

In addition, at the request of one of the parties, the judge or the court, as the case may be, may also decide to shorten the applicable deadlines if there are serious reasons and the deadline is not one for filing an appeal. The parties can also agree to shorten the legal or court deadlines.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no specific duty under Greek procedural rules to preserve documents and other evidence pending trial. There is a general duty on the parties and their attorneys to conduct the proceedings in good faith and to set out the facts as they know them, fully and truthfully. The parties and their attorneys are also expected to contribute, with their diligent conduct of the trial and the timely raising of argumentation and submission of means of evidence, to the expedition of the trial and the speedy resolution of the dispute.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Although the notion of privilege exists in Greek law, there are no specific rules in Greek civil procedural law determining whether a document can be characterised as privileged or not. That said, it is specifically provided in the Greek Code of Civil Procedure that priests, lawyers, notaries, doctors, pharmacists, nurses, psychologists and their aides, as well as any advisers of the parties, cannot be examined, when summoned as witnesses, on the facts that were entrusted to them or they ascertained during the exercise of their profession, for which they have a confidentiality obligation, unless the party entrusting the same to them and to whom the secrecy relates allows it. Public officials and military personnel, in service or retired, cannot be examined as witnesses for facts for which they have a confidentiality obligation, unless the competent minister allows their examination. In any event, priests, lawyers, notaries, doctors, pharmacists, nurses and their aides, as well as any advisers of the parties, are entitled to refuse to be examined as witnesses on the facts that were entrusted to them. Relatives up to the third degree (unless they have the same relation to all parties), spouses (even after the dissolution of their marriage) and those engaged to be married may also refuse to testify. Lastly, any witness may refuse to testify facts that constitute professional or artistic privilege.

In view of the above, documents containing privileged information are not expected, as a matter of Greek law and practice, to be shown to the other party, and any request to the court either to examine as a witness a person covered by privilege or to force a party to produce documents that contain privileged information is not likely in the majority of cases to be accepted.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

The parties have the right to examine under oath witnesses prior to trial before the competent magistrates (justices of the peace), notaries, lawyers or Greek consulates (if the testimony is given outside of Greece). They have a duty to summon the other party to attend, if they wish, the execution of such testimony under oath (affidavit), at least two business days before, and to include in such summons the exact date and place of execution of the affidavit to be given, the action or brief to which it refers, and the name, address and profession of the affiant. The party summoned may obtain a copy of the affidavit at any time after its execution or at the time of its submission to the court by the opponent, together with the latter's pleadings and supporting documentation.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence is presented to the court by means of each party's pleadings and additional pleadings and rebuttals, which are filed together with each party's supporting documentation. In respect of claims that were filed after 1 January 2016 that are heard in the ordinary procedure, witnesses and experts no longer give oral evidence and their testimonies are in effect substituted by written testimonies under oath (affidavits) executed before the competent magistrates (justices of the peace), notaries, lawyers or Greek consulates (if the testimony is given outside of Greece). If, after the review of the case file, it is found by the court that the oral testimony of one affiant from each side or, in the absence thereof, of one person proposed by each side, is absolutely required, then an order to repeat the hearing for the purposes of such oral testimony will be given by the court. Witnesses and experts can still give oral evidence in cases heard under the special proceedings, the voluntary procedure or interim measures proceedings.

Interim remedies

12 | What interim remedies are available?

Interim remedies are available and include:

- the ordering of security for a monetary claim;
- the registration of a prenotation of mortgage;
- the conservatory seizure of movables, immovables, rights in rem thereon, claims and all assets of the debtor either in his or her hands or in the hands of third parties;
- the placement in judicial escrow (custody) of movables, immovables, a group of objects or of a business in the event of a dispute pertaining thereto, such as for their legal ownership or possession;
- the temporary adjudication of certain categories of claims;
- the temporary regulation of a situation via the court's order to do, omit or tolerate a certain act by the party against which the application has been filed;
- the sealing, unsealing, signing or public deposit; and
- the issuance of a European Account Preservation Order pursuant to Regulation (EU) No. 655/2014.

The above remedies are available in support of foreign proceedings provided that the local Greek courts have jurisdiction to order the interim relief sought.

Remedies

13 | What substantive remedies are available?

Substantive remedies include:

- compensatory damages to the injured party for any loss that he or she has suffered;
- restitution in the form of monetary recovery or recovery of property;

- specific performance obliging a party to perform its contractual obligations after a breach has been established; and
- a declaratory judgment declaring the rights or obligations of one party.

Punitive damages, however, are not available under Greek law. In the case of a monetary claim and when the debtor is late in payment, the creditor is entitled to claim the interest provided by contract or by law, without being obliged to prove any damage. In addition to interest, the creditor may also claim, unless otherwise provided by law, any other positive damage that he or she has suffered. In those cases, interest is payable on a money judgment provided that it is formally requested by the court.

Enforcement

14 | What means of enforcement are available?

Enforcement under Greek law includes the following means:

- in the case of an obligation to surrender a movable, via the taking by the court bailiff of such movable from the person against which enforcement is made and the delivery thereof to the appropriate person;
- in the case of an obligation to provide replaceable items or anonymous securities, via the taking by the court bailiff of such items or securities from the person against which enforcement is made and the delivery thereof to the appropriate person;
- in the case of an obligation to provide or surrender an immovable property, ship or aircraft, via the court bailiff expelling the person against which enforcement is made from such immovable property, ship or aircraft and establishing thereon the appropriate person;
- in the case of an act that can be done by a third party, via the creditor doing such act and the relevant cost being incurred by the debtor;
- in the case of an act that can only be done by the debtor, via the court condemning the latter to do such act and in the event that it is not done condemning same to a monetary penalty of up to €50,000 in favour of the creditor and to personal detainment of up to one year;
- if the debtor has the obligation to omit or tolerate an act, via a court threatening, in the event that the debtor violates his or her obligation, a monetary penalty of up to €100,000 in favour of the creditor for each violation and to personal detainment of up to one year;
- if someone is condemned to a declaration of his or her will (intention), such declaration is considered to have been made when the court's decision became final and unappealable;
- in the case of an obligation to surrender a child, via the court condemning the parent in possession of such child to surrender same under penalty, and in case of such non-compliance, of a monetary penalty of up to €100,000 in favour of the party requesting the child's surrender and to personal detainment of up to one year;
- in the case of a monetary claim that must be satisfied, via the seizure of the property against which enforcement is made or via compulsory administration or personal detainment; and
- if the creditor's claim cannot be fully satisfied via any imposed seizure of the debtor's property, via obliging the debtor to submit under oath to the court a detailed list of all his or her assets, with their exact location.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Civil court hearings in Greece are held in public and only the deliberation for the issuance of the court's decision is made in secret. The judge conducting the hearing may determine in his or her judgment the number of persons that can stay within the court and has the power to order the exclusion of minors, persons carrying arms, as well as those that do not behave well in court. The court can order a hearing, or part thereof, to be in closed session if it could be detrimental to good morals or public policy.

Pretrial proceedings and any proceedings outside court are not public, although the parties, their legal representatives and attorneys may attend. Any court documents filed with the court are not available to the public, but only to the parties, their legal representatives and attorneys.

Costs

16 | Does the court have power to order costs?

The court has the power to order costs, and as a rule it is the losing party that is condemned by the court to pay the costs of the winning party. In the case of partial victory and partial defeat of each party, the court will assess the costs according to the extent of their respective victory and defeat. The court can also offset all costs or part thereof when the dispute is between relatives up to the second degree or if it finds that the interpretation of the rule of law that was applied was especially difficult or there is reasonable doubt regarding the outcome of the dispute. For the purposes of the court determining and clearing the amount of costs that should be awarded, each side must produce a table with his or her respective costs.

The claimant is not required by law to provide security for the defendant's costs, but the defendant can make such a request to the court and the court may order security for costs if there is an obvious danger of inability to enforce the court's decision, condemning a plaintiff to pay costs.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee' agreements and other similar types of contingency or conditional fee arrangements between lawyers and their clients are available to parties in Greece. In the case of such an agreement, the agreed fee cannot exceed 20 per cent of the value of the dispute and, if more than one lawyer is involved, 30 per cent. The agreement must be made in writing and must be duly filed with the local bar association of the lawyer that has

concluded the agreement. It will be valid only if the lawyer has undertaken the obligation to carry out the trial until the court's decision has become final and unappealable, without the lawyer being entitled to any fee in the case of defeat. Any agreement between the parties for expenses does not overturn the validity of that fee arrangement.

As regards third-party funding, to date it is not directly regulated in Greek law. In the absence of any legislative provision to the contrary and in view of the general principle of contractual freedom, which is respected in Greek law, third-party funding is likely to be viewed as permissible if and to the extent that there are no provisions in the funding agreement that contravene the law.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Yes, such insurance is available, subject to the risk profile in question and the amount of coverage.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Greek law provides for simple and forced collective redress.

In the case of simple collective redress, more than one person can lodge a claim (or face a claim) if they have the same common rights or obligation or if their rights and obligations are based on the same factual and legal cause, or if the subjects of the dispute are claims or obligations of the same kind or obligations based on materially the same historical and legal basis and the court has competence upon each defendant.

Collective redress will be forced when the dispute requires a uniform way of resolution or if the parties can only jointly bring or face a claim or when, because of the circumstances of the case, there cannot be contrary decisions towards the parties. The litigants that do not legally participate in the trial or have been summoned to attend the same will be deemed to be represented by those attending.

In addition to the above, it is also possible under Greek law for consumer unions to bring a class action against suppliers that violate the law. Effective from 25 June 2023, the Greek legislative framework on the protection of consumers' collective interests was aligned with the provisions of Directive 2020/1828, initiating the representative actions mechanism. Representative actions can be raised by Consumer Associations in relation to a list of infringements specified in Annex II of the Directive and may take the form of injunctive measures against suppliers to cease or prohibit a particular practice even before it occurs or redress measures, including compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid by the consumer. The court competent to hear a representative action is the Multi-Member First Instance Court of the place of residence or registered offices of the defendant supplier.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties can appeal a decision if they were wholly or partially defeated in the first instance and if the decision was erroneous in fact or in law. The decisions that can be appealed are those of the magistrate courts, single-member first instance courts and multi-member first instance courts. Disputes heard before the magistrate courts with a value under €5,000 cannot be appealed. Only decisions that are either final or refer the dispute to the competent court can be appealed. The deadline for the filing of an appeal is 30 days from the service of the first instance decision or, if the appellant resides outside Greece or is of unknown residence, 60 days. If the decision has not been served, then the appeal deadline is two years from the publication of the first instance decision. During the time period for the filing of the appeal, the first instance decision cannot be enforced, unless the decision was declared by the first instance court as temporarily enforceable against the losing party. An appeal that has been duly filed will suspend the enforcement of the first instance decision, except for any first instance decision that was declared temporarily enforceable against the losing party.

The court will first examine the admissibility of the appeal, then examine the admissibility and soundness of its grounds, and if any of the appeal grounds is found to be sound, the first instance decision will be quashed and the appeal court will keep the case and decide on its merits. The appeal court cannot render a decision that is more detrimental to the appellant if the opponent has not filed its own appeal or counter-appeal. However, the appeal court can render a decision that is more detrimental to the appellant if it quashes the first instance decision and goes ahead with ruling on the merits.

A further appeal in cassation is possible before the Supreme Court, but only on points of law, not fact. The deadline for the filing of such further appeal is 30 days from the service of the appealed decision or, if the appellant resides outside Greece or is of unknown residence, 60 days. If the decision has not been served, then the appeal in cassation deadline is two years from the publication of the decision.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Reciprocal agreements for the recognition and enforcement of judgments exist between Greece and the following countries:

- Albania, Armenia, Bulgaria, Germany, Georgia, the successor states of Yugoslavia, China, Cyprus, Lebanon, Hungary, Ukraine, Poland, Romania, the successor states of the USSR, the successor states of Czechoslovakia, Syria, Tunisia, Switzerland, Norway and Iceland (for the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007);
- all contracting states to the Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;

- all contracting states to the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption;
- all contracting states to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;
- all contracting states, including the UK post-Brexit, to the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention 2005);
- all contracting states, including the UK post-Brexit, to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance;
- all contracting states to the Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956);
- all contracting states to the UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997;
- all contracting states to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999; and
- all contracting states to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (9 May 1980).

If no international agreement (multilateral or bilateral) exists or if the Regulation of the European Union does not apply to the recognition or enforcement of a certain foreign judgment, that judgment will be recognised and enforced in Greece pursuant to the Greek Code of Civil Procedure (GCCP) (Presidential Decree No. 503/1985, as amended and in force today). However, if an international agreement is in place or if the Regulation of the European Union is applicable, the rules of such agreement or EU Regulation will supersede and disapply the GCCP.

If the GCCP applies, the following rules and process may come into play.

First, as regards recognition of a foreign judgment issued pursuant to a disputes procedure, pursuant to article 323 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), that judgment is recognised to have force and constitute res judicata in Greece without any other procedure, provided that:

- it constitutes res judicata according to the law of the country of issuance;
- under the provisions of Greek law, the case was subject to the jurisdiction of the courts of the country to which the court that issued the judgment belongs;
- the party who lost was not deprived of the right to a defence and, in general, of the right to participate in the trial, unless that right was deprived according to a provision that applies equally to the subjects of the country to which the court that issued the judgment belongs;
- it is not contrary to a judgment of a Greek court that was issued in the same case and that constitutes res judicata for the parties between which the judgment of the foreign court was issued; and
- it is not contrary to good morals or to public policy.

Although recognition of a foreign judgment is ipso jure, that is, without any procedure, provided that the conditions set out in article 323 GCCP are met, there is also the possibility, if there is any legal interest in doing so, to file a civil action seeking a declaratory judgment on whether the res judicata of a foreign judgment has or does not have effect in Greece.

Second, as regards recognition of a foreign judgment issued pursuant to the voluntary (uncontested cases) procedure, pursuant to article 780 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (again, if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), it shall ipso jure have the same force and effect in Greece as that recognised to it under the law of the country of the court that issued it, provided that:

- the judgment applied the substantive law that should be applied under Greek law and was issued by a court that had jurisdiction pursuant to the law of the country whose substantive law it applied; and
- it is not contrary to good morals or to public policy.

Third, as regards recognition of a foreign judgment relating to the personal status of a party, pursuant to article 905, paragraph 4 GCCP and subject to what international treaties (multilateral or bilateral) or EU regulations provide (again, if there is any international treaty (multilateral or bilateral) or regulation of the European Union that applies to the foreign judgment in question, the rules of such treaty or EU regulation will supersede and disapply the GCCP), that judgment shall not ipso jure have res judicata effect in Greece, unlike what is provided under articles 323 and 780 GCCP. For this judgment to acquire that effect, it must be recognised by a judgment issued by the competent Greek single-member first instance court. A foreign judgment will be recognised if:

- it is enforceable pursuant to the law of the country of issuance;
- it is not contrary to good morals or public policy; and
- it meets the conditions of article 323(ii)–(v) GCCP.

As regards enforcement of a foreign judgment, pursuant to article 905 GCCP and subject to what international treaties and EU regulations provide, a foreign judgment can be enforced in Greece after it has been declared enforceable by a judgment of the single-member first instance court of the district within which the domicile of the debtor is or, if there is no domicile, of the debtor's residence, or, if there is no residence, of the Single-Member First Instance Court of Athens. A foreign judgment will be declared enforceable by the competent Greek single-member first instance court pursuant to the above procedure if it is enforceable pursuant to the law of the country of issuance and if it is not contrary to good morals or the public policy of Greece. Finally, for a foreign judgment to be declared enforceable, the conditions of article 323(ii)–(v) GCCP must also be met.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Yes, for civil and commercial matters, this is possible on the basis of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Law 5016/2023 on International Commercial Arbitration, applicable to international commercial arbitration proceedings seated in Greece, is the legal act incorporating in its entirety the UNCITRAL Model Law in Greek legislation. It abolishes the preceding legal framework (L. 2735/1999), that was not in harmony with the latest amendments of the Model Law adopted by UNCITRAL in July 2006.

The GCCP, and in particular articles 867–903, applies to domestic arbitration proceedings and has not been adopted in accordance with the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement should be in compliance witharticle 10 of Law 5016/2023, with regard to international commercial arbitration, and article 869 GCCP, with regard to domestic arbitration. Both provisions require the agreement to be written, either in document or in electronic form of any kind. However, the lack of a written agreement may be cured if both parties participate in the proceedings without expressing any objections or reservations.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In international commercial arbitration, in the absence of any relevant agreement of the parties, the arbitral tribunal shall consist of three arbitrators (article 14 of Law 5016/2023). Each party shall appoint one arbitrator and the two arbitrators shall appoint the third one. If a party does not appoint an arbitrator within 30 days from the receipt of such a request from the other party, or the two arbitrators, appointed by the parties, cannot agree to the appointment of the third one within 30 days from their appointment, any party may request the intervention of the competent single-member court of first instance to make such appointment (article 15, paragraph 4(a) of Law 5016/2023). The same procedure applies if

the arbitral tribunal is composed of a single arbitrator and the parties do not agree on his/her selection.

Article 18(2) of Law 5016/2023 provides that an arbitrator may be validly challenged only for justifiable doubts as to his or her impartiality, independence or possession of the qualifications agreed to by the parties. A party may even challenge an arbitrator appointed by itself, or in whose appointment it has participated, but solely for reasons of which it became aware after the appointment had been made.

In domestic arbitration, in the absence of any relevant agreement by the parties, each party may invite in writing the other party to appoint an arbitrator within at least eight days, mentioning in the same document the arbitrator it appoints. Each arbitrator is notified of the name and the address of the other arbitrator. Within 15 days of the last of the aforementioned notifications, the two arbitrators shall appoint the presiding arbitrator and announce such appointment to the parties (articles 872–874 GCCP). If any of the aforementioned appointments fail to be completed within the deadlines provided, any party may request the intervention of the competent single-member court of first instance to make such an appointment (article 878 paragraph 1 GCCP).

In domestic arbitration, the arbitrators may be challenged for reasons related to their prior involvement in the case, any interest they may have in the arbitration, their family relation to the parties or any relationship they may have to the parties that creates any suspicion of bias and their entire or partial incapacity to contract or deprivation of political rights. The party challenging the arbitrator is able to invoke only reasons of which it became aware after the appointment of the arbitrator took place (article 883, paragraph 2 GCCP).

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Subject to the grounds for challenging an arbitrator (that is, for justifiable doubts as to his or her impartiality, independence or possession of the qualifications agreed to by the parties; or, in domestic arbitration, for reasons related to their prior involvement in the case, any interest they may have in the arbitration, their family relation to the parties or any relationship they may have to the parties that creates any suspicion of bias and their entire or partial incapacity to contract or deprivation of political rights), and any requirements set out by the parties in the arbitration agreement, the parties, any appointing authority or the court are not restricted when appointing the arbitrators. In domestic arbitration, article 871A GCCP provides for specific requirements when judges are selected as arbitrators. In addition, Greek legislation does not place any restrictions on appointing non-nationals as arbitrators in either international commercial or domestic arbitration.

However, article 49 of the Introductory Law of the GCCP, article 16(2) of Law 4110/2013, as amended by article 103 of Law 4139/2013 Government Gazette Vol. A 74/20.03.2013 (which replaced article 6(3A) of Law 3086/2002) and article 8(1) of Legislative Decree 736/1970 list certain requirements for the appointment of arbitrators over disputes arising from contracts concluded with the state or state entities in both international and domestic arbitration. In particular, the state's arbitrator should be only a senior magistrate, a senior member of the State Legal Council, a university professor or a Supreme Court lawyer.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

Pursuant to articles 27 of Law 5016/2023 and 886 GCCP, the arbitral tribunal is free to conduct the arbitration in an appropriate manner, subject to any requirements agreed to by the parties. However, the aforementioned power of the arbitrators is restricted by articles 26 of Law 5016/2023 and 886(2) GCCP, which provide that the parties shall be treated with equality and be given a full opportunity of presenting their case (ie, attending the hearings, submitting and elaborating on their claims, and submitting their evidence). In addition, any other rules considered as public order rules are mandatory in all cases and cannot be excluded by means of the arbitration agreement (article 890(2) GCCP).

Court intervention

28 On what grounds can the court intervene during an arbitration?

In both international commercial and domestic arbitration, the court's intervention is mainly reserved for cases where the arbitration is at a standstill and the parties or the arbitrators address a relevant request to the court.

First of all, the competent single-member court of first instance may intervene in the arbitration, upon the request of one of the parties, if the arbitrators' selection mechanism agreed by the parties fails, unless the parties' agreement provides otherwise for securing such selection (article 15 (4)(a) of Law 5016/2023), or if the parties or the arbitrators have failed to appoint an arbitrator, or the presiding arbitrator respectively, within the provided deadlines (articles 15 (4)(a-b) of Law 5016/2023 and 878(1) GCCP). The court's decision on the appointment of an arbitrator is not subject to appeal (articles 15(6) of Law 5016/2023 and 878(3) GCCP).

In addition, in international commercial arbitration, if the challenge of an arbitrator, under any procedure agreed upon by the parties or under the procedure provided by law (ie, withdrawal of the challenged arbitrator, agreement by the other party to the challenge, or the arbitral tribunal's decision on the challenge) is not successful, the challenging party may request, within 30 days of having received notice of the decision rejecting the challenge, the competent single-member court of first instance to decide on the challenge, whose decision shall not be subject to appeal. Pending such a request, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and issue an award (article 19(3) of Law 5016/2023). In domestic arbitration, it is the competent single-member court of first instance that decides upon such a challenge in the first place, while such decision is not subject to appeal and the arbitrators postpone the adjudication of the case until the issuance of the court's decision (article 883(2) GCCP). Despite the aforementioned provision, it is accepted that the arbitral tribunal is not obliged to postpone the arbitration, precisely to safeguard the velocity of the arbitral procedure, which is one of its main advantages. In such a case, the arbitral award would be subject to annulment only if the request for challenging the arbitrator was finally accepted by the court.

In international commercial arbitration, if an arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, and if any controversy remains concerning any of these grounds, any party may request the competent single-member court of first instance to decide on the termination of his or her mandate, whose decision shall not be subject to appeal (article 20(1) of Law 5016/2023). If the court accepts that request, the appointment of a substitute arbitrator is effected according to the rules applicable to the arbitrator being replaced (article 21(1) of Law 5016/2023).

With respect to domestic arbitration, article 880 GCCP provides that any arbitrator or presiding arbitrator who initially accepted his or her appointment may subsequently decline to perform his or her duties for exceptional reasons, upon being granted the court's permission. Permission is granted by the competent single-member court of first instance, upon examination of the arbitrator's or any party's request, in ex parte proceedings. Such decision is not subject to appeal. Article 884 GCCP also allows any of the parties to request the competent court of first instance to order a reasonable deadline for the delivery of the award if the arbitral proceedings or the issuance of the award are delayed and the arbitral agreement does not set out any such deadline.

Finally, pursuant to article 13 of Law 5016/2023, the arbitration agreement does not prevent a regular court from granting interim relief, before or during the arbitral proceedings. What's more, if a party does not comply voluntarily with the interim relief ordered by the arbitral tribunal, in international commercial arbitration, the other party may resort to the competent court requesting the imposition of interim relief.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

In relation to international arbitration, article 25 of Law 5016/2023 provides that, unless otherwise agreed by the parties, the arbitral tribunal may, upon request of one of the parties, order any interim relief considered necessary in relation to the nature of the dispute. The arbitral tribunal may order any of the parties to provide security in relation to such relief. If a party does not comply voluntarily with the interim relief ordered by the arbitral tribunal, the other party may resort to the competent court requesting the imposition of interim relief.

In domestic arbitration, arbitral tribunals are explicitly prohibited from granting interim relief, and any such agreement between the parties is considered null and void (articles 685 and 889 GCCP).

Award

30 | When and in what form must the award be delivered?

Greek law does not impose any time limits that the tribunal should respect for the delivery of the arbitral award. However, as regards domestic arbitration, article 884 GCCP allows any of the parties to request the competent court of first instance to order a reasonable deadline for the delivery of the award if the arbitral proceedings or the issuance of the award are delayed and the arbitral agreement does not set out any such deadline. No relevant provision exists with regard to international commercial arbitration.

Read this article on Lexology

Under article 40 of Law 5016/2023, the award must be in writing, signed by the arbitrator or arbitrator, and must contain the grounds for the ruling, unless otherwise agreed by the parties or the award is an award on agreed terms. The arbitral award must also state the date and place of the arbitration, and the original must be delivered to each party. The above requirements, together with the statement of the full names of the arbitrators and parties to the arbitration agreement, should be respected in relation to domestic arbitration as well, pursuant to article 892 GCCP. As opposed to international commercial arbitration, in domestic arbitration, the delivery of copies of the arbitration award to the parties is sufficient (article 893(2) GCCP).

Pursuant to article 41(5) of Law 5016/2023, unless otherwise agreed by the parties and if the award is to be enforced in Greece, the arbitrator or one of the arbitrators (appointed by the tribunal) is obliged to file the original of the award with the secretariat of the competent court of first instance. The same obligation exists under domestic arbitration (article 893(2)GCCP).

Appeal

31 | On what grounds can an award be appealed to the court?

In principle, awards of international commercial arbitration are not subject to appeal (ie, challenge on the merits), but the parties have the power to agree recourse against the award before another arbitral tribunal (article 44(2) of Law 5016/2023). The same applies to domestic arbitration (article 895 GCCP).

In any case, international commercial arbitration awards may be set aside for procedural reasons by virtue of a relevant action filed before the competent court of appeals. Pursuant to article 43 of Law 5016/2023, an award will be set aside if the applicant claims and proves that:

- a party to the agreement was, under the law applicable to it, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or the arbitral tribunal held that it lacked jurisdiction despite the existence of a valid arbitration agreement;
- the applicant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the arbitral award concerns a dispute that does not fall within the arbitration agreement or transcends the arbitration agreement or the claims submitted to arbitration;
- the composition of the arbitral tribunal or the arbitral proceedings were not in compliance with the arbitration agreement or, absent such agreement, with Law 5016/2023; or
- grounds 6 and 10 of article 544 GCCP for the filing of trial de novo are met.

With respect to domestic arbitration, an award may be set aside partially or in its entirety by virtue of a relevant action filed before the competent court of appeals for the following reasons:

- the arbitration agreement is void;
- at the time of issuance of the award, the arbitration agreement was not in force;

- the choice of arbitrators was not in compliance with the terms of the agreement or the provisions of the law or the arbitrators were revoked by the parties or exempted;
- the arbitrators acted transcending their powers pursuant to the arbitration agreement or the law;
- the parties' equality during the proceedings, or the provisions of law with respect to the manner the arbitrators decided or the formal requirements of the arbitral award were not respected;
- the award contravenes public policy or the accepted principles of morality;
- the award is incomprehensible or contains controversial provisions; or
- one of the grounds for the filing of trial de novo under Greek law is met (article 897 GCCP).

In addition, the GCCP allows the parties to challenge an award, requesting the declaration of its non-existence by the competent court of appeals, if:

- there was not an arbitration agreement at all;
- the subject matter of the dispute was not arbitrable; or
- the award was issued in arbitration involving a non-existing individual or legal entity (article 901 GCCP).

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The party that intends to enforce a foreign arbitral award in Greece should file an application for its recognition and enforcement before the single-member court of first instance of the residence of the debtor, to be heard in ex parte proceedings. The court has the power to summon any third party that has a legitimate interest to intervene to the trial, rendering such party a litigant of the proceedings. In addition, Greece is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and has transposed the latter to its national legislation by virtue of the Legislative Decree 4220/1962. Therefore, the grounds on which recognition and enforcement of a foreign arbitral award may be refused (if invoked by a party or ex officio, where applicable) are those prescribed in article V of the New York Convention (article 45 of Law 5016/2023).

In contrast, for the enforcement of a domestic arbitral award, its filing to the secretariat of the single-member court of first instance suffices.

Costs

33 | Can a successful party recover its costs?

The reimbursement of the parties' costs may be subject to the arbitration agreement. In the absence of a relevant provision in the arbitration agreement, the arbitral tribunal, taking into account the circumstances of the case, the arbitral proceedings and in particular the outcome of the arbitration, shall decide on the allocation of the costs of the arbitration to the parties (article 41(4) of Law 5016/2023).

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative dispute resolution mechanisms have not been commonly used in Greece. Mediation, as well as judicial mediation, was introduced in the Greek legal order in 2010 by virtue of Law 3898/2010, which transposed into Greek law Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters and provided for optional recourse to mediation.

In 2012, the institution of judicial mediation was amended via article 214B GCCP, allowing the parties, at their initiative or following a request by the court, to refer a dispute to judicial mediation at any stage of the proceedings. Effectively, the judge of the court before which the case is pending will act as a mediator and will have separate and joint meetings with each party and their legal representatives and make non-binding suggestions thereto regarding the resolution of the dispute. If the parties reach an agreement, minutes of judicial mediation will be drafted, signed and lodged at the secretariat of the first instance court, so as to become enforceable. The judicial mediation scheme is still in force, although, in practice, it has rarely been applied.

In 2018, Law 4512/2018, containing Regulations Relevant to Mediation, was adopted for the purpose of further harmonising Greek legislation to the provisions of the same directive and making recourse to mediation mandatory for specific types of disputes. However, the Supreme Court held via its Legal Opinion No. 34/2018 that the provision of Law 4512/2018 on mandatory recourse to mediation was unconstitutional, as it violated the right to judicial protection (articles 6, 20 of the Greek Constitution, article 13 of the European Convention of Human Rights and article 47 of the Charter of Fundamental Rights of the European Union). Therefore, the effect of the said provision was suspended twice: first until 16 September 2019, and then until 30 November 2019. On the latter date, Law 4640/2019 introduced a new mandatory mediation scheme and abolished the aforementioned provision, which was never applied.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

By virtue of Law 4640/2019, the prior recourse to mediation proceedings is rendered mandatory for the following certain types of disputes, which include:

- disputes in respect of which the parties have validly agreed in writing a mediation clause;
- family disputes, except for those concerning: divorce, cancellation of marriage, recognition of existence or non-existence of marriage, and the relationship between parents and children; and

- disputes resolved under the ordinary procedure, in the following cases: if the object of the dispute exceeds €30,000, if the dispute falls within the competence of the single-member first instance civil court, and, in every case, if the dispute falls within the competence of the multi-member first instance civil court.

The mediation scheme involves the following.

First, the mediator is appointed upon mutual agreement of the parties or by decision of a third party appointed by the parties. The mediation procedure commences upon submission of a relevant request to the appointed mediator by one of the parties.

Subsequently, the mediator determines the date and place of the mandatory initial mediation session, during which the parties are present, each accompanied by a lawyer. The initial mediation session must take place within 20 days of the day following the receipt of the request for recourse to mediation. The parties are free to withdraw at any time from the mediation session, without any justification or sanction. Upon conclusion of the mandatory initial session, the mediator drafts the relevant minutes, which are signed by all participants.

Upon the completion of the initial mediation session, the parties may agree to continue with the mediation procedure, which will have to be completed within 40 days.

If an enforceable agreement is concluded in the context of the mediation procedure, the mediator will draft the relevant mediation minutes, which will be signed by the mediator and the parties.

Pursuant to article 44 of Law 4640/2019 and article 74(14) of Law 4690/2020, this mandatory mediation scheme came into force:

- on 30 November 2019 for disputes in respect of which the parties have validly agreed in writing a mediation clause;
- on 15 January 2020 for family disputes, except for those concerning:
  - divorce;
  - annulment of marriage;
  - recognition of existence or non-existence of marriage; and
  - and the relationship between parents and children; and
  - on 1 July 2020 for disputes resolved under the ordinary procedure, in the following cases:
  - if the object of the dispute exceeds €30,000, if the dispute falls within the competence of the single-member first instance civil court; and
  - if the dispute falls within the competence of the multi-member first instance civil court.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In relation to arbitration, it is noticeable that criminal cases cannot be referred to arbitration under Greek law. With regard to tax disputes, although in principle they are not arbitrable, they can be referred to arbitration where the state has control over the subject of the dispute. Labour disputes are also explicitly exempt from arbitration, except for collective bargaining disputes (article 16 of Law 1876/1990 as amended through Law 4635/2019). In relation to mediation, the mandatory mediation scheme does not apply indicatively to the following disputes:

- disputes falling within the competence of the magistrate court (justice of the peace), namely to disputes of a monetary value up to €20,000 or disputes within the exclusive competence of the said court regardless of their monetary value;
- disputes falling within the competence of the single-member first instance civil court with a monetary value under €30,000;
- disputes of the voluntary (non-contentious) procedure;
- interim measures proceedings;
- special proceedings, namely property disputes, payment order and order for the return of leased property (articles 614 to 645 of GCCP) and specific family disputes (592 of GCCP), that is, concerning:
    - divorce;
    - annulment of marriage;
    - recognition of existence or non-existence of marriage; and
    - the relationship between parents and children;
- appeal or opposition proceedings;
- enforcement proceedings; and
- disputes in which the Greek state, a municipal or regional authority, or a legal entity of public law is a litigant.

Another interesting element about the mandatory mediation scheme regards the suspension of the statute of limitations. As soon as the mediator has been appointed, he or she will send a written notification to the litigant parties regarding the time and place of the mandatory initial session. That written notification will suspend the limitation period for the exercise of relevant claims or rights, as well as the judicial deadlines for filing of pleadings, addendum-rebuttal or intervention. Any agreement of the parties regarding voluntary recourse to mediation will have the same effect. In the case of failure to reach an agreement in the context of the mediation, or termination of the mediation procedure in any other manner, the limitation period shall no longer be suspended and will continue to run from the day following the above events.

As far as the mediation costs are concerned, each party must pay, apart from the payment of its attorney, a note of prepayment of fees amounting to €100 for cases falling within the

competence of the single-member first instance court, and €150 for cases ruled by the multi-member first instance court. In principle, the mediator's payment is freely determined by agreement of the parties. If no agreement has been concluded, the mediator's payment amounts to €50 for the mandatory initial session and €80 for every additional mediation hour. If a party does not attend the initial mandatory session, despite being summoned, the competent court before which the dispute is brought may impose on this party a fine ranging from €100 to €500.

No judicial duty is payable. The judicial duty corresponds to 0.8 per mille, plus surcharges, on the total amount claimed and it is currently payable for actions requesting not only the satisfaction of a claim (usually its payment) but also the mere recognition thereof (declaratory judgment).

Finally, the signed mediation minutes constitute an executory title, in accordance with article 904, paragraph 2 GCCP, as of the date of submission to the competent court. Those minutes can also be used as a title for registration or lifting of a mortgage. After the submission of the signed mediation minutes to the court, no civil action can be filed for the dispute in question and any pending trial is cancelled.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The last series of legislative amendments, via Law 4842/2021 (Government Gazette Vol A/190/13.10.2021), effective as of 1 January 2022, as such law has been amended and is in force at the time of writing, has brought some changes to the Greek e-justice system. Though electronic trials and the remote examination of witnesses are still not possible in Greek civil litigation, a series of legislative efforts over the past years have somewhat facilitated and encouraged the use of technology for the completion of certain procedural acts, for example:

- the service of court documents by court bailiffs through electronic means;
- the exchange of electronic communication between the court secretariat and a litigant for the purposes of the litigant remedying a typical omission;
- the posting of the docket by the court electronically;
- the filing of court documents by parties electronically;
- the issuance of certificates electronically; and
- the release to the parties' attorneys of court decisions and transcripts electronically.

There has also been a change in the procedural rules applicable to disputes before the magistrate courts with a value under €5,000; such claims must be served to the counterparty through court bailiffs within 10 days, or if the defendant resides abroad or is of unknown address, within 30 days, of their filing at the latest. Any supporting documentation and evidence by both parties, as well as written pleadings by the defendant, must be filed

within 20 days as of the above deadline of the claim's service to the defendant, while additional pleadings and rebuttals can be filed within five days of the filing of the pleadings.

In the field of case law, there has been an interesting development concerning the judicial duty that is often payable by the plaintiff.

The judicial duty is payable to the Greek state and certain state institutions and corresponds to 0.8 per mille, plus surcharges, on the total amount claimed by the plaintiff. By virtue of Law 4640/2019, the obligation to pay the judicial duty was extended to actions in the ordinary procedure requesting the mere recognition of a claim (by virtue of a declaratory judgment), except for the actions with a claimed amount under €250,000. The obligation to pay judicial duty also applied to actions in the ordinary procedure that had already been filed but had not been heard yet at the time of entry into force of the relevant provision.

A recent court judgment (68/2021 of the Athens Multi-Member First Instance Court) ruled that the extension of the obligation of judicial duty payment to actions that had already been filed before the entry into force of Law 4640/2019 is not in conformity with the Greek Constitution. According to the court, the grounds for the unconstitutionality are that the statutory provision in question does not comply with the principle of legal certainty, which derives directly from the Constitution; a particular aspect of this principle, which was held to have been infringed in this case, is the principle of protection of the individual's confidence in the state and its institutions.

This judgment has not been the only one to date to find constitutionality issues with the statutory provision in question; nor is it likely to be the last. Although the statute has not yet been amended by the legislature, it is highly likely that if the Greek courts, especially the higher courts (the appeal courts and Supreme Court) continue ruling in this direction, the legislative body is likely to decide to modify Law 4640/2019 accordingly and limit the obligation to pay judicial duty to actions filed after the entry into force of the said law.

Christos Paraskevopoulos cparaskevopoulos@bernitsaslaw.com

5 Lykavittou Street, Athens 106 72, Greece
Tel: +30 210 339 2950
www.bernitsaslaw.com

Read more from this firm on Lexology

Read this article on Lexology

Hong Kong

Bryan O'Hare, Pui Yip Leung, Rachel Yeung and Wing Lui

Hill Dickinson

RETURN TO CONTENTS

Summary

LITIGATION	278
Court system	278
Judges and juries	279
Limitation issues	279
Pre-action behaviour	280
Starting proceedings	280
Timetable	281
Case management	281
Evidence – documents	282
Evidence – privilege	283
Evidence – pretrial	283
Evidence – trial	284
Interim remedies	284
Remedies	285
Enforcement	285
Public access	286
Costs	286
Funding arrangements	287
Insurance	288
Class action	288
Appeal	288
Foreign judgments	289
Foreign proceedings	290
ARBITRATION	**291**
UNCITRAL Model Law	291
Arbitration agreements	291
Choice of arbitrator	291
Arbitrator options	291
Arbitral procedure	292
Court intervention	292
Interim relief	293
Award	293
Appeal	293
Enforcement	293
Costs	294
ALTERNATIVE DISPUTE RESOLUTION	**295**
Types of ADR	295
Requirements for ADR	296

Read this article on Lexology

MISCELLANEOUS 296
Interesting features 296
UPDATE AND TRENDS 297
Recent developments and future reforms 297

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Hong Kong civil court system comprises the following major courts and tribunals:

- Small Claims Tribunal: to hear and decide low-value monetary claims involving HK$75,000 or less. The main types of claims handled by the Tribunal are debt, service charges, damage to property, goods sold and consumer claims. Hearings are conducted informally, and no legal representation is allowed.
- Labour Tribunal: to hear and decide employment-related disputes. Hearings are conducted informally, and no legal representation is allowed.
- Lands Tribunal: to hear and decide cases relating to possession of premises, building management, land and tenancy disputes.
- Competition Tribunal: to hear and decide cases relating to competition law. The Tribunal has all the same powers, rights and privileges as the Court of First Instance.
- Market Misconduct Tribunal: to hear and decide cases relating to market misconduct matters including insider dealing, false trading, price rigging, stock market manipulation, disclosure of information about prohibited transactions and disclosure of false or misleading information inducing transactions in securities and futures contracts.
- District Court: to hear and decide monetary claims for an amount over HK$75,000 but do not exceed HK$3 million. The Family Court in the District Court handles matrimonial cases, for example, divorce, maintenance, custody and adoption of children. There are currently 41 judges in the District Court.
- Court of First Instance: unlimited civil jurisdiction and hears appeals from various tribunals, such as the Labour Tribunal and the Small Claims Tribunal. There are currently 26 judges in the Court of First Instance.
- Court of Appeal: jurisdiction to hear appeals from the Court of First Instance, the District Court and various tribunals and statutory bodies, such as the Lands Tribunals and the Competition Tribunal. There is currently one chief judge and 13 justices of appeal.
- The Court of Final Appeal: the highest appellate court with jurisdiction to hear appeals from the Court of Appeal and the Court of First Instance. There is one chief justice, three permanent judges and 16 non-permanent judges. The court when sitting will comprise five judges, which usually comprise the chief justice, three permanent judges and one non-permanent judge from another common law jurisdiction.

Certain types of cases are classified according to specialist court lists to aid proper and efficient case management; for example, the Commercial List, the Construction and Arbitration List, the Personal Injuries List, the Intellectual Property List and the Admiralty List.

Read this article on Lexology

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Judges

Hong Kong courts adopt the common law adversarial system. Parties to litigation present their evidence and arguments to the judge, who will then assess the strengths of the arguments and evidence presented by each side, decide whether the evidential factual and legal standards have been met and, ultimately, determine the dispute.

Judges are appointed by the Chief Executive (head of the Hong Kong government) on the recommendation of the Judicial Officers Recommendation Commission. The Commission is an independent statutory body composed of judges, persons from the legal profession and eminent persons from other sectors.

To retain experienced senior judges and attract qualified private practitioners to join the judiciary, some changes were made to the retirement age on 6 December 2019:

- the normal retirement age for judges of the Court of Final Appeal as well as the Court of Appeal and the Court of First Instance was extended from 65 to 70;
- the normal retirement age for members of the Lands Tribunal, magistrates and other judicial officers at the magistrate level was extended from 60 to 65; and
- the normal retirement age for judges of the District Court was maintained at 65.

Jury

Trial by jury in civil cases is very rare. A party may apply to the court for a trial by jury if there is at issue a claim in respect of libel, slander, malicious prosecution, false imprisonment or seduction, or as prescribed under the Rules of the High Court (Chapter 4A). However, there will be no trial by jury where the court considers that the trial requires any prolonged examination of documents or any scientific or local investigation that cannot conveniently be made with a jury.

Limitation issues

3 | What are the time limits for bringing civil claims?

Subject to certain exceptions (see below), the broad time limits for bringing various civil claims are:

- contractual claims: six years from the date of breach of contract;
- tortious claims: six years from the date when damage was suffered;
- personal injuries claims: three years from the date of the accident or the date of knowledge (whichever is later) for common law negligence claim, or two years from the date of the accident for claim under the Employees' Compensation Ordinance (Chapter 282);
- recovery of land: 12 years from the date when the right accrued or 60 years if the claim is brought by the government;
- deeds: 12 years from the date of breach;

- cargo claims: one year from the date of damage or loss if subject to Hague-Visby Rules; otherwise, the six-year time limit for contract and tort claims applies; and
- salvage claims: two years from the date on which the salvage operations are terminated; and
- collision of vessels claims: two years from the date of damage, loss or injury.

The Limitation Ordinance (Chapter 347) does not prohibit parties from varying the statutory time limits. It also provides that the time limits can be extended under certain exceptional circumstances, for example:

- where the plaintiff was under a disability, the time limit begins to run from the date the plaintiff ceases to be under a disability or dies (whichever is earlier); and
- where the action is based upon the defendant's fraud, a relevant fact has been deliberately concealed by the defendant or the action is for relief from consequences of mistake, the time limit begins to run when the plaintiff discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Before commencing proceedings, it is good practice for a plaintiff to send a pre-action demand letter to the defendant setting out the factual and legal basis of the claim and the relief or remedies being claimed against the defendant.

For personal injuries claims, it is mandatory for a plaintiff to issue a pre-action demand letter to the defendant (and copied to the defendant's insurer, if known) four months before commencing proceedings.

The parties should also make every reasonable effort to settle their dispute through 'without prejudice' settlement negotiations or mediation (which is now compulsory under the court rules unless a party has cogent reasons for not wishing to mediate the dispute). The court may make an adverse costs order against any party that fails to engage in mediation without good reasons.

The court can also, upon application, order pre-action discovery of 'relevant' and 'necessary' documents to enable the plaintiff to formulate the case properly.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are usually commenced in the Court of First Instance and the District Court (depending on the quantum of claim) by issuing a writ of summons. Certain types of proceedings can also be commenced by originating summons, originating motion and petition. Generally, there are three methods to serve the writ on a local defendant, namely, by personal service, by registered mail or by 'insertion through letter box'. If the defendant is

a limited company, the plaintiff can serve the writ by posting it to, or leaving it at, its registered office. If the defendant is located overseas, the plaintiff is required to obtain the court's permission to serve proceedings on a defendant not in Hong Kong.

The judiciary's figures show that the Court of First Instance alone received 15,008 civil cases in 2021 and 14,341 in 2022. The average waiting time (Civil Fixture List), from application to fix date to hearing, increased from 176 days in 2021 to 178 days in 2022.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Civil proceedings are typically commenced by a writ of summons being issued by the plaintiff together with a statement of claim (which the plaintiff can also elect to serve at a later date). After the writ has been issued, it must be served on the defendant within 12 months unless the court has agreed to extend the validity of the writ beyond 12 months. The subsequent steps and deadlines are as follows:

Action	Deadline
Defendant to acknowledge service of the writ	Within 14 days from the service of the writ (including the day of service)
Defendant to file and serve a defence (and counterclaim, if any)	Within 28 days from (1)
Plaintiff to file and serve a reply (and defence to counterclaim, if any)	Within 28 days from (2)
Close of pleadings	Within 14 days from (3)
Discovery (disclosure of documents related to the case)	Within 14 days from (4)
Parties to file a timetabling questionnaire	Within 28 days from (4)

Thereafter, the parties are required to exchange factual witness statements and expert reports (if necessary). The parties may then apply to set the case down for trial. The time frame for a civil claim from the date of commencement of the action to a trial can be approximately 24 months and potentially longer, depending on the complexity of the case, the number of days to be reserved for the trial and the availability of judges (which depends on the volume of cases in the court diary).

Case management

7 | Can the parties control the procedure and the timetable?

The court rules give the parties an element of control over the case procedure and timetable. The courts are also vested with active case management powers to increase cost effectiveness and ensure that cases are dealt with as expeditiously as is reasonably practicable.

After the close of pleadings, the parties are required to exchange and file with the court a timetabling questionnaire setting out their proposed case management directions and timetable. Afterwards, if the parties are able to reach an agreement on the case management directions and timetable, they should seek the approval of the court. Otherwise, the plaintiff is required to take out a case management summons for a case management hearing. At

the case management hearing, the court will give case management directions and set a timetable for the parties to comply with those directions.

The case management directions typically specify the timetable for the parties to complete discovery, exchange witness statements and expert evidence (if any), and complete a case management conference, a pretrial review (PTR) and the trial. Parties may by consent or upon application to the court vary the non-milestone events (eg, discovery, exchange of witness statements and expert evidence). Milestone dates (eg, case management conference, PTR and trial) may only be postponed by the court under exceptional circumstances.

A PTR usually takes place around eight weeks before the trial to ensure that the case is ready to proceed to trial on the allocated dates. At the PTR, the court will typically give directions and deadlines for the plaintiff to file and serve the trial bundles and the parties to file their respective opening submissions.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The process of preserving and disclosing relevant documents and evidence pending trial is called 'discovery'. It is a continuing process that begins when litigation is contemplated and continues until the end of the trial. The scope of discovery covers all documents that are relevant to the issues in the action and, therefore, includes documents that both support and are detrimental to a party's case.

There are three main stages of discovery:

- Automatic discovery: after the close of pleadings, each party is required to disclose, by way of a 'list of documents', all documents that he or she has or has had in his or her possession, custody or power relating to matters in question between the parties in the action. If a party fails to make automatic discovery, the court may, upon application, make an order for general discovery.
- Specific discovery: the court may, upon the application of a party, order the other party to disclose specific documents that are in the possession, custody or power of the other party; relate to the issues in the action and are necessary to dispose fairly of the cause or matter; or for saving costs.
- Inspection: a party serving a list of documents is obliged to produce the documents referred to in the list for inspection by the other party, except where the documents are privileged.

Interrogatories are another form of discovery, whereby a party may serve written questions on another party for the purpose of obtaining admissions or evidence of material facts within his or her knowledge and relevant to the dispute. Answers to interrogatories are normally given on affidavit and the other party may rely on the answers as evidence at trial.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Documents that are 'privileged' are protected from disclosure in litigation. The parties only need to disclose their existence (but not the contents) during discovery. The main bases for claiming privilege are:

- Legal professional privilege: includes litigation privilege and legal advice privilege. Litigation privilege protects confidential communications made between either the client or his or her legal adviser and a third party (eg, factual or expert witness), where those communications have come into existence for the dominant purpose of being used in connection with actual, pending or contemplated litigation. Legal advice privilege protects confidential communications between a client and his or her legal adviser for seeking or giving legal advice. Where an in-house lawyer provides advice to his or her employer in the capacity of legal adviser, that advice is protected by legal professional privilege.
- Without prejudice communications: communications relating to good-faith settlement negotiations are privileged and protected from disclosure.
- Privilege against self or spousal incrimination: no person is compelled to disclose documents if doing so will expose that person or his or her spouse to proceedings for a criminal offence or for recovery of penalty.
- Public interest immunity: disclosure of documents may be withheld if to do so would be prejudicial to public interest.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

The parties exchange factual witness statements before trial in accordance with the court's case management directions. Normally the court directs that the witness statements served by the parties shall stand as the evidence-in-chief of the witnesses at trial. Under special circumstances and with the permission of the court, evidence may also be given by affidavit or deposition.

Expert evidence may be allowed upon the agreement of the parties or with the court's permission. If a party seeks to adduce expert evidence, the court gives expert directions requiring the expert witnesses to exchange and submit to the court written expert reports, attend a joint experts meeting and submit a joint expert report to the court. The court may also direct the parties to appoint a single joint expert where appropriate.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Generally, witnesses (factual and expert) are examined orally at trial in open court. The party serving the witness statements decides whether to call the witness to attend the trial. If a witness is not called to give evidence at the trial, no other party may rely on the witness statement of that witness as evidence at the trial. A witness who is called is first examined-in-chief by the party who calls him or her. The other party or parties may then cross-examine him or her. Afterwards, the witness may be re-examined by the party who calls him or her. The scope for re-examining a witness is limited to only those matters raised during cross-examination. It is not another opportunity to go through the evidence provided by the witness.

In special circumstances, and with the court's permission, a witness may be permitted to give evidence and be cross-examined by video link. The court recognised in a recent case – *Au Yeung Pui Chun v Cheng Wing Sang* [2020] HKCFI 2101 – that there are grounds, in view of the covid-19 pandemic, 'for real concern for a person who is being asked to travel a very long distance including taking a flight to attend trial in an unfamiliar place at this time in the midst of the coronavirus outbreak'.

In addition to Practice Direction 29 – Use of The Technology Court, the judiciary has also published a number of guidance notes regarding the use of remote hearings for civil business in civil courts in 2020.

Interim remedies

12 | What interim remedies are available?

Available interim remedies are as follows:

Injunctions: court orders requiring a party to do something or refrain from doing something, such as:

- *Mareva* injunctions (which is now the same as a freezing injunction) to prevent a party from disposing of its assets or removing those assets from Hong Kong. The court can also grant a worldwide *Mareva* injunction that covers assets both in and outside Hong Kong;
- *Anton Piller* orders permitting the applicant to enter the respondent's premises and inspect or preserve specified property; and
- *quia timet* ('because he fears') injunctions to prevent an anticipated infringement of the applicant's legal rights.
- Interim payment: where a plaintiff can show that if the case proceeds to trial, he or she will recover a substantial award of damages from the defendant, the court may order the defendant to make an interim payment into court on account of any damages, debt or other sums that he or she may be held liable to pay to the plaintiff.
- Appointment of receivers: where it appears to the court to be just and convenient to do so, it may appoint a receiver to receive, manage or protect property pending the trial.

Read this article on Lexology

- Appointment of provisional liquidators: to safeguard the assets of a company prior to the hearing of a winding-up petition.

The Court of First Instance may also grant free-standing interim relief in relation to proceedings that have been or are about to be commenced outside of Hong Kong and that are capable of giving rise to a judgment that may be enforced in Hong Kong.

Remedies

13 | What substantive remedies are available?

Common substantive remedies include:

- damages: monetary compensation for the innocent party. Damages may also be awarded for prospective losses, inconvenience and injured feelings or as punishment in the form of punitive and exemplary damages;
- specific performance: requiring a party to perform the contractual obligations he or she undertook to discharge;
- restitution: restoring the innocent party to the position they were in before the injury occurred;
- rescission: setting aside a contract and putting the parties back into the position that they were in before entering into the contract;
- quantum meruit: reasonable remuneration for the value of work done or goods supplied;
- injunctions: requiring a party to do or cease to do something;
- declarations: where the court declares the legal position of the parties;
- account of profits: recovery of profits attributable to a breach of a fiduciary relationship; and
- interest: simple interest is usually awarded on the judgment debt from the date of the judgment until its satisfaction at a rate as the court thinks fit (the court may award compound interest in certain cases, such as claims in equity).

Enforcement

14 | What means of enforcement are available?

Even if a plaintiff successfully obtains judgment against a defendant, it does not necessarily follow that the judgment debt will be paid. There are various ways for the plaintiff (the judgment creditor) to enforce a judgment against the defendant (the judgment debtor):

- writs of execution, whereby the court bailiffs can seize property belonging to the judgment debtor;
- garnishee proceedings, whereby debts owed may be enforced by seizure and attachment to debts owed to the judgment debtor;
- charging orders on property, whereby the judgment creditor becomes a secured creditor;
- stop notices or stop orders that prevent dealing in securities in a manner contrary to the interest of the judgment creditor;
- prohibition order to restrain the judgment debtor from leaving Hong Kong (often an effective tool to procure payment of a judgment debt if the individual needs to travel outside Hong Kong);

- committal proceedings to hold the judgment debtor in contempt of court, which can result in a fine or ultimately imprisonment;
- oral examination of the judgment debtor as to his or her assets available to satisfy the judgment; and
- bankruptcy or winding-up proceedings against the judgment debtor.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

The legal system in Hong Kong is based on the principle of open justice, which promotes openness and transparency such that justice should not only be done but be seen to be done. As such, hearings are generally heard in open court. In exceptional cases, hearings are held in closed courts, such as where the subject matter of the proceedings would otherwise be destroyed or for moral, public policy or national security reasons, or where parties' private lives so require.

The only court documents available to the public are the writs filed to commence civil proceedings and court judgments. The substantive case documents (such as pleadings, witness statements, expert reports and court orders) are not available to the public.

Costs

16 | Does the court have power to order costs?

The courts have broad discretion to make costs orders. The general rule is that 'costs follow the event'; that is, the unsuccessful party pays the successful party's costs.

Other cost orders include 'no order as to costs' (where the parties are responsible for their own respective costs), and other more 'bespoke' costs orders depending on the circumstances (eg, the successful party is ordered to pay part of the unsuccessful party's costs where the plaintiff has not succeeded on all of his or her claims or where there is a finding of procedural misconduct by both sides).

In exercising its discretion, the court will generally take into account various factors, such as the parties' conduct during the proceedings, including whether a party had failed to accept a written settlement offer and eventually does not 'beat' the settlement offer in the judgment.

The court is also mandated to exercise its case management powers to encourage and facilitate the use of alternative dispute resolution (ADR) procedures. Notwithstanding that the court can only encourage, but not compel, the parties to use ADR procedures, the court can take into account the refusal of any party to undertake mediation or another ADR procedure (without a reasonable explanation) when awarding costs (eg, to deprive a party of an entitlement to costs).

If the parties are unable to agree on the amount of costs, the receiving party may apply to the court for a taxation of his or her costs (a process for the court to assess the amount of costs payable by the paying party). Effective from 1 December 2018, the Court of First Instance and

the District Court substantially increased solicitors' recoverable hourly rates (by more than 40 per cent), which means that a winning party can recover a much higher sum towards payment of his or her actual legal costs from the losing party. In practice, the winning party can usually expect to recover about 60 per cent to 70 per cent of his or her actual costs.

A defendant can apply for an order that the plaintiff provide security for costs at any time before the judgment is final in the following situations (it is preferable to apply early on in the proceedings):

- the plaintiff is ordinarily resident out of Hong Kong;
- the plaintiff is suing for the benefit of a third party and there is reason to believe that he or she will be unable to pay the costs of the defendant if required;
- the plaintiff has changed his or her address during the proceedings to evade the consequences of litigation; and
- the plaintiff is a company (whether incorporated in or outside Hong Kong) and there is reason to believe that it will be unable to pay the defendant's costs from assets within Hong Kong if the defendant succeeds in its defence.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency or conditional fee arrangement

In Hong Kong, solicitors are not allowed to enter into a conditional or contingency fee arrangement to act in contentious business. Barristers are also not allowed to accept instructions on a contingency fee basis.

Third-party funding

Third-party funding is generally not permitted for litigation in Hong Kong courts. It amounts to criminal offences of champerty and maintenance. There are, however, the following exceptions:

- 'common interest' cases, involving third parties with a legitimate common interest in the outcome of the litigation to justify support in the litigation;
- cases involving 'access to justice' considerations (eg, the Supplementary Legal Aid Scheme); and
- other accepted lawful practices, such as insolvency proceedings (where a liquidator can assign a cause of action to a third party) and the doctrine of subrogation as applied to contracts of insurance.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Although insurance companies often participate in litigation (via the doctrine of subrogation), legal expense insurance schemes or 'after-the-event insurance' are not prevalent in Hong Kong, in particular where lawyers are not allowed to charge on a contingency fee basis. There are certain types of insurance that may cover the parties' legal costs (eg, professional indemnity insurance and management liability insurance).

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

There is currently no specific procedure for class actions in Hong Kong. The only type of collective proceedings permitted under the Rules of the High Court is 'representative proceedings', which enable numerous persons who have the 'same interest' in any proceedings to begin or continue the proceedings by or against any one or more of them representing all or as representing all except one or more of them. A judgment or order made in representative proceedings is binding on all the persons so represented but shall not be enforced against any person who is not a party to the proceedings, except with the leave of the court.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties to proceedings may appeal on questions of law or fact, or against the court's exercise of its discretion. Higher courts are generally reluctant to interfere with the lower court's exercise of discretion and finding of facts, especially where they are based on the credibility of the witnesses or the preference of one witness' evidence over another, as the lower court has had the advantage of hearing the live evidence at first hand and the judge is in the best position to form a view on the credibility of the witness, having observed the witness giving evidence.

Parties may appeal judgments or orders made by the District Court or the Court of First Instance to the Court of Appeal. For final judgments or orders made by the Court of First Instance, appeal lies 'as of right' (ie, no leave is required) to the Court of Appeal. Leave is required to appeal against interlocutory decisions made by the Court of First Instance or decisions made by the District Court.

A party may also seek leave from the Court of Appeal or the Court of Final Appeal to appeal to the Court of Final Appeal for judgments handed down by the Court of Appeal (whether final or interlocutory). Leave will be granted if, in the opinion of either court, the question involved in the appeal is one that, because of its general or public importance or otherwise, ought to be submitted to the Court of Final Appeal for decision. The Court of Appeal or the Court of Final Appeal may grant leave subject to conditions as it considers necessary.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment (other than a Chinese judgment) may be recognised and enforced in Hong Kong under two different regimes:

the statutory regime under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319): judgments from certain specified countries under the Foreign Judgments (Reciprocal Enforcement) Order (Chapter 319A) may be registered and enforced in Hong Kong provided that the specified statutory conditions are satisfied – once the court grants leave for the judgment to be registered, the foreign judgment can be enforced in the same manner as a Hong Kong judgment; or

the common law regime: foreign judgments from non-specified countries may be enforced by commencing a writ action relying on the foreign judgment as evidence of a debt between the parties. To be enforceable at common law, there are a number of requirements, such as:

- the foreign judgment must be final and conclusive on the merits of the claim;
- the foreign judgment must be for a debt or definite sum of money;
- the defendant must have submitted to the jurisdiction of the foreign court; and
- the foreign judgment was not contrary to Hong Kong rules of public policy or notions of natural justice.

The enforcement of Chinese judgments in Hong Kong is subject to a separate regime under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Chapter 597). This ordinance gives effect to the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements between Parties Concerned', which was signed on 14 July 2006 (the 2006 Arrangement).

A judgment creditor under a Chinese judgment that satisfies the specified statutory conditions can apply to the Court of First Instance to register the judgment under the ordinance. The conditions include:

- the judgment relates to a commercial contract and was given after 1 August 2008;
- the parties to the commercial contract had a written agreement made after 1 August 2008 specifying that the courts in mainland China have exclusive jurisdiction over the dispute;
- the judgment was given by the Supreme People's Court, a higher or intermediate people's court or certain recognised primary people's courts;
- the judgment is enforceable in mainland China;
- the judgment is final and conclusive; and
- the judgment is for a definite sum of money (not being a sum payable in respect of taxes or similar charges or in respect of a fine or other penalty).

On 26 October 2022, the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill was passed to give effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR signed in 2019 (2019 Arrangement), to establish a more

comprehensive mechanism for mutual recognition and enforcement of judgments in a wider range of civil and commercial matters. The bill will come into effect after both Hong Kong and the Mainland have prepared rules and judicial interpretations respectively to implement the 2019 Arrangement. The 2019 Arrangement, once effective, will supersede the 2006 Arrangement, unless otherwise agreed by the parties before the effective date of the 2019 Arrangement.

The 2019 Arrangement includes the following significant changes:

- an applicant will need to show the connection between the dispute and the requested place to prove that the original court has jurisdiction over the action (the Jurisdiction Requirement);
- the parties are no longer required to agree on an exclusive jurisdiction clause when signing the contract. A judgment will be enforceable in Hong Kong so long as it meets the Jurisdiction Requirement;
- a judgment of second instance (or a judgment of first instance from which there is no appeal within the statutory time limit) issued by a Primary People's Court in mainland China will be covered by the 2019 Arrangement;
- the 2019 Arrangement adopts an 'excluded matters' approach and covers most civil and commercial cases. Excluded matters mainly include those relating to succession, administration or distribution of estate, corporate insolvency, personal bankruptcy, certain maritime matters and certain matrimonial and family matters; and
- both monetary and non-monetary judgment will be enforceable. In the case of mainland China, any judgment, ruling, conciliatory statement and order of payment are included, but a ruling concerning preservation measures will not be covered by the 2019 Arrangement.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

There are no restrictions on taking evidence from a witness in Hong Kong for use in existing foreign proceedings if the witness is willing to give evidence voluntarily. Otherwise, the foreign court must issue a letter of request to the Court of First Instance requiring the witness to give evidence in Hong Kong for civil proceedings instituted or to be instituted before the foreign court. The Court of First Instance has power, on application, to make provision for obtaining evidence in Hong Kong as far as it considers appropriate for the purpose of giving effect to the request.

On 1 March 2017, the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR came into force. This arrangement provides that parties must make any request for the taking of evidence through their respective designated liaison authorities.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Arbitration Ordinance (Chapter 609) (AO) adopts the UNCITRAL Model Law, with supplemental or modified provisions that are specific to Hong Kong.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be in writing to be enforceable in Hong Kong (AO, section 19). That requirement is met if:

- the content of the arbitration agreement is recorded in any form, irrespective of how the agreement was concluded;
- the content of the arbitration agreement is recorded in electronic communication; or
- reference is made in a contract to any document containing an arbitration clause, which makes the arbitration clause part of the contract.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The parties are at liberty to determine the number of arbitrators or authorise a third party to make the decision. Otherwise, the Hong Kong International Arbitration Centre (HKIAC) will determine whether one or three arbitrators should be appointed (AO, section 23).

The parties are free to agree on the procedure for challenging an arbitrator. Otherwise, the AO prescribes the procedure for making that challenge, which includes provisions for the challenging party to submit written reasons to the arbitral tribunal and, if unsuccessful, to further request the court or HKIAC to decide on the challenge.

An arbitrator can only be challenged if there are justifiable doubts about his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Arbitrators can be chosen from an extensive pool of local and foreign professionals in Hong Kong, who are multilingual and possess expertise in different industries (eg, international trade, construction, maritime and intellectual property). Various arbitral institutions and professional associations (eg, HKIAC, the Hong Kong Bar Association and the Law Society

of Hong Kong) maintain arbitration committees or lists to assist parties in choosing suitable arbitrators. The parties are free to appoint arbitrators from abroad if necessary.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

Under the AO, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration. In the absence of agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate and in compliance with the following overriding principles (AO, section 46):

- parties' right to equal treatment and the right to be heard;
- the arbitral tribunal must conduct the arbitration independently, fairly and impartially; and
- the arbitral tribunal must use appropriate procedures to avoid unnecessary delay or expense, to provide a fair means for resolving the dispute.

Court intervention

28 On what grounds can the court intervene during an arbitration?

The court may only intervene in arbitral proceedings in limited circumstances prescribed under the AO, including:

- staying court proceedings for arbitration where the matter is the subject of an arbitration agreement;
- determining challenges to arbitrator appointment;
- granting interim measures (eg, injunctions, asset or evidence preservation orders);
- granting orders to inspect, preserve or sell property being the subject of arbitral proceedings; and
- setting aside and enforcing arbitral awards.

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR), which came into effect on 1 October 2019, allows a party to arbitral proceedings administered by a Chinese arbitral institution to apply to the Court of First Instance for interim measures. Similarly, a party to arbitral proceedings in Hong Kong may apply to the intermediate people's court of the place of residence of the other party for interim measures. Hong Kong is the first and only jurisdiction that can seek mutual assistance from China in interim measures in aid of arbitral proceedings.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, the AO empowers arbitrators to grant interim measures, including injunctions, asset or evidence preservation orders.

Award

30 | When and in what form must the award be delivered?

The AO does not prescribe any time limit for the arbitral tribunal to make and deliver an award. Nonetheless, the arbitral tribunal has an overriding duty to render an award in a conscientious, reasonable and timely manner, and not unduly delay in rendering the award.

The parties may also agree on a specified time limit for the arbitral tribunal to render the award.

An award must be in writing, signed by the arbitrators, dated and stated with the seat of arbitration, and shall provide reasons upon which the award is based unless agreed otherwise. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitral award cannot generally be appealed to the court on the merits. Parties may agree to include the opt-in provisions in Schedule 2 of the AO in the arbitration agreement, which allow a party to challenge an award on the ground of serious irregularity or appeal to the court on questions of law.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

With leave of the court, an award (domestic or foreign) is enforceable in the same way as a Hong Kong court judgment. If leave is not granted, an award can still be enforced under common law by bringing an action based on the award (section 84, AO).

Specifically, a Convention award (an award made in a country that is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) can be enforced in Hong Kong following the general procedures in section 84 of the AO (section 87, AO).

After the return of Hong Kong's sovereignty to China in 1997, and with the implementation of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR in June 1999 (the 1999 Arbitration Arrangement), Chinese arbitral awards made pursuant to the Chinese Arbitration Law can be enforced in Hong Kong like a convention award. A similar reciprocal arrangement is in place between Macao and Hong Kong.

Read this article on Lexology

On 27 November 2020, the Hong Kong Department of Justice and the Supreme People's Court of the People's Republic of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the HKSAR and the Mainland (Supplemental Arbitration Arrangement). Following the enactment of the Arbitration (Amendment) Ordinance 2021 on 19 May 2021, the Supplemental Arbitration Arrangement is now in full effect.

Important amendments made under the Supplemental Arbitration Arrangement:

- Article 1 of the Supplemental Arbitration Arrangement includes the term 'recognition' when referring to enforcement of arbitral awards under the 1999 Arbitration Arrangement, in line with the two-stage approach (ie, the recognition stage and the execution stage) under the New York Convention.
- Article 2 of the Supplemental Arbitration Arrangement clarifies the scope of the arbitral awards that may be mutually recognised and enforced in mainland China and Hong Kong. It removes the condition of 'recognised Mainland arbitral authorities', and hence all awards issued in mainland China pursuant to its Arbitration Law can be enforced in Hong Kong. Also, all arbitral awards (ie, both ad hoc and institutional) rendered in Hong Kong pursuant to the AO can be enforced in mainland China.
- Article 3 of the Supplemental Arbitration Arrangement enables parties to make simultaneous applications to enforce the arbitral award in both Hong Kong courts and mainland Chinese courts. Previously, parallel enforcement of an arbitral award was not permitted under the 1999 Arbitration Arrangement.
- Article 4 of the Supplemental Arbitration Arrangement clarifies that the enforcing courts can impose interim measures before or after the court's acceptance of an application to enforce an arbitral award.

Costs

33 | Can a successful party recover its costs?

An arbitral tribunal has discretion to give directions on costs in an award. The general practice of 'costs follow the event' is usually adopted. Only reasonable costs are allowed, which may include costs in the preparation of the arbitral proceedings prior to commencing arbitration. A tribunal may also direct a specified limit to the recoverable costs.

Under section 74 of the AO, a provision of an arbitration agreement to the effect that the parties, or any of the parties, must pay their own costs in respect of arbitral proceedings arising under the agreement is void, unless the provision is part of an agreement to submit to arbitration a dispute that had arisen before the agreement was made.

Furthermore, under section 56(1)(a) of the AO, unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may require a claimant to give security for costs of the arbitration.

The AO does not specify a list of factors that an arbitral tribunal will consider when determining whether or not to order security for costs. However, section 56(2) of the AO expressly excludes the following grounds for seeking an order for security for costs:

- a natural person ordinarily resident outside Hong Kong; or
- a body corporate or association incorporated or formed under the law of a place outside Hong Kong, or whose central management and control is exercised outside Hong Kong.

Through the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (which came into effect on 1 February 2019), third-party funding of arbitration is allowed in Hong Kong. Such funding can cover arbitral proceedings and any related court proceedings. Funding can be in the form of money or any other financial assistance in relation to any costs of the arbitration. The funding agreement must be in writing and must be disclosed to the parties to the arbitration and the arbitral tribunal. A Code of Practice was further issued on 7 December 2018, setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration in Hong Kong.

On 16 December 2022, Part 10B of the Arbitration Ordinance and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules were enacted to provide for Outcome Related Fee Structures (ORFS), permitting conditional fee agreements (CFAs), damages-based agreements (DBAs) and hybrid damages-based agreements (Hybrid DBAs) in arbitration proceedings in Hong Kong. CFAs are effectively 'no win, no fee' or 'no win, low fee' arrangements and the definition of a 'successful outcome' can be decided between the parties. DBAs are where fees are paid if the client has recovered and obtained a financial benefit in addition to recoverable legal fees. Hybrid DBAs are a combination of an unconditional 'success fee' and the conditions of a DBA. The new system also provides safeguards to protect the interests of clients and to prevent overcharging or abuse of the ORFS regime, including requirements for a written and signed ORFS agreement, and a statutory cap on the amount of uplift fees depending on the type of ORFS agreed to, being no more than 100 per cent of the benchmark fee (fees that would have been paid if not for the ORFS) for CFAs, no more than 50 per cent of the financial benefit recovered by the client for DBAs and Hybrid DBAs, and where the client is unsuccessful, no more than 50 per cent of the benchmark fees for Hybrid DBAs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Common forms of alternative dispute resolution (ADR) in Hong Kong are conciliation, mediation, adjudication and arbitration. Arbitration and mediation are the most popular types of ADR in Hong Kong for reasons of confidentiality and availability of experienced arbitrators and mediators in the jurisdiction.

The Hong Kong courts strongly encourage the parties to attempt to resolve their disputes by mediation. Unreasonable refusal to participate in mediation before trial may attract adverse costs consequences in subsequent court proceedings.

Arbitration is commonly used to resolve disputes involving international parties, such as disputes arising out of the international sale of goods. Specialist arbitrations are also well established in Hong Kong, such as intellectual property arbitration, domain name arbitration, maritime arbitration, construction arbitration and investment arbitration.

Lastly, adjudications are commonly used to determine construction disputes.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

ADR is a voluntary process. The courts usually do not compel the parties to participate in an ADR process. However, one of the underlying objectives of the Rules of the High Court is to facilitate the settlement of disputes by encouraging the parties to use an ADR procedure. Parties to litigation are encouraged to attempt mediation (Practice Direction 31). The court also has broad case management powers to impose adverse costs consequences on parties who unreasonably refuse to attempt mediation.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Hong Kong's dispute resolution system aims to facilitate resolution and settlement in a cost-efficient manner. Some interesting features are highlighted below:

- Sanctioned offers and sanctioned payments under the court rules: these are designed to encourage the parties to actively consider settlement and avoid prolonging litigation. They involve procedures allowing one party to make offers or payments into court to settle a dispute. If the other party does not accept the sanctioned offer or payment, he or she bears the risk of costs and interest sanctions if he or she subsequently fails at the trial to do better than the sanctioned offer or payment, even if he or she wins at trial.
- Apology Ordinance (Chapter 631): Hong Kong was the first Asian jurisdiction to enact an apology legislation (effective from 1 December 2017). Its objective is to prevent the escalation of disputes and facilitate their amicable resolution. Under the Apology Ordinance, an apology does not constitute an express or implied admission of a person's fault or liability in connection with the matter and must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person making the apology. The Apology Ordinance applies to various civil proceedings, including judicial, arbitral, administrative, disciplinary and regulatory proceedings, but not criminal proceedings.
- Hong Kong continues to be a renowned international dispute resolution hub: Hong Kong has an international and diverse pool of legal and dispute resolution talent with over 11,500 practising solicitors and barristers, together with more than 85 foreign law firms

and 1,500 registered foreign lawyers from 33 jurisdictions. Several reputable international legal and dispute resolution institutions have set up offices in Hong Kong, such as:

- the Hong Kong International Arbitration Centre (HKIAC);
- the International Court of Arbitration of the International Chamber of Commerce;
- the China International Economic and Trade Arbitration Commission;
- the China Maritime Arbitration Commission;
- the Permanent Court of Arbitration;
- the Hong Kong Maritime Arbitration Group; and
- eBRAM International Online Dispute Resolution Centre.

- On 21 September 2020, the Baltic and International Maritime Council (BIMCO) announced the adoption of the BIMCO Law and Arbitration Clause 2020. The Law and Arbitration Clause 2020 replaces the Dispute Resolution Clause 2017. Hong Kong is named under the new Arbitration Clause as one of the four designated arbitration venues, alongside London, New York and Singapore, evidencing Hong Kong's strength as a reputable maritime arbitration centre.
- Referring to HKIAC's Statistics in 2022, a total of 515 matters were submitted to HKIAC in 2022, where 344 were arbitrations, 161 were domain name disputes and 10 were mediations. The total amount in dispute across all arbitrations was HK$43.1 billion. The average amount in dispute in administered arbitrations was HK$180.6 million. 97.7 per cent of the arbitrations were seated in Hong Kong, while other seats included England & Wales or were not specified. Disputes were subject to 16 different governing laws, with Hong Kong law being the majority.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Court procedures

On 28 April 2022, the Hong Kong Judiciary announced the beginning of the implementation of the integrated Court Case Management System (iCMS), which is a free-to-register system for submitting and receiving case-specific digital court documents. Usage of the iCMS for electronic filing (e-filing) is optional.

- On 6 May 2022, the Hong Kong Judiciary launched the first tranche of implementation of the iCMS, allowing electronic filing of court documents and payments relating to personal injury and tax claims in the District Court.
- On 29 July 2022, the iCMS was extended to civil action proceedings in the District Court, and on 30 December 2022, was further extended to employees' compensation cases in the District Court and summons cases in the magistrates courts.

Litigation

There has been an overall positive trend in the Hong Kong courts treatment and recognition of cryptocurrencies and crypto-assets, including:

- On 28 April 2022, the Court of First Instance granted proprietary remedies (including asset tracing and equitable compensation) over cryptocurrencies in *Nico Constantjin Antonius Samara v Stive Jean Paul Dan* [2022] HKCFI 1254, a case relating to the misappropriation of cryptocurrencies by a fraudster. Interim relief ordered in the proceedings also included a Mareva injunction, and a discovery order against the fraudster's bank accounts and Gatecoin wallets/accounts, where the fraudster held the victim's bitcoins.
- On 31 March 2023, the Court of First Instance held in *Re Gatecoin Limited* [2023] HKCFI 914 that cryptocurrencies constitute property in Hong Kong as defined under the Interpretation and General Clauses Ordinance and can be held on trust. The landmark decision marks the first time the Hong Kong courts have recognised crypto-assets as property, which places them in the category of intangible assets (such as shares and securities), and also mirrors the stances of other common law jurisdictions.
- On 14 April 2023, the Court of Appeal in *Tam Sze Leung v Commissioner of Police* [2023] HKCA 537 overturned the landmark decision of the Court of First Instance on 31 December 2021, which had held that the 'letter of no consent' regime used by the Hong Kong Police Force to freeze bank accounts holding suspected proceeds of crime (No Consent Regime) was unconstitutional. The Court of Appeal maintained the lawfulness of the No Consent Regime, and confirmed that Tam Sze Leung was not distinguishable to its previous judgment in *Interush Ltd v Commissioner of Police* [2019] HKCA 70, where the No Consent Regime was also challenged and consequently affirmed by the Court of Appeal.

Insolvency

On 4 May 2023, the Court of Final Appeal in *Guy Kwok-hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 delivered a landmark judgment with findings on, among other things, the important issue of the proper approach of the Hong Kong court to a bankruptcy petition where the parties had agreed to submit to the exclusive jurisdiction of a specified foreign court for the purposes of legal proceedings arising out of or relating to their agreement. It was held that in an ordinary case where the underlying dispute of the petition debt was subject to an exclusive jurisdiction clause, the court should dismiss the petition unless there were countervailing factors, such as the risk of the debtor's insolvency impacting third parties, the debtor's reliance on a frivolous defence, or an occurrence of an abuse of process.

Arbitration

On 16 December 2022, Part 10B of the Arbitration Ordinance and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules were enacted to provide for Outcome Related Fee Structures (ORFS), allowing conditional fee arrangements, damages-based arrangements, and hybrid damages-based arrangements in arbitration proceedings in Hong Kong.

On 21 April 2023, in the decision of *Canudilo International Company Limited v Wu Chi Keung And Others* [2023] HKCFI 1055, the Court of First Instance dismissed an application for

leave to appeal its earlier decision in *Canudilo International Company Limited v Wu Chi Keung And Others* [2023] HKCFI 700 (Decision), in which the Court set aside the leave granted to enforce a final arbitral award of 7 June 2021 (Final Award). Mimmie Chan J. held that the appellant's argument that the Decision was based on an error in reviewing the correctness of the Final Award had no reasonable prospect of success because the Decision was made on the basis of the defect in the structural integrity of the arbitral process, rather than the correctness of the arbitrator's decision. In doing so, the Court also stressed, inter alia, the principle laid down by appellant courts that assessment of whether there was procedural unfairness in an arbitration is a broad and multi-factorial exercise dependent on the Court's analysis of the documentary evidence, and it would be unlikely for the Court of Appeal to interfere with the decision of the judge at first instance.

Intellectual Property

On 1 May 2023, the Copyright (Amendment) Ordinance 2022 came into operation. The Ordinance covers five key areas, namely:

- introducing an exclusive technology-neutral communication right for copyright owners in light of technological developments;
- introducing criminal sanctions against infringements relating to the new communication right;
- revising and expanding the scope of copyright exceptions to allow use of copyright works in certain common Internet activities; facilitate online learning and operation of libraries, museums and archives; and allow media shifting of sound recordings, etc;
- introducing 'safe harbour' provisions to provide incentives for online service providers to co-operate with copyright owners in combating online piracy and to provide reasonable protection for their acts; and
- introducing two additional statutory factors for the court to consider when assessing whether to award additional damages to copyright owners in civil cases involving copyright infringements.

The amended law has aligned Hong Kong copyright regime with modern technological developments and international standards.

Data protection and data privacy

Data privacy laws are expected to undergo substantive amendment in the second quarter of 2023. The Office of the Privacy Commissioner for Personal Data has reported recently to the Legislative Council that she is working closely with the government to review and amend the Personal Data (Privacy) Ordinance (PDPO). References were made to laws of other jurisdictions to propose practicable policies to strengthen the protection of personal data privacy. The proposed amendments are (1) setting up mandatory data breach notification mechanism; (2) requiring data retention policy; (3) empowering the Privacy Commissioner to impose administrative fines; and (4) introducing direct regulation of data processors.

Doxxing-related criminal offences under the PDPO came into effect on 8 October 2021. On 6 October 2022, the first doxxing-related conviction was handed down by the magistrates court for seven charges of doxxing, including sharing the victim's name, photos, addresses, telephone numbers, and details of her employment on four social media platforms with the

intent to cause specified harm to her or her family members. The defendant was sentenced to eight months' imprisonment.

Regulatory

On 7 December 2022, the Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Bill 2022 was passed to facilitate the regulation of Virtual Asset Service Providers (VASPs) by the Securities and Futures Commission (VASP Regime). Upon commencement, the trading of non-security tokens by Virtual Asset Trading Platforms will be regulated by the VASP Regime, and the trading of security tokens will continue to be regulated under the existing regimes pursuant to the Securities and Futures Ordinance. Under the VASP Regime, any company (incorporated in Hong Kong or overseas and registered in Hong Kong) carrying on a business of providing a virtual asset service in Hong Kong or holding themselves out as doing so will need to be licensed, including carrying business and advertising or marketing services in Hong Kong and/or to Hong Kong investors. Individuals and businesses without a separate legal personality cannot obtain a VASP license under the VASP Regime.

HILL DICKINSON

Bryan O'Hare	bryan.ohare@hilldickinson.com
Pui Yip Leung	puiyip.leung@hilldickinson.com
Rachel Yeung	rachel.yeung@hilldickinson.com
Wing Lui	wing.lui@hilldickinson.com

33B United Centre, 95 Queensway Admiralty, Hong Kong
Tel: +852 2525 7525
www.hilldickinson.com

Read more from this firm on Lexology

Read this article on Lexology

India

Shaneen Parikh, Vikash Kumar Jha, Akhil Mahesh, Nikhil Aradhe and Varalika Dev

Cyril Amarchand Mangaldas

RETURN TO CONTENTS

Summary

LITIGATION	302
Court system	302
Judges and juries	303
Limitation issues	304
Pre-action behaviour	304
Starting proceedings	305
Timetable	306
Case management	307
Evidence – documents	307
Evidence – privilege	307
Evidence – pretrial	308
Evidence – trial	308
Interim remedies	308
Remedies	308
Enforcement	309
Public access	309
Costs	309
Funding arrangements	310
Insurance	310
Class action	310
Appeal	312
Foreign judgments	312
Foreign proceedings	313
ARBITRATION	**313**
UNCITRAL Model Law	313
Arbitration agreements	313
Choice of arbitrator	314
Arbitrator options	314
Arbitral procedure	314
Court intervention	315
Interim relief	315
Award	315
Appeal	316
Enforcement	317
Costs	317
ALTERNATIVE DISPUTE RESOLUTION	**318**
Types of ADR	318
Requirements for ADR	318

Read this article on Lexology

MISCELLANEOUS 319
Interesting features 319
UPDATE AND TRENDS 319
Recent developments and future reforms 319

LITIGATION

Court system

1 | What is the structure of the civil court system?

India is primarily a common law jurisdiction, although some personal laws (ie, laws followed by and applicable to only persons of a particular faith or religion) are based on customary practice and religion.

Civil courts in India are governed by the procedure set out in the Code of Civil Procedure 1908. Criminal offences are covered by the Indian Penal Code 1860, and criminal courts are governed by the procedure set out in the Code of Criminal Procedure 1973.

India's judicial system is broken up into three distinct streams – criminal cases, civil cases and other cases that may be referred to specific statutorily constituted courts and tribunals depending on the subject matter and the statutes concerned. Jurisdiction of a court is dependent on its territorial and pecuniary limits and may also be circumscribed by subject matter. Some courts and tribunals are conferred with exclusive jurisdiction over matters and disputes of a particular subject matter.

The principal court of original jurisdiction is a city civil court (in metropolitan areas) and a court of civil judge, senior division (in non-metropolitan areas).

There are 25 high courts covering the 29 states and seven union territories of India (established under article 214 of the Constitution of India). A high court is a court of appeal and has supervisory jurisdiction over all lower courts and tribunals in the state or union territory over which it has territorial jurisdiction. The High Courts of Bombay, Delhi, Calcutta, Madras and Himachal Pradesh also have original jurisdiction.

The Supreme Court of India (established under article 124 of the Constitution) has authority over all high courts, lower courts and tribunals in India, and is the final court of appeal.

Presently, there are a total of 34 judges of the Supreme Court, instead of 34, which is the prescribed number. Each high court has different number of judges; there are 794 high court judges in 25 high courts, rather than the prescribed 1,114.

The jurisdiction of Indian courts is limited by territory, the pecuniary value of the claim or dispute, and the subject matter. A court has territorial jurisdiction over a dispute if the defendant habitually resides, carries on business or works for gain within its territory or, if the cause of action arises or immoveable property is the subject matter of the claim, within the territorial limits of such court.

The pecuniary jurisdiction of a court is determined by the relevant state in which the court is situated. The valuation of a plaintiff's claim (and the defendant's counterclaim, if any) determines which court has pecuniary jurisdiction over the case.

Subject matter also plays a part, and exclusive jurisdiction may be statutorily conferred upon certain courts or tribunals, to the exclusion of regular civil courts, depending on the type of claim or dispute.

The Commercial Courts, Commercial Appellate Courts Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the Commercial Courts Act 2015) was enacted to establish specialised commercial courts and divisions for expeditious adjudication of commercial disputes in a timely manner. Commercial disputes of a specified value (ie, 300,000 rupees or above (amended and reduced from 10 million rupees originally)) are adjudicated by such commercial courts.

Certain statutes exclude civil court jurisdiction and confer exclusive jurisdiction on statutorily constituted tribunals or quasi-judicial bodies, such as the National Company Law Tribunal and National Company Law Appellate Tribunal, which deal with matters of company law and insolvency, and the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals, which deal with expeditious adjudication for the recovery of debts owed to banks and financial institutions. There are other tribunals set up to decide matters in relation to competition and unfair trade practices, environmental issues, real estate, electricity tariffs, etc.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Indian court proceedings are adversarial (ie, where parties present their case before a judge who must remain impartial). As India follows the common law system, judges do not generally act as inquisitors, which may be the case in a civil law jurisdiction. However, it is not uncommon for judges to put questions to a witness or direct parties to lead evidence or make disclosure on certain issues, meaning they are not completely passive in their role.

India abolished the jury system for civil and criminal proceedings in the late 1960s, and currently, only matrimonial disputes relating to the Parsi community involve jury proceedings. A challenge to this process is pending in the Supreme Court since 2017.

Article 124 and Article 217 of the Constitution of India govern appointments to the Supreme Court and High Courts respectively and espouse a consultative process between the executive and judiciary in the selection of judges. However, jurisprudence curated since the 1980's towards furthering the independence of the judiciary has culminated in a collegium system of appointments, wherein the Chief Justice of India and next four seniormost judges deliberate on the appointment of judges.

Only an Indian citizen may be appointed as a member of the judiciary. A citizen, having held judicial office for at least 10 years, or an advocate, registered as an advocate of a high court for more than 10 years, may be appointed as a judge of a high court. To be appointed as a judge of the Supreme Court, a citizen must have served as a judge of a high court for more than five years or have practised as an advocate of a high court for more than 10 years, or

must, in the opinion of the President of India, be a distinguished jurist. The age of retirement of a high court judge is 62 years, while for a Supreme Court judge it is 65 years.

Diversity in the higher judiciary, at present, does not reflect the intersectional plurality of India. For the first 40 years since the Supreme Court's inception, only men had been appointed as judges with Ms. Fathima Beevi, the first woman justice of the Supreme Court, being appointed only in 1989. As of May 01, 2023, there are only three women judges in the Supreme Court – although one of them, Justice B V Nagarathna, is set to become the first female chief justice of India in 2027. This lack of representation has been a systemic issue throughout the judiciary and the Bar, but there has been a conscious effort to increase diversity and have more equitable gender representation.

Limitation issues

3 | What are the time limits for bringing civil claims?

Under the Limitation Act 1963, the general period of limitation for civil suits is three years from the date on which the cause of action first arose. The period of limitation varies in certain specific instances: for instance, 12 years for a suit to recover possession of immovable property, 12 years for execution of a decree, one year for an action based on tort and 30 years for suits by or on behalf of the government. Limitation for filing an appeal varies from 30 to 90 days.

Limitation may be extended under certain circumstances, for instance, where there has been a part-payment or acknowledgement in writing of a debt before the expiry of the prescribed period of limitation, or where a party has wrongly but in good faith pursued an action in a court that does not have jurisdiction.

Courts do not have the power to extend the period of limitation; a suit filed after its expiration is bound to be dismissed even if limitation has not been taken up as a defence. However, a court may, under certain limited circumstances, condone a delay in filing appeals.

During the covid-19 pandemic lockdown, the Supreme Court, in exercise of its powers under article 142 of the Constitution, suspended the period of limitation for all claims for a period of about one-and-a-half years, thereby permitting these claims to be brought even after the strict period of limitation had lapsed, subject to certain rules for the calculation of such limitation.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Under the Commercial Courts Act 2015, no suit may be instituted until the plaintiff has exhausted pre-institution mediation, unless the plaintiff seeks urgent interim relief, in which case they may apply without exhausting the mediation process.

There are no specific pre-action steps that are required before initiating other civil proceedings (which are not considered commercial disputes), except for those prescribed in section 80C of the Code of Civil Procedure mentioned below.

Read this article on Lexology

Certain statutes prescribe mandatory pre-action steps to filing of certain proceedings, for instance:

- the Code of Civil Procedure 1908: no suit may be instituted against a government or public officer for official acts without two months' written notice containing the cause of action, the name, description and residence of the plaintiff, and the relief claimed;
- the Insolvency and Bankruptcy Code 2016: an operational creditor must issue a 'demand notice', giving the debtor 10 days to respond, before filing any proceedings against a debtor; and
- the Negotiable Instruments Act 1881: prior to initiating proceedings owing to a cheque for insufficiency of funds, the drawee must issue a written demand notice to the drawer along with the relevant bank details showing that the cheque has been returned unpaid. Fifteen days thereafter, if the payment is not made by the drawer of the cheque, the drawee can initiate proceedings.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced by filing a plaint before the court of competent jurisdiction. The defendant is notified of the initiation of proceedings through a writ of summons issued by the court, along with a copy of the plaint.

The backlog of cases is a widespread problem and is faced by every judicial and quasi-judicial body in India. This is largely attributable to a dearth of judicial officers, inadequate infrastructure, a lack of proper case management systems and parties filing frivolous litigations. The latest data suggests that there are over 68,847 pending cases before the Supreme Court, 428 of which involve constitutional issues.

Proposals to ease backlog of cases include implementation of the e-Courts Mission Mode Project by the central government, which encourages the adoption of digital solutions to help reduce the backlog of cases. Further, arrears committees are being set up in high courts to clear cases that have been pending for over five years. There has been a call for a robust alternate dispute resolution mechanism.

Former attorney general, Mr K K Venugopal, had proposed the establishment of a National Court of Appeal, as a means to reduce systemic pendency of cases. It was recommended that such court of appeal would function as an intermediary court between the high courts and the Supreme Court, and would relieve the latter of some appellate functions. The Supreme Court would then only consider cases involving substantial questions of law relating to the Constitution.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The Code of Civil Procedure 1908 governs the procedure and timeline for civil cases. A civil suit is instituted by the presentation of a plaint (in the format set out in the Code), which must include details of the cause of action, the facts showing that the court has jurisdiction and that the suit is filed within the period of limitation, and the relief claimed, along with a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees.

The plaint should have annexed to it a list of documents referred to or relied upon by the plaintiff that are relevant to the dispute and the claim.

A suit must include the whole of the claim that the plaintiff is entitled to make in respect of the cause of action; if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, their claim, they are precluded afterwards from suing in respect thereof (unless they have obtained leave of the court for that purpose). The plaint must be supported by an affidavit deposed by the plaintiff verifying the correctness of facts.

The defendant must issue its defence by way of filing a written statement within 120 days of receipt of the writ of summons. If the defendant does not appear or does not file a written statement, the court may proceed to hear the case, and may even pass judgment, ex parte.

The procedure thereafter is broadly as follows:

- Disclosure of documents: each party discloses, under oath, documents referred to and relied upon. The counterparty is entitled to inspect these documents and has the right to request the court to direct further disclosure or inspection. A party also has the right to request the other party to provide particulars or to answer interrogatories.
- Framing of issues: the court, in consultation with the parties, frames issues for determination in the suit.
- Evidence: oral testimony and witness evidence-in-chief is filed by way of an affidavit of evidence-in-chief, with a right of cross-examination by the counterparty.
- Hearing: the plaintiff, ordinarily, has the right to begin, and the other parties reply in turn. The party beginning has the right to reply generally on the whole case after all parties have stated their case.

A judgment must be pronounced within 30 days of the date of the conclusion of arguments, which is extendable to 60 days in exceptional circumstances. A decree must be drawn up within 15 days thereafter. The time taken for civil trials varies depending on the court and can be anywhere from five to 10 years (or shorter, if the proceeding is before a commercial court or division).

There is a right of first and second appeal, and they can take several years for adjudication.

Case management

7 Can the parties control the procedure and the timetable?

Under the Code of Civil Procedure, parties cannot control the procedure or the timetable. However, power is given to the courts to extend timelines and to limit litigation delays through costs under the provisions of the Code.

Under the Commercial Courts Act, case management hearings are conducted to decide the next steps and timeline for the litigation, which are speedier than ordinary civil suits.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Yes. During pendency of trial, parties have a duty to preserve documents and other evidence. Each party is required to share copies of the evidence relied on with counterparties and make the originals available for inspection. The Code of Civil Procedure also provides for discovery and interrogatories, and parties must produce documents unhelpful to their case if called upon to do so. Additionally, during cross-examination, a witness can be compelled to produce a document. The court also has the power to impose exemplary costs against a defaulting party that fails to disclose essential documents or wrongfully withholds or refuses to produce them.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Evidence in India is governed by the Indian Evidence Act 1872, which sets out categories of privileged communications and documents that (except in specific circumstances) cannot be disclosed, including:

- communications between spouses made in the maintenance of marriage;
- professional communications between a legal professional (including their employees) and their client, which are privileged unless the communication was in pursuit of an illegal purpose, or the commission of a crime or fraud has been observed by that legal professional since commencement of his or her engagement. Communications and advice rendered to employers by in-house lawyers employed full-time can, in certain cases, be treated as privileged, particularly if created for the purposes of litigation; and
- some official government communications and documents are also privileged, including unpublished official records relating to state affairs and communications with a public officer in their official capacity when disclosure of this information would be detrimental to public interests, and additionally, a magistrate, police officer or revenue officer cannot be compelled to disclose the source of information regarding commission of an offence.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The general practice is to have direct evidence recorded through witness statements as affidavits filed prior to trial. Parties may introduce both factual and expert witness evidence.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Oral evidence is now commonly recorded through affidavits of evidence-in-chief. Thereafter, the counterparty may cross-examine every such witness in open court. Often, this process is carried out before a court-appointed commissioner rather than in open court before the judge for efficiency.

Interim remedies

12 | What interim remedies are available?

The power to grant interim relief stems from the Code of Civil Procedure, whereby interim relief is available in the form of injunctions (including for the freezing of accounts), the attachment of property, the appointment of receiver, the furnishing of security, etc. Search and seizure orders may also be granted in certain cases. These interim remedies are not available in support of foreign proceedings.

Remedies

13 | What substantive remedies are available?

Substantive remedies are available in the form of:

- declarations;
- injunctions;
- specific performance;
- monetary relief in the form of damages or compensation, or both; and
- interest on the claimed amount.

Yes. Punitive or exemplary damages may be awarded by the courts, but in practice they are rarely awarded.

Enforcement

14 | What means of enforcement are available?

A decree can be executed by various means, including the payment of money, the delivery of possessions, the arrest and detention of the judgment debtor, and the attachment of property and sale.

Wilfully disobeying a court order amounts to civil contempt under the Contempt of Courts Act 1981 and is punishable with imprisonment of up to six months or with a fine of up to 2,000 rupees, or both.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court proceedings are usually held in 'open court', meaning that hearings are held in public, subject to the court's discretion as to the existence of circumstances that justify holding proceedings behind closed doors or in camera as set out in the Code of Civil Procedure. Instances that may necessitate in camera proceedings include sensitive matters of family law, those involving the reputation of the parties or issues involving privacy or business. Further, the confidentiality of proceedings may also be maintained pursuant to an application made by a party to the proceedings.

Ordinarily, operative parts of judgments are pronounced in open court. Orders and judgments of the Supreme Court, high courts and district courts are available in the public domain, with digital copies being uploaded to their respective websites; pleadings, witness statements and documents relied on by parties may be specifically procured by filing an application with the relevant court and explaining the need for such document.

Costs

16 | Does the court have power to order costs?

The general rule for the grant of costs is that costs follow the event (ie, the loser pays), and when departing from this rule, courts are to record the reasons therefor in writing. The Code of Civil Procedure and the Commercial Courts Act provide for awarding costs at the court's discretion. While ascertaining costs, the court takes into account the conduct of the parties. The Commercial Courts Act specifies that the costs that may be awarded are reasonable costs relating to witness fees and expenses, legal fees incurred and any fees incurred in connection with the proceedings. Interest can also be awarded on costs.

Under the Code, the court on its own motion or on an application of the defendant may pass a reasoned order directing the plaintiff to provide security for costs incurred or likely to be incurred by the defendant.

Funding arrangements

17 Are ‘no win, no fee’ agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The Bar Council of India Rules prohibit advocates from agreeing to share the proceeds of litigation or a contingency fee. Contingency fees have been held by courts to be void and opposed to public policy and professional ethics as such an arrangement leads to a violation of an advocate’s fiduciary duty towards clients.

There is no express legislation permitting third-party litigation funding in India, but the general consensus (with some detractors) is that it is permitted. This is born of certain provisions in the Civil Procedure Code and the Arbitration and Conciliation Act 1996. Judicial precedents have ruled that the principles of champerty and maintenance are not applicable in India, and accordingly, unless the funding agreement is particularly onerous, usurious or otherwise opposed to public policy, it should be permissible.

Lawyers cannot take up matters on a contingency or success fee basis and are not permitted to fund litigations in which they represent a litigant thereto. The Supreme Court in *BCI v A K Balaji* ((2018) 5 SCC 379) noted that advocates themselves cannot fund litigation on behalf of clients, but there is no restriction on third parties doing so.

Insurance

18 Is insurance available to cover all or part of a party’s legal costs?

Insurance that covers parties’ legal costs is not uncommon in India, but it is unlikely to be blanket cover that protects an entity from any litigation. Instead, there are insurance policies that cover the legal costs of entities arising from or in relation to certain specific actions. For example, directors’ and officers’ liability insurance protects individuals from personal losses arising out of them serving as directors or officers in an organisation (and may also cover the costs of the organisation in defending this claim), while employment practice liability insurance covers disputes arising between an employee and his or her employer.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, the ability of a group of plaintiffs to seek collective redress is available. The remedy of class actions enables an action to be brought by a few in the name of, and for the benefit of, many. Relevant statutes and provisions are briefly set out below.

Representative actions

The Code of Civil Procedure enables plaintiffs to collectively bring a claim to court in a representative capacity for the benefit of a group or class of persons. Similar provisions enable a group of representative defendants to enter a defence on behalf of the entire group.

A representative action needs the permission of the court to proceed. Notice must be given to all persons interested, so that any person on whose behalf, or for whose benefit, the suit is instituted (or defended), may apply to be made a party, particularly as any decree passed will be binding on all members of the class.

Public interest litigation

Public interest litigation filed by a few petitioners for the general benefit of the public is often filed for the enforcement of fundamental rights under the Constitution. This remedy is only available against government entities in performance of their duties. This route is not available against private entities performing private functions or for the enforcement of private or contractual rights. As this action is filed on behalf of the public at large, the petitioners are not required to have suffered the legal injury complained of or to be part of the affected class.

Consumer protection

The Consumer Protection Act 2019 introduced the remedy of consumer class action, in which one or more consumers can file a class action on behalf of a group. Complaints may be filed in relation to any goods sold or delivered, provided the consumers have the same interest or grievance and seek the same relief on behalf of or for the benefit of the group.

The central and state governments are also empowered to file a complaint either in their individual or in their representative capacity for the interests of consumers in general.

Companies Act 2013

Members and depositors of a company may, either individually or as a class, join together for redress and seek appropriate relief from the National Company Law Tribunal. There is a numerical threshold to be met as a condition to using this remedy: namely, a minimum of 100 members or 10 per cent of the total members of a company.

Relief may be sought against the company and its directors, auditors, experts, advisers or consultants for any fraudulent, unlawful or wrongful act, including monetary compensation or damages for commission of fraudulent acts or those that that are prejudicial to the interests of the company or its members or depositors, or against public interest. Orders passed are binding on everyone concerned.

There is no maximum cap on the compensation or damages that may be awarded, or the manner in which they may be distributed among the applicants; this is left to the discretion of the Tribunal.

Industrial Disputes Act 1947

Representative actions are permitted to be brought by workers' unions as a mechanism to promote collective bargaining to improve the conditions of workers. There also is a voluntary arbitration mechanism, whereby the appropriate government may (if satisfied that the parties in voluntary arbitration are the majority) also invite non-parties to present their cases to the arbitrator for adjudication of the dispute.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Decrees of civil courts are appealable by way of a first appeal to a higher court, unless specifically barred by statute. Thereafter, if there is a substantial question of law involved, a second appeal will go to a high court. A first appeal is a matter of right, while a second appeal is generally discretionary and more limited in scope. Appeals may go to the Supreme Court on a substantial question of law of general importance or one involving interpretation of the Constitution. Additionally, the Supreme Court may grant special leave to appeal against any judgment, decree, determination, sentence or order passed by any court or tribunal in India if it involves a substantial question of law in the public interest.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment is deemed to be conclusive unless proven otherwise. Under the Code of Civil Procedure, foreign judgments passed by superior courts in a reciprocating territory (identified by the government through gazetted notifications) can be enforced in India. Presently, only 13 countries are deemed to be reciprocating territories, including the United Kingdom, Singapore and the United Arab Emirates. A judgment from such territories is enforceable as a decree of an Indian court, unless:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- the proceedings in which the judgment was obtained are opposed to natural justice; or
- it has been obtained by fraud, etc.

To enforce a judgment from a non-reciprocating country a suit must be filed. The onus of proof in this regard is on the judgment debtor who is opposing enforcement.

The enforcement of a judgment from a non-reciprocating country must be through filing a substantive suit in India before the appropriate court on the back of this judgment. In such a case, the foreign judgment will be persuasive but will not be binding in the same way that it would have been if it had been a judgment from a reciprocating territory.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

A request to examine a witness or obtain evidence situated within the jurisdiction of a particular high court in India in furtherance of civil proceedings before a foreign court may be communicated to that high court through: a letter from the highest consular officer of that country in India; a letter from that foreign court transmitted through the central government; or a party to those foreign proceedings producing such a letter from the foreign court before the high court. If a foreign court wishes to obtain evidence from a witness residing within the local limits of a particular high court in India in civil proceedings, that high court may, under the Code of Civil Procedure, issue a commission to examine the witness on an application by a party to the foreign proceeding or on an application by a state government law officer.

Additionally, India is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, under which, on receipt of a letter of request issued by a foreign court for obtaining evidence, the letter must be transmitted to the authority appropriate to execute this request.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Arbitration and Conciliation Act 1996 (the Arbitration Act) is based on the UNCITRAL Model Law, a sevident from its preamble.

The Arbitration Act is split into two parts: Part I applies to arbitrations seated in India and contains provisions setting out timelines and the broad procedure to be followed, and provisions relating to challenge and enforcement of awards; and Part II deals with enforcement of foreign awards and referring parties to arbitration (foreign-seated arbitration) where there is an arbitration agreement in existence.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement (whether as a clause in a contract or a separate agreement) is one where the parties agree to submit all or specified disputes to arbitration that have arisen or may arise between them in the future relating to a defined legal relationship (whether contractual or not) and that are considered commercial. An arbitration agreement must be in writing (including through electronic means) and is deemed to be in writing if it is in a document signed by the parties, there is an exchange of communications recording this

agreement or it is in statements of claim and defence in which one party has alleged the existence of an arbitration agreement and the other does not dispute this fact.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Parties may agree upon any odd number of arbitrators to be appointed, the default position being a sole arbitrator. If there is no agreed procedure for the appointment of the tribunal or the parties cannot agree on an arbitrator, the appointment is made on the application of a party by the Supreme Court (for international commercial arbitrations) or a high court (in other cases).

India has incorporated much of the IBA Guidelines on Conflict of Interest into the Arbitration Act through the Fifth and Seventh Schedules (covering ground from the orange and red lists of the Guidelines). A challenge to an arbitrator's appointment is maintainable if there are circumstances giving rise to justifiable doubts as to his or her independence or impartiality (Fifth Schedule) or if he or she does not possess the qualifications agreed between the parties. Additionally, notwithstanding any prior agreement, if the prospective arbitrator falls afoul of the grounds of the Seventh Schedule, he or she is ineligible for appointment, unless the parties waive this condition by an express written agreement after the dispute has arisen.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

The parties are free to appoint any arbitrator of their choice, including both legal and technical experts. Generally, in the case of an international commercial arbitration, it is common for the sole or presiding arbitrator to be of a neutral nationality.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

The procedure set out in the Arbitration Act broadly follows the UNCITRAL Model Law, but parties are free to agree to any procedure subject to compliance with the non-derogable provisions of the Arbitration Act. In the absence of agreed procedure, tribunals are empowered to conduct proceedings in a manner considered appropriate, which includes the power to determine the admissibility, relevance, materiality and weight of the evidence adduced. The Arbitration Act further states that tribunals shall not be bound by formal rules of civil procedure or evidence under Indian law.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The Arbitration Act seeks to minimise judicial intervention and interference such that no judicial authority may intervene, except where specifically provided.

If a party unsuccessfully challenges the appointment of an arbitrator before the tribunal itself, it may thereafter apply to the court to set aside the final award. Parties may also apply to the court to decide on the termination of an arbitrator's mandate if he or she becomes de jure or de facto unable to perform his or her functions or fails to act without undue delay.

Recourse to the courts by way of appeal is available from orders of the court refusing to refer parties to arbitration, granting or refusing to grant interim relief and setting aside or refusing to set aside awards, and from orders of the tribunal ruling on its own jurisdiction or scope of authority and granting or refusing to grant interim relief.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. Interim relief under the Arbitration Act can be granted by courts and by arbitrators, with both having the same powers. Interim relief can be granted by arbitrators for:

- an interim measure of protection in respect of preservation;
- the interim custody or sale of any goods that are the subject matter of the arbitration agreement;
- securing the amount in dispute in the arbitration;
- detention, preservation or inspection of any property or thing that is the subject matter of the dispute; or
- an interim injunction or the appointment of a receiver.

Insofar as emergency arbitration is concerned, orders or awards passed by an emergency arbitrator in India-seated arbitrations are enforceable (as ruled by the Supreme Court in *Amazon.com* ((2022) 1 SCC 209). Emergency orders and awards passed in foreign-seated arbitrations are treated as not being directly enforceable, and it is usual to file a separate application for identical interim relief from a court on the basis of the emergency order or award.

Additionally, Indian courts have the power to grant interim relief in support of foreign-seated arbitrations, unless the relevant provisions are expressly excluded by agreement of parties to the contrary.

Award

30 | When and in what form must the award be delivered?

For purely domestic arbitrations (ie, between Indian parties), the award is to be made within 12 months of the date of completion of the pleadings, with an extension of six months by

consent of the parties. Any further extensions must be by way of application to the court. In the case of international commercial arbitrations, the award is to be made expeditiously, with an endeavour to meet similar timelines.

Provision is also made for a fast-track procedure, wherein the tribunal dispenses with technical formalities and proceeds with a documentary hearing – with written pleadings, submissions and documents, and oral hearings only at the request of all parties or if deemed necessary. The award is required to be made within six months of the date upon which the tribunal enters reference.

An award must be in writing, stating its date and place of arbitration, and signed by all members of the tribunal (it is enough for the majority to sign the award as long as the reasons for omitting any signature is stated). The award must state the reasons therefor, unless otherwise agreed by the parties or if it is in pursuance of a settlement. A signed copy of the award will be delivered to each party.

The tribunal is empowered to make an interim award on any matter on which it can render a final award; unless otherwise agreed, tribunals may grant reasonable interest on whole or part of money forming part of the award, and for the whole or part of the period from the cause of action arising to the date of the award.

Appeal

31 | On what grounds can an award be appealed to the court?

Section 34 of the Arbitration Act contains the limited grounds on which a party can challenge an award and seek that it be set aside (rather than appealed). The scope of review of an award is very narrow (along the same lines as set out in the New York Convention) and there is no review available on merits.

An award may be set aside if, on the basis of the tribunal's record, it can be established that:

- a party was under an incapacity;
- the arbitration agreement is invalid under the applicable law;
- a party was not given proper notice of the appointment of the arbitrators or the proceedings, or was unable to present his or her case; or
- the award deals with a dispute not falling within the scope of the reference to arbitration.

The court may also set aside the award if it finds that the subject matter is non-arbitrable, the enforcement thereof would be contrary to public policy or (in cases of domestic awards) the award is vitiated by patent illegality on the face of it.

The court, in exercise of its powers to set aside an award, cannot modify the award given the absence of a specific statutory provision.

An application to set aside an award must be made within three months of the date of receipt of the award (extendable by a further 30 days by the court, for sufficient cause).

An appeal is available against an order setting aside or refusing to set aside an award.

There is no provision for a second appeal; although, an aggrieved party may approach the Supreme Court for special leave to appeal against any order or judgment on a substantive question of law in the public interest.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A domestic award can be enforced once the time limit to challenge the award (ie, within three months of the date of receipt of the award) has lapsed or an application to set aside the award has been refused. An award is enforceable in the same manner as a decree of the court under the Code of Civil Procedure.

Pending adjudication of a set aside application, an award can be enforced unless it is stayed by the court on an application of the aggrieved party. The stay is usually conditional upon deposit of the award amount by the award debtor who filed the challenge.

An application for enforcement of a foreign award may be filed in any high court with jurisdiction over the location of the award debtor's assets. The enforcing party must produce the original or authenticated copy of the award, the original or certified copy of the arbitration agreement, and evidence that it is a foreign award before the executing court.

Indian law follows a two-step process for enforcement of foreign awards – the award must be made in a country that is a signatory to the New York Convention and this country must have been specifically notified as a reciprocating country by the Indian government in the Official Gazette.

Enforcement of a foreign award can be refused (on the grounds set out in the New York Convention) if the award debtor establishes that:

- it was under an incapacity;
- the arbitration agreement is invalid under the applicable law;
- a party was not given proper notice of appointment of arbitrators or the proceedings or was unable to present his or her case;
- the award deals with a dispute not falling within the scope of the reference to arbitration; or
- the composition of the tribunal was not according to the agreement (or to the law of the country of arbitration, if there is no such agreement).

Additionally, enforcement may also be refused if the subject matter is not arbitrable or if its enforcement would be against Indian public policy.

Costs

33 | Can a successful party recover its costs?

The general rule is that costs follow the event, and the unsuccessful party is ordered to pay costs of the successful party, subject to a contrary order of the court or the tribunal with written reasons therefor. The award of costs is discretionary, and the costs that may

be awarded include reasonable costs relating to the fees and expenses of arbitrators and witnesses, legal fees and expenses, any administrative fees of any institute supervising the proceedings and any other expenses that may have been incurred by the party in connection with the proceedings and award. While ascertaining costs, the court or tribunal considers the conduct of the parties, whether a party raised frivolous claims that delayed proceedings and whether any reasonable settlement offer was refused. From a practical perspective, actual costs are not granted in most cases, although that is changing.

There is no judicial precedent in relation to recovery of other costs, including third-party funding costs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Apart from arbitration, other forms of alternative dispute resolution (ADR) that are popular and widely adopted in India are *Lok Adalats*, mediation and conciliation.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Under the Commercial Courts Act, no suit is to be instituted unless the plaintiff exhausts the remedy of pre-institution mediation, unless the suit contemplates urgent interim relief.

Although there is no mandate for ADR prior to filing a suit or invoking arbitration under the Code of Civil Procedure or the Arbitration Act (it is based solely on the contract between the parties), both courts and arbitral tribunals encourage parties to settle their disputes.

Part III of the Arbitration Act provides for conciliation and provides that a settlement agreement through conciliation may be enforced in the same way as an award with the consent of the parties.

The government issued the Mediation Bill 2021, which mandates pre-litigation mediation before approaching any court or certain tribunals as notified. The Bill also provides that mediated settlement agreements will be final, binding, and enforceable in the same manner as court judgments. The Bill is yet to be passed by both the Houses of India's bicameral legislature.

Additionally, some statutes contain requirements for pre-institutional ADR or empower the court to encourage amicable settlement even during proceedings.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Indian dispute resolution system has a few interesting features of arbitration and litigation, including:

- the Fourth Schedule of the Arbitration Act determines the fees for arbitrators appointed by the court based on the value of the dispute, and this cannot be derogated from except by consent of all parties to the arbitration; and
- article 142 of the Constitution is a catch-all provision that gives the Supreme Court wide authority to do what it deems necessary for 'doing complete justice' in any case. This is a power to be used sparingly, and it is usually invoked only if absolutely necessary.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The recent cases of note, rendered by Indian Courts are as under:

- Stamp duty is required to be paid for instruments executed in India for them to be produced as evidence in courts or tribunals. The quantum of stamp duty payable varies based on the nature of the instrument and the state in which it is executed. In *M/s. N.N. Global Mercantile Private Limited v M/s. Indo Unique Flame Ltd. & Ors.* (Civil Appeal No(s). 3802-3803 of 2020) a Constitution Bench of the Supreme Court in a 3:2 majority held that in the event an instrument amenable to stamp duty is unstamped (or insufficiently stamped), and such instrument contains an arbitration clause, then such arbitration clause would be unenforceable for the purpose of appointing an arbitrator, and that the Court ought to impound such instrument till the requisite stamp duty is paid.
- In *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV* (Arbitration Petition (Civil) No. 05 of 2022) the Supreme Court held that in the absence of an agreement between parties as to arbitral fees (whether pre or post the dispute arising), the tribunal must abide by the arbitral fees as set out in the Fourth Schedule of the Arbitration Act (which is decided based on the value of the dispute).
- In *Emaar India Ltd. v. Tarun Aggarwal Projects LLP and Another* (2022 SCC OnLine SC 1328) the Supreme Court observed that while appointing an arbitrator, the High Court can undertake a preliminary inquiry to determine whether the dispute falls within the 'excepted matters' under the agreement, as well as to determine ex facie if the agreement is non-existent, invalid or that disputes are prima facie non-arbitrable. The Supreme Court therefore held that the issue of the arbitrability of a dispute ought to be left to the arbitrator unless it is prima facie evident that such a dispute is non-arbitrable.

Policy and legislative developments

The New Delhi International Arbitration Centre (Amendment) Act 2022 was brought into to force requiring the India International Arbitration Centre (earlier called the New Delhi International Arbitration Centre) to strive to facilitate the conduct of international and domestic arbitration and conciliation, as well as expand the same to include the conduct of other forms of alternative dispute resolution.

The Competition Amendment Act 2023 has brought in amendments to the Competition Act, 2002, to regulate mergers and acquisitions based on the value of the transaction. For instance, transactions exceeding 20 billion rupees will now require the Competition Commission of India's approval.

The Bar Council of India in March 2023 notified the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India 2022 (BCI Rules) to regulate the entry of foreign lawyers and foreign law firms in India. Broadly, the BCI Rules permit foreign lawyers and firms to open a law firm and practice in specified 'non-litigious' areas once they are registered under the Rules. Foreign lawyers and firms can also continue to practice on a fly in, fly out basis provided that they advise only on foreign law, and do not stay in India for more than 60 days in a period of 12 months.

Shaneen Parikh	shaneen.parikh@cyrilshroff.com
Vikash Kumar Jha	vikashkumar.jha@cyrilshroff.com
Akhil Mahesh	akhil.mahesh@cyrilshroff.com
Nikhil Aradhe	nikhil.aradhe@cyrilshroff.com
Varalika Dev	varalika.dev@cyrilshroff.com

Peninsula Chambers Peninsula Corporate Park, GK
Marg, Lower Parel, Mumbai 400 013, India
Tel: +91 22 2496 4455
www.cyrilshroff.com

Read more from this firm on Lexology

Read this article on Lexology

Indonesia

Mahareksha S Dillon, Joseph Hendrik and Talitha A Ekadhani
SSEK Law Firm

RETURN TO CONTENTS

Summary

LITIGATION	**322**
Court system	322
Judges and juries	323
Limitation issues	323
Pre-action behaviour	324
Starting proceedings	324
Timetable	325
Case management	326
Evidence – documents	326
Evidence – privilege	326
Evidence – pretrial	327
Evidence – trial	327
Interim remedies	328
Remedies	328
Enforcement	328
Public access	329
Costs	329
Funding arrangements	329
Insurance	329
Class action	330
Appeal	330
Foreign judgments	330
Foreign proceedings	331
ARBITRATION	**331**
UNCITRAL Model Law	331
Arbitration agreements	331
Choice of arbitrator	332
Arbitrator options	332
Arbitral procedure	333
Court intervention	333
Interim relief	333
Award	333
Appeal	334
Enforcement	334
Costs	335
ALTERNATIVE DISPUTE RESOLUTION	**335**
Types of ADR	335
Requirements for ADR	335

Read this article on Lexology

MISCELLANEOUS 336
Interesting features 336

UPDATE AND TRENDS 336
Recent developments and future reforms 336

LITIGATION

Court system

1 | What is the structure of the civil court system?

The court system is administered by the Supreme Court, as one of the two institutions (the other being the Constitutional Court) authorised to administer Indonesia's judicial system, pursuant to Law No. 48 of 2009 regarding Judicial Authority (the Judiciary Law). Under the authority of the Supreme Court, the courts of first instance are divided into general courts, religious courts, state administrative courts and military courts.

General courts adjudicate criminal and civil matters, comprising district courts as the courts of first instance, high courts as the appellate courts and the Supreme Court as the court of cassation and the highest judicial authority. A minimum of three judges, in an odd number, must comprise a judicial panel at each level of the court system, unless stipulated otherwise by law. Simple claims involving disputes of a value less than 500 million rupiah are heard by a single judge (instead of a three-member panel). Attached to the general courts are special courts administered to examine and adjudicate specific matters related to criminal and civil matters:

- Industrial relations courts adjudicate disputes arising from or in relation to an employment relationship, including disputes over the termination of employment and disputes involving labour unions. An ad hoc judge will be appointed in each case before the industrial relations court, but the case will still be presided over by a career judge. Decisions of the industrial relations courts may not be appealed, and parties may only pursue the cassation process at the Supreme Court.
- Commercial courts adjudicate matters concerning intellectual property rights, the suspension of debt payment obligations (PKPU) and bankruptcy. For PKPU and bankruptcy, the commercial courts do not have an appeals process to the high courts, but parties may pursue cassation directly to the Supreme Court.
- Anti-corruption courts adjudicate corruption cases. There may be ad hoc judges assigned to examine and adjudicate cases.

Religious courts adjudicate civil and commercial matters based on Islamic law. The parties to disputes examined and adjudicated by religious courts must be Muslim or shariah-based institutions.

State administrative courts adjudicate matters related to state administrative objects.

Military courts adjudicate criminal acts committed by military personnel and compensation owed to the parties injured, as well as administrative disputes within the military.

Read this article on Lexology

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Juries are not recognised in Indonesia. As a civil law country, Indonesian courts are largely inquisitorial. However, judges in civil proceedings adopt a more passive role compared to judges in criminal proceedings, only deciding on disputes and arguments brought forth by the disputing parties and granting relief that is sought by the disputing parties. Judges in civil proceedings decide a dispute based on the preponderance of evidence; they are not empowered to request additional evidence beyond what the parties have formally presented. However, judges may enquire further into the relevance and materiality of each factual piece of evidence underpinning every claim as necessary to reach a legal conclusion. Each panel of judges is selected by the chief of the court after a case is registered. The chair of the panel will be a senior judge deemed capable according to the assessment of the chief of court.

In response to the small number of new judges being appointed, the Supreme Court issued Regulation No. 2 of 2017 regarding the Appointment of Judges, as amended by Supreme Court Regulation No. 1 of 2021. The regulation sets out the authority of the Supreme Court to appoint judges, the procedure and selection process, the process of recommendation and appointment of judicial candidates, and the status of candidates that fail the mandatory training.

Judges are often transferred to different courts in various regions in Indonesia every three to five years. Judges may be transferred earlier (ie, after two years) for personal reasons, such as a compelling family matters or an urgent medical condition involving the judge or a member of their family.

Limitation issues

3 | What are the time limits for bringing civil claims?

Pursuant to article 1967 of the Indonesian Civil Code (ICC), civil claims relating to both rights in rem and in personam are subject to a 30-year statute of limitations. The time limit may be suspended by law in certain cases, namely under articles 1986 to 1992 of the ICC. The 30-year time limit generally applies to obligations that by nature are valid for an indefinite period. The time limit may be suspended by agreement of the parties, and the civil claim shall expire upon lapse of the agreed time limit.

Certain laws provide shorter time limits for specific types of claims. Claims related to shipping, as provided in articles 741, 742, and 743 of the Indonesian Commercial Code, have limitations of one, two, three or five years, depending on the nature of the claim. Aviation claims are subject to a limitation of two years for claims relating to domestic flights, as provided in article 177 of Law No. 1 of 2009 regarding Aviation, as amended by Law No. 6 of 2023 regarding the Enactment of Government Regulation in Lieu of Law No. 2 of 2022 regarding the Job Creation Law, and two years for claims relating to international flights, as provided in article 35(1) of the 1929 Warsaw Convention, which Indonesia ratified in 1933. Claims for certain professional services, such as those provided by doctors, lawyers, teachers and notaries, are subject to a two-year limitation, as provided in articles 1968 to 1970 of the Indonesian Civil Code.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Before a contractual claim is submitted, the defendant will usually have been served up to three warning letters by the plaintiff, essentially alleging breach of contract followed by a request for compensation. This requirement does not apply if the contract specifies the conditions, circumstances or actions that automatically amount to a breach of contract.

In the context of civil proceedings, the first thing a plaintiff must consider before bringing a claim is whether the defendant has agreed to be subject to a certain dispute resolution mechanism. The second is to identify the entity and the location of the defendant. This will determine the court that shall have the competence to adjudicate the case.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

As regulated under article 118 of the Indonesian Civil Procedural Code (HIR) and article 10 of the Civil Procedural Code, for islands outside of Java, proceedings are commenced when the plaintiff submits a statement of claim for registration to the district court. If the plaintiff is represented by counsel, it should also submit a legalised power of attorney. The district court shall then determine the exact date and time to start the examination of the case. Article 122 of the HIR further regulates that the bailiff, at the instruction of the district court, will summon the disputing parties to appear before the panel of judges. The timing of service of the defendant with the claim documents depends on the distance of the defendant's domicile from the court. It can be eight, 14 or 20 days before the date of first hearing, which shall be determined on a case-by-case basis. In pressing circumstances, the defendant may be summoned to appear earlier, but not less than three days before the start of the hearing phase. Service to defendants domiciled outside of Indonesia was previously governed by the cooperation scheme between the Supreme Court and the Ministry of Foreign Affairs, which was manifested in a memorandum of understanding dated 20 February 2018 (2018 MOFA-SC MOU). Under this cooperation scheme, Indonesian courts, through the Supreme Court, issued a request for service of court documents addressed to the destination country. The service requirements followed the procedure of the destination country and the Indonesian mission in that country coordinated with the relevant judicial authority to affect the service. However, the 2018 MOFA-SC MOU expired in February 2023 and there is currently no clarity on whether the 2018 MOFA-SC MOU will be extended or replaced by a new cooperation scheme.

Parties are usually summoned and served with court documents via mail. However, the Supreme Court issued Regulation No. 1 regarding Electronic Administration and Court Proceedings 2019, as amended by Supreme Court Regulation No. 7 of 2022 (PERMA 1/2019, as amended), which facilitates online case registration via the Court Information System. If the plaintiff chooses to register the lawsuit online using PERMA 1/2019, as amended, the parties will be electronically summoned by the bailiff and court documents will be served through the 'electronic domicile' (email addresses) of the parties.

In the statement of claims submitted, the plaintiff must provide information on the identity of both parties, the type of claim (either breach of contract or tort or unlawful act) and the relief requested.

The courts are generally capable of listing disputes in a timely manner, but proceedings are regularly delayed. To address the issue of delays, the Supreme Court, through Circular Letter No. 2 of 2014 (CL 2/2014), mandated district courts to resolve cases within five months and appeals in the high courts to be decided within three months. District court judges may request an extension with the approval of the chief of the relevant district court. In practice, it is common for court proceedings to last longer than the period regulated under CL 2/2014.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

During the first day of a hearing, if all the parties named in the lawsuit are present, the parties will be required by the panel of judges to undergo a court-mandated mediation to try and reach an amicable settlement. The proceedings will be adjourned for 30 days for the mediation process. The mediation process is free of charge if the parties use the court's internal mediator and hold the mediation in one of the court's rooms. Unlike court hearings, the mediation process is basically closed to the public, unless the parties state otherwise.

If the disputing parties can achieve an amicable settlement through mediation, the parties will enter into a settlement agreement that can be endorsed by the panel of judges. This settlement agreement shall be treated in the same manner as a final and binding court decision. If the mediation is unsuccessful and no extension of up to an additional 30 days is requested, the proceedings will commence with the plaintiff's claims.

If one of or all the parties fails to attend the mediation two times in a row, the mediator is obliged to declare that mediation has failed and the panel of judges will then start the court hearings.

Hearings for civil disputes are normally conducted with a one- to two-week interval between each phase, in the following order:

- The plaintiff reads the statement of claims.
- The defendant submits its statement of defence to the plaintiff's claims and may also submit a counterclaim. If the defendant raises a jurisdictional or procedural challenge at this stage and it is accepted, the court will render an interlocutory judgment declining the plaintiff's claims for further examination. The plaintiff is given the right to appeal the interlocutory judgment to the high courts.
- The plaintiff submits its rejoinder to the defendant's statement of defence and its defence to the defendant's counterclaim.
- The defendant submits a response to the rejoinder and any rejoinder to the plaintiff's defence to the defendant's counterclaim.
- The parties – the plaintiff first and the defendant second – submit their respective documentary evidence to be verified by the court.

- The court will examine the parties' witnesses (ie, factual witnesses and experts). The witnesses and experts are to present their testimony orally and must be presented under oath.
- The parties have the option to submit a concluding memorandum.
- The panel of judges will determine a date to render the final judgment.

Within 14 days of the district court rendering its final judgment, the dissatisfied party may file a notice of intention to appeal to the relevant high court. Appeals in the high courts should be decided within three months.

Simple claims for disputes of less than 500 million rupiahs are heard in an expedited procedure that must be concluded within 25 days of the date of the first hearing.

Case management

7 | Can the parties control the procedure and the timetable?

Article 2(4) of the Judiciary Law imposes on the courts the duty to conduct proceedings in a straightforward, expedient and cost-efficient manner. However, in a civil dispute, the parties can suggest and agree on a timetable for the hearings. This timetable would then have to be approved by the panel of judges.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Indonesian court procedure does not regulate the discovery process. Parties do not have an obligation to share or disclose evidence or documents before the proceedings.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Advocates are obliged to maintain the confidentiality of any information communicated by their clients as part of attorney–client privilege, as stated in article 19 of Law No. 18 of 2003 regarding Advocates (the Advocates Law). This includes documents and correspondence exchanged with and obtained from clients during an advocate's professional legal services. In-house lawyers are regarded as employees providing legal services to employers rather than as advocates as defined in the Advocates Law. Therefore, their advice to their employers is not subject to attorney–client privilege.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Parties do not have an obligation to share or disclose evidence or documents before the proceedings. No written statements of witnesses and experts are exchanged in advance. Evidence must be directly addressed by the parties through their arguments during trial.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The evidentiary hearing commences after the exchange of written arguments. Presentation of documentary evidence is a sufficient means to prove a civil case. Documents submitted as evidence must be presented at trial, and the counterparty is entitled to review the documents submitted but not to receive copies thereof. The public shall not have access to the evidence submitted to the panel of judges. However, since civil proceedings are open to the public, submitted evidence and other information disclosed during the hearings (including sensitive commercial information) can be accessed by the public.

Witness testimony is classified as evidence under article 1866 of the Indonesian Civil Code and article 164 of the HIR for civil disputes. Witness testimony must be given orally and in person at the hearing. This means the testimony must be presented by the witness without any representation and it cannot be made in writing. Witnesses have a legal obligation to appear during court proceedings; the law imposes sanctions for witnesses who fail to appear after being properly summoned. Judges will postpone the hearing or set another hearing date for the examination of witnesses who fail to appear at the initial hearing. Experts appointed by the parties must also present their evidence orally.

Witnesses and experts who appear before the court will testify under oath in accordance with their respective religion. Each party, including the panel of judges, will have the opportunity to question the witnesses. The parties may ask questions to support their respective arguments. Foreign witnesses are allowed to testify before Indonesian courts. However, a party presenting a foreign witness is obliged to provide an official sworn translator to translate the witness' statement to the court.

Documents submitted as evidence must first be affixed with a stamp duty of 10,000 rupiah (approximately US$0.70). If the documents are not in the Indonesian language, they must be translated by a sworn translator before being submitted to the court.

There is no distinction between oral and documentary evidence, as the value of evidence and witnesses depends on the considerations of the panel of judges examining the case.

For proceedings conducted under the framework of PERMA 1/2019, the examination of witnesses may be conducted remotely, which will have the same effect as an examination conducted in open court. However, remote hearings under PERMA 1/2019 still require the parties' agreement.

Read this article on Lexology

Interim remedies

12 | What interim remedies are available?

The Indonesian laws on civil procedure lack any definition of interim remedies, provisional measures or rules defining the conditions warranting these measures. Nevertheless, courts regularly grant measures to protect the parties' rights forming the subject matter of a claim or to preserve the object of dispute while proceedings are ongoing. The request for interim relief must be submitted at the same time as the registration of a claim with a court, in which the plaintiff may request the panel of judges to grant restraining orders and security attachments over a defendant's assets. These remedies are not available in support of foreign proceedings. The 2018 MOFA-SC MOU provided that foreign courts may request certain judicial assistance from Indonesian courts with respect to searching and identifying individuals and assets. However, there is no clarity on whether 2018 MOFA-SC MOU has been extended.

Remedies

13 | What substantive remedies are available?

The available substantive remedies for contractual claims are compensation for losses, interests and costs. This includes loss of profits or loss of opportunities, if they are quantifiable. Substantive remedies for unlawful acts (tort) are compensation for material and non-material losses. Article 1250 of the Indonesian Civil Code also stipulates a moratory interest on a monetary judgment (ie, 6 per cent per year calculated from the date of judgment). Specific performance or injunctive relief is very rare in the Indonesian courts as it is difficult to enforce and execute. There have been no known instances where the Indonesian courts granted punitive damages.

Enforcement

14 | What means of enforcement are available?

Once a judgment is deemed final and binding, the winning party must submit an application for enforcement to the district court where the losing party is domiciled. The district court will issue an execution warning based on article 196 of the HIR, ordering the losing party to comply with the judgment within eight days. If the losing party fails to comply, the court may issue an attachment order against the losing party's assets or property that are identified in the application for enforcement. These assets will be confiscated, usually with the assistance of the police, and publicly auctioned. Enforcement of bank account assets may be done by notifying the court of the target bank and account number, and blocking and encashing the account.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Most court hearings are held in public, except for certain matters such as divorce cases. The open nature of court hearings means that court documents should be readily accessible by the public. However, in practice, documents related to the proceedings will only be made available to, or with the written authority of, the parties concerned.

Costs

16 | Does the court have power to order costs?

Indonesian civil procedure has no specific rules governing the power of the court to order costs. The losing party must pay the court fees, which comprise the operational costs of proceedings and the registrar's (administrative) fees (eg, stamp duty, the conveyance of documents submitted and the cost to deliver notices). As held in Supreme Court Decision No. 3557 K/Pdt/2015, dated 29 March 2016, each party is responsible for bearing its own legal costs. For that reason, the Supreme Court in that case refused the request that the losing party bear the winning party's legal costs. Security for costs is not recognised in the Indonesian legal system.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Indonesian civil procedure is silent on litigation financing and, therefore, there is no express prohibition against certain arrangements. Litigants usually fund their own cases, sometimes involving certain arrangements with their lawyers. They may agree on a fixed lump sum, hourly rates or another type of arrangement, including retainers and contingency fees.

Indonesia does not currently have any regulations pertaining to third-party funding for disputes. To date, there is no publicly available jurisprudence of the Indonesian courts relating to the use of third-party funding. There are also no associations or companies in Indonesia recorded as having a formal presence in the business of providing third-party funding for litigation.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Indonesia does not currently have regulations pertaining to insurance specifically for litigation costs. However, professional individual insurance is generally available to indemnify a party's litigation costs.

Read this article on Lexology

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants may bring a class action lawsuit if there is a large number of people who wish to submit a claim with the same facts, circumstances and legal basis, pursuant to article 1(a) of Supreme Court Regulation No. 1 of 2002. The class representative must represent the interests of the members of the group that must be protected. Class actions adopt the opt-out procedure, meaning class members can opt out of the claim after being notified by the class representative. Class actions in Indonesia are most often initiated in connection with environmental disputes or consumer protection matters.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

A party may submit an appeal to a high court if they find the judgment of the district court incorrect or unfair. The party should file a notice of intention to appeal within 14 days of the district court rendering a judgment. The appealing party can submit a memorandum of appeal outlining the arguments on appeal in writing, but this is not mandatory.

Pursuant to article 23 of the Judiciary Law, right of further appeal is provided in the form of cassation to the Supreme Court. A request for cassation should be submitted to the Supreme Court through the district court that issued the first judgment in the case. The timeline for submitting a request for cassation is the same as the timeline for submitting an appeal to a high court (ie, within 14 days of the high court rendering its appeals judgment). However, submission of a memorandum of cassation, as well as a counter-memorandum of cassation, is mandatory at this stage.

In certain cases, a final and binding judgment can also be challenged by filing for a judicial review in the Supreme Court based on limited grounds pursuant to article 67 of the Judiciary Law. These limited grounds include the existence of fraud or forgery tainting the judgment, the discovery of new and material evidence, an excess of power by the judges, the failure to provide proper legal consideration, a contradictory ruling with a previous judgment on the same subject matter and the occurrence of a manifest error or mistake.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Pursuant to article 436 of the Civil Procedural Code for islands outside of Java, foreign judgments are not immediately recognised and enforced in Indonesia, except if this recognition and enforcement mechanism is provided by a convention or reciprocal agreement with another country that binds Indonesia. At the time of writing, Indonesia is not party to any such convention or agreement. Therefore, to enforce a foreign judgment, a litigant must commence a new lawsuit and relitigate the case at the relevant district court in Indonesia, where the foreign judgment may be presented as evidence. The only other

exception is foreign judgments pertaining to the calculation and apportionment of general average claims, where they shall be recognised and enforced by Indonesian courts pursuant to article 724 of the Indonesian Commercial Code.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Indonesia is not a contracting party to the 1970 Hague Evidence Convention. These procedures were initially regulated in a cooperation scheme under 2018 MOFA-SC MOU, which expired in February 2023. The 2018 MOFA-SC MOU regulated that foreign courts may request assistance from Indonesian courts to obtain the testimony of witnesses located in Indonesia. Such requests for judicial assistance were made in the form of letters rogatory, where the Ministry of Foreign Affairs assisted foreign courts in the exchange of letters rogatory through diplomatic channels to the Supreme Court, which would forward the letters to the Indonesian courts for their follow-up. However, there is no clarity as to whether the 2018 MOFA-SC MOU has been extended.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (the Arbitration Law) is not based on the UNCITRAL Model Law. There has been no formal proposal to amend the Arbitration Law and incorporate provisions of the UNCITRAL Model Law. Discussions surrounding this matter have largely been academic.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Pursuant to article 1 of the Arbitration Law, an arbitration agreement must be made in writing. It may be in the form of an arbitration clause within a written contract or, if the arbitration agreement is concluded after a dispute has arisen, in a separate written agreement to arbitrate. In cases where the parties cannot sign the separate written agreement, the arbitration agreement must be executed in notarial deed form (article 9(2) of the Arbitration Law). Article 9(3) of the Arbitration Law imposes formal requirements for a separate written agreement to arbitrate, which must contain:

- the issue or issues in dispute;
- the full names and places of residence of the parties;
- the full name and place of residence of the arbitrator or arbitral tribunal;
- the place where the arbitrator or arbitral tribunal will make decisions;
- the full name of the tribunal secretary;
- the time limit of dispute resolution;

Read this article on Lexology

- a statement of intent from the arbitrator; and
- a statement of intent of the disputing parties to bear all costs required for dispute resolution through arbitration.

Failure to fulfil the above formal requirements shall render the arbitration agreement null and void. There is no similar formal requirement with respect to an arbitration clause.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of an agreement on the number and method of appointing arbitrators in the arbitration agreement or the arbitration rules, article 13 of the Arbitration Law provides for the chief of the relevant district court to appoint the arbitrator or tribunal. The Arbitration Law provides the default mechanism to appoint a sole arbitrator or the three arbitrators constituting a tribunal. In practice at the Indonesian National Arbitration Board (BANI), if the number of arbitrators is not regulated in the arbitration agreement, the claimant, in its request for arbitration, may propose the number of the arbitrators, which must be agreed by the respondent.

For arbitration agreements providing for a sole arbitrator, the chief of the relevant district court can appoint the sole arbitrator if the parties are unable to designate the person within 14 days of the claimant notifying the respondent of the dispute. If the arbitration agreement provides for three arbitrators, each of the parties will appoint one arbitrator and the two arbitrators must appoint a third and presiding arbitrator. If they fail to do so, the chief of the relevant district court can appoint the third arbitrator.

Appointment of an arbitrator can only be challenged within 14 days of his or her appointment by way of a written objection filed to the other party and to the arbitrator concerned. Article 22 of the Arbitration Law provides that the appointment of an arbitrator can be challenged based on sufficient reasons and authentic evidence giving rise to justifiable doubts as to the arbitrator's independence or impartiality. An appointment can also be challenged if a party can prove that the arbitrator has a family, financial or work relationship with the other party or its attorneys. There is no restriction on the right to challenge an arbitrator appointment.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

Article 12 of the Arbitration Law establishes that arbitrators must be at least 35 years old and have at least 15 years of experience in their field of expertise. These requirements have been subject to criticism owing to the vagueness of the benchmark for competence and the rationale behind a minimum age restriction, unnecessarily limiting the pool of qualified young arbitrators. BANI has its own pool of over 100 arbitrators consisting of Indonesian and foreign nationals.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Article 36 of the Arbitration Law stipulates that, by default, arbitrations under Indonesian law are to be documents-only proceedings, and an oral hearing may be held only with the approval of the parties or if the tribunal deems it necessary. Article 48 of the Arbitration Law imposes a 180-day time limit on the arbitral proceedings, which may be extended as necessary and with agreement of the parties. In the absence of an agreed procedure, the arbitration shall be conducted in accordance with articles 38 to 48 of the Arbitration Law, which largely mirrors the civil court procedure but with greater flexibility afforded to the arbitrators.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Article 11(2) of the Arbitration Law precludes courts from intervening in any dispute subject to an arbitration agreement. Notwithstanding this, some district courts still entertain cases subject to an arbitration agreement. This was the case in the *Himpurna* dispute in 1999, where the Central Jakarta District Court issued an injunction to suspend an ongoing UNCITRAL arbitration case despite the lack of authority under the Arbitration Law.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators are empowered to grant interim relief pursuant to article 32(1) of the Arbitration Law, namely to regulate the order of proceedings, including granting the attachment of assets, ordering the deposit of goods to a third party or ordering the sale of perishable goods. However, the Arbitration Law does not provide for court-ordered interim measures or enforcement mechanisms for interim awards. Thus, the parties do not have recourse to the Indonesian courts to obtain or enforce such measures.

Award

30 | When and in what form must the award be delivered?

An award rendered in Indonesia must be delivered in writing with a header that states 'for the sake of Justice based on belief in the Almighty God', pursuant to article 54 of the Arbitration Law. An award must also contain:

- the case title;
- a brief summary regarding the background of the dispute;
- the positions of the parties;
- the full names and addresses of the arbitrators;
- the reasoning and conclusion of the arbitrators resulting in a specific order or instruction; and

- any dissenting opinion.

Failure to fulfil any of the above requirements shall render the award unenforceable.

Appeal

31 | On what grounds can an award be appealed to the court?

An award is final and binding and may not be subject to appeal, cassation or review (article 60 of the Arbitration Law). Nevertheless, a party may request the relevant district court to set aside an award based on the grounds of article 70 of the Arbitration Law (ie, false or forged letters or documents submitted in the arbitration hearings, discovery of material documents intentionally concealed by a party after the award is rendered or where an award was rendered as a result of fraud committed by one of the parties to the dispute). The judgment on the setting aside may be appealed to the Supreme Court, which will make a final decision.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Pursuant to article 59 of the Arbitration Law, domestic awards must be registered within 30 days to the district court of the respondent's domicile and requested with an enforcement order. Awards that have been signed by the chief of the district court with an enforcement order shall be enforced in accordance with the procedure for enforcing final and binding court judgments. An Indonesian court can refuse the enforcement of a national award if the underlying arbitration agreement is absent or invalid, the dispute is not commercial in nature, the dispute cannot legally be resolved through arbitration (eg, family law matters and criminal offences) or the award contradicts public policy in Indonesia (article 62(2) of the Arbitration Law). A decision refusing the enforcement of a foreign award may be challenged directly to the Supreme Court for cassation.

The enforcement of foreign awards in Indonesia is regulated by articles 65 to 69 of the Arbitration Law and Supreme Court Regulation No. 1 of 1990 regarding the Procedure for the Enforcement of Foreign Arbitral Awards (PERMA 1/1990), which is the implementing legislation of the New York Convention in Indonesia. Enforcement of foreign awards must be pursued before the Central Jakarta District Court, and the decision to enforce a foreign award may not be subject to appeal or cassation. Enforcement of foreign awards can be refused pursuant to article 66 of the Arbitration Law if the award:

- was rendered in a country not bound by any bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards with Indonesia;
- does not fall within the scope of commercial law under Indonesian law; or
- contradicts public policy in Indonesia.

In addition, Indonesian courts have directly applied the grounds to refuse enforcement provided in article V of the New York Convention, but it is not possible to identify a consistent approach taken by Indonesian courts in dealing with the issues enumerated therein. For example, in assessing the rights of the party to present its case and whether there is any

irregularity in the procedure during enforcement proceedings, Indonesian courts tend to apply Indonesian laws instead of looking at the law of the seat. In *Trading Corporation of Pakistan Limited v PT Bakrie and Brothers* (Case No. 64/Pdt/G/1984/PN.Jkt.Sel), the South Jakarta District Court refused to enforce an award rendered in London, reasoning that the tribunal failed to hear both parties adequately pursuant to the requirement under Indonesian law. Indonesian courts also conduct similar assessments of Indonesian laws when refusing enforcement based on violation of Indonesian public policy under article V(2)(b) of the New York Convention. The only definition of Indonesian public policy is found in article 4(2) of PERMA 1/1990, which states that 'An *exequatur* (enforcement order) shall not be granted if the award violates the fundamental basis of the entire legal system and society in Indonesia (public order).' This broad definition of Indonesian public policy renders any incompatibility with mandatory provisions of Indonesian law or Indonesia's national interests as a ground to refuse enforcement under article V(2)(b) of the New York Convention. In practice, this definition gives Indonesian courts considerable discretion to take an expansive approach to what constitutes violation of public policy (eg, violation of the prevailing laws and regulations in Indonesia), harm to national interests (eg, harm to the national economy) or a violation of Indonesian sovereignty.

Costs

33 | Can a successful party recover its costs?

Indonesia does not currently have regulations pertaining to cost recovery or third-party funding for arbitration. The BANI Rules are silent on these matters. They may be governed by the arbitration rules selected by the parties.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The main alternative dispute resolution (ADR) methods in Indonesia are mediation, adjudication and conciliation, with mediation being the most popular. Most Indonesian parties attempt to settle disputes amicably through discussion and negotiation without a particular ADR framework. ADR is commonly used in sectors such as construction and mining. Construction disputes are often settled through adjudication, but there is currently no formal adjudication mechanism or regulation in Indonesia.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Court-annexed mediation is mandatory at the start of court proceedings, where each court maintains a list of approved mediators to be appointed if the parties do not appoint one.

Mediation held in the court premises using a mediator provided by the court is free, where the mediator is typically another judge not sitting in the case concerned. The procedure for court-annexed mediation follows the procedure set out in Supreme Court Regulation No. 1 of 2016 on Mediation in Court Procedure.

Article 45 of the Arbitration Law requires arbitrators to attempt an amicable settlement of the parties' dispute at the beginning of the arbitration. However, the Arbitration Law does not further specify the procedure or time limit for such amicable settlement. This is usually at the discretion of the arbitrator and the willingness of the parties to settle the dispute amicably. Mediation is also encouraged before resorting to litigation or arbitration, although there is no mechanism to compel mediation during the proceedings.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

On 31 March 2023, the President of Indonesia enacted Law No. 6 of 2023 on the Stipulation of Government Regulation No. 2 of 2022 in Lieu of Law No. 11 of 2020 on Job Creation into Law (Law 6/2023). Law 6/2023 was enacted following Constitutional Court Decision No. 91/PUU-XVIII/2020 (CC Decision 91/2020), which found that the formation of Law No. 11 of 2020 regarding Job Creation (Law 11/2020) was not in line with the Constitution and was not in accordance with the procedure for enacting statutory regulations. CC Decision 91/2020 further rendered that Law 11/2020 would become permanently unconstitutional if the legislators did not make amendments within two years after CC Decision 91/2020 was pronounced. Law 6/2023 was enacted to revoke and replace Law 11/2020 following CC Decision 91/2020. Nevertheless, a number of parties, mainly labour unions and college students, have objected to the enactment of Law 6/2023 and have demanded its revocation.

In the context of civil proceedings, the Central Jakarta District Court recently rendered a controversial decision, ie, Central Jakarta District Court Decision No. 757/Pdt.G/2022/PN Jkt.Pst. The case began with a lawsuit filed by a small Indonesian political party, the Just and Prosperous People's Party (Prima), against the General Elections Commission (KPU) on 8 December 2022. In its lawsuit, Prima claimed that it was disadvantaged by the KPU decision that Prima was not qualified to contest the 2024 general elections. Prima asked

the Central Jakarta District Court to order KPU to halt its ongoing preparations for the 2024 elections and restart the process approximately two years and fours months from the date the court decision was read.

The panel of judges granted Prima's lawsuit in its entirety, a controversial decision, given the prospect of delayed elections. The KPU appealed the decision to the Jakarta Capital Region High Court, which granted the appeal and stated that the Central Jakarta District Court lacked the authority to try and adjudicate the case. The decision of the Jakarta Capital Region High Court annulled the Central Jakarta District Court Decision, so the 2024 elections look set to proceed as planned.

As of this writing, there is no proposal for dispute resolution reform.

Mahareksha S Dillon	maharekshadillon@ssek.com
Joseph Hendrik	josephhendrik@ssek.com
Talitha A Ekadhani	talithaekadhani@ssek.com

14th Floor Mayapada Tower I, Jl Jend. Sudirman
Kav 28, Jakarta 12920, Indonesia
Tel: +62 21 521 2038
www.ssek.com

Read more from this firm on Lexology

Read this article on Lexology

Israel

Alon Pomeranc and Reut Beitz

Lipa Meir & Co

RETURN TO CONTENTS

Summary

LITIGATION	339
Court system	339
Judges and juries	339
Limitation issues	340
Pre-action behaviour	340
Starting proceedings	340
Timetable	341
Case management	341
Evidence – documents	341
Evidence – privilege	341
Evidence – pretrial	342
Evidence – trial	342
Interim remedies	342
Remedies	342
Enforcement	342
Public access	343
Costs	343
Funding arrangements	343
Insurance	343
Class action	344
Appeal	344
Foreign judgments	344
Foreign proceedings	345
ARBITRATION	**345**
UNCITRAL Model Law	345
Arbitration agreements	345
Choice of arbitrator	345
Arbitrator options	346
Arbitral procedure	346
Court intervention	346
Interim relief	346
Award	347
Appeal	347
Enforcement	347
Costs	347
ALTERNATIVE DISPUTE RESOLUTION	**347**
Types of ADR	347
Requirements for ADR	348

Read this article on Lexology

MISCELLANEOUS 348

Interesting features 348

UPDATE AND TRENDS 348

Recent developments and future reforms 348

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Israeli civil court system is comprised of three instances. Magistrate courts are trial courts. Magistrate courts serve as courts of first instance for most civil disputes, with subject matter jurisdiction of claims in which the sum claimed is not higher than 2.5 million shekels and some real estate cases. A single judge hears cases in the magistrate courts.

The District courts are intermediate appellate courts. They have appellate jurisdiction over magistrates' courts and have original jurisdiction in monetary claims exceeding 2.5 million shekels and disputes over land ownership (typically with one judge hearing the case). In addition, the district court has jurisdiction in certain matters defined by the law, including real estate ownership disputes, certain corporation matters, bankruptcies and companies' liquidations proceedings, and administrative proceedings. District courts have residual jurisdiction over civil cases that the magistrate courts do not cover.

The Tel Aviv and Haifa District Courts each have a specialised economic division. These Economic courts have exclusive subject matter jurisdiction over financial matters such as derivatives disputes. Special courts include traffic, labour and local affairs courts. Religious courts have exclusive jurisdiction in matters of personal status, such as marriage and divorce.

Israel's Supreme Court is the ultimate appellate jurisdiction nationwide. The Supreme Court is the final court of appeals and a High Court of Justice (HCJ). As the High Court of Justice (Bagatz), the Supreme Court is hearing primarily administrative and constitutional petitions for judicial review of executive action and legislation.

The Supreme Court consists of 15 Justices and two Registrars. The President of the Supreme Court heads the Israeli judicial system. Generally, the Supreme Court sits in panels of three. However, a single Justice may hear certain matters, such as interlocutory applications, temporary orders, and applications for leave to appeal.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Professional judges comprise Israeli civil courts, and there is no jury system. The legal system is adversarial. The passive role of the judge in the adversarial system grants the

parties significant control over litigation management. Yet, in practice, Israeli judges have a more active role.

Where a civil claim is brought in the court, the procedural rules governing such claims are found in the civil procedure regulations. Recently, these rules of procedure underwent a massive reform. The new regulations entered into effect in 2021, detailing the rules for conducting court proceedings. The new Israeli rules of civil procedure formally express the trend toward more robust judicial activism and reflect the managerial role of judges. Under the new rules, judges formally received broadened authority to conduct legal proceedings efficiently and justly to resolve the conflict between the parties quickly. For instance, the pretrial stage allows the judge significant involvement in the process. During pretrial, the judge can cross-examine witnesses or the parties themselves to resolve the case at that stage. Also, in the trial, during cross-examination of witnesses, the judge may ask witnesses questions. The new rules formalise the common practice of judges who offer settlement proposals to the parties.

Limitation issues

3 | What are the time limits for bringing civil claims?

Generally, civil claims have a seven-year statute of limitations; in a case of a claim relating to land – 25 years. The parties may contractually agree on a more extended or shorter limitations period for matters other than real property, but at least six months.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Generally, there are no pre-action conduct requirements before commencing a commercial lawsuit. Administrative petitions require the exhaustion of remedies with the relevant agencies before filing the petition.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings commence when the plaintiff submits a statement of claim to the court. The statement of claim, along with a summons to court, is served to the defendant.

The Israeli courts are under a heavy workload. The workload affects the management of the cases and their duration, which normally takes several years to be fully conducted. Some tools to alleviate the burden in courts are mandatory mediation in most cases submitted to magistrates' courts, attempts to reach settlements and referral of disputes to arbitration.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The statement of claim and a summons is served to the defendant. Generally, the defendant must serve an answer within 60 days, and the plaintiff may serve a reply to the answer within 14 days. After the last pleading is submitted to Court, generally, the parties exchange demands for the disclosure and written Interrogatories.

Usually, pretrial hearings are scheduled according to the judge's calendar pursuant to the submission of the last pleading and following disclosure.

Case management

7 | Can the parties control the procedure and the timetable?

The parties have limited control over procedures and timetables. Generally, the timetable is set by the regulations and the court's orders. Nonetheless, the courts tend to grant time extensions more liberally when the parties reach procedural agreements concerning time extensions.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Parties are bound to full mutual disclosure of the documents that are part of their claim. During discovery, each party discloses to the other party the records and correspondence relevant to the case in its possession, custody or control. Following these requests and responses, motions are submitted concerning the preliminary proceedings under a strict timetable before the first pretrial hearing.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Privileged documents, such as attorney-client communications or materials prepared in anticipation of litigation, are not presented to the other party. Yet, in the discovery affidavit, it is customary to furnish their existence and indicate that these documents are privileged. The client may waive the confidentiality of attorney–client communications protected by the attorney-client privilege.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

In most cases, instead of oral testimony, the witnesses (including experts) submit their testimony in the form of a written affidavit (or a written expert opinion). The witnesses and experts are then subjected to cross-examination in court. Following a recent civil procedure reform (2021), preference will be given to hearing oral evidence.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Instead of oral testimony, the witnesses (including experts) often submit their testimony in a written affidavit (or a written expert opinion). The witnesses and experts are subject to cross-examination in court. Following the recent civil procedure reform, preference is given to hearing oral summations and evidence and direct examinations. The court decides whether witnesses shall give oral evidence or file affidavits. In most cases, witnesses submit affidavits that serve instead of oral testimony. The affidavits (or expert witness written opinion), including their appendices, serve as evidence. The opposing party may object to the admissibility of documents attached to the affidavits or submitted as part of cross-examination if these documents were not disclosed during the preliminary proceedings.

Interim remedies

12 | What interim remedies are available?

Interim remedies are available for parties, including temporary restraining orders, preliminary injunctions and prejudgment seizures. Typically, an interim remedy is issued to maintain the status quo when the lawsuit is filed until a final decision is made on the merits to ensure the implementation of the judgment if the permanent remedies are granted.

Remedies

13 | What substantive remedies are available?

Remedies may include enforcement of contracts, damages and declaratory relief.

Enforcement

14 | What means of enforcement are available?

The Law Enforcement and Collection System Authority is responsible for enforcing judicial decisions.

If a court decision is disobeyed, the court may issue a contempt order against that party. It should be noted that contempt orders are usually not applicable with respect to monetary verdicts.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Generally, court hearings are open to the public. In certain circumstances, court hearings are held behind closed doors (eg, where specific concerns about disclosure of trade secrets or other sensitive information exist or to maintain national security, etc).

Decisions and judgments may be accessible to the public online. If a third party wishes to access court files, they may submit a request detailing its reasoning for inspecting the file.

Costs

16 | Does the court have power to order costs?

Generally, prevailing parties can recover court costs and attorney's fees from the opposing side. The winning party may submit proof of its actual, reasonable expenses (e.g., fee agreements and receipts) for reimbursement. Courts have broad discretion to decide the amount of costs. At the beginning of the proceeding, the defendant may request the court to order the plaintiff to deposit collateral for expenses.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

There is flexibility in setting fee agreements between lawyers and their clients, including 'no win, no fee' or other types of contingency or conditional fee arrangements. Some areas of law set limitations or caps on such arrangements. Lawyers are barred from paying court fees or giving loans to their clients. Third-party financing of claims is permissible.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance is available to cover legal costs. Terms vary by insurance policy coverage.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions are available for litigants with similar claims and are common in banking, securities, insurance, environment, antitrust and consumer protection. Limited causes of action are available for litigants against the state, such as in cases of tax overcharge..

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Cases that begin in the magistrate courts can be appealed as of right to the district courts. Decisions by the district courts can be appealed to the Supreme Court.

When sitting as an appellate court, the Supreme Court hears appeals as of right and applications for leave to appeal. It primarily hears appeals from the final judgments of district courts sitting as trial courts and appeals on leave from final decisions of district courts sitting as appellate courts. Leave to appeal is generally granted when the question is general, beyond the applicant's case, or when a substantial injustice has occurred.

It is worth noting that courts can dismiss an appeal without hearing the other party.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The Foreign Judgments Enforcement Act (FJEA) governs the recognition and enforcement of foreign judgments in Israel. The FJEA provides for separate procedures for recognition of a foreign judgment: declaration of the foreign judgment as an enforceable judgment, direct recognition, and indirect (incidental) recognition.

Under the FJEA, a foreign judgment is eligible for enforcement if the following requirements are met: the foreign judgment must be rendered by a court of competent jurisdiction according to the laws of the state of origin; the judgment must be final; the obligation imposed by the judgment must be enforceable according to Israeli law; the content of the judgment must be compatible with public policy; and the judgment must be enforceable in the state of origin.

The enforcement of foreign judgments is subject to reciprocity. This means that a foreign judgment shall not be declared enforceable if entered in a state under the laws of which judgments entered by Israel courts are not enforceable. This requirement has been interpreted by Israeli courts as 'potential of enforcement.' The court may, however, on application by the Israeli Attorney General, enforce a foreign judgment even where there is no reciprocity.

The defendant may raise the following defenses against the enforcement of a foreign judgment:

- the judgment was obtained by fraud;
- the defendant was not given a reasonable chance to bring a defense before the foreign court;
- the judgment was given by a court with no jurisdiction over the case according to Israeli private international law;
- the existence of inconsistent judgments on the same subject-matter and between the same parties; or
- at the time that the action was brought in the foreign court, a lawsuit on the same subject-matter between the same parties was pending before an Israeli court.

Israel has bilateral treaties with several countries related to the enforcement and recognition of foreign judgments.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Israel is a signatory to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. It provides apostille services and recognises legal documents from foreign countries that are party to the convention, which were authenticated according to the Convention.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Israeli Arbitration Act is primarily based on British law, not the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The Israeli Arbitration Act requires an arbitration agreement to be in writing. The writing requirement can be satisfied as a provision in a general agreement. When the parties' intent to resolve the disputes through arbitration is clear, courts shall enforce the arbitration provision.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration clause is silent on the arbitrator's identity, and the parties disagree, they can request the competent court to appoint a single arbitrator.

The court may remove an arbitrator if the arbitrator is unworthy of trust (eg, due to a conflict of interests); the arbitrator's conduct during the arbitration distorts justice, or the arbitrator cannot fulfill her role.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The court appoints the arbitrator unless the parties agree on the arbitrator's identity. Courts will often appoint a retired judge or an esteemed lawyer who is qualified to adjudicate the matter.

Israeli Arbitration establishments have 'pools' of arbitrators, and the establishment's president typically appoints an arbitrator from the arbitrator's list.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Act sets default rules which exempt the arbitrator from the civil procedure rules, substantive law and evidence rules. The arbitrator should detail his reasoning. It is customary to require the arbitrator to adhere to the substantive law in an arbitration clause.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, courts do not intervene during an arbitration except in specific circumstances, such as when the parties request to remove the arbitrator.

Courts have auxiliary powers to assist the arbitrator in areas such as the invitation of witnesses, contempt of court against witnesses, collection of evidence, foreclosure of assets, temporary restraining orders and interim relief.

If a party addresses the court during a pending arbitration, the arbitration proceedings are not ceased unless the court instructs otherwise.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

The arbitrator may sometimes grant interim relief; or request the competent court to use its auxiliary powers to grant interim relief.

Award

30 | When and in what form must the award be delivered?

The arbitration award must be in writing and signed by the arbitrator.

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitration award can be canceled as follows: ten statutory grounds allow the court to revoke an arbitration award, including lack of authority, lack of reasoning (when applicable), the award contradicts public policy, the arbitrator was not lawfully appointed and due process considerations.

The parties may also agree that an appellate arbitrator will hear an appeal.

If the arbitration agreement or clause stipulated a right to appeal to court, the parties might request it where a fundamental error in applying the law caused grave injustice.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A domestic award can be enforced when submitted by the winning party to the competent court for approval and the other party does not submit a leave for cancellation or an appeal.

A foreign award may be approved according to the New York Convention, which was incorporated into domestic law.

Costs

33 | Can a successful party recover its costs?

A successful party can recover its costs. The arbitrator is entitled to determine costs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The new Israeli rules of civil procedure incorporate alternative dispute-resolution procedures into the legal process. The referral of cases from the court system reflects the judicial attempt to decrease case load and minimise litigation costs. The most common alternative dispute resolution (ADR) processes in Israel are mediation and arbitration.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Commonly, the court asks the parties to consider ADR. In most cases, the civil procedure regulations set forth a mandatory mediation meeting by a court-appointed mediator before the case's first hearing. However, if such a meeting is unsuccessful, the court cannot compel the parties to continue participating in the ADR process.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Israel is considered a mixed legal system of civil law and common law. This is evident, for example, in the combination of codified and precedent-based laws. Under the binding precedent principle, a precedent ruled by the Supreme Court binds every court except the Supreme Court. A ruling by a District court guides the Magistrate courts.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The new Israeli rules of civil procedure aim to help the court conduct the trial while maintaining a proper and fair judicial system. The rules seek to achieve the following goals: to bring about the simplification and unification of legal procedures; to root out barriers that cause prolonged court hearings; to bring about mutual disclosure and complete transparency between the parties before and during the filing of a claim; to bring about a balance between the needs of the litigants and the consideration of unrepresented litigants; to promote accessibility to the judicial process; and to ensure a proper and fair procedure and prevent the waste of valuable judicial time. The new rules emphasise fair trials, public access and prompt dispute resolution time.

The new civil procedure rules have made the legal process more strategic and structured. On top of this, essential substantive principles that judges employ such as good faith and reasonableness – allow them broad discretion under Israeli law.

Alon Pomeranc pomeranc@lipameir.co.il
Reut Beitz reut@lipameir.co.il

2 Weizmann St, Tel-Aviv 6423902, Israel
Tel: +972 3 5070600
https://lipameir.co.il

Read more from this firm on Lexology

Read this article on Lexology

Japan

Akira Tanaka and Kazuroo Shiraishi
Anderson Mōri & Tomotsune

RETURN TO CONTENTS

Summary

LITIGATION	308
Court system	308
Judges and juries	308
Limitation issues	308
Pre-action behaviour	309
Starting proceedings	310
Timetable	310
Case management	311
Evidence – documents	311
Evidence – privilege	311
Evidence – pretrial	311
Evidence – trial	312
Interim remedies	312
Remedies	312
Enforcement	313
Public access	313
Costs	314
Funding arrangements	314
Insurance	314
Class action	315
Appeal	315
Foreign judgments	316
Foreign proceedings	316
ARBITRATION	**317**
UNCITRAL Model Law	317
Arbitration agreements	317
Choice of arbitrator	317
Arbitrator options	317
Arbitral procedure	317
Court intervention	318
Interim relief	318
Award	318
Appeal	318
Enforcement	318
Costs	319
ALTERNATIVE DISPUTE RESOLUTION	**319**
Types of ADR	319
Requirements for ADR	320

Read this article on Lexology

MISCELLANEOUS 320
Interesting features 320
UPDATE AND TRENDS 321
Recent developments and future reforms 321

LITIGATION

Court system

1 What is the structure of the civil court system?

In Japan, all judicial power is vested in the Supreme Court and the lower courts, such as the high courts, district courts, family courts and summary courts. The courts are the final adjudicators of all legal disputes. There are about 3,800 judges in Japan. Summary courts have jurisdiction over proceedings where the contested amount is not more than ¥1.4 million. The district courts will hear appeals from the summary courts and as the court of first instance for all matters with a value above ¥1.4 million and those dealing with real estate. The family courts have jurisdiction to hear non-monetary family law claims. Appeals from the district and family courts are heard by the high courts. In addition to the existing eight high courts, the Intellectual Property High Court was established as of 1 April 2005. Finally, the Supreme Court hears appeals on certain matters from the high courts. There is no specialist commercial or financial court other than the Intellectual Property High Court. Although the Tokyo District Court and the Osaka District Court have divisions that specialise in commercial cases or intellectual property cases, such a division is merely one of the divisions of the Tokyo District Court or the Osaka District Court and is not an independent district court that has been established or formed exclusively by a special law.

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

Japan has no jury system for civil proceedings. Judges analyse the facts, apply the law and issue judgments. In civil proceedings, judges have to rely on the factual information provided to the court by the parties and will not, as a rule, collect information themselves. They do not, therefore, have an inquisitorial role, but they are not passive either, as they will evaluate all arguments and all the evidence before them. A filed lawsuit is allocated to one of the divisions of the court at its sole discretion. It is practically impossible for the parties to request for a change of the judges in charge, unless such judges are prohibited from examining the case pursuant to the Code of Civil Procedure (eg, a judge who is the spouse of one of the parties).

Limitation issues

3 What are the time limits for bringing civil claims?

As a general rule, contract claims are time-limited to 10 years. However, contract claims arising from commercial transactions are limited to five years. Tort claims are limited to 20

Read this article on Lexology

years from the occurrence of the event giving rise to the claim, or a limitation period of three years from the time of knowledge of the damage and of the identity of the party responsible for said damage (whichever period ends first). In addition, there are various shorter limitation periods for certain specific claims under the Japanese Civil Code, such as two years in the case of accounts receivable related to movable assets.

Time limits can be suspended by a court action, attachment and provisional attachment or provisional disposition as well as by acknowledgement of the claim. Following suspension, the above-mentioned limitation periods will start to run anew from the time when the cause of such suspension ceases to exist.

In cases of a private claim (eg, to obtain payment), the limitation period will only be suspended if court action is taken within six months from demand for payment.

On 26 May 2017, an amendment bill to the Civil Code, which includes amendments to provisions concerning the statute of limitations, was finally passed by the Diet and enacted into law. The new law came into force on 1 April 2020. An outline of the amendments as it relates to the limitation period is as follows:

- As a general rule, contract claims from commercial transactions and contract claims from all other transactions will be time-limited to the earlier of five years from the time when the creditor comes to know of the possibility to exercise the claim or 10 years from the time when the claim becomes exercisable.
- Time limit for tort claims concerning damage to life or body will be extended. Specifically, such tort claims will be time-limited to the earlier of five years (currently three years) from the time when the victim or his or her statutory agent comes to know of the damage and the identity of the party responsible for said damage or 20 years from the time of tort.
- Various shorter limitation periods under the existing Civil Code, such as two years in the case of accounts receivable related to movable assets, will be abolished.
- In addition, the amendments will newly allow for suspension of time limits by an agreement in writing between the relevant parties. In principle, a one-year suspension from the time when such an agreement is made will be allowed. If such agreements are repeatedly made, suspension can be extended; however, such extension is limited to a maximum of five years from the original time limit.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There is no obligation to take any pre-action steps in Japan. While there is the advance notice system, which enables the exchange of allegations and evidence between prospective litigants in advance of the actual initiation of a lawsuit, it is rarely used. Although, under the advance notice system, the court may order a holder of documents to disclose relevant documents upon request from the claimant, such holder is not subject to penalties even if it refuses to do so without a justifiable reason. Another step available for a party to assist in the institution of a suit is a petition for preservation of evidence. Upon such a petition, if the court finds circumstances where, unless the examination of evidence is conducted in advance it will be difficult to use or collate the evidence, the court may conduct

an examination of the evidence. In situations where a party plans to file a certain type of lawsuit in which a certain kind of evidence might be easily falsified (eg, a medical malpractice lawsuit in which medical records are typically submitted to the court as evidence), courts also often accept such a petition to examine the evidence. Except for such cases, this procedure is not frequently used. In practice, the claimant usually sends a content-certified letter (notice where contents and delivery are certified by the post) through the post, which states the issue at cause and demands some action to be taken.

Interlocutory measures, which are designed to secure the enforceability of the judgment, are available under Japanese law. There are two types of interlocutory measures: provisional attachment (used to preserve the property at issue that belongs to the debtor for securing a monetary claim); and provisional disposition (used to preserve disputed property and to establish an interim legal relationship between the parties).

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are initiated by filing a complaint with the court that has jurisdiction to hear the claim. Depending on the size of the claim, appropriate stamps need to be attached to the formal complaint. The defendant is notified of the commencement of civil proceedings by receiving a summons and the complaint from the court. The court generally serves a summons and the complaint on the defendant approximately 10 days after the filing of the complaint. In general, Japanese courts, especially those located in big cities such as Tokyo and Osaka, deal with a lot of cases, and have some difficulty reading legal briefs and documentary evidence in detail. One of the proposals is that the courts substantially increase the number of judges, but the current court budget is not sufficient to realise this proposal. However, under the Act on the Expediting of Trials, the expediting of trials shall be achieved by enhancing the human resources of the courts, and the government must take the necessary financial measures required to achieve this purpose.

Timetable

6 What is the typical procedure and timetable for a civil claim?

After the filing of the complaint, the court clerk will examine whether the correct form for the complaint has been used and whether the appropriate amount of stamps have been affixed on the complaint (the amount of the stamps depends on the amount of the claim). The clerk will then contact the plaintiff or the plaintiff's attorney and, depending on his or her availability, will decide the date of the first oral hearing. The court will then serve a summons and the complaint on the defendant. The first oral hearing will typically be held 40 to 50 days after the filing date. Before the hearing, the defendant must file a defence, which will deny or accept each claim and factual information relied upon in the complaint. At each key event in the proceedings (particularly after the witness examination), the judge may ask the parties whether they have an intention to settle the case.

Following the first hearing, there will be a court hearing of (on average) 10 to 15 minutes once a month or once every few months. In addition to an oral hearing, the judge may hold a preparatory court hearing, at which the judge and both parties will discuss the issues at hand for a relatively long time in chambers.

The examination and cross-examination of witnesses will follow. After this, each party will file its closing brief. The oral proceedings will then close and the court will issue its judgment. On average, judgment is rendered one-and-a-half to two years following the filing of the complaint.

Case management

7 | Can the parties control the procedure and the timetable?

The parties have no control over the procedure or timetable in a civil trial, but the judge will consider the parties' requests for changes to the procedure or timetable and may make changes to the procedure or timetable to the extent allowed by applicable laws.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no legal obligation to preserve documents for the purpose of pending or foreseeable litigation. However, a party's destruction of valuable documents related to pending or foreseeable litigation may lead the judge to find an adverse inference against such a party.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

No; the concept of 'privilege' in the context of document disclosure does not exist in Japanese law. In Japan, document disclosure is only intended for specific documents by means of a court's document production order.

Attorneys-at-law, patent attorneys, foreign attorneys licensed to practice in Japan, medical doctors, etc, are exempt from the obligation to submit documents containing confidential information disclosed by their clients. In addition, if the documents are related to matters concerning technical or professional secrets, a holder of such documents is exempt from the obligation to submit them.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

No. However, a judge often instructs a party that is requesting examination of a live witness to submit an affidavit of the witness prior to oral testimony.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Witnesses and experts give oral evidence, although a judge has discretion whether to hear the evidence. Documentary evidence can be presented to judges at the hearing or the preparatory hearing to be held once a month or once every few months.

Interim remedies

12 What interim remedies are available?

Interlocutory measures, which are designed to secure the enforceability of the judgment, are available under Japanese law. There are two types of interlocutory measures: provisional attachment (used to preserve the property at issue that belongs to the debtor for securing a monetary claim) and provisional disposition (used to preserve disputed property and to establish an interim legal relationship between the parties).

In addition, it is also possible in some cases to obtain an interim judgment, which is binding on the court (ie, the court that renders an interim judgment will be bound by the interim judgment when rendering the final judgment) but is not enforceable. The purpose of such interim judgment is to focus on particular issues in the proceedings and to prepare for the final judgment by first resolving some issues between the parties. However, the court has sole discretion to decide whether to issue an interim judgment, and in practice, Japanese courts seldom do so, except to admit international jurisdiction over the claims.

Remedies

13 What substantive remedies are available?

Actual but not punitive damages are the most common form of remedy under Japanese civil procedure. Various types of injunctions are also available.

Interest is payable on monetary judgments. In the event of a claim arising from a contractual obligation, the interest rate follows the contract rate. Otherwise, in general, the default interest rate will be 5 per cent, while for contract claims arising from commercial transactions, the default rate will be 6 per cent.

On 26 May 2017, an amendment bill to the Civil Code, which includes amendments to provisions concerning the default interest rate, was finally passed by the Diet and enacted into law. The new law came into force on 1 April 2020.

Under the amendments concerning the default interest rate, the default interest rate for contract claims arising from commercial transactions and for claims arising from other transactions or torts will be 3 per cent. However, the default interest rate will be reviewed every three years and may be amended by taking into consideration the past five years' average rate of interest on short-term loans. Unless otherwise agreed by the relevant

parties, the default interest rate at the time when the first interest accrues to the claim will continue to apply to the claim, even after the default interest rate is amended.

Notwithstanding the above, in the same way as under the existing Civil Code, if relevant parties agree to an applicable interest rate, such interest rate will apply to the contract claim, unless such interest rate violates laws and regulations that restrict excessive interest rates (eg, the Interest Rate Restriction Act).

Enforcement

14 | What means of enforcement are available?

There are different enforcement procedures for monetary and non-monetary claims. Monetary claims are enforced by attachment of the assets of the defendant. This is achieved by acquiring possession of the property for movable goods and, in the case of immovable goods, through a court declaration that the property in question is attached. The attached property will then be converted into money by way of auction. In the case of attachment of a claim against a third party, a garnisher may collect the claim by filing a lawsuit against the third party or may receive assignment of the claim with permission from a court.

For non-monetary judgments, enforcement can take various forms. The judgment ordering the party to transfer property can be realised by direct enforcement. The court or bailiff will seize the property in question and hand it to the plaintiff. A judgment that obliges someone to do something can be enforced by substitute performance at the expense of the defendant. An obligation not to do something can be enforced by indirect enforcement, that is, the imposition of fines until the defendant complies.

Japanese civil procedure does not provide for criminal sanctions for contempt of court in the event of non-compliance with the court's directions.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Oral hearings are held in public, except for cases where trade secrets need to be protected in relation to patent and other IP cases. Preparatory hearings and hearings for family cases are also generally held in private. Court documents are available to the public. Anyone can inspect court documents regardless of their relationship to the parties to the case, and a person who proves to have an interest in the case can take copies of those documents. If either party to the case needs to restrict such inspection from a third party, a petition should be filed in court on the ground that the documents contain trade secrets or material secrets regarding the personal (namely, private) life of the party.

Read this article on Lexology

Costs

16 | Does the court have power to order costs?

The court can order costs to be paid by one party to the other, but that does not cover attorneys' fees. In tort cases, the plaintiff can add a certain portion (usually 10 per cent) of attorneys' fees as part of the damage that it has suffered.

The judge assesses the costs. These will cover the cost of the stamps that need to be attached to a complaint and other costs admitted by the rules of the court, but will not cover the actual costs borne by the parties. The costs are assessed after either party makes a petition to fix the amount of costs.

Security for costs is only available in special cases, such as in lawsuits between shareholders and directors where the defendant asks the plaintiff to place a bond as security. This procedure is also available where the plaintiff does not have an office address or a residence in Japan, unless otherwise stipulated by an applicable treaty.

There is no new rule governing how courts rule on costs.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee' arrangements are not specifically prohibited under Japanese civil procedure law and the Law of Lawyers. However, lawyers' rules of ethics may be interpreted as being against such arrangements. In practice, 'no win, no fee' arrangements are rare in Japan. Conditional fee arrangements are not rare in Japan, especially for boutique firms dealing with only domestic cases. The parties may bring proceedings using third-party funding, but it may cause a problem under the Law of Lawyers if the third party takes a share of any proceeds of the claim. A defendant may share its risk with a third party, although such arrangements may be subject to insurance regulation.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

There is no insurance available to cover all or part of a party's legal costs incurred in relation to all types of litigation. Insurance for product liability, directors and officers or professional malpractice, etc, may cover legal costs for relevant litigation.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Previously under Japanese law, a class action was not allowed, and therefore each person had to be an individual plaintiff, although there was no restriction on the total number of plaintiffs named in one complaint. For example, hundreds of plaintiffs may file a complaint against a national or municipal government or a certain industry allegedly causing environmental problems or pharmaceutical side effects. In 2007, an amendment to the Consumer Contract Act introduced 'consumer organisation proceedings', which allowed certain qualified consumer unions and non-profit organisations to seek injunctions, for the benefit of the relevant consumers, against business operators to prevent them from performing unfair acts, such as soliciting for the execution of a consumer contract that contains an unfair provision.

On 4 December 2013, the Diet passed a bill that introduced a new class action system (the New System). This new Act on Special Civil Procedure for Collective Recovery of Consumers' Damage Act came into effect on 1 October 2016. The New System is aimed at providing remedies in respect of damages suffered by a considerable number of mass-market consumers. The New System consists of two stages. The first stage is a procedure to determine the common issues of law and fact between a business operator and the relevant class of aggrieved consumers (namely, whether the business operator is obliged to make payment to consumers). This first-stage procedure can only be filed by a 'specified qualified consumer organisation' (SQCO), and can generally only be filed against business operators that have privity of contract with the consumers on behalf of whom the procedure is filed (nevertheless, in cases of tort claims, certain business operators, such as those who solicited consumers to enter into contracts with other business operators, can be defendants even if they do not have privity of contract with the consumers). If the SQCO successfully obtains a declaratory judgment in its favour, the proceedings may continue to the second stage, which determines the existence and amount of the individual claims. The second stage is commenced by a petition filed by the SQCO, after which the SQCO will make an announcement encouraging consumers to join the second stage. After consumers join the proceedings, the court determines the existence and amount of the individual claims through a prompt and simple procedure. Claims that can be brought under the New System are limited to certain types of monetary claims resulting from a consumer contract, and do not include claims for compensation for life or bodily damage or for damage to property other than that which is the subject of the contract.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgments and decisions of the district court can be appealed to the high court and then to the Supreme Court. The grounds for appeal from the district court to the high court are that the first judge made an error in a factual finding or in the application of the law. The Supreme Court will hear appeals from the high court on grounds of error in interpretation of the law and other violations of the Constitution. In addition, violations of the civil procedure

Read this article on Lexology

rules, such as an error in jurisdiction, lack of reasoning, etc, will also give rise to a right of appeal to the Supreme Court. The parties may also file petitions to the Supreme Court, which gives the Supreme Court discretion to accept cases if the judgment being appealed is contrary to Supreme Court precedents or contains significant matters concerning the interpretation of laws and ordinances.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Japanese courts recognise foreign final and conclusive civil judgments for claims obtained in a foreign court and will issue an enforcement order provided that:

- the jurisdiction of such court is recognised under Japanese law or applicable international conventions;
- the defendant received due notice of the foreign proceedings or voluntarily appeared before the foreign court;
- such judgment or the proceedings at the foreign court are not contrary to public policy as applied in Japan; and
- reciprocity exists as to recognition by the foreign court of a final judgment obtained in a Japanese court.

If the enforcement order is rendered, it will be possible for the plaintiff to proceed with enforcement procedures against the defendant's assets just as they would be able to in the case of a Japanese domestic court judgment.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

There are two procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions. One is to request a Japanese court to provide judicial assistance and obtain evidence in accordance with the Convention Relating to Civil Procedure or bilateral international agreements. The Japanese court may examine a witness based on written questions annexed to a request from a foreign court via the Minister of Foreign Affairs. The other procedure is to take depositions at consular premises in accordance with the Consular Convention between Japan and the United States or the Consular Convention between Japan and the United Kingdom. Obtaining evidence for use in other jurisdictions in any manner that is not in compliance with international conventions is generally considered to constitute a violation of Japan's judicial sovereignty.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes. Japan enacted the new Arbitration Law on 1 March 2004 (the enactment date) based on the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The Arbitration Law requires that an arbitration agreement be in writing (article 13). Electronic records of agreements are deemed to be in writing.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The Arbitration Law has adopted the same rules as stipulated in the UNCITRAL Model Law. Most of the commercial arbitration institutions in Japan appoint an arbitrator from among the candidates listed on their own panel of arbitrators. In addition, parties are permitted to appoint an arbitrator who is not listed on the panel, subject to the rules of the individual commercial arbitration institutions.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Most of the commercial arbitration institutions in Japan have a candidate list that includes not only lawyers (such as attorneys-at-law, former judges and law professors) but also other experts, such as business experts and technical experts, and accordingly, this is generally sufficient to meet the various qualifications and needs of complex arbitration matters.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Law contains almost the same procedural rules as those of the UNCITRAL Model Law. It stipulates that the 'equal treatment principle' be the basic substantial rule of procedure (article 25). Besides this principle, parties are free to agree on procedural rules, subject to ensuring that there is no violation of public policy principles contained in the Arbitration Law. If the parties' agreement on the procedure is silent, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration in a manner it considers appropriate.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

In addition to the scope of intervention and jurisdiction stipulated by the UNCITRAL Model Law, the Arbitration Law has a set of concrete rules, that is, basic rules for hearing procedures, procedures to appeal arbitral awards, etc. According to these rules, district courts that exercise jurisdiction over a place of arbitration or to which parties have agreed shall have jurisdiction over the arbitration. Other than the appointment procedures of the arbitrator (including challenges and removal), the court does not have any power to intervene during an arbitration procedure. Its role is only to support the examination of evidence and witnesses upon the application of either party.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. The Arbitration Law introduced the possibility for arbitrators to grant interim relief. However, owing to the legislation being relatively new, it is not yet clear how interim relief will be enforced. Concrete enforcement procedures of the interim measures may be determined by future legislation or amendments to the Arbitration Law.

Award

30 | When and in what form must the award be delivered?

As stipulated in the UNCITRAL Model Law, the arbitral tribunal must render a reasoned award in writing and signed by the arbitrators. A copy signed by the arbitrators must be delivered to each party after the award date.

Appeal

31 | On what grounds can an award be appealed to the court?

No, there is no right of further appeal. The parties to the arbitration have a right to set aside the award only when certain specific events stipulated in the Arbitration Law occur (the events are identical to those in the UNCITRAL Model Law). In *Descente Ltd v Adidas-Salomon AG et al*, 123 Hanrei Jiho 1847 (2004), the court decided, obiter, that there are no grounds for setting aside an award other than those already contained in the Arbitration Law.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

As stipulated in the UNCITRAL Model Law, an arbitral award can be enforced when the relevant court recognises an award (article 45). Substantial requirements for recognition are almost the same as stipulated in the UNCITRAL Model Law. When the court recognises the award, the court renders an enforcement decision. With respect to the procedure for obtaining an enforcement decision, the Arbitration Law provides that the court may call

for oral arguments. In Japan, enforcement procedures have not generally been affected by changes in the political landscape.

Costs

33 | Can a successful party recover its costs?

The parties can decide to split costs by mutual agreement. The Arbitration Law states that the arbitral tribunal shall determine the allocation of actual costs based on the agreement of the parties. The scope of allocable and recoverable costs is determined by a mutual agreement between the parties or an applicable arbitration institution's rule, and may broadly include various types of costs as long as such costs are actually paid in relation to the arbitration procedure (article 49). When an agreement is silent on the subject, each party shall bear its respective costs with respect to the arbitration procedure. Unless otherwise agreed to by the parties, the arbitral tribunal may order the parties to deposit an estimated cost amount with the arbitral tribunal prior to the arbitration proceedings (article 48).

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

In the context of an international commercial transaction, arbitration would be the most popular type of alternative dispute resolution (ADR), although many Japanese parties still prefer to go to state court (eg, the Tokyo District Court). For domestic disputes, the preference for mediation and conciliation is very strong; furthermore, even Japanese arbitrators, unless experienced parties or counsel remind them otherwise, recommend the parties to settle without rendering an award.

Recently, new types of ADR have been introduced in Japan. For example, turnaround ADR has been created for the rehabilitation of companies suffering financial difficulties. This proceeding assists with the coordination between the financial creditors and debtors and is carried out under independent specialists; the participation of trade creditors is not required. In spite of the name, this proceeding does not necessarily involve the resolution of disputes.

In addition, financial ADR has also been introduced to assist in the resolution of disputes between financial institutions and customers. The characteristics of this ADR are that:

- a financial institution cannot refuse to participate in dispute resolution proceedings without a justifiable reason if a customer files a petition with a designated dispute resolution institution;
- a financial institution cannot refuse to give an explanation or to submit related documents without a justifiable reason if requested by a designated dispute resolution institution; and

- a designated dispute resolution institution may, at its discretion, make a special conciliation proposal, which the financial institution must accept unless it chooses to file a lawsuit.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

No, the parties do not have to consider ADR before litigation except in family cases and certain cases such as rent review. However, for particular types of cases, such as construction disputes and medical malpractice, if the courts find the case suitable for mediation and conciliation, they may suggest the transfer of the case to the court's special division for mediation and conciliation, where the courts have a list of experts in such technical fields.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The revised Code of Civil Procedure came into force on 1 April 2012. It introduced a new set of provisions stipulating the international jurisdiction of Japanese courts in civil and commercial matters. Considering the disparity in bargaining power, the revised Code of Civil Procedure provides special rules on jurisdiction over lawsuits relating to consumer contracts and employment relationships. With respect to lawsuits relating to consumer contracts, where a consumer files a lawsuit relating to a consumer contract against a company, Japanese courts will have jurisdiction if the domicile of the consumer at the time of the conclusion of the contract or at the time of filing the suit is Japan. On the other hand, a company can only file a lawsuit relating to a consumer contract against a consumer if the consumer is domiciled in Japan.

With respect to lawsuits relating to employment relationships, where an employee files a lawsuit relating to an employment relationship against his or her employer, Japanese courts will have jurisdiction if the place where the labour was supplied under the employment contract (or, if no such place is specified, the office that hired the employee) is located in Japan. On the other hand, an employer can only file a lawsuit relating to an employment relationship against an employee if the employee is domiciled in Japan.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

On May 18, 2022, the Code of Civil Procedure was partially amended with respect to several material aspects thereof (the Amendment), which may have an impact on the way dispute settlement processes are being handled. The main revisions are as follows:

Establishment of a system to conceal addresses and names

Under the previous Code of Civil Procedure, if a case record contained confidential information (eg, trade secrets), a party could file a petition to restrict access to that relevant part. However, the party could not proceed with the suit without revealing their name and address to the other party.

Effective 20 February 2023, the Amendment allows a party who is a victim of domestic violence or crime to proceed with civil proceedings without disclosing their name and address to the other party.

A party wanting to keep their name and address secret from the other party may file a petition with the court to keep the information confidential, and if granted, proceed without including such information in the documents being submitted. If there is a risk that keeping such information confidential would cause substantial disadvantage to the opponent and their ability to present arguments, the other party may, subject to the court's permission, inspect all or part of the confidential information.

Expanding the range of procedures that can be attended via web conferencing

Japan has already made considerable use of Web-based court proceedings, but the Amendment further expands the range thereof.

For example, where it was previously mandatory to appear in court in case of an oral hearing, the Amendment allows participation in such proceedings via web conference. In addition, it is now possible to settle a divorce in cases of personal status litigation and domestic relations arbitration via web conference.

These procedures are expected to be implemented gradually by approximately 2025.

Establishment of statutory trial period litigation procedures

With the consent of both parties, courts are now able to adjudicate certain cases in simplified proceedings rather than ordinary litigation. Such proceedings are concluded within six months of their initiation and a judgement is rendered by no later than one month thereafter; the whole process is concluded within seven months. Since an ordinary lawsuit typically takes about one to three years prior to reaching a judgment in the first instance, the new

process is significantly shorter. A party may, at any time following the commencement of this simplified proceeding, request to transfer the case to ordinary judicial channels.

A party may not appeal against a judgment reached pursuant to this simplified procedure. Any party dissatisfied with the judgment may object, and if so, the process re-commenced as a regular lawsuit.

These procedures are expected to become effective on 18 May 2026.

ANDERSON MŌRI & TOMOTSUNE

Akira Tanaka	akira.tanaka@amt-law.com
Kazuroo Shiraishi	kazuroo.shiraishi@amt-law.com

1-1-1 Otemachi Otemachi Park Building,
Chiyoda-ku, Tokyo 100 8136, Japan
Tel: +81 3 6775 1000
www.amt-law.com

Read more from this firm on Lexology

Read this article on Lexology

Liechtenstein

Matthias Niedermüller and Alexander Milionis
Niedermüller Rechtsanwälte | Attorney at Law

RETURN TO CONTENTS

Summary

LITIGATION	367
Court system	367
Judges and juries	368
Limitation issues	369
Pre-action behaviour	369
Starting proceedings	369
Timetable	370
Case management	371
Evidence – documents	371
Evidence – privilege	371
Evidence – pretrial	372
Evidence – trial	372
Interim remedies	373
Remedies	374
Enforcement	374
Public access	374
Costs	375
Funding arrangements	376
Insurance	376
Class action	376
Appeal	377
Foreign judgments	378
Foreign proceedings	379
ARBITRATION	**380**
UNCITRAL Model Law	380
Arbitration agreements	380
Choice of arbitrator	380
Arbitrator options	381
Arbitral procedure	381
Court intervention	382
Interim relief	382
Award	383
Appeal	383
Enforcement	384
Costs	384
ALTERNATIVE DISPUTE RESOLUTION	**384**
Types of ADR	384
Requirements for ADR	385

Read this article on Lexology

MISCELLANEOUS 385
Interesting features 385

UPDATE AND TRENDS 385
Recent developments and future reforms 385

LITIGATION

Court system

1 What is the structure of the civil court system?

The Principality of Liechtenstein is a hereditary constitutional monarchy on a democratic and parliamentary basis and is a civil law jurisdiction.

The laws governing dispute resolution are primarily the Code of Civil Procedure (CPC), the Jurisdiction Act (JA) and the Enforcement Act (EA). Non-contentious proceedings are governed by the special Act on Special Non-Contentious Proceedings in Civil Matters.

The organisation of the courts is governed by the Court Organisation Act. The civil courts all have their seat in the capital Vaduz. In general, there are three levels and only three civil courts in Liechtenstein.

- the Princely District Court (DC);
- the Princely Court of Appeal (COA); and
- the Princely Supreme Court (SC).

In addition, the Liechtenstein Constitutional Court is established as a separate instance to protect constitutional rights.

Also, in dispute resolution matters access to the following international courts of law is possible under certain requirements:

- EFTA Court in Luxembourg (equivalent to the European Court of Justice (ECJ) in the EU); and
- European Court of Human Rights in Strassbourg, France.

The DC is the first instance for all civil law and also criminal law matters and is composed of 15 single judges of which four are acting as investigating judges in criminal proceedings and two are mainly dealing with Foundation supervisory matters. Certain matters in simplified proceedings such as foreclosure, probate and guardianship cases, can also be handled by specially trained non-judicial officials of the DC who are bound by instructions of the judges. There are no juries in civil proceedings.

Both the COA and the SC are collegiate courts and consist of three, respectively two senates. Each senate of the COA is composed of three judges, ie, a senate chairman and two senior judges whereas the senate of the SC is composed of a senate chairman and four most senior judges.

Read this article on Lexology

There are not yet any special courts installed for specific matters however currently discussions are ongoing on a reform of the court system which also could include the implementation of special courts for Foundation law and Trust law.

The majority of the judges must have Liechtenstein citizenship. Also, traditionally the SC is composed of professors and experienced supreme court judges from abroad. The judges are selected by a selection committee composed of the Reigning Prince and members of the Parliament.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The civil proceeding is governed by certain principles which define the relationship between the court and the parties and their duties (principle of party disposition, principle of party presentation, investigation principle, principle of ex officio proceedings and duty of instruction). As opposed to the common law system the judge in a civil law system generally has a far more active role when it comes to taking the evidence.

The principle of party disposition gives the parties largely control over the lawsuit. The parties decide whether, when and to what extent civil proceedings shall be initiated, what the subject matter of the proceedings shall be and which evidence shall be taken but merely has to ascertain the truth based on the evidence presented by the parties. The parties also are obliged to present their evidence and the judge does not have a duty to ascertain facts on its own. In case corresponding facts have been alleged by a party, the judge may collect additional evidence that has not been requested by the parties. However, including documents and the hearing of witnesses is not permitted if both parties object to taking such evidence.

Also, the parties decide the way and point in time the proceeding shall end such as withdrawal, acknowledgement, settlement or court decision. Thus, the judge is bound by the motions of the parties and is barred from deciding on matters that go beyond the subject matter defined by the parties.

Due to the duty of instruction the judge is obliged to instruct the parties if their pleadings are unclear, incomplete or lack precision and give possibility for an improvement. Also, the judge is obliged to discuss the factual and legal pleadings with the parties and may not base the decision on any legal ground that the parties obviously were not aware of without giving the parties opportunity for making statements beforehand.

In some proceedings such as in foundation supervisory proceedings and non-contentious matters in general, the investigation principle applies which gives the judge largely control over the subject matter of the proceedings and in particular the ability to decide on evidence to be taken and to even go beyond the scope of applications of the parties when deciding on the matter.

Also, the court has to determine and apply the law *ex officio*. The principle of iura novit curia applies also in all proceedings but only with regards to domestic law. The courts also take into account foreign law, but in case foreign law applies the parties of the proceedings are

obliged to present the foreign law and submit evidence, eg, by presenting the statutory law or by expert witnesses.

Limitation issues

3 What are the time limits for bringing civil claims?

Liechtenstein law treats limitation periods as a matter of substantive law, not procedural law. The general limitation period is 30 years after a claim arises. However, for certain types of contractual claims, the limitation period is five years (eg, claims for delivery of goods or performance of work or other services in a trade, business or other enterprises, claims for rent, claims of employees etc.) or less (eg, three years for the right to challenge a testamentary disposition).

Claims for damages become time-barred within three years after the damaged party has become aware of the damage, the damaging party and the causal relation of both. For claims against a financial intermediary in connection with a financial services transaction, the absolute time limit is reduced to 10 years after the claim arises. In all other cases, the absolute limitation period is 30 years after the occurrence of the harmful event. In any event, however, if the damage is caused by a criminal offence punishable with imprisonment of more than three years, the limitation period for such claim is always 30 years.

Pre-action behaviour

4 Are there any pre-action considerations the parties should take into account?

In Liechtenstein, there is no compulsory conciliation proceeding necessary before the filing of a legal action or application.

Anyhow, a party may apply for a conciliation attempt and the summons of the opponent for this purpose. However, this is very unusual, entirely voluntary and only possible if the opponent resides in Liechtenstein. The nonappearance of the opponent has no consequences.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are initiated by filing a legal action or application with the DC, which includes an outline of the jurisdiction of the court, the set of facts on which the claim or application is based, the evidence that shall be taken to prove the facts and the relief sought. A legal outline is not required, however, in most cases, it is recommended to be included for clarification purposes.

Provided the court accepts the jurisdiction, the defendant is then notified by being served with the legal action or application *ex officio* after the court fees have been paid. If the defendant is not domiciled in Liechtenstein, service of the action and the claim documents

is regularly effected by a letter rogatory in civil matters via the competent court at the domicile of the defendant.

In case the civil proceeding is initiated by an application for an injunction which pursues the purpose of securing the claims, a different process applies.

Liechtenstein courts are widely known to be highly efficient and able to handle also high caseload of complex and demanding cases with international aspects. Also, they are known to have a very short overall duration of proceedings when compared with other jurisdictions.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

After the filing of the legal action the court the court fees have to be paid by the applicant. Thereafter the court serves the claim documents to the defendant and sets a date for the first oral hearing. At the first oral hearing, the defendant may raise formal objections (such as lack of jurisdiction) and apply for an order for a security deposit for costs in case the claimant is a foreign person or a legal entity.

After the security deposit has been made or it is clarified that no deposit applies, the court orders the defendant to provide a counterstatement to the claim.

Thereafter the court schedules a case management hearing where it is determined based on the submissions of the parties whose evidence shall be taken. The court also passes an order as to which evidence shall be taken.

The case is then heard in one or more oral hearings where the parties can present their arguments, witnesses are examined, and also expert opinions are obtained. If the judge holds that sufficient facts have been taken that allow a decision to be made, the judge closes the taking of evidence, potentially dismisses outstanding further evidence taking which it considers to be irrelevant and thereafter delivers the written judgment.

Generally, factual pleadings and new evidence may be put to the court by the parties until the closing of the oral hearing. The court however may refuse to take evidence in case the evidence has been negligently brought forward and if the taking would considerably extend the proceedings.

The duration of the taking of evidence in the first instance highly depends on the subject matter and the complexity of the case. If an extensive taking of evidence is required (eg, a large number of witnesses, hearing of witnesses abroad by letter rogatory, expert witness reports), the taking of evidence at the DC can be up to one year, in complex cases even longer.

Generally, a decision of the DC can be obtained within one year. The appeal proceeding before the COA usually would take three to six months. In case of a further appeal to the SC, a decision can also be expected within three to six months.

Case management

7 | Can the parties control the procedure and the timetable?

Generally, the judge has control over the case management and in particular on the sequence of taking the different evidence offered, when hearings shall take place and when the taking of evidence shall be closed and a decision be rendered. However, judges usually also try to accommodate the preferences of the parties in case they agree on certain conduct.

In case of delays in the case handling caused by the other party, applications for setting time limits for taking the evidence may be filed, which the judge has to decide upon based on the general procedural principles. In case of substantial delays in the case handling caused by the judge, the parties may apply with the supervisory judge for setting deadlines or file disciplinary complaints.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Other than in several common law jurisdictions, Liechtenstein law neither knows any discovery proceedings nor a duty of parties to preserve evidence in view of an upcoming or pending trial. Only certain licensed entities have an obligation to maintain and archive files for a certain period, however without being obliged to generally disclose them to the opposite party. Thus, each party generally has to ensure to have its own documentation relevant to the claim.

Parties are also not obliged to present documentation that may be contrary to their interest. This rule is limited by the principle that each party is obliged to make true, correct and complete statements in the proceeding. Under certain conditions, parties may request the edition of documents in the possession of the opposing party or a third party. This is in particular the case if a party refers to a document or it is a mutual document.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Parties and witnesses are generally obliged to appear and testify. However, there are also certain exceptions under which witnesses may refuse testimony.

This in particular applies in cases of legal secrecy obligations of a lawyer. Section 321 of the CPC provides that the lawyer is entitled to refuse to give testimony on all information entrusted to him or her by the client. This privilege must also not be circumvented by other means such as the examination of employees or an order to produce certain documents. The privilege includes client-attorney correspondence irrespective of where and in whose possession the correspondence is. The above applies for Liechtenstein and foreign lawyers alike. Thus, foreign lawyers who are members of a bar association may invoke the same principles for the client-attorney relationship. The secrecy obligations of an attorney are

additionally protected by criminal procedure laws. Thus client-attorney documentation also generally is exempt from seizures in criminal proceedings.

However, in-house lawyers do not enjoy the same protection under procedural law as they are formally not acting as an attorney at law within the meaning of procedural law and the Act on Attorneys.

Additionally, Liechtenstein law also knows a similar secrecy obligation for professional trustees with regard to all information they have been entrusted with by their client.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

As opposed to many common law jurisdictions, Liechtenstein Law does not have any general duties to preserve evidence or any pretrial discovery obligations.

The CPC only allows for the preservation of evidence under certain conditions. If the conditions apply, certain witnesses or parties may be heard before the commencement of the case – particularly if the danger is given that the evidence may not be available any more in the future.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

There are five main types of evidence under Liechtenstein procedural laws, namely documentary evidence, witness testimony, expert witness testimony, inspection on the spot and party testimony. These types of evidence, however, are not exhaustive. Procedural law also accepts other types of evidence such as tape and video recordings, electronic data, biological evidence, etc. Also, as opposed to other jurisdictions, evidence that has been obtained by unlawful acts is permitted in civil proceedings.

The general rule is that each party must evidence the facts that form the basis of the respective position and are favourable to the respective party. Based on the principle of immediacy and orality of proceedings, judges shall obtain an immediate impression of the evidence. Thus, only what has been brought forward in an oral hearing may form the basis of a decision. Therefore, witnesses must testify orally and will be questioned by the court and the parties. Expert witnesses may provide written expert statements and are only heard based on the application of either party.

Records of witness statements made in other court proceedings are only admissible as evidence if all parties agree or if all parties were involved in the other court proceedings and the evidence is no longer available.

Witnesses that are not willing or able to appear before the court in Liechtenstein may be interrogated by a foreign court based on a letter rogatory proceeding. Also, since January 2019 a

witness may be heard by means of video conference instead of letter rogatory proceedings under certain requirements.

Interim remedies

12 | What interim remedies are available?

According to the applicable rules of the EA interim injunctions may be issued upon application prior to, during the course of a proceeding or even in an enforcement proceeding to secure the claims and rights of the claimant in case the absence of an injunction would lead to the risk that the claims asserted by the claimant could not successfully be enforced in the future based on the court decision that shall be obtained in the main proceeding. This applies in case the future court decision ordering a payment would have to be enforced abroad.

Injunctions for instance may secure monetary claims by putting a lien on certain assets of the defendant located in Liechtenstein which the applicant would have to identify in the application. In this regard, it is noteworthy that also overall rights and claims can be seized that only grant indirect access to certain assets, such as instruction rights, voting rights etc. Injunctions also may serve as a means to preserve a certain status quo which shall be adhered to until termination of the proceeding. It is however not possible to search for and pledge undefined assets of a debtor. Search warrants are only possible in the context of criminal proceedings.

The applicant must provide prima facie evidence for his claim and the endangerment of his claim that makes the injunction necessary. An endangerment is given, if the claimant without an injunction would have to enforce the asserted claims abroad or if the claims could not be effectively enforced.

Based on a recent decision of the ECHR as a general rule, the court has to hear the defendant before issuing the injunction. However, if the hearing of the defendant before issuing the injunction may jeopardize the effectiveness of the injunction, such as that it leads to the risk of disposal or moving of the assets, the injunction may still be issued on an *ex parte* basis. In such cases, an injunction usually can be obtained within one to two weeks.

Generally, an injunction may exist as a standalone measure but must be justified by a main proceeding in which a claimant pursues his main claim. The main proceeding can be a proceeding in Liechtenstein or any other proceeding abroad which leads to a decision enforceable in Liechtenstein. Arbitration proceedings can also serve as the justifying main proceeding.

When granting the injunction, the court also sets a time limit within which the initiation of the main proceeding has to be evidenced or otherwise the injunction be lifted. In case a main proceeding is already pending, the court determines that this proceeding serves as the justification proceeding.

In the injunction, the court may also order the applicant to provide a security deposit for costs or damages if the court holds that the applicant was not able to sufficiently attest to the claims. Further, the injunction is always granted at the risk of the applicant who, in case

of loss of the main proceeding, is liable for all loss and damage of the defendant caused by the injunction.

In very urgent cases also so-called super-provisional injunctions can be obtained within a day which then has to be followed up with an application for an injunction within two days thereafter.

Remedies

13 | What substantive remedies are available?

For contractual and tort claims the principles of damages law foresee a restitution in kind (specific performance) as the primary remedy. If restitution in kind is not feasible, regular monetary damages apply. Further, a claimant can also ask for specific performance under a certain agreement as well as for omissions.

However, punitive damages cannot be asked for in Liechtenstein as they are against the principle that only the damage and loss suffered shall be remedied. Thus, for the same reason, decisions of foreign courts ordering punitive damages are not enforceable in Liechtenstein as far as they exceed the actual damage suffered.

Enforcement

14 | What means of enforcement are available?

The EA provides for a broad array of enforcement means and the applicability depends on the underlying claim that shall be enforced.

Decisions ordering payments allow the seizure and auctioning of all kinds of assets of the debtor. A lien can be put on all kinds of claims and rights of the debtor that have any monetary value. In particular, claims and rights that only indirectly grant access to assets can be attached and transferred to the claimant. Also, forced administration of companies or other properties is a possible means of enforcement.

In case the decision to be enforced orders a party for a personal act or omission for the benefit of another party enforcement can be made by ordering personal actions of the debtor subject to fines or imprisonment of up to 12 months in case the action cannot be taken by a third person. If the act can also be performed by a third party, the court will order such act to be taken by the third party at the cost of the debtor.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

In civil proceedings, generally, the oral hearings and announcements of the decision are public. Under certain conditions, however, the public may be excluded from hearings such as in case it is required to protect business secrets. Also, some types of proceedings are generally not open to the public such as injunction hearings and hearings in non-contentious

proceedings regarding very private and family matters. Recordings of public hearings however are not permitted even if they are public.

The entire written documentation regarding the court case such as the submissions, evidence documents and decisions are also not accessible to the public. However, individuals that can show legal interest in the content of the case file may be granted access to the file based on a reasoned application. The court decisions of lower instances are not published. Only certain relevant decisions of the SC are published however on an anonymous basis.

Costs

16 | Does the court have power to order costs?

The general rule is that the losing party has to reimburse the costs of the successful party according to the applicable lawyer's tariff. In case a party is only partly successful, only parts of the costs are reimbursed based on the quota of success. The law, however, also provides for several exceptions and special rules. The lawyer's tariff defines the costs based on the amount in dispute and certain procedural actions. In the case of lower amounts in dispute, the procedural costs the losing party has to reimburse often do not correspond to the effective procedural costs the party has to bear vis a vis the engaged lawyer.

A foreign claimant further is obliged to provide for a security deposit for the presumed procedural costs of the defendant in case the claimant is resident in a country where a cost decision of a Liechtenstein court could not be enforced. Legal entities acting as claimants also generally are obliged to provide a security deposit for presumed procedural costs. However, also exemptions apply, such as if the entity is able to show sufficient funds within Liechtenstein or another country where Liechtenstein cost decisions are enforceable. Also, exemption from the obligation to provide a security deposit can be obtained based on an application for legal aid in case the claimant and in case of legal entities also the persons potentially benefiting from the claim are not able to provide for the deposit. Legal aid is granted only, if the litigation is not considered vexatious or futile.

The security deposit can be provided by wire transfer or also by a bank guarantee of any bank within the EU/EEA.

With the decision on the matter the court also passes an order to reimburse the necessary and appropriate costs based on the principles defined in the CPA. These principles also allow for refusal to grant reimbursement of costs for certain actions, in particular in the case they were unnecessary for the pursuit of the claim. In certain types of proceedings such as non-contentious proceedings, the court has wider discretion on the principles of allocating costs to either of the parties. The amount of the costs is always defined by the lawyer's tariff.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Due to the rules of the Attorneys Act lawyers are generally prohibited from entering into *quota litis* agreements or from taking over and pursuing claims at their own risk and cost. Thus, attorneys may also not act as litigation funders. Thus, 'no win, no fee' agreements or other types of contingency fees are generally not permissible. An attorney may however agree on a basic fee with an additional success fee depending on the success of the case whereas the conditions and amount must be precisely defined.

The limitations under the Attorneys Act however do not apply to other persons who do not qualify as Attorneys. Therefore, litigation funding generally is permitted and also widely used in Liechtenstein, in particular in international complex asset recovery matters or arbitration proceedings. Additionally, in cases of mass claims professional litigation funders are getting engaged. Thus, a claimant of a civil case may also shift his risk of the proceeding to a third party for a share in the outcome of the proceeding. Due to commercial reasons, litigation funding however in practice is only interesting in case of larger amounts in dispute and only for the side of the claimant.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

There are different types of insurance possible to obtain insurance coverage for protection against the financial risks associated with civil cases as a claimant and a defendant and also associated with other types of proceedings. However, depending on the terms of the insurance policy there may be substantial restrictions on the coverage in terms of scope and amount covered (insurance sum). Further restrictions may also apply regarding the hourly rates covered by the insurance. However, a restriction on the selection of an attorney is not permitted.

Further D&O insurance may also provide for coverage not only of the procedural costs but also the financial obligations towards the other party. Insurances are thus more likely to be utilised in the role of a defendant in a case.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Liechtenstein law does not know an institute similar to the class actions under common law.

The procedural law however allows for a joinder of claimants or defendants under certain requirements. Parties may act as joint claimants or defendants if their claims are based on

the same or at least similar factual and legal grounds and the claims fall under the jurisdiction of the Liechtenstein courts. In such cases, the case of the joint parties is heard together.

Further, it is also possible to formally join several independent cases together into one case for the taking of evidence. In such cases, however, separate final decisions are rendered.

However, in any event, it is required that a certain party actively participates in the proceeding and it is not possible to render decisions for or against persons or entities that were not formally party of the proceeding.

The Consumer Protection Act however allows consumer protection organisations to file claims for omission on behalf of several individuals for example against the terms and conditions of businesses that are disadvantageous to consumers. However, these claims are not class actions in the strict sense as they are limited to determining that certain conduct or clauses are not in accordance with the law and omission is ordered.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgements of the DC may be appealed to the COA within four weeks. The COA may then either confirm or amend the decision or annul the decision and remand the matter back to the first instance for further taking of evidence or correction of procedural errors and rendering a new decision. An oral hearing at the COA is only conducted upon application of one of the parties or if the COA itself considers it to be necessary. The procedural law allows for new facts and evidence to be presented in the appeal submission as long as the underlying claim that is asserted remains identical. An amendment of the claim is generally not possible. The COA may also refuse to permit further facts or evidence if it concludes that they were negligently brought forward with delay. In the appeal, the factual findings, procedural errors and the legal assessment may be contested. For some procedural errors, a prior rebuke in the oral hearing is required in order to permit a later contesting in the appeals proceeding.

Unless explicitly excluded in the law all other decisions of the DC that are not judgments, such as orders, may be appealed to the COA within 14 days. Exceptions from a separate appeal are procedural orders on the conduct of the proceeding or other decisions that may be appealed together with the main decision.

Decisions of the COA also generally may be appealed to SC whereas some limitations apply. Judgments of the COA may be appealed within four weeks. However, an appeal to the SC is excluded in cases of low amounts in dispute (up to 5,000 Swiss francs) or in cases where the COA has fully confirmed the decision of the DC (up to 50,000 Swiss francs amount in dispute). The appeals proceeding before the SC is in writing only.

Orders of the COA generally may be appealed within 14 days subject to limitations. Orders of the COA that confirm orders of the DC may not be further appealed. Also, orders related to any question of costs may not be appealed to the SC, but the COA is the last instance regarding costs.

The SC also only deals with the legal questions and procedural errors of the COA but not with any questions on facts. Also, no new facts are allowed in the proceeding. The SC decides in writing without a prior oral hearing.

Decisions of the final instance that also are conclusive on a certain item and thus are not merely remanding a matter back to a lower instance may be appealed to the Liechtenstein Constitutional Court within four weeks after service of the decision that shall be appealed.

In the appeal, only violations of constitutional rights may be asserted such as violation of constitutional rights granted by the Liechtenstein Constitution and the European Convention on Human Rights. The Constitutional Court only may annul the appealed decision and remand back for a new decision in adherence with the constitutional rights. The ordinary courts are then bound by the legal considerations of the Constitutional Court.

Appeals against judgments to the COA and the SC have suspensive effect and the underlying decision does not become enforceable until becoming final and binding. However, appeals against orders do not have any suspensive effect and orders of the courts generally are enforceable right after being issued – though upon application, the higher instance may grant suspensive effect.

An appeal to the Constitutional Court also does not have any suspensive effect by itself but can be granted by the Constitutional Court upon application if the conditions for suspensive effect are given.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Liechtenstein is not a member state of any multilateral treaties on the enforcement of court decisions such as the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988/2007 or the Council Regulation (EC) No. 44/2001 of 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation). Thus, foreign decisions only may be enforced in Liechtenstein to a limited extent.

The only exception for multilateral treaties is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to which Liechtenstein is a member.

According to the EA decisions of foreign courts are generally only recognised and enforceable in Liechtenstein in case it is provided for in bilateral treaties or if reciprocity is guaranteed to the government. Given that no such reciprocity declarations have been provided, the latter rule is irrelevant.

Liechtenstein has only concluded bilateral treaties on the recognition and enforcement of court decisions in civil law matters with Switzerland and Austria. Under the treaties the following requirements further have to be met to allow for recognition:

- the recognition must not be contrary to the public policy of Liechtenstein and the objection of res iudicata must be observed (no prior Liechtenstein decision on the same matter);

- the deciding court must have had jurisdiction based on one of the principles set out in the treaty (eg, mere jurisdiction based on assets would not suffice);
- the judgment must be final and binding according to foreign law; and
- in the case of a default judgment, the writ of summons initiating the proceeding must have been served on the party in default personally or on a proper representative.

In most cases, foreign decisions cannot be enforced in Liechtenstein. Thus, a foreign creditor must obtain an enforceable Liechtenstein decision to be able to enforce claims into assets located in Liechtenstein. A foreign final and binding decision can serve as a means to allow the creditor to obtain an enforceable Liechtenstein decision in a fast-track proceeding. The foreign creditor would first obtain a payment order of the DC against the debtor. In case the debtor files an objection against this payment order within the 14-day time limit, the creditor may then obtain an annulment of the objection in a summary proceeding by utilising the foreign final and enforceable decision (Rechtsöffnung). In case the requirements are met the DC then declares the annulment of the objection and reinstates the payment order. The debtor then may initiate a revocation proceeding within 14 days which is an own regular contentious proceeding in which the debtor may relitigate the matter. However, the roles of the claimant and defendant are reversed, whereby the debtor must act as the claimant and has the burden to prove the non-existence of the claim.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

With regard to legal assistance in civil matters, Liechtenstein has signed the European Convention on Information Relating to Foreign Law and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Further, the provisions of the Jurisdiction Act provide that the DC must grant legal assistance unless the bilateral agreements do not provide differently. Legal assistance however has to be refused in case the act requested does not fall into the competence of the DC, is prohibited by Liechtenstein law or if reciprocity is not given. In the case of doubt on the question of reciprocity, a binding declaration of the COA is to be obtained.

Further, the DC must adhere to the Liechtenstein procedural laws when providing legal assistance.

The most common cases of legal assistance for a foreign court in civil matters are the service of documents and the examination of witnesses.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Liechtenstein arbitration generally follows the Austrian model, which is based upon the Model Law on International Arbitration (UNCITRAL). In order to make the law more attractive and effective the Liechtenstein arbitration law however included several amendments.

In general, all claims arising from rights involving an economic interest that are usually decided by domestic courts are arbitrable. All other claims are arbitrable if the parties are capable of reaching a settlement on the subject matter of the dispute.

Further all types of disputes in relation to trusts, foundations or companies to arbitration, including disputes among participants of a trust or Foundation, the removal of trustees of a trust or members of the foundation council or the challenging of resolutions of trustees of a trust or the foundation council.

However, matters that by mandatory law fall within the scope of the foundation supervisory court such as the removal of trustees or members of the foundation council for gross breach of duties, or proceedings that are initiated by a public authority ex officio (eg, the Princely District Court (DC) or the Foundation Supervision Authority) are exempt from arbitration.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing and must be contained either in a written document signed by both parties or in letters, telefaxes and emails or other means of transmitting messages between the parties that provide a record of the agreement. Also, a contractual referral to a document containing an arbitration agreement such as a reference to general terms and conditions constitutes an arbitration agreement. Usually in practice the arbitration clauses and agreements define the applicability of the Liechtenstein Arbitration Rules of the Liechtenstein Arbitration Association (LIS) which provides for a detailed and concise set of arbitration rules similar to the Rules of Arbitration, administered by the ICC International Court of Arbitration.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Unless otherwise provided in the arbitration agreement, the number of arbitrators according to the provisions of the Code of Civil Procedure (CPC) is three whereas each party appoints one arbitrator which then in turn appoints a third arbitrator as chairman. If a party fails to appoint an arbitrator within time after having obtained the request the arbitrator shall be appointed by the court upon further request of a party. The appointment of an arbitrator may

only be challenged if circumstances exist that give rise to justifiable doubts on impartiality or independence or do not have the qualifications agreed upon by the parties.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Generally, the parties may freely determine the composition of the arbitral tribunal and also may freely agree on the number of arbitrators and the appointment process. By law, only full-time judges of the Liechtenstein courts are excluded as arbitrators. If the parties have agreed on an even number of arbitrators, they must appoint a further person as chair. A person approached for possible appointment as an arbitrator must disclose any circumstances relevant to the questions of impartiality or independence. After appointment, an arbitrator must disclose any such circumstances to the parties without delay, unless they have already been informed and consented to the continuation on this informed basis.

Even if a formal legal education is not required to be eligible as arbitrator parties are of course well advised to choose a person that has the legal and professional expertise for the specific dispute as well as the skills and capacities to handle the process. In practice often lawyers from the large pool of local and international members of the LIS are selected as they are able to meet the requirements also for complex arbitration cases.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The arbitral tribunal adjudicates the dispute pursuant to the statutory provisions or other provisions as agreed upon by the parties.

Unless the parties have agreed otherwise, any agreement on the applicable law or the legal system of a state shall be construed as referring to the respective substantive law and not to its conflict of laws rules.

In the absence of a choice of law, the arbitral tribunal shall apply the statutory provisions or rules of law it considers appropriate which are the provisions that have the closest connection to the dispute.

Subject to the mandatory provisions of section 611 et seq CPC (such as the right to be heard), the parties are also free to agree on procedural rules. The parties may also refer to other rules of procedure. Failing such agreement, the arbitral tribunal, subject to the provisions of the applicable law, must conduct the arbitration in such manner as it considers appropriate.

Often the arbitration clauses refer to or the parties separately agree to apply Liechtenstein Rules issued by the Liechtenstein Arbitration Association which provide for a detailed and concise set of procedural rules and thus clarity and certainty.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, the arbitration agreement establishes an exclusion of the jurisdiction of the national courts. If a court is approached with a claim that is subject to an arbitration agreement, the court has to reject the claim, unless the defendant enters into the claim by making submissions on the matter itself without objecting to the jurisdiction. If the court however establishes that there is no valid arbitration agreement or that it cannot be performed, the court may also hear the case.

Also, as a general rule, when an arbitration proceeding is pending, no parallel other arbitration case or court case in the same matter may be commenced and any other such claim must be rejected. Some minor exceptions apply.

However, the law provides that even in case of valid arbitration agreements, the regular courts, in particular, still have competence on the following items which also cannot be overridden by agreement:

- Decisions on applications on interim measures in connection with the arbitration case (602 CPC);
- Appointment, rejection or early dismissal of an arbitrator under certain preconditions (604 et seq CPC);
- Enforcement of provisional measures validly ordered by the arbitral tribunal (610 CPC); and
- Decisions on applications to set aside the arbitration award (628 CPC).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless otherwise agreed by the parties in the arbitration agreement, the arbitral tribunal upon request of a party may order provisional or protective measures against a party in relation to the subject matter of the dispute in case otherwise the enforcement of the claim would be frustrated or substantially more difficult or if there is a risk of irreparable damage. Before imposing such measures, the arbitral tribunal is obliged to hear the other party and also may request the applying party to provide security for potential costs and damages in connection with the demanded interim measure (610 CPC).

As outlined above the power to enforce an interim measure against the other party however solely remains in the competence of the civil courts under the respective domestic laws.

It is noteworthy that according to the Liechtenstein Rules the competence to order interim measures shall be only with the arbitral tribunal and the parties shall not address the regular courts with applications for interim measures after the arbitral tribunal has been established.

Award

30 | When and in what form must the award be delivered?

Once the arbitral tribunal holds that the facts are duly presented and the matter is ready for decision, it will close the proceedings and render the arbitral award.

The award shall be made in writing and signed by the arbitrators. Unless agreed otherwise, the signatures of the majority of members of the arbitral tribunal shall suffice, provided that the chairman or another arbitrator shall indicate on the award the obstacle to the absence of signatures. Unless not agreed otherwise by the parties, the award must give the reasons that form the basis of the decision, the date on which it was rendered and the seat of the arbitral tribunal (612 CPC). A copy of the award signed by the arbitrators shall be sent to each party.

The award and the documentation on its service are joint documents of the parties and the arbitrators. The arbitral tribunal must agree on the safekeeping of the award and the documentation of its service with the parties. Upon request of a party, the chair is obliged to confirm that the award is final and enforceable (623 CPC).

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitral award and also awards ruling on the jurisdiction of the arbitral tribunal may only be appealed with an action filed with the COA within four weeks following the rendering and receipt of the award. The action may only apply to set aside the award. The COA has the jurisdiction as first and last instance, notwithstanding a possible extraordinary appeal to the Constitutional Court for alleged violations of constitutional rights.

According to Liechtenstein law, the arbitral award may be set aside only for the following reasons:

- There is no valid arbitration agreement in place, or the arbitral tribunal has denied jurisdiction despite the existence of a valid arbitration agreement;
- A party was not given proper notice of the appointment of an arbitrator, the arbitral proceedings or was for other reasons unable to present its case;
- the award decides on a dispute not covered by the arbitration agreement, or contains decisions on matters that are beyond the scope of the arbitration agreement or the applications of the parties;
- the arbitral tribunal was not constituted in accordance with the provisions of the law or the applicable arbitration agreement of the parties;
- the arbitral proceeding was conducted in a manner that conflicts with the Liechtenstein public order;
- the requirements under which an action for reopening could be filed against a court judgment are met;
- the subject matter of the dispute is not arbitrable under Liechtenstein law; and
- the arbitral award conflicts with the Liechtenstein public order.

Read this article on Lexology

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Liechtenstein has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). Thus, arbitral awards that have been obtained before the arbitral tribunal and in proceedings in accordance with the New York Convention constitute enforcement titles and can be enforced in Liechtenstein without re-examination of the merits of the case.

The enforcement of arbitral awards lies solely in the competence of the state courts and is governed by the provisions of the Enforcement Act. For an enforcement, an original or certified copy of the award along with the confirmation of the arbitrators is required that the award is final and enforceable. In case the award is in a foreign language, a translation is required as well.

Costs

33 | Can a successful party recover its costs?

Once the arbitral proceeding is terminated, the arbitral tribunal shall decide on the obligation to reimburse costs, unless the parties have agreed otherwise. When deciding on the costs the arbitral tribunal shall, at its discretion, take into account the circumstances of the individual case, in particular the outcome of the proceeding. The obligation to reimburse costs may include all costs reasonable for the purpose of legal prosecution or legal defence.

Together with deciding on the obligation to reimburse costs, the arbitral tribunal shall fix the amount of the costs to be reimbursed, as far as this is possible and the costs are not set off against each other. The decision on the reimbursement of costs and the amount shall be made in the form of an award.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The most important alternative dispute resolution means are arbitration (governed by the Code of Civil Procedure) and mediation proceedings (governed by the Law regarding Mediation in Civil Law Matters) whereas arbitration has a much more important role and mediation is seen as less practical and important.

Liechtenstein also implemented the EU Directive on Consumer alternative dispute resolution (ADR). Even if participation is voluntary, Companies in Liechtenstein have to inform consumers about the opportunity for ADR proceedings in case of a dispute. Liechtenstein also offers a Conciliation Board for conflicts with financial service providers, such as asset

management companies, banks, professional trustees and others. Given that these ADRs are voluntary, they do not have an important role in dispute resolution.

Further, Liechtenstein law knows ADR means in case of disputes on the change of the professional trustee that administrates a foundation and other company. Here the Liechtenstein Chamber of Trustees conducts a proceeding and renders recommendations for a handover of the administration in case of conflicts of interest. Not following the recommendations of the Chamber of Trustees could lead to disciplinary consequences for a trustee.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Conducting and participating in ADR is voluntary. Thus, neither a court nor an arbitral tribunal can compel parties to participate in an ADR process. An exception is only given for disputes about parental custody.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In cases of asset recovery or complex commercial litigation civil litigation is often combined with criminal investigation proceedings as the civil claims often are based on suspected criminal activity of the counterparty. Criminal investigations give the creditor and claimant the possibility to obtain additional information and documentation as a private damaged party in case house searches and seizures are conducted in the course of the investigations.

UPDATE AND TRENDS

Recent developments and future reforms

37 | What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Currently, discussions are underway for a reform of the court system that aims to speed up the process and further professionalise the court system. The discussions also include a proposal for the merger of the Court of Appeals with the Supreme Court. However, the larger part of the proposals in their current form is widely rejected by the courts and legal practitioners alike as being insufficiently conceived and unnecessary.

An aspect of the proposals that however may get wider acceptance is the proposal to introduce a specialised senate at the Court of Appeals for proceedings in foundation and trust law matters in order to further professionalise the courts and increase the expertise in these important areas of law.

There have been a few landmark decisions of the Princely Supreme Court (SC) in relation to foundation law in the past. One landmark decision of 2018 deals with the restructuring of Foundations and clarifies the requirements and rules under which the entire assets of a foundation could be transferred to a new foundation such as in cases of restructurings.

A further landmark decision clarified under which conditions and circumstances a beneficiary can be considered as an entitled beneficiary that has a claim on the foundation assets or merely as a discretionary beneficiary. The decision clarifies that the judgment must be made on a case-by-case basis and is highly dependent on the statutes, bylaws and overall circumstances.

Further, the SC recently passed a landmark decision that is relevant for asset protection matters when it confirmed that a foreign insolvency administrator has no active standing in a parallel domestic insolvency proceeding and in particular may not appeal the decision or demand handover of the Liechtenstein assets.

Matthias Niedermüller mn@niedermueller.law
Alexander Milionis ami@niedermueller.law

Werdenbergerweg 11
FL-9490 Vaduz, Liechtenstein
Tel: +423 236 1015
http://niedermueller.law/de/

Read more from this firm on Lexology

Read this article on Lexology

Malaysia

Datin Jeyanthini Kannaperan, K Shanti Mogan, Yee Mei Ken, Jimmy S Y Liew and Sathya Kumardas

Shearn Delamore & Co

RETURN TO CONTENTS

Summary

LITIGATION	388
Court system	388
Judges and juries	388
Limitation issues	389
Pre-action behaviour	389
Starting proceedings	390
Timetable	390
Case management	391
Evidence – documents	391
Evidence – privilege	392
Evidence – pretrial	392
Evidence – trial	392
Interim remedies	393
Remedies	394
Enforcement	394
Public access	395
Costs	395
Funding arrangements	396
Insurance	396
Class action	397
Appeal	397
Foreign judgments	397
Foreign proceedings	398
ARBITRATION	**399**
UNCITRAL Model Law	399
Arbitration agreements	399
Choice of arbitrator	399
Arbitrator options	400
Arbitral procedure	400
Court intervention	401
Interim relief	401
Award	402
Appeal	402
Enforcement	403
Costs	403
ALTERNATIVE DISPUTE RESOLUTION	**403**
Types of ADR	403
Requirements for ADR	404

Read this article on Lexology

MISCELLANEOUS 404

Interesting features 404

UPDATE AND TRENDS 405

Recent developments and future reforms 405

LITIGATION

Court system

1 | What is the structure of the civil court system?

Malaysia's court system is hierarchical, with the primary courts being (in ascending order) the Magistrates' Court (claims between 5,000 – 100,000 Malaysian ringgit), Sessions Court (claims between 100,001 – 1,000,000 Malaysian ringgit), High Court (claims exceeding 1,000,000 Malaysian ringgit), Court of Appeal and Federal Court. A single judge sits at each level, save for the Court of Appeal and Federal Court where the panel will usually consist of three judges. The court system allows parties to any dispute to appeal from the court of first instance to another court of higher jurisdiction.

There are two high courts of co-ordinate jurisdiction, namely the High Court of Malaya (Peninsular Malaysia) and the High Court of Sabah and Sarawak (East Malaysia) which sit at each of the States in Malaysia. Courts that are organised by subject matter are mainly situated in Kuala Lumpur.

Malaysia also has Sharia courts, which deal with certain matters involving Islamic law.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The judicial system in Malaysia is adversarial in nature. Courts generally adopt a non-interventionist role in the proceedings and decide on questions of fact and law based on the evidence and arguments advanced by the parties.

The level of intervention by the court during a hearing varies depending on the individual judges, some of whom will undertake a more active inquiry during the hearing. As for judicial intervention during a witness's testimony at trial, notwithstanding the court's power to ask questions under section 165 of the Evidence Act 1950, the judicial intervention will not be excessive, and the courts remain neutral and impartial during evidence-taking. See *Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 1 MLJ 743.

In 2009, the Judicial Appointments Commission was established with the aim to make the nomination, appointment and promotion of judges at the High Court, Court of Appeal and Federal Court more transparent and comprehensive.

Limitation issues

3 | What are the time limits for bringing civil claims?

The Limitation Act 1953 prescribes the following limitation periods:

Nature of Action	Limitation Period
Actions in contract and in tort.	Six years from the date of the contractual breach or tortious act.
Actions to recover land.	12 years from the date the right of action accrues.
Actions to recover trust property in respect of a breach of trust.	Six years from the date the right of action accrues.
Actions in respect of fraud or fraudulent breach of trust, or to recover trust property or the proceeds thereof from the trustee.	No limitation period.
Actions to enforce court judgment.	12 years from the date the right to enforce judgment accrues.
Actions to enforce arbitral award.	Six years from the date the right to enforce judgment accrues.

In respect of civil suits filed against the government, the limitation period is 36 months from the date of the act, neglect or default, or the cessation of a continuing injury or damage. See section 2 of the Public Authorities Protection Act 1984.

The Limitation (Amendment) Act 2018 recognises that the limitation period may be postponed in instances where:

1. there has been concealment of fraud or mistake. Time starts to run from the date of discovery of the fraud or mistake (section 29(1)); and
2. the damage was not discoverable before the expiry of six years in an action for negligence. Time will be extended by three years from the date of discovery with no action being possible 15 years after the date the damage occurred (section 6(A)).

Estoppel can apply to defeat a defence of limitation if it can be shown that the party asserting limitation was guilty of unconscionable conduct. See *Asia General Equipment and Supplies Sdn Bhd & Ors v Mohd Sari bin Datuk OKK Hj Nuar & Ors* [2012] 3 MLJ 49.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Generally, there are no preconditions to initiating proceedings. However, there may be statutory prerequisites to be complied with, such as issuing statutory notices before commencing proceedings to wind up a company, to bankrupt an individual and for leave to commence a derivative action. A pre-action demand may also be required if the contract provides for the same.

A pre-action discovery order may be obtained against possible parties to any intended action if the party seeking discovery establishes, amongst others, that he has a bona fide cause

of action against persons known or unknown, the information and documents sought are necessary, relevant and in the possession, custody or control of the party against whom discovery is sought. See Order 24 rule 7A of the Rules of Court 2012.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A complaint is usually initiated by filing either a writ of summons with a statement of claim, or an originating summons with an affidavit, depending on the nature of the proceedings. These documents (save for the affidavit) can be amended after they have been filed, either as of right or with leave.

The plaintiff is required to serve the originating process on a defendant personally or at his last known address by prepaid advice of receipt registered post or in such manner as stipulated under the contract. Service may be effected by way of substituted service with leave of court.

Where a defendant is residing abroad, the originating process may be served out of jurisdiction with leave of court. In such instance, the plaintiff must show, among others, that he has a good arguable case falling within the circumstances set out in Order 11 rules 1 and 2 of the Rules of Court 2012. See *Joseph Paulus Lantip & Ors v Unilever PLC* [2012] 7 CLJ 693.

The courts in Malaysia are required to hear and dispose matters within set timelines. The number of civil and criminal courts in some States within Malaysia have been increased to deal with the proliferated number of actions filed in recent years. As such, court matters usually proceed timeously.

Timetable

6 What is the typical procedure and timetable for a civil claim?

The typical timeframe for a commercial claim commenced by a writ of summons which proceeds for trial is as follows:

Step in Proceedings	Timeline
• Upon service of the writ of summons and statement of claim, the defendant is required to enter an appearance. • The defendant is required to file a defence (and counterclaim if applicable).	• 14 days from the date of service of summons. • 14 days from the date of appearance.
• Plaintiff is required to file a reply to the defence (and defence to counterclaim if applicable).	• 14 days from the date of receipt of defence (and counterclaim if applicable).
• If any interlocutory application is filed after the close of pleadings, the Court will give directions to case management on the filing of affidavits and written submissions and fix a hearing/decision date.	• Within two–four months from the date of filing of such application.

Read this article on Lexology

• Upon disposal of interlocutory applications, the court will fix trial dates.	• Trials are generally fixed within six to 12 months from the date of filing of the writ.
• After the evidence is concluded at trial, the court will direct parties to file transcribed notes of proceedings and written submissions. • The court may fix a hearing date for oral submissions. • The decision of the court after a full trial.	• Up to three months for filing of notes of proceedings and written submissions. • Within two months from the date of filing of written submissions. • Typically, within three months from the date of written/oral submissions.

Case management

7 | Can the parties control the procedure and the timetable?

In Malaysia, court procedure and timelines are largely governed by the Rules of Court 2012. However, it is possible for parties to make requests for enlargement or abridgement of timelines. The Rules also prescribe for pretrial case management wherein the court may give appropriate orders and directions to secure the just, expeditious and economic disposal of the action including the possibility of settlement of any or all of the issues in the matter. These directions include the filing of pretrial documents such as the bundle of pleadings, bundle of documents, statement of agreed facts, statement of issues to be tried, list of witnesses, summary of case and witness statements. The court may impose sanctions for non-compliance with these directions. See Order 34 of the Rules of Court 2012; *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Under the present legal framework, there is no duty of automatic disclosure imposed on parties in respect of civil proceedings. Parties are only required, under Order 34 rule 2(2) of the Rules of Court 2012, to adduce documents that will be relied on or referred to in the course of the trial. The duty to disclose will only arise if and when, and to the extent that the court orders disclosure under Order 24 rules 3 and 7 of the Rules of Court 2012. The court has discretion to order discovery at any time in the course of proceedings. The documents which a party may be ordered to discover include documents which adversely affect his own case or another party's or support another party's case. The party required to give discovery under this provision has a continuing duty to give discovery of all documents falling within the ambit of such order until the proceedings have concluded.

Further, Order 24 rule 10 of the Rules of Court 2012 allows for the inspection of documents referred to in pleadings and affidavits without the necessity of a court order.

In view of the above framework for discovery, preservation of documents pending trial is necessary. Indeed, the destruction of relevant documents can attract penal consequences (see section 204 of the Penal Code). Further, the wilful suppression or destruction of useful documents will lead to an adverse inference that the documents, if produced, would go against the party who is responsible for withholding or destroying the same (see section 114(g) of the Evidence Act 1950).

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Malaysia recognises the concept of legal privilege. Order 24 Rule 13(2) of the Rules of Court 2012 allows a party to object to the production of a document on the ground that it is privileged. The court may inspect the document to decide whether the objection is valid.

Further, communication between solicitors and clients, including legal advice rendered, is privileged and protected from disclosure under section 126 of the Evidence Act 1950. However, such privilege may be expressly or impliedly waived by a client or abrogated by statute and does not apply to communications in furtherance of an illegal purpose.

Our courts have also recognised that litigation privilege under common law continues to apply in respect of communications between solicitors and clients as well as third parties for the purposes of or leading to evidence for use in legal proceedings. See *Wang Han Lin & Ors v HSBC Bank Malaysia Berhad* [2017] MLJU 1075.

Communications between an in-house counsel and officers within the organisation are not protected by privilege. See *Toralf Mueller v Alcim Holding Sdn Bhd* [2015] MLJU 779.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

The timeline for the filing and exchange of witness statements and expert reports, if any, will typically be ordered by the court at the pre-trial case management. See Order 34 r 2(2) of the Rules of Court 2012.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Facts required to be proven at trial of any writ action shall be by way of examination of witnesses present physically in Court (Order 38 rule 1 of the Rules of Court 2012) or by way of remote communication technology (Order 33A of the Rules of Court 2012). The practice today is for the examination-in-chief of a witness to be by way of a written witness statement in question-and-answer form, although further oral examination-in-chief is permissible. The witness statement must be filed in court and served on all parties not less than seven days before it is to be tendered and read at trial (see Order 38 rule 2(4) of the Rules of Court 2012). Thereafter, the witness is subject to oral cross-examination and finally re-examination. See section 138 of the Evidence Act 1950.

The evidence of an expert witness is given in a written report signed by the expert and exhibited to an affidavit affirmed by him or her (see Order 40A r 3(1) of the Rules of Court 2012 – experts of parties) or directly filed in court (Order 40 rule 2 – court-appointed expert).

Similar to witnesses of fact, an expert witness is also subject to cross-examination and re-examination.

Interim remedies

12 | What interim remedies are available?

Litigants may file applications before the trial or substantive hearing of a claim to obtain various interim remedies, pending the disposal of the substantive claim, including interim injunctions.

An interim prohibitory injunction is only available where a party seeking injunctive relief is able to show a serious issue to be tried, the balance of convenience lies in favour of the injunction and that damages are not an adequate remedy (see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193). However, additional considerations apply to specific injunctions such as Mareva injunctions and Anton Piller orders, and mandatory injunctions.

The types of injunctions available include the following:

1. a Fortuna injunction to restrain a party from presenting a winding-up petition – see *Mobikom v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316;
2. a Mareva injunction to restrain a defendant from parting with his or her assets – see *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97;
3. an Anton Piller order to allow the plaintiff's representatives to enter a defendant's premises to inspect and remove material and documents – see *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239;
4. an anti-arbitration injunction to restrain a party from proceeding with arbitration proceedings – see *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1;
5. an anti-suit injunction to restrain judicial proceedings to prevent a multiplicity of proceedings – see *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1;
6. an injunction for the detention, custody or preservation of any property which is the subject matter of the suit, or for the inspection of any such property in the possession of a party to the suit – see Order 29 Rule 2 of the Rules of Court 2012;
7. an injunction for samples to be taken of any property which is the subject matter of the suit, for any observation to be made on such property or for any experiment to be tried on or with such property – see Order 29 Rule 3; and
8. an injunction to prevent the infringement of intellectual property – see *Radion Trading Sdn Bhd v Sin Besteam Equipment Sdn Bhd & Ors* [2010] 8 MLJ 648, and an injunction to prevent the disclosure of confidential information – see *TeohChong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669.

Our courts have recognised that injunctions can be granted in aid of foreign proceedings or arbitration (Order 29 Rule 1(1) of the Rules of Court 2012; sections 11(1) and (3) Arbitration Act 2005). In this respect, a worldwide Mareva injunction may also be granted to include assets located abroad to prevent the dissipation of such assets or as part of a plaintiff's coordinated effort for worldwide civil recovery. See *Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and Other Appeals* [2021] 7 CLJ 857.

Remedies

13 | What substantive remedies are available?

After full trial, litigants are able to obtain a variety of reliefs including monetary damages, declarations, temporary and perpetual injunctions and specific performance.

The recognised types of damages are as follows:

- Special damages, where the damage suffered is readily quantifiable in monetary terms. See *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675.
- General damages, where the damage suffered is not readily quantifiable in monetary terms. See *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675.
- Aggravated damages, where the defendant's conduct has injured the feelings and dignity of the plaintiff. See *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd and Hong Hing Thai Enterprise Sdn Bhd (Third Party)* [2011] 4 MLJ 354.
- Exemplary damages, which are punitive damages to punish and deter, where there is oppressive, arbitrary or unconstitutional action by servants of the government, or where the defendant's conduct has been calculated to make a profit for himself or herself which may exceed the compensation payable to the plaintiff. See *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

Whilst there are no rules limiting maximum damages, damages (other than aggravated and exemplary damages) are generally compensatory in nature and will not exceed the actual loss suffered by a plaintiff.

A claim for contractual liquidated damages cannot be recovered simpliciter if tantamount to a penalty. However, in the absence of proof of actual loss, the Court will award reasonable compensation not exceeding the amount stipulated in the contract by applying the concepts of legitimate interest and proportionality. See section 75 of the Contracts Act 1950; *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15.

The court also may award pre-judgment interest on debts or damages, at such rates as provided under the contract or the court deems fit, for the whole or any part of the period between the date when the cause of action arose and the date of judgment. See section 11 of the Civil Law Act 1956.

Further, a successful party is also entitled to obtain post-judgment interest on judgment debts based on the rates contractually provided for, or at the rate of 5 per cent per annum as prescribed by the Chief Justice through Practice Direction No 1 of 2012, to be calculated from the date of judgment to satisfaction. See Order 42 Rule 12 of the Rules of Court 2012.

Enforcement

14 | What means of enforcement are available?

A judgment can be enforced through the following means:

- a writ of seizure and sale, where the judgment debtor's property is seized by the court and sold through an auction (Order 47 of the Rules of Court 2012);
- a garnishee order made against a debtor of the judgment debtor, to pay sums due to the judgment debtor directly to the judgment creditor (Order 49 of the Rules of Court 2012);
- a charging order imposed on any interest to which the judgment debtor is beneficially entitled in any securities (Order 50 of the Rules of Court 2012);
- the appointment of a receiver to manage income from the judgment debtor's assets and make payment to the judgment creditor (Order 51 of the Rules of Court 2012);
- bankruptcy proceedings against a judgment debtor who is an individual, whose property will vest in the Director General of Insolvency for payment of all his or her debts;
- winding-up proceedings against a corporate judgment debtor, whose property will vest in a liquidator for payment of all its debts and thereafter the company will be dissolved; or
- a judgment debtor summons requiring the judgment debtor (in the case of an individual) or an officer of the judgment debtor (in the case of a company) to attend court and be orally examined on the judgment debtor's ability to satisfy the judgment (section 4 of the Debtors Act 1957).

Aside from monetary judgments, a party who fails to comply with the terms of a court order can be liable for contempt of court and may be fined or imprisoned. See *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] MLJU 242.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

In civil proceedings, court filings and proceedings are accessible by the public. Once a document is filed, it is generally considered public and not confidential.

If a party wishes court filings or proceedings to be kept confidential, an application for a sealing or protective order may be made. In some instances, the court would inspect the documents first and then decide whether a sealing order should be granted. Additionally, if parts of the document contain confidential information not relevant to the case in question, the court may redact those parts. See *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621.

Costs

16 | Does the court have power to order costs?

The object of awarding the costs to a litigant is to indemnify him for the expenses he had incurred in successfully establishing his legal rights. A successful party is usually entitled to costs from the losing party. While it is possible to submit a bill of costs to the court which will include details of the costs of the litigation (Order 59 Rule 7(2) of the Rules of Court 2012), in practice the court will award a lump sum to the successful party as costs, which may not be representative of the actual costs incurred. An appeal against an award of costs can only be brought with leave of court (section 68(1)(c) of the Court of Judicature Act 1964).

A defendant can seek security for costs under Order 23 of the Rules of Court 2012 if:

- the plaintiff is ordinarily resident out of the jurisdiction;
- the plaintiff is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the defendant's costs if ordered to do so;
- the plaintiff's address is not stated in the writ or is incorrectly stated; or
- the plaintiff changed his or her address during the proceedings to evade the consequences of the litigation.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Litigation funding is not permitted due to the operation of the common law doctrines of maintenance and champerty that continue to apply in Malaysia, despite changes in other jurisdictions.

Contingency fee arrangements between solicitors and clients are not permitted in Malaysia.

Section 112(1)(b) of the Legal Profession Act 1976 states that no advocate and solicitor shall enter into any agreement to prosecute any suit or action which stipulates or contemplates payment only in the event of success.

As such, contingency fee agreements are void and unenforceable. See *Lee Mun Keong v Precise Avenue (M) Sdn Bhd & Anor* [2014] 8 CLJ 74.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

In some instances, insurers offer coverage for legal costs incurred by the insured, which is commonly known as liability insurance policies. These policies are typically undertaken by corporate entities such as large-scale multinational companies and financial institutions with large interests to be protected.

Some examples of the available types of liability insurance policies in Malaysia which may cover legal costs and damages to be paid to the opponent are Public Liability Insurance Policy, Workers' Compensation Insurance Policy, Product Liability Insurance Policy, Professional Indemnity Insurance Policy and Directors and Officers Liability Insurance. Nonetheless, the extent and amount covered will be dependent on the sum insured in the insurance policy taken by the insured.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Representative actions are permitted under Order 15 Rule 12 of the Rules of Court 2012. The named plaintiffs and those they represent must share a common interest and a common grievance, and the relief sought must be beneficial to all members. See *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712.

This rule is designed to avoid multiplicity of proceedings and evidence need only be given by the named plaintiffs as representatives. A judgment or order made in a representative action binds all parties to the action including those represented.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

A party dissatisfied with a decision of the court may appeal to a higher court either as of right or with leave.

Appeals from the Magistrates' and Sessions Courts are to the High Court, and appeals from the High Court are to the Court of Appeal. Most appeals are as of right, although some require leave. Decisions of the Court of Appeal may be appealable, with leave, to the Federal Court. A party seeking to appeal to the Federal Court must show that the appeal involves a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage or the decision on the effect of any provision of the Federal Constitution including the validity of any written law relating to any such provision. See section 96 of the Courts of Judicature Act 1964.

The Federal Court also has a limited jurisdiction under Rule 137 of the Rules of Court 2012 of the Federal Court 1995 to review its own decisions as the review process is not intended to give the losing litigant a second bite at the proverbial cherry. Instead, motions for review are limited to instances where there has been a manifest miscarriage of justice. See *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Under the Reciprocal Enforcement of Judgments Act 1958 (REJA), a foreign judgment that is a monetary judgment made by a superior court from the reciprocating jurisdictions listed in the First Schedule (namely, the UK, Hong Kong, Singapore, New Zealand, Sri Lanka, Brunei and certain states in India) may be registered in Malaysia.

The judgment creditor may, within six years from the date of the judgment, apply to the High Court for leave to register the judgment by filing an originating summons supported by an

affidavit (see Order 67 Rule 3 of the Rules of Court 2012). An order giving leave to register a judgment must be served on the judgment debtor and such order shall state the period within which an application may be made to set aside the registration and no execution of the judgment can be issued until the expiration of that period. See Order 67 rule 5 and section 5 of REJA.

Where no reciprocal agreement exists, an action has to be filed on the judgment at common law. The judgment creditor will normally apply for summary judgment, relying on the foreign judgment as proof of the debt. The defences available against the suit are that the foreign court had no jurisdiction, the judgment was obtained by fraud, the judgment would be contrary to public policy, and the proceedings in which the judgment was obtained were opposed to natural justice. See *Hua Daily News Bhd v Tan Chien Chin & Ors* [1985] 1 LNS 131.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Order 66 of the Rules of Court 2012 governs the procedures for obtaining evidence for use in a foreign court.

A person duly authorised may make an ex-parte application to the High Court of Malaya on behalf of a foreign court or tribunal for an order for the examination or attendance of witnesses or for the production of documentary evidence. The application must be supported by an affidavit exhibiting the letter of request, certificate or other document evidencing the desire of the foreign court or tribunal to obtain the oral or documentary evidence for the purpose of the matter pending before it.

In addition, the Attorney General may also apply for an order for the examination or attendance of witnesses or for the production of documentary evidence for it to be used in the foreign court in the following two instances: -

- Firstly, where the letter of request, certificate or other document requesting to obtain the evidence is received by the Minister and sent by him or her to the Registrar with an indication that effect should be given to the request without requiring an application to be made by an agent of any party to the matter before the foreign court or tribunal; or
- Secondly, where the letter of request, certificate or other document requesting to obtain the evidence is received by the Registrar pursuant to a Civil Procedure Convention which provides for the taking of the evidence in Malaysia to assist the matter before a foreign court or tribunal and where no person is named as the person who should make the necessary application on behalf of such party.

The examination of a witness may be conducted before any fit and proper person nominated by the person applying for such an order before the Registrar or before any other qualified person as the Court deems fit. Subject to any other order made in respect of the examination of any witness, the examiner shall send the deposition of the witness to the Registrar. Following that, the Registrar shall send the deposition taken with a sealed certificate to the Minister or other appropriate person in accordance with the Civil Procedure Convention, for transmission to the foreign court or tribunal.

ARBITRATION

UNCITRAL Model Law

23 Is the arbitration law based on the UNCITRAL Model Law?

The principal legislation that applies to both domestic and international arbitrations is the Arbitration Act 2005 (AA) which is based on the UNCITRAL Model Law. Order 69 of the Rules of Court 2012 provides the procedural requirements for arbitration-related suits such as the enforcement of arbitral awards.

Arbitration agreements

24 What are the formal requirements for an enforceable arbitration agreement?

The formal requirements for an enforceable arbitration agreement are governed by section 9 of the AA, where it is expressly stated that an arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement and must be in writing. A written arbitration agreement may be in the following forms:

- A document signed by the parties;
- An exchange of letters, telex, facsimile or other electronic means of communication which provide a record of the agreement in any form; or
- An exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The parties to an arbitration agreement are free to decide on the number of arbitrators. However, where the parties fail to determine the number of arbitrators, section 12 of the AA operates to provide for a tribunal of three arbitrators in international arbitrations, and one arbitrator in domestic arbitrations. Section 13(2) of the AA provides that the parties are free to agree on a procedure for appointing an arbitrator or the presiding arbitrator.

Where parties fail to agree on such procedure, and the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator (section 13(3) of the AA). Where section 13(3) above applies and (1) a party fails to appoint an arbitrator within thirty days of receipt of a request in writing to do so from the other party; or (2) the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment or such extended period as the parties may agree, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) (AIAC) for such appointment (section 13(4) of the AA).

Under section 13(5) of the AA, where in an arbitration with a single arbitrator, (1) the parties fail to agree on the procedure referred to in section 13(2) of the AA; (2) the parties fail to

agree on the arbitrator, either party may apply to the Director of the AIAC for the appointment of an arbitrator. Section 13(6) of the AA provides that where the parties have agreed on the procedure for appointment of the arbitrator, (1) a party fails to act as required under such procedure; (2) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or (3) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director of the AIAC to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 14(3) of the AA provides that: 'An arbitrator may be challenged only if (a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or (b) that arbitrator does not possess qualifications agreed to by the parties.' A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made. (section 14(4) of the AA).

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties to an arbitration agreement are free to decide on their choice of arbitrator(s). It is explicitly provided in section 13 of the AA that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties agree otherwise. Arbitral centres such as the AIAC provides a wide pool of arbitrators with diverse background and experiences. Occasionally, senior counsel from well-established law firms who are experienced in handling large, complex disputes are asked by parties to sit as arbitrators. The outlook for appointing suitable arbitrators remains optimistic.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Yes. The AA applies to arbitration in Malaysia. Parts I, II and IV of the AA, comprising sections 1 to 5, sections 6 to 39 and sections 47 to 51, are of mandatory application in respect of both domestic and international arbitrations where the seat of arbitration is in Malaysia.

Examples of mandatory legislative provisions that apply in Malaysia are as follows:

- Any dispute on which parties have agreed to arbitrate under an arbitration agreement can be determined by arbitration unless it is contrary to public policy, or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (section 4, AA).
- Parties must be treated with equality and each party must be given a fair and reasonable opportunity of presenting that party's case (section 20, AA).
- Provisions which are aimed to promote the freedom of choice enjoyed by the parties. For example, the parties are free to:
    - determine the number of arbitrators (section 12(1), AA);

    - agree on a procedure for the appointment of the arbitrator(s) (section 13(2), AA); and
    - agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration (section 21(1), AA).

- A court must stay proceedings that are the subject of an arbitration agreement and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed (section 10(1), AA).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Arbitration in Malaysia can be traced back to as early as 1809 and the role of courts in arbitration matters has evolved ever since. The arbitration clause does not wholly oust the jurisdiction of the court – it simply deprives the court of jurisdiction to enquire into and decide the merits of the case. When there is a binding reference to arbitration, therefore, the proper course is to stay the cause until it has been settled by arbitration. The defender has a right to such an order whenever an action has been brought by someone who is party to an arbitration agreement in respect of the subject of the action.

Section 8 of the AA provides that no court shall intervene in matters governed by the AA, except where it is provided so. The courts have recognised the policy of minimal curial intervention in the context of section 8 of the AA (*Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; *Padda Gurtaj Singh v Tune Talk Sdn Bhd & Ors* [2021] MLJU 436).

Even though the court does generally practice a minimal-interventionist approach, it is vital to understand that a defendant has to file for a stay of the proceedings before taking any 'steps in the proceedings' if she wants the matter to be arbitrated, otherwise the defendant would be deprived of an order for a mandatory stay. Some examples of 'step in the proceedings' would be giving notice to produce documents, submission of statement of defence and counterclaim, attending summons for directions and seeking a prayer to strike out the plaintiff's writ.

Apart from granting interim measures under section 19 of the AA (discussed below) and when it concerns the enforcement of the award, the courts have refrained from intervening in arbitration matters.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, the arbitral tribunal has the power to grant interim measures under section 19 of the AA pending the disposal of the matter via arbitration. Upon the request of either party, the arbitral tribunal may order a party to:

- maintain or restore the status quo of the matter pending determination of the dispute;
- take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied;

- preserve evidence that may be relevant and material to the resolution of the dispute; or
- provide security for the costs of the dispute.

Award

30 | When and in what form must the award be delivered?

The arbitral award must be made in writing, be signed by the arbitrator or a majority of all the members of the arbitral tribunal, state its date and seat of arbitration and, unless the parties have agreed otherwise or it is an award pursuant to a settlement, also state the reasons upon which it is based (see section 33 of the AA). There is no time limit provided by Malaysian law on the delivery of the award, but the time for making an award may be limited by the arbitration agreement entered into between the parties. If there is a time limit, the arbitrator must deliver the award within that time limit or give notice to extend the time limit where this is provided for under the arbitration agreement between the parties, failing which the award may be set aside (see *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd* [2021] 2 CLJ 173.

The High Court may also extend the time limit, unless otherwise agreed by the parties (section 46 of the AA). However, the High Court may only do so where there is an application made by the arbitrator or the parties and not on its own volition (see *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd* [2021] 2 CLJ 173.

Appeal

31 | On what grounds can an award be appealed to the court?

The extent of the court's power to intervene in arbitral matters is limited to what is expressed in AA, which is, unless the Act provides otherwise the court cannot intervene. When there is a binding arbitration agreement between the parties, the general rule is that it is not proper for the plaintiff to seek a remedy in court when there was a specific provision for arbitration and also appropriate preliminary contractual steps for dispute resolution.

Pursuant to section 6 of the AA, an award is final and binding and may be set aside only if one of the following circumstances in section 37 is established:

- a party to the arbitration agreement was under an incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or under the laws of Malaysia;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the Act; or
- the award is in conflict with the public policy of Malaysia.

Section 37 of the AA is now the only recourse parties may have in seeking to set aside an award. This is the provision which has been used by Malaysian courts to set aside arbitral awards. The grounds for setting aside an award under section 37 is similar to the grounds under article 34 of the UNCITRAL Model Law and the relevant provision of the New York Convention.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

An award may be enforced by applying to the High Court under section 38 of the AA. Under Order 69 rule 8 of the Rules of Court 2012, the application shall be made by an originating summons accompanied by an affidavit showing the written evidence that will be relied on, including the original arbitration agreement and the duly authenticated original award or, in either case, a duly certified copy thereof.

Once the application is allowed, the order giving permission to enforce the award shall be served on the respondent by delivering a copy to him or her personally or sending a copy to him or her at his or her usual or last known place of residence or business.

Within 14 days of the service of the order, the respondent may apply to set it aside. The award shall not be enforced until after the expiration of that period or until after the respondent's application (if filed) has been finally disposed of. See Order 69 rule 8 of the Rules of Court 2012.

Costs

33 | Can a successful party recover its costs?

Parties are entitled to recover such costs in arbitration, especially where doing so is provided for in the arbitration agreement. The general principle in Malaysia in relation to the award of costs is for the arbitral tribunal to order costs in favour of the successful party and to award all reasonable costs incurred by that party during the arbitration. This would generally include legal fees and disbursements reasonably incurred by the party in respect of the arbitration.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The general methods of alternative dispute resolution in Malaysia are arbitration, adjudication and mediation.

Arbitration is commonly resorted to in commercial and construction disputes and has to be contractually agreed upon as the chosen mode of resolving disputes.

Adjudication is resorted to for construction disputes, and operates on a 'pay now, argue later' principle to give 'life' back to the enterprise or underlying contract which had reached an impasse or stalemate. The proceedings are governed by the Construction Industry Payment and Adjudication Act 2012.

In recent years, court-assisted mediation has been gaining traction as there is no cost involved, the process is confidential and has a high rate of success.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Arbitration clauses are strictly enforced by the courts. A suit filed in violation of an arbitration clause will normally be stayed upon the application of the defendant. See section 10(1) of the AA.

When a suit is filed, the court will usually raise the possibility of mediation with the parties during case management. If the parties agree, the mediation can be conducted either by the court or by an external mediator privately arranged by the parties. The former has been the preferred choice for most parties as there is no cost involved.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Since the advent of the covid-19 pandemic, the Rules of Court 2012 have been amended to allow for the increased use of remote communication technology, such as Zoom, by the courts for case management, hearings and trials. This has resulted in substantial savings of parties' time and costs.

The court will normally give directions regarding the protocols to be adopted prior to the hearing or trial. In the case of trials, the directions include the use of soft copy documents, technological requirements and facilities, recording proceedings and the location and supervision of witness testimony to ensure the integrity and fairness of the proceedings.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The legal landscape in Malaysia saw significant trends across several industries, including advancements in technology and data protection, the implementation of regulatory guidelines to tackle corporate governance and sustainability concerns as well as an emphasis on the role of the Judiciary as the gatekeeper of justice rather than merely being interpreters of the law. Some key developments include (in no particular order of preference):

Tackling Corruption

The *Federal Court in Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 1)* [2022] 5 MLJ 85 upheld the former Prime Minister's conviction on seven charges of criminal breach of trust, money laundering and abuse of power involving 42 million Malaysian ringgit from funds of SRC International Sdn Bhd (SRC) during his premiership. The evidence showed that the accused used his position as Prime Minister and Finance Minister at the time to ensure that a 4 billion Malaysian ringgit loan could be disbursed to SRC. Additionally, by virtue of his overarching control of SRC, the accused had misappropriated and converted for his own use the sum of 42 million Malaysian ringgit, resulting in a wrongful gain to him and a wrongful loss to SRC. In light of the Federal Court's decision, it is hoped that more efforts will be taken to combat corruption in Malaysia and to convincingly demonstrate that corruption will not be tolerated.

Environmental: Launch of the Voluntary Carbon Market Exchange

In late 2022, Bursa Malaysia launched a Voluntary Carbon Market (VCM) Exchange to enable companies to purchase voluntary carbon credits from climate-friendly projects and solutions. Participation in the voluntary carbon market allows companies to offset their carbon emission footprint and meet their voluntary climate goals. Through Bursa Malaysia's VCM exchange, buyers and suppliers can transact high-quality carbon credits at transparent prices.

It is believed that the VCM will act as a catalyst, encouraging investments in high-quality offsetting projects that can generate positive environmental and societal benefits. It is important to note that in the 2022 budget, the government of Malaysia announced the implementation of VCM as one of the key initiatives to address the climate change agenda as well as the pioneer of the implementation of a domestic Emissions Trading System and carbon tax.

However, the legal trend in VCM has shown that a successful VCM relies on an ecosystem of actors which includes the government, validation and verification bodies, project developers and proponents, financial institutions and most importantly the participants of the legal industry who has the duty to create and maintain rules, procedures and standards governing carbon credit market. The legal industry in Malaysia has taken the call for action in making the VCM effective by facilitating access to high-quality standardised carbon credit products to offset the carbon footprint from the operations and/or product value chain of its clients.

Read this article on Lexology

Rights of Appeal Against Summary Determinations

Parliament has passed the Courts of Judicature (Amendment) Act 2021, which came into force on 1 October 2022. The amendments restrict a litigant's right to appeal against decisions of the Subordinate Court and High Court involving the dismissal of applications for summary judgment, dismissal of applications to strike out pleadings and successful applications to set aside judgments in default.

The amendments will therefore require a more thorough consideration of litigation strategy by litigants and their legal advisers, and in particular on whether or not to commence summary disposal proceedings where the facts are in dispute and require viva voce evidence.

Enhancement of Employees' Rights

Malaysia, which already has a pro-employee legal framework, has moved to further meet international labour standards as outlined by the International Labour Organization, by passing amendments to enhance the protection and welfare of workers, including improving gender equality. The Employment (Amendment) Act 2022, which amends the Employment Act 1955 (EA), is scheduled to come into force on 1 January 2023.

Prior to the amendments, the EA applied to employees earning up to 2,000 Malaysian ringgit per month and/or a specified group of employees. However, the EA now applies to all employees, with the exception of certain provisions (such as overtime payments) which do not apply to employees earning more than 4,000 Malaysian ringgit per month.

Other key amendments include allowing workers to apply for flexible working arrangements, extending paid maternity leave from 60 days to 98 days, providing seven days of paid paternity leave, reducing maximum working hours from 48 hours per week to 45 hours, and requiring employers to exhibit notices to raise awareness of sexual harassment issues.

Shearn Delamore &Co.

Datin Jeyanthini Kannaperan	jeyanthini@shearndelamore.com
K Shanti Mogan	shanti@shearndelamore.com
Yee Mei Ken	mkyee@shearndelamore.com
Jimmy S Y Liew	jimmyliew@shearndelamore.com
Sathya Kumardas	sathya@shearndelamore.com

7th Floor, Wisma Hamzah-Kwong Hing, No.1, Leboh Ampang, 50100 Kuala Lumpur, Malaysia
Tel: +603 2027 2727
www.shearndelamore.com

Read more from this firm on Lexology

Read this article on Lexology

Monaco

Donald Manasse
Donald Manasse Law Offices

RETURN TO CONTENTS

Summary

LITIGATION	408
Court system	408
Judges and juries	408
Limitation issues	409
Pre-action behaviour	409
Starting proceedings	410
Timetable	410
Case management	410
Evidence – documents	411
Evidence – privilege	411
Evidence – pretrial	411
Evidence – trial	412
Interim remedies	412
Remedies	412
Enforcement	412
Public access	412
Costs	413
Funding arrangements	413
Insurance	413
Class action	413
Appeal	413
Foreign judgments	414
Foreign proceedings	414
ARBITRATION	**414**
UNCITRAL Model Law	414
Arbitration agreements	415
Choice of arbitrator	415
Arbitrator options	415
Arbitral procedure	415
Court intervention	416
Interim relief	416
Award	416
Appeal	416
Enforcement	416
Costs	416
ALTERNATIVE DISPUTE RESOLUTION	**417**
Types of ADR	417
Requirements for ADR	417

Read this article on Lexology

MISCELLANEOUS 417
Interesting features 417
UPDATE AND TRENDS 418
Recent developments and future reforms 418

LITIGATION

Court system

1 What is the structure of the civil court system?

Monaco is a civil law sovereign and independent micro-state. There is a court of general jurisdiction (the Tribunal de Premiere Instance), and a Court of Appeals where a second 'trial' on facts and law is heard. The Cour de Revision is the court of last resort, judging only on questions of law. It is the equivalent of the French Cour de Cassation. Criminal cases are tried before the Tribunal Correctionnel, and the Court of Appeals. Particularly serious crimes will be tried before the Tribunal Criminel.

The Justice de Paix exists as a small claims court for claims up to €3,000 and where a matter is on appeal, up to €10,000.

The Tribunal Supreme is the administrative court before which cases against the government administration and on issues of constitutionality of the laws are heard.

Civil cases in the first instance will be heard before three judges. Court of Appeals cases are heard before three judges, of which one is the Presiding judge and is addressed as President. Urgent hearings are heard before one judge.

Judges also act as guardianship judges, and as supervising judges in insolvencies.

There is a special jurisdiction for labour law cases, comprised of lay representatives of employer and employee organisations, in which a professional judge will also sit.

Commercial rent issues are heard before the Court of General Jurisdiction, but if the issue between the parties relates only to the value of the lease, then the matter is referred to an arbitral commission made up of designated lay persons, and one magistrate.

There are no special commercial or financial courts, but commercial cases will be heard on specific days of the week and before usually the same judges.

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

There are no juries in civil or correctional cases in Monaco. Only the Tribunal Criminel is composed of both jurors and judges (four lay persons and three magistrates).

Although the Code of Civil Procedures provides the possibility of hearing witnesses in civil proceedings, in practice this does not occur. If it were to occur, the judge would be inquisitorial, and would be the only person allowed to pose questions, including those requested by the parties.

Monaco judges are drawn from the Monegasque population but also from the French judges' corps. In France, like in Monaco, the magistrature is a profession, and members will be trained after law school at the French Ecole Nationale de la Magistrature in Bordeaux. Lawyers can seek to become judges after ten years practice, but unlike in the common law system this is not a common practice. It is unknown in Monaco that a member of the Monaco Bar (of which there are some 30 lawyers) will seek to become a magistrate.

A strong preponderance of judges are women.

Limitation issues

3 | What are the time limits for bringing civil claims?

The general limitations statute to bring a civil claim is five years.

Personal injury claims can be brought within 10 years of the date on which the physical condition of the victim is 'consolidated' or stabilised and not expected to change.

Environmental action has a 30-year statute of limitations.

Actions for fees by professionals must be brought within two years.

Actions to claim real property can be brought 30 years from the date on which the persons knew or should have known the facts to allow them to bring the action.

The statute of limitations against architects and builders is ten years.

The parties can agree to modify the general statute of limitations, but it cannot be reduced to less than one year or increased to more than seven years. They can agree reasons to suspend the running of the statute in addition to the reasons listed by law. However, parties cannot modify the limitations period in personal injury, salary payments alimony and child support and other specific cases where payment is required annually or in shorter periods.

The modification of the statute of limitation is not possible in contracts between professionals and consumers or not-for-profit entities.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

In any money claim, a demand notice should be made on the debtor. This can be done by the creditor, their lawyer, or a bailiff requested to do so.

Ex parte disclosure orders can be sought from the court of First Instance President prior to initiating an action, to obtain information from third parties. Orders can be sought to preserve evidence. Ex parte injunctions to freeze assets can also be sought.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil actions are commenced by instructing a bailiff to serve the other party with the equivalent of the summons and complaint. The summons will contain the date and place of the first hearing, the name of the parties and set out the claim.

The Monaco courts have the capacity to handle cases. The courts hear a high number of international law issues and high-value claims.

Timetable

6 What is the typical procedure and timetable for a civil claim?

The normal timetable for a civil claim is 18 months from the serving of the summons to a judgement. At the first hearing, the defendant's lawyer will file a notice of appearance and request the supporting documentation. The court will establish a date for their reply, usually between six to eight weeks. The parties will exchange written pleadings until the parties are satisfied that the oral argument can be heard.

Procedures can be seriously delayed if the parties or the court decide to appoint an expert to evaluate aspects of the claim. Preliminary issues of jurisdiction or standing to sue can also delay outcomes.

Court of Appeals cases are heard as of right. Although no new unrelated claims can be brought, the appellate process is a re-litigation of the first instance process. The normal timetable can take between nine and 18 months.

The court can establish, or a party can request, a calendar that will determine successive dates and a date for 'cloture' or closing of possibility to exchange pleadings in advance of oral argument.

Case management

7 Can the parties control the procedure and the timetable?

The parties control the procedure and timetable together with the court.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no duty to preserve documents or other evidence unless an order has been issued requiring this. There is no obligation to share relevant documents. There is an obligation of loyalty towards the court and the other party in bringing arguments and documents to the court's attention.

A recent reform of the Code of Civil Procedure allows a court to order the production of documents once the lawsuit has begun. There is no contempt procedure for failing to do so, but fines can be imposed. However, the procedure is new and there is little case law as yet to determine the extent to which civil law judges will order such production, which was unknown in the system. In a pending civil case against a bank charged with selling bonds days before the collapse of the issuing company, a request has been made for the production of all internal communications of the bank relating to the bonds in question. The bank is resisting the request, and the court has not yet indicated its willingness to order the production.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

In Monaco, in-house lawyers are not members of the Bar and therefore their advice is not protected by the confidentiality granted to attorney-client communications. However, a general provision of the Penal Code (article 308) protects as confidential all information received by a person in confidence in their professional capacity. If a court orders the production of documents, it is possible that the person will object that the information is confidential. Banks that have been ordered to produce information have refused on the basis of bank secrecy.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

Parties exchange documents, legal opinions and written evidence from witnesses and experts prior to oral arguments.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

There is no oral evidence, although in certain circumstances an expert may be questioned by a court. The pleading lawyer will refer to the evidence in their oral argument, and the court will be given bundles by each of the lawyers in the matter, containing written pleadings and documents exchanged.

Interim remedies

12 | What interim remedies are available?

Interim remedies such as freezing orders of bank accounts, registration of judicial mortgages on property and attachments of things of value (such as automobiles, yachts, furniture, jewellery and artwork) are all available pre-trial. These can be obtained in support of foreign proceedings, although local proceedings will have to be brought to validate the 'seizure' orders once they have been executed.

Remedies

13 | What substantive remedies are available?

Punitive damages are not available. Interest can be awarded from the date of the first demand letter provided it was sent by registered letter or by bailiff. Damages can be awarded for abusive resistance to a demand for payment, but such damages are generally not of any considerable amount.

Enforcement

14 | What means of enforcement are available?

Court orders can be accompanied by a daily fine for not complying. Enforcement is otherwise assured by bailiffs that can execute against the property of the debtor. For judicial mortgages, property can be subject to a forced sale at auction. Seizures of valuable objects and shares must be followed by a public auction.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Civil court hearings, other than matrimonial hearings, are public. The practice before the pandemic was that decisions were read publicly but this is no longer the case. Decisions are not always published, and only Monaco Bar members can obtain access to unpublished opinions. The 'roll' of civil court hearings is available to lawyers, but not posted or available to the general public. Summons, pleadings and evidence are not publicly available.

Published cases (as well as unpublished decisions) will not carry the name of the physical persons who are parties.

Costs

16 Does the court have power to order costs?

The court can award costs, and these are assessed on the real costs expended. However, members of the Monaco Bar can also claim 0.4 per cent of the claim in controversy if their claim or defence is successful.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency agreements are illegal. However, success fee arrangements, by which whatever fee is paid is augmented in the event of the client's hoped for outcome are not illegal. Third-party funding is known and has not created difficulty.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

Insurance for costs is not known in Monaco and not readily available.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

There is no 'class action' in the Monaco civil procedure.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties have a right to appeal. There is no requirement to ask for 'leave to appeal'. The appeal will be a re-trial on the merits. There is a further appeal possibly on legal issues only.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Monaco only has one bilateral agreement on the recognition of foreign judgments, with France. It is not a member of the European Union and therefore not bound by the regulations on recognition of European judgments.

However, the Code of Private International Law (CDIP) article 15, sets out the rules for recognition (or non-recognition) of foreign judgements. There is no requirement that the foreign country recognise Monaco's judgments (no reciprocity requirement). The foreign judgement will be recognised and enforceable unless it is shown that:

- it was rendered by a court not having jurisdiction or only asserting jurisdiction on grounds indicating an insufficient nexus with that country: temporary presence of the defendant in the foreign country, or on the basis of assets being present in the jurisdiction and not having any relationship to the litigation, or the defendants exercising an unrelated activity in the country;
- the defendant did not have notice and an opportunity to defend;
- the judgment is contrary to Monaco public order;
- the decision is contrary to a decision rendered between the same parties in the Principality, or in a foreign country and recognised in the Principality; or
- a case is pending in the Principality between the same parties and on the same issues, and which was filed first.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Monaco has adhered to the Hague Convention on the obtaining of evidence in civil and commercial proceedings abroad of 18 March 1970. It will not execute a request for pre-trial discovery.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Monaco does not have an arbitration law. A draft law was proposed in 2007 but has not been enacted having met with strong opposition.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The requirements for arbitration are set out in the Civil Code articles 940 to 965. While any party may agree to arbitration once a controversy has arisen, only merchants can validly contractually agree to 'arbitrate' any civil disputes arising from a contract.

The agreement must be in writing.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the agreement is silent on the applicable rules or the applicable law but provides for arbitration, the choice may be made by an application to the Court. A party may challenge the appointment of an arbitrator.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

There is no public pool of experienced arbitrators in Monaco. There is a depth of experience in certain sectors (shipping, construction, sports law for example). A number of practitioners in Monaco have experience in arbitration (whether members of the Monaco Bar or foreign jurists authorised to practice in Monaco).

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

There is mention of arbitration in the Code of Civil Procedure, but there is only a general article that specifies that the parties can agree the rules, and if they do not then the procedures of the courts are to be followed. The parties are expected to produce their writings and evidence within fifteen days of the agreement to arbitrate an issue being signed. The arbitration is to be completed within three months of the signing of the arbitration agreement, unless the agreement specifies otherwise.

The arbitrators are expected to apply the law, unless the agreement allows them to be 'amiable compositeurs' and thus to decide in the equivalent of equity.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The arbitral award must be made executory by a court order, and only then can they be executed. The award can be appealed, unless the parties have agreed in the arbitration agreement or at any time not to allow appeals.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

There is no instance of arbitrators having power to do so.

Award

30 | When and in what form must the award be delivered?

The award must be rendered in writing by all the arbitrators. It must be presented to the court of first instance, and an order making it executory must be rendered.

Appeal

31 | On what grounds can an award be appealed to the court?

There is a general right of appeal on the merits unless this has been waived.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Monaco is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards. The foreign award is presented ex parte to the court of first instance and an order can be rendered for its recognition. The order can then be subject to opposition.

A Monaco-based opposition which is followed by an Order of the Court can be enforced as any order of the court.

Costs

33 | Can a successful party recover its costs?

Costs can be recovered in the arbitration in accordance with the rules applicable or agreed.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Conciliation is required in matrimonial matters as well as in labour and commercial lease value claims.

In matrimonial matters, the parties will first appear before a judge to determine if there can be a conciliation before either party is authorised to file for separation or divorce.

In labour cases, a Bureau de conciliation exists before which claims must first be heard before the matter is litigated before the labour tribunal.

Mediation is proposed in family matters by the social services but is not court mandated.

All justice of the peace cases must be preceded by a conciliation hearing.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The alternative dispute resolution process is required in matrimonial, labour, small claims and commercial lease matters. In general litigation, the parties cannot be compelled to participate in a mediation process.

In matrimonial matters, once the conciliation process has been unsuccessful and the divorce authorised, attempts have been made to request a party to be compelled to mediate, but these have not met the favour of the courts.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Because victims in criminal cases can be awarded damages, it is not uncommon that civil cases will be accompanied by criminal complaints in an effort to pressure the other party to settle. This is not considered unethical in the Monaco system, although it is not a tactic that is preferred by criminal court investigating magistrates or judges. The settlement of the criminal complaint can include payment of a sum of money but will not ensure that criminal action will not be pursued.

Read this article on Lexology

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Decisions in Monaco are not all public, although those of the Tribunal Supreme (the administrative court) are published. The Tribunal Supreme is a constitutional court where actions of the government can be contested; in a recent case, a promoter won an award of more than €100 million against the government before that Tribunal, causing controversy. Lawyers will refer to specific key cases or judgments, from Monaco and also neighbouring France. There has been a general trend to allow the piercing of the corporate veil of foreign companies holding property in Monaco. In one matter, the enforcement of a New York judgment containing a punitive damages complement was refused in Monaco. However, in the action of validation of the seizure order allowed by the court against the foreign company assets which ran in parallel, the court of first instance awarded the amount ordered by the New York court, even though the foreign judgment was not recognised. The case is on appeal.

The recent reform of the Code of Civil Procedure allowing courts to order the production of documents will provide case law and an indication of how far judges trained in civil law are willing to extend the requirement for document production, and the sanctions they will impose for failure to comply.

Donald Manasse dmm@manasselaw.com

Est Ouest, 24 blvd Princesse Charlotte, MC 98000, Monaco
Tel: +377 93 50 29 21
www.manasselaw.com

Read more from this firm on Lexology

Panama

Khatiya Asvat and **Joaquín De Obarrio**

Patton Moreno & Asvat

RETURN TO CONTENTS

Summary

LITIGATION	420
Court system	420
Judges and juries	421
Limitation issues	421
Pre-action behaviour	422
Starting proceedings	422
Timetable	423
Case management	423
Evidence – documents	423
Evidence – privilege	424
Evidence – pretrial	424
Evidence – trial	424
Interim remedies	425
Remedies	425
Enforcement	425
Public access	426
Costs	426
Funding arrangements	426
Insurance	426
Class action	427
Appeal	427
Foreign judgments	427
Foreign proceedings	428
ARBITRATION	**428**
UNCITRAL Model Law	428
Arbitration agreements	428
Choice of arbitrator	429
Arbitrator options	429
Arbitral procedure	429
Court intervention	430
Interim relief	430
Award	430
Appeal	430
Enforcement	431
Costs	431
ALTERNATIVE DISPUTE RESOLUTION	**432**
Types of ADR	432
Requirements for ADR	432

Read this article on Lexology

MISCELLANEOUS 432
Interesting features 432

UPDATE AND TRENDS 432
Recent developments and future reforms 432

LITIGATION

Court system

1 What is the structure of the civil court system?

At the first level are the municipal courts, with jurisdiction on matters not exceeding US$5,000 and certain case-specific matters (eg, eviction proceedings). The municipal courts have jurisdiction over a municipality. Appeals against decisions of the municipal courts are heard by the circuit courts, where three circuit judges act as the appellate court, one of them serving as the main appellate judge.

Next are the circuit courts, with jurisdiction on matters exceeding US$5,001 and certain case-specific matters (eg, oral proceedings related to challenges against resolutions of corporations and claims involving land). The circuit courts have jurisdiction over a province, except for the province of Panama, where three groups of circuit courts hold jurisdiction over a series of municipalities.

The provinces are distributed in what is known as judicial districts. For civil matters, the Republic of Panama has four judicial districts headed by a Superior Court: the First Judicial District, formed by the provinces of Panama, Colon, Darien, San Blas and Panama Oeste; the Second Judicial District, formed by the provinces of Coclé and Veraguas; the Third Judicial District, formed by the provinces of Chiriquí and Bocas del Toro; and the Fourth Judicial District, formed by the provinces of Los Santos and Herrera. Appeals against decisions of the circuit courts are heard by the Superior Courts or courts of appeal of the relevant province's judicial district.

The Superior Courts or courts of appeal generally serve as appellate courts for appeals against decisions of the circuit courts, as well as first instance courts for constitutional challenges against actions of public officials with jurisdiction over a province, and other matters. The Superior Court is composed of five magistrates for the First Judicial District and three magistrates for the other judicial districts. The magistrates act as an appellate court consisting of three magistrates, each alternating as the main magistrate on different cases, pursuant to case distribution rules.

Challenges against decisions of the Superior Courts are heard before the Civil Chamber of the Supreme Court of Justice, in particular, the writ of cassation. Three Supreme Court justices form the Civil Chamber.

Matters related to constitutional challenges are heard by the Plenary Assembly of the Supreme Court of Justice. The Supreme Court comprises nine justices overseeing four chambers, each chamber composed of three justices, namely the First Civil Chamber, the

Second Chamber for criminal matters, the Third Chamber for administrative matters and labour litigation, and the Fourth Chamber for general matters.

Other special courts exist, such as the courts of commerce, composed of three (two active) circuit-level commercial courts of the first judicial circuit of Panama, and a Superior Commercial Court, part of the First Judicial District. In addition, special insolvency courts are to be incorporated into the civil court system, to eventually operate at the circuit court level, overseen by a Superior Insolvency Court, part of the First Judicial District. There are also two maritime courts with nationwide jurisdiction and a maritime court of appeals.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

In civil matters, the burden of proof is borne by the plaintiff. Therefore, the judge's role consists of verifying and analysing the evidence produced by the parties in the proceedings, and forming their own concept, based on personal knowledge and experience, the applicable law and principles, and the rules for admission of evidence. This process is known as critical analysis. When conducting this critical analysis, the judge can request the production of evidence, including the assistance of experts; however, this analysis cannot make up for or supplement deficiencies of the parties, in particular as it relates to the plaintiff's burden of proof duties. Juries are not involved in civil proceedings. Civil proceedings are mostly of a written nature.

Limitation issues

3 | What are the time limits for bringing civil claims?

Different time limits apply depending on the nature of the claim.

The general time limit provided by the Civil Code for the filing of a personal claim for actions that do not have a particular time limit is seven years.

The general time limit for the filing of a claim for tortious damages is one year.

Real estate claims have a 15-year time limit.

The time limit for claims to seek payment of overdue leases is five years.

Claims to seek payment of civil services rendered by lawyers, notaries, experts, custodians, interpreters, arbitrators and services provided by pharmacists, medical doctors, engineers, chemists, teachers and professors, as well as lodging and food, and the sale of provisions to non-merchants or those merchants practising in another activity, are limited to two years.

It is not permitted for the parties to agree to suspend time limits; however, individuals with the capacity to dispose of assets can waive the acquired time limit.

The above are Civil Code-governed claims.

Read this article on Lexology

Note that civil proceedings also include claims governed by the Code of Commerce, where the default time limitation is five years.

Claims governed by the Code of Commerce subject to civil procedure include: claims for retail sales, claims for agents' wages, claims for transportation contracts, broker's liability claims and insurance claims where the time limitation is one year.

Claims related to corporations and the resulting relations and liabilities between shareholders or partners, as well as with regard to the company; liability of liquidators or managers of corporations; interest due on leases when charged yearly or for lesser periods; collection of negotiable instruments; wholesale activity; and financial leasing and banking facilities have a time limitation of three years.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Considering the formal nature of civil proceedings, the plaintiff must verify that documents serving as evidence comply with the requirements of the governing law as well as for their admissibility (eg, signatures have been acknowledged before a notary, documents granted abroad have been legalised, documents have been signed by individuals with authority and certificates have been obtained within the legal timeline for their validity).

The plaintiff can try to secure or produce evidence that may otherwise not be available during the proceedings through prejudicial petitions that may include witness statements, inspections of places, objects or documents with the assistance of experts, special disclosure of accounting or financial records, and reports from private or public institutions. A security deposit (in the range of US$100 to US$1,000) for damages is generally required for the order to be effected.

A plaintiff can try to secure the claim through the prejudgment attachment of assets, such as cash in banks, movable assets, property recorded with the Public Registry, credits and inventories. A security bond for damages that may be caused, representing an estimated 25–40 per cent of the attachment amount or claim amount (the attachment amount cannot exceed the claim amount) is required in the form of cash deposited with the National Bank in the relevant court's account, insurance or bank guarantees, mortgages or public debt instruments; the amount is set by the court at its discretion. The prejudgment attachment is an ex parte application; once the order has been effected, the plaintiff must file the complaint within the following six days and serve the defendant with proceedings within the following three months; otherwise, the complaint may be dismissed.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings commence through the filing of a complaint. Once the complaint is admitted, the court instructs service on the defendant. The defendant is personally served through

the judiciary. If the defendant is a corporation, then its legal representative would have to take service. If the defendant or its representative is not within Panamanian jurisdiction, letters rogatory must be sent to the foreign jurisdiction through diplomatic channels. The defendant must be provided with a copy of the complaint and order of admission, and will be required to sign the order of admission. At such moment, the term for answering the complaint shall commence. If the defendant cannot be located, an absentee party defendant shall be appointed.

The Panamanian judiciary's caseload is significant and the allocated budget is restricted, and as a result the progression of proceedings is slow.

Timetable

6 What is the typical procedure and timetable for a civil claim?

The timeline for an ordinary civil claim is as follows:

- filing the complaint;
- answer to complaint: to be filed within 10 days of service of the order of admission of complaint;
- filing of evidence: takes place 15 days after the term for responding to the complaint, and must be filed within the following five days;
- counter-evidence: must be filed within three days of the filing of evidence term;
- objections to evidence: must be filed within three days of the filing of counter-evidence term;
- taking of evidence: the court may set a calendar of up to 30 days. The order for taking of evidence may take an estimated one to two years or more;
- closing statements: filed within five days of the conclusion of the taking of evidence stage;
- decision: one to three years or more;
- appeal: to be taken three days after service, filed within the five following days; one to two years; and
- cassation: two to three years or more.

Case management

7 Can the parties control the procedure and the timetable?

The duty to maintain the pace and progress of the proceeding falls on the judge. However, there are mechanisms that allow the parties to control certain aspects of the procedure and its timetable: the parties can agree to stay the terms of proceedings for periods of up to three months, and they can also ask the judge to eliminate, modify or have as effected certain parts of the procedure.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Generally, no. Discovery is not available in civil proceedings.

Read this article on Lexology

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

In principle, yes. The document would be protected by attorney–client privilege.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

No. A party can try to secure evidence prior to the commencement of proceedings.

The timeline for an ordinary civil claim is as follows:

- filing the complaint;
- answer to complaint: to be filed within 10 days of service of the order of admission of complaint;
- filing of evidence: takes place 15 days after the term for responding to the complaint, and must be filed within the following five days;
- counter-evidence: must be filed within three days of the filing of evidence term;
- objections to evidence: must be filed within three days of the filing of counter-evidence term;
- taking of evidence: the court may set a calendar of up to 30 days. The order for taking of evidence may take an estimated one to two years or more;
- closing statements: filed within five days of the conclusion of the taking of evidence stage;
- decision: one to three years or more;
- appeal: to be taken three days after service, filed within the five following days; one to two years; and
- cassation: two to three years or more.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Generally, evidence is submitted in the form of briefs together with evidentiary documents, either at the moment the complaint is filed or answered, or during the stage of filing of evidence, counter-evidence and objections (this applies to ordinary or standard civil proceedings), or when filing or answering a motion. The briefs must contain the list of fact witnesses, the appointment of expert witnesses and the questions to be addressed by the expert witnesses. Witnesses can be interrogated and counter-interrogated by the parties, and the judge may also interrogate; expert witnesses are also interrogated on their findings and conclusions in a similar manner. The judge may order witnesses to face each other if they give contradictory answers.

Interim remedies

12 | What interim remedies are available?

General injunctive remedies such as freezing injunctions are not available in civil proceedings.

Plaintiffs can seek prejudgment attachment of a defendant's assets.

Plaintiffs can also request the staying of negotiations or dealings whenever a real right (such as property) may be affected, subject to the consigning of security for damages with the court.

In connection with claims involving challenges against resolutions of a corporation, a staying order or freezing order is available provided the plaintiff files the complaint within 30 days of the document being recorded with the Public Registry or, if the document was not recorded, from the moment the plaintiff learned of its existence.

Interim remedies are available in connection with foreign proceedings when the relevant decision is presented for acknowledgment and enforcement before the Fourth Chamber of the Supreme Court of Justice.

Remedies

13 | What substantive remedies are available?

As a general rule, in addition to the proven claimed amount, the prevailing party is entitled to interest (at a default rate of 6 per cent per annum in civil matters and 10 per cent in commercial matters), litigation costs and expenses, as well as legal fees set in accordance to the Bar tariff, which considers the type of procedure and claim amount.

Moral damages (eg, emotional or reputational loss) are available in civil claims for damages.

Punitive damages are generally not available in civil proceedings. As exceptions, treble damages are available in consumer defence or action proceedings, as well as in the special procedure of international private law conflicts before the Panamanian courts, where the parties can request the application of foreign law indemnity rules.

Enforcement

14 | What means of enforcement are available?

If a defendant does not comply with the final order within six days of receiving service, the plaintiff can commence special enforcement proceedings and request the post-judgment attachment of the defendant's assets.

In certain cases, the plaintiff can request that the defendant or a third party who fails to comply with or breaches an order of the judge be held in contempt. This may result in arrest and fines.

Public access

15 Are court hearings held in public? Are court documents available to the public?

Generally, yes. However, in oral proceedings, any of the parties may request that the hearing be held privately, for reasons of security, morality, decorum or public policy.

In addition to the parties, the case file documents are generally available to lawyers, paralegals and clerks, appointed experts and custodians, other court-appointed assistants, law students, and those individuals authorised by the judge for purposes of research or education, as well as other individuals specially authorised by the judge.

Costs

16 Does the court have power to order costs?

Yes. As a general rule, the prevailing party is entitled to legal costs. Legal costs (or legal fees) are set by application of the Bar tariff, which generally considers the type of procedure and claim amount. In addition to legal costs, the prevailing party can seek payment of other expenses, such as expert fees, expenses for the reproduction of documents, certificates, fees charged by public institutions and other expenses related to the proceedings. The judge can adjust or eliminate the application of legal costs and only order payment of expenses if he or she considers that the losing party litigated in good faith. Good faith cannot be considered to exist, inter alia, when a defendant fails to appear before the court despite having been served with proceedings; enforcement proceedings are required to seek performance of the judgment; the defendant denies evident statements that should have been accepted as true; false documents or witnesses are submitted; no evidence is filed to substantiate the facts of the complaint or a motion; or a party abuses his or her litigation rights.

The plaintiff is not obligated to provide security for the defendant's costs.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

This is a matter of private agreement between counsel and client. The above arrangements, although not customary in our system, should in principle be available.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

Not applicable.

Read this article on Lexology

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes. Class actions exist in connection with consumer protection claims. In addition, the Judicial Code has a special chapter on international private law conflict procedure, which allows the judge to group or consolidate actions whenever a great number of plaintiffs or defendants exist.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeal is generally available against decisions or orders of the first instance judge. Generally, the appellant has three days after receiving service of the decision or judgment (two days if dealing with an order) to appeal against the adverse judgment. The brief of appeal must be filed before the first instance judge within five days, and the opposing party has the following five days to lodge its brief opposition. The first instance judge shall review the brief to confirm that appeal is available against the decision and that the appeal has been timely filed; in that case, the case file is sent to the Superior Court. The appellant can also request the taking of evidence in special circumstances, as part of the appeals procedure.

The extraordinary writ of cassation before the Civil Chamber of the Supreme Court of Justice is available, in special circumstances, against appellate court decisions. The writ of cassation deals with special and specific matters of procedure, application of the law and evaluation of evidence.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Generally, a final foreign judgment will be recognised and enforced in the courts of Panama without retrial of the originating action by instituting exequatur proceedings before the Fourth Chamber of the Supreme Court of Justice of Panama.

For a writ of exequatur to be obtained from the Fourth Chamber of the Supreme Court of Justice, the following are required:

- The existence of a treaty or, in its absence, reciprocity. The principle of reciprocity provides that the country that issued the judgment would, in similar circumstances, recognise a final and conclusive judgment of the courts of Panama. Reciprocity is presumed to exist; therefore, if the opposing party (and, exceptionally, the Prosecution Office of the Attorney General) considers reciprocity is lacking, then such party must provide evidence within the course of exequatur proceedings.
- A judgment issued because of an action in personam. Actions in personam are the opposite of 'real' actions (ie, real estate property situated in Panama).

- Demonstrating the judgment was rendered after personal service has been effected on the defendant. When analysing the exequatur petition, the Fourth Chamber of the Supreme Court of Justice will look for confirmation of proper personal service of process effected on the defendant. The purpose of this requirement is to verify that the defendant had the opportunity to submit a defence against the claim, and that, therefore, the principles of contradiction or bilateralism and due process were observed.
- That the cause of action upon which the judgment was based is lawful and does not contravene the public policy of Panama.
- Providing authentic copies of the documents evidencing the judgment, according to the law of the relevant foreign court and have been duly legalised by a Consul of Panama or pursuant to the 1961 Hague Convention on the legalisation of documents.
- Providing translations of the copy of the final judgment (and complementary evidence) by a licensed translator in Panama.
- The judgment must be final and definitive, meaning that no other remedies (ie, appeals or other challenges) are available against the judgment.

Once the writ of exequatur has been obtained from the Fourth Chamber of the Supreme Court of Justice, the plaintiff must commence special executory proceedings before the civil courts to seek collection of the owed amounts.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Foreign courts can request legal assistance from the Panamanian judiciary through letters rogatory, either through means of treaties or conventions, or following principles of international comity. The petitions are channelled through the Fourth Chamber of the Supreme Court of Justice, which will review the application and, if granted, shall instruct the competent courts to take or instruct the production of the required evidence.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Generally, yes, with influence from the ICC Arbitration Rules, as well as the arbitration laws of other jurisdictions (Spain, France, Mexico and others).

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing. An arbitration agreement shall be considered to meet this requirement whenever evidence of its contents can be produced by any means. This includes electronic communications that can be accessed for eventual confirmation. The existence of a written form can also result from the exchange of briefs of complaint and

answer to the complaint, whenever a party affirms its existence and the opposing party does not object, or by reference to an arbitration clause existing in a document that would apply to the relevant contract.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Generally, the parties are free to appoint the number of arbitrators, provided the tribunal is composed of an odd number. If the parties cannot agree to the number of arbitrators, the dispute shall be decided by a sole arbitrator. If one of the parties is the state or a state entity, then the tribunal shall consist of three arbitrators.

It the arbitral tribunal is composed of three arbitrators, then each party appoints one arbitrator, and the appointed arbitrators then appoint the chair. If a party fails to appoint an arbitrator within the following 30 days of the last appointment of an arbitrator, of if within such term the arbitrators do not appoint the chair, then the appointment can be requested by any of the parties, from a national or international institution, pursuant to their respective rules.

An arbitrator can only be challenged in those circumstances when justified doubt exists regarding the arbitrator's impartiality or independence, when the arbitrator does not meet the qualifications agreed by the parties, or when the arbitrator does not meet the requirements of law (such as individuals who have been found to have seriously breached the code of ethics of an arbitral institution, or individuals declared criminally liable for fraud).

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

The parties generally agree that each shall appoint one arbitrator. The chair may be appointed by the institution or the party-appointed arbitrators, depending of the arbitration agreement and applicable rules. The most active arbitral institutions have lists of arbitrators, for both domestic and international arbitration, from which the chair of the tribunal is appointed following the relevant institution's rules. The candidates are generally experienced practitioners in their fields and have served as arbitrators, and include national as well as internationally renowned specialists.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

The law on arbitration contains substantive provisions regulating matters such as the definition of domestic or international arbitration, matters that can be submitted to arbitration, the effects of the arbitration agreement, the default rule that arbitration shall be at law

when the parties do not state the nature of the arbitration, and requirements for application for the annulment or enforcement of the award.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, court intervention during an arbitration is not admissible. The parties can agree to arbitrate a court dispute, provided the matter can be submitted to arbitration. The courts can intervene prior to the formation of the arbitral tribunal by providing interim relief or precautionary measures at the request of the plaintiff, or they can intervene at the request of the arbitral tribunal, for purposes of assisting the tribunal with interim relief or with the production of evidence.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes.

Award

30 | When and in what form must the award be delivered?

In domestic arbitration, the general rule is that the award must be delivered within two months of the filing of closing statements, and may be extended for an additional two months depending on the degree of complexity. In international arbitration, the award must be delivered within the term provided by the relevant rules, or as agreed by the parties or the arbitral tribunal.

Generally, the arbitration award must be in written form signed by the majority of the arbitrators. If there is no majority consent, then the chair can sign the award. The award must include the analysis and motivations (except as otherwise agreed by the parties) and the date and the seat of the arbitration. The award is served by the arbitral institution or the tribunal, as applicable, to the parties through delivery of a signed copy of the award. Generally, a single award is issued; however, multiple awards can also be issued, as may be agreed with the parties.

Appeal

31 | On what grounds can an award be appealed to the court?

Appeal is not available against the arbitral award. The award can be challenged through an annulment application filed before the Fourth Chamber of the Supreme Court of Justice, on the following grounds:

- that one of the parties to the arbitration agreement was under some incapacity under the law applicable to it, or the agreement was not valid pursuant to the law to

which the parties subjected it or, if no provision was made in this regard, pursuant to Panamanian law;

- that the party against was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable, for whatever reason, to present its defence;
- that the award deals with a dispute that was not contemplated by the arbitration agreement, or that did not fall within the terms of the submission to arbitration, or contains decisions that go beyond the scope of the arbitration clause or the submission to arbitration. However, if the provisions of the award that refer to the matters submitted to arbitration can be separated from those that have not been submitted to arbitration, the former may be recognised and enforced;
- that the formation of the arbitral tribunal or the arbitral proceedings did not conform to the parties' agreement – except when such agreement breaches the arbitration law – or, in absence of an agreement, it did not conform to the arbitration law;
- that the arbitration tribunal has ruled on a matter that could not be arbitrated; and
- that the international arbitral award breaches international public policy, or in the case of a domestic award, that such award breaches Panamanian public policy.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Foreign arbitral awards in Panama are recognised and enforced in accordance with:

- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958);
- the Inter-American Convention of International Commercial Arbitration (Panama, 1975); or
- any other treaty ratified by the Republic of Panama on the recognition and enforcement of arbitral awards. The petition for recognition is filed before the Fourth Chamber of the Supreme Court of Justice of Panama.

In the case of foreign awards where Panama served as the seat of arbitration, enforcement can be directly requested before the civil circuit courts through judgment enforcement proceedings.

Domestic awards are enforced through judgment enforcement proceedings before the civil circuit courts.

Costs

33 | Can a successful party recover its costs?

Generally, yes. When filing closing statements, the parties are generally requested to submit a report on incurred costs, including legal expenses, expert fees, and arbitrator and services fees of the institution, as well as general expenses incurred during the arbitration, for evaluation by the arbitral tribunal and inclusion in the award.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

The most commonly used alternative dispute resolution (ADR) processes are mediation and conciliation. ADR has still to gather momentum; it is generally conceived as a pre-arbitration or pre-litigation stage.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In certain cases, the parties contractually agree to mandatory ADR prior to commencing arbitration. The arbitral tribunal may stay the arbitration and request the parties to submit to ADR in cases where the arbitration has commenced without the observance of this stage.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Not applicable.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In January 2023, the Supreme Court of Justice presented to the National Assembly the draft law adopting the Code of Civil Procedure. The basis of the draft law project is the modernisation of the civil procedure system, favouring the use of orality in the central stages of the process which is expected to be streamlined and faster. As of April 2023, the project is pending its second debate of three before being approved into law by the National Assembly. If approved and ratifed by the President of the Republic, the new Code of Civil Procedure is expected to enter into force throughout the national territory two years after being published in the Official Gazette.

Khatiya Asva kasvat@pmalawyers.com
Joaquín De Obarrio jdeobarrio@pmalawyers.com

Capital Plaza Building 8th Floor,
Avenue Roberto Motta Costa del Este, Panama City, Panama
Tel: +507 306 9600
www.pmalawyers.com

Read more from this firm on Lexology

Philippines

Manolito Alvarez Manalo and Joan Roshen M Dueñas
Ocampo, Manalo, Valdez & Lim Law Firm

RETURN TO CONTENTS

Summary

LITIGATION	435
Court system	435
Judges and juries	435
Limitation issues	435
Pre-action behaviour	436
Starting proceedings	436
Timetable	437
Case management	437
Evidence – documents	438
Evidence – privilege	438
Evidence – pretrial	439
Evidence – trial	439
Interim remedies	439
Remedies	440
Enforcement	440
Public access	441
Costs	441
Funding arrangements	441
Insurance	441
Class action	442
Appeal	442
Foreign judgments	442
Foreign proceedings	443
ARBITRATION	**443**
UNCITRAL Model Law	443
Arbitration agreements	443
Choice of arbitrator	444
Arbitrator options	444
Arbitral procedure	444
Court intervention	445
Interim relief	445
Award	446
Appeal	446
Enforcement	446
Costs	446
ALTERNATIVE DISPUTE RESOLUTION	**447**
Types of ADR	447
Requirements for ADR	447

Read this article on Lexology

MISCELLANEOUS 447
Interesting features 447

UPDATE AND TRENDS 448
Recent developments and future reforms 448

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Philippine judicial system comprises first-level courts (municipal, metropolitan and regional trial courts), the Court of Appeals and the Supreme Court. A single judge presides over first-level courts, while the Court of Appeals comprises 69 justices, who sit in divisions of three members. The Supreme Court comprises 15 justices, which sit en banc or in divisions of three, five or seven members.

The jurisdiction of first-level courts depends on the nature of the proceedings and the amounts involved. A metropolitan trial court has exclusive original jurisdiction over civil actions involving amounts at lower limits. Civil actions involving amounts beyond the threshold of metropolitan trial courts, as well as actions incapable of pecuniary estimation, are handled at the first instance by regional trial courts.

Metropolitan trial court decisions can be appealed to a regional trial court. In turn, regional trial court decisions can be appealed to the Court of Appeals and the Supreme Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The judge presiding over civil proceedings:

- determines the facts;
- ensures that the parties comply with the rules of procedure;
- interprets the applicable laws; and
- in penning the decision, applies the law.

In the performance of their functions, judges must be impartial. Nonetheless, during a trial, judges may adopt an inquisitorial role only for clarificatory purposes.

The Philippines has not adopted the jury system.

Limitation issues

3 | What are the time limits for bringing civil claims?

The time limits for bringing civil claims are as follows:

Read this article on Lexology

- eight years from the time possession was lost for actions to recover movable property;
- 30 years for actions affecting title to or possession of real property;
- 10 years for actions involving mortgages, written contracts, obligations created by law and judgments;
- six years for actions involving oral contracts and quasi-contracts;
- four years for actions involving injury to the rights of the claimant and quasi-delicts;
- one year for actions involving forcible entry, detainers and defamation; and
- five years for all other actions.

Actions to demand a right of way or to bring an action to abate a public or private nuisance are not time-limited.

Time limits for bringing civil claims may not be suspended merely by agreement of the parties involved. However, such periods may be interrupted if:

- a relevant action is filed before the court;
- the creditors produce a written extrajudicial demand; or
- the debtor issues a written acknowledgement of the debt.

Pre-action behaviour

4 Are there any pre-action considerations the parties should take into account?

Depositions may be commenced before a civil action has been instituted. However, a proper petition for this purpose must be filed with the court. The petition should indicate that the petitioner expects to be a party to an action but is presently unable to commence this action. The petition must also describe the expected action in which the deposition would be used and the facts to be established in and purpose of the deposition. If allowed, the deposition may be used in any action involving the same subject matter.

All other remedies may be availed of only after a civil action has been instituted.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A claimant institutes a civil action by filing a complaint and paying the proper fees therefor. The responding party will be notified by the court of the complaint through a summons and issued a copy of the complaint.

Owing to greater court accessibility and the relative ease of initiating civil actions, court dockets have become congested. In response, the Philippine judiciary has actively promoted amicable settlements to resolve civil actions. Thus, after they are instituted and before the trial, civil actions are diverted to mediation over which accredited mediators from the Philippine Mediation Centre preside. Where mediation fails, another chance to arrive at an amicable settlement is available during judicial dispute resolution, presided over by a judge.

If mediation fails again and trial ensues until complete resolution of the civil action, a third attempt at mediation is available at the appellate level.

Timetable

6 What is the typical procedure and timetable for a civil claim?

After the institution of a civil action, the clerk of the court is required to issue summons to the responding party within five days of receipt of the complaint. In turn, the summons should require the responding party to answer the complaint within 30 days of a successful service in accordance with the rules of court. If the responding party is a foreign private juridical entity, the answer may be submitted within 60 days. Both periods are subject to a 30-day extension for meritorious reasons. The claimant may file a reply within 15 days of receiving an answer. After all pleadings have been submitted, the clerk of court will set the case for pretrial not later than 60 days from the submission of the last pleading. At least three days before the pretrial, the parties must ensure that the other receives their pretrial brief.

During pretrial, the parties identify:

- the possibility of an amicable settlement;
- the admitted facts;
- the legal issues to be resolved;
- their respective evidence and witnesses; and
- the trial dates.

The parties are then referred to court-annexed mediation, which should not exceed 30 days. Mediation may fail due to the expiration of the period. However, if amicable settlement is still possible, the court may refer the parties to judicial dispute resolution to be conducted by another court within 15 days from notice of failure of mediation.

If judicial dispute resolution is also unsuccessful, trial before the original court ensues. During the trial, the parties present their evidence and witnesses. Each party is allowed to present their witnesses and evidence within 90 days. After the trial terminates, the court may require the submission of memoranda. Thereafter, the civil action will be submitted for resolution. The decision must be served on the parties within 90 days therefrom.

The 1987 Constitution requires courts to resolve cases in three months in the first instance, 12 months on appeal (ie, before the Court of Appeals) and 24 months on final appeal (ie, before the Supreme Court). These periods commence after the case is submitted for resolution.

Case management

7 Can the parties control the procedure and the timetable?

In general, the parties cannot control the procedure, as each step in the process is a prerequisite for the next. However, the timetable may be controlled by implication. Parties may request specific deadlines and choose when hearings will be set, subject to the court's

approval. Further, while courts frown on postponements, parties may ask for leave of the court to extend reglementary periods for submissions and defer trial dates or hearings for compelling reasons.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

While there is no express requirement on the matter, diligence dictates that parties preserve their evidence prior to the termination of the trial. After the presentation of their testimonial, documentary and object evidence in open court, parties submit their evidence to the court through a formal offer of evidence. It then becomes the court's duty to preserve the parties' evidence until the final disposition of the case.

Parties need not volunteer documents; however, they may seek leave of the court to compel another party to produce documents (ie, non-privileged) that are material to the case.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Communications between the following persons are generally privileged:

- husband and wife;
- attorney (or person reasonably believed by the client to be licensed to engage in the practice of law) and client;
- doctor (or person reasonably believed by the patient to be authorised to practice medicine) and patient; and
- minister or priest (or person reasonably believed to be a minister or priest) and penitent.

In-house lawyers are covered by the attorney-client privilege. However, the privilege may be waived by the person in whose favour the privilege was constituted.

In addition, communications made to public officers in confidence and in relation to their official capacity cannot be disclosed if the public interest would be disadvantaged.

Communications between the above-enumerated persons remain privileged even when obtained by a third party on the condition that the original parties to the communications reasonably protected the confidentiality of said privileged communications.

Aside from the foregoing, any person cannot be compelled to testify against their direct ascendants or descendants or about any trade secret. However, persons with knowledge of trade secrets may be directed by the court to disclose the same to avoid fraud or injustice.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties may exchange written evidence from witnesses prior to the trial proper. In civil actions, and under the Revised Rules of Civil Procedure, the parties are required to state in their initiatory complaints or answers:

- the names of their witnesses;
- summaries of their witnesses' intended testimonies; and
- their documentary and object evidence.

It is also required that the parties attach their witnesses' judicial affidavits to the initiatory complaints or answers. Likewise, documentary evidence to be identified and authenticated by the witnesses is attached to these judicial affidavits.

Only those witnesses with attached judicial affidavits may be presented during trial. The sole exception to this rule is the presentation of additional witnesses who were not able to provide their judicial affidavits in a timely manner for meritorious reasons. Implied in this exception is that the primary witness's judicial affidavit must be attached to the initiatory complaints or answers.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence is presented through the presentation of witnesses, who are tasked with identifying and authenticating the parties' documentary and object evidence. Witnesses may be subject to direct examination, cross-examination, redirect examination and recross examination. Moreover, after both parties have concluded the presentation of their evidence, witnesses may be recalled with the court's permission.

In civil actions, witnesses' judicial affidavits take the place of their oral direct testimony. Nonetheless, the cross-examination, redirect examination and recross examination of the witnesses are given orally.

If a party wishes to present an unwilling witness summoned by the court through a subpoena, this witness must give oral evidence. The rule on judicial affidavits does not apply to unwilling witnesses.

Interim remedies

12 | What interim remedies are available?

Parties may apply for preliminary attachment, preliminary injunction, receivership, replevin or support as interim remedies. These remedies are available to local proceedings only.

The more common interim remedies are:

- preliminary attachment, which is available where the applicable fraudulent circumstances are present in a case and the applicant wishes to attach on the opponent's property as security for the potential judgment award; and
- preliminary injunction, which is available where:
    - the relief sought in the civil action is the performance or restraining the commission of a certain act;
    - the performance or non-performance of an act will result in injustice or irreparable damage to the applicant; or
    - there is a threat of violation of the rights of the applicant with respect to the subject matter of the action.

Remedies

13 | What substantive remedies are available?

Parties may seek relief in the form of specific performance or rescission of contracts and damages. The damages that may be recovered are as follows:

- actual damages or the loss capable of pecuniary estimation;
- moral damages, which compensate the claimant for (among other things) physical suffering, mental anguish and besmirched reputation;
- nominal damage, which is similar to punitive damages;
- temperate or moderate damages to compensate for a pecuniary loss where the amount cannot be determined with certainty;
- liquidated damages or an indemnity or penalty agreed to be paid based on a contract; and
- exemplary damages, which are imposed by way of example for the public good.

Enforcement

14 | What means of enforcement are available?

As regards judgments for money, the officer of the court may simply demand payment from the judgment obligor. If the judgment obligor cannot pay in full, the officer may levy on the properties of the judgment obligor, which includes debts due the judgment obligor and bank deposits. However, certain properties indispensable to the judgment obligor's livelihood and those qualifying as basic necessities are exempt from execution.

The execution of judgments for specific performance are straightforward. Failure to comply may result in the court directing the performance of the act at the cost of the judgment obligor, or contempt in some cases.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

In general, court hearings for civil cases are conducted in public, except those concerning children and family cases and adoption proceedings, which are confidential in nature. Similarly, case files are generally available to the public, except records concerning children and family cases and adoption proceedings.

In light of the covid-19 pandemic, the Supreme Court of the Philippines issued rules on the conduct of remote hearings through videoconferencing. Where a hearing is conducted via videoconferencing, some courts do not allow litigants and lawyers who are not involved in a particular case that is being heard to join the gallery of the videoconference. A similar practice is employed for physical court hearings to avoid the spread of the covid-19 virus.

Costs

16 | Does the court have power to order costs?

Yes. The courts may rule that either party pay the costs of an action, or that it be divided. Costs are calculated in accordance with the Supreme Court's guidelines.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Yes, contingent fee arrangements are accepted in the Philippines as these are beneficial to parties that have meritorious claims but are unable to secure legal counsel owing to insufficient funds. Under contingent fee arrangements, legal fees are usually a fixed percentage of what may be recovered in an action. Hence, a lawyer would be able to collect legal fees only if the litigation succeeds.

A party may commence an action using third-party funding. However, in the strict sense, the court will not recognise the funding arrangement. Hence, the third party may not be able to collect from the judgment award. Instead, the third party may demand payment from the party pursuant to their agreement.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Yes, legal costs may be covered by liability insurance, including indemnity insurance, director and officer liability insurance and comprehensive general liability insurance.

Read this article on Lexology

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, the Philippines allows class action suits to be filed in regular courts. The general rule for a class suit to be filed is that:

- the subject matter is of common or general interest to many persons; and
- the persons are so numerous that it is impractical to bring them all before the court.

Class action suits aim to obtain relief for or against numerous persons as a group or as an integral entity, and not as separate, distinct individuals whose rights or liabilities are separate from and independent of those affecting the others.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, appeals to higher courts are available against adverse decisions rendered by lower courts. The appeal, when available, usually requires the listing of an assignment of errors by the court in rendering the decision on any question of law or fact that has been raised in the lower court and that is within the issues framed by the parties.

Court of Appeals decisions may be appealed to the Supreme Court, which is deemed the final arbiter for all cases.

Foreign judgments

21 What procedures exist for recognition and enforcement of foreign judgments?

The Philippines recognises foreign judgments and allows procedures for the enforcement thereof. This practice is based on generally accepted principles of international law, by virtue of the incorporation clause of the Constitution that considers these principles as forming part of the laws of the land even if they are not derived from treaty obligations.

Although Philippine courts have not laid down the exact boundaries by which foreign judgments can be recognised and enforced, there is no question that this remedy is considered among the universally accepted tenets of international law. States generally accept in principle the need for such recognition and enforcement – albeit subject to limitations of varying degrees – and the Philippines is no exception.

Nonetheless, anyone seeking to enforce a foreign judgment or final order may be prevented by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Revised Rules of Evidence require documentary evidence arising from official acts of a sovereign authority, or its official bodies, tribunals or public officers to be proved by:

- its official publication; or
- a copy attested by the officer having legal custody of the document and a certificate that said officer has custody.

If the document is kept in a country that is a contracting party to a treaty or convention to which the Philippines is a party, or considered a public document under a treaty or convention in force between the Philippines and that country, the certificate of the officer having legal custody of the document must be executed in the form prescribed by the applicable treaty or convention, subject to the doctrine of reciprocity. If the treaty or convention abolishes the requirement for the certificate or exempts the pertinent document from its application, the certification need not be presented.

If there is no such treaty or convention, the certificate may be made by any officer (ie, secretary of the embassy or legation, consul general, consul, vice consul or consular agent) in the foreign service of the Philippines stationed in the pertinent foreign country. The certificate must also be authenticated by the seal of their office. Public documents not covered above must be authenticated at the Philippine embassy in the foreign country. The Philippines recently acceded to the Apostille Convention, which allows for a simplified process in authenticating foreign-made or foreign-kept documents.

As regards oral evidence, depositions and written interrogatories are acceptable modes of preserving the testimony of witnesses located outside the Philippines.

ARBITRATION

UNCITRAL Model Law

23 Is the arbitration law based on the UNCITRAL Model Law?

Yes. The Alternative Dispute Resolution Act 2004 categorically adopts in its entirety the UNCITRAL Model Law, both for international and domestic commercial arbitration.

Arbitration agreements

24 What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate a controversy arising between parties, as well as a submission to arbitrate an existing controversy, must be in writing and subscribed by the party sought to be charged or by their lawful agent.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of an agreed method to select an arbitrator, the parties must seek guidance from a first-level court, which will designate an arbitrator or arbitrators.

The court may appoint one or three arbitrators, according to the importance of the controversy involved.

The appointment of an arbitrator may be challenged if an arbitrator discovers any circumstances likely to create a presumption of bias or that they believe might disqualify them as an impartial arbitrator; the parties are made aware of such circumstances. Those challenges can be made even after arbitration has begun.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

A person who wishes to be an arbitrator should be of legal age, with no imposed restrictions as to their capacity to exercise their civil rights and must be able to read and write. No person appointed to serve as an arbitrator may be related by blood or marriage within the sixth degree to either party to the controversy. No person may serve as an arbitrator in any proceeding if they:

- have or have had financial, fiduciary or other interest in the controversy or cause to be decided or in the result of the proceeding; or
- have any partiality or prejudice that may gravely affect the right of a party to a fair award.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Yes, there are specific provisions on how to initiate arbitration, appoint arbitrators and conduct arbitration hearings under Republic Act 876 (the Arbitration Law) and Republic Act 9285 (the Alternative Dispute Resolution Act 2004) and its implementing rules and regulations.

Arbitration is allowed when:

- two or more persons agree to submit to arbitration any controversy existing between them at the time of the submission, which may be the subject of an action; or
- the parties to a contract agreed in said contract to settle by arbitration a controversy thereafter arising between them.

To initiate arbitration, the provisions of the submission or contract must be complied with. For instance, where a prior demand is required under the arbitration contract, the claimant must serve on the responding party a demand for arbitration containing the nature of the controversy, the amount involved and the relief sought.

On the other hand, where a party to a submission to arbitration refuses to arbitrate, the other party must also serve a demand for arbitration as stated above.

However, the submission or contract may be revoked on such grounds that exist under Philippine law for revocation of any contract.

Further, the following matters cannot be the subject of arbitration by virtue of certain public policies that may be affected or violated:

- labour disputes covered by the Labour Code;
- a person's civil status;
- marriage validity;
- grounds for legal separation;
- courts' jurisdiction;
- future legitime (ie, a succession issue);
- criminal liability; and
- future support (ie, a family law issue).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Judicial intervention is permitted if:

- it is unclear whether the arbitration agreement and its provisions are valid and enforceable;
- it is unclear whether a dispute is covered by the arbitration agreement;
- an action demanding arbitration should be filed;
- interim remedies are necessary to conserve the subject matter of arbitration pending appointment of the arbitrators;
- a petition to quash or vacate the award is warranted;
- the confirmation and enforcement of the award is due;
- the appointment or challenge of an arbitration is necessary due to an event of default of the appointing authority; or
- appeals from a judgment of the court are filed.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. A request for an interim measure of protection to prevent irreparable loss, preserve evidence or compel the performance of an act may be made with the arbitral tribunal after its constitution and during the arbitral proceedings. The arbitral tribunal is deemed constituted when the final nominated arbitrator (ie, the sole arbitrator or the third arbitrator) has

accepted the nomination and the party making the request received written communication of such acceptance.

Where an arbitral tribunal is powerless to act or unable to act effectively, the request may be made with the regular courts. If the arbitral tribunal is not yet constituted, the request for an interim measure must be filed in court.

Award

30 | When and in what form must the award be delivered?

The parties may agree on the period within which the award must be rendered. This agreement must be in writing. In the absence of an agreement, arbitrators must render an award within 30 days of the closing of the hearings or, if the oral hearings have been waived, within 30 days of the arbitrators officially closing the proceedings in lieu of oral hearings. The parties may likewise agree to extend this period.

The award must be written and signed and acknowledged by the sole arbitrator or by a majority of the arbitrators, if more than one. Each party will be provided with a copy of the award.

Appeal

31 | On what grounds can an award be appealed to the court?

The agreement by the parties to refer a dispute to arbitration means that the arbitral award is final and binding. A party to an arbitration is therefore precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award.

Unless a public policy is violated or the substance and format of the arbitration proceedings are infirm, as provided for under the UNCITRAL Model Law, the arbitral award may not be vacated by filing an appeal or set aside by filing an action with the appellate courts.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic arbitral awards are executed in the same manner as final and executory decisions of first-level courts.

The recognition and enforcement of international arbitral awards are governed by the rules set out in the New York Convention, to which the Philippines is a signatory.

Costs

33 | Can a successful party recover its costs?

Under Philippine arbitral rules, costs are generally borne equally by the parties unless otherwise agreed on or directed by the arbitrator or arbitral tribunal.

There are specific instances in court filings where the parties that are unsuccessful in opposing the enforcement of arbitral awards or in questioning the jurisdiction of the arbitral tribunal are made to shoulder the costs of the suit, including the payment of lawyers' fees incurred by the prevailing party.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Aside from arbitration, the Philippines recognises other forms of alternative dispute resolution (ADR). Acceptable forms of ADR include:

- mediation;
- conciliation;
- early neutral evaluation;
- mini trial; or
- any combination thereof.

The most commonly used ADR methods (and mandated by the courts) are mediation and judicial dispute resolution conferences. These are normally conducted before the trial properly begins.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In both civil and criminal cases, mediation and judicial dispute resolution conferences are ADR methods that parties to a case must undergo during the proceedings or before the trial begins. In criminal cases, only the civil aspect of the claim can be the subject of ADR proceedings.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

If mediation fails and the case proceeds to trial, discussions or statements made during alternative dispute resolution hearings are generally inadmissible as evidence against the party making the statement.

Further, even at the appellate level, mediation is available in civil claims (except for those that cannot be compromised as a matter of public policy) and for minor crimes. Tax court and quasi-judicial agency judgments can also be the subject of appellate court mediation proceedings.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

One of the more contentious issues in arbitration involves questions of law on jurisdiction, particularly cases heard and tried before the Construction Industry Arbitration Commission (CIAC). The construction industry in the Philippines is at the forefront of arbitration law practice owing to the fact that the CIAC was one of the earliest arbitral bodies created by law (ie, in 1985) and has the most experience among all other arbitral bodies.

The law creating the CIAC provides that the CIAC has original and exclusive jurisdiction in commercial disputes between parties to a construction agreement where there exists an arbitration clause, regardless of whether the parties themselves specified a different arbitration procedure or tribunal and venue (outside the Philippines) to hear and decide the dispute.

The Supreme Court has generally upheld the CIAC's right to assume jurisdiction regardless of the intent of the parties in the contract to confer jurisdiction to a different arbitral tribunal. However, this is particularly controversial, as one of the main elements of arbitration is giving importance to the wishes of the parties, including their choice of jurisdiction. Depriving the parties of this option (at least in construction agreements) nullifies one of the key elements of arbitration.

There has been a move to soften this position among some members of the CIAC, but to date the Supreme Court has made no ruling to the contrary. Notably, in a recent Supreme Court decision, the CIAC's jurisdiction was expanded to include government contracts involving construction projects even where the contract contains no arbitration clause.

Aside from the CIAC, one of the more popular arbitration centres is the privately run Philippine Dispute Resolution Centre (PDRCI). In recent years the number of cases referred to the PDRCI has steadily grown.

Designed to expedite the adjudication of cases in the second-level courts (regional trial courts), Republic Act 11576 (RA 11576) was enacted in August 2021. The law expanded the jurisdiction of first-level courts (metropolitan trial courts and municipal trial courts (MTCs)) with the idea that cases that would ordinarily be filed with the second-level courts would now be tried and heard by the first-level courts, thus decongesting the higher courts.

As a result, the jurisdictional amount that can be heard by MTCs has been expanded to 2 million Philippine pesos for civil actions and monetary claims; whereas, previously, depending on the nature of the claim, the jurisdictional amounts were only 20,000 Philippine pesos to 400,000 Philippine pesos.

The Supreme Court, in March 2022 and in an effort to reconcile and harmonise its Rules on Summary Procedure and Small Claims with the enactment of RA 11576, came out with the Rules on Expedited Procedures for first-level courts. Thus, civil claims not exceeding 2 Million Philippine pesos will be now be covered by the Rules on Summary Procedure, while the threshold amount for the Rules on Small Claims has been increased to 1 Million Philippine pesos (from 400,000 Philippine pesos).

In addition, small claims court notices can be made through mobile phone calls, SMS messages or instant messaging software applications. Videoconferencing hearings can also be held through court-approved platforms. Alternative platforms or instant messaging applications with video call features may also be allowed at the discretion of the court. The Rules on Expedited Procedures took effect in April 2022.

Manolito Alvarez Manalo mannix@omlawphil.com
Joan Roshen M Dueñas jmd@omlawphil.com

28th Floor Pacific Star Building, Sen Gil J Puyat Avenue
corner Makati Avenue, Makati City 1227, Philippines
Tel: +63 2 7751 8899
www.omlawphil.com

Read more from this firm on Lexology

Read this article on Lexology

Romania

Alina Tugearu and Cosmin Vasile

Zamfirescu Racoți Vasile & Partners

RETURN TO CONTENTS

Summary

LITIGATION	451
Court system	451
Judges and juries	452
Limitation issues	452
Pre-action behaviour	452
Starting proceedings	453
Timetable	453
Case management	454
Evidence – documents	454
Evidence – privilege	454
Evidence – pretrial	455
Evidence – trial	455
Interim remedies	455
Remedies	455
Enforcement	456
Public access	456
Costs	456
Funding arrangements	457
Insurance	457
Class action	457
Appeal	458
Foreign judgments	458
Foreign proceedings	458
ARBITRATION	**459**
UNCITRAL Model Law	459
Arbitration agreements	459
Choice of arbitrator	459
Arbitrator options	460
Arbitral procedure	460
Court intervention	461
Interim relief	461
Award	461
Appeal	462
Enforcement	462
Costs	463
ALTERNATIVE DISPUTE RESOLUTION	**463**
Types of ADR	463
Requirements for ADR	463

Read this article on Lexology

MISCELLANEOUS 464
Interesting features 464
UPDATE AND TRENDS 464
Recent developments and future reforms 464

LITIGATION

Court system

1 What is the structure of the civil court system?

The Romanian civil court system comprises the following subdivisions: the first court, the Tribunal, the Court of Appeal and the High Court of Cassation and Justice. Depending on its nature or size, a claim may be settled in first instance by any of these courts, except for the High Court of Cassation and Justice, which is solely an appeal court (with some exceptions in special matters).

As a rule, from the point of view of the hierarchy of courts, a claim that has been settled in the first instance by the first court will be subject to appeal at the Tribunal and to a second appeal at the Court of Appeal. Similarly, a claim that has been settled in the first instance by the Tribunal will be subject to appeal at the Court of Appeal and to a second appeal at the High Court of Justice. A claim settled in the first court before the Court of Appeal will be subject to (final) appeal at the High Court of Justice. No omission of either of these jurisdictions is acceptable in the course of appeals.

However, following a major modification of the Romanian Civil Procedure Code, which came into force on 15 February 2013 (the New Civil Procedure Code), there have been some changes to the civil court system. Previously, any litigation case would normally go through all three degrees of jurisdiction described above. Under the new provisions, most claims will be settled only in the first instance and appeal, that is, in two degrees of jurisdiction; however, if a claim is important enough either by virtue of its nature or size, a second appeal will be open. During the transition phase from the former Civil Procedure Code to the New Civil Procedure Code, all the situations described above are possible, depending on the date on which the claim was first filed, with the New Civil Procedure Code applicable to claims filed from 15 February 2013 onwards.

There is one judge in the first instance, two judges in appeal and three judges in second appeal, with some exceptions in special matters. A recent government ordinance, which applies to cases initiated from 1 January 2023, abolished appeals adjudicated by three judges.

Specialised courts exist in matters such as relations between professionals, insolvency, family and minors. In addition, there are specialised sections within the courts in matters such as labour law, administrative and fiscal law, and insolvency.

The New Civil Code of Romania (the New Civil Code), which entered into force on 1 October 2011, replaced both Romania's Civil Code of 1864 and the former Commercial Code of Romania of 1887. Consequently, after 2011, in Romania, the notion of 'commercial

relation' no longer exists, its equivalent (with certain differences) being 'relations between professionals'.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The Romanian legal system does not include the participation of a jury in either civil or criminal proceedings.

The judge has an active, inquisitorial role, leading the settlement of the case and the hearings and, if necessary, asking for any clarifications and supplementary information and documents from the parties. A person may become a judge after taking a course at the Magistrates' National Institute and passing an exam. When graduating from the Magistrates' National Institute, a person may choose the court (that has openings available) where they want to adjudicate, in the order of their grades (as preference is given by the courts to those with higher grades).

Limitation issues

3 | What are the time limits for bringing civil claims?

The time limits for bringing civil claims differ, according to the nature of the claim and the subjective right at the basis of the claim. Generally, these limits range from one to 10 years, the general term being three years. However, some of the claims are not subject to a certain time limit, such as the claim for partition of certain goods jointly held by more owners.

According to the New Civil Code, in force since 1 October 2011, in certain limits provided for by the law, the parties may contractually agree to suspend time limits, to fix a different starting point of the time limit or to modify the duration of the time limit. Until the adoption of the New Civil Code, according to the former legal provisions on statutes of limitation (which still govern legal relations entered into before 1 October 2011), rules on limitation and its course were imperative and the parties could not derogate from them at their own will; although, the law described a small number of cases where limitation could be suspended or interrupted.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

In particular cases expressly established by law, preliminary procedures are compulsory. These procedures may consist of mediation, conciliation and inquiries at the notary public, and proof of fulfilment of these procedures will have to be attached to the action submitted to court. In addition, contracting parties may agree that preliminary procedures are to be followed pre-litigation. Other than such legal and contractual preliminary procedures, no pre-action exchange of documents may be considered a preliminary step for bringing an action. In Romania, there are no provisions allowing a pre-action disclosure order.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings commence at the moment of submission of an action or claim in court by the claimant. Following the registration of the action or claim, a preliminary written procedure takes place solely between the court and the claimant, during which the court makes sure that the claim complies with all the mandatory conditions regarding its contents and that the claimant has filed all the necessary documents that need to be attached to the claim. Only after the claim fulfils all formal conditions does the court proceed to communicate such claim to the defendant and proceed to the issuance of orders regarding the further requests to be fulfilled by the parties, according to the legal provisions regarding civil procedure.

The caseload is a constant concern for the Romanian judicial system. The high degree of congestion in the courts affects the time in which a case is settled, with the duration provided for by law usually being exceeded. Measures to reduce the necessary time for adjudicating a dispute have included increasing the number of judges and also the adoption of the New Civil Procedure Code (which entered into force on 15 February 2013), which – as opposed to the previous Civil Procedure Code – provides for a written submissions phase aimed at limiting the period when parties may submit defences and written evidence.

Timetable

6 What is the typical procedure and timetable for a civil claim?

According to the New Civil Procedure Code, applicable to claims submitted after 15 February 2013, the typical procedure and timetable for a civil claim are as follows: after verifying the fulfilment of the formal conditions of the claim, the judge organises the communication of the claim to the defendant, accompanied by a note obliging the defendant to submit a statement of defence within 25 days of the communication of the claim. If the statement of defence is not submitted in time, the defendant may be unable to propose further evidence in its defence or invoke objections regarding the claim (except for objections of public order).

The submitted statement of defence will thereafter immediately be communicated to the claimant, accompanied by a note obliging them to submit an answer to the statement of defence within 10 days of the communication of the statement of defence.

Within three days of the submission of the answer to the statement of defence, the judge establishes the first court hearing, which will be no later than 60 days from this date. In urgent matters, these terms may be reduced by the judge, according to the circumstances of each matter.

Case management

7 Can the parties control the procedure and the timetable?

The civil procedure and timetable are established by law. In practice, they are affected by the high degree of congestion in the courts, and the period in which a case is settled tends to be longer than what the law provides.

The parties have very little influence on the development of the case from this point of view, and their intervention is rather limited. The parties' conduct and diligence in fulfilling their procedural obligations and submitting the necessary documents on time may influence the duration of the case (which may be delayed on purpose), but under the New Civil Procedure Code, there are clear deadlines and sanctions for not meeting them, therefore limiting even more the possibility of the parties to influence the procedure and timetable. However, the parties establish the procedural frame (that is, the parties and the object of the claim) and other relevant elements of the trial, such as the evidence presented in support of the claim, and such frame directly influences both the procedure and the timetable.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The admission and presentation of evidence before the court is an important stage of the civil trial. All documents invoked by a party in support of its claims must be presented to the court and to the other parties in certified copies. Upon the court's request, the party that submitted a certified copy of a document may be compelled to present the original. Failure to do so may result in the exclusion of the respective document from the body of evidence to the case.

The parties must share all relevant documents. If one of the parties informs the court that an opposing party owns a relevant document, the court may compel the latter to submit the document if the document is conjoint for both parties, if the party that owns it made reference to it or if, according to the law, the party is compelled to submit it.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are several types of privileged documents. On the one hand, public authorities and institutions have a right to refuse the submission of documents related to national defence, public safety or diplomatic relations.

On the other hand, all documents that benefit from a confidentiality provision or agreement may only be presented upon the court's express instruction. The court may refuse to instruct the submission of a document if such submission would breach a legal confidentiality obligation, such as a lawyer's advice.

Read this article on Lexology

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

In Romanian civil trials, all evidence is managed by and through the court. It is the court, at the parties' request, that allows for different types of evidence to be submitted. All exchanges of written evidence between the parties will be done only after the commencement of the trial. In addition, written evidence from witnesses and experts not appointed by court will only count as documents, not as witness statements or expert reports. The rule is that all evidence is presented directly in front of the judge and not by intermediary means.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

As a rule, evidence is presented directly to the court. The witness statement is given orally before the judge. Each of the parties has the right to address questions to the witness. The answers to these questions and the statement are written down by the court clerk and signed by the witness. The document thus drafted is attached to the file as a witness statement.

Experts primarily give written evidence in the form of an expert report that is submitted to the file. However, if the judge requires additional information, the expert may be called before the court for an oral statement of clarification.

There also exists the possibility that the administering of evidence is conducted between lawyers without the participation of the court, within a deadline set in this respect by the court. In practice, this procedure is very rarely used.

Interim remedies

12 | What interim remedies are available?

Search orders are not available in the Romanian civil procedure. Interim remedies are, however, at the parties' disposal. An interim levy or a freezing injunction may be placed in relation to the debtor's assets in particular conditions, upon the creditor's request. This measure freezes the assets of the debtor and prevents him or her from selling them, taking them abroad, etc. The levy may be lifted if the debtor provides a sufficient guarantee that the debt will be paid.

Remedies

13 | What substantive remedies are available?

Both punitive damages and interest are available according to Romanian law. Punitive damages are available in the case of observance of the debtor's fault. Interest is payable

upon request, and its amount is either previously established by the parties or, in the absence of an agreement, the legal interest rate.

Enforcement

14 | What means of enforcement are available?

Any final or otherwise enforceable court decision or order can be enforced with the assistance of an enforcement officer and under the court's supervision, following the request of the creditor, if the debtor does not willingly obey the dispositions of the court.

Disobeying a court decision or order, aside from the criminal consequences, gives the creditor the right to request the application of enforcement procedures that may consist of the capitalisation of movables and immovables or the garnishment of bank accounts.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

As a rule, court hearings are held in public sessions. In particular cases, the law provides that some types of claims are to be settled in the presence of the parties only. In addition, following a grounded request of a party, the court itself may instruct that hearings are held in the presence of the parties only.

Under the provisions of the New Civil Procedure Code, the trial has been divided into two phases: the administration of evidence and debate of any prior issues necessary for the settlement of the case, and the closing arguments, both to be held as a rule in public sessions.

Court documents are only available to the parties in the trial and their representatives. To study a file, applicants must present an identification document proving their capacity. Under specific conditions provided by the law, members of the press may study court documents.

Costs

16 | Does the court have power to order costs?

The court has the power to order several types of costs, including a stamp fee, bail and an expert's fee. The stamp fee is determined by law, according to the object and value of the litigation, and the court ensures that the claimant pays it. Payment of bail may be requested in several cases; for example, a request for suspension of the execution of a judgment. According to the New Civil Procedure Code, unless otherwise established by law, bail will not exceed 20 per cent of the value of the claim or 10,000 lei for claims that cannot be evaluated. The expert's fee is determined according to the complexity of the case and the amount of work to be completed by the expert. In Romania, there is no provision requiring a claimant to provide security for the defendant's costs. There are no new rules governing how courts rule on costs.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The legal provisions regulating the relations between lawyers and clients forbid a *pactum de quota litis*. However, the parties to the legal assistance contract are free to set any combination of fixed or hourly fees and success fees, the latter being due from the client only if a certain result is reached.

Litigation funding by a third party is not officially provided for within the Civil Procedure Code. Therefore, third-party funding of the proceedings is permitted, according to the principle that in civil proceedings everything that is not interdicted is permitted. However, third-party funding is not frequently used in Romania. The third-party funding will be governed by the agreement concluded between the funder and the beneficiary. Therefore, third-party funding of the proceedings generates private law effects between the third party and the beneficiary but does not affect the procedural frame unless the third party purchases the rights stemming from the claim and becomes a party in the trial. In this case, there are certain cases in which certain third parties cannot purchase the rights stemming from the claim. In the absence of such formal purchase, any understanding between a party of a trial and a third party exceeds the limits of the trial and will be dealt with separately.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

It is possible to sign an insurance policy covering a party's legal costs, as well as the opponent's costs, if such a judgment is issued.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The concept of class actions is not regulated in Romania. However, several litigants may address the court with a collective claim if their rights stem from the same cause or if there is a close connection between their claims. These elements (same cause, connection) must be justified in front of the court. In addition, class actions may be filed by organisations representing the interests of its members; for example, a trade union can represent its members in a claim with respect to labour rights. There are no new developments regarding class actions.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties can file an appeal against the judgment of the first court. There are different grounds of appeal, depending on the particular conditions of each case. As a rule, all judgments issued in the first court can be appealed, unless otherwise provided by the law, because in Romania the double degree of jurisdiction principle is recognised by the law.

A second appeal is possible against a judgment issued in appeal. In particular cases expressly provided by law, a judgment can only be appealed once, with no possibility for a further appeal. The law enumerates the grounds for filing a second appeal. Failure to prove the existence of one of these grounds results in the annulment of the second appeal.

The law also provides further means of appeal that are only applicable in particular conditions.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The recognition and enforcement of foreign judgments is governed either by the Civil Procedure Code or by reciprocal agreements. According to the Civil Procedure Code, foreign judgments are directly recognised in Romania in expressly provided cases. Apart from these cases, foreign judgments are recognised after the fulfilment of several conditions, among them the existence of a reciprocal agreement with the issuing state.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions is possible, in accordance with the provisions of EC Regulation No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters. The applicable procedure provides that, to obtain evidence, the foreign court must address the Romanian court with a standard request, indicating the procedure step to be fulfilled and all relevant details.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

No; Romania has not transposed the UNCITRAL Model Law into national law. The provisions with respect to arbitration are contained within the Civil Procedure Code, which does not follow the Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be concluded in writing, otherwise it is deemed null. The condition of the written form is considered fulfilled when the referral to arbitration was agreed following an exchange of correspondence, notwithstanding its form, or exchange of procedural deeds. If the arbitration agreement refers to a dispute regarding the transfer of a right to immovable property or regarding the constitution of other real rights over immovable property, then the arbitration agreement must be concluded in a notarised authentic form under the absolute nullity sanction.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In such a situation, three arbitrators will be appointed, one by each party and the third arbitrator – the chair – by the other two arbitrators.

An arbitrator may be challenged in cases of incompatibility, namely if he or she finds him or herself in one of the situations of incompatibility provided for judges in the Romanian Civil Procedure Code (eg, the arbitrator previously expressed his or her opinion in relation to the solution in the dispute that he or she was appointed to settle; there are circumstances that justify the doubt that he or she, his or her spouse, ancestors or descendants have a benefit related to the dispute; his or her spouse or previous spouse is related (at a maximum, to the fourth degree) with one of the parties; etc) or for the following reasons that cast doubt on the arbitrator's independence and impartiality:

- he or she does not meet the qualifications or other requirements regarding arbitrators provided in the arbitration agreement;
- a legal person whose shareholder the arbitrator is or in whose governing bodies the arbitrator is bears an interest in the case;
- the arbitrator has employment relations or direct trade links with one of the parties, with a company controlled by one party or that is placed under common control with the latter; or
- the arbitrator has provided consultancy to one of the parties, assisted or represented one of the parties or testified in one of the earlier stages of the case.

The challenge request must be filed within 10 days from the moment that the party was informed of the appointment of the arbitrator or from the moment that the cause for challenge occurred.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Under Romanian arbitration law, any natural person with full capacity to exercise his or her rights may act as an arbitrator, without any other criteria needing to be met (eg, citizenship, as the previous rules stipulated, or certain qualifications).

If the parties agree to arbitrate under the purview of the Bucharest Court of International Commercial Arbitration (CICA), they must check the specific requirements set out in the regulations of this arbitral institution. For arbitral disputes initiated after 1 January 2018 under the purview of CICA, the new rules that entered into force on 1 January 2018 apply.

The list of arbitrators of CICA comprises reputed professors of law and lawyers with a high degree of experience in various areas of law, including niche areas of law. Thus, the pool of candidates meets the needs of the majority of complex arbitral disputes.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Under Romanian law, provided that the arbitration clause is valid, the parties are free to determine the procedural laws applicable to the arbitral proceedings or may entrust such choice to the arbitral tribunal.

However, there are some limitations as to the parties' freedom to determine the procedural rules applicable. In this respect, the law provides that the rules chosen by the parties must observe the fundamental principles of civil procedure, namely:

- no arbitrator can refuse to judge, arguing that the law does not provide for the specific case at hand or is unclear or incomplete;
- the arbitral proceedings must be conducted in such a manner to ensure equality of parties and that they are treated in an equal and non-discriminatory manner;
- the parties are free to dispose of their rights (by waiving them, acknowledging the other party's claims, etc) and can choose to initiate or not the arbitral proceedings;
- the object and limits of the arbitral proceedings are to be determined by the parties' claims and defences;
- the parties are obliged to oversee the obligations and deadlines imposed by the arbitral tribunal and to substantiate or prove their claims and defences, thus ensuring that the procedures are conducted in a timely manner;
- the parties must exercise their procedural rights in good faith, so as not to adversely affect the procedural rights of the other party;

- each party has a right to defence and is allowed to participate in any and all phases of the proceedings, have access to the case file, request evidence and present its oral and written pleadings;
- the arbitral proceedings must be conducted in an adversarial manner and ensure that all aspects presented during the proceedings are subject to comments or arguments from both parties;
- the arbitral proceedings must be conducted in an oral manner, except for the situation where the parties have expressly requested that judgment be based solely on the written submissions and evidence on file;
- the evidence must be administered before the arbitral tribunal, except for situations where the parties have decided otherwise;
- the arbitral tribunal vested with the resolution of the case cannot be replaced during the proceedings except for limited situations and in accordance with the law; and
- the arbitral tribunal must decide the case in accordance with the legal provisions applicable and must endeavour to establish the truth in the case, based on the parties' pleadings and evidence administered.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The court has a limited role with regard to an ongoing arbitration case. As a matter of principle, a court (namely the tribunal whose jurisdiction covers the seat of the arbitration), may intervene to remove impediments that occurred in the organisation and development of the arbitration proceedings or to fulfil particular duties belonging to the courts; for example, following the request of one of the parties, the court may order precautionary or provisional measures regarding the object of arbitration, ascertain various circumstances of fact, or intervene in the selection of arbitrators by appointing an arbitrator (when the party who should appoint him or her fails to cooperate) or the presiding arbitrator (chair) if the parties do not agree on the appointment of the sole arbitrator or, in the case of a three-panel arbitral tribunal, when the two arbitrators do not agree on whom should they appoint as presiding arbitrator.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

The arbitral tribunal has the power to grant interim relief by ordering precautionary or provisional measures or ascertaining various circumstances of fact, and if the parties do not obey those orders there is the possibility to request the intervention of the court.

Award

30 | When and in what form must the award be delivered?

If the parties do not agree otherwise, the arbitral tribunal must render its award within six months of its constitution, under the sanction of caducity of the arbitration (that is, the expiry or nullity of the arbitration proceedings following the lapse of the time allowed for its settlement). The party who intends to invoke such sanction if the arbitration term is not

observed must indicate so in writing at the first hearing, or else the caducity sanction will not be applied.

The award must be delivered in written form, which must be communicated to all the parties involved within one month of its issuance.

Appeal

31 | On what grounds can an award be appealed to the court?

The grounds for setting aside an arbitral award are limited to the following:

- the dispute is not arbitrable;
- the arbitral tribunal was vested in the lack of an arbitration agreement or under a null and void or ineffective agreement;
- the arbitral tribunal was not constituted in accordance with the arbitration agreement;
- the party was not present at the hearing and the summoning proceedings were not legally fulfilled;
- the award was rendered outside the six-month deadline for arbitrage, although one of the parties raised the time limitation objection and the parties refused to continue the proceedings (caducity of the arbitral tribunal);
- the arbitral tribunal ruled on aspects that had not been requested for or granted more than requested (*ultra petita*);
- the award does not include the relief granted and the reasoning, does not indicate the date and place of the arbitral seat, or is not signed by the arbitrators;
- the award is contrary to the public policy, good moral conduct or mandatory provisions of Romanian law; and
- following the date on which the award was rendered, the Romanian Constitutional Court declares as unconstitutional the law, the ordinance or any legal provisions part of a law or ordinance related to the arbitration.

The court decision rendered following a setting-aside claim can also be further appealed before the superior court of law for formal reasons.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic awards can be enforced in the same manner as court decisions. Foreign awards must first follow a special procedure for recognition and enforcement, with the observance of certain formal conditions similar to those provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, including situations in which recognition and enforcement are denied.

Enforcement procedures have not been affected by changes in the political landscape.

Costs

33 | Can a successful party recover its costs?

Yes; assuming there is no agreement between the parties regarding the costs incurred, the winning party can recover its costs on the condition that it requests and proves such costs. The arbitral tribunal will include the order for the defendant to pay those costs within the arbitral award.

The court has the power to order the losing party to cover several types of costs incurred by the winning party, including judicial taxes, experts' fees, lawyers' fees and other expenses incurred in relation to the court proceedings (eg, travel expenses). The court has the ability to limit the amount of the prevailing party's attorneys' fees by taking into account the difficulty of the litigation, the actual amount of work required from the attorneys and other similar elements. If a claim is only partly admitted, the court may order the costs to be shared (ie, each party will cover their own costs).

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The most commonly used alternative dispute resolution process until recently was conciliation. In the past couple of years, though, mediation has become more popular. However, because mediation is more expensive than conciliation, which is usually organised by the parties themselves or by the assisting attorneys, conciliation remains the more popular procedure. Also, mediation has seen a decline owing to the removal of its mandatory nature in particular cases, following a decision of the Romanian Constitutional Court issued in 2014.

Adjudication is also used, generally in disputes arising from International Federation of Consulting Engineers contracts.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Since August 2014, mediation has no longer been compulsory before submitting a claim to court.

If either the law or the contract provides for another type of preliminary procedure, such as adjudication, the courts or tribunals may compel the parties to undergo that procedure.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

There are some interesting issues, such as the settlement of contradictory judgments, incidents during enforcement procedure and the rules of legal representation, but these require a more technical approach than is required for this publication.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

No updates at this time. There are no significant decisions or proposals under debate.

Alina Tugearu alina.tugearu@zrvp.rol
Cosmin Vasile cosmin.vasile@zrp.ro

12 Plantelor Street, Sector 2, Bucharest RO-023974, Romania
Tel: +40 21 311 05 17
www.zrp.ro

Read more from this firm on Lexology

Read this article on Lexology

Serbia

Nenad Stanković, Sara Pendjer and Luka Marosiuk
Stankovic & Partners NSTLaw

RETURN TO CONTENTS

Summary

LITIGATION	466
Court system	466
Judges and juries	466
Limitation issues	467
Pre-action behaviour	467
Starting proceedings	467
Timetable	468
Case management	469
Evidence – documents	469
Evidence – privilege	469
Evidence – pretrial	470
Evidence – trial	470
Interim remedies	470
Remedies	470
Enforcement	471
Public access	471
Costs	471
Funding arrangements	472
Insurance	472
Class action	473
Appeal	473
Foreign judgments	473
Foreign proceedings	474
ARBITRATION	**474**
UNCITRAL Model Law	474
Arbitration agreements	474
Choice of arbitrator	475
Arbitrator options	475
Arbitral procedure	476
Court intervention	476
Interim relief	476
Award	476
Appeal	477
Enforcement	477
Costs	477
ALTERNATIVE DISPUTE RESOLUTION	**478**
Types of ADR	478
Requirements for ADR	478

Read this article on Lexology

MISCELLANEOUS 478
Interesting features 478

UPDATE AND TRENDS 479
Recent developments and future reforms 479

LITIGATION

Court system

1 What is the structure of the civil court system?

The civil court system is divided between courts of general jurisdiction and commercial courts. General courts operate in the following hierarchy: basic courts, higher courts, appellate courts and the Supreme Court of Cassation. Basic and higher courts act as courts of first instances. The main difference between the competencies of these two types of courts is in the value of the disputes – higher courts are competent for the disputes where the value is higher than €40,000. In most cases, higher courts decide on appeals against the decisions rendered by the basic courts. Appellate courts decide on the appeals filed against the decisions rendered by the higher courts. The Supreme Court of Cassation decides on extraordinary legal remedies in both commercial and non-commercial disputes.

Commercial courts serve as courts of first instance in commercial disputes (in general, disputes between two commercial entities). The Commercial Appellate Court decides on appeals on decisions issued by commercial courts.

The Constitutional Court decides on constitutional appeals. Constitutional appeals are appeals against final decisions that allegedly infringe rights granted by the Constitution.

In most cases, decisions of the court of the first instance are rendered by single judge. In second instance courts, three professional judges form a trial chamber. The Supreme Court of Cassation also decides in a trial chamber, which comprises five professional judges.

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

The role of a judge is a passive one. However, the court is authorised to present evidence and establish the facts that have not been introduced or recommended by the parties, if it follows from the proceedings or presentation of evidence that the parties are disposing of claims being contrary to mandatory norms, public policy, morals or good customs.

There are no juries in civil proceedings, but there are lay judges involved in some first instance proceedings, such as family law disputes or some non-adversarial proceedings. A professional judge always serves as a president of a trial chamber.

When selected for the first time, judges are selected by the National Assembly for a period of three years. After this period, judges are selected for a lifetime by the High Court Council

(the independent and autonomous organ ensuring and guaranteeing the independence and autonomy of courts and judges).

During the selection of judges, the following is taken into account: the national demographic, adequate representation of members of national minorities, and knowledge of professional legal terminology in the language of the national minority that shall be officially used by the court.

Limitation issues

3 | What are the time limits for bringing civil claims?

For most civil claims, there are no time limits for bringing a claim to court. Nevertheless, in certain cases, statutes prescribe time limits for bringing claims. Examples include annulment of a decision of a company's assembly: 30 days from the date of receiving the information about the decision, but no later than three months from the date when the decision was enacted; 30 days for filing a lawsuit of dissenting shareholders that were against the specific type of decision of the company; and, to initiate proceedings for protection of employee's rights, 60 days from the date of receipt of a decision that violates employees' rights.

Parties are not allowed to agree on clauses to suspend time limits or other time limits.

A statute of limitation is not a procedural issue. The court will only pay attention to the statute of limitation expiring if the parties invoke this argument.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There are no mandatory pre-action considerations that parties should take into account. Before filing a lawsuit against Serbia, a party may file a request for peaceful settlement of the dispute to the state attorney, which suspends debt for a time-barred 60 days.

If the court estimates that there is a justifiable danger that it will not be possible to present some evidence or that its subsequent presentation might be difficult, it can order a presentation of evidence. These proceedings are urgent and the court can present evidence, including a pre-action exchange of documents between the parties or from a third person; however, there will be no examination of the parties as, in pre-action behaviour, the court cannot order examination of the parties.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are initiated by filing a lawsuit before a competent court and are commenced once a respondent receives the lawsuit. A plaintiff is notified by receiving a piece of evidence that the court has received a lawsuit, while a respondent is notified by the court by receiving

a lawsuit and exhibits, accompanied by instructions about its rights and obligations arising from the lawsuit.

Currently, courts in Serbia are short on capacity for handling their caseload and are unable to act within prescribed time limits. This is because there are not enough judges and administrative staff in comparison to the number of cases. In most cases, judges share courtrooms, which results in one judge holding hearings on odd days and the other on even days. Some of the proposals to ease capacity issues are employing new judges, delegating some of the court's responsibilities to public notaries, adopting the Law on Protection of the Right to Trial within a reasonable time and introducing licensed mediators to help parties reach an agreement before the lawsuit.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Even though there are specifics for every kind of proceeding, a typical procedure is as follows:

- the plaintiff files a lawsuit;
- the court performs a formal check of the lawsuit;
- if the lawsuit passes this formal check, it will be delivered to the respondent for a response within 15 days of receipt;
- the respondent then has 30 days to provide a response to the lawsuit;
- the court schedules and holds a preparatory hearing within 30 days of its delivery to the plaintiff of the response to the lawsuit. However, a preparatory hearing can be postponed an unlimited number of times, which can make procedures lengthy;
- one or more hearings, with possible submissions between them;
- conclusion of the hearing;
- first instance decision (in writing within eight days of the announcement or, in more complex cases, within 15 days, which is rarely fulfilled in practice);
- appeal: 15 days from receipt of the written judgment;
- the opposing party has 15 days to provide a response to the appeal (response is optional);
- the appeal, response to the appeal and complete court records are delivered to the court of second instance within eight days of receipt of the response;
- the court of second instance usually decides without a hearing, the deadline for the decision being nine months after the receipt of a case file;
- if the second instance court sends the case back to the court of first instance for another decision, it sends it within 30 days of the decision and the court of first instance must hold a new hearing within 30 days of receipt of records from the court of second instance;
- if the second instance court decides not to send the case back for another decision and to decide on its own, the decision becomes final; and
- in certain cases, the parties have the right to extraordinary legal remedies; however (unlike appeal), they do not have suspensive effect over the decision.

Case management

7 Can the parties control the procedure and the timetable?

The parties can only recommend the timetable to the court. The judge then issues a final decision on the timetable. Failure to conduct the proceeding in accordance with the adopted timetable is the basis for initiation of disciplinary proceedings against the judge.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

During proceedings, both parties can request evidence, especially relevant documents to be obtained from the other party and also from a third party that is not directly involved in the proceedings.

If one party states that there is a relevant document that the party wants to use as evidence, and claims that document is in the possession of another party, the court can order that party to submit that document to the court. The party is allowed to refuse to submit the document if it contains privileged information. If the other party denies possession of that evidence, the court can perform a presentation of evidence to establish where the evidence is located.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Witnesses are allowed to withhold answers about the information entrusted to them by the party as the party's proxy or as the party's religious confessor. Facts learned by the witness in the capacity of lawyer, medical doctor or other professionals are also considered privileged if there is an obligation to maintain professional secrecy. The parties to the proceedings, as well as witnesses, are allowed to refuse to give an answer or provide a document that contains sensitive information or could expose the party or witness to a criminal or civil (material) liability. This privilege of party or witness can be used as protection against exposing the party or witness, as well as his or her spouse, civil partner, direct ascendants and descendants, and distant relatives.

Advice from an in-house lawyer is not privileged, but a company's representative is entitled to refuse to give an answer about the internal company conversation. The court will assess the importance of the party's denial to testify.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

The parties do not usually exchange written evidence before trial, except where documents must be obtained upon request. Although it is not prohibited, parties are cautious regarding voluntary disclosure of their tactics.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The presentation of evidence depends on the type of evidence, the most common being witnesses, experts and relevant documents. Witnesses usually give oral testimony. A witness may submit a written statement, which must be certified before the public notary. The court can call upon a witness to confirm his or her testimony before the court at the hearing or through a conference call, via phone or video.

Experts give written statements about their observations and opinions on facts. If observations and opinions issued by the expert are unclear, incomplete or contradictory, the court shall order the expert to supplement or correct the observations and opinions and set a deadline for elimination of deficiencies, or invite the expert to come to a hearing to orally present his or her submission.

Interim remedies

12 | What interim remedies are available?

Interim remedy can be granted if a party shows that its claim is probable, and that, without a granted interim remedy, collection of its claim would be jeopardised. The Law on Enforcement and Security, which regulates this topic in Serbia, stipulates a non-exhaustive list of possible interim remedies (measures). There are two groups of interim remedies, for securing pecuniary and for securing non-pecuniary claims. As regards freezing injunctions, the freezing of bank accounts is available. Search orders are available as a part of seizure of assets.

Interim measures can be issued in support of foreign proceedings.

Remedies

13 | What substantive remedies are available?

The court can order a respondent to give or perform something to stand or prohibit the respondent from doing something to the plaintiff's detriment. If requested, the court can only determine the existence, that is, the absence of a right or legal relationship, violation of the rights of a person or the truth or inaccuracy of a document.

Punitive damages or liquated damages are not recognised by the Serbian legal system. Interest is payable on money judgment after the voluntary obligation for fulfilment deadline, stated in a judgment, has passed, unless stated otherwise in the agreement or in the law. Courts can only order single interest, while compound interest is forbidden.

Enforcement

14 | What means of enforcement are available?

In most cases, enforcement is performed by the public bailiffs by prescribed methods of seizure of assets and their monetisation or compulsory performance of specific non-pecuniary performance. A debtor that disobeys orders from public bailiffs or that alienates, hides, damages or diminishes its property or undertakes actions that may cause irreparable damage that is difficult to repair to the enforcement creditors can be sanctioned with a monetary fine. If a debtor does not fulfil its obligation to perform, non-perform or stand what is established by enforceable document, a court can give that party additional time for fulfilment and instruct the debtor that if he or she fails to fulfil their obligation within the additional time it will be obliged to pay to the creditor a certain amount of money for each day of default or some other unit of time (court penalties).

Serbian criminal law recognises refusal to act upon a final court decision or failure to act within the stipulated time by the responsible person in a legal entity as a criminal act.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Generally, hearings are public, except for special proceedings, such as family law proceedings. The court may exclude the public from all or part of the hearings to protect the interests of national security, public policy and morals in a democratic society, as well as to protect the interests of minors or the privacy of participants in the proceedings if the measures for maintaining the order prescribed by law cannot ensure a smooth running of the hearing.

The parties, their representatives and proxies are allowed, with the permission of a judge, to review, photocopy, photograph and transcribe the case file in which they participate. A third party that has a legitimate interest can also request this insight into case files.

Costs

16 | Does the court have power to order costs?

The court has the power to order costs. Costs consist of court fees, attorney fees and other expenses necessary for conducting a hearing (eg, experts). The general principle is that the 'loser pays', that is, if the party succeeds with its claim or its defence in full, the opposing party will be entitled to reimbursement of costs in full; if the party succeeds partially, the court will order an equal percentage of the requested costs. The party is obliged, regardless of the outcome of the proceedings, to reimburse the opposing party for the costs caused by

its own fault or by a case that has occurred to that party. This rule also applies to proxies of the parties.

A foreign or stateless plaintiff may be required to provide security for the respondent's costs if the respondent has requested it. The main exception to this obligation is the exclusion of this obligation by international convention or if the domestic respondent is not obliged to provide security for costs in the jurisdiction from which the respondent originates.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In proceedings related to property claims, lawyers are entitled to conclude a written agreement with their clients stipulating that the lawyer's fee will be paid in proportion to the success in the proceedings. The agreed percentage must not exceed 30 per cent. 'No win, no fee' agreements are available, but only for property claims, while for non-property claims the parties are only allowed to agree to a 50 per cent deduction of the lawyer's fee. An agreement that would stipulate that a lawyer would purchase a disputed right entrusted to him or her, or contracted for itself participation in the division of the amount awarded to his or her principal, is null and void.

Third-party funding is not regulated by Serbian law. Court decisions can award the costs only to parties in the proceedings, not to third parties. Regarding participation in the liability, the respondent is entitled to conclude an agreement on the assumption of fulfilment with a third party, subject to the deferred condition that the party needs to pay anything to a plaintiff. Nevertheless, in this scenario, the plaintiff has an obligation to accept payment from a third party, but it would not have any right toward third persons. During the proceedings, the parties are not explicitly obliged to disclose these agreements on third-party funding, but as it can lead to a conflict of interest and threaten the judge's impartiality and independence, it is recommended to disclose those agreements.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

Insurance as the protection of an obligation to pay all or part of the legal costs of a party is not used in Serbia and, to the best of our knowledge, insurance companies do not offer these types of insurance. Insurance legislation does not prevent the conclusion of these types of agreements.

However, an insurance agreement is considered null and void if:

- the insured risk has already occurred;
- it was certain that it would occur; or

- it is possible that it had already ceased to exist (therefore, frivolous claims are uninsurable).

During the negotiation process, the party is obliged to disclose to its insurance company all information about the case, as hiding this information can lead to an insurance agreement being void.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The Serbian legal system does not recognise class action litigation. Previous attempts to introduce consumer class action lawsuits ended when the Constitutional Court decided that those lawsuits were unconstitutional. There have been many attempts, mainly from organisations for the protection of consumer rights, to change laws so that they permit class action lawsuits. To date, these attempts have been unsuccessful.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The first instance judgment is always subject to appeal. General grounds for appeal are: significant breach of provisions of rules governing the adversarial proceedings, erroneously or incompletely established factual situation, and erroneous application of substantive law.

The Serbian legal system recognises three types of extraordinary legal remedies: revision before the Supreme Court of Cassation, motion to reopen the proceedings filed by the party and motion to reconsider final and binding judgment, which can only be filed by the public prosecutor.

Foreign judgments

21 What procedures exist for recognition and enforcement of foreign judgments?

Recognition and enforcement of foreign judgments is regulated by international treaties, as well as by the domestic private international law. There are two types of proceedings: the first is a non-adversarial proceeding, which is limited to the process of recognition. After this proceeding is completed and if the foreign judgment is recognised, it has the status of a domestic judgment.

The second type is a proceeding for recognition of judgment as a preliminary issue in some other proceedings, including enforcement proceedings. In these proceedings, the decision on recognition has effect only for the main proceedings.

The condition for recognition is reciprocity with the country where the decision is rendered. Reciprocity can be established by law, by international treaty or by fact.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

These proceedings do exist in the Serbian legal system. Rules regulating these proceedings are prescribed mainly by international or bilateral treaties on international legal aid or in the Law on Adversarial Proceedings, which are applicable unless stated otherwise in the particular agreement.

The general rule is that the procedure of international legal aid is initiated at the request for help from the foreign court that is communicated via diplomatic channels. Presentation of evidence is done in accordance with domestic procedural law or in accordance with the foreign procedural law, unless such presentation of evidence is not contrary to the public policy of Serbia.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Serbian Law on Arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration. Furthermore, Serbia is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

For arbitration agreements to be enforceable, they must be in writing. An arbitration agreement is in writing if it is concluded by an exchange of messages that enable written evidence of the agreement of the parties, regardless of whether those messages have been signed by the parties. An arbitration agreement can be a separate agreement, part of a written commercial agreement, part of some other agreement or part of the terms and conditions of one party to which the agreement in writing refers.

Except when an arbitration agreement is not in writing, it is deemed null and void if a dispute is not arbitrable; the contracting parties did not have the capacity or ability to conclude it; it is concluded under the influence of coercion, threats, fraud or misrepresentation; or if the parties chose an even number of arbitrators.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement and relevant rules are silent on the number of arbitrators, their number will be determined by the chosen appointment authority (a person or institution designated by the parties). If the parties have not chosen that appointment authority, the number will be determined by the court. If the permanent arbitral institution organises arbitration, that institution will be the appointing authority.

If the case is to be decided by a sole arbitrator, the appointment of that arbitrator will be agreed by the parties. If the parties fail to reach an agreement on the appointment in 30 days, the arbitrator will be appointed by the person or institution to which the parties entrusted this task. Finally, if the parties are silent on that matter, the arbitrator will be appointed by the court.

If the case is to be decided by a panel of three arbitrators, then each party appoints one arbitrator, and if the party does not appoint an arbitrator, the appointing authority will appoint the arbitrator. If the parties are silent on this matter, the arbitrator will be appointed by the court. The president of the tribunal is appointed by the already appointed arbitrators, or if they do not reach an agreement, by the person or institution to which the parties entrust this task. If the parties are silent on this matter also, the arbitrator will be appointed by the court. An appeal against the decision of the court to appoint an arbitrator is not allowed.

An arbitrator may only be challenged if there are facts that can justifiably raise concerns about the arbitrator's impartiality or independence, or that he or she does not meet the criteria established by the parties' agreement. The parties can challenge the appointment up to 15 days from the day they were notified about the appointment or from the day that they become aware of the reasons on which they base the challenge.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

An arbitrator may be any person with legal capacity, irrespective of nationality or profession. The arbitrator must be impartial and independent from the parties. Before accepting the appointment, he or she must declare all the facts that might raise doubts about his or her impartiality and independence. The potential arbitrator cannot be appointed if he or she is sentenced to unconditional imprisonment, while the consequences of conviction last.

None of the two currently active permanent commercial arbitration institutions in our jurisdiction (Belgrade Arbitration Center (BAC) and Permanent Arbitration at the Chamber of Commerce and Industry of Serbia) have a pool of arbitrators. Although the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia has no roster of arbitrators, to assist the parties with the choice of arbitrators, the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia prepares a list of persons qualified for dispute resolution who may be appointed as arbitrators by the parties.

Read this article on Lexology

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to choose rules for regulating their dispute or to point to the rules of some permanent arbitration institution. If the arbitration is international, the parties may agree to apply foreign law to the arbitration proceedings. If the parties are silent on this matter, the arbitrators will apply rules that they find appropriate. The parties are equal in the proceedings and the arbitration court has a duty to enable each party to present its arguments and evidence, as well as to present its arguments in relation to the acts of the other party.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Except where the court intervenes to determine the number of arbitrators and arbitrator appointments, the court can decide upon a request for interim relief whether the seat of arbitration is in Serbia or another country. The court can also assist in the presentation of evidence. That evidence has equal power as any other presented before the arbitrator or abitrators.

If the arbitral tribunal decides on the objections to its jurisdiction and scope of the agreement, as a preliminary question either party may request the court designated by law to decide on this matter, within 30 days of the date of receipt of the decision. No appeal shall be allowed against this decision of the court.

If the parties mutually agree, ad hoc arbitration or a permanent arbitration institution may deposit the final award at the court, for the court to deliver the award to the parties.

Except for challenging the jurisdiction of the tribunal, the court's powers can be overridden by an agreement, as the court can only have a role if the parties have not used their right or are silent on that matter, as well as when the arbitrators need assistance.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless the parties explicitly provide differently, the arbitrator or tribunal has powers to grant interim relief before or during the arbitration. The arbitrators may grant any type of interim relief they find suitable, taking into consideration the type of dispute. The arbitrators may condition their decision on interim relief, subjecting another party to provide reasonable securitisation.

Award

30 | When and in what form must the award be delivered?

The arbitrators decide on the case in the form of a written final arbitral award. The arbitral tribunal may make separate awards on different issues at different times (partial award) or

on cross-claims (interim award). An arbitral award is issued after the deliberation of all the arbitrators, unless the parties have agreed otherwise. A majority of arbitrators have to vote for the award, unless the parties have agreed otherwise.

According to the rules of two permanent arbitration institutions in our jurisdiction, arbitrators have six months from the date of constitution of the arbitral tribunal to solve the dispute. However, this period can be prolonged at the request of the parties, tribunal or presidency of the BAC or Permanent Arbitration at the Chamber of Commerce and Industry of Serbia. The rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia stipulate that the final award shall be made within 30 days of the last non-public hearing of the arbitration tribunal.

Appeal

31 | On what grounds can an award be appealed to the court?

The final (domestic) arbitral award has the effect of a final and binding decision and it cannot be appealed.

In ad hoc arbitrations, the parties are able to agree to an arbitral appeal mechanism that should postpone the final and binding effect of the award.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Domestic final awards have the legal effect of a final and binding judgment issued by the court, while foreign arbitral awards have that effect once they are recognised. The Serbian Law on Arbitration contains exactly the same rules as those in the New York Convention. Domestic awards are enforced equally as any court's judgment. Control of domestic awards is possible through the process of annulment of an arbitral award.

A foreign arbitral award must be recognised before enforcement. There is a right to appeal the first instance decision within 30 days of its receipt. Once the award is recognised, it has domestic final and binding effect.

This procedure has not been affected by changes in the political landscape.

Costs

33 | Can a successful party recover its costs?

The parties are obliged to pay for the costs of arbitration in advance. A decision on costs is a mandatory element of the final award. The law does not contain provisions on when and if a party can recover the costs of arbitration. Usually, the tribunal would apply the 'loser pays' principle.

The Law on Arbitration does not regulate third-party funding, nor has a Serbian court yet decided on the matter.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative dispute resolution (ADR) processes are not commonly used in Serbia. The most commonly used ADR process is mediation.

There is no mandatory provision regarding referral of the parties to mediation.

Serbia was one of the first countries in the world to sign the Singapore Convention on Mediation, which applies to international settlement agreements resulting from mediation.

Adjudication is mostly used in resolving construction disputes.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The court does not have the power to compel parties to mediation before or during the proceedings. At the beginning of the preparatory hearing, the parties are informed that they can peacefully solve their dispute if they wish. If the parties choose mediation, they are obliged to engage licensed mediators. Mediation proceedings are initiated by accepting a proposal for mediation, and, if the other party is silent on the proposal, it is deemed that the proposal is rejected. The parties are allowed to initiate mediation proceedings during the proceedings, even during appeal proceedings. If the parties solve their dispute through mediation, they are released from paying the court's administrative fee.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One particularly interesting feature about the dispute resolution in our jurisdiction is the possibility of retorsion. This enables a Serbian natural or legal citizen to establish jurisdiction of domestic courts over foreign nationals if there is jurisdiction in a foreign country over Serbia. Domestic plaintiffs can use that criterion (not prescribed in Serbian law, but prescribed in a foreign legal system) to establish jurisdiction against a foreigner coming from that state whose law has such provision.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

No significant developments occured in the field of dispute resolution in Serbia during past year. Worth mentioning is that the Constitutional Court in its Decision, Uz 11484/2018 as of 27 January 2022 declared that the well-known principle reformatio in peius has its application in civil law, not just criminal law. Even though this principle is not explicitly declared in the Law on Adversarial Proceedings as such, contrary for example to the Law on Criminal Proceedings, the Constitutional Court found that this principle is embodied in the principle of fair trial declared in the Constitution of the Republic of Serbia. Hence, the Constitutional Court found that in the case where only one party filed the appeal, the second instance court cannot reverse the initial decision in a way that decision on appeal worsens the position of the appellant.

Additionally, the Serbian Bar Association introduced an initiative to raise lawyer's tariffs which would, if adopted, increase lawyer's costs by 50 per cent.

Nenad Stanković	nenad.stankovic@nstlaw.rs
Sara Pendjer	sara.pendjer@nstlaw.rs
Luka Marosiuk	luka.marosiuk@nstlaw.rs

Njegoseva 19/II, 11000 Belgrade, Serbia
Tel: + 81 11 334 96 02
www.nstlaw.rs

Read more from this firm on Lexology

Singapore

Angelia Thng and Edmund Jerome Kronenburg

Braddell Brothers LLP

RETURN TO CONTENTS

Summary

LITIGATION	481
Court system	481
Judges and juries	483
Limitation issues	484
Pre-action behaviour	485
Starting proceedings	486
Timetable	488
Case management	492
Evidence – documents	492
Evidence – privilege	493
Evidence – pretrial	493
Evidence – trial	494
Interim remedies	495
Remedies	495
Enforcement	495
Public access	496
Costs	497
Funding arrangements	498
Insurance	499
Class action	499
Appeal	500
Foreign judgments	501
Foreign proceedings	502
ARBITRATION	**502**
UNCITRAL Model Law	502
Arbitration agreements	503
Choice of arbitrator	503
Arbitrator options	504
Arbitral procedure	505
Court intervention	505
Interim relief	506
Award	506
Appeal	507
Enforcement	509
Costs	510
ALTERNATIVE DISPUTE RESOLUTION	**510**
Types of ADR	510
Requirements for ADR	512

Read this article on Lexology

MISCELLANEOUS 513
Interesting features 513
UPDATE AND TRENDS 513
Recent developments and future reforms 513

LITIGATION

Court system

1 What is the structure of the civil court system?

The judicial power of Singapore is vested in the Supreme Court, State Courts and Family Justice Courts.

The Supreme Court hears civil and criminal cases. It consists of the Court of Appeal and the High Court (which comprises the General Division, Appellate Division and the Singapore International Commercial Court).

The State Courts hear civil and criminal cases. The State Courts include the district courts, magistrates' courts, coroners' courts, small claims tribunals, community dispute resolution tribunals and employment claims tribunals.

The Family Justice Courts hear family cases and selected criminal cases involving youth offenders, and include the Family Courts, Youth Courts and the Family Division of the High Court.

The head of the judiciary is the chief justice.

As of 30 March 2023, the Supreme Court Bench consists of 29 judges (including the chief justice, four justices of the Court of Appeal and three judges of the Appellate Division), two judicial commissioner, five senior judges and 19 international judges.

The chief justice, judges of appeal and judges of the High Court have tenure until the age of 65, unless further extended by approval of the president. Judicial commissioners are appointed on a short-term contract basis, but enjoy the same powers and immunities as a judge of the High Court during their term. The senior judges and international judges are appointed for a specified period (usually three years).

With effect from 2 January 2021, the High Court was restructured into the General Division of the High Court and the Appellate Division of the High Court.

The General Division of the High Court exercises both original and appellate jurisdiction in civil and criminal cases. The General Division continues to exercise supervisory and revisionary jurisdiction over the State Courts. Unless specified otherwise by any written law, proceedings in the General Division of the High Court are heard before a single judge.

The Appellate Division of the High Court hears all civil appeals that are not allocated to the Court of Appeal under the Sixth Schedule of the Supreme Court of Judicature Act (SCJA),

and any civil appeal or other process that any written law provides is to lie to the Appellate Division. Appeals to the Appellate Division will usually be heard by three judges. However, certain appeals may be heard by two judges. Further, certain appeals may be decided without hearing oral arguments if the parties consent.

The Court of Appeal, which is the highest appellate court in Singapore, hears all criminal appeals against decisions made by the General Division in the exercise of its original criminal jurisdiction, prescribed categories of civil appeals and appeals that are to be made to the Court of Appeal under written law. Appeals to the Court of Appeal are usually heard by a bench of three judges, although some appeals are heard by only two judges. Where necessary, the Court of Appeal may comprise five or more judges. Judges of the High Court may sit in the Court of Appeal on such occasion as the chief justice requires.

As a superior court of record, the General Division of the High Court has unlimited original jurisdiction over civil claims. With the exception of probate matters, the action must be commenced in the General Division of the High Court where the value of the claim exceeds S$250,000. Probate matters are commenced in the Family Division of the High Court only if the value of the deceased's estate exceeds S$5 million, or if resealing of a foreign grant is involved. Ancillary matters in family proceedings involving assets exceeding S$1.5 million are also heard in the General Division of the High Court. Further, admiralty matters, company winding-up and bankruptcy proceedings, and applications for the admission of advocates and solicitors are exclusively heard by the General Division of the High Court.

Within the General Division of the High Court, various specialist lists have been set up for:

- arbitration;
- tort claims, intellectual property/information technology;
- finance, securities, banking, complex commercial cases;
- building and construction, shipbuilding, complex and technical cases;
- shipping and insurance;
- revenue law;
- public law and judicial review; and
- company law, insolvency and trusts.

Certain judges of the General Division of the High Court identified as having expertise in these specialised areas of law would generally be assigned to hear matters in the respective areas.

The Singapore International Commercial Court (SICC) is a division of the General Division of the High Court designed as a specialist court for transnational commercial disputes, and its proceedings are governed by its own set of rules and practice directions that follow international best practice. The SICC provides for various special features in line with its international character, such as adjudication by specialist commercial judges and foreign representation of parties. The SICC has jurisdiction to hear and try an action if:

- the claim in the action is of an international and commercial nature;
- the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement; and

- the parties to the action do not seek any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention).

The SICC may also hear cases that are transferred from the General Division of the High Court. Questions relating to whether the SICC has jurisdiction shall be heard and determined by the SICC. SICC cases may be heard by either one or three judges.

Within the State Courts, civil claims with a value of up to S$60,000 may be commenced in the magistrates' courts, which provides for a simplified civil procedure. This includes the upfront disclosure of documents, a limitation on interlocutory applications and early and robust case management. Civil claims with a value exceeding S$60,000 but not exceeding S$250,000 (or in the case of road traffic accident claims or claims for personal injuries arising out of industrial accidents, with a claim value exceeding S$60,000 but not exceeding S$500,000) may be commenced in the district courts. However, if all parties consent, a district court may exercise jurisdiction to try an action even where the amount in dispute exceeds S$250,000 (or S$500,000, in the case of road traffic accident claims or claims for personal injuries arising out of industrial accidents). Parties to district court proceedings may also, by consent, adopt the simplified procedure used in magistrates' court cases.

The Employment Claims Tribunal (ECT) hears only salary-related (whether statutory or contractual) employment disputes for all employees, claims for wrongful dismissal and claims for salary in lieu of notice of termination by all employers, subject to a claim limit of S$20,000, or if the case has undergone a formal mediation process, S$30,000. Before a claim may be heard by the ECT, parties must undergo compulsory mediation conducted by the Tripartite Alliance for Dispute Management. The proceedings in the ECT are designed to be informal and judge-led, and representation by lawyers is not allowed. The ECT is not bound by the usual rules of evidence and may inform itself on any matter in such manner as it thinks fit.

The small claims tribunals can only hear certain types of cases (such as claims relating to contracts for the sale of goods or provision of services) with a value not exceeding S$20,000 (or S$30,000, if the parties consent). Proceedings are conducted expeditiously and with minimal formalities (and costs). Parties are not allowed to be represented by lawyers.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The civil litigation process in Singapore is adversarial in nature, with the parties or their legal representatives presenting evidence and arguments that advance their cases. The judge generally has a passive role as the decider of questions of both fact and law, and decides based on the evidence and arguments advanced by the parties. Since 1970, the jury system is no longer in use in Singapore.

The chief justice, judges of appeal, judicial commissioner and other judges are appointed by the president on the advice of the prime minister. Before giving his advice on the appointment of a judge or judicial commissioner, the prime minister must consult the chief justice. Among other stringent requirements, the candidate must have been a qualified member

of the legal profession for a minimum number of years, depending on the level of appointment. To promote diversity on the bench, candidates are chosen from differing backgrounds, ranging from academia to private practice and the public sector. Additionally, the inclusion of international judges in the SICC brings together specialist commercial judges from both civil law and common law traditions.

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods for civil claims are generally set out in the Limitation Act (Chapter 163). Limitation periods for specific actions or claims (such as those relating to the carriage of goods by sea) are set out in other written law.

In general, actions founded on a contract or on tort must be brought within six years from the date on which the cause of action accrued. Actions upon any judgment shall not be brought after 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after six years from the date on which the interest became due. A claim for contribution under section 15 of the Civil Law Act (Chapter 43) shall not be brought after two years from the date on which the right to contribution accrued. Actions to recover land or money secured by mortgage or charge on land or proceeds of the sale of land may not be brought after 12 years from the date on which the right has accrued. Actions for damages for negligence, nuisance or breach of duty may not be brought after six years from the date on which the cause of action accrued or, thereafter, three years from the earliest date on which the claimant first had the knowledge and the right required to bring an action. However, for damages in respect of personal injuries, the time limit to bring an action is three years from the date on which the cause of action accrued or, thereafter, three years from the earliest date on which the claimant had the knowledge required to bring an action for damages in respect of the relevant injury. Actions for negligence, nuisance or breach of duty are also subject to a longstop limit of 15 years from the date of the act or omission constituting the negligence, nuisance or breach of duty, or that caused the injury or damage.

Limitation periods may be extended by fraud of the defendant or his or her agent concealing the right of action, or by a mistake. The periods of limitation may not run until the fraud or mistake has been or ought to have been discovered by the plaintiff. The limitation period may also be suspended where the claimant is under a disability until after the disability has ceased.

The Limitation Act must be expressly pleaded as a defence to operate as a bar to an action.

The Foreign Limitation Periods Act (Chapter 111A) provides that where the applicable law in an action or proceedings is the law of another country, state or territory, the law of that other country, state or territory relating to limitation shall apply for the purposes of the action or proceedings to the extent that the application does not conflict with public policy.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Under the Rules of Court 2021 (ROC 2021) a party must make an offer of amicable resolution (to resolve the dispute whether in whole or in part) before commencing an action in the courts, unless the party has reasonable grounds not to do so. It must be in writing, and must be open for acceptance within a reasonable period of time, and in any case, for at least 14 days unless the parties otherwise agree. An offer of amicable resolution must not be rejected by the other party unless it has reasonable grounds to do so. The terms of an offer which has been made and not accepted must not be relied upon or made known to the court until after the court has determined the merits of the action and is dealing with the issue of costs. If a party informs the court that it does not wish to attempt to resolve the dispute by amicable resolution, the court may order the party to submit a sealed document setting out the party's reasons for such refusal. The sealed document will only be opened by the court after the determination of the merits of the action and its contents may be referred to by the court when deciding the issue of costs.

Apart from the requirement to make an offer of amicable resolution, there are also specific pre-action protocols that must be observed in commencing the following claims:

- personal injury claims (excluding medical negligence claims);
- non-injury motor accident claims;
- medical negligence claims;
- non-injury motor accident claims;
- defamation claims (including libel and slander); and
- business-to-business debts (in the State Courts).

There are various optional pre-action applications that parties may consider making in aid of pursuing their claims, for example:

- Claimants may apply for production of documents and information before the commencement of proceedings or against a non-party to identify possible parties to any proceedings, to enable a party to trace the party's property or for any other lawful purpose.
- For SICC proceedings, a party may apply for a pre-action certificate to obtain an early indication from the court on certain matters, for example: whether the claim is of a commercial and international nature; whether the action is an offshore case; and whether there should be confidentiality orders. These matters are relevant to the issue of jurisdiction, foreign representation and application for confidentiality orders respectively. This could save parties time and costs. The pre-action certificate must be exhibited in the court papers within six months of the date of its grant and is conclusive until set aside.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

All civil proceedings commenced on or after 1 April 2022, including appeals, are subject to the ROC 2021. The following rules and practice directions will also apply: Supreme Court Practice Directions 2021 (for civil proceedings in the Supreme Court), State Court Practice Directions 2021 (for civil proceedings in the State Courts), Singapore International Commercial Court Rules 2021 and the Singapore International Commercial Court Procedural Guide 2021 (for civil proceedings in the SICC).

In the Supreme Court and the State Courts, there are two modes of commencing civil proceedings:

- by originating claim. An originating claim must be served together with a statement of claim. Where a defendant is served with a generally endorsed originating claim, the statement of claim must be served within 14 days of service of the originating claim; or
- by originating application. An originating application must be supported by affidavit.

In the SICC, all proceedings must be commenced by an originating application. Every originating application must be accompanied by a claimant's statement and a copy of the written jurisdiction agreement to which the claimant and defendant are party.

Where a substantial dispute of fact is likely to arise or where the claimant intends to seek summary judgment, the proceeding should be begun by originating claim.

Where the proceeding is an application made to the court or a judge under any written law, or where the proceeding principally raises issues of the construction of any written law or of any document or some question of law, or in which there is unlikely to be any substantial dispute of fact, it may be begun by originating application.

Under the ROC 2021, reasonable steps must be taken to serve an originating process expeditiously. Where the originating process is to be served in Singapore, reasonable steps to serve the defendant must be taken within 14 days of the issue of the originating process. Where the originating process is to be served outside Singapore, reasonable steps to serve the originating process must be taken within 28 days of the issue of the originating process.

An originating claim or originating application must be served personally on each defendant (or on his or her solicitors).

For individuals within Singapore, personal service is effected:

- on a natural person by leaving a copy of the document with that person, or the person's agent if that person is an overseas principal;
- on any entity by leaving a copy of the document with the chairperson or president of the entity, or the secretary, treasurer or other officer;
- on any person or entity according to the requirements of any written law; or

- in any manner agreed with the person or the entity to be served.

The following persons may effect personal service:

- a process server of the court;
- a solicitor;
- a solicitor's employee;
- a litigant who is not legally represented or such a person's employee; or
- any other person that the registrar may allow in a particular case or generally.

Where personal service is impracticable, an application may be made to court for substituted service, such as by way of a notice to be published in a newspaper with national circulation, or by posting on the entrance to the defendant's last known place of residence or some other manner as the court may direct (including by electronic mail or internet transmission).

For defendants outside Singapore, an application must be made to the court for leave to serve the originating process outside Singapore. The court's approval is however not required for service outside Singapore if such service is allowed under a contract between the parties. Service outside Singapore may be effected in the following manner:

- according to the manner contractually agreed between the parties;
- where there is a civil procedure convention governing service in the foreign country, according to the manner provided in that convention;
- through the government of the foreign country if that government is willing to effect service;
- through the judicial authority of the foreign country if that authority is willing to effect service;
- through a Singapore consular authority in that foreign country; or
- according to the manner provided by the law of that foreign country.

Service of originating processes may also be effected by any manner that is agreed between the parties, such as by service on a designated local process service agent specified in a contract signed by the parties. If a defendant's solicitor endorses on the originating process that he or she accepts service on behalf of the defendant, it is deemed served on the defendant.

The courts generally do not face capacity issues impacting their ability to handle disputes in a timely manner. In 2021, the Appellate Division of the High Court was established to address the increase in volume and complexity of the appellate case load and ensure that court proceedings remain efficient while maintaining high standards of access to and quality of justice.

Under the ROC 2021, all parties and the court must seek to achieve the following five Ideals in all civil proceedings:

- fair access to justice;
- expeditious proceedings;

- cost-effective work proportionate to the nature and importance of the action, the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises, and the amount or value of the claim;
- efficient use of court resources; and
- fair and practical results suited to the needs of the parties.

To enhance the effectiveness and efficiency of the judicial processes, the courts continually optimise resources through a multi-pronged strategy, including the promotion of greater use of alternative dispute resolution, active case management at pretrial conferences and deployment of technology.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

In the Supreme Court and State Courts, originating claims and originating applications are valid for service for three months from the date of issue. An application may be made to extend the validity of the originating claim or originating application if it has not been served on all or any of the defendants before or after it expires. Except in a special case, the court may extend the validity of the originating claim or originating application only twice and by not more than three months each time.

In the SICC, an originating application is valid for service for 12 months from the date of its issue.

For civil proceedings in the High Court

Upon being served with an originating claim, the defendant must file a notice of intention to contest or not contest within 14 days of service of the statement of claim on the defendant where it is served in Singapore, and 21 days where it is served outside Singapore. If the defendant wishes to contest the claim, the defendant must then file and serve a defence to the originating claim within 21 days of service of the statement of claim on the defendant where it is served in Singapore, and five weeks where it is served outside Singapore. If the defendant fails to file and serve a defence within the prescribed time, the claimant may apply for judgment in default of defence. After the defendant has filed its defence or the claimant has filed its defence to counterclaim, no further pleadings may be filed unless the court otherwise orders. If a claimant wishes to file a reply, it must seek approval of the court.

Upon being served with an originating application, the defendant must, if it wishes to contest the originating application, file and serve the defendant's affidavit within 21 days of service of the originating application and supporting affidavit if service is in Singapore, and within five weeks if service is effected outside Singapore. If a defendant does not file and serve the defendant's affidavit within the timelines, the court will proceed on the basis that the defendant does not wish to introduce evidence and will hear the originating application based on the plaintiff's affidavit and the parties' submission. Except in a special case, no further affidavits may be filed after the defendant's affidavit on the merits.

After pleadings have been filed and served, parties will be invited to state their views on whether it is appropriate for the court to order that parties file and exchange affidavits of

evidence-in-chief (AEICs) prior to the production of any documents. If parties are unable to agree on whether such an order should be made, the court will determine this issue at a further case conference. The court may order the parties to file and exchange AEICs of all or some witnesses after the pleadings have been filed and served, but before any production of documents and before the court considers the need for any application. This is meant to crystallise key issues, reduce the scope of disclosure and avoid the possibility that witnesses may adjust their evidence to match disclosed documents.

The first case conference will be held eight weeks after the originating claim or originating application is issued, where the defendant is to be served in Singapore, or 12 weeks after the originating claim or originating application is issued, where the originating claim or originating application is to be served outside Singapore, or at any time earlier or later as stipulated by the court. The case conferences will be presided over by the judges or registrars in consultation with the judges, to ensure that the judges have close control over the manner in which a case progresses. Case conferences can be held at any stage over the course of proceedings, including appeals.

Prior to the first case conference, parties will be required to complete a pre-case conference questionnaire, to focus on key issues and identify points of agreement. If parties wish to adduce expert evidence, they must fill in an expert witness template prior to the case conference.

The court will also give directions for a single application pending trial (SAPT) to be filed by each party – akin to an 'omnibus' interlocutory application. This means that each party must file one SAPT (and not that all parties must jointly file one SAPT). The SAPT must deal with all matters that are necessary for the case to proceed expeditiously. The matters to be included in the SAPT include but are not limited to:

- addition or removal of parties;
- consolidation of actions;
- division of issues at trial to be heard separately;
- security for costs;
- further and better particulars of pleadings;
- amendment of pleadings;
- filing of further pleadings;
- striking out of part of an action or of the defence;
- judgment on admission of facts;
- determination of questions of law or construction of documents;
- production of documents;
- interim relief;
- expert evidence and assessors;
- independent witnesses and interested non-parties; and
- independent counsel.

The party applying for the SAPT must file and serve its application and supporting affidavit within 21 days of the date of the case conference, and the other party must file and serve its affidavit in reply within 21 days thereafter. The supporting affidavit and the reply affidavit should address all matters in the SAPT unless otherwise directed by the court.

If a party wishes to file an application before the court gives directions for the filing of the SAPT, it may do so without seeking permission if the intended application falls under Order 9 Rule 9(7) of the ROC 2021 namely:

- injunctions;
- substituted service;
- service out of Singapore;
- setting aside service of an originating process;
- judgment in default of a notice of intention to contest or not contest an originating claim;
- judgment in default of defence;
- summary judgment;
- striking out the whole of an action or defence;
- stay of the whole action;
- stay of enforcement of a judgment or order;
- an enforcement order;
- permission to appeal;
- transfer of proceedings under the State Courts Act;
- setting aside third-party proceedings; or
- permission to make an application for a committal order.

If a party wishes to file an application prior to the filing of the SAPT that is not covered under Order 9 Rule 9(7) of the ROC 2021, the party must seek permission of the court to do so by way of letter setting out the essence of the intended application and the reasons why it is necessary at that stage of the proceedings.

If the court has not made a direction for AEICs to be filed prior to production of documents, the court will give directions for the SAPT to be filed after parties have given production of documents (ie, after general production of documents has been completed). If the court has ordered for AEICs before the exchange of documents, the SAPT should not be filed until after all AEICs have been filed and served.

After the SAPTs are filed, the court may direct parties to file an SAPT checklist to indicate their preferred sequence of the matters set out in the SAPTs. The court will then issue directions to inform parties of the sequence of the matters to be heard for the respective applications in the SAPTs.

At the appropriate stage, the court must fix a period in which the claimant is to set down the action for trial (for originating claims). For originating claims, where the claimant does not set down the action for trial within the timelines directed, the defendant may set the action down for trial or may apply to the court to dismiss the action and, on the hearing of any such application, the court may order the action to be dismissed accordingly or make such order as the court thinks just. The court must estimate the length of time needed for the trial or hearing, including oral or written submissions, and assign the trial or hearing dates accordingly.

Depending on the complexity of the matter and other factors, such as the location of parties, evidence and witnesses, a matter may proceed to trial as soon as six months from the date of issue of originating process, but more often between 12 and 18 months, and rarely beyond.

For civil proceedings in the State Courts

For originating claims filed in the State Courts, a case conference will be fixed around seven weeks after a defence has been filed. The court will notify parties which of the following case management frameworks applies:

- specially managed civil list (applicable to more complex or high value cases);
- simplified process pursuant to Order 65 of ROC 2021 (for lower value claims);
- court dispute resolution (CDR) process; or
- general process.

Civil simplified case conferences will be called for all magistrates' court cases, save for non-injury motor accident claims, personal injury claims and negligence claims (which will fall under the CDR framework). Where parties to a district court case consent for Order 65 to apply to their proceedings, they can also use the simplified process framework. At civil simplified case conferences, the court will jointly consider with the parties all available options for resolving the case parties. If a resolution cannot be reached, the court will make the necessary orders or directions either to progress the matter to trial or for assessment of damages.

For civil proceedings in the SICC

A defendant must file and serve a defendant's statement within 28 days of being served with both the originating application and the claimant's statement or accompanying witness statement. The defendant's statement must state:

- whether the defendant intends to contest the claim or any part of it and identify the claim or part that is contested; and
- whether the defendant intends to apply to dispute that the originating application, claimant's statement or accompanying affidavit was properly served or to dispute that the SICC has or should assume jurisdiction in the matter.

The SICC will order that a contested claim or counterclaim be decided by one of the following adjudication tracks (having regard to any agreement between the parties):

- pleadings adjudication track;
- statements adjudication track; or
- memorials adjudication track;

Case management conferences will be held as the SICC thinks appropriate. Prior to a case management conference, parties must:

- attempt to agree on the matters to be discussed at that case management conference including but not limited to the adjudication track for the determination of the dispute and any proposed modifications to the track;
- attempt to identify the real issues in dispute, and any preliminary issues;
- consider the possibility of alternative dispute resolution, and be prepared to inform the SICC of the suitability of the case for alternative dispute resolution; and

- unless the SICC otherwise directs, submit a case management bundle (or updated case management bundle) at least seven working days prior to the case management conference.

There is no procedure for the filing of an SAPT in SICC proceedings.

At the appropriate stage, the court must fix a period in which the claimant is to set down the action for trial.

Case management

7 Can the parties control the procedure and the timetable?

Under the ROC 2021 and practice directions, the courts will exert greater control over the pace of litigation, instead of leaving it to the parties to do so. Parties will be expected to assist the court and conduct their cases in a manner that will help achieve the five Ideals set out in the ROC 2021. Where there is non-compliance with any rule, any practice directions or any order or direction by the court, the court has the power to dismiss, stay or set aside the proceedings, and give an appropriate judgment or order even if the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Parties to a civil proceeding have a continuing obligation to preserve documents and other evidence relevant to the issues in dispute pending trial. Under the ROC 2021, all parties are required to produce and exchange the following documents in their possession or control within 14 days of the date of the case conference at which the court may order such production:

- all documents that the party will be relying on;
- all known adverse documents, including documents that a party ought reasonably to know are adverse to its case and private or internal correspondence; and
- documents agreed between the parties, if any.

A requesting party may apply for the production of a specific document or class of documents in a party's possession or control. 'Control' has a wide meaning and the obligation to produce documents would include, for example, documents in the party's custody or power. The court may order any party to produce the original or a copy of a specific document in the party's possession or control, if the requesting party properly identifies the requested documents and shows that the requested documents are material to the issues in the case.

In special cases, the court may order a party to produce documents that merely lead a party on a train of inquiry to other documents or documents that are part of a party's private or internal correspondence. The court may also order the production of a party's private or internal correspondence if they are known adverse documents.

The court will not order that parties produce:

- privileged documents; and
- documents where production would be contrary to the public interest.

In exercising its powers to order the production of documents, the court must bear in mind, in addition to the Ideals, the following principles:

- a claimant is to sue and proceed on the strength of the claimant's case and not on the weakness of the defendant's case; and
- a party who sues or is sued in court does not thereby give up the party's right to privacy and confidentiality in the party's documents and communications.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The Evidence Act (Chapter 97) provides that communications between an advocate or solicitor and his or her client made in the course and for the purpose of his or her employment as advocate or solicitor may not be disclosed without the client's express consent. The Evidence Act makes clear that this duty extends to a legal counsel in an entity. However, the duty of non-disclosure does not extend to any communication made in furtherance of any illegal purpose or any fact observed showing that any crime or fraud has been committed since the commencement of the employment.

In addition, the common law principles of litigation privilege and the privilege attaching to without prejudice communications continue to apply under Singapore law insofar as they are not inconsistent with the Evidence Act. Litigation privilege protects from disclosure at discovery any documents created when litigation is reasonably contemplated and for the predominant purpose of litigation. Without prejudice communications privilege protects communications made in the course of genuine negotiations to resolve disputes.

Under the rules governing SICC proceedings, if all parties agree that any rule of evidence in Singapore law shall not apply and such other rules of evidence (if any), whether found in foreign law or otherwise, shall apply instead, a party may apply to the SICC to make an order to that effect. Examples of substantive rules of evidence under Singapore law that parties may agree to disapply include rules relating to privilege.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

As a general rule, the trial in an originating claim, assessment of damages or value, and taking of accounts must be decided on the basis of the witnesses' AEICs, including expert witnesses.

In a special case, the court may allow a witness's evidence-in-chief to be given orally instead of by AEIC.

Parties may also subpoena witnesses to testify at trial, and in such cases, the evidence-in-chief of the witness answering a subpoena would be given by oral testimony. Witnesses may also be subpoenaed to produce documents.

Parties are to inform the court during the case conference if they intend to rely on expert evidence. No expert evidence may be used in court unless the court approves. The parties must consider whether expert evidence will contribute materially to the determination of any issue that relates to scientific, technical or other specialised knowledge and whether such issue can be resolved by an agreed statement of facts or by submissions based on mutually agreed materials.

Under the ROC 2021, as far as possible, parties must agree on one common expert. Except in a special case and with the court's approval, a party may not rely on expert evidence from more than one expert for any issue. In a case where there is more than one expert, the court may order that all or some of the experts testify as a panel and give their views on the issues referred to them and comment on one another's views. The court may order cross-examination and re-examination of all or some of the experts in the panel in any sequence as the court thinks appropriate, whether before or after the experts have testified as a panel.

Under the rules governing SICC proceedings, if all parties agree that any rule of evidence in Singapore law shall not apply and such other rules of evidence (if any), whether found in foreign law or otherwise, shall apply instead, a party may apply to the SICC to make an order to that effect.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

An AEIC may not be used if the maker does not attend court for cross-examination, unless the parties otherwise agree. Witnesses subpoenaed to testify at trial give their evidence orally. Witnesses may also be subpoenaed to produce documents without the obligation to attend court personally.

Witnesses and experts may not give oral evidence-in-chief at the trial except in relation to matters that have arisen after his or her AEIC was filed or if the court otherwise orders.

An action commenced by originating claim will generally be decided at a trial involving oral evidence and cross-examination.

Under the rules governing SICC proceedings, if all parties agree that any rule of evidence in Singapore law shall not apply and such other rules of evidence (if any), whether found in foreign law or otherwise, shall apply instead, a party may apply to the SICC to make an order to that effect. Examples of substantive rules of evidence under Singapore law that parties may agree to disapply include rules relating to the examination of witnesses.

Interim remedies

12 | What interim remedies are available?

The court has wide powers to order a variety of interim remedies, including:

- prohibitory injunctions to restrain the defendant from engaging in certain conduct;
- mandatory injunctions to compel the defendant to perform certain acts;
- Mareva injunctions (or freezing orders) to prevent the defendant from dissipating assets so as not to frustrate any judgment that the claimant may eventually obtain against him or her;
- search orders to require the defendant to allow the claimant or his or her representatives to enter, search and remove from his or her premises material or evidence relating to the subject matter of the action; and
- interim payments for a proportion of the damages claimed or debt owed.

Where the claimant has applied for summary judgment, the court may give the defendant leave to defend the claim subject to conditions, including the provision of security for the claim as well as costs and interest.

The High Court may make orders for interim remedies in support of international arbitrations, irrespective of whether the place of arbitration is in Singapore under section 12A of the International Arbitration Act (Chapter 143A).

Remedies

13 | What substantive remedies are available?

Common substantive remedies available to a claimant include:

- damages: to compensate the loss suffered by the claimant as a result of the defendant's actions;
- specific performance: to require the defendant to perform the terms of the contract that were breached;
- injunction: to restrain or compel conduct on the part of the defendant;
- account: to recover profits taken as a result of breach of duty; and
- declaration: a pronouncement by the court of the legal positions between parties.

Where money is payable under an order, it carries interest as agreed between parties, or if there is no agreement on interest, simple interest at 5.33 per cent per year. Interest is to be calculated from the date of the order until the date of payment.

Enforcement

14 | What means of enforcement are available?

Under the ROC 2021, where an order requires a person to pay money, to do or stop doing an act, or to perform a duty, the court must give that person a reasonable time within which to

comply unless the court intends for these to be performed on the day that the order is given. When there is no time specified, it is deemed that the order requires immediate compliance.

The ROC 2021 consolidates all methods of enforcement into a single enforcement order. A party seeking to enforce a judgment must take out a single application for one or more methods of enforcement. Common methods of enforcement include:

- enforcement order for attachment of a debt (formerly termed as garnishee order);
- stay of enforcement (formerly termed as stay of execution);
- enforcement order (formerly termed as writ of execution);
- enforcement order for possession of property (formerly termed as writ of possession); and
- enforcement order for seizure and sale of property (formerly termed as writ of seizure and sale).

The enforcement applicant may apply to the court by summons without notice for an enforcement order not earlier than three days from service of the court order on the enforcement respondent. If the enforcement applicant is seeking multiple methods of enforcement, it must state whether the sheriff is to enforce them in any particular sequence or whether all or some methods are to be enforced simultaneously. The supporting affidavit must contain a written undertaking from the enforcement applicant's solicitors (or the applicant, if not represented) to indemnify the sheriff against all claims, costs and expenses arising from complying with the enforcement order, to pay upon request all charges, commissions, expenses and fees incurred by or payable to the sheriff in complying with the enforcement order, and to deposit the money requested by the sheriff before the sheriff complies with the enforcement order and from time to time.

An enforcement order is valid for 12 months from the date of issue, and may be extended by the court for a period of 12 months if the application is made before the enforcement order would have expired. The enforcement order ceases to be valid if satisfaction of the judgment is recorded by filing the consent of the judgment creditor, or the enforcement applicant gives written notice to the sheriff not to take further action on the enforcement order because the enforcement order has complied with all the terms of the court order or for any other reason.

Failure to comply with an order of court may amount to contempt of court, and may be punished by sequestration of assets or committal. Further, the court may order that any acts required to be performed by an order of court be performed by another party or by a person appointed by the court at the cost of the party in default.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

The general rule is that actions by originating claim are adjudicated by a single judge in open court. Originating applications, on the other hand, are usually heard in chambers. Proceedings may be held in camera where it is expedient in the interests of justice, public safety or propriety, or some other sufficient reason exists to do so.

Court users can apply to inspect files and court documents that have been made public. Litigants can inspect their own case files and request for copies of court documents. A non-party may inspect a case file with leave of court upon filing a request stating his or her interest in the matter. Details of all originating processes, writs of execution and distress and appeals to the Court of Appeal are available to the public without leave of court.

To prevent an inspection of a case file by a non-party to the case file, an application to seal the case file or court documents or both may be made according to applicable rules and procedures. Such applications will be heard by a High Court judge, who may grant the order with or without conditions.

Costs

16 | Does the court have power to order costs?

The court has full discretion to order costs, whether in principle or amount. Under the ROC 2021, the court must have regard to all relevant circumstances in exercising its power to fix or assess costs, including:

- efforts made by the parties at amicable resolution;
- complexity of the case and the difficulty or novelty of the questions involved;
- skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
- urgency and importance of the action to the parties;
- number of solicitors involved in the case for each party;
- conduct of the parties;
- principle of proportionality; and
- stage at which the proceedings were concluded.

The court may order two or more parties' costs to be set off against one another so that only the balance has to be paid. The court may also stay or dismiss any application, action or appeal or make any other order as the court deems fit if a party refuses or neglects to pay any costs ordered within the specified time, whether the costs were ordered in the present proceedings or in some related proceedings.

Generally, the court will order costs of any proceedings in favour of a successful party, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. The court may also disallow or reduce a successful party's costs or order that party to pay costs if:

- that party has failed to establish any claim or issue which that party has raised in any proceedings, thereby unnecessarily increasing the amount of time taken, the costs or the complexity of the proceedings;
- that party has done or omitted to do anything unreasonably;
- that party has not discharged that party's duty to consider amicable resolution of the dispute or to make an offer of amicable resolution in accordance with the ROC 2021; or
- that party has failed to comply with any order of court, any relevant pre-action protocol or any practice direction.

The costs payable by any party to any other party must be fixed by the court that heard the matter after an oral hearing or by way of written submissions from the parties, unless the court thinks fit to direct an assessment of costs. For costs in relation to trials of originating claims and originating applications involving cross-examination, parties must file a cost schedule setting out with sufficient particularity the quantum of party-and-party costs and disbursements that the party intends to claim in the event that the party succeeds. Parties must have regard to the costs guidelines set out in the Supreme Court Practice Directions 2021. That being said, nothing in the costs guidelines is intended to guide or influence the charging of solicitor-and-client costs.

The amount of costs any party is entitled to recover is the amount allowed after assessment on the standard basis, unless it appears to the court to be appropriate to order costs to be assessed on the indemnity basis.

A defendant may apply for security for the defendant's costs of the action if the claimant:

- is ordinarily resident outside of the jurisdiction;
- is a nominal claimant who is suing for some other person's benefit (but not suing in a representative capacity) or is being funded by a non-party, and there is reason to believe that the claimant will be able to pay the defendant's costs if ordered to do so; or
- has not stated or has incorrectly stated the claimant's address in the originating claim or originating application, or has changed the claimant's address during the course of the proceedings, so as to evade the consequences of the litigation.

If the claimant is a corporation, the court may require sufficient security to be given where there is reason to believe that the company will be unable to pay the costs of a successful defendant.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Conditional fee arrangements (CFAs) were generally prohibited in Singapore until 4 May 2022 when amendments were made to the Legal Profession Act 1966 to allow for CFAs in the following types of legal proceedings:

- international and domestic arbitration proceedings;
- certain proceedings in the Singapore International Commercial Court; and
- related court and mediation proceedings.

The Legal Profession (Conditional Fee Agreement) Regulations 2022 implements safeguards relating to information that lawyers must provide to clients before entering into CFAs.

CFAs in Singapore are meant to enhance access to justice by providing businesses or individuals with additional funding options to pursue meritorious claims that they may

otherwise not pursue. Such CFAs will not affect recovery of costs from the client by another party; contingency fee agreements where remuneration is payable as a percentage of the damages awarded will continue to be prohibited.

Third-party funding (TPF) was also generally prohibited in Singapore until 2017 when the Civil Law Act was amended and the common law torts of maintenance and champerty were abolished. In June 2021, the categories of proceedings for which TPF is permitted was extended to include the following:

- domestic arbitration proceedings;
- court proceedings arising from or connected with domestic arbitration proceedings;
- proceedings commenced in the SICC, for as long as those proceedings remain in the SICC;
- appeal proceedings arising from any decisions made in the SICC proceedings commenced (to which TPF has been permitted); and
- mediation proceedings relating to any of the above.

TPF is also permitted under specific circumstances in insolvency proceedings started in the Insolvency, Restructuring and Dissolution Act 2018 (IRDA). For example, the court approved a funding arrangement to pursue existing litigation for the benefit of a company in liquidation and held that the doctrine of maintenance and champerty had no application to the exercise of the statutory power of sale under section 272(2)(c) of the Companies Act (Chapter 50): see *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337.

Litigation may also be state funded if a party is financially eligible for legal aid rendered by the Legal Aid Bureau, which is part of the Ministry of Law.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

After the event (ATE) insurance is available in Singapore. ATE insurance covers the costs incurred in defending or pursuing litigation, in particular offsetting the opponent's costs and disbursements if the insured is unsuccessful, and may be purchased after a legal dispute has arisen.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Singapore does not have a broad process for class action. Representative action is the only form of group litigation in Singapore.

Under the ROC 2021, where numerous persons have a common interest in any proceedings, such persons may sue or be sued as a group with one or more of them representing the group. Further, a representative action is usually only appropriate where the number of interested persons is too large for them to be joined as parties to a non-representative action.

Specific legislative provisions may provide for particular types of representative actions. One example is section 85 of the Building Maintenance and Strata Management Act (Chapter 30C), which enables a management corporation to bring or defend proceedings on behalf of the subsidiary proprietors of a development.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties may appeal against findings of both fact and law. However, an appellate court would be slow to reverse findings of fact and will do so only if the findings are plainly wrong or against the weight of the evidence.

Under the ROC 2021, the broad objectives are to move parties quickly from procedural skirmishes to the main battle on the merits, requiring less formality for appeals against applications, and saving costs and reducing prolixity by requiring only materially relevant documents to be filed with the imposition of page limits. All appeals in the Supreme Court are split into two chapters:

- appeals from applications in actions (including decisions made pursuant to matters within an SAPT; and
- appeals from judgments and orders after trial (this also includes hearings on the merits of an originating application).

The Court of Appeal, as the highest appellate court, hears all criminal appeals against decisions made by the General Division in the exercise of its original criminal jurisdiction, prescribed categories of civil appeals and appeals that are to be made to the Court of Appeal under written law.

The General Division of the High Court hears appeals from a decision or order made by a district judge or magistrate in the State Courts (including the small claims tribunal and ECT).

The Appellate Division of the High Court hears all civil appeals that are not allocated to the court of Appeal under the Sixth Schedule of the SCJA, and any civil appeal or other process that any written law provides is to lie to the Appellate Division.

A party may not always have a right of appeal. An appeal may lie as a matter of right (with or without the leave of court), or there may be no right of appeal at all. For example:

- orders made by district court or magistrates' court that are appealable only with leave: see sections 21(1) and 83(1), and the Third Schedule of the SCJA;
- decisions of the General Division of the High Court that are not appealable: see sections 29(b), 80(2A)(i) and 83(1) and Fourth Schedule of the SCJA. Examples include a judgment/order made by consent of the parties, an order by a judge giving or refusing further and better particulars, and an order by a judge refusing security for costs;
- decisions of the General Division of the High Court that are appealable only with leave and certain exceptions: see sections 29A and 83(1) and Fifth Schedule of the SCJA. Some examples include an order by a judge giving unconditional leave to defend any

proceedings, an order by a judge giving or refusing discovery or inspection and an order by a judge refusing a stay of proceedings;

- civil appeals to be made to Court of Appeal: see sections 29C and 83(1) and Sixth Schedule of the SCJA. Some examples include an appeal arising from a case relating to the law of arbitration, a case relating to the law of patents and appeals against a decision of the SICC; and
- cases where the decision of the Appellate Division of the High Court is not appealable: see sections 46(1) and 83(1), and Ninth Schedule of the SCJA.

For SICC proceedings, parties may contractually exclude or limit the right of appeal against a judgment or order of the SICC.

Except insofar as the lower court or the appellate court may otherwise direct, an appeal does not operate as a stay of enforcement or of proceedings under the decision of the lower court.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment may be recognised and enforced under the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) (Chapter 264), the Reciprocal Enforcement of Foreign Judgments Act (REFJA) (Chapter 265) or the Choice of Court Agreements Act 2016 (No. 14 of 2016) (CCAA), or under the common law by way of commencing an action on the judgment itself.

The RECJA and REFJA apply only to judgments from the gazetted countries under the respective legislation. Under the RECJA and REFJA, a foreign judgment can generally be registered if it is final and conclusive between the parties, is for a sum of money, and applicable procedural requirements are complied with. A foreign judgment may be enforced as if it were a judgment of the Singapore courts only after it has been registered.

Enforcement of a foreign judgment under the RECJA, REFJA or common law may not be allowed in certain circumstances, for example, where the foreign judgment has been obtained by fraud or in breach of principles of natural justice.

The CCAA was enacted to implement the Hague Convention of 30 June 2005 on Choice of Court Agreements (the Convention) and came into force on 1 October 2016. The CCAA applies to judgments given in international civil or commercial cases where there is an exclusive choice of court agreement that designates a court of a contracting state to the Convention. However, it does not apply to any interim judgments or where the exclusive choice of court agreement was concluded before the Convention entered into force in that contracting state. Under the CCAA, a judgment given by a court of a contracting state to the Convention (other than Singapore) will be recognised and enforced if it has effect and is enforceable in the state in which the judgment originated. However, there are certain mandatory and discretionary grounds for refusing recognition or enforcement. For example, it is mandatory to refuse recognition or enforcement of a foreign judgment obtained by fraud in connection with a matter of procedure.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The procedure to get an order for evidence to be obtained in Singapore for use in civil proceedings in another jurisdiction is governed by the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 and Order 55 of the ROC 2021.

An application must be made to the High Court supported by affidavit exhibiting a letter of request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside Singapore.

The Singapore court may order the provision for:

- examination of witnesses, orally or in writing;
- production of documents;
- inspection, photographing, preservation, custody or detention of any property;
- taking samples of any property and carrying out of experiments on or with any property;
- medical examination of any person; and
- taking and testing of blood samples.

The deposition of the witness will be sent to the registrar, who will send the deposition, together with a certificate sealed with the seal of the Supreme Court, to the foreign court or tribunal.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

In Singapore, both the Arbitration Act 2001 (AA) and the International Arbitration Act 1997 (IAA) form part of the arbitration law.

Non-international arbitrations are governed by the AA, unless parties agree that the IAA or the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law) shall apply instead. International arbitrations are generally governed by the IAA, unless parties agree that the AA shall apply instead.

The IAA essentially enacts (and incorporates as its First Schedule) the 1985 UNCITRAL Model Law with some statutory modifications. Various elements of the 2006 UNCITRAL Model Law have since also been incorporated into the IAA. The IAA also gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The AA does not expressly enact the UNCITRAL Model Law. That said, it has undergone various modifications in line with many principles contained in the UNCITRAL Model Law.

The greatest difference between the AA and the IAA is the level of judicial intervention permitted. For instance, a stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6(1) and UNCITRAL Model Law, article 8(1), IAA, First Schedule) but discretionary in a domestic arbitration (AA, section 6(2)). An appeal to the courts may be made against a domestic award for an error of law (AA, section 49) but an international award under the IAA cannot be challenged on that basis. The court also has the power to extend contractual limits for the commencement of a domestic arbitration (AA, section 10) but there is no equivalent power under the IAA or the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be in writing. An agreement concluded orally or by conduct or any other means may also be a valid arbitration agreement provided that the contents of such an agreement are recorded in any form (IAA, section 2A). For instance, in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, the Singapore Court of Appeal had to consider whether a set of terms (which included an agreement to arbitrate in Singapore) set out in a contract note that was sent by R1 International to Lonstroff AG shortly after the deal had apparently been agreed was incorporated as part of the contract between the parties and, if so, whether an antisuit injunction ought to be made against Lonstroff AG from pursuing a case in the Swiss courts. The Court of Appeal held that the contract note was part of the contract between the parties – it was improbable that the parties expected to contract purely on the bare bones of the prior email confirmations – and as such, those terms (including the agreement to arbitrate) would have, as regards the industry practice and size and scope of the subject matter of the supply contracts in question, probably expected terms such as the agreement to arbitrate in Singapore to be incorporated into the more detailed contract note.

Parties are also increasingly including in their arbitration agreements a specific statement as to their express choice of law to govern the arbitration agreement. In the absence of an express choice of law to govern the arbitration agreement, the Singapore High Court (see *BCY v BCZ* [2016] SGHC 249 and *BNA v BNB and another* [2020] 1 SLR 456) has endorsed the approach of the English Court of Appeal in *SulAmérica Cia Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] 1 Lloyd's Rep 671, holding that where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend for the same system of law to govern both the arbitration agreement and the main contract. However, it remains to be seen whether the Singapore courts will continue to adopt this approach following the decision of the English Court of Appeal in *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb' and others* [2020] EWCA Civ 574.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

For arbitrations involving one claimant and one respondent, where the parties cannot agree, the IAA and the Singapore International Arbitration Centre (SIAC) Rules provide for the default appointment of a single arbitrator by the SIAC president as appointing authority (IAA,

section 8(2) and 8(3) and SIAC Rules, Rule 10.2). Under the SIAC Rules, the default provision is for a single arbitrator, but the SIAC registrar has discretion to appoint three arbitrators if the dispute warrants it (SIAC Rules, Rule 9.1). Section 9A(2) of the IAA and Rule 11.3 of the SIAC Rules provide that where two out of three arbitrators have been appointed by the parties, the third arbitrator shall be appointed by the SIAC president unless the parties have agreed upon a procedure for nominating the third arbitrator and if that procedure has resulted in a nomination.

For multiparty arbitrations (three or more parties) which require three tribunal members, section 9B of the IAA (introduced by way of amendments on 1 December 2020) provides for a default appointment mechanism in situations where the parties have not agreed any procedure for appointing the tribunal. In brief:

- all claimants must jointly appoint one arbitrator. They must notify the respondents of their joint appointment when they refer the dispute to arbitration, for example, when filing their request for arbitration or notice of arbitration;
- all respondents must jointly appoint a second arbitrator and inform the claimants of their joint appointment within 30 days of receipt by the last respondent of the request for arbitration or notice of arbitration;
- if either of the above appointments is not made by the parties within the time limits specified, or if the claimants or respondents cannot come to a joint appointment, or if any party requests, the appointing authority must appoint all three arbitrators. If that occurs, the appointing authority may, having regard to all relevant circumstances, reappoint or revoke the appointment of any arbitrator already appointed;
- assuming two arbitrators have been appointed, within the time limits, by the claimants and respondents respectively, they will then choose the third arbitrator (who shall be the presiding arbitrator) within 60 days of receipt by the last respondent of the request for arbitration or notice of arbitration; and
- if the two party-appointed arbitrators fail to agree on the appointment of the third arbitrator within the 60-day time limit, the appointing authority must, upon the request of any party and having regard to all relevant circumstances, appoint the third arbitrator.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

For arbitrations administered by the SIAC, parties are free to choose arbitrators of their choice, whether or not from the SIAC panel of arbitrators. Nonetheless, the SIAC maintains a panel of arbitrators adept in meeting the needs of complex arbitration for parties' selection. The panel of arbitrators comprises experienced, qualified and distinguished arbitrators from over 40 jurisdictions, including professionals from both legal and non-legal backgrounds such as engineers, quantity surveyors and master mariners. The SIAC also maintains a specialist panel of arbitrators for intellectual property disputes.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

The AA and the IAA allow parties and the arbitral tribunal wide discretion to decide on the procedure to be followed for the arbitration. However, both statutes contemplate the exchange of statements of claim and defences and provide that parties must be given sufficient advance notice of any hearings or meetings of the arbitral tribunal, that all statements, documents or other information supplied by one party to the arbitral tribunal must also be supplied to the other party, and that any expert report or evidentiary document upon which the arbitral tribunal may rely in making its decision must be communicated to the parties.

Court intervention

28 On what grounds can the court intervene during an arbitration?

During an arbitration, the powers of the court are generally exercised in support of the arbitration, and with the agreement of the parties or the permission of the arbitral tribunal. The court may also be asked to decide the question of whether the arbitral tribunal has jurisdiction to hear the arbitration following a decision on the question by the arbitral tribunal.

Orders made by an arbitral tribunal may be enforced by the Singapore High Court 'as if they were orders made by the court' (AA, section 28(4) and IAA, section 12(6)). Such orders may include an order granting security for costs, discovery of documents and discovery of facts (ie, interrogatories), taking evidence by way of affidavit, or measures for the preservation of evidence (AA, section 28 and IAA, section 12).

The court may also grant interim relief in aid of arbitrations that are seated outside Singapore (IAA, section 12A). The orders of an emergency arbitrator in Singapore may be enforced in Singapore as though they were orders of an arbitral tribunal (IAA, section 12(6) read with section 2(1)).

The court will generally not interfere with the exercise of the tribunal's discretion to make interlocutory orders. It the tribunal refuses to make such orders, the court will not compel the tribunal to make them.

The court will not set aside interlocutory orders made by a tribunal (see PT *Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157).

The court has the power to issue orders to attend or orders to produce documents (ie, subpoenas) to witnesses within the jurisdiction to testify or produce documents at arbitral proceedings (AA, section 30 and IAA, section 13). It may also intervene on various grounds, such as deciding on a challenge as to the arbitrator's impartiality, independence, hearing an appeal against a tribunal's decision on its jurisdiction and setting aside the award.

The court also has the power to enforce duties of confidentiality. In December 2020, the IAA was amended to add section 12(1)(j) under which a tribunal may make orders to enforce any obligation of confidentiality:

- that the parties to an arbitration agreement have agreed to in writing, whether in the arbitration agreement or in any other document;
- under any written law or rule of law; or
- under the rules of arbitration (including the rules of arbitration of an institution or organisation) agreed to or adopted by the parties.

Such orders may, by leave of the General Division of the Singapore High Court, be enforceable in the same manner as if they were orders made by a court, and where leave is so given, judgment may be entered in terms of the order or direction (IAA, section 12(6)).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators under both the AA and the IAA have powers to make orders for the provision of security for costs, the preservation and interim custody of any evidence, and the preservation, interim custody or sale of any property that is or forms part of the subject matter of the dispute. In addition, the IAA also gives the arbitral tribunal the power to order security of the amount in dispute, to make orders for ensuring that any award that may be made is not rendered ineffectual by the dissipation of assets, and for any interim injunction or other interim measure (IAA, section 12(1)).

The SIAC Rules provide that a party in need of emergency interim relief may apply for the appointment of an emergency arbitrator prior to the constitution of the arbitral tribunal (SIAC Rules, Rule 30.2 and Schedule 1).

Award

30 | When and in what form must the award be delivered?

Although neither the IAA nor the AA prescribes a time limit within which an award should be rendered, a tribunal should conduct the arbitration 'without undue delay' (UNCITRAL Model Law, article 14, IAA, First Schedule). Similar provisions can be found in the AA (section 16). There does not appear to be any Singapore case law defining what would amount to undue delay. In *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154, the Singapore High Court found that a 19-month delay in the release of the award did not violate any rule of natural justice.

Under the SIAC Rules, there is a default requirement for a tribunal to submit its draft award to the registrar within 45 days of the date on which the tribunal declares the proceedings formally closed. This deadline may be extended at the registrar's discretion or if the parties agree (SIAC Rules, Rule 32.3).

If the expedited procedure under Rule 5.1 of the SIAC Rules is adopted, the tribunal must render its award within six months from the date when the tribunal is constituted, unless the registrar extends that period owing to exceptional circumstances (SIAC Rules, Rule 5.2).

The AA and IAA prescribe that the award must fulfil the following requirements (UNCITRAL Model Law, article 31, IAA, First Schedule and AA, section 38):

- the award must be made in writing and signed by the arbitrators (in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators provided that the reason for any omitted signature of any arbitrator is stated);
- the award must state the reasons for the award, unless the parties have agreed that no reasons are to be given or the award is one on agreed terms;
- the award must state the date of the award and the place of arbitration; and
- a copy of the award shall be delivered to each party to the proceeding.

Appeal

31 | On what grounds can an award be appealed to the court?

An award is challenged by making an application to the Singapore High Court to set aside the award. Unless a correction to the award is sought, the application must be made within three months of the date the award is received by the applying party (UNCITRAL Model Law, article 34(3), IAA, First Schedule). The Singapore courts have no power to extend this time limit, which is absolute; they cannot even do so in cases of fraud – see *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGCA 9.

The three-month period may, however, run from the date that a legitimate application to correct an award is made under article 33 of the UNCITRAL Model Law (see UNCITRAL Model Law, article 34(3), IAA, First Schedule), namely, one that validly falls under the provision and is not in truth a request for the tribunal to review or revisit its decision – see *BRS v BRQ* and another and another appeal [2021] 1 SLR 390. Where the application for correction does not fall legitimately under article 33, the time in which an application for setting aside must be made remains three months from the date that the award is received by the applying party.

The grounds for setting aside are stated in article 34 of the UNCITRAL Model Law, supplemented by two additional grounds set out in section 24 of the IAA.

Article 34 of the UNCITRAL Model Law provides that the award may be set aside on the following grounds:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings and was unable to present its case;
- the award dealt with a dispute not falling within the terms of the arbitration agreement;
- the tribunal was improperly constituted;
- the subject matter of the arbitration was not capable of settlement by arbitration; or
- the award was contrary to public policy.

Under section 24 of the IAA, the following are two further grounds for setting aside an award:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of natural justice occurred in connection with the making of the award, by which the rights of a party were prejudiced.

Under the AA, unless the parties have agreed otherwise, a party may appeal against an award on a question of law arising out of an award (AA, section 49(1)). If the parties agree for any reason to dispense with the tribunal giving reasons for the award, that agreement is to be treated as an agreement to exclude the jurisdiction of the Court under this section. That said, a question of law does not arise merely because there was an error in the arbitrator's application of the law. It must be shown that there is a finding of law that the parties had disputed and required the guidance of the court to resolve, namely, 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered'; this is a high threshold to meet – see, for example, *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 and *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] SGHC 81 at [36]–[37].

An award will not be set aside for breach of an agreed procedure if the non-observance is derived from the applicant's own doing, or if the challenge to the award is against the arbitral tribunal's procedural orders or directions that fall within the exclusive domain of the arbitral tribunal – see *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114.

Neither will an award be easily set aside for allegedly being in conflict with the public policy of Singapore (UNCITRAL Model Law, article 34(2)(b)(ii), IAA, First Schedule). In *Gokul Patnaik v Nine Rivers Capital Limited* [2021] 3 SLR 22, the Singapore International Commercial Court (SICC) – a division of the Singapore High Court – affirmed that the threshold for setting aside was very high. The SICC refused to set an aside an award despite expert evidence that the underlying contract was illegal in another jurisdiction – the applicant had not demonstrated that the illegality would 'shock the conscience' or 'violate the most basic notions of morality and justice'.

In *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154, the Singapore High Court held that for an award to be set aside under article 34(2)(a)(iv) of the UNCITRAL Model Law, the procedural breach complained of could not be of an arid, technical or trifling nature; rather, it had to be a material breach of procedure serious enough that it justified the exercise of the court's discretion to set aside the award. This would often, though not invariably, require proof of actual prejudice. In that case, neither the tribunal's failure to declare the proceedings closed nor the 19-month delay in the release of the award violated any rule of natural justice. Further, such complaints did not rise to the level of gravity that the notion of public policy contemplated. The court also observed that an accusation against a tribunal for committing a breach of natural justice was a serious matter; as such, courts take a serious view of such challenges, and this was the reason those that had succeeded were few and far between and limited only to egregious cases where the error was 'clear on the face of the record'.

Further, in *ASG v ASH* [2016] 5 SLR 54, the Singapore High Court clarified that for an award to be set aside under article 34(2)(a)(ii) of the UNCITRAL Model Law, the party alleging a breach of natural justice must demonstrate 'a clear and virtually inescapable inference that the arbitrator did not apply his mind at all to [an important] aspect of that party's submissions' and that this set a 'high bar' for the party making the assertion of a breach of natural justice. It is only if the aggrieved party can show either that the tribunal might have realised the issue for determination but deliberately avoided grappling with it, or that the tribunal entirely overlooked the issue in question, that a breach of natural justice can be established. There is a 'crucial difference between a tribunal's decision to reject an argument, whether explicitly or implicitly, and its failure even to consider that argument. There will be no breach

of natural justice if the tribunal reaches its decision implicitly, or reaches the wrong decision, or in fact fails to understand the argument'. Illustrating these principles, the Singapore Court of Appeal upheld the setting aside of a Singapore Chamber of Maritime Arbitration (SCMA) award on the grounds of the tribunal's breach of natural justice in disallowing the parties from calling any witness evidence, and convening a hearing for oral submissions only; the respondent had been denied a full opportunity to present its case – see *CBS v CBP* [2021] 1 SLR 935. Again, where a tribunal's decision on various issues falls outside the scope of the parties' submission to arbitration (eg, as stated in Terms of Reference under the International Chamber of Commerce Arbitration Rules) this would occasion a breach of natural justice justifying the setting aside of an award where the parties were deprived of a sufficient opportunity to present their case – see *CBX v CBZ* [2021] SGCA(I) 3.

In 2019, the Singapore Court of Appeal set aside an award rendered in a Permanent Court of Arbitration investor-state arbitration seated in Singapore for lack of jurisdiction under article 34(2)(a)(iii) of the UNCITRAL Model Law, stating that it could also have done so under article 34(2)(a)(i) of the UNCITRAL Model Law – see *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263. In that case, the court held that where an investor purports to accept a state's offer to arbitrate certain disputes under an investment treaty, but the dispute falls outside the scope of the offer as stated in the treaty, there would be a lack of jurisdiction, and the Singapore courts (as the supervisory courts at the seat) would have jurisdiction to set aside the award.

As made extremely clear by the Singapore Court of Appeal in *CAJ and another v CAI and another appeal* [2022] 1 SLR 505, in which the Singapore Court of Appeal (in unusual fashion) partially set aside an award due to the tribunal's breach of natural justice and acting in excess of its jurisdiction:

> *The court will exercise its power with restraint, setting aside awards only when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated ... A perusal of the published decisions of the Singapore court would show that, over the past 20 years, approximately only 20% of applications to set aside arbitral awards have been allowed. This attests to the fact that it is not common in Singapore for awards to be set aside, and the courts have only done so in exceptional cases when the grounds are clearly made out. In these cases, the awards were typically set aside on grounds of breach of natural justice and/or excess of jurisdiction.*

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Awards made in Singapore, as well as awards made in countries that are parties to the New York Convention, may be recognised and enforced in Singapore by application to the Singapore High Court. Under the AA and IAA, a party may apply to the court for leave to enforce an award in the same manner as a judgment or order of court to the same effect. To give effect to the New York Convention, to which Singapore is a party, provisions governing the enforcement of foreign awards from other countries that are parties to the New York Convention have been incorporated into the IAA.

Singapore's political landscape has been relatively stable and its pro-arbitration and pro-enforcement stance enables parties to enforce an arbitral award relatively swiftly and with more success. That being said, Singapore courts are unlikely to recognise the enforcement of foreign awards that have been set aside at the place of arbitration. See, for example, the patron's speech of Singapore Chief Justice Sundaresh Menon at the Chartered Institute of Arbitrators London Centenary Conference on 2 July 2015 in which he stated the traditional view as being that 'an award which is set aside at the seat of arbitration has no legal existence or effect because the force of an award comes from the law of the seat, ex nihilo nihil fit'. This is one of the grounds upon which recognition and enforcement may be refused under the New York Convention, namely, that the award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made' (New York Convention, article V(1)(e)).

Costs

33 | Can a successful party recover its costs?

A Singapore-seated arbitral tribunal has wide and general discretion to allocate and apportion costs in its awards, unless the parties have agreed otherwise. The general rule, however, is that costs follow the event. This rule derives from court proceedings and means that the losing party will be ordered to bear the legal costs and arbitration costs incurred by the successful party, in full or in part. The paying party has the right to apply to the registrar of the SIAC for taxation (assessment) of the costs to be paid under an award, unless the award directs otherwise (IAA, section 21(1)). A tribunal need not take Singapore civil procedure principles on the allocation of costs into account (see *VV and another v VW* [2008] 2 SLR 929). The SIAC Rules provide that most forms of costs are recoverable, including the fees and expenses of the tribunal and the SIAC's administration, as well as legal and expert fees and expenses (SIAC Rules, Rules 35 to 37). The tribunal may also take into account any third-party funding arrangements in apportioning the costs of the arbitration.

Under the IAA, the court also has the power to make an award or order of costs of the proceedings against any party, in making a ruling or decision that the arbitral tribunal has no jurisdiction (IAA, section 10(7)).

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Singapore is well positioned as a world-class alternative dispute resolution (ADR) hub. It offers a suite of both public and private dispute resolution institutions. Aside from arbitration, other types of ADR include mediation, negotiation, neutral evaluation (where a neutral third party reviews the case and provides an early assessment of the merits of the case) and lay adjudication. ADR is widely accessible in Singapore, and the most popular form of ADR is mediation. The State Courts' Court Dispute Resolution Cluster consolidates different ADR services for individuals who have pending matters in the State Courts under one umbrella.

While ADR services under the State Courts generally remain free, a fee of S$250 is payable by each party for district court cases (excluding non-injury motor accident, death or personal injury or protection from harassment claims).

In certain industries, adjudication is becoming very popular or even mandatory.

In the building and construction industry, the Building and Construction Industry Security of Payment Act 2004 provides for an adjudication process for payment disputes within the industry.

For the financial services industry, the Financial Industry Disputes Resolution Centre (FIDReC) has been set up as an affordable and accessible avenue for consumers to resolve their disputes with financial institutions. From 3 January 2017, the jurisdiction of FIDReC has been increased to up to S$100,000 per claim between consumers and financial institutions. The decision of the adjudicator is final and binding upon the financial institution but not on the consumer.

In addition, the Singapore International Mediation Centre (SIMC) provides world-class mediation services targeted at mediating international commercial disputes with a panel of internationally respected mediators. SIMC offers an innovative process of 'Arb-Med-Arb' under the Arb-Med-Arb Protocol between the Singapore International Arbitration Centre (SIAC) and the SIMC, under which a dispute is referred to arbitration before mediation is attempted. If the parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award, which is generally accepted as an arbitral award, and, subject to any local legislation or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If the parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings. Apart from SIMC, the Singapore International Mediation Institute (SIMI) works closely with both domestic and international mediation bodies and is partnered with the International Mediation Institute. SIMI promulgates qualification and credentialing standards to contribute to the professionalisation of the mediation practice in the region. It aims to apply and enforce world-class standards of mediation, to provide impartial information about mediation and promote mediation education and awareness.

For domestic commercial disputes, the Singapore Mediation Centre (SMC) is a not-for-profit organisation that provides commercial mediation services. The SMC's panel of mediators mostly comprises domestic mediators. While most of the disputes that the SMC handles are construction disputes, the SMC also deals with banking, contractual, corporate, employment, information technology, insurance, partnership, shipping and tenancy disagreements.

The Law Society Mediation Scheme was officially launched on 10 March 2017 and its mediation services are available for all types of civil disputes without monetary limit on the value of a dispute. All parties must agree to the mediation, and legal representation is not required under the scheme. The rules are designed to make processes flexible and quick; for example, a mediation is deemed to conclude when no mediation settlement agreement is signed by the parties within 30 calendar days of commencement of the mediation.

To further promote mediation in Singapore, the Mediation Act 2017 (MA) was introduced in 2017. The MA applies to mediations conducted partly or wholly in Singapore, or where the

mediation agreement provides that Singapore law applies. It aims to promote, encourage and facilitate the resolution of disputes by mediation, and includes, among other things, provisions aimed at making settlements more enforceable, by allowing parties who reach a settlement after mediation to agree to apply for the settlement to be recorded as a court order, which can be immediately enforced.

Also, on 7 August 2019, 52 states signed the United Nations Convention on International Settlement Agreements Resulting from Mediation in Singapore. Commonly known as the Singapore Convention on Mediation, this multilateral treaty provides a cross-border enforcement mechanism for international settlement agreements resulting from mediation, without the need for a party to first bring a contractual claim for breach of the agreement. Singapore and Fiji became the first two states to ratify the Singapore Convention on Mediation on 25 February 2020, followed by Qatar on 12 March 2020. Having been ratified by three states, the Singapore Convention on Mediation came into force on 12 September 2020.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The Rules of Court 2021 (ROC 2021) compels both the court and parties to take a more proactive approach towards considering ADR both before and during proceedings. Under the ROC 2021, a party must make an offer of amicable resolution before commencing an action in the Singapore courts unless the party has reasonable grounds not to do so. Similarly, the other party must not reject the offer made, unless it also has reasonable grounds to do so. Lawyers are obliged under the Legal Profession (Professional Conduct) Rules 2015 to advise their clients to consider ADR and give their clients sufficient information about the different ways in which their disputes may be resolved using an appropriate form of ADR.

Once proceedings are commenced, parties are required to fill in a pre-case conference questionnaire (PCQ) stating whether amicable resolution has been attempted and if so, when, and the form of amicable resolution attempted by the parties. The PCQ is to be submitted before the first registrar's case conference. Any party who wishes to attempt mediation or any other means of amicable resolution during proceedings should file and serve on all parties an ADR offer. The party in receipt is to respond by filing and serving the response to ADR offer within 14 days of receipt. If a party refuses to go for ADR, the court has the power to order that the refusing party submit a sealed document setting out its reasons for refusing to attempt ADR. The court may take into consideration the ADR offer and the response thereto when making subsequent costs orders. Under the ROC 2021, the court also now has the power to order the parties to attempt to resolve the dispute by amicable resolution. The court may also suggest solutions for the amicable resolution of the dispute to the parties at any time as the court thinks fit.

For proceedings commenced in the State Courts, there is a 'presumption of ADR' in all civil claims to encourage ADR as the first choice in the resolution of disputes. The court's ADR process (involving mainly mediation and neutral evaluation) is compulsory in cases of non-injury motor accident, personal injury and medical negligence claims. For the category of magistrates' court cases to which the simplified procedure applies, the court may refer

the case for ADR with the parties' consent or where the court is of the view that doing so would facilitate the resolution of the dispute between the parties. Cases that do not fall under such category will automatically be referred for ADR unless any or all of the parties choose to opt out of ADR. The court may take into account a party's refusal of ADR when making subsequent costs orders.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Singapore is a world-class dispute resolution hub. It offers a complete suite of dispute resolution services, namely, litigation, arbitration and mediation, for both domestic and international disputes. The Singapore judicial system has been consistently rated as one of the most independent and efficient in the world, particularly for the resolution of civil disputes. The country's situation on one of the major trade routes of the world, zero tolerance for corruption, and long history of an open economy, have given its judiciary and institutions a highly international perspective.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In January 2023, the Singapore International Commercial Court (SICC) launched the Litigation-Mediation-Litigation Protocol (LML Protocol), which is a mediation-friendly protocol in collaboration with the Singapore International Mediation Centre (SIMC) to establish a framework to promote the amicable resolution of international commercial disputes.

Under the LML Protocol, disputes commenced in the SICC may be referred to the SIMC for mediation. Following which, these disputes may then be continued or terminated The LML Protocol also provides for case management stays of SICC proceedings for up to eight weeks after the commencement of mediation, subject to any extension by the Singapore Courts for good reasons. The LML Protocol also recognises that the Court may grant interim relief to preserve a party's rights despite a case management stay.

Parties may choose to adopt the LML Protocol when contracts are being negotiated by incorporating the model LML Clause into their agreements. Alternatively, parties may by a separate agreement adopt the LML Protocol at any other time, such as after a dispute has arisen.

In addition, the Legal Technology Platform (LTP) Initiative was launched in 2022 to provide a matter management and collaboration tool designed around legal workflows. The LTP helps to streamline lawyers' workflow by providing them with a bird's-eye view of their matters, so that they can concentrate on more substantive legal work.

Angelia Thng	angelia.thng@braddellbrothers.com
Edmund Jerome Kronenburg	ej.kronenburg@braddellbrothers.com

11 Beach Road #04-01
Singapore 189675
Tel: +65 6499 9490
www.braddellbrothers.com

Read more from this firm on Lexology

Read this article on Lexology

South Korea

Gee Hong Kim, Jinhee Kim, Mary Kosman and Sang Yong Jun
JIPYONG LLC

RETURN TO CONTENTS

Summary

LITIGATION	516
Court system	516
Judges and juries	517
Limitation issues	517
Pre-action behaviour	517
Starting proceedings	517
Timetable	518
Case management	519
Evidence – documents	519
Evidence – privilege	519
Evidence – pretrial	520
Evidence – trial	520
Interim remedies	520
Remedies	521
Enforcement	521
Public access	521
Costs	522
Funding arrangements	522
Insurance	523
Class action	523
Appeal	523
Foreign judgments	524
Foreign proceedings	524
ARBITRATION	**524**
UNCITRAL Model Law	524
Arbitration agreements	524
Choice of arbitrator	525
Arbitrator options	525
Arbitral procedure	525
Court intervention	525
Interim relief	526
Award	526
Appeal	526
Enforcement	527
Costs	527
ALTERNATIVE DISPUTE RESOLUTION	**527**
Types of ADR	527
Requirements for ADR	528

Read this article on Lexology

MISCELLANEOUS 528
Interesting features 528

UPDATE AND TRENDS 528
Recent developments and future reforms 528

LITIGATION

Court system

1 What is the structure of the civil court system?

Korean courts are divided into three levels: courts of first instance (district courts), courts of the appellate level (high courts or appellate divisions in the district courts) and the Supreme Court. Civil cases generally start in a district court with jurisdiction over the defendant. There are 18 district courts, six high courts and one Supreme Court. There are roughly 2,500 judges at the district court level, 400 judges at the high court level, 100 Supreme Court research judges (chief judge level) and 14 Supreme Court justices as at December 2021.

In civil actions, the amount in dispute determines the proper court for appeal and the number of judges assigned to the case. Beginning 1 March 2022, cases with claims of 500 million won or less are heard by a single judge in a court of first instance. For cases with claims of more than 500 million won, a panel of three judges hears the case in a court of first instance. For cases with claims of 200 million won or less, appeals are heard by the appellate division of a district court before a panel of three judges. For cases with claims of more than 200 million won, appeals are heard by a high court before a panel of three judges.

Korea has specialised courts handling specific matters, and some district courts and high courts also have specialised divisions assigned to specific issues. The Family Court and the Administrative Court are courts of first instance, and the Patent Court functions as an appellate level court. The Patent Court hears matters appealed from the Intellectual Property Trial and Appeal Board. Appeals from the Patent Court are made to the Supreme Court. In addition, the Seoul Rehabilitation Court handles bankruptcy matters.

Korea's Constitutional Court exercises jurisdiction over cases involving:

- adjudication on the constitutionality of statutes upon petition by ordinary courts;
- impeachment;
- dissolution of a political party;
- competence disputes between government agencies, between government agencies and local governments, and between local governments; and
- constitutional complaints.

The Court consists of nine justices who are appointed by the President. Issues of impeachment, dissolution of political parties and competence disputes must be raised by the government. Individuals may file a constitutional complaint if a fundamental right has been infringed by the government. Constitutional Court cases are preliminarily reviewed by a panel and then transferred to the full bench of justices.

Read this article on Lexology

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Civil cases are decided by the presiding judge or a panel of judges. There are no jury trials for civil actions. Korean judges play an inquisitorial role in civil hearings. Judges can question the parties *sua sponte* and order submission of briefs or evidence.

Diversity is a factor considered by the chief justice in the appointment of justices to the Supreme Court.

Limitation issues

3 | What are the time limits for bringing civil claims?

Under the Civil Code, the general statute of limitations is 10 years. However, certain types of claims may be subject to a special statute of limitations. For instance, monetary claims arising out of commercial transactions must be brought within five years (article 64 of the Commercial Code). Claims for interest, support fees, salaries, rent and other claims based on the delivery of money, etc, within one year must be brought within three years (article 163-1 of the Civil Code). Claims for insurance premiums must be brought within two years, while claims for insurance coverage must be brought within three years.

Tort claims must be brought within the following periods (whichever ends earlier): three years from the date the injured party became aware of the injury and the tortfeasor's identity or 10 years from the date the tort was committed.

The statute of limitations period begins to run the day after a claim could have first been raised. It may be suspended by way of the claimant's demand notice followed by judicial proceedings, attachment or the obligor's acknowledgment of the claim. A tolling agreement between parties to suspend time limits is not recognised under Korean law. The time limit begins to run anew from when the cause of suspension ceases to exist.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There are no pre-action requirements prior to filing a civil proceeding.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings commence when a complaint is filed in a court with jurisdiction. In Korea, the court is responsible for service of process. A party is served when a court official or mail carrier delivers the complaint and related documents to the party. If there is no known address for the defendant, the court may allow service by public notice if there is no other

way to effectuate service. For foreign defendants, service is determined by the defendant's country of residence. Defendants residing in a member state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or a bilateral treaty are served accordingly. All other foreign defendants are served through diplomatic channels.

The Supreme Court has a high caseload, and it may take several years for a final judgment to be issued by the Supreme Court. However, the first instance and the appellate courts are capable of rendering decisions in a relatively timely manner. Courts have been encouraging ADR to ease capacity issues.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Once a complaint is filed, the court will serve the complaint within one to two weeks. The defendant must file an answer within 30 days of receiving the complaint, in principle. However, answers are often filed late, and courts are generally lenient with excusable delays. Subsequent written submissions do not have fixed deadlines. Parties may continue to submit preparatory briefs and supporting evidence until the hearing is closed. Once the hearing is closed, supplementary briefs may be submitted until judgment is rendered.

The court typically schedules oral hearings four to six weeks apart. The number of hearings held depends on the complexity of the case. In complex cases, the presiding judge may order preparatory hearings and pleadings to set out the main issues for decision, as well as each party's claims and evidence.

Once the hearing is closed, the court typically announces its decision within four to six weeks. The court thereafter issues a written judgment usually within a week.

Appeals to the appellate court or the Supreme Court must be filed within two weeks of receiving a written copy of the judgment. The grounds of appeal to the appellate court may be submitted after filing a notice of appeal, while the grounds of appeal to the Supreme Court must be submitted within 20 days of notice of the court's receipt of the litigation record.

In general, a civil action before the court of first instance or the appellate court takes approximately 12 months to conclude. Pursuant to the Act On Special Cases Concerning Procedure For Trial By The Supreme Court, the Supreme Court can reject an appeal without stating any reason within four months of the records of appeal being received. Approximately more than 70 per cent of cases appealed to the Supreme Court are dismissed at this early stage following the above Act. If an appeal is not dismissed at the early stage, it may take several years for the judgment to be issued by the Supreme Court.

Case management

7 | Can the parties control the procedure and the timetable?

The court determines the schedule for the proceedings. However, parties may request extensions or changes to set dates. These requests are generally allowed unless it is deemed to cause undue delay.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Compared to common law jurisdictions, the scope of discovery is substantially limited. There are no pre-litigation discovery requirements. Parties need only submit the documents necessary to prove their case.

If a document known to exist is held by the other party or a third party, a party may request the court to order this document be produced. A party or third party must produce a requested document when (1) they hold the document in question; (2) the applicant is legally entitled to seek production; or (3) the document has been prepared for the benefit of the party requesting it or prepared as to a legal relationship between the requesting party and the document holder. If a party does not comply with the court's order to produce a document, then the court may draw an adverse inference against the party.

There is no duty to preserve evidence pending trial. However, if a party intentionally destroys evidence pending trial, the court may draw an adverse inference, and the party may be prosecuted for procedural fraud.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

A party or a third party may refuse a production order if the document in question contains confidential information related to the duties of government officials, if disclosure may incriminate the person or his or her relatives or if the document in question is exempt. Under the Civil Procedure Act, documents are exempt from production orders containing the advice or work products of attorneys-at-law, patent attorneys, notaries public, certified public accountants, certified tax consultants, persons engaged in medical care, pharmacists, etc (ie, those who have a duty of confidentiality). Documents containing the advice or work products from foreign and locally licensed in-house lawyers are also protected from disclosure to the extent they are under a duty of confidentiality.

Attorney–client privilege is not recognised under Korean law. The Korean Supreme Court has ruled that attorney–client privilege cannot be inferred from the constitutional right to counsel or the rights of attorneys to refuse testimony (Supreme Court Decision 2009 Do6788, 17 May 2012). However, attorneys have a duty to maintain confidentiality under the Attorney-At-Law Act and must not divulge confidential matters that were learned in the

course of performing their duties. There have been several attempts to enact legislation establishing attorney–client privilege; however, none has been successful to date.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Parties may submit written evidence and statements during the trial phase before the hearing is closed. While article 149 of the Civil Procedure Act prohibits the late submissions of evidence, presenting new evidence in an appellate court is allowed in principle.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Parties submit documentary evidence to the court during the course of the proceedings. As a private document is presumed to be authentic when it bears the signature, seal or thumb-print of the principal or of his or her representative, witnesses or attorneys are not required to authenticate documentary evidence in advance of submission.

A party may request a witness to provide oral testimony at trial. If deemed reasonable, a witness may be permitted to provide a witness statement instead of oral testimony.

A party may also request that the court appoint an appraiser. Court-appointed appraisers must be impartial. Appraisers generally provide an appraisal report and sometimes provide oral testimony at trial. A party may hire their own expert witness and submit the expert's opinion as supporting evidence. However, testimony from a court-appointed appraiser generally has more evidentiary value than a party's own expert.

When witnesses provide oral testimony, the party calling the witness first conducts direct examination and must submit a list of questions in advance to the court. The opposing party may then cross-examine the witness, but cross-examination is, in principle, limited to the matters presented on direct examination.

Interim remedies

12 | What interim remedies are available?

The most frequently sought interim remedies are provisional attachment and preliminary disposition as stipulated in the Civil Execution Act. A party with a monetary claim to enforce may request a provisional attachment order to freeze the other party's assets. The requesting party must demonstrate a need to preserve the asset. For non-monetary claims, a party may request a preliminary disposition ruling. The court generally issues two types of provisional dispositions. The first type is an injunction prohibiting a party from disposing of property at issue. The petitioner must demonstrate the existence of circumstances that may threaten or prevent the party from exercising its rights. The second type is an injunction temporarily fixing the parties' respective positions in relation to a disputed right. The

petitioner must show that it is likely to suffer substantial injury before final judgment if an injunction is not issued.

An application for provisional attachment or preliminary disposition may be granted only against properties, assets located in Korea and persons over whom the Korean courts have jurisdiction. Such application may be made in support of a foreign proceeding.

Under the Civil Procedure Act, a party may also move for the preservation of evidence by requesting the court to examine the evidence in advance. A party may apply for preservation of evidence before or after the filing of a complaint. The court may render a ruling ex officio for the preservation of evidence during trial.

Remedies

13 | What substantive remedies are available?

In addition to injunctive relief for specific performance and declaratory remedies, a court may order payment of monetary compensation for both economic and non-economic damage. In general, punitive damages are not allowed. There are only a few specific statutes that allow punitive damages, capped at three to five times the amount of actual damages, in cases of serious accidents, product liability, patent infringement and fair trade violations, among others. Both pre- and post-judgment interest is available. Unless the parties contracted otherwise, interest rates are set by the law. The statutory interest rate is 6 per cent per year for commercial claims and 5 per cent per year for civil claims. The Act on Special Cases Concerning Expedition of Legal Proceedings prescribes a statutory interest rate of 12 per cent per year, which accrues from the date the defendant is served with the complaint. If the court finds that the defendant had grounds to dispute the complaint, this interest accrues from the date of the court's judgment.

Enforcement

14 | What means of enforcement are available?

A judgment is enforceable when it is final and can no longer be appealed, but courts often allow provisional enforcement. A creditor may petition the court for compulsory performance, compulsory auction, compulsory administration or seizure of the debtor's property. A party can also request an order to set a date for the debtor to perform an obligation and order indirect compulsory damages for delayed performance.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are open to the public. However, the court can limit access for national security or public policy reasons.

The case record, including parties' filings, is in principle not publicly available. While a third party vindicating legitimate interests may request to view and copy litigation records, these

requests may be denied if the party refuses access. A party may apply in advance for restriction on perusal of the portions of litigation records containing secrets.

Court judgments can be made available to the public with personal information redacted. The court may decide not to disclose a judgment on national security or public policy grounds, or for the protection of individual privacy or trade secrets. Supreme Court and some lower court judgments are published through press releases or can be found on the Supreme Court's website. Copies of a judgment can be requested online.

Costs

16 | Does the court have power to order costs?

Korean courts have the power to order costs. Generally, the losing party is responsible for the winning party's costs. However, the court has discretion to allocate costs between the parties. In practice, costs are allocated to each party in proportion to the success of each parties' respective claim.

Once a judgment becomes final, the court determines the cost of litigation. The litigation cost consists of attorneys' fees, filing fees, service of process fees and other out-of-pocket expenses. Legal fees are fixed according to the formula found in the Supreme Court Rule on the Calculation of Legal Fee of Litigation Cost.

A plaintiff is not required to provide security for the cost of defence unless the court decides otherwise. If the plaintiff has no domicile, office or business place in Korea, or the claim is groundless, the defendant may request the court to order the plaintiff to pay security for the cost of litigation. The security may be satisfied through a surety bond.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency or conditional fee arrangements are allowed in civil cases in Korea. Other fee arrangements, such as hourly or task-based billing, are also allowed. However, in exceptional circumstances, a court may reduce the legal fee if it determines that it is unreasonably excessive.

There are no laws or regulations that address third-party funding. However, the Attorney-at-Law Act prohibits attorneys from becoming assignees to any rights in dispute.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance is available to cover all or part of a party's legal costs. Both a party's own costs and its potential liability for an opponent's costs can be covered by insurance.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants with similar claims may join a lawsuit as co-litigants.

Class actions are permitted only for certain securities-related cases, such as an action for damages based on false disclosure, insider trading or market manipulation. The representative party must file an application for class action permission along with the complaint. To certify a class, the following requirements must be met:

- there must be at least 50 class members;
- at least 1/10,000 of the outstanding shares must be held by the class members;
- there must be common questions of law and fact; and
- a class action must be an appropriate means of enforcing the rights of the class members.

Once permission is granted, members of the class are bound by any decision in the lawsuit unless they opt out.

A bill was proposed to allow class actions in all areas of civil litigation. Public comments were received but no legislation has been enacted.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Grounds for appeal depend on which court the appeal originates from. When decisions of the court of first instance are appealed, the appellate court reviews the case de novo. Parties are allowed to introduce new evidence and arguments.

Decisions of the appellate court may only be appealed to the Supreme Court on questions of law. Appeals to the Supreme Court must be based on one of the following grounds:

- there is a violation of the Constitution, statutes, administrative decrees or regulations that affected the judgment;
- there was erroneous determination of whether an order, rule or disposition is unlawful;
- an act, order, rule or disposition has been interpreted contrary to a Supreme Court precedent;
- a relevant Supreme Court precedent needs to be changed;
- there is a serious violation of any act or subordinate statute; or

- there are other grounds for appeal as prescribed in the Civil Procedure Act.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

To enforce a foreign judgment, the party seeking enforcement must obtain an enforcement judgment from the Korean court.

A final and conclusive judgment from a foreign court can only be recognised and enforced if it meets four requirements. First, the foreign court that issued the judgment must have international jurisdiction recognised under a Korean law or treaty. Second, the defendant must have been properly served with enough time to prepare a defence. Third, recognition of such judgment must not violate the public policy of Korea. Fourth, there must be a guarantee of reciprocity such that a Korean court judgment would be recognised and enforced in the courts of the foreign country in question or the recognition requirements in Korea and in the foreign country are not off-balance and do not differ on important points.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Act on International Judicial Mutual Assistance in Civil Matters stipulates detailed procedures for obtaining evidence both by and from a foreign country. However, in jurisdictions where a bilateral treaty and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters are in force, the bilateral treaties or the Hague Convention prevails.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Arbitration Act of Korea is based on the UNCITRAL Model Law on International Commercial Arbitration. The law was revised in 2016 to adopt the amendments of the 2006 UNCITRAL Model Law, with some variations.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

For an arbitration agreement to be enforceable, it must be in writing. The agreement may be in the form of an arbitration clause or a separate agreement.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Unless the parties agree otherwise, the number of arbitrators under the Arbitration Act is three. Absent a party agreement, the manner of appointment is determined by law. For one arbitrator: if the parties cannot agree on an appointment within 30 days of a party's request to appoint an arbitrator, the appointment is made by a court or an arbitration institution designated by the court upon the request of a party. For three arbitrators: each party appoints one arbitrator, and the two arbitrators appoint a third arbitrator by mutual agreement. If the arbitrators cannot agree on the third appointment, a party may request that a court or an arbitral institution designated by the court appoint the third arbitrator.

Even if the parties have an agreement regarding the appointment of arbitrators, a party may request appointment of the arbitrator or arbitrators by a court or an arbitral institution designated by the court if an arbitrator cannot be appointed. Challenges to the appointment of an arbitrator are restricted to lack of impartiality or independence and lack of qualifications as agreed between the parties.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

The Korean Commercial Arbitration Board (KCAB) has a pool of 1,200 domestic arbitrators and 500 international arbitrators. Arbitrators have diverse backgrounds in, for example, industries, business, the government, the law and academia. Parties may nominate or appoint arbitrators from outside the KCAB's pool.

Arbitral procedure

27 Does the domestic law contain substantive requirements for the procedure to be followed?

Under the Arbitration Act, parties are free to agree on the arbitral procedure, except those contrary to the mandatory provisions. If there is no agreement, the arbitral tribunal may conduct the hearing in a manner it considers appropriate. An arbitral tribunal sitting in Korea must follow the Arbitration Act, including notice of written communication (article 4), grounds for challenge (article 13), equal treatment of parties (article 19), and form and contents of arbitral award (article 32).

Court intervention

28 On what grounds can the court intervene during an arbitration?

The Arbitration Act follows the UNCITRAL Model Law and limits court intervention, except for on those grounds specifically provided for in the Act. A court with jurisdiction may consider the following matters:

- appointment of arbitrators and designating an arbitral institution;
- requests for challenging an arbitrator;
- requests for terminating an arbitrator;
- requests to examine the authority of the arbitral tribunal;
- recognition of an interim measures, court decisions regarding interim measures or orders to provide assets as security;
- requests to challenge an expert;
- retention of the original copy of an arbitral award;
- actions for setting aside an arbitral award to court;
- recognition or enforcement of arbitral award; and
- other matters stipulated in the Arbitration Act.

The Korean Supreme Court has ruled that courts may intervene only in matters enumerated in the Arbitration Act, and specifically held that applications for preliminary injunctions to stay an arbitration on the grounds of non-existence or invalidity of an arbitration agreement would not be allowed (Supreme Court Decision 2017 Ma6087, 2 February 2018).

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators have the power to grant interim relief under the Arbitration Act unless otherwise agreed by the parties. Arbitrators may order a party to maintain or restore the status quo, act or not act to prevent harm to the proceeding, preserve assets and preserve evidence.

To grant an interim measure, the petitioner must show that without the interim measure they would be irreparably harmed, and that harm would be greater than any harm to the other party as a result of the interim measure. The petitioner must also demonstrate that they are likely to succeed on the merits of the claim.

Award

30 | When and in what form must the award be delivered?

Under the Arbitration Act, an arbitral award must be in writing, state the reasons on which it is based, state the date and the place of arbitration, and be signed by all arbitrators. The arbitral award must be delivered to each party. Upon the request of the parties, the arbitral tribunal may deliver the original copy of the award to a court with jurisdiction along with a document certifying delivery. The Arbitration Act does not stipulate when the award must be delivered.

Appeal

31 | On what grounds can an award be appealed to the court?

Once an arbitral award has been issued, a party challenging the award must file a request to set aside the award in a court with jurisdiction within three months of receipt of the arbitral award. An action to set aside an arbitral award is limited to the following grounds:

- a party was under some incapacity, or the arbitration agreement is not valid under the parties' chosen law or Korean law;
- the petitioner was not given proper notice or was otherwise unable to present its case;
- the award deals with a dispute that is not subject to the arbitration agreement or is beyond the scope of the arbitration; or
- the arbitral tribunal or procedure did not comply with the arbitration agreement of the parties.

The court, on its own initiative, may set aside an arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under Korean law or the award is against the public policy of Korea. Under the Arbitration Act, disputes over property rights and disputes over non-property rights that are capable of resolution without a court judgment are considered proper subjects for arbitration.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A party may apply for recognition and enforcement of an arbitral award. A domestic award will not be recognised if the award has no binding power over a party or if the award has been set aside by a court.

For foreign awards subject to the New York Convention, recognition and enforcement of foreign arbitral awards is determined in accordance with the Convention. If the New York Convention does not apply, foreign arbitral awards are recognised and enforced in the same manner as foreign judgments.

Costs

33 | Can a successful party recover its costs?

Under the Arbitration Act, the arbitral tribunal may allocate costs and order payment of interest.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Judicial conciliation, judicial and administrative mediation, and arbitration are widely used in Korea. Alternative dispute resolution (ADR) is gaining popularity.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

ADR is not compulsory. Korean courts generally encourage judicial conciliation to resolve disputes. Either party may object to the court's recommendation, and there is no sanction for refusal.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The following features are notable in Korean litigation: (1) the court has broad case management discretion on both procedural and substantive matters; and (2) more emphasis is placed on documentary evidence than on witness testimonies.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The Serious Accident Punishment Act was enacted on 27 January 2022. The Act imposes criminal liability against (1) business owners or executives who fail to ensure the safety of their business operations and (2) businesses or institutions that fail their supervisory duties. The Act also imposes punitive damages of up to five times the actual damages.

The amendment of the Prosecutors' Office Act and the Criminal Procedure Act has been a significant issue not only in the legal field but also in the political arena last year. The amendments were enacted on 10 September 2022 to restrict prosecutors' direct investigative powers only to corruption, economic crimes and obstruction of justice. For all other types of crime, only the police can initiate a criminal investigation.

Additionally, a Hawaiian court's decision to award treble damages for an unfair trade practice was recognised by the Supreme Court (Supreme Court Decision 2018Da231550 Decided 11 March, 2022). Prior to this decision, the lower courts did not recognise punitive damages like those found in Anglo-American jurisprudence and only recognised a judgment within the limits of actual damages but not beyond (Busan High Court Decision 2009Na3067 Decided 23 July 2009, Seoul District Court Eastern Branch Decision 93Gahap19069 Decided 10 February 1995).

Read this article on Lexology

There are no noteworthy proposals for dispute resolution reform. However, amendments to Korean Civil Procedure Code will go into effect on 19 October 2023. The amendments address abuses of the litigation process by establishing a procedure for withholding the filing of a lawsuit and clarifying that legal aid may not be granted for legal fees in cases where it is clear that the claim is meritless.

JIPYONG JIPYONG LLC

Gee Hong Kim	ghkim@jipyong.com
Jinhee Kim	jinheekim@jipyong.com
Mary Kosman	marykosman@jipyong.com
Sang Yong Jun	junsy@jipyong.com

26F, Grand Central A, 14 Sejong-daero, Jung-gu, Seoul 04527, Korea
Tel: +82 2 6200 1600
www.jipyong.com

Read more from this firm on Lexology

Read this article on Lexology

Spain

Pedro Rodero Rodríguez, Cristina Camarero Espinosa, Marta Rodrigo Lavilla and Marina Blaya González

Ontier

RETURN TO CONTENTS

Summary

LITIGATION	531
Court system	531
Judges and juries	532
Limitation issues	533
Pre-action behaviour	533
Starting proceedings	534
Timetable	534
Case management	535
Evidence – documents	535
Evidence – privilege	536
Evidence – pretrial	536
Evidence – trial	536
Interim remedies	537
Remedies	537
Enforcement	538
Public access	538
Costs	539
Funding arrangements	539
Insurance	539
Class action	540
Appeal	540
Foreign judgments	541
Foreign proceedings	541
ARBITRATION	**542**
UNCITRAL Model Law	542
Arbitration agreements	542
Choice of arbitrator	542
Arbitrator options	543
Arbitral procedure	544
Court intervention	544
Interim relief	544
Award	544
Appeal	545
Enforcement	545
Costs	546
ALTERNATIVE DISPUTE RESOLUTION	**546**
Types of ADR	546
Requirements for ADR	546

Read this article on Lexology

MISCELLANEOUS 547
Interesting features 547
UPDATE AND TRENDS 547
Recent developments and future reforms 547

LITIGATION

Court system

1 What is the structure of the civil court system?

The civil court system is mainly divided as follows.

Peace courts

These are single-member bodies, located in very small municipalities where there are no courts of first instance and instruction, and they are served by lay judges, that is, those who do not belong to the judicial career.

Courts of first instance and commercial courts

Courts of first instance

There is at least one court of first instance in each county or judicial district. They are single-member bodies with competence to hear, in the first instance, cases that are not attributed by law to other courts or tribunals.

Commercial courts

There is at least one commercial court in each province. Commercial courts are single-member specialist bodies that are competent to hear, in the first instance, proceedings related to certain specific matters attributed by law, such as: insolvency proceedings, unfair competition, IP, certain corporate matters, claims related to transport law or maritime law, antitrust, transport agreements, class actions based on consumer and user regulations, etc.

Provincial appeal courts

Provincial appeal courts are the highest judicial body at the provincial level, but limited to civil or commercial and criminal jurisdictions. They are subdivided into sections composed of three or more magistrates who specialise in civil, commercial or criminal matters. They are competent to rule on appeals against judgments issued, at first instance, by Courts of First Instance and Commercial Courts.

High courts of justice

High courts are the highest judicial bodies in each of the regions (autonomous communities) into which Spain is divided. Composed of three chambers, the first of which hears both civil, commercial and criminal cases, high courts only deal with very specific matters, such

as those with extraordinary appeals related to the application of local civil law, arbitration support and control functions, and civil and criminal liability of certain public officials for acts committed in the exercise of their functions.

The Supreme Court

The Supreme Court is the highest national jurisdictional body (except as provided for in matters of constitutional guarantees). It is divided into five chambers, the first of which has jurisdiction over civil and commercial matters. This first chamber is composed of its president and nine magistrates. Among other competences, it hears the extraordinary appeals (extraordinary appeal for breach of procedure and cassation) against judgments issued at second instance by Provincial Appeal Courts.

The competencies of each of these bodies are established in Organic Law 6/1985 of 1 July of the Judicial Power, and their composition is detailed in Act 38/1988 of 28 December on demarcations and organisation of the judicial institutions.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Civil judges must solve the disputes submitted to their consideration, in accordance with the rules of the civil procedure.

In Spain, the civil jurisdiction is governed by the principle of party contribution or 'principle of justice at the request of a party', set forth in article 216 of the Act 1/2000 of 7 January on Civil Procedure (CPA), which implies that the parties must provide the competent court with the facts, the evidence and the specific claims of the case.

With regard to the evidentiary process, civil judges shall decide about the means of evidence proposed by each party, either admitting, limiting or rejecting them. On a general basis, they do not have power to seek evidence ex officio in dispositive proceedings, with two exceptions:

- Where the court deems that the evidence put forward by the parties could turn out to be insufficient to clarify the facts at issue, the court may point out the evidence that it may deem appropriate, taking into consideration the probative elements whose existence is reflected in the records (see article 429.1.II of the CPA).
- Exceptionally, the court may, on an ex officio basis or at the request of a party, agree upon the taking of new evidence concerning relevant facts that have been alleged in a timely manner, if the evidence taken beforehand has not been conducive as a result of no longer existing circumstances that were independent of the will and diligence of the parties, as long as there are solid reasons to believe that the new procedures shall provide certainty regarding such facts (see article 435.2.I of the CPA).

However, in practice, both exceptions are hardly applied.

The jury does not intervene in civil proceedings.

Limitation issues

3 | What are the time limits for bringing civil claims?

The Spanish Civil Code (SCC) provides a general statute of limitations for bringing civil claims, which vary depending on the type of action. There is a general period of five years, established for any personal action that does not have a special period.

Other relevant time periods are:

- 20 years for the mortgage action;
- five years for actions to claim payment of leases or other payments to be made on an annual basis or in shorter time periods;
- three years for actions to claim payment by certain professionals for the exercise of their professions (eg, solicitors, registrars, notaries, pharmacists, teachers, manual workers, servants and agricultural labourers, innkeepers or merchants); and
- one year for the action to recover or retain possession, the action to claim civil liability as a result of insults or slander, and for obligations resulting from fault or negligence.

Additionally, there are some actions that do not prescribe, for instance the action between co-heirs, co-owners or owners of adjoining properties to request partition of the estate, division of common goods.

Apart from the statute of limitations contained in the SCC, there are many special laws containing specific limitation periods for certain actions (eg, those related to unfair competition, agency agreements or directors' liability).

The limitation period of actions can be interrupted by bringing the action before courts, by an out-of court claim made by the creditor, and by any act of acknowledgement of the debt by the debtor (article 1973 of SCC).

However, causes of suspension of limitations periods are an exception under Spanish law and can just be applied when they are expressly determined by law.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

On a general basis, there are no mandatory steps that a party must take before issuing civil proceedings. However, there can be exceptional provisions expressly contemplated by special laws, such as the Organic Law 2/1984 of 26 March regulating the right of rectification. According to this law, before filling a lawsuit, a written claim for rectification must be sent to the editor of the media that published the information to be rectified, in such a way that there is evidence of its date and receipt.

With regard to optional steps, prior to the filing of the lawsuit, the parties have the possibility to resort to or apply for:

- preventive or pre-procedural conciliation, which is regulated by Law 15/2015 of 2 July on voluntary jurisdiction;
- preliminary proceedings, regulated in articles 256 to 263 of the CPA;
- measures for seizing evidence, which are set forth in article 298 of the CPA; and
- interim measures, regulated in articles 721, et seq, of the CPA).

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In general terms, civil proceedings commence with the filing of the lawsuit by the plaintiff, which shall be accompanied by all the relevant documents and expert reports in which the party will rely on. The Dean's Office shall then assign the case to the corresponding court, which is pre-determined by law, who shall issue a decision admitting the claim for consideration and ordering to summon the defendant to answer to the claim.

Both the judicial order and the claim with all its exhibits shall be served to the defendant at its domicile (the registered office, if it is a legal entity). Such service can be made either by the officials of the court or by the claimant's court representative (*procurador*).

In Spain, most courts have to support a severe caseload, which results in much longer processing times than those initially foreseen by the legislator.

Timetable

6 What is the typical procedure and timetable for a civil claim?

For ordinary proceedings:

- Lawsuit: proceeding begins with the filing of the lawsuit by the plaintiff, which shall include all documents the claimant intends to rely on to demonstrate the merits of the claim, as well as, if applicable, expert reports supporting any technical issues.
- Answer to the claim (and counterclaim: once the defendant is served with the claim, the defendant has 20 business days from service to file its answer to the claim and, when the case may be, its counterclaim, which shall be done in the same brief and within the same term.
- Answer to the counterclaim: the claimant has 20 business days from service of the court's order admitting the counterclaim for consideration.
- Preliminary hearing: once the answer to the claim or, as appropriate, the counterclaim, has been filed or the corresponding time limits have elapsed, the court clerk shall call the parties to a hearing in order to:

  - explore possible settlement;
  - discuss procedural matters that could lead to termination of the proceedings;
  - make complementary or clarifying allegations or allege new facts,
  - identify key controversial facts;
  - propose and discuss the evidence the parties intend to rely on; and

    - schedule the trial date.

- Trial: this is the hearing for the practice of the different means of evidence admitted by the court, including the examination of all fact witnesses and experts, and conclusions on the merits by the lawyers.
- Judgment: the judge will finally issue its decision, which can be appealed before the Provincial Appeal Court within 20 days from service.

Although the CPA includes several deadlines for the judge and the clerk, they are merely indicative, as most courts are overloaded and cannot comply with those deadlines.

Case management

7 | Can the parties control the procedure and the timetable?

Civil proceedings are governed by the dispositive principle, which means that litigants are empowered to dispose of the matter at dispute in the proceedings and may waive, acquiesce, submit themselves to mediation or arbitration and reach agreements on the matter at issue, except where the law should prohibit it or set forth limitations for reasons of general interest or to the benefit of a third party. All these actions may be performed, on the basis of their nature, at any time during the first instance, the appeals or the enforcement of judgment.

Additionally, the parties may seek a stay of proceedings, which shall be agreed upon by the court clerk through an order whenever it does not harm the general interest or a third party and the stay does not exceed 60 days.

Apart from that, the parties do not have much control over the procedure or the timetable, since the case will be managed from the court's office.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The parties shall preserve all relevant documents and other evidence while pending proceedings, in accordance with the time periods contained in the different laws (eg, six years for corporate documents)

Each party shall submit to the court all documents they deem appropriate to support the case.

However, upon the other party's request, the court may order a party or another person or body to display certain documents, which are deemed necessary for the purpose of clarifying the facts under dispute.

Orders and files shall be kept and safeguarded by the court clerk until the processing is complete. Royal Decree 937/2003 of 18 July 2003 on the modernisation of judicial archives regulates the organisation and operation of the judicial archives, as well as the procedure for the removal of judicial documentation.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Article 5 of the Spanish Deontological Code of the Legal Profession establishes the duty and the right of the lawyer to keep secret all the facts or news that they know by reason of any of the modalities of their professional performance, without being obliged to testify about them.

Consequently, the lawyer shall not bring to court nor provide their clients with letters, communications or notes received from the lawyer of the other party, unless expressly authorised by the latter.

However, in exceptional cases of extreme seriousness in which the mandatory preservation of professional secrecy could cause irreparable damage or flagrant injustice, the Dean of the correspondent Bar shall advise the lawyer with the sole purpose of guiding and, if possible, determine alternative means or procedures for the solution of the problem raised, weighing the legal assets in conflict.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

On a general basis, parties do not exchange written evidence from witnesses prior to trial.

With regard to experts, expert reports must be provided with the claim or the answer to the claim, and shall be formulated in writing. However, if the parties are unable to submit the expert reports together with the claim or the statement of defence, they shall indicate in one or the other the opinions that, as appropriate, they intend to use, which they shall submit for their transfer to the counterparty as soon as they have them at their disposal and in any event five days before commencement of the hearing prior to the declaratory action or the preliminary hearing.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

On a general basis, documentary evidence and expert reports shall be accompanied to the lawsuit or to the answer to the claim, as the case may be.

Parties' and witnesses' examinations shall be conducted orally during the trial. Experts shall only provide oral evidence when the party requests the ratification of the expert report during the trial.

Read this article on Lexology

Interim remedies

12 | What interim remedies are available?

CPA refers expressly to the following interim measures, although this is not a *numerus clausus* list:

- pre-judgement attachment;
- intervention or court-ordered receivership of productive assets;
- judicial deposit of a movable assets;
- the drawing up of inventories of assets in accordance with the conditions to be specified by the court;
- precautionary registry notation of the claim;
- other registry notations in cases where registry publication is useful to ensure adequate enforcement;
- court order to provisionally cease an activity;
- intervention and deposit of income obtained through an activity considered illicit and whose prohibition or cessation is requested in the claim, as well as the consignment or deposit of the amounts claimed as compensation for the intellectual property;
- temporary deposit of the works or objects allegedly produced contrary to the rules on intellectual and industrial property, as well as the deposit of the material employed for their production;
- suspension of contested corporate resolutions when the claimant or claimants represent at least 1 or 5 per cent of the corporate capital, depending on whether the defendant company has issued securities that, at the time of the contest, are admitted to negotiation on an official secondary market; and
- any other measures expressly established by the laws for the protection of certain rights or deemed necessary to ensure the effectiveness of the judicial protection that may be granted in the affirmative judgment that may be passed at the trial.

In the case of foreign proceedings, without prejudice to any special rules set forth in treaties and conventions or any European Union rules that may apply, whoever that can prove to be party to any jurisdictional or arbitration proceedings being conducted in a foreign country may seek injunctions from a Spanish court should the legally required prerequisites be met, except where the main matter at issue should solely lie within the competence of Spanish courts.

Remedies

13 | What substantive remedies are available?

Substantive remedies vary depending on the type of action brought, which can be: declaratory actions, condemnation actions and constitutive actions.

In cases related to breach of contractual obligations, the most popular remedies are: specific performance, termination or compensation for damages, which shall be calculated according to the damage actually suffered (including direct losses, consequential losses and loss of profit). Spanish law does not recognise the concept of punitive or exemplary damages.

Read this article on Lexology

Regarding the concept of interest, general rules of the SCC and the CPA are to be applied. With this respect, article 220 of the CPA declares the possibility to sentence the defendant to settle interest. Unless otherwise agreed, the defendant should pay agreed interest and, in default of this, the legal interest (article 1108 of the SCC). Expired interest accrues legal interest from the onset of the judicial claim (article 1109 of the SCC).

According to article 576 of the CPA, the time at which any judgment or decision ordering the payment of a liquid amount of money has been issued in first instance shall determine the accrual of annual interest in favour of the creditor equal to the legal interest on money increased by two percentage points or the appropriate rate established by agreement between the parties or by a special provision of the law.

Enforcement

14 | What means of enforcement are available?

We shall distinguish between provisional enforcement, through which the party who has received a condemnatory ruling in his or her favour in the first instance may, with no need for security, request and obtain its provisional enforcement; and definitive enforcement, once the ruling has become firm and final (ie, no remedy of appeal is possible, either because none is foreseen by the law, or because, although foreseen, the legally established term has expired without any of the parties having filed such remedy of appeal).

If the condemned party does not comply with the ruling, the execution phase shall begin, which will depend on the nature of the condemnation (eg, a monetary order will lead to the adoption of measures such as the seizure of assets). In certain cases (eg, the obligation to do or not do something), the court can impose fines to the enforced party to compel it to comply with the ruling. If disobedience persisted, there could be criminal consequences.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

According to article 138 of the CPA, the evidence procedures, hearings and appearances intended to hear the parties before passing a decision shall be conducted at a public hearing. However, the proceedings may be heard in closed session when this is necessary for the protection of public policy or national security in a democratic society; when the interests of minors or the protection the private lives of the parties and other rights and liberties require this; or, insofar as the court deems this to be strictly necessary, when, due to the occurrence of special circumstances, being heard publicly might damage the interests of justice.

On a general basis, court documents are not available to the public. Only those who can prove that they have a legitimate and direct interest may request information on the status of judicial proceedings and can examine the court's files.

Costs

16 | Does the court have power to order costs?

Yes, the court can order costs.

Article 241 of the CPA establishes that, save the provisions of the Law on Gratuitous Legal Aid, each party shall pay the expenses and court costs incurred in the proceedings at their own request as they are incurred.

In the case of defeat, article 394 et seq of the CPA establishes that the court costs shall be awarded against the party whose claims have been set aside, unless the court finds and justifies that the case may pose serious de facto or de jure doubts.

On a general basis, costs are calculated in accordance with the guidelines for the assessments of costs published by the different Bar Associations, with the limit established by law (ie, it shall not exceed a third of the cost of the proceedings). CPA regulates a specific procedure for the appraisal of costs, which is heard by the clerk of the court.

The claimant is only required to provide a bond in some specific cases, for instance, when requesting the adoption of precautionary measures.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Although it is not expressly permitted nor prohibited, 'no win, no fee' agreements may not be fully respectful with the provision set forth in article 14 of the Spanish Deontological Code of the Legal Profession, which states that the lawyer has the right to receive remuneration for his or her professional performance. However, it is also true that, as of today, the regulation in this respect in Spain determines that the amount and the regime of the fees will be freely agreed with the client, always respecting the deontological regulations and the rules of unfair competition.

Third-party funding is not regulated in Spain. Although the popularity of this figure is increasing, it is still lower than in other countries.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Yes. The insurance may cover the legal costs and also other extrajudicial costs inherent to the claim (eg, the lawyer's fees), and may also guarantee the payment of the resulting compensation.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Legally constituted associations of consumers and users shall be authorised to defend the rights and interests of their members and of the association in court, as well as the general interests of consumers and users, without prejudice to the individual standing of those aggrieved. There are two possible scenarios:

- Where the aggrieved in a harmful event is a group of consumers or users whose members are perfectly determined, or are easily determined, authorisation to seek to protect such collective interests falls to the associations of consumers or users, which are legally incorporated entities that have the defence or protection of the latter as their object, and the affected groups themselves.
- When those aggrieved by an event are an undetermined number of consumers or users, or a number difficult to determine, the standing to bring proceedings in defence of these diffuse interests shall correspond exclusively to the associations of consumers and users that, in accordance with the law, are representative.

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests was a step forward for class actions, although the usual practice so far has been for those injured by the unlawful actions of one or more companies to file individual claims through law firms or platforms.

Likewise, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC now aims to lay the foundations for future consumer collective actions. Last December, a draft bill on class actions was approved by the government, which is currently in the Parliamentary pipeline, aiming to transpose the Directive into the Spainsh legal system. In particular, this draft bill foresees the creation of a special procedure for class actions, whose rules will be incorporated as a new Title to the CPA. In addition, the use of tools such as electronic platforms is envisaged, allowing for more agile processing and direct and simple access by the consumers and users affected. If adopted, this Bill would also amend other regulations, such as the General Law for the Defence of Consumers and Users, the Unfair Competition Act, or the Law on General Terms and Conditions of Contracts.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals may be lodged against the judgments issued in all kinds of trials, definitive court orders and any others which the law may set forth, apart from the judgments issued in oral trials for amounts below €3,000.

When lodging the appeal, the appellant shall set forth the pleas upon which the challenge is based, the judgment or court order against which the appeal is being lodged and the

specific decisions being contested. On a general basis, there is no special requirement as to the content of the material or factual allegations of law.

There is no right of further appeal. Only in some specific cases may a party resort to extraordinary appeal for breach of procedure and cassation.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Recognition and enforcement of foreign judgements will depend on the country in which such judgment has been issued:

- Regarding EU countries, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, states that a civil or commercial judgment given in a member state shall be recognised in the other member states without any special procedure being required.
- As per the enforcement, this Regulation states that a judgment given in a member state and enforceable in that state shall be enforced in another member state when, on the application of any interested party, it has been declared enforceable there.
- With respect to non-EU countries, the provisions of the treaty, if any, formalised between the Kingdom of Spain and such country shall apply.

In the absence of a treaty, provisions contained in the International Legal Cooperation on Civil Matters Act 29/2015 of 30 July (ILCA), regulating the exequatur procedure (see articles 44, et seq) shall be considered.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Spain is a party in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matter, signed in The Hague on 18 March 1970.

If a bilateral treaty on legal cooperation has been formalised between Spain and the correspondent country, the provisions of such treaty may apply.

Otherwise, provisions of the ILCA shall apply, which establishes a procedure applicable to acts of communication and service of judicial and extrajudicial documents, such as notifications, summons and subpoenas, as well as letters rogatory for the purpose of acts relating to the collection and the taking of evidence.

Read this article on Lexology

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Arbitration in Spain is regulated by the Arbitration Act 60/2003 of 23 December 2003 (SAA), which is clearly inspired by the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (UNCITRAL Model Law).

However, even if the UNCITRAL Model Law is the point of departure of the Spanish legislation, there are some minor differences between the Model Law and the SAA, such as:

- Model Law stands that, in absence of agreement by the parties on the number of arbitrators, there shall be three arbitrators, while the SAA establishes there shall be one.
- Apart from the criterion contained in the Model Law for the determination of the international nature of an arbitration, the SAA incorporates an additional instance: where the legal relationship from which the dispute stems has an impact on international trade.
- Regarding the arbitration agreement, the SAA reinforces the anti-formalist criterion in relation to the compliance of the requirement of a 'written agreement'.
- Model Law is more exhaustive describing the different types of interim measures available, which are not stated in the SAA but are in the Act 1/2000 of 7 January on Civil Procedure (CPA).

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

According to the SAA, the arbitration agreement may adopt the form of either a separate agreement or a clause incorporated into a broader agreement. In either case, the agreement shall express the will of the parties to submit to arbitration all or some of the disputes that have arisen or may arise with respect to a given legal relationship, whether contractual or not; and be in writing, in a document signed by the parties or in an exchange of letters, telegrams, telexes, faxes or other means of telecommunication that provides prove or record of the agreement.

In any case, an arbitration agreement will be regarded to exist if in an exchange of statements of claim and defence the existence of an agreement is alleged by one party and not denied by the other.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

On a general basis, the parties are free to agree on the number of arbitrators and the procedure for their appointment. In the absence of agreement, only one will be appointed.

In arbitration with a sole arbitrator, he or she shall be appointed by the competent arbitral court at the request of any of the parties. In arbitration with three arbitrators, each party shall appoint one, and the two appointed arbitrators shall appoint the third. If one party does not appoint the arbitrator within 30 days after receiving the request of the other party to do so, the appointment shall be made by the competent arbitral court at the request of any of the parties, and the same shall apply when the appointed arbitrators are unable to agree on the third arbitrator within 30 days from the last acceptance.

Likewise, in the event of multiple claimants or defendants, if the plaintiffs or the defendants do not agree on the arbitrator they should appoint, all the arbitrators shall be appointed by the competent arbitral court.

With regard to the right to challenge, SAA states that an arbitrator may only be challenged if circumstances that result in justifiable doubts as to his or her impartiality or independence arise, or if he or she does not possess the qualifications agreed upon by the parties or those required by law. When a party has appointed an arbitrator, or has participated in such appointment, that party may only challenge the appointed arbitrator if the reasons have become aware after the appointment.

The parties shall be free to agree on the procedure for the challenging of arbitrators. Failing such agreement, a party who intends to challenge an arbitrator will state the grounds for the challenge within 15 days after becoming aware of the acceptance or of any circumstance that may give rise to justified doubts about the arbitrator's impartiality or independence. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators will decide on the challenge.

Finally, if the above-mentioned challenge procedure is not successful, the challenging party may, if appropriate, assert the challenge when contesting the award.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The SAA lays down no requisites other than that arbitrators must be natural persons in full possession of their civil rights, provided that the legislation to which they shall be subject to in the exercise of their profession does not prevent them from doing so.

The qualifications to be met by arbitrators are left to the discretion of the parties, by analogy to the rules in place in the countries where arbitration is most highly developed.

Likewise, regulations of the arbitration institution that is hearing the proceedings shall apply.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

SAA does not include any substantive requirements, granting the parties the power to freely agree on the procedure to be followed by the arbitrators in their proceedings, with respect to the principles of equality, hearing and contradiction.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The general rule is the non-intervention of any court in the arbitration proceedings, except in those cases where the SAA expressly provides so.

In particular, SAA sets forth which courts are competent for the support and control functions of arbitration, such as:

- to appoint and dismiss court-appointed arbitrators;
- to provide court assistance for taking evidence;
- to adopt interim measures;
- to enforce the award or arbitral decisions;
- to rule on the application for setting aside the award; and
- to recognise foreign arbitral awards or decisions.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Under Spanish law, interim measures can be adopted directly by the arbitrators or by local courts.

With regards to the arbitrators' powers, unless otherwise agreed by the parties, the arbitrators may, at the request of either party, take such interim measures of protection as they deem necessary in respect of the subject matter of the dispute, and they may require sufficient security from the applicant.

Arbitral decisions on interim measures, whatever form they may take, shall be subject to the rules on annulment and enforcement of awards.

Award

30 | When and in what form must the award be delivered?

Unless otherwise agreed by the parties, the arbitrators shall decide the dispute within six months from the date of submission of the statement of defence or from the expiration of the time limit for submitting it; and may extend such time limit for a period not exceeding two months, by means of a reasoned decision.

Unless otherwise agreed by the parties, the arbitrators shall decide the dispute in a single award or in as many partial awards as they deem necessary. All awards must be issued in writing and signed by the arbitrators, who may specify how they voted.

The award will state the grounds upon which it is based, except for awards delivered on agreed terms.

The arbitrators will notify the parties of the award in the form and within the time limit agreed to by the parties or, failing that, by delivery of a signed copy of the award to each party.

Appeal

31 | On what grounds can an award be appealed to the court?

An arbitration award cannot be appealed, but it may be set aside if the applicant alleges and furnishes proof:

- that the arbitration agreement does not exist or is not valid;
- that the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- that the award contains decisions on questions not submitted to arbitration;
- that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an imperative provision of this act, or, failing such agreement, was not in accordance with this act;
- that the subject matter of the dispute is not apt for settlement by arbitration;
- that the award is in conflict with public policy.

Application to set aside an arbitral award must be the object of an oral hearing and no further appeal will be allowed against the judgment issued.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Awards will be enforced in accordance with the provisions of the CPA and the SAA.

A domestic award has the consideration of 'enforceable title' itself and, therefore, there is no need to conduct a prior recognition proceeding. The tribunals shall have the power to enforce a domestic award as far as the party requesting the enforcement submits the enforcement request, together with the award, the arbitration agreement and those documents supporting the notification of the award to the parties (see articles 517.2 and 550.1.1º of the CPA). Awards are enforceable even when action has been brought to set them aside.

A foreign award shall meet some additional requirements: a foreign award shall be submitted in Spain, as in many other countries, to an exequatur procedure prior to its enforcement.

In this sense, article 46(2) of the SAA determines that such procedure shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York, 10 June 1958 (or any other convention considered more favourable), without prejudice

to the provisions of other international conventions more favourable to the granting of such awards, and shall be conducted in accordance with the procedure established in the CPA for awards made by foreign courts.

To that end, the provisions contained in the International Legal Cooperation on Civil Matters Act 29/2015 of 30 July, regulating the exequatur procedure (articles 44 et seq), shall also be considered.

Costs

33 | Can a successful party recover its costs?

Subject to the agreement of the parties, the arbitrators shall decide in the award on the costs of the arbitration, which shall include the fees and expenses of the arbitrators; if applicable, the fees and expenses of the counsels or representatives of the parties; the cost of the service provided by the institution administering the arbitration; and other expenses incurred in the arbitration proceeding.

Although nothing is expressly regulated on this subject in the SAA, both pre- and post-award interest can be included on the principal claim and costs incurred, as far as it is requested by the parties.

With regard to third-party funding, in Spain there is no specific regulation for this figure and there are no records of Spanish courts considering third party funding in connection with arbitration.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative dispute resolution (ADR) process such as negotiation, conciliation or mediation are available in Spain. However, parties do not usually resort to this type of methods.

In this regard, arbitration and judicial mediation in family law matters are perhaps the most usual processes.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Currently, it is not necessary to resort to an ADR prior to the filing of the lawsuit, nor during the pendency of the proceeding. The court may not compel the parties, but shall inform them of the possibility of recurring to negotiations in an effort to resolve the dispute, including

the recourse to mediation, in which case the parties shall inform about their decision in this regard and the reasons thereof at the hearing (see article 414(1) of the Act 1/2000 of 7 January on Civil Procedure).

However, a Project of Law on Procedural Efficiency Measures is being now processed, which introduces the mandatory use, prior to judicial proceedings, of the so-called 'appropriate means of dispute resolution' in the civil and commercial areas. If this project is finally approved in 2023, it would enter into force three months after its publication in the Official State Gazette.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

UPDATE AND TRENDS

Recent developments and future reforms

37 | What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

Among the most relevant judgements on civil and comercial matters of the past year, the following can be highlighted:

- Decision of the Constitutional Court (Plenary) no. 37/2022, of 10 March, which ruled on an law adopted in the region of Catalonia that limits the freedom to set rental prices. This ruling declares such law is unconstitutional, as it deals with a matter that falls within the competence of the State and not of the autonomous communities.
- Decision of the Supreme Court (First Chamber) no. 277/2022, of 31 March, which ruled on surrogacy matters. In particular, it determines that surrogacy violates the fundamental rights recognised in the Constitution and the international conventions on human rights. However, the adoption of the child by the person with whom such child lives and forms a *de facto* family is possible.
- Decisions of the Supreme Court (First Chamber) of 27 January 2022 (Appeal no. 2528/2016 and Appeal no. 4119/2016), which determine that even if the absence of direct information on the past evolution of the IRPH determines the lack of transparency of the clause in question, the so-called 'abusivity control process' shall be carried out anyway.
- Decsion of the Supreme Court (First Chamber) of 27 April 2022 (Appeal no. 708/2019), which establishes that extrajudicial claims that are only addressed to the insurer do not have the effect of interrupting the prescription against the insured.

- Decision of the Supreme Court (First Chamber) of 22 June 2022 (Appeal no. 5557/2021), which affirms that the eviction action cannot be enervated when the lessor has formally request the payment by means of a burofax delivered by postal services and left notice without it being withdrawn by the lessee.
- Decision of the Supreme Court (First Chamber) no. 9/2023, of 11 January 2023, annulling a resolution of a company's shareholders' meeting not to distribute dividends, on the grounds that it had been adopted by abuse of majority, and ordering the distribution of profits, at least in the percentage distributed in the only financial year in which such a distribution was agreed.

Moreover, regarding policy and legislative developments, the following may be underlined:

- Law 16/2022, of 5 September, on the reform of the consolidated text of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of 5 May, for the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on frameworks for preventive restructuring, debt relief and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and debt waiver proceedings, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council on certain aspects of company law (Restructuring and Insolvency Directive).
- Law 6/2022, of 31 March, amending the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion, approved by Royal Legislative Decree 1/2013, of 29 November, to establish and regulate cognitive accessibility and its conditions of requirement and application.
- Law 29/2022 of 21 December adapting national legislation to Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on Eurojust and regulating conflicts of jurisdiction, international legal cooperation networks and staff working for the Ministry of Justice abroad.

Additionally, it is also worth mentioning the Draft Bill on the Right to Housing, which was approved by the Council of Ministers on 1 February 2022, by the Congress on 27 April 2023, and which is pending of approval by the Senate. This law includes measures in order to increase the supply of housing at affordable prices, to avoid situations of tension in the rental market and to support young people and vulnerable groups in accessing housing. It also offers autonomous communities and local entities different tools that shall help to contain or reduce rental prices and to increase the stock of social rental housing. It shall also modify different provisions of the Act 1/2000 of 7 January on Civil Procedure.

It is also relevant to mention that, if the Project of Law on Procedural Efficiency Measures is finally approved in 2023, it would enter into force three months after its publication in the Official State Gazette.

Pedro Rodero Rodríguez	prodero@ontier.net
Cristina Camarero Espinosa	ccamarero@ontier.net
Marta Rodrigo Lavilla	mrodrigo@ontier.net
Marina Blaya González	mblaya@ontier.net

Plaza Presidente Cárdenas 4, 28036 Madrid, Spain

Tel: +34 91 431 30 00

www.ontier.net

Read more from this firm on Lexology

Read this article on Lexology

Sweden

Andreas Eriksson and Gustav Tranvik
TIME DANOWSKY Advokatbyrå AB

RETURN TO CONTENTS

Summary

LITIGATION	551
Court system	551
Judges and juries	551
Limitation issues	552
Pre-action behaviour	552
Starting proceedings	553
Timetable	553
Case management	554
Evidence – documents	554
Evidence – privilege	554
Evidence – pretrial	555
Evidence – trial	555
Interim remedies	555
Remedies	556
Enforcement	556
Public access	556
Costs	557
Funding arrangements	557
Insurance	557
Class action	558
Appeal	558
Foreign judgments	558
Foreign proceedings	559
ARBITRATION	**559**
UNCITRAL Model Law	559
Arbitration agreements	559
Choice of arbitrator	560
Arbitrator options	560
Arbitral procedure	560
Court intervention	561
Interim relief	561
Award	562
Appeal	562
Enforcement	562
Costs	562
ALTERNATIVE DISPUTE RESOLUTION	**563**
Types of ADR	563
Requirements for ADR	563

Read this article on Lexology

MISCELLANEOUS	564
Interesting features	564
UPDATE AND TRENDS	**564**
Recent developments and future reforms	564

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Swedish court system is relatively fragmented, with courts of general competence, separate administrative courts and specialist courts for certain matters. The composition of the courts, namely, the number of judges and their qualifications, can also vary depending on kind of case at issue, as can the procedural framework.

Most commercial disputes are handled by the courts of general competence, with district courts as courts of first instance. The district courts' rulings can be appealed to courts of appeal. The Supreme Court is the court of last resort, but very few cases are given leave to appeal.

In the courts of general competence, all judges in commercial disputes are lawyers. Typically, the district court is composed of three judges, and the courts of appeal of four judges. In the Supreme Court, most matters are decided by five judges.

Intellectual property disputes as well as cases concerning competition and marketing law are handled by the Patent and Market Court and the Patent and Market Court of Appeal, which are composed of both lawyers and specialist judges. Some decisions and judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court.

Certain types of labour disputes are initiated at or may be appealed to the Labour Court, which is the court of last resort in those cases. The Labour Court is composed of both lawyers and persons nominated by employers' and employees' organisations.

The Land and Environment Courts and the Land and Environment Courts of Appeal decide certain matters concerning real estate and environmental law. Some decisions by the Land and Environment Courts of Appeal may be appealed to the Supreme Court. The Land and Environment Courts and the Land and Environment Courts of Appeal are composed of both lawyers and specialist judges.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

In commercial disputes, the courts take a passive role. The courts are strictly bound by the claims presented by the parties and the circumstances that the parties have invoked. It is also for the parties to introduce the evidence that the courts shall consider – the courts will not take any initiatives in that respect.

Read this article on Lexology

There are no juries in commercial disputes. Juries are only appointed in cases falling under the Fundamental Law on Freedom of Expression and the Freedom of Press Act, such as libel or defamation in print or broadcast media.

Limitation issues

3 | What are the time limits for bringing civil claims?

Matters of limitation are generally considered substantive – not procedural – in nature.

The general limitation period pursuant to the Limitations Act is ten years (three years for claims against consumers), but there are many areas where specific limitation periods apply, including in transportation, insurance, labour and company law.

Limitation periods may be varied by contract, but it is not possible to extend the time limits indefinitely. In B2C relationships, the limitation period that applies for claims against the consumer may be shortened, but not extended. However, a debtor faced with a claim may choose not to invoke the fact that the limitation period has lapsed, thereby effectively waiving the application of the statute of limitation at issue.

Under the general rules in the Limitations Act, the limitation period is interrupted by:

- the debtor recognising the debt, for example by amortising or paying interest;
- the debtor receiving a claim in writing from the creditor; or
- the creditor initiating legal proceedings.

For claims subject to specific rules on limitation, other requirements may apply, such as a requirement to initiate court proceedings in order to stop the clock.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There are typically no formal steps that must be taken before legal proceedings are initiated. However, members of the Swedish Bar Association (advocates) are required by the Code of Ethics of the Bar Association to give the adverse party due notice before legal action is taken to give the adverse party the opportunity to consider the claim and settle out of court. This obligation does not apply where there are compelling reasons not to give notice, for instance if a delay would risk a loss of rights or if a notice would trigger the adverse party to dispose of assets.

It is possible to apply for security measures and document production before claims are brought. It is also possible under certain circumstances to apply for the taking or preservation of evidence for a future trial. In case of suspected intellectual property right infringements, a party can apply to court for assistance in investigating the occurrence of an infringement under special rules in intellectual property legislation.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced by the claimant applying in writing to the court for a summons. The application must state the relief sought and the circumstances that are invoked in support of the claim. A preliminary statement of evidence should also be included. A small application fee (currently 2,800 Swedish krona) is charged.

If the application is not dismissed following the court's ex officio assessment of formalities, the court shall issue a summons calling on the defendant to respond to the claim. The court administers the services of the summons.

Generally, the courts have the capacity to handle their caseloads, but processing times have been impacted by the covid-19 pandemic. There may also be risk of longer processing times if a large commercial dispute is to be decided in a smaller district court.

Timetable

6 What is the typical procedure and timetable for a civil claim?

A typical procedure starts with the claimant submitting a written application for a summons to the competent district court (normally the court where the respondent is domiciled) and paying the application fee. If the formalities are met, the court serves the summons on the respondent party, which is given the opportunity to state its position in a written reply. The normal time limit for the reply is two or three weeks, but in complex cases extensions of one month or more are common. Following the reply by the respondent, there is a period of exchange of further written submissions. In this period, there is usually also a preparatory meeting where the court seeks to clarify the parties' positions, probes the possibilities of a settlement and decides the time plan for the remainder of the proceedings. Before the end of the preparatory stage of the proceedings, the court draws up a case summary setting out the respective claims and positions and the key circumstances invoked by the parties. The court can set a cut-off date for invoking new circumstances and evidence, usually a few weeks or months before the main hearing. The final part of the procedure is the main hearing, or trial, where all the claims, circumstances and evidence is presented.

Typically, proceedings in the court of first instance take one to two years, depending on the nature of the case and the court's workload. If the judgment is appealed, as is often the case, the proceedings at the appellate level normally take about one more year. Complex cases may take longer.

Very few cases are granted leave to appeal in the Supreme Court. This happens only where there have been severe procedural errors in the lower courts, or if the case is considered to be of precedential importance. If leave to appeal is granted, it can take one year or more before the Supreme Court's judgment is rendered.

Case management

7 Can the parties control the procedure and the timetable?

The courts have a general obligation to handle cases expeditiously. In principle, the parties cannot change time limits or stay the proceedings, even if they are in agreement. The courts decide the timetable. At the same time, the courts shall consult with the parties regarding the timetable and the courts are generally responsive to requests that the parties put forward in good faith.

From a practical point of view, the parties' procedural dispositions will have a great impact on the conduct of the proceedings. A complex case with many preliminary questions may take considerably longer to decide than a straightforward matter.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Swedish law does not provide for discovery or any similar wide document disclosure. Document production is only ordered at the request of a party and limited to specific documents or narrow categories of documents that are likely to be relevant to the case. Documents containing trade secrets and communications that are covered by attorney-client privilege are excluded from the disclosure obligation.

There is no general rule that requires parties to preserve every document of possible relevance to a dispute. Thus, as a starting point, Swedish law does not prevent companies from implementing automatic deletion routines for email, etc. That said, if someone were to destroy on purpose a document that is intended to serve as evidence, he or she could face criminal liability. The fact that a document was destroyed could also be factored in when the court assesses the evidence.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Communication between a member of the Bar and his or her client is protected by privilege such that it cannot be covered by a document production order. Nor is a member of the Bar required or allowed to testify on matters that are covered by attorney-client privilege. There are also rules that make information provided to counsel in a dispute privileged, regardless of whether he or she is a member of the Bar. However, it should be noted that if privileged information were to come into the possession of the other party and invoked as evidence, there is no rule under which it would be deemed inadmissible. Under the principle of free evidence, the parties are allowed to introduce, and the courts should take into consideration, everything that is relevant to the outcome of the dispute.

Advice from an in-house lawyer is generally not privileged. However, the structure of the Swedish rules on document production, which limit document production to specific

documents or categories of documents that can be assumed to be of relevance as evidence, means that internal documents seldom are disclosed. There are also exceptions for personal notes that may apply to internal assessments.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

There is no requirement to exchange evidence before the commencement of legal proceedings. Once proceedings have been initiated, the first stage of the procedure is aimed at clarifying the parties' positions, including what evidence the parties intend to present at trial (the main hearing). In this preparatory stage, the parties shall present all written evidence on which they rely. The parties shall also identify all witnesses that are to be heard and list the circumstances that each testimony is intended to prove. However, written witness statements are generally not allowed. The main principle is that witness testimonies are given orally during the main hearing. Typically, only experts provide written statements (expert reports). Therefore, while the topics to be covered by a witness are known before the hearing, the opposing party will generally not know the exact content of the testimony beforehand.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The Code of Judicial Procedure is based on the premise that everything that is relevant to the case at hand shall be presented orally at the main hearing. This includes both the written and oral evidence.

In practice, written documents are presented by the parties by referring to them and only going through the most central parts at the hearing.

Witnesses and experts are heard orally before the court. With the exception of expert witnesses, there are normally no written witness statements. Therefore, a testimony will start with the witness giving an account of the relevant circumstances guided by questions from the party invoking the witness. This is followed by cross-examination and redirect.

Interim remedies

12 | What interim remedies are available?

In commercial disputes, courts have the possibility under Chapter 15 of the Code of Judicial Procedure to order arrest of property, injunctions or other appropriate security measures aimed at protecting the claimant's rights.

In IP infringement cases, the claimant often seeks a temporary cease-and-desist order pending the final judgment. In the case of suspected intellectual property right infringements, it is also possible to apply to the court for assistance in investigating the occurrence of an infringement.

It is possible to apply to the court for security measures even if the dispute is subject to an arbitration agreement. Swedish courts can also order security measures in support of foreign proceedings. Notably, according to article 35 of the EU Brussels I Regulation (1215/2012), by which Sweden is bound, an application may be made for provisional or protective measures to the courts of an EU member state, even if a court in another member state has jurisdiction over the substance of the matter.

Remedies

13 | What substantive remedies are available?

The vast majority of all claims are for payment of outstanding fees, damages or other types of monetary compensation. However, specific performance or declaratory relief may also be requested.

Damages are typically calculated so as to give the offended party full compensation for the loss actually suffered, no more, no less. However, in certain areas of law there are elements of punitive damages. Liquidated damages or contractually fixed compensation amounts are also allowed, regardless of whether the compensation exceeds the actual loss. In extraordinary circumstances, the level of compensation may be adjusted.

Interest is typically awarded on monetary judgments, provided that interest is claimed and the interest claim is substantiated.

Enforcement

14 | What means of enforcement are available?

In Sweden, all enforcement is handled by the Enforcement Authority.

A party seeking enforcement applies to the Enforcement Authority, which then takes appropriate measures to ensure that the ruling is given effect. For instance, in the case of judgments for monetary compensation, the Enforcement Authority can seize and sell the losing party's property. Where the judgment is for specific performance, the Enforcement Authority can impose a fine if the judgment is not complied with.

It is also possible for courts to impose a fine, for example in conjunction with an order for document production.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court proceedings in Sweden are public, which means that documents that are submitted will be on public record and that hearings are open for anyone to attend. All decisions and judgments will also be publicly available. While there are exceptions to this main rule (for instance in respect of trade secrets), these seldom cover all information that the parties consider to be confidential.

Read this article on Lexology

Parties that wish to keep their disputes confidential should refer them to arbitration and include confidentiality undertakings in their arbitration agreements.

Costs

16 | Does the court have power to order costs?

The main rule under the Code of Judicial Procedure is that the costs of the proceedings shall be allocated between the parties in accordance with the outcome of the dispute. Thus, the losing party is normally ordered to pay all or part of the winning party's costs. Only costs that are deemed reasonably required to protect the party's right are compensated. Typically, this includes reasonable costs for legal representation, experts and other evidence, and internal resources that have been involved in the dispute.

In proceedings between Swedish parties or parties from countries within the EEA, no security for costs is required. In proceedings brought by a foreign claimant against a Swedish or EEA party, the court may, at the request of the respondent, order the claimant to provide security for the respondent's costs. There are, however, several exceptions to this rule.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The Code of Ethics of the Swedish Bar Association does generally not allow success fee arrangements, where the lawyer is paid a part of the amount awarded to the client or where the lawyer's right to payment is entirely dependent on the outcome of the case. Exceptions may apply in special circumstances, for example where it would be needed for the client to get access to justice. Also, an arrangement where the fee is reduced if the client loses or higher if the client wins, could be allowed depending on how it is structured.

There is nothing that prevents a party entering into an agreement with a third party for funding or risk sharing with respect to a dispute. Third-party litigation funding is a relatively new phenomenon on the Swedish market, but is starting to gain popularity. A market for third-party litigation funding is emerging with a number of firms now being active in Sweden.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

There is nothing that prevents a party from taking out litigation insurance. Insurance coverage for litigation costs is a normal component in many business insurances.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

According to the Group Proceedings Act it is possible to initiate proceedings where one claimant acts on behalf of a group. For a group action to be permitted, several requirements need to be met. The claim must be founded on circumstances that are common to the group, the proceedings must not be unsuitable because of differences in legal grounds between members, most of the claims must not be able to be claimed individually by the members of the group, the group must be reasonably defined, and the claimant must be suitable to act on behalf of the group.

So far, very few group proceedings have been brought in Sweden. A proposal for new legislation concerning group proceedings has been presented to implement EU Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers. The proposal is intended to enter into force in January 2024.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeal to a general court of appeal in a commercial dispute requires a leave to appeal. Leave to appeal shall be granted if:

- there are reasons to doubt the correctness of the judgment of the lower court;
- it is not possible to assess the correctness of the lower court's judgment without a full review;
- the case is of importance as precedent; or
- there are extraordinary circumstances, such as severe procedural errors in the lower court.

The preparatory works make clear that the rules are to be applied generously. Leave to appeal is typically granted in complex cases.

The possibilities for further appeal to the Supreme Court are much more limited, and leave is only granted in very few cases that are deemed to be of precedential importance or where there have been severe procedural errors in the lower courts.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The main rule in Swedish law is that foreign judgments are not recognised or enforceable without statutory support.

The rules on recognition and enforcement that have the greatest practical importance are those set out in the EU Brussels I Regulation (1215/2012). Sweden shall recognise and

enforce judgments from other EU member states without any special procedure or declaration of enforceability.

In situations where statutory support is lacking – for example where the Brussels I Regulation is not applicable – foreign judgments may, in certain circumstances, be given effect without being formally binding, such that Swedish courts may issue a ruling based on the foreign judgment without making any new assessment of the case.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Within the EU, there are rules on cooperation between courts in the taking of evidence in civil and commercial matters as set out in Regulation 2020/1783. Under this framework, courts are obliged to offer assistance in the taking of evidence at the request of courts in other member states.

Sweden is also party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and there is a separate agreement on the taking of evidence between the Nordic states.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Swedish Arbitration Act of 1999 is not based on the UNCITRAL Model Law, but the Model Law was given due consideration in the legislative process leading up to the enactment of the Arbitration Act.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Under Swedish law, agreements are typically binding without any requirements as to form. Principally, this is also the case for arbitration agreements. It follows that implied or oral arbitration agreements can also be valid. That said, most arbitration agreements are – and should be – made in writing, in order to properly document the parties' agreement.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

According to the Arbitration Act, there shall be three arbitrators unless otherwise agreed by the parties. Each party appoints one arbitrator, and the two party-appointed arbitrators appoint the third arbitrator, who will typically act as the chairperson of the arbitral tribunal.

The parties' choice of arbitrator shall be stated in the request for arbitration and the answer, respectively. If an appointment is not made in the prescribed order, the court will make the appointment at the request of a party.

The right to challenge the appointment of an arbitrator is very limited. An arbitrator can only be removed if he or she does not meet the requirements with respect to independence and impartiality set out in the Arbitration Act.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Anyone who has full legal capacity and is independent and impartial in relation to the parties and the dispute at issue may act as arbitrator. No other formal requirements apply, and the parties are free to choose any arbitrators whom they think have suitable qualifications, including specific subject matter competence.

That said, most arbitrators are well-renowned lawyers, judges and legal scholars with previous experience of arbitration proceedings. Sweden has a very well-developed arbitration community and a long tradition of both domestic and international arbitration. There is a pool of experienced arbitrators for most types of disputes.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Act contains very few rules on the conduct of the proceedings. The parties and arbitrators have the freedom to tailor the proceedings to fit the specific dispute at issue. There are, however, a few overarching provisions.

Section 21 of the Arbitration Act dictates that the arbitrators shall handle the dispute in an impartial, practical and speedy manner. This provision also sets out that the arbitrators shall act in accordance with instructions from the parties, unless impeded from doing so. According to section 24 of the Arbitration Act, the arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally and the parties shall have the opportunity to review all documents that are submitted. If a party so requests, an oral hearing shall be held prior to the determination of the dispute.

Section 23 of the Arbitration Act sets out the general rules for establishing the parties' positions. The claimant shall first state his or her claims and the circumstances invoked in support of it. Thereafter, the respondent shall do the same. According to section 25, the parties shall – as a main rule – supply the evidence to be considered by the arbitrators.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, courts shall not intervene in arbitration proceedings. Instead, there are several provisions under which the courts should assist in rendering arbitration proceedings more efficient.

A dispute that is covered by an arbitration agreement may not be tried in court if either of the parties objects to the court's jurisdiction when action is brought.

Once arbitration has been initiated, a court may not try the issue of the arbitrators' jurisdiction if either party objects. Instead, the question of jurisdiction shall first be tried by the arbitrators. If the arbitrators decide the question as a separate preliminary matter and find that they have jurisdiction, this decision may be appealed to the Court of Appeal at the seat of arbitration. An appeal does not prevent the arbitration proceedings from continuing. The possibility to appeal to court may be overridden by agreement.

Courts may order security measures at the request of a party notwithstanding the existence of an arbitration agreement. The courts may also assist in the hearing of witnesses under oath, or in ordering document production, if requested by one of the parties and permitted by the arbitral tribunal.

If both parties are foreign, it is possible to agree to exclude some or all of the grounds for setting aside an arbitral award.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Under the Arbitration Act the arbitrators may, unless otherwise agreed by the parties, decide at the request of a party that the other party shall undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators. The arbitrators have a wide discretion when ordering interim measures. Interim measures may include orders to take active action or to refrain from certain activities and could be aimed at preventing irreparable harm or securing future enforcement. Also measures aimed at securing or preserving evidence can be ordered.

Orders by arbitrators on interim measures are generally not considered enforceable. Therefore, it is also possible to apply for interim measures in court, notwithstanding the arbitration agreement.

Award

30 | When and in what form must the award be delivered?

An award shall be in written form and signed by the arbitrators.

The award must be delivered to the parties immediately after it has been finally decided. The Arbitration Act does not set out any specific time limit within which the award shall be rendered, but section 21 of the Arbitration Act dictates that the arbitrators must handle the arbitration in an efficient and speedy manner. Many arbitration rules, such as those of the Stockholm Chamber of Commerce Arbitration Institute, also provide for specific time limits for the award, thereby ensuring a speedy process.

Appeal

31 | On what grounds can an award be appealed to the court?

The Arbitration Act does not provide for any possibility to appeal an award on substantive matters. However, an award can be set aside or nullified due to formal errors on grounds analogous to those set out in article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Sweden is party to the New York Convention. Therefore, Sweden will recognise and enforce any foreign arbitral award that is based on an arbitration agreement, with limited exceptions as set out in the New York Convention.

A party seeking enforcement of a foreign arbitral award shall make an application to the Svea Court of Appeal. The award or a certified copy of the award must be attached. If the award is in a language other than Swedish, a certified translation into Swedish is also typically required. The application is then sent to the other party, which is given the opportunity to object. Unless the court finds that there are circumstances preventing enforcement corresponding to those set out in article V of the New York Convention, the court shall declare the award to be enforceable in the same manner as a Swedish court judgment. The award can thereafter be enforced in Sweden through the Enforcement Authority.

Swedish courts are independent and have long taken an arbitration-friendly approach.

Costs

33 | Can a successful party recover its costs?

The Arbitration Act provides that the arbitrators may, upon request of a party, order the opposing party to pay compensation for costs. The arbitrators have a wide discretion when deciding what costs should be compensated and how they should be allocated. That said, most arbitrators let the allocation of costs follow the outcome on the merits of the case,

such that the losing party is ordered to pay all or part of the winning party's costs. Typically, all reasonable costs for legal representation, experts and evidence as well as internal work in connection with the dispute is compensated, but also other items may be recovered provided that they are sufficiently closely related to the dispute.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Many commercial disputes are resolved through arbitration, either ad hoc under the Arbitration Act or under the auspices of an arbitration institute, such as the Stockholm Chamber of Commerce (SCC) Arbitration Institute.

Expert determination is also sometimes used. When that is the case, the parties have agreed to refer a question to an independent expert or a panel of experts. Depending on the parties' agreement, the resulting expert opinion can be guiding, contractually binding or even have the full effect of an arbitral award. As of 2021, the SCC offers a service called Express Dispute Assessment, whereby a neutral person is appointed to provide an assessment of a dispute within three weeks. By default, the assessment is not binding, but the parties may agree to give it binding effect or that the findings should be confirmed in an arbitral award.

Mediation is another possibility. The Mediation Act of 2011 contains provisions on mediation in commercial disputes, and the SCC and other arbitration institutes also offer mediation services. That said, formalised mediation is not frequently used in Sweden.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Courts have a general obligation to encourage parties in commercial disputes to settle the dispute, unless this would be inappropriate. The courts can also refer the case to mediation, but this requires the consent of both parties. This option is seldom used.

Arbitration agreements sometimes require that the parties negotiate in good faith or go through mediation before arbitration is initiated. Once arbitration has been initiated, the arbitrators do not have any power to compel the parties to participate in mediation or any similar process, unless this is provided for in the arbitration agreement.

Read this article on Lexology

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The procedural framework for commercial disputes in courts in Sweden is relatively formalistic. The parties must take great care when they formulate their requests for relief and the grounds that are invoked, since the courts are strictly bound by what the parties state in these respects. At the same time, cases are decided solely based on what is presented at the oral main hearing, where all judges are lawyers. The combination of a high degree of formalism and oral proceedings without the participation of juries puts high demands on parties and counsel.

There is strong preference for arbitration in commercial relationships in Sweden.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In December 2022, the Swedish Supreme Court delivered two judgments that highlight the increasing importance of EU law in dispute resolution.

The first case concerned arbitral awards rendered in Sweden pursuant to an intra-EU investment protection agreement between a company from Luxembourg and the Republic of Poland. After obtaining a preliminary ruling from the Court of Justice of the European Union (CJEU), the Supreme Court found the awards to be invalid, since the arbitration agreement in the case was considered to be incompatible with the fundamental rules and principles governing the legal order in the EU – and thus also in Sweden.

In the second case, the Supreme Court found that a failure by a court to obtain a preliminary ruling from the CJEU, at least in certain situations, can be regarded as a severe procedural error giving grounds for annulment of the resulting judgment.

Not being a legislative change per se, it is good to know that the Stockholm Chamber of Commerce Arbitration Institute have adopted new rules, in force from 1 January 2023. Among other changes, there is now a rule explicitly stating that the arbitral tribunal can decide, after consulting with the parties, whether a hearing shall be conducted in person or remotely.

A proposal for new legislation concerning group proceedings has been put forward to implement EU Directive 2020/1828. The proposal is intended to enter into force in January 2024.

Read this article on Lexology

TIMEĐANOWSKY

Andreas Eriksson andreas.eriksson@timedanowsky.se
Gustav Tranvik gustav.tranvik@timedanowsky.se

Birger Jarlsgatan 15, PO Box 590, Stockholm 114 11, Sweden
Tel: +46 8 555 677 00
www.danowsky.se

Read more from this firm on Lexology

Read this article on Lexology

Thailand

Pisut Rakwong and Supachoke Pongdasakorngamjai
Pisut & Partners

RETURN TO CONTENTS

Summary

LITIGATION 567
Court system 567
Judges and juries 567
Limitation issues 568
Pre-action behaviour 568
Starting proceedings 569
Timetable 569
Case management 570
Evidence – documents 570
Evidence – privilege 570
Evidence – pretrial 571
Evidence – trial 571
Interim remedies 571
Remedies 572
Enforcement 572
Public access 572
Costs 573
Funding arrangements 573
Insurance 573
Class action 574
Appeal 574
Foreign judgments 575
Foreign proceedings 575

ARBITRATION 575
UNCITRAL Model Law 575
Arbitration agreements 576
Choice of arbitrator 576
Arbitrator options 576
Arbitral procedure 577
Court intervention 577
Interim relief 577
Award 577
Appeal 578
Enforcement 578
Costs 579

ALTERNATIVE DISPUTE RESOLUTION 579
Types of ADR 579
Requirements for ADR 580

Read this article on Lexology

MISCELLANEOUS 580

Interesting features 580

UPDATE AND TRENDS 581

Recent developments and future reforms 581

LITIGATION

Court system

1 What is the structure of the civil court system?

The Court of Justice is divided into three levels: the court of first instance, the Appeal Court and the Supreme Court.

General civil courts of first instance comprise district courts and provincial courts. District courts have jurisdiction to hear small claims with value below 300,000 baht, while provincial courts have jurisdiction over claims exceeding 300,000 baht, non-monetary cases, non-contentious cases, and all other civil claims that are not subject to the jurisdiction of other civil courts. At least two judges would constitute a quorum for the purposes of hearing and determining any matter in the provincial courts, whereas only one judge is required for district courts.

The Appeal Court handles an appeal against the judgment or order of the general civil courts. The Supreme Court is the final court of appeal in all cases in Thailand. At least three judges form a quorum of the Appeal Court and the Supreme Court. No oral arguments and witness examination will take place at the appeal stage.

In addition to the above, there are five specialised courts in Thailand: the intellectual property and international trade court, the tax court, the labour court, the bankruptcy court, and the juvenile and family court. Quorum and types of judges for the purposes of determining any matter in the specialised courts are specified under the specific legislation regarding the disputed matter. An appeal against the judgment of the specialised court must be made to the Appeal Court for specialised cases or directly to the Supreme Court, as the case may be. A further appeal, which is not an automatic right, may be made to the Supreme Court.

Judges and juries

2 What is the role of the judge and the jury in civil proceedings?

There is no jury system in Thailand. The accusatorial system applies for most civil cases, except in some specialised courts and specific case types. Judges must decide the issues of fact and law based on the facts presented by the parties, and judges are not empowered to request additional facts and evidence on their own accord.

Limitation issues

3 | What are the time limits for bringing civil claims?

The statutory time limits or periods of prescription for bringing civil claims vary significantly depending on the nature of the claims as prescribed by laws. The time limit for claims for which no specific period is prescribed by law is 10 years. A claim for a wrongful act is barred one year after the day that the wrongful act and the person bound to make compensation became known to the injured person, or 10 years from the day of commission of the wrongful act. However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, that longer prescription will apply.

The statutory time limit cannot be extended or suspended by mutual agreement of the parties. Nevertheless, for debt-recovery claims, the time limit may be interrupted if the debtor has acknowledged the debt towards the creditor by written acknowledgement, making partial payment or payment of interest, giving securities or undertaking any act implying the acknowledgement of debt. In this case, the time limit begins to run when the interruption ceases.

The statutory time limit in civil claims is not a matter of public policy. As such, if the defendant does not raise this matter in an answer, the court would not have authority to dismiss the claim on grounds of expiry of time limits.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Typically, a plaintiff will send a demand letter to the defendant before initiating civil proceedings. However, specific pre-action requirements exist for certain claims as outlined in the Civil and Commercial Code.

For instance, in cases involving the enforcement of a mortgage, a claim can only be filed after the notice period has elapsed. The mortgagee must provide written notice to the debtor, allowing a reasonable time of at least 60 days for the performance of obligations. Additionally, if the mortgagor pledges their property as security for another person's obligation, the mortgagee must notify the mortgagor within 15 days of serving the written notice to the debtor. Failure to do so releases the mortgagor from liability for interest, compensation, and associated charges starting from the expiration of the 15-day period.

Regarding claims against guarantors, a claim can be filed once the written notice reaches the guarantor. If the creditor fails to serve written notice to the guarantor within 60 days from the debtor's default, the guarantor is released from liability for interest, compensation, and charges arising after the 60-day period.

For lease contracts, termination can occur at the end of each rent period by providing notice of at least one rent period (not exceeding two months). In cases of non-payment of rent, the lessor has the right to terminate the contract. However, if rent is payable monthly or at longer intervals, the lessor must first notify the tenant of the required payment within a period of no less than 15 days.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A plaintiff commences civil proceedings by filing a complaint with the competent court and paying the proper court fee. If the complaint is accepted, the court officer will commence serving the summons and a copy of the complaint on the defendant at the address provided by the plaintiff. If the defendant's address is located overseas, the court shall proceed with service to the defendant through an international express mail service, an international mail service provider or the Office of the Court of Justice and the Ministry of Foreign Affairs through a diplomatic channel. In the latter case, the plaintiff is required to submit copies of the summons and the complaint to the court in the certified official language of the defendant's country or in English.

The courts occasionally extend their operating hours into the evenings and hold weekend sessions to deal with the backlog of cases.

Timetable

6 What is the typical procedure and timetable for a civil claim?

Service of complaint

Once a summons and a copy of the complaint have been effectively served, the defendant has 15 or 30 days from the date of service, depending on the means of service, to file an answer or counterclaim. If the complaint is served on the defendant or any person who is authorised to accept service, the defendant has 15 days from the date of service to file an answer. If the complaint is served by affixing the documents to the premises of the defendant, the defendant has 30 days to file an answer. However, parties usually seek an extension to answer the complaint, and the court generally grants this extension upon reasonable request.

Settlement of issue

Typically, 45 to 60 days after the filing of a complaint, the first hearing will be held for the purposes of determining the issues in dispute and scheduling a trial hearing. The court will examine the allegations and evidence filed by the parties, direct any party to adduce evidence first or afterwards, and schedule a date for trial. If the court views that a settlement may be reached between the parties, the court may schedule a mediation hearing and appoint a mediator to assist in mediation.

Trial

The court will schedule the hearings for taking the evidence of each party. The number of hearings depends on the number of witnesses each party wishes to present, the amount of documentary evidence and the complexity of the case.

Judgment

Once the trial is completed, the courts will schedule the hearing to read the judgment. Parties may request to file a closing statement with the court within the given time frame.

Case management

7 | Can the parties control the procedure and the timetable?

The parties cannot control the procedure, timetable or dates of the trial hearings. Once the first hearing date has been fixed, the parties may seek to reschedule on the grounds of a scheduling conflict. If the trial cannot be concluded within the timetable imposed by the court for reasons such as protracted examination proceedings, the court may further reschedule or fix another hearing date.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no such duty under the law. The parties have the right to determine the evidence to be presented to court in support of their case. However, any party may request the court to issue an order to subpoena a document, either from the opposing party or a third party, within the given time frame, unless there are reasonable grounds for refusal, such as confidentiality or the possibility of causing damage to third parties if documents are produced.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Attorney–client privilege is recognised under Thai law. While the Regulations of the Lawyers Council on the Conduct of Lawyers BE 2529 (AD 1986) prohibit lawyers from disclosing confidential information about clients unless clients have consented or a court order has been obtained, those Regulations only apply to licensed lawyers who have been registered with the Lawyers Council of Thailand.

Nevertheless, it is a criminal offence under section 323 of the Thai Criminal Code for legal advisers, consultants or professionals, including their staff, to disclose confidential client information that may cause harm to the client. Any licensed or non-licensed lawyers, including in-house lawyers are, therefore, bound by this confidentiality obligation.

A court order or subpoena would override attorney–client privilege and confidentiality obligations.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

There is no pretrial discovery process in Thailand. However, parties may request for the submission of written statements ahead of the examination-in-chief. If that request is granted by the court, the parties are required to submit to the court and serve on the opposing party the written statement no less than seven days before the hearing for the testimony of the witness.

Under the Civil Procedural Code, parties are required to submit a list of the evidence and a copy of the documentary evidence that the parties intend to present at trial to the court and the opposing party no less than seven days before the commencement of the first trial hearing. Failure to do so would result in inadmissibility of evidence, unless the court rules otherwise, taking into account special circumstances.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Most evidence is presented through the oral testimony of witnesses who give evidence under oath. The judge may conclude and record the testimony given by the witness at his or her discretion. Often, only necessary facts related to the issues of the case are recorded. The parties generally request to submit a written statement instead of giving oral evidence for the convenience of all parties. That written statement stands as the examination-in-chief and does not bar the right of the witness to give further oral evidence before the court. The witness is required to attend the hearing to confirm his or her written statement and to be cross-examined by the opposing party.

Once the examination-in-chief is finished, the opposing lawyer has an opportunity to cross-examine the witness. The lawyer who has called a witness may then re-examine the witness with regard to matters answered by the witness during cross-examination.

All proceedings are conducted in Thai. If a foreign witness is required, he or she would need to testify through a translator. Documents in a foreign language must be translated into Thai, and only the original documents are admissible as evidence. Copies of those documents are admissible where parties mutually agree to admission; the original document has been lost or destroyed for reasons beyond the parties' control or it is in the interest of justice to produce a copy; the original document is in official custody or control; or the opposing party does not object to that admission.

Interim remedies

12 | What interim remedies are available?

Interim remedies available upon application at any time before the court renders its judgment include seizure or attachment orders, restraining orders, orders directing government

authorities to suspend or revoke any registration, and orders for provisional arrest or detention. These orders may only be granted in respect of proceedings in Thailand. Search orders are not available for civil proceedings.

Emergency injunctive remedies are available by filing a separate motion establishing the emergency with an application for the injunctive remedies. If the court is satisfied of the urgency and grounds of the application, the court will consider and make a decision on the application on the same day on an ex parte basis.

When granting orders for interim remedies, the court often requires the applicant to provide security in the amount deemed appropriate by the court, as a guarantee for any losses that may be incurred as a result of the relief.

Remedies

13 | What substantive remedies are available?

Courts are empowered to award punitive damages but rarely do so. Punitive damages have been officially prescribed in several laws such as the Trade Secret Act, the Promotion and Development of Quality of Life of Persons with Disabilities Act, the Product Liability Act, the Consumer Case Procedural Act and the Personal Data Protection Act.

Courts are empowered to render judgments ordering the payment of interest on money judgments up to the date of full payment at the contractual rate agreed between the parties, or at the statutory rate.

Enforcement

14 | What means of enforcement are available?

After the court renders a judgment, the court will issue a decree requiring a judgment debtor to perform in accordance with the court judgment within a certain period of time. If the judgment debtor fails to comply with the judgment, the judgment creditor is entitled to request the court to issue writ of execution against the judgment debtor, where an execution officer will be appointed for the purposes of seizing the property, executing attachment of claims against third parties and liquidating the seized property by auction. The judgment creditor is, however, responsible for locating the debtor's assets.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings in civil proceedings are open to the public. However, the court may proceed with a hearing behind closed doors for public interest reasons or to prevent the disclosure of all or any of the facts or circumstances of the case from the evidence taken.

Court documents such as pleadings, witness statements and court orders are not available to the public. Third parties that have a legitimate interest or a reasonable ground may request access to court documents.

Costs

16 | Does the court have power to order costs?

Courts have the power to order the losing party to pay the successful party's costs. The amount is determined at the court's discretion, taking into account the complexity of the case, the time devoted and the amount of work carried out by lawyers, subject to the statutory maximum rates tied to the value of the claim. In any event, large legal fee awards are not common in Thailand.

The plaintiff may be required to provide security for the defendant's costs upon request of the defendant, at any time before judgment, under the following special circumstances:

- if the claimant is not domiciled in Thailand or does not carry on business in Thailand and the defendant can prove that the claimant does not have property liable for execution in Thailand; or
- where there is strong reason to believe that the plaintiff will evade payment of costs when losing the case.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

There are no specific rules governing contingency or conditional fee arrangements between lawyers and clients. However, according to the Supreme Court judgments, lawyers are prohibited from having any interest in the outcome of the case and such arrangements are contrary to public policy and good morals. Therefore, such arrangements are void and unenforceable in Thailand.

Third-party funding is not a recognised concept under Thai law. However, based on the Supreme Court judgments, the courts tend to view any form of third-party funding without any interest in the litigation or with intent to profit from the disputes between other parties as contrary to public policy and good morals. Third-party funding is therefore void and unenforceable in Thailand.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance for a party's legal costs is not extensively available in Thailand. However, it is generally available overseas and may include the costs of litigation conducted in Thailand.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class action lawsuits in Thailand can only be filed by the plaintiff, meaning that there is no defendant class action. The Civil Procedure Code does not specify the number of people required to file a class action claim. All courts in Thailand, except for district courts, have jurisdiction over class action claims. Cases that are eligible for class action are as follows: wrongful acts; breaches of contract; and rights claims that derive from other laws, such as environmental laws, consumer protection laws, labour laws, securities and exchange laws, and trade competition laws.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

For general civil cases, appeal to the Appeal Court must be made within one month of the date of the decision of the court of first instance. Appeals on questions of fact where the value of the property or the amount in dispute in the appeal court does not exceed 50,000 baht are prohibited. Appeals on questions of law are permissible.

Further appeal to the Supreme Court must be made within one month of the date of the decision of the Appeal Court. Appeal to the Supreme Court is not an automatic right. The parties must request permission to appeal from the Supreme Court, and permission will only be granted if the appeal is a significant matter worthy of consideration. Section 249 of the Civil Procedure Code sets out 'significant matters' as follows:

- matters relating to the public interest or public policy;
- when a judgment or an order of the appeal court in a significant question of law is contrary to the general precedent of judgments or an order of the Supreme Court;
- when a judgment or an order of the appeal court determines a significant question of law that does not yet have a precedent or order of the Supreme Court;
- when a judgment or an order of the appeal court is contrary to final judgments or orders of other courts;
- those with the purpose of developing legal interpretation; and
- other significant matters as prescribed by the regulations of the president of the Supreme Court.

Other significant matters are provided by the Regulation of the President of the Supreme Court regarding the application for the request for permission to appeal to the Supreme Court in Civil Case BE 2564 (AD 2021) as follows:

- the judgment or order of the appeal court contains dissenting opinion in the significant matter and it is deemed appropriate to consider by the Supreme Court;
- the judgment or order of the appeal court in the significant question of law contradicts an international convention ratified by Thailand; and

- the judgments or orders of the court of first instance and the appeal court are contradicting on a significant issue and it is deemed appropriate to consider by the Supreme Court.

If permission is not granted by the Supreme Court, there will be no further appeal in any form and the case is final.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Thailand is not a party to any conventions on recognition and enforcement of foreign judgments. There are no specific rules governing the recognition and enforcement of foreign judgments. However, Thai courts accept foreign judgments as evidence in a new trial. The only option for a judgment creditor to enforce a foreign judgment is by commencing new proceedings in Thai courts. Even if the foreign judgment is based on the merits of the case, the plaintiff must present all key witnesses and testimony in the new proceedings. The plaintiff must show that the foreign judgment is a final judgment in the relevant foreign jurisdiction where all avenues of appeal have been exhausted. The grounds of a foreign judgment would also need to be clear.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Thailand is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. However, Thai courts may issue a letter rogatory to the foreign court to examine the witness in other jurisdictions and transmit a deposition back to a Thai court on the basis of judicial cooperation or through diplomatic channels. Likewise, the court will assist in obtaining the documentary evidence required through the same diplomatic channels for use in civil proceedings in other jurisdictions.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Thai arbitration law as codified under the Thai Arbitration Act BE 2545 (AD 2002) was generally modelled upon the UNCITRAL model, which replaced the 1987 Act. Two forms of arbitration are recognised under Thai law: in-court arbitration and institutional arbitration.

In-court arbitration is governed by the Civil Procedural Code. The parties file with the court a joint application to submit a dispute in reference or all issues pending before a court of first instance to the arbitrator for settlement.

At present, there are three well-known arbitration institutions in Thailand: the Thai Commercial Arbitration Committee of the Board of Trade of Thailand, the Thai Arbitration Institute and the Thai Arbitration Centre.

In addition, arbitration has been promoted by various government authorities to solve commercial disputes governed by special laws. For example, disputes arising from insurance agreements shall be resolved by a registered arbitrator of the Office of Insurance Commission; disputes arising from intellectual property laws shall be resolved by a registered arbitrator of the Department of Intellectual Property; and disputes arising from securities and exchange laws, provident fund laws or derivative laws shall be resolved by a registered arbitrator of the Securities and Exchange Commission.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be in writing and signed by the parties, which may be in the form of a clause in contract or in the form of a separate agreement. An exchange between the parties through letters, facsimiles, telegrams, telex, data exchange with an electronic signature or other means that provide a record of the agreements. A statement of claim or defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other also constitutes an enforceable arbitration agreement.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement is silent, a sole arbitrator is appointed. If the parties are unable to agree on the arbitrator, either party may file a motion with the court requesting the court to appoint an arbitrator.

The parties may challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts as to their impartiality, independence or qualification agreed by filing a statement with the arbitral tribunal. If the challenge filed with the arbitral tribunal is unsuccessful, the challenging party may request the court to challenge. Nevertheless, no party shall challenge the arbitrator appointed except where the said party is not aware of the grounds for challenge at the time of the appointment.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties may choose arbitrators from the list of arbitrators of the relevant institute. The candidates are equipped with professional experiences from various professions, such as civil and commercial law, engineering, investment, international law and communication technology, to cater for various levels of complexity of arbitration. The parties are also free

to choose an unlisted arbitrator, subject to the mutual agreement of both parties; however, this is rare in practice.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Arbitral procedure is subject to the rules of the arbitration institutes selected by the parties in arbitration agreements. Where an agreement stipulates that any dispute shall be settled by arbitration without referring to specific arbitration rules, the parties may follow the rules of the institute where the claim is submitted.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

An arbitral tribunal or a party with the consent of the majority of the arbitral tribunal may request the court to issue a subpoena or order for submission of any documents or materials during an arbitration. In addition, a party to arbitration may request the court to issue an order for interim relief before or during the arbitration proceedings. If the court is satisfied that had such proceedings been in court, the court would have been able to issue a subpoena, court orders and interim relief, the court may proceed as requested. The relevant provisions under the Civil Procedure Code apply. Furthermore, the court can make a final decision on silent matters or other matters, such as the appointment, challenging and jurisdiction of arbitrators. The court's powers cannot be overridden by agreement.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

The Thai Arbitration Act does not expressly afford arbitrators the authority to order interim relief unless the rules of the arbitration institute agreed between the parties specify the arbitral tribunal's power to award interim remedies. However, there are no formal written laws and it is uncertain as to whether the interim remedies awarded by arbitrators are enforceable.

Award

30 | When and in what form must the award be delivered?

There is no statutory time limit within which an award must be delivered unless otherwise specified in the rules of the arbitration institute. The award shall be made in writing and signed by members of the tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority shall suffice, provided that the reason for the omission of signatures for the remaining arbitrators is stated.

Appeal

31 | On what grounds can an award be appealed to the court?

A party may file an application for setting aside the arbitral award with the competent court within 90 days of receipt of a copy of the award or of the correction or interpretation or of an additional award.

The court shall set aside the arbitral award if the applicant can prove that:

- a party to the arbitration agreement was under some incapacity under the law applicable to that party;
- the arbitration agreement is not binding under the law of the country agreed by the parties, or failing any indication thereon, under the law of Thailand;
- the party making an application was not given proper advance notice of appointment of the tribunal or the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;
- the award deals with a dispute not within the scope of the arbitration agreement (if the award on the matter that is beyond the scope thereof can be separated from the part that is within the scope, the court may set aside only the part that is beyond); or
- the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or unless otherwise agreed by the parties.

The court shall also set aside the arbitral award if the court finds that:

- the award involves a dispute not capable of settlement by arbitration; or
- the recognition or enforcement of the award would be contrary to public policy.

An appeal against the lower court judgment under the Arbitration Act must be filed with the Supreme Court or the Supreme Administrative Court, as the case may be. Decisions of the lower court can only be appealed in the following circumstances:

- the recognition or enforcement of the award is contrary to public policy;
- the order or judgment is contrary to the provisions of law concerning public policy;
- the order or judgment is not in accordance with the arbitral award;
- the judge who sat in the case gave the dissenting opinion; or
- the order concerns provisional order measures for protection under section 16 of the Arbitration Act.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The award shall only be enforced if it is subject to an international convention, treaty or agreement to which Thailand is a party, and such award shall be applicable only to the extent that Thailand accedes to be bound.

The party seeking enforcement of foreign and domestic awards is required to file an application with the competent court within three years of the day that the award becomes enforceable and produce the following documents to the court:

- an original or certified copy of the arbitral award;
- an original or certified copy of the arbitration agreement; and
- a Thai translation of the award and of the arbitration agreement by a translator who has taken an oath or who was affirmed before the court or in the presence of an official or an authorised person, or who was certified by an official authorised to certify translations or by a Thai envoy or consul in the country where the award or the arbitration agreement was made.

The court may refuse enforcement of the arbitral award, regardless of where it was made, if the party facing enforcement can prove that the award has not yet become binding, that the award has been set aside or suspended by a competent court or under the law of the country where it was made, or that there are any of other grounds for setting aside of the arbitral award.

Costs

33 | Can a successful party recover its costs?

Unless otherwise agreed by the parties, the fees and expenses of the arbitral proceedings and the remunerations for the arbitrator, excluding attorneys' fees and expenses, are paid in accordance with the terms stipulated in the award.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative dispute resolution (ADR) options available in Thailand are out-of-court arbitration, court-annexed arbitration, court-supervised mediation, out-of-court mediation and negotiation. In 2019, Thailand passed the new Mediation Act BE 2562 (AD 2019), which allows the parties to resolve the dispute by certified mediators outside the courthouse and allows mediation to be enforced by the court if the other party does not comply with it. Furthermore, in 2020, an amendment was made to the Civil Procedure Code permitting court-supervised pre-litigation mediation to take place prior to the actual filing of the case. Importantly, these meditation processes are not subject to any court fees. If mediation is unsuccessful and the prescription period has lapsed after the filing of the application or it will lapse within 60 days of the date of the mediation's conclusion, the prescription period shall be extended for 60 days from the end of the mediation. In Thailand, parties to disputes often resolve their disputes through informal negotiations.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no requirement for the parties to consider ADR before litigation or arbitration and the court or tribunal cannot compel the parties to participate in an ADR process.

However, some specialised cases in specialised courts are required by law to have a mediation session before going to trial for the purpose of a continuous relationship between the parties, such as in family and labour disputes.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Act on the Timeframe of Judicial Proceedings BE 2565 (AD 2022) was put into effect on 23 January 2023 after being enacted on 25 October 2022. Its purpose is to enhance the efficiency of judicial administration in Thailand and establish a clearer timeframe for judicial proceedings.

According to this act, judicial authorities in Thailand including the Courts of Justice, are required to establish specific timeframes for each stage of their judicial services. In line with this, the Office of Judiciary has issued the Judicial Regulation on the Timeframe for Court Cases BE 2566 (AD 2023), which became effective on 24 January 2023, to govern the timeframe of court proceedings. The Regulation outlines specific timeframes for each stage of proceedings in the Court of Justice based on the case type at each court level.

The Regulation classifies cases in the court of first instance into three categories:

1. Special Management Case: A case without complexity that is likely to be resolved in one hearing or through document submission instead of witness examination. The timeframe is six months from the date of the order accepting the complaint.
2. Ordinary Case: A case that requires witness examination and cannot be resolved quickly. The timeframe is one year from the date of the order accepting the complaint. However, for criminal cases where the defendant is detained during the proceedings, the timeframe is six months from the issuance of the arrest warrant. Additionally, for all types of civil and criminal cases falling under the jurisdiction of the district court, the timeframe is six months from the date of the order accepting the complaint.
3. Extraordinary Case: A complicated case that cannot be completed within one consecutive session of witness examination, requiring multiple sessions of consecutive days of witness examination, two to four days per session. The timeframe is one year from the date of the order accepting the complaint.

The timeframe for the Appeal Court with jurisdiction over cases decided by the courts of first instance in Bangkok, the Regional Appeal Courts with jurisdiction over cases decided by courts of first instance outside Bangkok, and the Specialised Appeal Courts to consider the appeal are between four months and one year from the date of receiving the case file from the court of first instance. The specific duration within this timeframe depends on the type of case.

The timeframe for the Supreme Court to consider the appeal is one year from the date of receiving the case file from the court of first instance, except for some types of criminal cases and civil or criminal cases where witness examination is required at the Supreme Court stage.

Additionally, the Regulation provides specific timeframes for the consideration of various petitions such as petitions for provisional release and release orders, refund of court fees, matters seeking the decision of the President of the Appeal Court, and permission to appeal to the Supreme Court.

Furthermore, the Administrative Court and Constitutional Court have also issued their regulations to define the timeframe applicable to their proceedings.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

There are no proposals for dispute resolution reform.

Pisut Rakwong pisut@pisutandpartners.com
Supachoke Pongdasakorngamjai supachoke@pisutandpartners.com

3 Rajanakarn Building, 8th Floor, 3 South Sathorn Road.
Yannawa, Sathorn, Bangkok 10120, Thailand
Tel: +66 2026 6226
www.pisutandpartners.com

Read more from this firm on Lexology

Read this article on Lexology

United Arab Emirates

Amal Al Raisi, Charlotte Foster and Celine Abi Habib Kanakri

Kennedys Law LLP

RETURN TO CONTENTS

Summary

LITIGATION	583
Court system	583
Judges and juries	585
Limitation issues	585
Pre-action behaviour	587
Starting proceedings	588
Timetable	588
Case management	589
Evidence – documents	589
Evidence – privilege	590
Evidence – pretrial	590
Evidence – trial	590
Interim remedies	591
Remedies	591
Enforcement	591
Public access	592
Costs	592
Funding arrangements	593
Insurance	593
Class action	593
Appeal	593
Foreign judgments	594
Foreign proceedings	595
ARBITRATION	**595**
UNCITRAL Model Law	595
Arbitration agreements	595
Choice of arbitrator	596
Arbitrator options	596
Arbitral procedure	597
Court intervention	597
Interim relief	597
Award	598
Appeal	598
Enforcement	599
Costs	600
ALTERNATIVE DISPUTE RESOLUTION	**601**
Types of ADR	601
Requirements for ADR	602

Read this article on Lexology

MISCELLANEOUS 602
Interesting features 602
UPDATE AND TRENDS 603
Recent developments and future reforms 603

LITIGATION

Court system

1 What is the structure of the civil court system?

The UAE has both onshore and offshore jurisdictions, which have distinct laws and regulations. The onshore courts, where proceedings are conducted in Arabic, operate a civil law-based system. The offshore jurisdictions, which include the Dubai International Financial Centre in Dubai (DIFC) and the Abu Dhabi Global Market in Abu Dhabi (ADGM), have their own civil and commercial laws and procedures, and their own courts.

UAE onshore courts

The UAE onshore courts run in two systems, federal and local. The emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system. However, Abu Dhabi, Dubai and Ras Al Khaimah maintain their own local judicial departments. Both systems have three levels of courts, which are:

- the court of first instance for both federal and local cases – this has jurisdiction over all civil, commercial, administrative, labour and personal status cases;
- the Abu Dhabi federal court of first instance is exclusively competent to hear all disputes which the Ministries and Federal Authorities are parties to;
- the court of appeal for both federal and local cases – this represents the second stage of litigation and is competent to hear court of first instance judgments where the losing party was not satisfied and appealed the court of first instance judgment; and
- the court of cassation for local cases. All decisions of the court of cassation are final and binding and are not subject to further appeal. For federal cases, this is the Federal Supreme Court.

There are four types of court: civil courts, commercial courts, labour courts and personal status courts. The courts are divided into two circuits: the minor and major circuits. The minor circuits are formed by a single judge who hears all claims of first instance regardless of their value and judgements issued by this circuit are final if the value of the case doesn't exceed 50,000 Dirhams. The major circuits are formed of three judges, who have jurisdiction over all civil, commercial and labour actions that do not fall within the jurisdiction of the minor circuits (plus a few other matters such as real estate and bankruptcy).

For certain types of disputes, claimants have other alternatives to the court system, such as the Insurance Disputes Settlement and Resolution Committee for most insurance disputes, the Medical Liability Committee and the Rental Disputes Committee.

UAE offshore courts

The UAE hosts two judicial free zones (DIFC and ADGM), which are independent English-language common law jurisdictions, with the DIFC having its own laws modelled on English law and the ADGM largely adopting English law.

DIFC

The DIFC courts have jurisdiction over most civil and commercial matters occurring within the DIFC or when expressly agreed between the parties to the dispute. The DIFC courts are divided as follows:

- The Small Claims Tribunal (SCT), which is made up of a single judge who can hear cases where the amount or value of the claim does not exceed 500,000 dirhams, relating to employment law where all parties to the claim elect in writing that it be heard by the SCT and non-employment-related claims where the amount does not exceed 1 million dirhams and all parties elect in writing for the claim to be heard by the SCT.
- The Court of First Instance, which is made up of a single judge and can hear civil or commercial cases and disputes arising from or related to a contract that has been fulfilled, or a transaction that has been carried out, in whole or in part in the DIFC, or an incident that has occurred in the DIFC; objections filed against a decision made by the DIFC's bodies, which are subject to objection in accordance with the DIFC's laws and regulations; any application over which the court has jurisdiction in accordance with the DIFC's laws and regulations; and any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.
- The Court of Appeal, which has jurisdiction over appeals filed against judgments made by the Court of First Instance and interpretation of any article of the DIFC's laws upon the request of any of the DIFC's establishments (with leave). It comprises at least three judges, with the Chief Justice or the most senior judge presiding. This court is the highest court in the DIFC courts, and no appeal shall arise from a decision of this court.

In December 2021, the DIFC courts announced the launch of the Specialised Court for the Digital Economy aimed at simplifying the process of complex civil and commercial disputes related to the digital economy (including big data, blockchain and AI)), which had its specialised rules issued in December 2022.

ADGM

The ADGM courts have jurisdiction over most civil and commercial matters occurring within the ADGM or when expressly agreed between the parties to the dispute. The ADGM courts have the following levels:

- The Court of First Instance, which is divided into three categories: the Small Claims Division (SCD), the Employment Division and the Commercial and Civil Division. The Commercial and Civil Division can hear appeals from the SCD based on a question of law. A party requires permission to appeal from an order or judgment in the Court of

First Instance to the Court of Appeal. It comprises the Chief Justice and any judge of the ADGM courts directed to sit in that court by the Chief Justice.
- The Court of Appeal consists of the Chief Justice and any judge of the ADGM courts directed to sit in that court by the Chief Justice. It is the highest court, from which there is no further appeal.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

UAE onshore courts

Judges have an inquisitorial role and maintain significant discretion. Judges at first instance are tasked with determining the facts of the case (very often through court-appointed experts, who prepare reports to assist the court), referring the case to investigation, hearing witnesses, interrogating the parties to the dispute and then ruling on the law. Proceedings in the UAE are based on written pleadings of the parties, which are supported with documentary evidence where there are generally no oral hearings.

The Federal Supreme Court maintains five judges appointed by the Ruler of the UAE, after approval by the Federal Supreme Council. The judges of the Federal Supreme Court cannot be removed and their services cannot be ended except in certain circumstances.

The UAE's first female judge, HE Judge Kholoud al Dhaheri, was appointed by the Abu Dhabi Judicial Department in 2008. Since then, a number of female judges and public prosecutors have been appointed in the UAE, and these numbers are increasing annually, highlighting the UAE's continued efforts to bridge the gender gap and empower women in the judiciary.

Juries are not involved in civil proceedings before the UAE courts.

UAE offshore courts

On the other hand, the DIFC and ADGM courts have an adversarial system, based on the English system. DIFC courts judges, including the Chief Justice, are appointed by a decree issued by the Ruler of the UAE for a period not exceeding three years, and may be reappointed until they reach the age of 75. ADGM courts judges are nominated by the Chief Justice and subsequently appointed by the ADGM Courts Board.

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods (the time within which a party must file a claim or commence a legal action) are set out in various laws depending on the type of claim. Generally, the limitation periods for civil claims are:

Type of claim	Limitation period	UAE law
Contracts (non-commercial)	15 years	Article 473 of the UAE Civil Code

Read this article on Lexology

Type of claim	Limitation period	UAE law
Contracts (commercial)	5 years	Article 92 of the UAE Commercial Code
Building contracts for defects	10 years	Article 880 of the UAE Civil Code
Disputes relating to cheques	6 months–3 years	Article 618 of the UAE Commercial Code
Insurance disputes	3 years	Article 1036 of the UAE Civil Code
Tort (causing harm)	3 years	Article 298 of the UAE Civil Code
Sale of goods	1 year	Article 524 of the UAE Civil Code
Employment disputes	1 year	Article 6 of the UAE Labour Law
Disputes in relation to the carriage of goods by sea	1 year	Article 287(a) of the UAE Commercial Maritime Law
Civil guarantees	6 months	Article 1092 of the UAE Civil Code
Commercial guarantees	5 years	Article 92 of the UAE Commercial Code
Rental claims (renewal rights)	5 years	Article 474(1) UAE Civil Code

There is no uniform test for triggering the limitation period. It is very important in each case to check what has triggered the limitation period – for example, whether it was triggered by the breach of contract or the discovery of the breach or the harmful act itself or by the discovery of the harmful act.

Certain statutes (eg, article 481 of the UAE Civil Code) suspend the limitation period if a party can demonstrate a 'lawful excuse' for not filing a claim within the relevant time period. What will amount to a 'lawful excuse' is not entirely clear. However, one example is incapacity on the part of the claimant. The UAE courts have also noted that that the limitation period will be suspended if it appears from the surrounding facts and circumstances of the case that there was an obstacle preventing the claim from being commenced.

For civil claims commenced in the DIFC courts, the limitation periods are:

Type of claim	Limitation period	DIFC law
Breach of contract	6 years	Article 123 of DIFC Contract Law 2004
Joint liability	3 years	Article 9 of DIFC Obligations Law 2005
Negligence, occupiers' liability or misrepresentation	15 years	Article 9 of DIFC Obligations Law 2005
Fraud	No time limit or 6 years if contract-based	Article 9 of DIFC Obligations Law 2005 and article 123 of DIFC Contract Law 2004
Employment disputes	6 months	Article 10 of DIFC Employment Law 2019

For civil claims commenced in the ADGM courts, the limitation periods are as dictated by English law (eg, for breach of contract, six years and for personal injury three years).

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Although onshore UAE courts encourage the parties to attempt to resolve their disputes using methods such as mediation prior to commencing court action, this was generally not a legal requirement until very recently (see below). A few exceptions to this included: where the contract required it; in the emirates outside of Dubai, Abu Dhabi and Ras Al Khaimah, where parties to commercial disputes were required to first refer their dispute to the Reconciliation and Settlement Committee; in labour disputes where the labour law requires the employer/employee to file a request with the concerned authority to attempt to seek settlement. If settlement is not successful, then the dispute shall be referred to the court; and when a party wishes to commence a claim against a public entity. In the latter case, they will require permission from the legal department of that emirate. In the case of Dubai, a party will require permission from the Ruler's Court, who will attempt to reach amicable settlement of the dispute. If it cannot be settled within two months, the claim may proceed.

However, on 31 March 2021, the Dubai Court of First Instance issued Circular No. 2 of 2021 introducing for the first time the concept of a 'pretrial conference', a concept familiar to common law jurisdictions. The Circular provides that the pretrial conference will be held between the parties under the supervision of a judge where the parties are to discuss matters that will assist in the case being disposed of without delay – giving the examples of the possibility of settlement and expediting the trial process, narrowing down the scope of disputed issues and scheduling a procedural timetable for submission of pleadings, documents, expert reports etc.

Otherwise, traditionally, parties have not undertaken as many pre-commencement steps as they would in other jurisdictions (unless expressly required by the contract). The main reasons for this include the fact that the concept of 'without prejudice' does not operate in the UAE courts (so information used in mediation, for example, can potentially be used against you) and the lack of costs consequences (ie, courts only usually order the payment of a very nominal amount of the other side's legal fees, even if a party is unsuccessful).

Some voluntary pre-action steps that a party could take could include seeking a report from an expert frequently retained by the courts to review the evidence and present his or her views. Such a report, if favourable, could be used to attempt to persuade the other party of your position, or be used as evidential support in proceedings commenced subsequently.

In the DIFC, there are also no formal pre-action protocol procedures. However, the Rules of the DIFC Courts (the DIFC Court Rules) imply the use of alternative dispute resolution as part of the overriding objective. In the ADGM courts, the Rules provide that the court will expect the parties to have considered whether mediation might enable the settlement of the dispute prior to the commencement of proceedings, and the court may, on its own initiative or upon the application of any party, make an order referring the dispute or any part of the dispute to court-annexed mediation.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

To commence proceedings in the UAE, a claim must be filed at the Case Management Office of the relevant court (ie, the court that has jurisdiction to hear the dispute) either in person or online via the court's electronic portal. The claim needs to set out the basis of the dispute and the remedies sought and attach any supporting documents in Arabic or translated into Arabic by an official translator as the official language is still Arabic. However, the Chairman of the Federal Judicial Council or the President of the local judiciary, as the case may be, may issue a decision in certain circuits in specialised matters or cases to hold the case proceedings in English including the written submissions, witness statements, documentations and verdict. A court fee will also need to be paid. In Dubai, the court fee is 6 per cent of the value of each of the head of the claims, which is capped at a maximum of 40,000 dirhams per claim value (except for labour claims which is 5 per cent of the claim value, capped at 20,000 dirhams per claim) and in Abu Dhabi, the court fee is 5 per cent of the claim amount per claim, which is capped at a maximum of 40,000 dirhams per claim (except for labour claims, which do not require a court fee). Note that these are subject to change. The court bailiffs' office will then serve the claim along with a court notice on the defendant and the first hearing date will be set. This is usually within 10 days after the claim has been filed. The UAE courts are very efficient and regular dates for pleadings, and eventually judgment, are set within short and reasonable time periods.

In the DIFC courts, proceedings are commenced by filing a form under Part 7 or Part 8 of the Rules and paying the court fee. Proceedings are commenced once the court issues a claim form at the request of the claimant. After a claim form has been issued by the court, it must be served on the defendant by the claimant within four months after the date of issue (unless the defendant is outside of the DIFC or Dubai, in which case the claimant has six months).

The ADGM has a similar process where claims must be filed electronically and proceedings are commenced when the court issues the claim form. The claimant has a similar time to serve the proceedings on the defendant (except in the case of the Small Claims Division, where it has 14 or 21 days, depending on whether the defendant is inside or outside Abu Dhabi).

Timetable

6 What is the typical procedure and timetable for a civil claim?

Generally, in the UAE onshore courts, once a claim form is served on a defendant, the court will schedule the first hearing within 15 days from the date of registering the statement of claim. After the defence is filed, there may be several rounds of submissions and the court may appoint an expert from its panel of experts. The expert then largely takes over conduct of the case, meets with the parties, reviews the evidence and pleadings, and issues a report to the court. The court then reviews the expert's report and will often adopt the expert's

findings and issue judgment. Generally, cases are usually concluded within 12 to 18 months of their commencement.

The processes in the DIFC and ADGM courts are similar. A defendant can file an acknowledgement of service within 14 days after service of the claim form. Assuming it has done so, a defendant who wishes to defend all or part of a claim must file a defence and serve a copy on the claimant within 28 days after service of the claim form (for small claims in the ADGM, a response is required within seven days). If a claimant wishes to file a reply to the defence, it must file and serve the reply on all parties within 21 days after service of the defence. At this stage, the court may issue a summary judgment, issue directions or set a date for a case management conference depending on the case. Generally, the process is quite fast-paced and efficient.

Case management

7 | Can the parties control the procedure and the timetable?

The Case Management Office controls the procedure and timetable in UAE courts. However, a party can request an adjournment of a hearing for extra time to file a proceeding or document. With the introduction of Circular No. 2 of 2021 in Dubai Courts, introducing for the first time the concept of a pretrial conference, the parties in Dubai Court proceedings have some more control over the scheduling of a procedural timetable.

The parties in the offshore courts would have slightly more flexibility to determine the timetable (eg, the parties may attempt to agree the timetable by consent, which the court can endorse). In DIFC and ADGM courts, it is possible for the parties to request the court to issue a consent order to stay the proceedings or extend a deadline.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no duty to preserve documents or other evidence pending trial under UAE law. Further, the parties are not required to share documents with one another. However, the litigant may request the court to order the opponent to submit any written document in their possession in limited cases such as (1) if the law permits requiring him to submit or deliver it; and (2) if the document is joint between the litigants.

The ADGM Court Procedure Rules and DIFC Court Rules contain detailed provisions on disclosure of documents, but generally, a party is only required to disclose those documents on which it relies, unless ordered by the court to do otherwise. Courts also have the power to order the preservation of evidence.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The concepts of legal-professional privilege and 'without prejudice' privilege do not exactly exist within onshore UAE. There are no express provisions within the law covering them, so technically a party can use any document that supports their position in civil litigation. However, UAE lawyers are bound by the duty of confidentiality to their client, so communications between them and their clients would be confidential (subject to some very limited exceptions, such as where the court requires their production).

Similar duties of confidentiality exist in the DIFC and ADGM, where lawyers are required to keep information communicated to them by their client confidential unless such disclosure is authorised by the client, ordered by the ADGM courts or as required by law. The DIFC Court Rules go further to actually define the term 'privilege', which is stated to be the right of a party to refuse to disclose a document or produce a document or to refuse to answer questions on the ground of some special interest recognised by law.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

Following the latest amendments to the Civil Procedures Law, the litigants may exchange memoranda, documents and experts reports before the trial phase with the case management. The court may also assign one or more local/ international expert(s) to prepare or review those expert reports submitted by the litigants.

The DIFC and ADGM courts have comprehensive rules on evidence admissibility, and it is common for the court to set dates by which the parties are to exchange witness statements. A witness who has provided a statement will be expected to attend the trial to be cross-examined. The courts can also admit expert evidence both orally and through written expert reports. Those experts will also then be required to attend for cross-examination at trial.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

In the UAE onshore courts, evidence is generally presented through written submissions and memorandums. However, the parties can file an application to the court requesting permission to present oral evidence for witnesses and experts. The application is at the discretion of the court only.

The DIFC and ADGM courts are more akin to the English courts and allow parties to present their evidence by way of both written and oral evidence for witnesses and experts, and are often required to attend for cross-examination at trial.

Interim remedies

12 | What interim remedies are available?

There are a range of interim remedies available in UAE courts, such as precautionary attachment orders to prevent dissipation of assets, travel bans to prevent a defendant from leaving the country while proceedings are ongoing and arrest orders. The granting of interim remedies is a matter for the court's discretion and it is for the applicant to prove that the relevant requirements have been satisfied.

Both the DIFC Court Rules and ADGM Court Procedure Rules provide that they are able to grant a number of interim remedies, including:

- interim injunctions;
- interim declarations;
- property preservation and inspection orders;
- orders for the sale of property;
- freezing orders;
- disclosure and search orders; and
- interim payment orders.

Remedies

13 | What substantive remedies are available?

The substantive remedy available in UAE courts, if (in the case of contract law) a party is unable to give specific performance of an obligation, is monetary damages – direct damages, loss of profits, loss of opportunity, consequential damages and even moral damages. The UAE does not recognise the concept of punitive or exemplary damages. In addition, the court can also award up to 12 per cent interest; however, recently, 5 per cent is being awarded.

Under the DIFC Law of Damages and Remedies, the primary substantive remedy available is damages. However, a court may also make orders for restitution, specific performance of a contract, declaration as to the rights, liabilities and obligations of a person, an injunction or any other order that the court thinks fit. The measure for damages is the amount of money that would put the person in the same position as they would have been in had they not sustained the wrong to be compensated, plus any other loss caused by the breach. The ADGM courts also have similar powers to award damages as well as make orders for injunctions or specific performance.

Enforcement

14 | What means of enforcement are available?

In UAE courts, enforcement of a final judgment is dealt with by the Court of Execution. A judgment creditor must file a statement of execution with the Court of Execution, which is served on the judgment debtor, who then has seven days to pay the judgment amount. If the judgment amount is not paid within the specified time limit, the judgment creditor may

file an application with the Court of Execution requesting them to file an attachment order against the judgment debtor's assets.

In the DIFC courts, a judgment creditor may enforce a judgment for the payment of money by a charge over property, attachment of assets, execution against assets or appointment of a receiver. In the ADGM courts, enforcing a judgment or order for the payment of money may be done by taking control of goods, attaching of earnings, obtaining a third-party debt order, charging orders and other orders for things such as possession of land and appointing receivers.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Technically, hearings in the UAE courts should be held in public. However, in practice, there are usually no oral hearings. The court file (containing the pleadings, judgments, etc) is not available to the public to inspect – only the parties to the proceedings and their lawyers (or another party with a power of attorney from that party) can access the file.

The general rule is that DIFC and ADGM court hearings are public unless the judge determines otherwise. DIFC and ADGM court judgments and orders can be found on their websites. In addition, the ADGM courts' website contains hearing dates and recordings of virtual hearings for some cases.

Costs

16 | Does the court have power to order costs?

The UAE courts do have the power to order costs. However, they usually only award costs to the successful party for court filing fees, court-appointed experts' fees and a minimal amount for lawyers' fees of approximately 2,000 dirhams. There is no concept of security for costs in the UAE courts.

The general rule with respect to costs in the DIFC courts is that the unsuccessful party will be responsible for settling the successful party's costs. However, the DIFC Court Rules provide that the court must take into consideration all the circumstances when making an order as to costs, including the parties conduct. The ADGM Court Procedure Rules follow a similar framework to the DIFC with respect to costs.

Funding arrangements

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

UAE law permits conditional and contingency fee arrangements between lawyers and clients. According to article (49) of the new Advocacy Law, the lawyer and client may agree on a percentage of the right awarded which shall not exceed 25 per cent of the value and no fees shall be due if the case is lost in this case. Conditional fee arrangements (eg, where a lawyer receives an uplift in fees in the event of success, but not a share of the proceeds) are permitted in DIFC and ADGM court proceedings but should comply with certain requirements. Contingency fee arrangements are generally prohibited in DIFC court proceedings.

UAE law does not prohibit third-party funding. However, it is still not widely used in UAE court proceedings. Third-party funding is permitted in both the DIFC and ADGM courts – see, for example, the DIFC's Practice Direction on Third Party Funding in March 2017 and Part 9 of the ADGM Court Regulations.

Insurance

18 Is insurance available to cover all or part of a party's legal costs?

UAE law does not prohibit after-the-event and other types of costs insurance. However, they are not commonly used in UAE litigation, whether onshore or offshore UAE.

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Neither UAE onshore courts nor offshore courts have any laws or procedures for class action proceedings. However, both the DIFC and ADGM courts have the power to make a group litigation order if there are a number of claims that give rise to common or related issues of fact or law.

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

A party has the right to appeal court of first instance judgments to the court of appeal, generally within 30 days, and it is very common to do so. Court of appeal judgments can also be appealed to the court of cassation, generally within 30 days but only if the value of the lawsuit exceeds 500,000 dirhams; if there was a violation of law (a mistake in its application or interpretation); if there was an issue with the procedures or jurisdiction that effected the judgment; if the judgement contradicts a previous judgement that acquired the force of res

judicata and that was rendered towards the same parties on the same subject matter; if there were no grounds or insufficient grounds in the judgment; or it was out of scope from what was requested.

Court of cassation judgments are final and binding and cannot be appealed. Decisions of the Insurance Dispute Committee and Medical Liability Committee can be appealed to the court of first instance within 30 days.

Both the ADGM and DIFC courts provide that decisions of the court of first instance can be appealed to the court of appeal where permission to appeal has been obtained. Permission will only be granted where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Decisions of the courts of appeal are final and binding and cannot be appealed.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

The UAE is a party to several agreements for judicial cooperation in relation to the reciprocal enforcement of foreign judgments between the signatory countries (some of which bind the DIFC courts as well), for example, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications. In these cases, the party seeking enforcement must apply to the Execution Court to register the judgment (with a certified and legalised copy of the judgment and proof that it is enforceable under the law of the country of origin). The Execution Court's order can be appealed to the court of appeal within 30 days.

Where no treaty or agreement exists, pursuant to article 222 of the new Civil Procedure law, judgments and orders delivered by a foreign country may be ordered to be executed in the UAE under the same conditions as prescribed in the law of that country for the execution of judgments and orders issued in the UAE. The execution, including the particulars specified in article 44 of the Law shall be made on a petition and submitted by the person concerned to the execution judge. The judge shall issue his order within five days from the date of its submission. His order may be appealed in accordance with the rules and procedures prescribed for filing an appeal. It shall not be admissible to order the execution before the verification of the following:

- The courts of the UAE are not exclusively competent in the dispute in which the judgment or order was rendered and the foreign courts that issued it are competent in accordance with the rules of international jurisdiction established by their law.
- The judgment or order is delivered by a court in accordance with the law of the country in which it was issued and duly ratified.
- The litigants in the case in which the foreign judgment was delivered were summoned and were duly represented.
- The judgment or order has the force of res judicata in accordance with the law of the court thatissued it, provided that the judgment has acquired the force of res judicata or provided for in the same judgment.
- The judgment does not conflict with a judgment or order rendered by a court of the UAE and does not contain anything contrary to public order or morals.

The DIFC and ADGM courts have also signed several similar agreements and have the power to ratify foreign judgments. Once the judgment has been ratified by the court it can be enforced within the DIFC or ADGM as any other judgment would, in accordance with the court rules and regulations. Often, the DIFC courts have been used as a conduit jurisdiction to enforce foreign court judgments in Dubai (especially when the subject of the judgment has assets in the DIFC).

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Generally, requests for evidence from foreign courts would occur through diplomatic channels through the onshore UAE courts and would often be subject to evidence of any arrangements between the UAE court and the foreign court (such as specific treaties).

However, the DIFC and ADGM have written procedures set out for the collection of evidence for use in foreign courts (see Rules 30.65–67 of DICR Court Rules; Rules 131–134 of the ADGM Court Procedure Rules of 2016; and article 82 of the ADGM Court Regulations). The procedures appear to have been used for the first time recently in the DIFC Court of First Instance where the court allowed the examination of two UAE-based witnesses based on two requests for judicial assistance from the District Court of the State of Minnesota.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes. The UAE's onshore arbitration law is set out in Federal Law No. 6 of 2018 (UAE Arbitration Law) and has brought the UAE's approach to arbitration more in line with international standards. UNCITRAL includes the arbitration laws of the UAE, namely the UAE Arbitration Law, the Dubai International Financial Centre's (DIFC) Arbitration Law No. 1 of 2008 (as amended in 2013), and Abu Dhabi Global Market's (ADGM) Arbitration Regulations of 2015 in the list of jurisdictions that have arbitration laws based on the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The main requirement for an enforceable arbitration agreement is that it be in writing, otherwise it will be void (article 7(1) of the UAE Arbitration Law, article 12 of the DIFC Arbitration Law and article 14 of the ADGM Arbitration Regulations). An arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement.

However, the UAE Arbitration Law contains an additional requirement that the person or representative signing the arbitration agreement must have the authorisation or capacity to conclude the agreement, otherwise it will be null and void (article 4(1)). The courts have

taken various approaches in relation to whether a legal representative has the authority to bind the party to an arbitration clause, including requiring 'special authorisation' in the signatory's power of attorney expressly authorising them to conclude an arbitration, and a legal presumption that the signature is that of the legal representative to that entity and they have authority to agree to arbitration.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement and relevant rules are silent on the number of arbitrators and their appointment, then:

- the UAE Arbitration Law provides that there will be three arbitrators (article 9(1)). In that case, each party will nominate one arbitrator and then those two arbitrators will nominate the third arbitrator. If one of the parties fails to nominate its arbitrator within 15 days of the notice from the other party's request, or if the appointed arbitrators fail to arrive at an agreement regarding the third arbitrator, then the court shall appoint the third arbitrator (article 11(3));
- the DIFC Arbitration Law provides that there will be one arbitrator (article 16(2)). If the parties do not agree on the arbitrator within 30 days of one party's request, then the arbitrator will be appointed by the DIFC Court of First Instance (article 17(3)); and
- the ADGM Arbitration Regulations provide that there will be one arbitrator (article 18(2)). If the parties do not agree on the arbitrator within 30 days of one party's request, then the arbitrator will be appointed by the institution administering the arbitration or if there is none, then the arbitrator will be appointed by the ADGM Court of First Instance (article 19(3)(a)).

In relation to challenging the arbitrators, all three UAE arbitration laws have similar requirements – that arbitrators can only be challenged if circumstances that give rise to serious doubts regarding their impartiality or independence exist, or if it is proven that conditions agreed upon by the parties or prescribed by the law were not satisfied. A party can only challenge for reasons they become aware of after the arbitrator's appointment (article 14 of the UAE Arbitration Law, article 18 of the DIFC Arbitration Law and article 20 of the ADGM Arbitration Regulations).

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties are free to elect the arbitrator they deem fit (provided that they are independent) even if not registered with any of the local institutions. The UAE has a significant pool of arbitrators to choose from – both locally and internationally – sufficient to meet the needs of even the most complex arbitrations. That said, it is still common to be seeking international expertise for the larger or more complex disputes – most often among English barristers or highly qualified civil lawyers (from both the Middle Eastern region and abroad).

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The UAE Arbitration Law provides that the parties may agree on the procedures to be adopted in the arbitration, including to agree that a particular institution's arbitral rules will be applicable. If there is no agreement to follow certain procedures, then the Tribunal may determine the procedures it deems appropriate in a manner not inconsistent with the principles of litigation and international conventions to which the UAE is a party (article 23 of the UAE Arbitration Law). The DIFC and ADGM laws provide similarly.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Generally, the court's ability to intervene in UAE-seated arbitrations is more limited than it used to be before the enactment of the UAE Arbitration Law. A party can approach the court in certain circumstances – for example, a party may request the court to take necessary action to complete the formation of the tribunal if there are difficulties with arbitrator appointment (article 11) or a party can request the court to rule on the tribunal's decision as to its own jurisdiction within 15 days of that decision (article 19).

The DIFC Arbitration Law and ADGM Arbitration Regulations expressly provide that the court shall not intervene in arbitration except to the extent provided in the law – and there are a number of grounds provided in the law, similarly including in relation to the appointment of arbitrators and a review of the decision on jurisdiction.

The parties cannot generally agree to limit the court's powers of intervention unless expressly set out in the law – for example, article 23(3) of the DIFC Arbitration Law provides that the court's ability to intervene is 'subject to the process agreed between the parties'.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Arbitrators have the power, at the request of a party, to grant interim or precautionary measures that the tribunal considers fit with respect to the subject matter of the dispute, unless the parties agree otherwise (article 21 of the UAE Arbitration Law, article 24 of the DIFC Arbitration Law and article 28 of the ADGM Arbitration Regulations). The court also has these same powers. These measures include to:

- preserve evidence that may be material to the dispute;
- take necessary measures to maintain goods that constitute part of the subject matter of the dispute;
- preserve assets and property out of which an award can be satisfied;
- maintain or restore the status quo pending determination of the dispute; or

- order an action to be taken to prevent current or imminent harm or prejudice to the arbitral process or refrain from taking an action that may cause harm or prejudice to the process.

The institutional rules also often provide the tribunal with these powers – for example, the new DIAC Rules of 2022 (Appendix II – Exceptional Measures) provide that a tribunal can grant any interim relief it considers appropriate in the circumstances, including preservation of assets or security for costs.

Award

30 | When and in what form must the award be delivered?

The award must be delivered in writing and signed by at least the majority of the arbitrators.

The UAE Arbitration Law states that it must be provided within the period agreed upon by the parties. If there has been no agreement, then the award must be issued within six months from the date of the first session of arbitration (extendable by six months by the Tribunal and longer, if necessary, by the court). It must contain the names and addresses of the parties, the names, nationalities and addresses of the arbitrators, a copy of the arbitration agreement, a summary of the parties' reliefs, submission and documents, the dispositive part and (if required) the reasons of the award, and the date and place of issuance (articles 41 and 42).

The DIFC Arbitration Law and ADGM Arbitration Regulations appear to be more flexible in this respect and do not contain a time limit within which arbitrators must issue the award. They only state that the award must contain the reasons upon which it is based unless the parties agree otherwise. They also require the award to state its date and the seat it was made, together with fixing the costs of the arbitration (article 38 DIFC Arbitration Law and article 55 ADGM Arbitration Regulations).

Appeal

31 | On what grounds can an award be appealed to the court?

Arbitral awards issued in accordance with the UAE Arbitration Law are final and binding and not subject to any supervision of the court of appeal, other than on very limited grounds. The limited grounds on which an arbitral award can be challenged or annulled are set out in article 53 of the UAE Arbitration Law. The grounds are:

- absence of an arbitration agreement (or if it is void or terminated);
- one of the parties, at the time of enforcement, lacks capacity or is of diminished capacity;
- the person lacked the legal capacity to take any action regarding the right, including capacity to enter into the agreement itself;
- if one of the parties was unable to present its case as a result of not being given proper notice of the proceedings, or the arbitral tribunal's violation of the litigation principles or for other reasons beyond its control;
- the arbitral award fails to apply the law agreed upon by the parties;

- if the composition of the tribunal or the appointment of one of the arbitrators is in conflict with the provisions of the law or agreement of the parties;
- if the arbitral proceedings are invalid to the effect that impairs the award, or if the award is rendered after the due time limit; or
- if the award deals with matters not falling within the scope of the arbitration agreement. If those matters can be separated, then the nullity affects exclusively the latter parts only.

The application to annul must be made within 30 days of notification of the award by the party requesting the annulment. The decision made by the court on this action to annul is final and not subject to any appeals (articles 53 and 54 of the UAE Arbitration Law).

The DIFC and ADGM's laws provide slightly more limited grounds for challenge (articles 41 and 57 respectively) but the applications can be made within three months of receipt of the award (not the shorter 30 days required by the onshore UAE laws). The grounds are that:

- a party to the arbitration agreement was under some incapacity, or the agreement was not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings;
- the award contains decisions beyond the scope of the submission to arbitration (if that section of the award can be separated then only that section will be set aside);
- the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, unless that agreement is in conflict with the provision of a law from which the parties could not derogate;
- the subject matter of the dispute was not capable of settlement by arbitration under its laws;
- the dispute was expressly referred to a different body or tribunal for resolution (DIFC only); or
- the award was in conflict with the public policy of the UAE.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

For enforcement in onshore UAE, a slightly different process applies for domestic awards versus foreign awards.

- Enforcement of domestic awards is governed by articles 52–57 of the UAE Arbitration Law. An application first needs to be made to the court of appeal to request the confirmation of the award requiring the original award or certified copy, a copy of the arbitration agreement, certified Arabic translation of the award and a copy of the transcript of filing the judgment with the court. The court then confirms and can enforce the award within a period of 60 days from the submission, unless it finds that one of the grounds for annulment is satisfied (article 55). The parties then have 30 days after the court of appeal's order to appeal to the court of cassation (article 54).
- For the enforcement of foreign awards, the procedure is set out in article 85(2) of Cabinet Decision No. 57 of 2018 (On the Regulation of Federal Law No. 11/1992 on the Civil Procedure). This is the same procedure as the enforcement of foreign judgments

except for the award. It must also have been issued on a matter for which arbitration is permissible in accordance with UAE law and is enforceable in the jurisdiction in which it is issued (article 86). An application for execution must be made in accordance with article 16 and submitted to the execution judge. The execution judge can then issue his or her order within three days, so long as the following are verified:

- that the courts of the UAE are not exclusively competent in the dispute in which the award was rendered and that the foreign tribunal is competent in accordance with the rules of international jurisdiction established by their law;
- the award is delivered in accordance with the law of the country;
- the litigants in the case in which the foreign award was delivered were summoned and duly represented (meaning that foreign summary judgments, for example, are not enforceable in the UAE);
- the award has the force of res judicata in accordance with the law that issued it; and
- the award does not conflict with a judgment or order rendered by a UAE court and does not contain anything contrary to public order.

Further, article 88 of the Executive Regulations states that the regulations will not prejudice the provisions of treaties, which would include the New York Convention (Recognition and Enforcement of Foreign Arbitral Awards 1958) to which the UAE is a party.

For enforcement in the DIFC and the ADGM, all awards, regardless of the state or jurisdiction in which they are made, are treated the same, with the same procedure. For enforcement of an award, a party must make an application for enforcement to that court (DIFC court if a DIFC award or ADGM court if an ADGM award). Subject to any challenges to recognition and enforcement, if the court decides to recognise the award, it will issue an order in both English and Arabic. The award creditor must then serve that court order on the award debtor and the award cannot be enforced until 14 days have elapsed or until any set-aside order has been disposed of.

Costs

33 | Can a successful party recover its costs?

The UAE Arbitration Law (article 46) provides the arbitral tribunal with the power to order the payment of arbitration expenses, including the fees and expenses incurred by the tribunal and the appointment of experts by the tribunal. The difficulty with the provision is that it does not expressly provide that arbitrators can order that the unsuccessful party pay the successful party's legal costs (which are often the largest part of the fees and expenses). Some of the institutional rules selected (such as the 2022 Dubai International Arbitration Centre Rules) expressly provide the tribunal with this power. In any case, especially where the arbitral rules are silent on the matter of legal costs (such as the Abu Dhabi Commercial Conciliation & Arbitration Centre Rules), it is best practice for parties to agree for the tribunal to have this power either in the arbitration agreement or in the terms of reference once the arbitration commences. If a third-party funder is involved, it would also be best practice for the parties to consider what would happen to those funder's costs and agree this in the terms of reference.

The DIFC Arbitration Law and ADGM Arbitration Regulations expressly provide that the arbitral tribunal must fix the costs of the arbitration in its awards, with the term 'costs' including fees of the tribunal and the reasonable costs of legal representation. Provided the tribunal orders so, a successful party can recover its reasonable costs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

Alternative forms of party-instigated dispute resolution (such as mediation, conciliation and negotiation) were generally not as common in the UAE as they were in jurisdictions such as the United Kingdom and Australia. This was largely due to the fact that the concept of 'without prejudice' privilege did not exist in the UAE, meaning that parties were more reluctant to engage in without prejudice discussions for fear that what they say will be used against them in later court proceedings. However, with the new Mediation Law (Federal Law No. 6 of 2021) and Mediation Centre Law (Dubai Law No. 18 of 2021) recently introduced, the UAE is demonstrating a strong intention to push parties to consider alternative dispute resolution (ADR). The Mediation Law addresses the issue of privilege by providing that any materials, agreements or concessions made by parties during mediation cannot be used before any court – and also provides more robust processes for both judicial and non-judicial mediation.

There are a few alternative forms of resolution set up by the courts and also for specific industries, for example:

- in the emirates outside of Abu Dhabi, Dubai or Ras Al Khaimah, all commercial disputes must first be referred to a Reconciliation and Settlement Committee to facilitate settlement and only then can proceedings be filed in court;
- the Special Judicial Committee has exclusive jurisdiction to determine all landlord and tenant disputes;
- the Centre for Amicable Settlement of Disputes in Dubai – where disputes of a certain nature (eg, claims under 100,000 dirhams) must first be referred to the centre for settlement, or parties can elect to approach the centre before commencing proceedings;
- the Insurance Disputes Committee for some insurance-related disputes;
- the Ministry of Labour's settlement process for disputes between employer and employee; and
- dispute resolution boards and other expert determination sometimes used in the construction industry.

The Dubai International Financial Centre (DIFC) court, while emphasising its primary role as a form for deciding civil and commercial disputes, encourages parties to consider the use of ADR (such as mediation and conciliation) and can also adjourn the cases to encourage parties to use ADR.

The Abu Dhabi Global Market (ADGM) courts provide a court-annexed mediation service, which was set up in 2016 to serve the increasing demand for mediation solutions. A dispute can be referred to court-annexed mediation either voluntarily by all parties to a dispute, or by an order of the court.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Generally, no (subject to the commercial disputes in the emirates outside of Dubai, Abu Dhabi or Ras Al Khaimah). However, the new Mediation Law means courts have the power to refer disputes to mediation at any stage of a case, provided the parties consent. Also, if the contract provides that ADR (such as negotiation or mediation) is required prior to commencing proceedings (especially arbitral proceedings), then it will be necessary to engage in that process to ensure the validity of the award.

The DIFC or ADGM court judges, if they deem it appropriate, can require parties to engage in an alternative dispute resolution process, such as mediation.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One of the particularly unique and interesting features of litigation in the UAE is the court's heavy use of experts to prepare reports to assist it with its decision-making. While in other jurisdictions courts are only likely to retain experts to assist in particularly technical or difficult cases and in addition to the parties' own experts, in the UAE, courts almost always appoint experts to review the facts and evidence and produce a report containing their findings. Although the reports are not binding, often these expert findings are adopted by the courts.

Furthermore, according to the new Civil Procedures Law, and with respect of foreign services, these shall be considered as having produced its effects after the lapse of 21 working days from the date of serving the concerned diplomatic mission in the state, with the letter of the Ministry of Foreign Affairs and International Cooperation containing the notification.

Finally, in accordance with article 9(1) of the new Civil Procedures Law, a notice may now be served by audio, video recorded calls, SMS, email and fax or any other means of modern technology.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

The most significant change in the arbitration landscape in the UAE has been Decree No. 34 of 2021, which abolished the Dubai International Financial Centre in Dubai (DIFC) Arbitration Institute (DIFC-LCIA) and the Emirates Maritime Arbitration Centre. The Decree provided that the Dubai International Arbitration Centre (DIAC) was to substitute the abolished centres (including the DIFC-LCIA) – and one of the objectives of the Decree was to strengthen the position of the Emirate of Dubai as a reliable global centre for the settlement of disputes and enhance the position of the DIAC as one of the best choices for disputing parties to resolve their disputes efficiently and effectively.

The Decree made clear that existing DIFC-LCIA arbitrations would continue, but the DIAC would administer those arbitrations, and existing arbitration agreements referring to DIFC-LCIA arbitrations would also remain valid and effective, but they would also be administered by the DIAC.

In March 2022, the DIAC released its new arbitration rules, which apply to all arbitrations referred to the DIAC after 21 March 2022. The main changes between the new DIAC Rules and the old ones include:

- that multiple arbitration proceedings can be consolidated into a single arbitration, and a party can also submit a single request for arbitration in respect of claims arising out of multiple arbitration agreements;
- third parties can be joined to proceedings as additional claimants or respondents, in certain circumstances;
- proceedings can be expedited (ie, an award issued within three months of filing) where either the sums claimed are less than 1 million dirhams, the parties agree or in cases of exceptional urgency;
- the DIFC is now the default seat of arbitration where the agreement does not specify a seat or venue; and
- lawyers' fees can now be recovered.

Separately, there have also been welcome additions to Dubai's onshore and offshore court systems to specifically deal with advancements in technology and finance – with the creation of new courts (within Dubai's commercial court) to expedite resolution of disputes related to securities (shares, bonds, financial instruments, etc), together with a new specialist court for the 'digital economy' in the DIFC dealing with a variety of fields including big data, blockchain and AI. These developments show the initiative of Dubai's government to have its judicial system keep up with the digital and financial transformation processes.

Also, the introduction of the Mediation Law in 2021 has also brought Dubai more in line with other jurisdictions, encouraging alternative forms of dispute resolution and amicable

settlements through the introduction of more robust and protective rules around mediation and conciliation.

In addition, the issuance of the new Civil Procedures Law and the new Commercial Transactions Law in 2023 has also brought the UAE more in line with international standards and adaptable to the latest developments.

Finally, on 19 October 2022, the Dubai Court of Cassation issued its judgement No. 790/2022 rejecting the enforcement of a foreign arbitral award issued by the LCIA. This judgement was based on, that the debtor was a company based in Qatar that did not have a domicile in the UAE. Therefore, the Dubai Court of Cassation decided that the Dubai Courts lack jurisdiction to enforce this foreign arbitral judgement.

Kennedys

Amal Al Raisi amal.alraisi@kennedyslaw.com
Charlotte Foster charlotte.foster@kennedyslaw.com
Celine Abi Habib Kanakri celine.kanakri@kennedyslaw.com

Office 1101 Conrad Tower, Sheikh Zayed Road, Dubai, United Arab Emirates
Tel: +971 4 350 3600
https://kennedyslaw.com

Read more from this firm on Lexology

Read this article on Lexology

United States – California

Peter S Selvin and Alice M Hodsden

Ervin Cohen & Jessup LLP

RETURN TO CONTENTS

Summary

LITIGATION	606
Court system	606
Judges and juries	607
Limitation issues	607
Pre-action behaviour	608
Starting proceedings	609
Timetable	609
Case management	610
Evidence – documents	610
Evidence – privilege	610
Evidence – pretrial	611
Evidence – trial	612
Interim remedies	612
Remedies	613
Enforcement	614
Public access	614
Costs	615
Funding arrangements	615
Insurance	616
Class action	617
Appeal	617
Foreign judgments	618
Foreign proceedings	618
ARBITRATION	**618**
UNCITRAL Model Law	618
Arbitration agreements	619
Choice of arbitrator	620
Arbitrator options	621
Arbitral procedure	621
Court intervention	622
Interim relief	622
Award	622
Appeal	623
Enforcement	623
Costs	624

Read this article on Lexology

ALTERNATIVE DISPUTE RESOLUTION 625
Types of ADR 625
Requirements for ADR 625
MISCELLANEOUS 626
Interesting features 626
UPDATE AND TRENDS 627
Recent developments and future reforms 627

LITIGATION

Court system

1 | What is the structure of the civil court system?

In the United States, there are parallel state and federal court systems, consisting in each case of a trial court, an intermediate appellate court and a Supreme Court. Although there are important differences between the two systems, the focus of this chapter is the California state court system.

The trial court in the state court system is the Superior Court. Each county in the state has its own set of Superior Courts. These are the courts of primary jurisdiction for all civil disputes, with cases involving amounts in controversy in excess of US$25,000 classified as unlimited civil cases, and cases involving amounts in controversy up to US$25,000 classified as limited civil cases. involving amounts in controversy in excess of US$25,000. See the California Code of Civil Procedure (CCP), section 86.

Trials and pretrial matters are generally supervised by a single, all-purpose Superior Court judge who is assigned to the case at the inception of the proceeding. Litigants have the ability to exercise one peremptory challenge to the assignment of such a judge.

The next level up is the California Court of Appeals, which is the state's intermediate appellate court. There are six districts of the Court of Appeals, which have jurisdiction over appeals arising from the Superior Courts located within certain geographic regions of the state. Thus, for example, the Second Appellate District is the appellate district that handles appeals arising from the Los Angeles Superior Courts. Each district has a presiding justice and two or more associate justices.

Each appellate district may be further subdivided into divisions, which are individual units of three-judge panels who hear appeals. Thus, an appeal from a judgment rendered by the Los Angeles Superior Court will mandatorily be heard by one of the divisions of the Second Appellate District.

The California Supreme Court represents the top level of appellate review in California, reviewing the decisions of the Courts of Appeal. The Supreme Court is based in San Francisco and consists of seven justices, who participate together in connection with the determination of matters as to which the court has granted review or has otherwise determined to hear. The Supreme Court's decisions are binding on all other California courts.

Read this article on Lexology

The California court system does not include specialist commercial or financial courts.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The traditional distinction between the role of the judge and jury in civil matters is that, while the jury determines all issues of fact, the judge controls all issues of law. The judge exercises this function, in part, by ruling on jury instructions and on motions for directed verdict or non-suit.

During the course of the trial, the judge is permitted to ask questions of witnesses, although most judges exercise this right sparingly. Unlike the practice in many civil law countries, the judge does not perform an inquisitorial or fact-finding role during a civil trial.

The right to a jury trial in a civil matter is guaranteed under both the US and California Constitutions. The principal exceptions are where the underlying right or claim is equitable in nature or where the parties have stipulated to arbitration or some other recognised alternative dispute resolution (ADR) procedure. Importantly, and in the absence of an enforceable arbitration provision, pre-dispute jury trial waivers are not enforceable in California. See *Grafton Partners, LP v Superior Court* 36 Cal 4th 944 (2005). Even where the parties' contract contains a choice of law providing for the application for the law of another state, and where the law of that other state permits pre-dispute jury trial waivers, California courts will still decline to enforce pre-dispute jury waivers. *Rincon EV Realty LLC v CP III Rincon Towers, Inc,* 8 Cal App 5th 1 (2017).

Judges who sit on the state court's trial bench (the Superior Court) are elected by county voters at a general election, with vacancies filled through appointment by the Governor. Supreme Court and Courts of Appeal justices are appointed by the Governor. As to those judges who are appointed by the Governor, there is strong impetus for the appointment of 'diverse' candidates.

Limitation issues

3 | What are the time limits for bringing civil claims?

California's CCP sets out the limitation periods that apply to particular claims or causes of action. For example, under section 339(1) of the CCP, an action for negligence is governed by a two-year statute of limitations. By contrast, an action for breach of a written contract is governed by a four-year statute of limitations as provided by section 337 of the CCP.

Importantly, these time limitations may have different rules pertaining to the accrual of the limitations period. For example, a cause of action for breach of contract generally begins to run from the time of breach, irrespective of whether the plaintiff had actual or constructive knowledge of the breach. By contrast, some causes of action in tort do not accrue until the plaintiff either knows or should have known of the underlying injury or circumstances giving rise to the claim.

Parties may suspend, or toll, the running of particular statutes of limitation by agreement. Thus, it is not uncommon for parties who are exploring settlement to enter into a 'tolling agreement', whereby the running of the statutes of limitations is tolled during the time such an agreement remains in effect.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Normally there are no prerequisites to filing suit. However, certain pre-action steps may be required to be undertaken by a plaintiff because of the nature of the claim or the underlying agreement. In *Gerro v Blockfi Lending LLC* Case No. B312647 (2022), the California Court of Appeal held that a forum-selection clause with a pre-dispute jury waiver was enforceable because it would not diminish Plaintiff's important rights. The case is pending with the Supreme Court to decide whether a pre-dispute jury waiver can negate a forum-selection clause.

Some kinds of civil claims, including those against government entities such as cities, counties and the state, require that the plaintiff assert an administrative claim, and have that claim denied, before bringing a civil suit. In addition, the pursuit of certain employment claims sometimes requires that the former employee obtain a 'right to sue' letter from the California Labor Commissioner.

Alternatively, there may be pre-suit requirements set out in the parties' underlying contract or agreement. For example, a loan agreement or promissory note may require that the payee or beneficiary give the borrower or obligor a written demand for payment, and an opportunity to cure, before filing suit. Other agreements may require pre-suit mediation or resort to some other form of ADR before bringing civil litigation.

As to orders at the inception of a case concerning disclosure of documents, witnesses or other information, this is an area where state and federal practice differ.

Under state court practice, the disclosure of documents, witnesses and other information is generally controlled by the discovery process – that is, the party seeking the production of documents, the identification of witnesses or other information is obliged to serve formal requests concerning same on the adverse party.

In federal court, by contrast, rule 26 of the Federal Rules of Civil Procedure requires voluntary disclosure near the inception of a case (and in any event before either side may commence formal discovery) of the documents on which a party will rely; the names and identities of key witness; and other basic information that is supportive of the underlying claim or defence. Although this disclosure under rule 26 may be supplemented, documents or witnesses not disclosed by a party through this means may be excluded at trial.

For both claimants and defendants, all litigants must maintain and preserve electronic records, including emails. The failure of a party-litigant to preserve those records, and the consequent loss of those records, could result in the court giving a jury instruction concerning spoliation of evidence, which could adversely affect that party-litigant's credibility in the eyes of the jury.

For parties who are sued in state court, an initial strategy call will be whether there are any opportunities to change the forum for the litigation. Defendants ought to evaluate whether there are any opportunities to have the case sent to arbitration; removed to a federal court; or transferred to a court in another jurisdiction. Defendants should also consider at the outset of litigation whether there are any coverage opportunities under any policies of liability insurance.

For parties initiating litigation, the selection of forum is critical at the outset. In addition, plaintiffs need to give consideration at the outset to the availability of provisional remedies, such as injunctions and prejudgment attachment, as the issuance of such provisional remedies often has an outcome-determinative impact on the course of the litigation.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A civil action is commenced by filing suit and causing the summons and complaint to be served on the defendants. Parties joined as defendants in a civil action in California generally learn of the pendency of the suit when they are formally served with the summons and complaint. Under California Rule of Court 3.110(b), service of the complaint must be accomplished within 60 days after the filing of the complaint, and proof of service attesting to same must be filed with the court within that time period.

The state court system in California has been facing chronic fiscal problems for a number of years. This has resulted in judges pushing civil cases into mediation or other forms of ADR in an effort to relieve this pressure on the court's docket. By contrast, the accepted wisdom is that the dockets of California's federal courts are not as congested. In addition, it is widely believed that federal court judges are more inclined to dispose of cases before trial by way of granting motions to dismiss or motions for summary judgment.

Timetable

6 What is the typical procedure and timetable for a civil claim?

Under the CCP, the plaintiff in a civil suit must effectuate service of the summons on the defendant within 60 days after the filing of suit. Following the effectuation of service, the plaintiff may commence discovery against the defendant after the passage of a statutory 10-day hold period, which itself can be modified by the court (see CCP section 2031.020(b)).

Early on in the proceeding, the court normally holds a case management conference (CMC) at which the trial date and various pretrial dates and deadlines may be set.

In Los Angeles Superior Court, the timeline to reach trial is approximately 16 to 18 months after the filing of a civil complaint.

Case management

7 Can the parties control the procedure and the timetable?

The parties, through their counsel, will have input at the CMC concerning the setting of trial and pretrial dates, but ultimately the judge will have the final say concerning both the setting of those dates and the pace at which the action proceeds to trial.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

In federal court cases, the parties are mandated under rule 26 of the Federal Rules of Civil Procedure to exchange documents early in the case. By contrast, there is no such requirement in state court practice for the voluntary exchange of documents at or near the inception of the case. Instead, production of documents in state court practice is generally governed by formal discovery.

There is a duty on the part of parties to preserve evidence, especially electronically stored information (ESI), when a claim is asserted or a suit is brought. Based on recent appellate precedent, most notably *Zublake v UBS Warburg* (217 FRD 309 (2003)), parties have an affirmative obligation to preserve ESI once litigation is filed (and in some circumstances even before that), and a failure to do so can have catastrophic consequences.

Even as to information or documents not consisting of ESI, a party could face a claim of spoliation of evidence if that party fails to preserve evidence pending trial. *Meta platforms, Inc. v BrandTotal Ltd.* Case No. 20-cv-07182 (NDCA May 27, 2022) granted the plaintiff's motion for sanctions due to the defendant's failure to preserve relevant data. Such a claim could be asserted either by way of an affirmative cause of action or, more commonly, by the adverse party either commenting to the jury on, or obtaining a jury instruction about, that failure to preserve evidence. In either event, such failure to preserve evidence pending trial could create enormous substantive and atmospheric problems for the party who fails to preserve such evidence.

Importantly, and as regards ESI, a California lawyer's responsibility is not fully discharged by simply instructing a client to comply with e-discovery rules. The duty extends to the attorney's obligation to make sure that the client follows through thoroughly with respect to the disclosure and production of such evidence. See, for example, Formal Opinion No. 2015-193 of the Standing Committee on Professional Responsibility of the California State Bar.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are both common law and statutory privileges that apply to evidence in the form of documentary evidence and testimony. The most notable of these privileges is the attorney–client privilege, which is codified in California Evidence Code section 950 et seq.

Read this article on Lexology

Where this privilege is invoked in connection with the production of documents, the party invoking the privilege must ordinarily supply the other side with a 'privilege log' that identifies the documents withheld on this ground by date, author, recipient and, in some cases, subject matter. See CCP section 2031.240 and *Hernandez v Supreme Court* (112 Cal App 4th 285, 291–292 (2003)). The furnishing of such a 'privilege log' is required so that the party who has propounded the document request will have the ability to test the application of the privilege in respect of particular documents. Where the parties are unable to informally resolve their disputes concerning the application of the privilege, the court or a discovery referee may sometimes conduct an in camera review of the documents. Importantly, the California Legislature in 2017 amended CCP 2016.080 to authorise the use of informal, court-supervised discovery conferences to streamline the process of enforcing rights to civil discovery.

The advice of in-house counsel is normally privileged from disclosure by the attorney–client privilege. In some cases, however, in-house counsel will serve both a legal and non-legal role. In those cases, the court will often have to ascertain the predominant role that individual was serving before determining the application of the privilege. See *Chicago Title Ins Co v Supreme Court* (174 Cal App 3d 1142, 1151-1152 (1985). Particularly, underlying business information or facts and business advice will not be privileged. However, a dual-purpose communication that mixes business and legal advice does not automatically lose its privilege, and the attorney-client privilege attaches if the dominant purposes of the communication is to obtain or provide legal advice. *Clark v Superior* Ct. 196 CalApp.4th 37, 50 (2011).

There is another privilege that is becoming increasingly significant in California. Cal Evidence Code section 1119 bars the introduction of anything said, or anything communicated in writing, if the statement was made, or the writing was prepared 'for the purpose of or in the course of a mediation'. The California Supreme Court has ruled in *Cassel v Superior Court*, 51 Cal 4th 113 (2011) that this privilege trumps a client's ability to sue his or her lawyer for malpractice on account of the lawyer's alleged conduct during the course of a mediation. In 2017, the California Law Revision Commission proposed a recommendation to the government that mediation confidentiality not be applied for purposes of supporting or defending a claim of attorney malpractice connected to the mediation.

In 2019, a new statute came into force with regard to mediations. The statute requires an attorney representing a client participating in a mediation to provide that client with a written disclosure. That disclosure, which must be signed by the client prior to the commencement of mediation, must contain the confidentiality restrictions pertaining to mediation that are contained in California's Evidence Code.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Witness lists and trial exhibits (other than those for impeachment) are normally exchanged shortly before trial. The parties are not required to identify the expected subject matter of any of the anticipated trial testimonies of the witnesses.

In the case of expert witnesses, CCP section 2034 governs their identification and disclosure. In brief, any of the parties to a civil lawsuit may issue an expert witness 'demand' to the other parties. The issuance of such a demand requires all parties to identify any expert witnesses they anticipate calling in the case and to specify the subject areas of each expert's anticipated testimony. Except in very narrow circumstances, experts not properly identified in response to a party's 'demand' will not be permitted to testify at trial.

In 2019, California's Code of Civil Procedure, which governs procedures in state trial court, was amended to allow parties to stipulate to an initial disclosure requirement modelled after rule 26 of the Federal Rules of Civil Procedure.

If the parties opt in by stipulation to this requirement, they would be required to exchange information at the inception of litigation. That information will include the identity of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defences; a copy or description of all documents, including electronically stored information, that the disclosing party has in its possession, custody or control that may be used to support its claims or defences; insurance agreements; and indemnification agreements.

This new state court procedure is triggered only by agreement of the parties, whereas the disclosure requirements under rule 26 of the Federal Rules of Civil Procedure are mandatory.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence at trial is presented by oral testimony of witnesses, including experts. In addition, evidence at trial usually also includes documentary evidence and demonstrative evidence. The plaintiff normally presents its case first, which is then followed by the defendant's case. Rebuttal evidence is then presented after the defendant's case.

Further, California law allows demonstrative exhibits as admissible evidence if it meets certain criteria. The jury can take admissible demonstrative evidence to the jury room for review during deliberations. As explained by the California Supreme Court, demonstrative evidence 'must accurately depict an expert opinion, the expert opinion must fairly represent the evidence, the trial court must provide a proper limiting instruction, and the animation must be otherwise admissible under Evidence Code sectoin 352.' *People v Caro* 7 Cal. 5th 463 (2019).

The plaintiff normally presents its case first, which is then followed by the defendant's case. Rebuttal evidence is then presented after the defendant's case.

Interim remedies

12 | What interim remedies are available?

There are several prejudgment remedies available in civil cases in California.

Where the plaintiff sues in contract for a liquidated amount, the plaintiff may apply for a writ of attachment. This is a prejudgment remedy that operates to create a lien on some of the defendants' assets pending the conclusion of trial. Thus, if a writ of attachment is levied on a defendant's bank account, only the sums in that account over and above the amount of writ will be available for the defendant's use pending trial.

A party seeking a writ of attachment will typically at the same time request the issuance of a temporary protective order (TPO). The TPO enjoins a defendant from transferring, hypothecating or pledging a particular piece of property (which is often also the subject of an accompanying attachment application) pending the outcome of the case.

There are various instances where the appointment of a receiver is indicated. For example, where a loan secured by real estate is in default, the lender will often bring suit for judicial foreclosure and seek the appointment of a receiver. In such instances, the appointment of a receiver will effectively divest the borrower of control over the real estate collateral pending the outcome of the suit.

Finally, various forms of injunctive relief are also available in civil lawsuits, although the *Mareva* order, or 'freeze order', available in UK courts is not available in California. By contrast, the attachment and TPO remedies discussed above run only against specific items of property. In addition, and again unlike a *Mareva* order, prejudgment or interim remedies issued by US courts are typically not enforced by their foreign counterparts with respect to property located in other jurisdictions.

However, nonresident attachment is available in California where personal jurisdiction of a defendant cannot be obtained but through quasi in rem jurisdiction, and the nonresident's property in California can be seized. C.J.E.R., Judges Benchbook, Civil Proceedings: before Trial, section 14.109. A writ of attachment issued under the nonresident procedure may be levied on property for which a method of levy is provided by CCP 488.300 et seq. Once the defendant files a general appearance, only nonexempt property may be levied on and exempt property levied on must be released. CCP 492.040.

Remedies

13 | What substantive remedies are available?

The typical remedies available in civil proceedings are money damages, injunctive relief and declaratory relief.

The court's award of money damages may also include recovery of costs (which are normally recoverable as a matter of right by statute), prejudgment interest (also recoverable as a matter of right by statute where the amount of the money damages was in a liquidated amount at the time of filing) and attorneys' fees (but only where the recovery of attorneys' fees is authorised by the parties' contract or available by statute). Punitive damages are also recoverable, but only in tort actions or where otherwise available by statute. In this regard, recent decisions of the US Supreme Court have placed constitutional limits on the permissible amount of punitive damages in relation to actual damages. Punitive damages requires 'conduct having the character of outrage frequently associated with crime, and

proof by clear and convincing evidence.' *Johnson & Johnson Talcum Powder Cases* 37 Cal. App 5th 292 (2019).

Enforcement

14 | What means of enforcement are available?

A distinction must be made between disobedience or non-compliance with a money judgment and disobedience or non-compliance with a court order requiring that a party does, or refrains from doing, certain things.

There is no sanction for a party's failure to satisfy a money judgment. Instead, the judgment creditor has certain rights to levy execution or otherwise enforce a money judgment, but the judgment debtor incurs no direct sanction for resisting such enforcement efforts.

As of 1 January 2023, the statute of limitations for certain judgments can be renewed for an additional five years after the initial ten year statute of limitations. These include money judgments for medical expenses under US$200,000 and personal debt under US$50,000. Senate bill (SB) 1200. Additionally, the new law reduces post-judgment interest on the principal amount of the money judgment from 10 per cent to 5 per cent per annum for judgments entered on or after 1 January 2023. SB 1200.

The disobedience of a court order requiring that a party does, or refrains from doing, certain things, however, subjects the non-complying party to the possibility of contempt. In this regard, contempt proceedings are quasi-criminal in nature, and the non-complying party may be subjected to fines or imprisonment, or both, for its disobedience. Monetary sanctions are directly appealable. *Deck v Developers Investment Co., Inc.* 89 Cal. App. 5th 808 (2023).

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Except in extraordinary circumstances, civil proceedings are open to the public, as are the pleadings or other court filings in a civil action, which are available to public view, inspection and copying. Thus, in keeping with the strong public policy favouring access to court records, judicial records may be sealed only if the court finds 'compelling reasons'; see, for example, *Pintos v Pac Creditors Ass'n*, 605 F3d 665, 677-78 (9th Cir 2010). In this regard, a litigant's desire to avoid embarrassment or annoyance caused by public disclosure of court records is not considered to be a sufficiently compelling reason to warrant the sealing of the record of legal proceedings (*Oliner v Kontrabecki*, 745 F3d 1024 (9th Cir 2014)).

In some cases, the parties will seek to 'seal' some or all of their pleadings or court filings. In some cases, this is done to shield trade secrets or other proprietary information from public disclosure. The procedure for filing pleadings under court seal is set out in the California Rules of Court.

Costs

16 | Does the court have power to order costs?

Costs incurred by a prevailing party in civil litigation are recoverable as a matter of right in California (see CCP section 1032). Those costs are claimed by the prevailing party by filing a cost bill following entry of judgment. Importantly, the costs recoverable under this procedure are limited in nature (for instance, filing and motion fees), and do not normally include attorneys' fees, which are only recoverable where specifically authorised by statute or the parties' underlying agreement.

Section 1030 of the CCP permits the superior court to order a non-resident plaintiff (including a foreign corporation) to post a bond to secure the payment of the defendant's costs and attorneys' fees. The threshold requirement for obtaining such relief is relatively low, namely that the plaintiff resides out of state or is a foreign corporation, and there is a 'reasonable possibility' that the defendant will prevail. The purpose of this provision is to enable a California resident to secure the recovery of its costs (and, where authorised, its attorneys' fees) against an out-of-state or foreign plaintiff. Although CCP section 1030 is a state statute, the federal courts have the inherent power to require plaintiffs to post security for costs and typically follow the forum state's practices in this area.

In a recent development, the California Supreme Court decided that a party who is dismissed from a lawsuit pursuant to a settlement agreement is entitled to the recovery of statutory costs under CCP section 1032(a)(4). See *DeSaulles v Community Hospital of the Monterey Peninsula*, 62 Cal 4th 1140 (2016).

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingent fee agreements are authorised in California. Those agreements typically allow counsel for a prevailing party to share in some percentage of that party's recovery.

Third-party litigation funding arrangements are also permitted. Under such an arrangement, a third party will provide financing to the plaintiff or its counsel for the prosecution of the lawsuit in exchange for a percentage interest in the recovery.

Although no appellate cases in California have directly addressed these issues, other state courts have expressly found that third-party funding arrangements are enforceable and do not violate the early common law prohibition on champerty. See, for example, *Charge Injection Technologies v DuPont*, 2016 Del Super LEXIS 118. Indeed, another Delaware case, *Carlyle Investment Management LLC v Moonmouth Company, SA*, 2015 Del Ch LEXIS 42 held that communication between a claimant and a litigation funding firm is subject to protection from discovery by reason of the work product doctrine.

Finally, a group of US Senators have introduced proposed new legislation concerning litigation funding arrangements. That proposed legislation would mandate disclosure of both the existence and terms of any litigation funding agreements in any federal class action or multi-district litigation.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

There are various forms of liability insurance that may provide for both the funding of a party's defence in a lawsuit and any indemnity payment that an insured party may make – for example, a payment in settlement or a payment to satisfy a judgment.

Typical forms of such liability insurance include commercial general liability (CGL) insurance and directors' and officers' (D&O) liability insurance. Where it is triggered, CGL insurance usually obligates an insurer to defend its insured in the litigation and also to pay those amounts (within the policy limits) that its insured becomes legally obliged to pay. By contrast, D&O insurance usually provides reimbursement to an insured entity for sums advanced by that entity for the defence of its directors and officers.

Importantly, as a matter of both statute and public policy, punitive damages are not insurable under California law. Thus, even though a liability carrier may be obliged to defend its insured in respect of all causes of action (whether covered or uncovered) that are asserted against its insured (*Buss v Superior Court*, 16 Cal 4th 35 (1997)), the liability carrier will ordinarily issue a 'reservation of rights' as to those claims that include a request for punitive damages or that are otherwise not covered under the policy.

In 2014, the California Supreme Court issued an important decision that limited an insurer's duty to defend advertising injury claims (*Hartford Casualty Ins v Swift Distribution*, 59 Cal 4th 277 (2014)).

Class action

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions are permitted in California. Class litigation is permitted where the following are applicable:

- commonality – there must be one or more legal or factual claims common to the entire class (in some cases, it must be shown that the common issues will predominate over individual issues, such as the amount of damages due to a particular class member);
- adequacy – the representative parties must adequately protect the interests of the class;
- numerosity – the class must be so large as to make individual suits impractical (in other words, that the class action is a superior vehicle for resolution than numerous individual suits);
- typicality – the claims or defences must be typical of the plaintiffs or defendants. See *Vasquez v Superior Court* (4 Cal 3d 800 (1971)); and
- ascertainability – there is some case authority suggesting that a class should not be certified unless its members are 'ascertainable'. See *Xavier v Phillip Morris USA, Inc*, 787 F Supp 2nd 1075, 1089 (ND Cal 2011).

In addition to the state court rules, there is a federal statute, the Class Action Fairness Act of 2005 (CAFA), which is found at United States Code (USC) sections 1332(d), 1453 and 1711–1715. This statute expands federal subject matter jurisdiction over certain large class action lawsuits. As a general matter, this statute allows removal to federal court of certain class actions that are originally filed in state court. The principal purpose of the statute is to curtail 'forum shopping' by plaintiffs in friendly state courts by expanding federal subject-matter jurisdiction.

In a recent case, CAFA's 'mass action provision' was applied where numerous individual actions were sought to be coordinated under applicable state court procedures. In the case, the Ninth Circuit held that the action was properly subject to removal to federal court (*Corber v Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir 2014)).

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Under state procedural rules, there is an automatic right to appeal an appealable order or judgment. Where the underlying order is not directly appealable, such as a discovery order or an order denying a motion for summary judgment, a party may seek discretionary appellate review by way of a petition for writ of mandate. Because such petitions are rarely granted, the main avenue for obtaining appellate review is by way of a direct appeal, which is usually prosecuted at the conclusion of a civil action. However, it is important to appeal from the first final order or judgment. In *Meinhadt v City of Sunnyvale* 76 Cal.App.5th 43 (2022), the court held that an order denying a writ of mandate was a final disposition as opposed to the judgment that followed the order, and dismissed the appeal based on the judgment as untimely.

Read this article on Lexology

Even though parties to a civil case may have an automatic right to seek appellate review, the scope of appellate review is often quite narrow. Thus, an appellate court will not ordinarily engage in an independent weighing of the facts, evaluation of the evidence or gauging of the credibility of the witnesses. Thus, appellate review from a judgment following a jury verdict will often be limited to alleged errors of law committed by the trial court, such as errors in the jury instructions. By contrast, where the issue is one of pure law, such as an appeal following the granting of summary judgment, the standard of review will be that of de novo review – that is, the Court of Appeal will review the matter in the first instance and will not be bound by the determinations of the lower court.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

As to the enforcement in the US of money judgments that have been issued by foreign courts, California has adopted the Uniform Foreign Money Judgment Recognition Act of 1962. See CCP section 1713 et seq. That statute allows a party who has been awarded a final money judgment by a foreign court to apply for recognition of that judgment in the United States. Once recognition has been obtained, the judgment may be enforced in the same manner as a judgment issued by a US court. According to its terms, this statute applies to any foreign money judgment that is final, conclusive and enforceable where rendered even though an appeal may be pending or the judgment is subject to appeal. However, there are several enumerated grounds for non-enforcement of a foreign money judgment.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The controlling statute here is a federal statute 28 USC section 1782. In brief, that statute provides that a US district court may entertain a request from a litigant involved in a pending foreign proceeding to compel a person residing within the district court's jurisdiction to provide testimony or produce documents for use 'in a proceeding in a foreign or international tribunal'. As the foregoing statute is federal in nature, the applicable case law in this area derives entirely from litigation in the federal courts. Put differently, California's superior courts effectively have no role in the area of compelling the production of testimony or documentary evidence in aid of litigation pending outside the United States.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

No. There is a distinction between (1) procedural law applicable to arbitration and (2) substantive law governing a claim that is in arbitration.

First, the applicable procedural law governs such matters as the enforcement of arbitration provisions and awards rendered after arbitration. In this regard, there are three primary sources for procedural law. First, there is the Federal Arbitration Act, 9 USC section 1 et seq, which in some cases will pre-empt contrary state procedural rules. Second, there is the California Arbitration Act, which is found at the California Code of Civil Procedure (CCP) sections 1280 et seq. Third, the arbitral organisation itself may have rules governing the appointment of arbitrators, the conduct of the hearing and similar issues.

Second, the substantive law to be applied in an arbitration proceeding may be California law, federal law, the law of a foreign nation, or some other form of substantive law. As arbitration is ordinarily a matter of contract, it is typical that the parties' contract will specify the substantive law to be applied. In the absence of such an express election, the arbitrator may be obliged to apply conflicts of law principles to determine the substantive law to be applied.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate a dispute is typically embodied in a provision in a written contract between the parties. See CCP section 1281.

In this regard, the US Supreme Court decision in *AT&T Mobility v Conception*, 563 US 321, 131 S Ct 1740 (2011) held that the Federal Arbitration Act (the FAA) pre-empts state laws that prohibit outright the arbitration of particular types of claims. Recent United States and California decisions have similarly enforced agreements to arbitrate. See *Viking River Cruises, Inc. v Moriana* 142 S.Ct. 1906 (2022) (holding that a California court decision preventing arbitration of California Private Attorneys General Act claims is superseded by the FAA); *Iskanian v CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348 (2014) (FAA pre-empts prohibition of class action waivers in employment cases). However, *McGill v Citibank, NA*, 2 Cal 5th 945 (2017), declared pre-dispute arbitration provisions that waive the right to seek public injunctive relief – namely injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public – to be unenforceable.

There is also an important decision from 2020. In *Victrola 89, LLC v Jaman Properties 8, LLC*, B295439 (Cal Ct App 2020), the court made clear that parties can provide that their agreement to arbitrate will be subject to the Federal Arbitration Act (FAA) in lieu of state court procedural rules. In that case, the pertinent agreement provided that 'enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act'. In these circumstances, the court concluded that the moving party's motion to compel arbitration would be governed by the FAA instead of state procedural rules.

This decision is important because it sanctions the use of the arbitration-friendly FAA rules in lieu of state procedural rules where the parties expressly provide for that. In view of the perceived hostility on the part of California appellate courts toward the enforcement of pre-dispute arbitration provisions, this decision provides a basis for increasing the likelihood that such provisions will in fact be enforced.

The appellate courts in California are also coming to grips with the enforceability of browser-wrap agreements. These agreements are typically found on websites in the form of

'terms and conditions' for website use. In recent cases, courts have declined to compel a claimant to pursue claims via arbitration where the arbitration provision was contained in such a browser-wrap agreement, holding that the websites at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract. *Doe v Massage Envy Franchising*, LLC 87 Cal.App.5th 23 (2022); *Norcia v Samsung Telecommunications*, 845 F3d 1279 (9th Cir 2017) (consumer not bound by arbitration provision contained in warranty sheet accompanying product); *Long v Provide Commerce* 245 Cal.App4th 855 (2016).

Another issue that the appellate courts in California have dealt with is whether non-signatories to an agreement containing an arbitration provision are bound by, or can themselves enforce, the agreement to arbitrate. The key cases in this area included *Garcia v Pexco, LLC*, 11 Cal App 5th 782 (2017) (agent may bind principal to terms of arbitration agreement); *Hutcheson v Eskaton Fountainwood Lodge*, 17 Cal App 5th 937 (2017) (relative holding healthcare power of attorney not authorised to bind principal to arbitration agreement); and *Jensen v U-Haul Co. of California*, 18 Cal App 5th 295 (2017) (employee was not third-party beneficiary of rental contract and therefore arbitration provision contained therein could not be enforced). See also *Vasquez v San Miguel Produce*, 31 Cal App 5th 810 (2019), rehearing granted (28 February 2019) (an agency or similar relationship between a signatory and one of the parties to an arbitration agreement allows enforcement of the agreement by the non-signatory).

Finally, there have been two highly significant legislative developments in California affecting arbitration.

Assembly Bill 51, signed by California Governor Gavin Newsom in October 2019, was blocked in February 2023 by the US Court of Appeals for the Ninth Circuit that held that the FAA preempts this bill, a law that prohibited 'forced arbitration' as a condition of employment. The Ninth Circuit upheld a federal district courts preliminary injunction that blocked enforcement of the bill. *Chamber of Commerce of the United States of America v Bonta* No. 20-15291 (9th Cir. Feb. 15, 2023).

Senate Bill 707, also signed by Governor Newsom in 2019, provides that in the context of employment disputes that are governed by arbitration, employees cannot be required to bear any type of legal costs or expenses incident to the arbitration process. This new law also provides that an employer's failure to pay those arbitration costs or expenses will constitute a material breach of the arbitration agreement.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the parties' agreement is silent on this point, then the selection and number of arbitrators is ordinarily determined by reference to the arbitral organisation's procedural rules on that subject. In the absence of such rules, CCP section 1282(a) provides for the appointment of a single neutral arbitrator.

As to the parties' right to challenge the appointment of a particular arbitrator, the arbitral organisation's procedural rules will likewise typically address both removal for cause and the right of either party to exercise a peremptory challenge. In the absence of such rules, CCP sections 1281.9 et seq. and 1297.121 et seq. set forth the grounds for the disqualification of an arbitrator which is on the basis of the required disclosure statement.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Selection of arbitrators can be governed in a particular case by at least two sets of rules.

First, the controlling arbitration clause may itself (and typically does) specify how many arbitrators are to be selected and the manner of their selection. Second, the rules of the particular arbitral organisation (eg, JAMS, International Chamber of Commerce (ICC), American Arbitration Association (AAA)) may outline the manner in which arbitrators shall be selected.

In terms of the pool of candidates, there are some arbitral organisations that are focused on, or specialise in, the resolution of disputes in certain substantive areas of the law. For example, the ICC and the International Dispute Resolution division of the AAA specialise in international or cross-border disputes, and the arbitrators from these organisations generally come from a pool of practitioners, and in some cases former judges, with experience in that specific area.

Outside the international area, the private ADR organisations that have a large presence in California (AAA, ADR Services, JAMS) have a variety of individual neutrals, with each having a particular focus or emphasis on a particular specialty. There is thus visibility and transparency to individual lawyers and their clients concerning who within these ADR organisations would be the 'right fit' in particular cases.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

As noted above, both the FAA and the California Arbitration Act address such matters as the enforcement of arbitration provisions found in the contract or agreement between the parties, and also the enforcement of awards rendered after arbitration. As the procedural outcomes under these two statutes may be quite different, practitioners should exercise care in drafting the language in the underlying agreement that contains the arbitration provision.

In this regard, there continue to be unresolved conflicts between state and federal courts concerning issues such as whether state or federal procedures govern the enforcement of arbitration agreements in State Court (*Los Angeles Unified School District v Safety National Casualty Corporation*, 13 Ca App 5th 471 (2017)) and whether state substantive law that disadvantages arbitration is trumped by the FAA (*Kindred Nursing Centers Limited Partnership v Clark*, 197 L Ed 2nd 806 (2017)). See also *Viking River Cruises, Inc. v Moriana* 142 S. Ct. 1906

(2022) (holding that the FAA trumps a California law under the Private Attorneys General Act that is disadvantageous to arbitration).

Importantly, California does not recognise or enforce pre-dispute jury trial waivers. Indeed, in a case in October 2019, the California Court of Appeal declined to enforce choice of law and choice of forum provisions in a commercial contract on the ground that such enforcement would lead to the forfeiture of a California resident's right to a jury in connection with a civil dispute. *Handoush v Lease Finance Group*, LLC, 41 Cal App 5th 729 (2019*)*. The case highlights the sanctity of the right to jury trial, which is safeguarded in both the US and California state constitutions.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Normally, once a matter has been sent to arbitration the role of the court is usually limited to proceedings to confirm or vacate an arbitration award. Resort to court process is allowed where a party to an arbitration seeks interim remedies, such as injunctive relief.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Depending on the rules of the arbitral organisation, interim relief can be granted in arbitration. Interim relief can be requested from an emergency arbitrator (providing the arbitral organisation allows for such), the arbitral panel itself or the national courts of the country where the arbitration is held.

The key determinant as to the availability of such relief is the language of the arbitration agreement itself, namely, whether it confers power on the tribunal to grant interim measures.

In the absence of such a provision, the CCP contains a carve-out that allows a party to an arbitration proceeding to seek provisional relief in the Superior Court, including the proviso that an application in court for such provisional relief does not waive the applicant's right of arbitration. See CCP sections 1281.8(b) and (d).

Award

30 | When and in what form must the award be delivered?

The rules of the arbitral organisation usually specify both the form and the timing of the arbitral award.

In the absence of such rules, CCP section 1283.4 provides that the award must be in writing and include a determination of all the questions submitted to the arbitrators for determination of the controversy. In addition, CCP section 1283.3 provides that the award shall be made within the time fixed in the parties' agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration.

Appeal

31 | On what grounds can an award be appealed to the court?

Appellate review of an arbitration award is extremely limited. In the first instance, an arbitration award must be 'confirmed' by the superior court. This means that following the conclusion of the arbitration proceeding, the prevailing party must petition the superior court to 'confirm' the arbitration award, that is, enter it in the form of an enforceable judgment (see CCP section 1285).

In the overwhelming number of instances, the superior court will 'confirm' the arbitration award and enter it as an enforceable judgment. This is because the grounds for vacating (or declining to 'confirm') the award are extremely limited. See CCP section 1286.2. Thus, an arbitration award will not be vacated even where an arbitrator made errors of fact or errors of law. See *Moncharsh v Heily & Blase* (3 Cal 4th 1 (1992)). Put simply, the superior court does not engage in an evaluation of the merits of the controversy when making its determination to confirm an arbitration award. But see *Aspic Engineering and Construction v EEC Centcom Constructors*, 913 F3d 1162 (9th Cir 2019) (where arbitrator's award fails to draw its essence from the parties' underlying agreement, vacation of award is proper).

By contrast where an arbitration agreement provides that the arbitrator's decision may be reviewed by the Superior Court for errors of fact or law, the scope of review will be broader than as otherwise provided under CCP 1286.2. See *Harshad & Nasir Corporation v Global Sign Systems, Inc*, 14 Cal App 5th 523 (2017).

As to whether an order granting or denying a petition to compel arbitration is appealable, the general rule in both state and federal courts is that an order compelling arbitration is not appealable (*Johnson v Consumerinfo.com, Inc*, 745 F3d 1019 (9th Cir 2014); *Bertero v Superior Court*, 216 Cal App 2d 213 (1963)), while at least in state court an order denying a petition to compel arbitration is appealable (*Smith v Superior Court*, 202 Cal App 2d 128 (1962)). In a state court, an appeal from an order denying a petition to compel arbitration will also operate to stay the trial court proceedings as to the party who brought the petition without the appellant having to post a bond.

The role of an appellate court is even more limited. Once an arbitration award is confirmed by the superior court, the appellate court's role is limited to determining whether such confirmation was appropriate. As with the trial court's own confirmation process, the appellate court does not engage in an evaluation of the merits of the controversy when it is asked to review the appropriateness of the trial court's action in confirming or vacating the award.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Once the hearing has been completed, the arbitration culminates in the arbitrator's issuance of an award in favour of one of the contracting parties.

If the loser pays the award, no further proceedings will presumably be necessary. However, in the event that the winner needs to enforce the award, it will have to file a court action to

confirm the award, that is, convert it into an enforceable judgment. If the arbitration provision is governed by the Federal Arbitration Act, that provision should expressly provide that parties agree that any arbitration award shall be judicially confirmed.

At this stage of the proceedings, the loser has few options. The grounds for challenging or setting aside an arbitration award are limited and extremely narrow. A court that is asked to confirm the award will not ordinarily review the merits or overturn the award, even where there have been errors of law or fact.

Nor can the merits of the arbitration award be appealed, except where the arbitration agreement provides that the arbitrator's decision can be reviewed for errors of fact or law (*Harshad & Nasir, supra*, 4 Cal App 5th 523). Thus, ordinarily, once a judgment on the award has been entered, any appeal therefrom will normally be limited to the appropriateness of confirmation, not the underlying merits of the dispute itself.

The recent change in the political landscape in the United States has not affected the enforcement procedures for foreign or domestic awards. Inasmuch as there is a separation of powers between the executive and judicial branches of government, the enforcement of foreign and domestic awards is governed by the pertinent statutes, especially the New York Convention, and the judicial interpretations of those statutes.

Costs

33 | Can a successful party recover its costs?

As a general rule, under CCP section 1284.2, each party to the arbitration is required to pay his or her pro rata share of the expenses and fees of the neutral arbitrator unless the parties' agreement otherwise provides.

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

There are no California statutes or judicial decisions that allow for the recovery of the costs incident to third-party litigation funding.

The California Court of Appeals found that recovery of interim attorney fees after a successful motion to compel arbitration is unconscionable. *Ramirez v Charter Communications, Inc.* 75 Cal.App.5th 365 (2022). The court further ruled that the interim attorney fees provision could not be severed, and thus the court held the entire arbitration agreement is unenforceable.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 What types of ADR process are commonly used? Is a particular ADR process popular?

The main types of (alternative dispute resolution) ADR besides arbitration are detailed below.

Pre-arbitration or pre-litigation mediation

The parties can agree that before either can commence arbitration or litigation, they must participate in a mediation process. That process can be entirely informal or supervised by a third-party neutral. If the mediation takes place under the auspices of an arbitral organisation, such as the AAA or the International Chamber of Commerce, the arbitration rules of the pertinent organisation may come into play. In general, having a mediation supervised by a third-party neutral is ordinarily more productive than leaving the parties, who may already be locked into their respective positions, to their own devices.

Reference

Trial by reference is an authorised form of ADR under California law and is described in CCP sections 638 et seq.

Several cases hold that a valid reference to a retired judge or other referee necessarily entails an enforceable waiver of the parties' right to a jury trial, even though the particular reference provision may not expressly speak to such waiver. See, for example, *O'Donoghue v Superior Court*, 219 Cal App 4th 245 (2013); *Woodside Homes of California v Superior Court*, 142 Cal App 4th 99 (2006). CCP section 645 expressly allows for appellate review of 'the decision of the referee . . . in like manner as if made by the court.' See *First Family Ltd Partnership v Cheung*, 70 Cal App 4th 1334 (1999).

Mini-trial

This process can be either binding or non-binding. The concept is that representatives from the two parties involved in the dispute will each make a streamlined presentation of their respective cases to a small decision-making body, which is often composed of an executive from each of the two companies, together with a third-party neutral. After the conclusion of the presentation, the non-litigant executives attempt to work out a solution with the aid of the third-party neutral.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Under Rule 3.1380 of the California Rules of Court, the court, on its own motion or at the request of any party, may set one or more mandatory settlement conferences.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

One of the most significant ongoing trends in California is the move toward alternative dispute resolution (ADR), and especially arbitration. This development means that sophisticated parties to disputes involving commercial or civil matters now frequently opt out of the judicial system by voluntarily electing arbitration or some other form of ADR.

Two other effects of this trend have been seen. First, there has been enormous growth in the number and variety of ADR providers in California, as well as legislation that has made it possible for California to be an preferred locale for international arbitration by making it possible for out-of-state and foreign attorneys 'to provide legal services in an international commercial arbitration or related conciliation, mediation, or alternative dispute resolution proceeding' in California. Cal. Civ. Proc. Code sections 1297.185-186.

Second, the law in this area has been developing rapidly. Issues frequently addressed by appellate courts in this area include the enforceability of pre-dispute agreements to arbitrate future disputes, especially in the employment context. See, for example, *Sanchez v Carmax Auto Superstores California*, 224 Cal App 4th 398 (2014). In addition, there have been several recent decisions from both state and federal courts concerning the interplay between the California Arbitration Act (which is found at CCP section 1280 et seq) and the Federal Arbitration Act (which is found at 9 USC section 1 et seq). See, for example, *Mastick v TD Ameritrade*, 209 Cal App 4th 1258 (2012).

There is another important development arising from this trend. As more and more disputes are resolved via arbitration or other forms of ADR, both the arbitral organisations and the courts have become more receptive to allowing appeals from arbitration awards to be heard on their full merits, as opposed to the more limited grounds set forth in the California Arbitration Act (CAA).

Thus, several arbitral organisations have adopted rules (which may be implemented on an optional basis by the parties) that would allow for appeals from arbitration awards to be heard on their full merits. One example is American Arbitration Association Rule A-10, which allows a party to appeal from an arbitration award where the award is based on an error of law that is material and prejudicial; or determinations of fact were made by the arbitrator that were clearly erroneous. Other arbitral organisations, such as JAMS and CDR, have enacted similar optional rules.

In addition, California law now provides that parties to an arbitration agreement that is governed by the CAA may stipulate to judicial review of their arbitration award. See, for example, *Cable Connection, Inc v DirecTV, Inc*, 44 Cal 4th 1334 (2008); *Harshad & Nasir Corporation v Global Sign Systems, Inc* 14 Cal App 5th 523 (2017). By contrast, parties to an arbitration agreement that is governed by the Federal Arbitration Act (FAA) may not expand the scope of appellate review otherwise available under section 10 of the FAA. See *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576 (2008).

Read this article on Lexology

In 2019, the US Supreme Court in *Henry Schein, Inc v Archer and White Sales, Inc* [139 S. Ct. 524] US (2019) is also noteworthy. This decision reaffirmed the principle that parties to an arbitration agreement may properly delegate the question of arbitrability to the arbitrator, as opposed to the Court. The Court went further, clarifying that the courts may not deny a petition to compel arbitration where the party opposing arbitration asserts that the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless'. See also *Sanquist v Lebo Automotive, Inc*, 1 Cal 5th 233 (2016) (issue of who decides whether arbitration agreement provides for class arbitration is one for arbitrator, not the court).

Separate from arbitration, there are two other sets of emerging issues in California.

The first area is in connection with labour and employment disputes. In this area, the California Supreme Court issued a decision in 2018, *Dynamex Operations West, Inc v Superior Court of Los Angeles* (2018) 4 Cal 5th 903, which reversed decades of precedent concerning the classification of workers as either employees or independent contractors. Under *Dynamex,* the court ruled that workers are presumptively employees and not contractors, and it imposed the burden on the hiring entity that classifies a worker as contractor to establish that this classification is supported under the 'ABC' test that it articulated in its decision.

This worker-friendly decision has profound implications for companies like Uber and others in the gig-economy marketplace. Indeed, companies in that marketplace have undertaken efforts to overturn *Dynamex* through the referendum and legislative processes.

In addition to *Dynamex*, there are the recent legislative initiatives Assembly Bill 51 and Senate Bill 707, which impact the ability of employers to enforce mandatory arbitration provisions in connection with labour and employment disputes in California.

Finally, the government recently passed the California Consumer Privacy Act (CCPA), which enacts a comprehensive privacy regime affecting businesses operating in California. Among other things, it requires companies to update their privacy policies and to provide specified notices about their collection of personal information, use and sharing practices. In addition, it provides for a private right of action for individuals affected by data breaches or the compromise of their personal information.

Although the CCPA is too new for there to have been any appellate cases interpreting its provisions, its enactment will undoubtedly spur the filing of privacy-related litigation in California.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

There are no pending reforms at this time regarding dispute resolution reform.

Read this article on Lexology

ERVIN COHEN & JESSUP LLP

Peter S Selvin pselvin@ecjlaw.com
Alice M Hodsden pahodsden@ecjlaw.com

9401 Wilshire Boulevard, 12th Floor, Beverly Hills CA 90212, United States
Tel: +1 310 281 6364
www.ecjlaw.com

Read more from this firm on Lexology

Read this article on Lexology

United States – New York

[Thomas E L Dewey](#) and [Christopher P DeNicola](#)
[Dewey Pegno & Kramarsky LLP](#)

RETURN TO CONTENTS

Summary

LITIGATION	630
Court system	630
Judges and juries	630
Limitation issues	631
Pre-action behaviour	631
Starting proceedings	632
Timetable	632
Case management	632
Evidence – documents	633
Evidence – privilege	633
Evidence – pretrial	633
Evidence – trial	633
Interim remedies	634
Remedies	634
Enforcement	635
Public access	635
Costs	635
Funding arrangements	635
Insurance	636
Class action	636
Appeal	637
Foreign judgments	637
Foreign proceedings	638

ARBITRATION	638
UNCITRAL Model Law	638
Arbitration agreements	638
Choice of arbitrator	639
Arbitrator options	639
Arbitral procedure	639
Court intervention	640
Interim relief	640
Award	641
Appeal	641
Enforcement	642
Costs	642

Read this article on Lexology

ALTERNATIVE DISPUTE RESOLUTION 642
Types of ADR 642
Requirements for ADR 643
MISCELLANEOUS 643
Interesting features 643
UPDATE AND TRENDS 643
Recent developments and future reforms 643

LITIGATION

Court system

1 | What is the structure of the civil court system?

The trial-level federal court is the district court. It may hear any civil case that is based on federal law (as opposed to state law), as well as civil cases that meet the standard of 'diversity', which requires that the plaintiffs reside in different US states than the defendants (or different nations, as long as there are not litigants on both sides of the 'v' from foreign countries), and that the amount of the claim exceeds US$75,000. District courts are divided among 94 geographic districts. Every district court also has within it a bankruptcy court, which hears bankruptcy proceedings.

An appeal from a district court is heard in the federal court of appeals that presides over its district. There are 13 courts of appeals, which altogether have a maximum of 179 judges. Most appeals are heard by a panel of three judges.

A decision by a court of appeals may be appealed to the Supreme Court, the highest court in the United States. The nine-member Supreme Court's docket is for the most part discretionary, and the Court accepts only a small fraction of the petitions for appeal that it receives.

In addition, there are several specialised federal civil courts. The Court of Federal Claims primarily hears monetary claims against the United States. The Court of International Trade hears cases concerning import transactions. The Tax Court hears cases regarding federal taxation. The Court of Veterans Appeals reviews decisions of the Department of Veterans Affairs.

State courts typically follow a similar structure, with a trial court, an intermediate court of appeals and a state Supreme Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Generally, the jury decides ultimate issues of fact, after being instructed on the applicable legal standard by the judge.

During the pretrial discovery process, the judge sets deadlines and resolves disputes among the parties, including those regarding production of documents and examination of witnesses. If either party makes a motion to dismiss all or part of the case before trial, or to rule on other matters, the judge will decide it. However, if either party requests a jury trial, then all disputes regarding facts in the case must be reserved for the jury at trial. The judge will therefore only decide questions of law, such as whether a particular statute applies or whether the complaint meets the minimum requirements to state a claim. (If no party requests a jury, the judge may decide questions of fact at a 'bench trial'.) During a jury trial, the judge will determine what evidence the jury is allowed to hear and will instruct the jurors regarding how to apply the law to the facts of the case.

Federal judges are nominated by the President of the United States and confirmed by the US Senate. Jurors are selected at random from the district where the trial will take place, and may be questioned by each party before being selected. Each party may choose to eliminate a certain number of potential jurors before the trial begins.

Limitation issues

3 | What are the time limits for bringing civil claims?

The time limit for bringing a claim, known as the 'statute of limitations', is generally defined by the federal statute on which the claim is based, or by reference to the law of the state where the federal district court is located. The time limits vary depending on the type of claim. For most civil claims, the statute of limitations will expire between one and six years after the events that gave rise to the claim.

Both sides of a potential lawsuit may agree to temporarily stop the clock on a statute of limitations by signing a 'tolling agreement'. Such agreements are interpreted as contracts and must therefore be drafted very carefully to avoid unintended results.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

Unless required to proceed in a particular forum by contract, a plaintiff may generally choose whether to bring an action in state or federal court. Therefore, before beginning an action, a plaintiff should consider which forum offers the most advantages.

Although some state courts allow limited pre-suit discovery, the rules in federal courts do not permit any investigative discovery until after an action has been filed.

Starting proceedings

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced by the filing of a complaint with the court. The plaintiff must also prepare a summons, to be signed by the clerk of the court. A defendant is notified of the proceedings when the plaintiff serves him or her the signed summons and complaint.

Federal courts generally have the capacity to manage their caseloads, and cases will typically be listed on a public docket within a day of filing. However, the speed with which a case will proceed through the phases of discovery and reach trial varies significantly from district to district and judge to judge. In general, civil cases take 1–3 years from initiation to conclusion, though more complex cases may take significantly longer. According to data published by the Administrative Office of the US Courts, as of 31 December 2022, the median time from filing to disposition in all civil actions in federal court was 12.3 months, while the median time from filing to trial in all civil actions in federal court was 34.6 months.

Timetable

6 What is the typical procedure and timetable for a civil claim?

The summons and complaint must be served upon the defendant within 90 days of the complaint being filed. The defendant must file a response (typically an answer or a motion to dismiss) within 21 days of service of the summons and complaint. After that, most deadlines for discovery, motions and all other aspects of the case will be dictated by a scheduling order entered by the judge.

A 2011 study by the federal judiciary determined that the median time from the filing of the complaint to the issuing of a scheduling order was between 77 and 125 days, depending on the district. The median time for the conclusion of discovery set by the first scheduling order was between 143 and 240 days later.

Case management

7 Can the parties control the procedure and the timetable?

Procedures in federal court are set by the Federal Rules of Civil Procedure. The timetable is controlled by the judge, who sets most deadlines in a scheduling order. The parties often submit a draft scheduling order with their preferred timetable, which the judge may approve with or without modifications. As the case progresses, the parties may seek extensions of deadlines, which the judge has discretion to grant or deny.

Evidence – documents

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Federal and state laws impose a duty to preserve relevant documents and evidence from the time a party can reasonably anticipate litigation. Parties that violate this duty may be subject to serious sanctions that can determine the outcome of an action.

A party must share non-privileged relevant documents that are responsive to requests from the other parties in the case, including documents that are unhelpful to its case.

Evidence – privilege

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Yes. There are several types of documents that are considered privileged. The 'attorney–client privilege' protects communications between a client and external counsel, as well as communications with in-house counsel located in the United States, concerning legal issues (the situation is less clear, however, with respect to in-house counsel located in foreign countries, where communications between in-house counsel and clients are not necessarily privileged). The 'work product privilege' protects documents prepared in anticipation of litigation or for trial. These privileges can be waived if the documents or communications are shared with third parties.

Evidence – pretrial

10 Do parties exchange written evidence from witnesses and experts prior to trial?

A party may seek written responses to interrogatories from other parties prior to trial, but may not seek written evidence from lay witnesses who are not parties. However, non-party lay witnesses may be questioned at a deposition before trial. Note, however, that US court rules provide for pretrial document production from both parties and non-parties that is much more wide-ranging than other jurisdictions.

An expert witness must submit a report during discovery containing a complete statement of his or her opinions, the facts and date considered in forming them, any documents that will be used to support those opinions, and his or her qualifications, experience and compensation for work in the case.

Evidence – trial

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence is presented primarily via the oral testimony of witnesses. Statements made by counsel at trial are not considered evidence. Documents may be offered in evidence and

shown to the jury, provided sufficient foundation has been offered to demonstrate their admissibility and authenticity. If a witness was questioned during a pretrial deposition but is unable to appear at trial, portions of his or her testimony may be read to the jury or shown by video.

Interim remedies

12 | What interim remedies are available?

A court may grant a preliminary injunction or temporary restraining order, ordering a party to refrain from taking a particular action. In federal court, a party seeking an injunction must show a likelihood of success on the merits, irreparable harm, and that the public or private interests implicated by the injunction favour that party. In terms of the specific relief available, a court may issue an order of attachment, seizing specific property that may be the subject of an eventual judgment. It may appoint a receiver to oversee a party's property during the pendency of a suit. It may issue a notice of pendency, which effectively makes a parcel of real property impossible to sell. Rarely, a court may order garnishment of a party's wages in advance of trial. The requirements for obtaining such remedies – including with respect to foreign proceedings – vary by state.

Notably, federal courts do not have authority to issue injunctions temporarily freezing a defendant's assets pending the outcome of a foreign lawsuit or arbitration. However, both federal and state courts have wide discretion to grant more narrow forms of interim relief, which are governed by state law.

In New York, the standard for obtaining a preliminary injunction is similar to the federal standard: the plaintiff must generally show a probability of success on the merits, irreparable harm and that the balance of equities favours the plaintiff. A plaintiff may obtain an order of attachment as security for a potential judgment, including in support of international arbitrations subject to the New York Convention.

Remedies

13 | What substantive remedies are available?

The most common remedy in civil lawsuits is money damages, which compensate the plaintiff for a loss. Restitution – which requires the defendant to return its gains to the plaintiff – is also available on some claims, such as unjust enrichment. Specific performance is also available as a remedy for breach of contract where damages would not provide an adequate remedy.

Punitive damages are rare in civil cases. They are not available for breach of contract. However, some federal and state-level statutory causes of action permit punitive damages in civil cases, and the party seeking such damages is generally required to establish grossly negligent or malicious conduct.

Both prejudgment and post-judgment interest are available on money judgments. Federal courts determine the rate of interest based on the laws of the states in which the federal

courts are located. In New York, the Civil Practice Law and Rules (CPLR) sets the statutory rate of interest at 9 per cent per year.

Enforcement

14 | What means of enforcement are available?

In civil cases, the most common sanctions are monetary fines, which may be imposed on a party or counsel for violations of rules of procedure (eg, destroying or failing to preserve evidence). In addition, adverse inferences may be applied by a judge in a bench trial or provided as jury instructions in a civil case.

Contempt orders are very rare in civil cases, but they are potentially available for egregious misconduct, such as repeatedly flouting court orders.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are held in public, and court documents, including pleadings, witness statements and orders, are available to the public with few exceptions. Documents containing particularly sensitive or confidential information may be filed with the court 'under seal' – meaning visible only to the parties – with court permission.

Costs

16 | Does the court have power to order costs?

The general 'American rule' is that each side bears its own fees and expenses, irrespective of the outcome of the case. While courts will sometimes award some modest increments of costs, such as court filing fees, to the prevailing party, and federal courts have discretion to require a claimant to post security for the costs that the opposing party may incur, there remains a general presumption against cost-shifting, absent a contractual or statutory basis to do so.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency fee arrangements between lawyers and clients are available in the United States. Under such agreements, lawyers agree to accept a percentage of the recovery that the client receives.

Third-party funding by professional investors seeking to invest in claims is available in the United States. At present, the industry is not regulated at the federal level, although some states have imposed limitations on the interest rates that third-party litigation funders can charge to consumers.

A third-party litigation funder may agree with a claimant that the third-party litigation funder will take a share of any proceeds on the claimant's claims. Parties to litigation are permitted to share risks with third parties, including claimants selling some proportion of any recovery to investors in return for an upfront payment. Liability insurance, in which a defendant pays a fixed sum to an insurer to offset a proportion of any liability, is also allowed.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Litigation expense insurance is available to cover all or part of a party's own legal fees and costs, although it is not widely used in the United States. To the extent that it is available in the United States, most insurers' policies will exclude coverage for an opponent's costs.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, class actions are available in the United States. At the federal level, class actions are permitted where a large number of plaintiffs allege that they have suffered similar injuries caused by the same defendant or defendants. Plaintiffs may generally bring class actions for any type of civil claim, but they must satisfy applicable legal and procedural requirements. For example, the Federal Rules of Civil Procedure require putative class action plaintiffs to satisfy the following factors before the class can be certified:

- the class must be so numerous that joining all members of the class would be impractical;
- there must be common questions of law or fact;
- the putative class must have representatives whose claims or defences are typical of the class;
- the putative class must have representatives who fairly and adequately protect the interests of the class;
- the common questions of law or fact must predominate over the questions affecting individual members; and
- a class action must be a superior form to all other available methods for fairly and efficiently adjudicating the dispute.

In New York, the CPLR requires putative class action plaintiffs to satisfy substantially similar procedural requirements.

On 20 October 2020, New York's Court of Appeals – the state's highest court – issued a noteworthy decision regarding cross-jurisdictional class action tolling. In *Chavez v Occidental Chemical Corp*, 35 N.Y.3d 492 (2020), the Court of Appeals held that New York law recognises

cross-jurisdictional tolling of statutes of limitations for absent class members of a putative class action filed in another jurisdiction. In addition, the Court of Appeals held that tolling ends when there is a clear dismissal of a putative class action, including a dismissal for forum non conveniens or denial of class certification for any reason. This decision is significant because it is consistent with the Supreme Court's decision in *American Pipe v Constr Co v Utah*, 414 U.S. 538 (1974), in which the Supreme Court held that the same principles apply to class action tolling in federal class actions.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

In general, a party in a federal action may appeal as of right from a final judgment. The same is true in state courts, but some state court systems (like New York) also permit interlocutory appeals (that is, appeals from non-final judgments).

The most common grounds for parties to appeal decisions in civil cases are errors of law (eg, applying the wrong legal standard to the facts of a particular case) and abuse of discretion (eg, where the lower court exceeded its discretion in deciding a motion or request for a ruling).

At the federal level, the party who loses at the district court can appeal that decision to a panel of the court of appeals for the federal circuit in which that district is located. After the court of appeals issues its decision, the losing party can request that all active judges of that court of appeals rehear the case, but such rehearings – which are called rehearings en banc – are disfavoured by the Federal Rules of Civil Procedure and are only permitted where en banc consideration is necessary to secure or maintain uniformity of the court's decisions or where the proceeding involves a question of exceptional importance. The party who loses at the court of appeals may then request that the Supreme Court review the appeals court's decision by filing a petition with the Supreme Court for a writ for certiorari, but Supreme Court review is usually discretionary, and the Court only grants about 3–4 per cent of those petitions each year.

In New York, decisions of the state trial court are appealable as of right to five-judge panels of the appellate division in the judicial department in which the trial court is located. After the appellate division issues a decision, the parties can seek leave to appeal to the highest court in New York – the Court of Appeals (unless the basis for the appeal is a double dissent at the appellate division on a question of law in the appellant's favour or an appeal involving a constitutional question, in which case the appeal to the Court of Appeals is as of right).

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Under US law, an individual seeking to enforce a foreign judgment must file a lawsuit in the United States, and that court will determine whether to recognise and enforce the judgment. The United States is not a signatory to any convention or treaty that requires recognition of foreign court judgments. Recognition of foreign judgments is therefore governed by the laws

of individual states. Generally, US courts will consider recognition and enforcement of judgments for a fixed sum of money, but will not enforce judgments for taxes, fines or penalties of any kind.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

A federal statute, 28 U.S.C. 1782, allows an 'interested person' in a proceeding in a foreign or international tribunal to obtain evidence in the United States for use in that proceeding. The interested person must file a petition in a federal district court seeking authority to serve a subpoena on a person or business in that district. With a subpoena, the interested person can seek documents or testimony from parties and non-parties to the foreign proceeding.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Federal Arbitration Act, the national arbitration law in the United States, is not based on the UNCITRAL Model Law. The Federal Arbitration Act was enacted in 1925 to place arbitration agreements on the same footing as other contracts and to declare a national policy in favour of arbitration. Although the Federal Arbitration Act differs from the UNCITRAL Model Law in some respects – for example, the Federal Arbitration Act defers to parties' arbitration agreements as to the specific procedures that will be used to arbitrate the parties' dispute – the Federal Arbitration Act is typically interpreted by federal courts in a manner that is consistent with the UNCITRAL Model Law.

Some states, such as Texas and Florida, have adopted state-level arbitration laws that are based on the UNCITRAL Model Law. Those laws apply to the extent that they do not conflict with the Federal Arbitration Act. New York has a state-level arbitration law in the Civil Practice Law and Rules (CPLR), but New York has not adopted the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The Federal Arbitration Act requires arbitration agreements to be in writing, but there is no requirement that arbitration agreements be signed. Federal and state courts also require a knowing and voluntary waiver of the right to bring a legal claim in court.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In circumstances where the arbitration agreement and any relevant institutional rules are silent on arbitrator appointment, the Federal Arbitration Act and the CPLR (which contains New York's state-level arbitration law) allow courts broad discretion to appoint an arbitrator or arbitrators. Neither the Federal Arbitration Act nor the CPLR provides specific procedures for the appointment of arbitrators where the parties' agreement and any relevant rules are silent on arbitrator appointment.

With respect to challenging the appointment of an arbitrator, neither the Federal Arbitration Act nor the CPLR provides a procedure for such challenges. Most arbitral institutions have rules that provide procedures for challenging arbitrators, which are generally based on conflicts of interest.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The options for choosing an arbitrator or arbitrators depend on the parties' agreement and any applicable institutional rules. Some arbitral institutions, such as the International Chamber of Commerce, JAMS, FINRA and the American Arbitration Association, provide parties with lists of potential arbitrators from applicable rosters (eg, commercial, employment and construction). The parties will then have the opportunity to rank and strike potential arbitrators. If this initial rank-and-strike process does not result in the required number of arbitrators, the arbitral institution will generate a new list and the parties will repeat the process until the required number of arbitrators has been selected.

The pools of candidates vary widely, depending on arbitral institution. Some arbitral institutions have well-known local practitioners (such as retired judges) on their rosters, while other arbitral institutions permit experienced industry professionals who do not necessarily have formal legal training to sit as arbitrators. Contracting parties should carefully consider potentially applicable institutional rules when drafting and negotiating arbitration clauses.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Neither the Federal Arbitration Act nor the CPLR contains specific requirements as to the procedures to be followed in arbitration.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Federal and state courts can provide preliminary injunction and attachment orders in connection with arbitration proceedings. In New York, the CPLR provides that courts can grant provisional remedies where the award may be rendered ineffectual without such provisional relief. To obtain a preliminary injunction in New York, the traditional criteria for a preliminary injunction must be satisfied, including likelihood of success on the merits, irreparable harm and the balance of equities favours the movant. New York courts generally require parties seeking attachment orders in connection with arbitration proceedings to satisfy the same criteria.

In addition, federal courts can enjoin parties from proceeding with arbitration where there is no agreement to arbitrate between the parties, although the Federal Arbitration Act does not expressly authorise anti-arbitration injunctions. In New York, the CPLR expressly provides for an application to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred. To obtain an anti-arbitration injunction, a party must satisfy the traditional criteria for injunctive relief.

Federal courts can also compel discovery in aid of public international arbitration proceedings pursuant to 28 U.S.C. 1782. In two consolidated cases, *ZF Automotive US, Inc. v Luxshare, Ltd.* and *AlixPartners, LLP v Fund for Protection of Investors' Rights in Foreign States*, 142 S.Ct. 2078 (2022), the Supreme Court unanimously held that section 1782 only allows discovery in connection with international arbitration proceedings that involve 'governmental or intergovernmental adjudicative bodies.' Thus, parties in private international arbitration proceedings cannot use section 1782 to obtain discovery from US persons for use in such proceedings. In New York, courts may only order disclosure in aid of arbitration under the CPLR in exceptional circumstances. Federal and state courts can also enforce subpoenas issued by arbitral tribunals.

In recent years, federal and state courts in California have held that public injunction waivers in arbitration agreements are unenforceable under California law, but it does not appear that federal and state courts outside of California would apply a similar rule. Thus, parties in other jurisdictions can agree to waive their right to obtain injunctive relief in court. There does not appear to be any authority, however, that parties can agree to waive statutory rights to seek judicial assistance in aid of arbitration.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, institutional rules generally authorise arbitrators to grant interim relief, including asset and document preservation orders. Federal and state courts have also enforced other forms of interim relief, including interim measures preventing a party from terminating an agreement or disclosing trade secrets or sensitive information.

Some institutional rules, such as those of JAMS and the American Arbitration Association, also permit the appointment of an emergency arbitrator for expedited relief in circumstances

where appointment of an arbitrator or arbitrators to hear the merits of the parties' dispute has not yet occurred.

Award

30 | When and in what form must the award be delivered?

The form and timing of delivery of the award are subject to agreement of the parties and applicable institutional rules. Thus, while the parties may agree that arbitrators must issue reasoned awards and that awards must be delivered within specific time frames, there is no legal requirement that arbitral awards must be reasoned or that they must be delivered within a particular time frame.

Appeal

31 | On what grounds can an award be appealed to the court?

The Federal Arbitration Act only permits vacatur of an arbitration award in very limited circumstances, namely, if:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality or corruption by the arbitrators;
- the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or
- the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

State laws similarly only permit challenges to an arbitral award on specific grounds. While those state laws generally track the four grounds contained in the Federal Arbitration Act, some state courts have held that awards may be vacated on public policy grounds as well. In addition, some states, including California, Texas and New Jersey, permit parties to use their arbitration agreements to expand the scope of judicial review by agreeing that arbitrators have no authority to issue decisions based on 'reversible' errors of law or fact, thereby effectively allowing parties to transform post-award vacatur proceedings into merits appeals.

In addition, the Federal Arbitration Act allows awards to be modified or corrected on several grounds, including:

- evident material miscalculation;
- the arbitrators issued an award on a matter not submitted to them; and
- the award is imperfect in a matter of form not affecting the merits of the parties' dispute.

In New York, the CPLR also permits modification or correction of awards on similar grounds.

Although neither the Federal Arbitration Act nor the CPLR expressly authorises vacatur on the basis of an error of law, some federal courts and state courts have nevertheless permitted vacatur on the basis of 'manifest disregard of the law'.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

As to foreign awards, the United States is party to both the New York Convention and the Inter-American Convention on International Commercial Arbitration. Where a foreign award is rendered in a country that has ratified either of those two conventions, a court can only refuse to enforce the award on the grounds contained in article VI of the New York Convention or article V of the Panama Convention. Unlike the Federal Arbitration Act, which contains four grounds for vacatur of an arbitration award (not including public policy), the New York and Panama Conventions expressly permit non-recognition of a foreign award where the award violates the public policy of the state where the award was rendered.

As to domestic awards, in New York, all arbitral awards rendered in New York may be enforced by courts. After a court orders confirmation of an arbitration award as a judgment, the judgment is enforceable as any other judgment issued by the court.

Costs

33 | Can a successful party recover its costs?

The Federal Arbitration Act is silent on whether a successful party can recover costs, and state laws vary by jurisdiction. In the absence of an applicable state law regarding costs, the parties' agreement and applicable institutional rules will govern. Many arbitral institutions have rules that authorise arbitrators to depart from the 'American rule', pursuant to which parties typically cover their own legal fees and costs, so that prevailing parties can recover their legal fees and costs.

There do not appear to be any cases issued by federal or state courts on the issue of whether a prevailing party in arbitration can recover third-party funding costs.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The two most common forms of alternative dispute resolution (ADR) in the United States are arbitration and mediation. The parties commonly use mediation, which is generally non-binding, to attempt to resolve disputes before and after the initiation of litigation or arbitration proceedings. Arbitration is commonly used in consumer, employee and business-to-business disputes. Mediation is less commonly used in consumer disputes and is more commonly used in employment and business-to-business disputes.

Other forms of ADR, such as conciliation and early neutral evaluation, are much less commonly used in the United States when compared with arbitration and mediation.

Requirements for ADR

35 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is no federal law or procedural rule requiring parties to litigation or arbitration to consider ADR before or during proceedings. However, certain federal and state courts require mediation before cases can proceed to trial or at other stages of the litigation.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

A key feature of the United States' legal system is the principle known as stare decisis, which requires lower courts to follow decisions of law rendered by higher courts in the same jurisdiction. This requirement gives the legal system a substantial amount of stability and predictability, because lower courts must apply the law to substantially similar fact patterns in the same way.

At the federal level, one notable feature is the constitutional prohibition on advisory opinions, meaning opinions that do not relate to an actual case or controversy. To avoid issuing advisory opinions, federal courts must ensure that genuine controversies exist between the parties, and they do so by requiring parties to satisfy standing, ripeness, mootness, finality and political question doctrines. At the state level, several states have statutory or constitutional provisions that permit advisory opinions in certain circumstances, but New York is not one of those states.

UPDATE AND TRENDS

Recent developments and future reforms

37 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In recent years, the Supreme Court issued two key decisions relating to civil dispute resolution. First, in *Ford Motor Co v Montana Eighth Judicial District Court*, 141 S.Ct. 1017 (2021), the Supreme Court held in an 8–0 opinion that state courts had specific jurisdiction over a car manufacturer in two product liability actions, even though the vehicles at issue were designed, manufactured and sold outside of the forum states and subsequently resold in those states by consumers, in light of the manufacturer's substantial business activities in those states. Second, in *GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC*, 140 S.Ct. 1637 (2020), the Supreme Court unanimously held that the New York

Convention does not conflict with domestic equitable estoppel principles that permit the enforcement of arbitration agreements by non-signatories.

There were no significant legislative developments at the national level or in New York relating to civil dispute resolution during the past year.

[Thomas E L Dewey](#) tdewey@dpklaw.com
[Christopher P DeNicola](#) cdenicola@dpklaw.com

777 Third Avenue, New York, NY 10017, United States
Tel: + 1 212 943 9000
www.dpklaw.com

Read more from this firm on Lexology

MORE TOPICS AVAILABLE ONLINE AT LEXOLOGY.COM/GTDT

Including

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Digital Business
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements